

**Using law and education as socialising agents for social change in South  
Africa**

**By**

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## Declaration of Originality

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### **Abstract and research problem**

The most dramatic example of social change in recent South African history was the abolishment of apartheid in 1994. Social change in post-apartheid South Africa is a progressive but nonetheless slow, complicated and multifaceted process. A potential impediment or cause of the slow progress could be that we are not making full use of the potential the law has to positively influence this process. A possible reason why the law is not currently being used sufficiently to effect social change is a lack of proper or effective socialising agents.. In this mini-dissertation I theorise that education is on the one hand an agent which has much potential to influence this change, but on the other hand may also be the cause of a substantial impediment and delay of social change

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# Chapter 1: Introduction to dissertation

## 1 Background and motivation

Our daily deeds as ordinary South Africans must produce an actual South African reality that will reinforce humanity's belief in justice, strengthen its confidence in the nobility of the human soul and sustain all our hopes for a glorious life for all - never, never and never again shall it be that this beautiful land will again experience the oppression of one by another, and suffer the indignity of being the skunk of the world.<sup>1</sup>

Apartheid's legacy adversely affected South Africa's reputation within the international community and left the country with a complex future mandate. To make the aspiration in Nelson Mandela's immortal words a reality societal, political and legal reparations and reconstructions will have to take place.

In speeches and public lectures, Nelson Mandela often mentioned the concept of a 'new society' which would be influenced by our 'actions and policies and institutions we create'.<sup>2</sup>

A new society implies that some sort of societal change has to occur. Social change itself is a complex concept. As a starting point one can note that the generalised *Encyclopedia Britannica* definition of social change is '...the alteration of mechanisms within the social structure, characterized by changes in cultural symbols, rules of behaviour, social organizations, or value systems'.<sup>3</sup>

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<sup>1</sup> Nelson Mandela, inaugural address 5/10/1994

[https://www.africa.upenn.edu/Articles\\_Gen/Inaugural\\_Speech\\_17984.html](https://www.africa.upenn.edu/Articles_Gen/Inaugural_Speech_17984.html) (accessed 7 October 2017)

<sup>2</sup> 'As we set about building a new South Africa, one of our highest priorities must be our children. The vision of a new society that guides us should already be manifest in the steps we take to address the wrong done to our youth and to prepare for their future. Our actions and policies, and the institutions we create, should be eloquent with care, respect and love.' Address at the launch of the Nelson Mandela Children's Fund, Pretoria, 8 May 1995 [http://www.mandela.gov.za/mandela\\_quotes/index.html](http://www.mandela.gov.za/mandela_quotes/index.html) (accessed 2 November 2017)

'new society cannot be created by reproducing the repugnant past, however refined or enticingly repackaged' Nelson Mandela's Nobel Lecture 10 December 1993 <http://www.sahistory.org.za/archive/mandela-quotes-and-interesting-information> (accessed 7 October 2017)

'Perhaps it was history that ordained that it be here, at the Cape of Good Hope that we should lay the foundation stone of our new nation.' Nelson Mandela's Inaugural speech 11 May 1994 <https://www.sahistory.org.za/archive/mandela-quotes-and-interesting-information> (accessed 13 April 2019)

<sup>3</sup> <https://www.britannica.com/topic/social-change> (accessed 2 September 2018)

Hence, social change can potentially be deduced to be a shift that happens within the systems and structures of a society which is then followed by changes in societal attitudes and collective consciousness subsequently affecting values and behaviours of a society.

In a South African context, Karl Klare sees a shift in society as a potential large-scale, but long-term project made practical by using political processes with firm legal foundations and he calls this project 'transformative constitutionalism'.<sup>4</sup> In South Africa specifically, transformative constitutionalism aims to infuse the transformative character of the values and rights contained in the South African Constitution into society and social structures.

The post-apartheid Constitution of the Republic of South Africa<sup>5</sup> contains the founding provisions on which the South African Republic is based followed by a list of fundamental human rights that give substance to these values. Entrenching these rights and values into the Constitution was the first step taken towards using policy for the mandate of reparation and reconstruction and they are the foundation for our social change towards the abovementioned ideal of 'new society'.<sup>6</sup> However, most of these values will remain powerless and the rights will remain unrealised as long as ordinary members of society are not aware of these rights or are unable to act in accordance with the rights and values.<sup>7</sup>

Mandela's ideal included the notion that societal change depends on actions, policies and institutions. Thus, if the goal is social change, actions, policies and

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<sup>4</sup> K Klare 'Legal culture and transformative constitutionalism' (1998) *South African Journal of Human Rights* 146, 150

<sup>5</sup> First the interim Constitution of the Republic of South Africa, Act 200 of 1993 and later the final Constitution of the Republic of South Africa Act 108 of 1996

<sup>6</sup> The preamble to the Constitution reiterates this notion by stating that 'We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.' What the ideal of the 'new society' would entail is discussed in section 3.4 and can be described as a 'prosperous, non-sexist, non-racial and democratic society' according to the National Development Plan Vision 2030 458

<sup>7</sup> A recent survey indicated that only 46% of respondents were aware of the Constitution and the Bill of Rights and that 'members of vulnerable and marginalised communities are particularly lacking in awareness of their basic rights. Those most in need of asserting their rights are those who are least aware of the legislation that they have at their disposal.' *Report of the access to justice and promotion of constitutional rights programme baseline survey on awareness of, attitude and access to constitutional rights* (2014)



institutions themselves need to undergo a shift towards the transformative constitutional values.

The postamble to the interim Constitution<sup>8</sup> defines, according to prominent legal figures like Justice Pius Langa, what the spirit of this post-apartheid transformative Constitution is:<sup>9</sup>

[A] historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The post-apartheid Constitution and its value-drenched foundations however was only the first step towards social change and a foundation does not a house build. To achieve a new society, it would be necessary to leverage law and the Constitution correctly which necessitates an understanding of how transformative constitutionalism works, or what could potentially impede it from working. I have found that the most prominent articles relating to transformative constitutionalism, like that of Klare and Langa, put the burden for this project on courts and legal practitioners.<sup>10</sup> If this approach is followed, the power of law would remain with the powerful instead of educating, enabling and empowering society itself, a problem Bestbier refers to as 'legal impotence'<sup>11</sup> and Hodgson refers to as 'constitutional illiteracy'.<sup>12</sup>

It is too late to focus on only the courts and law practitioners as agents and thus we have to start at the root of the problem; with the future citizens of the country who

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<sup>8</sup> Interim Constitution of the Republic of South Africa, Act 200 of 1993 'National Unity and Reconciliation' S251

<sup>9</sup> Interim Constitution of the Republic of South Africa, Act 200 of 1993; Justice P Langa, 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 352

<sup>10</sup> Langa lists the challenges to transformative constitutionalism as 'access to equal justice, legal education, legal culture' and describes those challenges in the context of the responsibility judges have for transformative adjudication and in terms of improving the legal education and legal culture of law students. Justice P Langa, 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 353, 360.

Klare on the other hand focusses on legal academics, a justiciable bill of rights and the legal culture of our adjudicators noting, in terms of the historic bridge referenced above, that '...adjudication should accordingly illuminate South Africa's steps across the bridge.' K Klare 'Legal culture and transformative constitutionalism' (1998) *South African Journal of Human Rights* 146 147

<sup>11</sup> A Bestbier 'Legal literacy – the key to a South African supra-culture' (1994) 15 *Obiter* 105 113 quoting: Fitzgerald 'Law at school – a Canadian viewpoint' 1978 *New Law Journal* 300

<sup>12</sup> TF Hodgson 'Bridging the gap between people and the law: Transformative constitutionalism and the right to constitutional literacy' (2015) *Acta Juridica* 189 193

can either be the future continuation of social problems, or the future of social change.

In this study I use desktop as well as empirical methods to produce a critical study on how social change in South Africa cannot be achieved without a proper understanding of how law influences social change and how the lack of a proper socialising agent impedes the power and influence of the law.

Socialising agents in this discussion refer firstly, to the sociological concept of socialisation, being the process of internalising values and norms in order to become part of a specific society or group, and agents being institutions or elements like family, peers, media and education that catalyse and craft this process.<sup>13</sup> For the purpose of my study I refer to educational institutions, specifically secondary schools, as socialising agents.

In this dissertation I demonstrate and conclude that social change in South Africa cannot be achieved without recognising that the law has the power to effect change, but its power is limited if socialisation does not occur effectively enough by using education as a socialising agent.

## **1.1 Research questions**

In this dissertation three primary research questions are set:

### **Question 1**

What is social change and why is it important in present-day South Africa?

### **Question 2**

What is the relationship between law and social change?

### **Question 3**

How can education as a socialising agent harness the power of law and contribute to social change?

## **1.2 Structure of dissertation**

Following this introductory chapter, the first research question on what social change is explored in chapter 2. The fundamental sociological theories relating to society and social change are unpacked to determine what impacts social change.

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<sup>13</sup> M Hirsh *Invitation to sociology of international law* 1 (2015) 7, 8

In chapter 3 I consider why law is essential to social change. I explore the relationship between law and social change by linking classic legal theory to sociological theory. I thereafter theorise about law's transformative power contained in the South African Constitution in the context of social change in South Africa. I hence philosophise about the power of law to impact society and subsequently cause social change.

In the fourth chapter I examine how we can potentially use education as a socialising agent and grass-roots rehabilitator of the current state of our society. I theorise why education can be seen as an agent of social change in the creation of a 'new society'. This chapter serves as an introduction to my conclusion and aim of this dissertation.

In chapter 5 I answer the question of how we can use law via education to effect social change. I reference the current efforts towards using education as a socialising agent to harness the power of the law and include empirical studies to contribute to my final conclusions.

The final chapter contains the conclusion to this dissertation.

### **1.3 Research methods**

A literature review was conducted using an desktop method to construct a critical analysis of various sources including primary resources like textbooks and writings by experts in their chosen field as well as academic articles. A document analysis of the current government-endorsed curriculum statements and education-related manifesto and the application thereof in the actual textbooks of the secondary schools in Gauteng was also done. The literature review is contained in the chapters that follow.

Additionally, I conducted an empirical study by way of distributing a rights-logic survey in the form of a questionnaire to a secondary school in Gauteng. The aim of the survey was to test, using rights-based scenarios, if learners can identify rights and know how to act in accordance with those rights. The questions and answers would then demonstrate whether the inclusion of rights or legal principles in secondary schools' learning outcomes is currently succeeding in being socialised

by educational agents and potentially contributing towards or impeding social change and transformative constitutionalism.

## Chapter 2: Social change

### 2 Introduction

Social change is a multidimensional concept and using one definition to explain it would not suffice. To understand what social change is and why it is important in a South African context, I will unpack the concept by discussing elements such as theories of social change, attempts made at defining social change and the mechanisms, impediments and sources of social change. I will apply these elements to the South African context.

#### 2.1 Theories of social change

The most prominent theorists and builders of the foundation of modern social science are Marx, Durkheim, Weber and Tönnies who are considered to be the 'classics' of social science. Their theories, although born from the historical issues of the nineteenth century, are still considered relevant as they have the potential to provide insight into an understanding of present-day society.<sup>14</sup>

These theorists were inspired by industrialisation and urbanisation. Change, in their context, was seen as 'unprecedented, progressive and probably inevitable'.<sup>15</sup>

Marx saw tension and struggle to be essential elements in the process of change and he focussed on the material mechanisms of the process of social change.<sup>16</sup> His theories were rooted in a critique of capitalism and how people are alienated from society by spending their lives producing products and capital for the capitalist rulers.<sup>17</sup>

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<sup>14</sup> RC Heredia 'Transition and transformation: The opposition between industrial and pre-industrial types of society in the writings of Karl Marx, Ferdinand Tönnies, Émile Durkheim and Max Weber' 35 (1986) *The Indian Sociological Society's Sociological Bulletin* 29

<sup>15</sup> K Healy *Social change: Mechanisms and metaphors* (1998) 2

<sup>16</sup> Heredia (n 14 above) 31, 33

<sup>17</sup> As above

For social change to occur, it would have to occur on a structural or institutional level as the rulers are the root of social alienation.<sup>18</sup> To counteract alienation, people would have to return to being social members of community where individuals rely on each other<sup>19</sup> – a view that I will explore in more detail below by considering the theories of Tönnies.

Asok Sen notes that according to Marx, ‘the material conditions for change have their origin in the womb of the old society itself’.<sup>20</sup> Marx himself had said that in the struggle for change from old to new, society was oppressed by ‘inherited evils’<sup>21</sup> and that ‘the tradition of all the dead generations weighs like a nightmare on the brain of the living’.<sup>22</sup>

According to Marx the economic, political and legal structure of society lie in an ideological social consciousness and ‘it is not the consciousness of men that determines their existence, but, on the contrary, social existence determines their consciousness’.<sup>23</sup>

Tönnies saw the need to explore the societies that were the eventual product of social change.<sup>24</sup> Ideology itself was not a focus for Tönnies but rather that which influences those ideologies, namely the will of individuals in society and how that affects social relations.<sup>25</sup>

He theorised that *Wesenwille*, translated as ‘spontaneous or essential will’ and *Kurwille* or ‘deliberate or arbitrary will’ formed the underlying foundation of all human

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<sup>18</sup> G Ritzer *Sociological Theory* third edition (1992) 51

<sup>19</sup> A Giddens *Capitalism and modern social theory: An analysis of the writings of Marx, Durkheim and Max Weber* (1971) 17

<sup>20</sup> A Sen ‘Marx, Weber and India Today’ (1972) 7 *Economic and Political Weekly* 309

<sup>21</sup> K Marx Preface to *Capital: A critique of political economy* Volume I Book One: ‘The process of production of capital’ 7 (1867)

<sup>22</sup> K Marx ‘The Eighteenth Brumaire of Louis Bonaparte’ (1852) Sec I

<sup>23</sup> H Kawakami ‘On Marx’s “Forms Of Social Consciousness”’ (1926) 1 *Kyoto University Economic Review* 27

<sup>24</sup> N Bond ‘Ferdinand Tönnies and Max Weber’ (2012) 12 *Max Weber Studies* 25; see also Heredia (n 12 above)

<sup>25</sup> Bond (n 24 above) 30

action<sup>26</sup> and influenced the relations of two societal collectives which he coined as *Gemeinschaft* or 'community' and *Gesellschaft* or 'society'.<sup>27</sup>

Wherever there was a sense of belonging among the masses, a serving attitude of the individual towards the group or 'unity in plurality', a social relationship was seen as *Gemeinschaft* while independence or division within a group and an attitude of using the group to further individual agenda was seen as 'plurality in unity' and hence *Gesellschaft*.<sup>28</sup>

Social change occurs in the modernisation, movement or development of a group changing from the essential will of a community (*Wesenwille* and *Gemeinschaft*) towards arbitrary will of a society (*Kurwille* and *Gesellschaft*).<sup>29</sup> Tönnies theorised that ethics are a product of essential will and hence communities, while if social change occurs towards a society with arbitrary will, ethics will suffer and conform in order to keep social peace and order.<sup>30</sup>

Weber saw ethics and values as conscious and intrinsic beliefs which take into account the consequences of behaviour, not just because of the power of will but because of conscious and rational decision.<sup>31</sup> Hence responsibility is taken for the effect of those behaviours on community but also on society as a whole.<sup>32</sup>

Thus, while Tönnies saw society and social changes therein to be a product of natural wills, Weber acknowledged the role that rationality and conscious decision play in the values and ethics that underlie society and subsequently cause change.

Weber hence advocated for an understanding of individuals' social interaction with each other and what motivates social actions.<sup>33</sup> Social actions were not seen to be random but create patterns which, over time, influence the establishment of societal

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<sup>26</sup> Bond (n 24 above) 33

<sup>27</sup> Heredia (n 14 above) 35

<sup>28</sup> Bond (n 24 above) 42

<sup>29</sup> Bond (n 24 above) 43

<sup>30</sup> As above

<sup>31</sup> Bond (n 24 above) 52

<sup>32</sup> As above

<sup>33</sup> <http://uregina.ca/~gingrich/319j1503.htm> (accessed 14 August 2018)

norms, laws and structures and subsequently help to understand how social change takes place.<sup>34</sup>

Durkheim inverted Tönnies's idea of a single direction movement from community to society and a subsequent complete loss of solidarity by theorising that the communal solidarity actually helps to create individualism.<sup>35</sup> Individualism is born out of society in that 'the totality of beliefs and sentiments common to average citizens of the same society forms a determinate system which has its own life; one may call it the 'collective' or 'common' conscience ... it is, in effect, independent of the particular conditions in which individuals are placed; they pass on and it remains'.<sup>36</sup>

Durkheim theorised that change emerges from the struggle caused by increased social contact, the sheer moral and material density of a group and a movement from a 'collective conscience' to a more individualised, personal consciousness similar to Tönnies's theory of change from community values to self-centred development. Durkheim appreciated the value of community but saw the social bonds resulting from these groupings and from their shared community values to be some sort of 'mechanical solidarity'.<sup>37</sup>

Durkheim essentially saw the value of being unified, not because of our sameness but because of the coming together and intertwining of our differences.<sup>38</sup>

Society can be integrated and experience solidarity because there is a newfound interdependence in moving from a traditional to a modern society where labour is divided and the bonds are resultant, not from common values but from a need for each other's diverse skills and attributes in a more 'organic solidarity'.<sup>39</sup>

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<sup>34</sup> RW Hadden *Sociological theory: An introduction to the classical tradition* (1997) 133

<sup>35</sup> Emile Durkheim *The Division of Labour in Society* (1893) 79, 80

<sup>36</sup> Durkheim (n 35 above) 79, 80

<sup>37</sup> Heredia (n 14 above) 36

<sup>38</sup> Durkheim (n 35 above) 277

<sup>39</sup> Durkheim (n 35 above) 277



When everyone in a group has the same function and attributes conflict can happen, while differentiation of skills and functions cause members to cooperate and thus work together better.<sup>40</sup>

Thus while Tönnies saw the move from community to society resulting in loss of solidarity and no more collective consciousness, Durkheim sees it as a positive, yet different sort of solidarity and that with this organic solidarity 'society becomes more capable of collective movement',<sup>41</sup> which could in turn make society even stronger than community.<sup>42</sup>

The movement towards organic society does not cause all common values to disappear. The basic values underpinning society and shared values remain,<sup>43</sup> but the evolving individualism could imply moral individualism as well and if moral regeneration has to happen in society, it could only happen through the process of institutional change.<sup>44</sup>

In writing about the theories of sociologist Anthony Giddens, David Gauntlett notes that Durkheim's views on society and social change focused on the macro level or big-picture view of social life while Weber focused on the micro level or effect of social interactions on individuals in society.<sup>45</sup> Gauntlett notes that this view of society and social change causes a dichotomy or gap in understanding society and social change. Giddens bridges the gap by introducing his 'structuration theory'.<sup>46</sup>

For Giddens there is a relationship between macro-level social structures like traditions, institutions and moral codes for doing things, and micro-level activities by human agents or the members of society. Human agents, as Weber theorised, create patterns via their individual interactions which habitually establishes and

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<sup>40</sup> Durkheim (n 35 above) 267

<sup>41</sup> Durkheim (n 35 above) 131

<sup>42</sup> See also similar theories of Georg Simmel. According to Simmel, when a city grows, so does alienation (Marx), division of labour (Durkheim) and the movement towards individual pursuits instead of communal values (Tönnies) <http://uregina.ca/~gingrich/simmel.htm>

<sup>43</sup> EC Cuff, WW Sharrock & DW Francis, *Perspectives in Sociology*, (1992) 31 third edition

<sup>44</sup> A Giddens 'Classical social theory and the origins of modern sociology' (1976) 81 *American Journal of Sociology* 709

<sup>45</sup> D Gauntlett *Media, gender and identity: An introduction* (2002) 101

<sup>46</sup> Gauntlett (n 45 above) 102

reproduces structures in society.<sup>47</sup> In terms of Tönnies's views on change from traditional to modern society, Giddens uses Weber's model of rationalising actions by noting that in traditional communities, individuals do not need to think about their actions because tradition programs them to act in a certain way while in modern society, law and public opinion dictates behaviour.<sup>48</sup>

Traditional society dictates our roles while modern society causes a sort of identity crisis where people have to decide who they are and how they should act. This self-questioning or rationalisation Giddens sees as both a consequence and cause of changes at institutional level.<sup>49</sup> When social changes occur on a macro, social structural level – for instance when a new law is introduced – then people have to rationally alter their social actions or behaviours in society on a micro level, according to this change.<sup>50</sup> This alteration of behaviour then determines their roles and social identities and 'social identities are associated with normative rights, obligations and sanctions which within specific collectivities, form roles'.<sup>51</sup>

The theories discussed thus far formed the foundation for attempts at understanding social change and how it can potentially be defined.<sup>52</sup> In the next section I will demonstrate that these useful societal and social-change theories cannot all be reduced to one definition but should be used in a hybrid combination of sorts, or a typology of social change. The typology of social change, rooted in the classical theories, will help us understand South Africa's unique social change journey at the end of this chapter.

## 2.2 Typology of social change

The theories above illustrate how society reacts to change but also affects change. These theories are useful and necessary and lay the foundation towards

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<sup>47</sup> As above

<sup>48</sup> Gauntlett (n 45 above) 104

<sup>49</sup> Gauntlett (n 45 above) 106

<sup>50</sup> As above

<sup>51</sup> A Giddens *The constitution of society* (1984) 282

<sup>52</sup> These theories are brought into relation with the notion of schools and social change in section 4.3 where I link the theories of social change of Marx, Weber, Durkheim and Tönnies with that of educational, cultural and human development psychologist Patricia Greenfield. In section 4.3.1 I discuss how schools function as transitional communities or a bridge between these theorists' notion of traditional versus modern society and hence contribute to social change by facilitating a bridging shift in values.

discovering how social change can be influenced and understood in societal context.

It is now necessary to build on that foundation by progressing to an understanding of what social change is.

Despite attempting a definition, my research indicates that social change is not an exact science but a complex sociological study which cannot be described by one definition from a single source.

The first published attempt at a definition of social change was recorded in an article from the American Academy of Political and Social Science in 1947.<sup>53</sup> It was inspired by the American peoples' resistance towards the social change associated with accountability towards an international organisation like the United Nations and complicated by a generational legacy of nationalism.<sup>54</sup>

Social change was referred to as 'always a slow and gradual process' which starts with new discoveries, inventions or developments and is catalysed by the subsequent social adaptations made to accommodate the new but is essentially a 'summation of changes in individuals'.<sup>55</sup>

Each definition of social change is underpinned by a different societal and social change theory or perspective to the extent that an occurrence in society can be explained differently by each theory of social change.

Roxanne de la Sablonnière theorises that using the classical theories and definitions of social change would do little for the field of its study and has proposed a more hybrid typology of social change. She compiled it by using all these theories as well as psychological theories of sociology and reverting to a typology of social change.<sup>56</sup>

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<sup>53</sup> DG Marquis 'Psychology of social change' (1947) 249 *The Annals of the American Academy of Political and Social Science* 75

<sup>54</sup> As above

<sup>55</sup> Marquis (n 53 above) 77

<sup>56</sup> R De la Sablonnière 'Toward a psychology of social change: A typology of social change' (2017) 8 *Frontiers in Psychology* 1

A typology of social change assists in moving away from explaining social change as simply being a large macro phenomenon of group or collective change. This explanation ignores change outside societal control – like political change – and the micro processes affecting change, like the psychological elements of change on individual level which Giddens referred to.<sup>57</sup>

Each societal context or phase poses unique challenges which influence societal goals and finding solutions for societal problems. They must be understood uniquely.<sup>58</sup>

Sablonnière notes that social change cannot simply be divided into two groups of change, namely incremental social change and dramatic social change. Two additional societal phases or contexts must be considered, namely a state of stability and a state of inertia.

According to Sablonnière's cumulative research, one can define the different social phases as follows:<sup>59</sup>

**Social stability** exists when society is actively working towards achieving collective goals and if changes occur, the effect is not dramatic. Changes are recognised but the core elements of society remain stable. An example would be a change in cabinet for a ruling political party. While the change is noticed, the core elements of society remain stable and members continue with their daily lives. The direct opposite of stability would be dramatic social change.

**Social inertia** exists in a society that needs positive change, but is stagnant because it lacks the capacity or organisational structure to create a sustainable solution. Members feel that their future is uncertain because their collective goals for constructive change are not necessarily shared by those in power who can effect that change.

Incremental social change and dramatic social change are most often contrasted in terms of the pace at which they happen. **Incremental social change** can be small

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<sup>57</sup> De la Sablonnière (n 56 above) 1

<sup>58</sup> De la Sablonnière (n 56 above) 5

<sup>59</sup> De la Sablonnière (n 56 above) 7 - 9

or big changes which happen during times of relative stability, slowly and over long periods of time, allowing the individuals involved to adapt to the changes. This sort of change is more sustainable and balanced.

**Dramatic social change** is caused by a major event – politically, economically or institutionally – which shakes or ruptures the entire social structure of a society or group, is often traumatic and leads to large-scale restructuring. Individuals in the society or group struggle to adapt to the sudden change. It is characterised by rapid pace, rupture in the social and normative structure and a threat to cultural identity.

The effect on social structure in this context is important because most existing definitions of social change (incremental or dramatic) are rooted in a change in social structure. This implies economic, political, cultural and technological frameworks and hence macro processes in society like power structures, institutions, national policies and laws.

The aforementioned changes in macro processes have a direct effect on micro processes in the normative social structure like community values, norms, morals and behaviours.

Sablonnière defines normative structure as ‘the behaviors of most community members whose aim is achieving collective goals. In other terms, when the normative structure is clear, people know what to do and when to engage in specific behaviors in order to meet the overarching goals of the collectivity ...’.<sup>60</sup> This approach echoes Durkheim’s ‘collective conscience’ discussed above.

Changes in normative structure are also a key element of social change and while incremental change still allows old patterns of thought and behaviour, dramatic social change demands a complete transformation.

Sablonnière and Donald Taylor refer to a normative theory of social change<sup>61</sup> according to which groups of people (community, society or country) function on a 80-20 principle during times of stability.

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<sup>60</sup> De la Sablonnière (n 56 above) 8

<sup>61</sup> De la Sablonnière (n 56 above) 9

In a functioning society 80% of citizens will behave morally and according to the normative societal structure in order to achieve collective goals while providing support to the 20% who struggle to function in society. This assures equilibrium and a functional society with the same norms and values.<sup>62</sup>

When dramatic social change occurs though, the normative structure is shaken and hence the foundational functional society. Regaining equilibrium is difficult if there is no majority providing social support to a struggling minority.<sup>63</sup> Incremental social change includes social support while dramatic social change does not.<sup>64</sup>

The aforementioned normative and structural disruptions then threaten cultural or group identity and peoples' impressions about the beliefs and rules they have in common. Consequently society members struggle to function properly in the process of social change. In a shift similar to Tönnies's communal values to societal collectives, Durkheim's 'common collective' becomes confused and Weber's solidarity is shaken, all in the process of social change.

Dramatic social change can lead to stability or inertia, depending on the society's coping abilities.<sup>65</sup>

Incremental social change occurs where slow and steady changes lead to large-scale transformation of social and/or normative structures and even cultural identities.<sup>66</sup>

The pace of this change has to be slow and for it to occur, one of the other social contexts has to exist.<sup>67</sup> An example of this could be the introduction of new technology like the cell phone. Initially it did not disturb the stability of society or affect the core elements but upon retrospect it becomes clear that cell phones have had major societal impacts because they incrementally affected the way members of society interact with one another.<sup>68</sup>

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<sup>62</sup> As above

<sup>63</sup> As above

<sup>64</sup> As above

<sup>65</sup> As above

<sup>66</sup> De la Sablonnière (n 56 above) 11

<sup>67</sup> As above

<sup>68</sup> As above

The importance of incremental social change is its ability to cause social structures to change and adapt without a rupture or collapse occurring.<sup>69</sup> Individuals in society are also able to adapt more easily and social support structures do not collapse because there is no trauma associated with the change.<sup>70</sup> The necessary implication is that incremental social change, as opposed to inertia, can be a way of affecting positive and constructive changes in a sustainable way.

Sablonnière's typology of social change shows that society experiences different phases of social change and each phase has its own features related to the pace at which change happens as well as the effect that the type of change has on the normative structure of society. The most desirable type of social change seems to be incremental social change as the pace is slow and steady yet has a large-scale effect on the normative structure of society.

In the conclusion to this chapter I will contextualise South Africa's recent historical journey through the phases of social change and the subsequent need for incremental social change. The discussion on social change would not be complete though without considering where in society the sources of all these potential social changes lie. This I will examine in 2.3.

### **2.3 Sources and mechanisms of social change**

Healy writes that theories of social change contain abstract explanations of the mechanisms of social change or how social change works, but this necessitates a linkage with the sources for social change in a society if we are to have a concrete understanding of social change.<sup>71</sup>

In order to influence social change or identify where impediments to social change lie, we need to not only understand the abstract mechanisms and how they work theoretically in society and what the phases and types of social change are, but also what the concrete sources of change are within the changing society. If we

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<sup>69</sup> De la Sablonnière (n 56 above) 11

<sup>70</sup> As above

<sup>71</sup> Healy (n 15 above) 15. If one sees a mechanism to be, as per the Cambridge Dictionary definition, 'a way of doing something that is planned or part of a system' then it makes sense to see the theories of social change to be the abstract way of seeing the process of social change and the sources of social change are then logically linked to the concrete functioning of the mechanism or system.

<https://dictionary.cambridge.org/dictionary/english/mechanism> (accessed 13 April 2019)

understand where we can source social change, then these sources can be used as facilitators or catalysts of social change. According to Healy's research – which is similar to Durkheim's views – social change finds its sources in 'demography, the economy, technology, planning, organisations, institutions and culture'.<sup>72</sup>

For purposes of this study I will focus on demography, institutions and culture.

Demography in the context of this study refers to the characteristics and composition of specific population groups.<sup>73</sup> Healy notes that demographics drive change on all levels of society and link interdependently with political and institutional change because societies use populations and family systems to influence and determine social policy.<sup>74</sup>

Institutions can either be seen from a regulatory viewpoint as actors – often used by the state – providing rules, systems, sanctions and power structures or inversely, institutions can be seen from a constitutive viewpoint to be those practices and routines that shape the actors and their goals and interests and provide a cognitive framework for thinking.<sup>75</sup> The difference in the two perspectives lies in the connotation. From the first perspective institutions may be seen as an obstacle to change because, although powerful, they are external, established and probably difficult to change. The latter can be seen as a major potential change agent because of the cognitive frameworks it provides through powerful actors, to shape how people think and act.<sup>76</sup>

Culture is considered to be 'a monolithic block of passively internalized norms transmitted by socialization and canonized by tradition'.<sup>77</sup> From this strongly worded definition one can see culture as having the potential to either provide obstacles to change or unique established and predictable contexts that can be used strategically to plan change.

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<sup>72</sup> Healy (n 15 above) 16

<sup>73</sup> <https://en.oxforddictionaries.com/definition/demography> (accessed 19 December 2018)

<sup>74</sup> Healy (n 15 above) 16

<sup>75</sup> Healy (n 15 above) 25

<sup>76</sup> Healy (n 15 above) 26, 27

<sup>77</sup> Healy (n 15 above) 28



The sources of change can function interdependently as both institutions and culture can affect the way people think, their ideologies and their internalised norms. According to Tönnies, demographic shifts from community to society can affect those ideologies as well.

From a regulatory viewpoint political figures and institutions can use culture, the study of traditional social actions, and the ways this affects establishment of norms, structures and even laws to maintain the *status quo*, or as a resource to manipulate societies and communities.<sup>78</sup>

If our aim is social change, we need to focus on these sources of change and how they affect people's ideologies and subsequently either enable or impede social change.

In the final section of this chapter I will explore and contextualise selected aspects of the theories and sources of social change in recent South African history and identify what the next step should be in the journey of social change, based on the type of social change I advocate for.

#### **2.4 The South African context or narrative**

Marx and Weber both theorised about struggle and crisis in society and how it is necessary for the development of a new social order.<sup>79</sup> In a South African context this is reminiscent of the apartheid struggle, our political and social crises and eventually, Nelson Mandela's idea of a 'new' society for South Africa.

In line with Marx's writings cited above the struggle for change to a new South Africa is not yet over as, moving from an old South Africa with its 'inherited evils'<sup>80</sup> the burdensome weight of 'the tradition of all the dead generations' still today 'weighs like a nightmare on the brain of the living'.<sup>81</sup>

During the Department of Monitoring, Planning and Evaluation's 2014 review of the past 20 years of progress towards social transformation in South Africa, Marx's

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<sup>78</sup> Healy (n 15 above) 30

<sup>79</sup> A Sen 'Marx, Weber and India Today' 7 (1972) *Economic and Political Weekly* 311

<sup>80</sup> Marx (n 21 above)

<sup>81</sup> Marx (n 22 above)

notion can be seen in the way they describe the inherited evils and its effect which still lingers today:

The democratic state inherited a divided nation, with high poverty levels, inequalities, discriminatory practices and inequitable distribution of income. The inequalities that persist today have largely been attributed to apartheid policies limiting access to quality education and formal labour market participation, which served to keep people trapped in poverty.<sup>82</sup>

Reminiscent of Weber's theory, our previous generations' social actions created patterns which established discriminatory societal norms, laws and structures which, if we endeavour to understand and approach them rationally, can provide guidelines on how to effect change. From Marx's perspective we can then see that in the womb of old society we can find the conditions for change. According to Durkheim though, moral regeneration would lie in institutional change.

Tönnies's notion of movement from community to society and its associated value dynamics as well as the influence these changes can have on individuals, is something I will pay special attention to in chapters 4 and 5.

While these theorists considered the communal versus societal values from a western point of view, it is important for us, throughout the rest of this dissertation, to consider it from an African context. The classic theorists saw a relatively clear-cut shift between rural and urban demographics, communal solidary and individualist-oriented entitlement values while in Africa, as I will indicate in chapter 4, we often find communities within societies and our collective consciousness is influenced by the communal philosophy of *Ubuntu* which recognises everyone's interdependence and interconnectedness.<sup>83</sup> The dynamics of individual and group value shifts coupled with developmental shifts in moving from communities to broader societal collectives whilst keeping one foot firmly rooted in a communal ideology or mind-set like *Ubuntu* has to be considered if we are to understand the patterns and trajectory of social change in South Africa.

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<sup>82</sup> Department of Monitoring, Planning and Evaluation, 'The Twenty Year Review', Chapter 3 *Social Transformation* (2014) 40  
<https://www.dpme.gov.za/publications/20%20Years%20Review/Pages/Background-Reports.aspx> (accessed 13 April 2019)

<sup>83</sup> 'The philosophy of Ubuntu means "humanity" and is reflected in the idea that we affirm our humanity when we affirm the humanity of others. It recognises that it is in our national interest to promote and support the positive development of others.' Preamble to 'Building a better world: The diplomacy of Ubuntu', White Paper on South Africa's foreign policy, 13 May 2011

In the context of Healy's sources of social change, specifically institutions, demographics and culture, the South African historical picture of the journey thus far can be illustrated as follows:

The apartheid regime controlled South African society by using institutions – from the negatively connoted regulatory point of view – to control other sources of social change such as demographics and culture. They did this by constructing a so-called 'Apartheid City' to ensure demographic division of population groups. It was achieved by more than 30 different Acts legally enshrining geographical separation based on race and by extension segregating people culturally as well.<sup>84</sup>

The aim of this geographical separation and segregation was not simply an overt statement of power and hierarchy but meant that resource distribution and development on all levels – infrastructure, economy, education etcetera – within the segregated areas was not only stunted during apartheid, but logically led to a developmental backlog after the abolishment of apartheid.

Underdeveloped urban areas which included townships, informal settlements and low-cost housing estates were still reported to be in a state of rapid growth post-apartheid, in 2007, despite their characteristic lack of commercial investment, low household income, high unemployment and poverty rates.<sup>85</sup>

In 2004 it was reported that in the urban area of Johannesburg alone, 73% of the population lived in townships, informal settlements and low-income housing.<sup>86</sup>

Hence, while South Africans have urbanised and supposedly shifted towards the modern concept of society, the urban areas themselves are still the legacy of developmental segregation.

Marx believed the key to real change lies in institutional and structural change because rulers are the root of social alienation.<sup>87</sup> The apartheid regime is an obvious example of this social alienation while the liberation struggle and eventually the first

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<sup>84</sup> [https://www.sahistory.org.za/jquery\\_ajax\\_load/get/topic/list-laws-land-dispossession-and-segregation](https://www.sahistory.org.za/jquery_ajax_load/get/topic/list-laws-land-dispossession-and-segregation) (accessed 30 August 2018) According to the homelands system, people were not only classified and segregated by race but by their ethnicity and culture as well

<https://www.sahistory.org.za/article/homelands> (accessed 13 April 2019)

<sup>85</sup> L Pernegger & S Godehart 'Townships in the South African geographic landscape – physical and social legacies and challenges' Training for Township Renewal Initiative (2007) 2

<sup>86</sup> Pernegger & Godehart (n 85 above) 4

<sup>87</sup> See section 1.1 above

democratically elected president Nelson Mandela were the institutional and structural changes that catalysed a counteraction of that physical, political and ideological alienation. Based on this context, in the conclusion to this chapter, I will now relate our current need for social change to Sabronnière's theory.<sup>88</sup>

## 2.5 Conclusion

In the context of Sablonnière's typology of social change, the fall of the apartheid regime constituted a dramatic social change because it caused a rupture in social structures, cultural identities as well as society's normative structures. It seems that South Africa entered into a state of inertia where we still currently find ourselves 24 years after the event that caused the dramatic social change. Society still feels the lingering need for positive change but is suspended in a state of transition between various cultural, normative and institutional struggles.<sup>89</sup>

Much like the first published definition of social change, we are aware that it is always a slow and gradual process but the only way we can move from a state of inertia to a new society is by focusing more on stable, sustainable and incremental social change in order to create large-scale social change.<sup>90</sup>

As per its definition, incremental social change implies slow and steady changes which lead to large-scale transformation of social and/or normative structures and even cultural identities. The shift towards a new cultural identity and normative structure of our new society, in the context of this dissertation, will not be based on

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<sup>88</sup> At this point it is important to note that I am purposely focusing on and comparing South Africa's narrative to Sabronnière's hybrid or combination typology of social change as opposed to separate comparisons of all the theories. The reason why her theory is most suitable to explain the South African narrative is because in this mini-dissertation I focus on social change as a gradual, multi-phased process. I do not intend to linger in the past with extensive emphasis on previous events or previous attempts at change and what previously hampered or promoted it. The past is used simply to contextualise why we are currently in a state of inertia and hence how we should in future promote social change in order to avoid possible impediments or delays. In chapter 3 I explain how law can help promote social change; in chapter 4 I link this notion to education as a way of promoting law and in chapter 5 I explain how, within these potential 'promoters' of change, we also have a potential impediment as well in terms of using education as a socialising agent for the social change we seek.

<sup>89</sup> In 2018, as a result of the findings in the South Africa Systematic Country Diagnostic, the World Bank classified South Africa as being in a state of "incomplete transition".  
<http://blogs.worldbank.org/nasikiliza/psd/an-incomplete-transition-overcoming-the-legacy-of-exclusion-in-south-africa> (accessed 13 April 2019)

<sup>90</sup> See Section 2.2 above

structural change but on the ideological shifts as eluded to by Marx, Tönnies, Weber, Durkheim and Sabronnière as discussed above. I will focus on who we are as a new society (where we find this new cultural identity) and what our values are (how this new normative structure looks). In the subsequent chapters I will focus on how we can achieve this incremental social change towards a new society by establishing what our new identity and values are and how we can achieve this by using education as an agent for the change we are striving towards. My focus will be on adequately using the guidance provided by the theories above and our understanding of what social change is in our historical and societal context along with an exploration of the intricacies and complexities of sources like demographics, culture and institutions necessary to catalyse this process.

## Chapter 3: The relationship between law and social change

### 3 Introduction

In the previous chapter I explored notions of social change and argued that, based on Sablonnière's typology of social change, South Africa needs incremental social change in order to move from our state of inertia to a new society.<sup>91</sup> To successfully enable this social change, I have started creating an understanding of our society and unique historical and social context by referring to the classic sociological theories which contain the abstract explanations of the mechanisms of social change and exploring the role of the sources of social change. In this chapter I will start exploring what this new society is that we need to incrementally change towards and why law is important to our process of incremental social change because of its effect on our society.

Dalei and Nirala theorised about how the law can be used as a device to produce social change and can even be seen as the most preferred instrument of change:

The law...not only articulates but sets the course for major social change. Attempted social change, through law, is a basic trait of the modern world. Law plays an important indirect role in social change by shaping various social institutions, which in turn have a direct impact on society. (e.g. Mandatory school attendance upgraded the quality of the labor force, which in turn played a direct role in social change by contributing to an increased rate of industrialization. The law interacts in many cases directly with basic social institutions, constituting a direct relationship between law and social change).<sup>92</sup>

Dror similarly theorised that law is an omnipresent or endemic element in every social institution and that 'the legal basis of organised social action in all modern societies ... calls for the reliance on legal means as indirect aids for nearly all conscious attempts to bring about directed social change'.<sup>93</sup>

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<sup>91</sup> What the ideal of the 'new society' would entail is discussed in section 3.4 and can be described as a 'prosperous, non-sexist, non-racial and democratic society' in terms of the National Development Plan Vision 2030 458

<sup>92</sup>P Dalei & SK Nirala 'Law and social change' *Journal of International Academic Research for Multidisciplinary (JIARM)* 1 (2013) 75 76

<sup>93</sup> Y Dror 'Law and social change' 33 (1958) *Tulane Law Review* 787 798

If law plays such an important and potentially powerful role in the process of social change, it is necessary to expound on my social change exploration from chapter 2 by considering the relationship between law and social change. This means that we have to add to our understanding of social change by looking at the relationship between law and our classic theories of social change as well as law's relationship with our sources of change.

I will demonstrate the relationship between law and social change theories by discussing the convergence of legal and classic sociological theories into social contract theory.<sup>94</sup>

Then I will discuss how the Constitution can function as a source of social change by being, essentially, a metaphorical social contract which has powerful transformative principles contained therein. These transformative principles create the framework or blueprint for our an envisaged South African cultural identity, normative structure and hence new society.<sup>95</sup>

Subsequently I will conclude that the relationship between the law and social change holds the key to the incremental social change we are seeking and that we can achieve a new society by making use of the Constitution and its transformative principles as a social contract in a long-term project of transformative constitutionalism.<sup>96</sup>

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<sup>94</sup> Social contract theory is evidently still relevant to South Africa today as it still features in government representatives' statements in the news and media. In a 2018 article written by Sisi Ntombela, Premier of the Free State Provincial Government and Deputy President of the ANC Women's League, she expressed her view that radical socio-economic transformation is impossible without social cohesion which can only be achieved if society forms a social contract otherwise known as a social compact. <https://www.dailymaverick.co.za/opinionista/2018-04-08-a-tripartite-social-contract-is-needed-for-sas-trajectory/> ( accessed 25 April 2019) .

In a 2016 news item, former Finance Minister Pravin Gordhan is reported as saying that 'The Constitution is the social contract between government and the people and it determines how the country moves towards a better future.' <https://www.news24.com/SouthAfrica/News/constitution-is-a-social-contract-gordhan-20160404> (accessed 14 April 2019)

<sup>95</sup> What the ideal of the 'new society' would entail is discussed in section 3.4 and can be described as a 'prosperous, non-sexist, non-racial and democratic society' National Development Plan Vision 2030 458

<sup>96</sup> In section 3.4 I note that a potential problem with viewing the Constitution as a social contract could be that the values therein might supposedly be shared by all members of society (if the process was truly as consultative as has been explained in 3.3) but that the reality is that most of the transformative principles and values have not yet found their way into the hearts of all South Africans.

### 3.1 Law and sociological theories

The classical sociological theorists – Marx, Durkheim and Weber – did not only make contributions to understanding society and social change, but also made pertinent links to law in society and hence law's role in social change.

Law, according to Marx's and Durkheim's theories, was a product of society's economic arrangement while Weber's theories focused on authority, its nature and sources of civil obedience.<sup>97</sup>

Durkheim's notion about traditional society's development into modern society and an accompanying shift from mechanical solidarity to organic solidarity also contained an accompanying legal-theoretical element to the transition which I will now explain.

According to Durkheim, while a society's specific organic or mechanical character might be difficult to identify, its law serves as an identifier as to the type of society and social organisation.<sup>98</sup> He suggested that groups of people are regulated by either repressive or restitutive law.<sup>99</sup>

Traditional society's legal regulation is based on generally drastic, repressive penalties or sanctions, which result from communities' shared values and subsequent outrage when those values are infringed upon by a member whose actions threaten the solidarity of the community.<sup>100</sup> The collective conscience is violated and the entire collective must react in resistance.<sup>101</sup>

Modern society's legal regulation is based on restitution. Resulting from the organic solidarity, the humane, restitutive regulations are available in multiple forms such as taxation and fines, regulated by laws and agents.<sup>102</sup> The aim of the regulation is

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<sup>97</sup> M Lippman *Law and society* (2015) 65

<sup>98</sup> Durkheim (n 35 above) 68

<sup>99</sup> Lippman (n 97 above) 54

<sup>100</sup> Lippman (n 97 above) 54

<sup>101</sup> Durkheim (n 35 above) 103

<sup>102</sup> Lippman (n 97 above) 54



restoring the social relations and solidarity between the members of society via restorative justice, financial compensation and reconciliation.<sup>103</sup> The interdependence of society's members should not be disrupted and so they regulate their relationships and their organic solidarity in a contractual way.<sup>104</sup>

According to Durkheim, when the collective consciousness changes, the system of law must subsequently change as well.<sup>105</sup> Thus, one can postulate that society and its accompanying social changes have a direct relationship to law.

Weber theorised that 'an order shall be called law where it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff or people especially ready for that purpose'.<sup>106</sup>

Weber's theory of society was based on rationalising interactions between individuals<sup>107</sup> and his idea of law was similarly based on a rational typology of law with law itself being dependent on 'staff or people' who use their interactions, specifically coercion, to guarantee its application in a society that was 'ready' for law's purpose. He created his hypothetical typology of law<sup>108</sup> by supposing that three types of authority exist in society, independently and interdependently, which helps explain and predict legal reasoning and explain why the law or a set of rules would be followed:<sup>109</sup>

The three categories of authority – charismatic, traditional and rational-legal authority – make use of four different types of legal reasoning: formal irrational

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<sup>103</sup> As above

<sup>104</sup> As above. While this is a generalised discussion to explain the theories, traditional society versus modern society as well as *Gemeinschaft* and *Gesellschaft* theory (Tönnies) in 2.1 can be likened to the South African context of the traditional ubuntu-orientated communities versus modern, urban society. Ubuntu itself connotes an approach of doing what is best for the community, not just the individual while modern society is orientated towards individual rights and regulated/legal restitution. CE Oppenheim 'Nelson Mandela and the power of Ubuntu' (2012) 3 *Religions* 369 371. See a detailed discussion of the comparison of ubuntu to *gemeinschaft* below in 4.3.1

<sup>105</sup> As above

<sup>106</sup> M Weber *Law in economy and society* (1954) 34

<sup>107</sup> See Section 2.1 above

<sup>108</sup> SL Roach Anleu *Law and social change* (2009) 23

<sup>109</sup> This entire section on the types of authority and reasoning is based on Lippman (n 97 above) 52

thought, substantive irrational thought, substantive rational thought and formal rational thought.

Charismatic authorities are followed because of their reputation for being admirable and making intuitive, wise, inspired decisions.

Traditional authorities are obeyed because of their inherited status, title or position in society and have discretion to create policy and judge cases.

Rational-legal authorities received their authority because of established procedures and their decision-making is based not on divine inspiration but on written, impersonal, codified rules. They are followed, not because of who they are but because of the authority of the codified rules they base their authority on.

Charismatic and traditional authorities often use formal irrational thought. This type of legal reasoning implies inexplicable, irrational decisions based on personal insights or divine wisdom. They also tend to use substantive irrational thought which can lead to inconsistent judgements because they base cases on substantive ethical, religious and political concepts.

This closely relates to substantive rational thought which the charismatic and traditional leaders also use and implies judgements that are more pre-occupied with substantive political and religious sources, such as biblical religious rules which are not strictly legal but authoritative nonetheless.

The last type of legal reasoning is used by the rational-legal authorities and hence the more consistent and balanced authority.

Formal rational thought is based on universally codified and uniformly applied sets of rules and legal principles that are not related to religion, tradition or morals. This form of thought is predictable, consistent and resulting in the establishment of secular legal systems.

Durkheim's and Weber's theories harmonise with Lippman's notion in chapter 1 that law, because it is influenced by society's solidarity and followed because of their rational ideas of authority and their legal reasoning, reflects society but also potentially changes society.<sup>110</sup> This demonstrates a direct relationship between law and societal development and hence an obvious potential influence on social change.

### **3.2 Convergence of legal and sociological theories**

Durkheim's and Weber's idea of law regulating relationships and solidarity between people in a contractual way, is key to classical legal theories like that of the 'social contract' associated with Thomas Hobbes, John Locke and Jean-Jacques Rousseau and shows a potential convergence between legal and sociological theory, which I will demonstrate.

Hobbes saw man as a rational but self-interested being who would submit to authority and live in a civil society only if it served his interests.<sup>111</sup> Civil society was seen as a remedy to the 'state of nature' which according to Hobbes was a hypothetical state in which all men naturally find themselves.<sup>112</sup> In the state of nature chaos, distrust and self-interest reigns and everyone fears for their life and having to survive without any authority to exercise control or retain balance.<sup>113</sup> Man, being rational, can then willingly create some sort of social contract in order to counteract the chaos and regulate relationships and society.<sup>114</sup>

This social contract has two elements or associated contracts: One is a contract for signing over any rights they had in the state of nature and to create a collective society with common laws; the other is to give authority to someone to enforce the first contract.<sup>115</sup> The enforcer must be respected and obeyed regardless of whether

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<sup>110</sup> Lippman (n 97 above) 367

<sup>111</sup> Celeste Friend 'Social contract theory' (accessed 25 October) <https://www.iep.utm.edu/soc-cont/>

<sup>112</sup> Friend (n 111 above)

<sup>113</sup> As above

<sup>114</sup> As above

<sup>115</sup> Friend (n 111 above)

he is fair. The social contract is the core of society and without it the dreaded state of nature is the only alternative.<sup>116</sup>

According to Hobbes a functioning society is only possible if we regulate relationships by way of contractual agreement, bound by rules and by a ruler.<sup>117</sup> This links to Durkheim's contractual regulation of the collective's solidarity and Weber's rational-legal authority and formal rational thinking.

Locke had a contrasting view of what the state of nature is. To him it is one of absolute freedom and equality.<sup>118</sup> There is no ruler to enforce rules but rather the Law of Nature and Morality which comes from 'God'.<sup>119</sup> Peace, balance and structure, if applied to Weber's theories, come from a traditional or charismatic authority and formal irrational thought.<sup>120</sup> Government is only necessary if someone disrupts the state of nature by infringing on someone's freedom and equality.<sup>121</sup> This is reminiscent of Durkheim's repressive law theory whereby repressive laws are instituted in a traditional society in order to avoid resistance by the community when a violation of the shared values of the collective conscience (their state of nature) causes subsequent outrage.

According to Locke:

So, however much people may get this wrong, what law is for is not to abolish or restrain freedom but to preserve and enlarge it; for in all the states of created beings who are capable of laws, where there is no law there is no freedom. Liberty is freedom from restraint and violence by others; and this can't be had where there is no law.<sup>122</sup>

A social contract can be formed consensually, in order to create a government which has laws, judges and an executive power which enforces the laws and judgements

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<sup>116</sup> As above

<sup>117</sup> As above

<sup>118</sup> As above

<sup>119</sup> As above

<sup>120</sup> As above

<sup>121</sup> As above

<sup>122</sup> John Locke *Second treatise of civil government* (1690) 306

<https://books.google.co.za/books?id=gRNDLAK4kPUC&pg=PA330&dq=Locke+two+treatises+no+man+in+civil+society&hl=en&sa=X&ved=0ahUKEwidoZ7R5KDeAhUB1xoKHfhSD0MQ6AEINjAC#v=onepage&q=Locke%20two%20treatises%20no%20man%20in%20civil%20society&f=false>

in order to protect the state of freedom and equality from transgressors. The consensually created government can be questioned and dissolved in order to create a new one if they fail to protect the state of nature adequately. Hence, a social contract and a government are established, not to create a moral society but rather to protect an already existing moral society. Control is not the aim of law or government, but rather protection.

Tönnies's theory of society's movement from the social and political order of *Gemeinschaft* to *Gesellschaft* was developed in light of Hobbes's and Locke's theories.<sup>123</sup> For Tönnies, *Gemeinschaft* was similar to the state of nature while *Gesellschaft* was the well-ordered society that resulted from the social contract. He saw Locke's idea of society or *Gesellschaft* resultant from a social contract as liberalist constitutionalism,<sup>124</sup> an idea which seems to resonate with Jean-Jacques Rousseau's theories.

For Jean-Jacques Rousseau the state of nature was similar to Locke's description. Initially all men lived simple, moral lives in relative isolation with an abundance of resources and demographic freedom.<sup>125</sup> There was general morality and no need for competition. As population grew, resources diminished and people started living in families and communities and working together to satisfy their needs. Later (in line with Durkheim's theories) division of labour had to occur to keep up with all the changes, developments and innovations. People started taking ownership of property and that, according to Rousseau, was the absolute enemy of the state of nature as it led to social comparisons, inequality and public values shifting from peace to competition.

In line with Locke's and Hobbes's theories, the moral degeneration of chivalric values in society has to be remedied by creating modern civil values.<sup>126</sup> A social contract is thus introduced to create a government in order to promote virtue and

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<sup>123</sup> N Bond 'Rational natural law and German sociology: Hobbes, Locke and Tönnies' *British Journal for the History of Philosophy* 19(6) (2011) 1175 1189

<sup>124</sup> As above

<sup>125</sup> This entire section on Rousseau's theories is based on <https://www.iep.utm.edu/soc-cont/> Celeste Friend 'Social Contract Theory' (accessed 25 October)

<sup>126</sup> Bond (n 123 above) 1193

protect equality and society's interests. Rousseau theorises that this contract, which he calls the naturalised social contract, is in reality only protecting the interests of those who have acquired so much property that they feel the need to be protected and hence the interests of the rich is served. This is much like Marx saw it to be in the context of what a society or state ends up being: 'The executive of the modern State is but a committee for managing the common affairs of the whole bourgeoisie'.<sup>127</sup> This sort of social contract actually only creates further competition and conflict.

Social change which leads to a naturalised social contract can hence be seen as a negative change which has to be remedied by the creation of a different type of normative social contract to remedy the economic and social inequalities and conflicts caused by history and its morally bad effect on development.<sup>128</sup> Hence Rousseau alluded to the idea of social change redressing historical harms and advancing moral regeneration and equality.

The normative social contract is consensually created by all members of society, who agree to come together and submit their individual will to a general, collective will (Durkheim and Tönnies) and appoint a rational legal authority (Weber) based on agreement. The uniting of individuals into a collective people is seen by Rousseau as the foundation of society. The normative social contract hence aims to advance equality by uniting the collective people in creating it as opposed to the naturalised social contract's creation of competition and conflict in society because of its protection of the interests of a selected elite. Rousseau further theorises that societies can fail though if people are not enlightened enough to realise the value of submitting to the collective will and the restrictions on their individual will. Societies also fail when separate political factions are created, like a division

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<sup>127</sup> <https://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch01.htm> (accessed 5 October 2018)

<sup>128</sup> <https://www.iep.utm.edu/soc-cont/#SH2c> (accessed 5 October 2018). See above n 82 which refers to South Africa's history's bad effect on development as worded in the DPME's review of 20 years of post-apartheid development which would then logically, in this context, necessitate the creation of a different type of social contract to advance regeneration and equality. On the next page I further contextualise the need for movement from a naturalised social contract, like that of the apartheid government which only served a select group of people, to a more normative social contract which can remedy the harms of the past.

between rich and poor, with one faction imposing their collective will on all the others.<sup>129</sup>

A potential problem with the general will is that, if the general people are not virtuous, neither will the general will be. The creation of a new state or society needs good laws and good laws make good citizens and a good society. At the same time, those laws have to be agreed upon by the people and if the people are not good, then even law cannot aid a society.

Rousseau mitigates this risk by identifying the role of the legislature.<sup>130</sup> The legislature has to work to create a new collective identity for the new state or collective which Rousseau refers to as 'making a people'.<sup>131</sup> This identity must help the general people to identify with the collective and become supportive of laws that will progressively make them and their future offspring good people and hence good citizens.<sup>132</sup>

He then identifies a problem with the legislature's role in communicating good laws to the people in that people might not understand the reason behind laws and the value of following them.<sup>133</sup>

His solution to the problem of not being able to resort to reason in order to get people to support the good laws is establishing authority by '*persuader sans convaincre*' or persuading without convincing.<sup>134</sup> He suggests that a good way to gain, in a Weberian sense, rational-legal authority is by persuading the people that their

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<sup>129</sup> C Bertram 'Jean Jacques Rousseau' *The Stanford Encyclopedia of Philosophy* (2018), EN Zalta (ed.), <https://plato.stanford.edu/archives/fall2018/entries/rousseau/>

<sup>130</sup> J Rousseau *The social contract* Book 2 Chapter 6 'The Law' (1762)19

<sup>131</sup> J Rousseau *The social contract* Book 2 Chapter 7 'The Law-maker' (1762)21

<sup>132</sup> As above n 131

<sup>133</sup> 'Another difficulty deserves attention. Wise men who try to speak in their language to the common herd, instead speaking as the herd does, have no chance of being understood. There are countless kinds of ideas that can't possibly be translated into the language of the people. Views that are too broad and objects that are too distant are equally out of its range: each individual, having no taste for any plan of government that doesn't suit his particular interests, can't easily see the advantages he would get as payback for the continual privations that good laws impose on him.' J Rousseau *The social contract* Book 2 Chapter 7 'The Law-maker' (1762)21

<sup>134</sup> As above 131

authority is actually charismatic and traditional, some divine wisdom and hence worthy of following and unquestionable.<sup>135</sup>

Perhaps South Africa's history is an example of an attempt at Rousseau's state with underlying characteristics of the other theorists' ideas. The apartheid government had a naturalised social contract which benefitted only a privileged few and ended up creating a failed society because of the race-divided political factions which tried to subordinate non-white races to their collective will since they considered themselves superior. In Locke's fashion, the government failed to protect the citizens and a new government had to be chosen. The relationship between law and society was not a good relationship because 'the culture of authority that existed until the end of apartheid created and maintained a distance between people and the law: the law was largely something imposed on people, not something to be embraced, understood and used by them'.<sup>136</sup>

This then led to an immediate societal need to unite and draft a normative social contract, creating a new collective and new society which I will elaborate on in the next section.

### **3.3 The Constitution as social contract**

In order to remedy the bad relationship that existed between law, society and subsequently social change during apartheid, a new social contract needed to be established post-apartheid. This new social contract would have to positively use the relationship law could have with society. It took form as the post-apartheid Constitution of the Republic of South Africa, 1996.

Essentially, a social contract aims at the creation of a new collective which leads to or is led by the use of good, restitutive, rational laws which are followed because they are administered by someone with authority and which subsequently leads to better citizens.

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<sup>135</sup> As above n 131. Rousseau's views are generally quite extreme and polarised. Some readers may argue that this implies that the people cannot critique or question the legislature but Rousseau's idea with creating a charismatic authority is probably more inclined towards creating an authority that, perhaps to a certain extent fools the people into feeling that they do not have to feel a need to question or critique that authority because their divine wisdom can be trusted and respected without much further thought.

<sup>136</sup> Hodgson (n 12 above) 194



A proper normative social contract, necessary for a social change to a new society, can be achieved by way of the ultimate social contract, a country's constitution. In Rousseau's words: <sup>137</sup>

What makes the work of legislation difficult is not so much what has to be constructed as what has to be destroyed; and what makes success so rare is the impossibility of finding natural simplicity combined with the features that are needed for society to be possible. All these conditions are indeed rarely found united, which is why few states have good constitutions.

I contend that South Africa's current Constitution<sup>138</sup> is a document which not only complies with Rousseau's wording above but also his ideology of good laws being followed because they have been created by the people and or has divine authority, which I will demonstrate below.

In what has been referred to as the largest public participation program ever, the post-apartheid Constitution of the Republic of South Africa took two years, input from 26 political parties, civil society organisations and ordinary citizens to compile 34 constitutional principles.<sup>139</sup> Former Deputy Chief Justice of the Constitutional Court, Dikgang Moseneke is quoted as saying: <sup>140</sup>

Notionally, our Constitution is premised on the will of the people expressed in representative and participatory processes. It does not only establish its supremacy, rule of law and fundamental rights but also recites our collective convictions. It contains our joint and minimum ideological and normative choices of what a good society should be. It enjoins the state, all its organs, to take reasonable steps without undue delay to achieve that good society.

Our Constitution hence has the characteristics of being composed of good legal and moral principles, covering Weber's entire typology of law and legal reasoning, by

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<sup>137</sup> J Rousseau 'The people (further continued)' *The social contract* Book 2 Chapter 10 (1762)

<sup>138</sup> The Constitution of the Republic of South Africa, 1996

<sup>139</sup> <https://www.sahistory.org.za/article/drafting-and-acceptance-constitution> (accessed 5 Oct 2018)

<sup>140</sup> Keynote address: 'Reflections On South African constitutional democracy – transition and transformation' by Deputy Chief Justice Dikgang Moseneke at the Mistra-Tmali, Unisa conference '20 Years of South African democracy: So where to now?' The University of South Africa Wednesday 12 November 2014

making use of an extensive consultative and collaborative process. Although the drafting was done by a legal elite, the contents of the Constitution at least aims to demonstrate our society's collective convictions and what we deem to be a good society or what we aim for our new society to be, from an ideological and normative perspective. The preamble to the post-apartheid Constitution's wording<sup>141</sup> reiterates its status as a social contract by starting with the wording 'We, the people of South Africa' implying a decision hypothetically made by the people, as a collective. In our context, this social contract is technically a pseudo or metaphorical contract if we consider the fact that the drafters of the Constitution were a legal elite and not technically society itself; but its value in establishing our new society's collective ideals is nonetheless valuable.

It has been referred to as one of the rare examples of a Constitution that engages both with the past that created it as well as with the future it wants to create<sup>142</sup> as the preamble's wording includes a recognition of the previous historical harms which would be addressed by 'adopt (ing) this Constitution as the supreme law of the Republic' in order to heal the harms of the past, lay foundations for a new society with different values and build a new South Africa.

The collective, the people of South Africa, is hence signing over their rights to the Constitution as the supreme law in order to create a new collective or society by establishing new values. In this way, the framework or blueprint is established for our new identity, new values and hence new society.

Before establishing those new values, the preamble invokes Weber's divine authority worthy of being followed by ending with the words 'may God protect our people'.

The next six sentences also form part of the new national anthem, which if a national anthem is seen as the creed or the song of the people, is an important cementing

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<sup>141</sup> Preamble to The Constitution of the Republic of South Africa, 1996

<sup>142</sup> P De Vos 'Grootboom, The right of access to housing and substantive equality as contextual fairness' (2001) *South African Journal of Human Rights* 258 260

element in uniting or creating the collective. These sentences ask for God's blessing in six different South African languages.

Perhaps the lawmakers drafting the Constitution had Rousseau's advice on what makes a failed society or how to '*persuader sans convaincre*' in mind and with good-intentioned strategy, used the languages of 'their herd' backed by divine wisdom, charismatic and traditional authority to ensure that the post-apartheid Constitution would potentially be supported by the people, not only because they were 'involved' and consulted in its drafting, but because of invoking the ultimate authority and presence of God. This is of strategic importance especially if one considers that 'the people' or 'the herd' of South African society has been found, in the most recent South African Social Attitudes report, to be 80% Christian with three-quarter of adults believing in God.<sup>143</sup> I will still mention later on in this dissertation whether the values contained in the post-apartheid Constitution are really supported by the people or has in effect been successfully internalised.

While Weber and many of the social contract theorists saw law's authority to be based on coercion by a group of authoritative figures, Mureinik theorised that, much like Rousseau, persuasion and not coercion would play an important role in terms of authority. The Bill of Rights in the post-apartheid Constitution and its transformative values could only be, as the interim Constitution envisioned, a 'historic bridge' between the divisive past and a future based on human rights, peace and development for all, if those who are trusted with the upkeep of the bridge understand that it has to lead from an authority of coercion to one of justification.<sup>144</sup>

The post-apartheid Constitution was hence the ultimate, albeit metaphorical, social contract and foundation or framework of the new collective. Consultatively,

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<sup>143</sup> B Roberts, M wa Kivulu & Y Derek Davids 'South African social attitudes 2nd Report Reflections on an age of hope' (2010)

<sup>144</sup> E Mureinik 'A bridge to where? Introducing the interim bill of rights' (1994) 10 *South African Journal of Human Rights* 31 32. Further to Mureinik's views and that of the classic social contract theorists, it might be useful to note the relevance of social contract theory in current day South Africa is clear from articles on public fora such as newspapers:

<https://www.news24.com/SouthAfrica/News/constitution-is-a-social-contract-gordhan-20160404>;

<https://mg.co.za/article/2018-10-11-south-africa-must-guard-against-the-erosion-of-its-social-contract>

(accessed 14 April 2019)

strategically and brilliantly drafted, it had the potential to let South African society progress from the dramatic social change experienced when apartheid was abolished, to stable, sustainable, incremental social change towards a new identity, new normative structure and new society.

It is now worth considering how the Constitution as a social contract is able to impact on the social change we are striving towards by using incremental social change, and what these new values in our new normative structure are that the new South African identity and our new society is based on.

### **3.4 Transformative constitutionalism and a new society**

As the 'supreme law of the Republic' the Constitution guides the creation of all laws and legal processes of a country and is essentially the foundation of a country's society and strategy for its future. The Bill of Rights applies to all law and binds all institutions in society – legislature, executive, judiciary and organs of state<sup>145</sup> – which resonates with Locke's ideal that 'No Man in Civil Society can be exempted from the Laws of it'.<sup>146</sup>

The Americans Brundige and Kalantry note that 'South Africa's Constitution is known throughout the world for its transformative vision and robust human rights protections ...'<sup>147</sup> In chapter 1 I noted that the post-apartheid Constitution with its transformative principles was the first step taken towards using policy for the mandate of reparation and reconstruction of a post-apartheid society.

The National Development Plan Vision 2030 states, in terms of social transformation, that the Constitution 'is a national compact that defines South Africa's common values and identifies our rights and responsibilities as people living together. The Constitution is also the vision for South Africa and offers a blueprint for the establishment of a prosperous, non-sexist, non-racial and democratic society'.<sup>148</sup>

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<sup>145</sup> The Constitution of the Republic of South Africa, 1996 Chapter 2, Section 8

<sup>146</sup> J Locke *Second treatise of civil government* (1690) 330

<sup>147</sup> E Brundige & S Kalantry 'Book review: Socio-economic rights: Adjudication under a transformative constitution by Sandra Liebenberg' (May 2012) *Human Rights Quarterly*, Vol. 34, 579 No. 2 601

<sup>148</sup> National Development Plan Vision 2030 458

The constitutional blueprint contains common values, rights and responsibilities or metaphoric terms and conditions of our new normative social contract with the state and hence the vision of our new society and our new identity. The values framework or the 'collective convictions, joint and minimum ideological and normative choices of what a good society should be'<sup>149</sup> can be found in the founding provision of the Constitution while the Bill of Rights in chapter 2 affirms these values, formally, in the shape of rights and responsibilities.<sup>150</sup>

The 'founding provisions' of the Constitution state that South Africa is founded on the values of human dignity, equality as well as human rights and freedoms<sup>151</sup>, non-racialism and non-sexism<sup>152</sup>. The idea is introduced of common South African citizenship where all citizens are '(a) equally entitled to the rights, privileges and benefits of citizenship; and (b) equally subject to the duties and responsibilities of citizenship'.<sup>153</sup> Democracy<sup>154</sup> as well as the supremacy of the constitution and rule of law<sup>155</sup> is also mentioned, with the detailed mandate that the Constitution's supremacy has the duty that 'law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.<sup>156</sup>

In many pivotal post-apartheid judgements, the Constitutional Court has reiterated these transformative values and its commitment towards ensuring supremacy<sup>157</sup> of

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<sup>149</sup> As above n 148

<sup>150</sup> Section 7. Rights. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

<sup>151</sup> Section 1 (a) of the Constitution

<sup>152</sup> Section 1 (b)

<sup>153</sup> Section 3 (2)(a),(b)

<sup>154</sup> Section 1 (d)

<sup>155</sup> Section 1 (c)

<sup>156</sup> Section 2

<sup>157</sup> In *MM v MN* the Court found that Xitsonga customary law was not consistent with the Constitutional principles of dignity and equality and hence ordered that customary law had to be further developed. This demonstrates the Court's commitment to the Constitution's values and supremacy even when deeply ingrained customary law and values are considered. *MM v MN and Another* 2013 (4) SA 415 (CC)

the Constitution.<sup>158</sup> The Constitutional Court's role has even been considered essential to the long-term project of transformative constitutionalism.<sup>159</sup>

In an article commemorating the writings of Mureinik, Klare writes about faith in law's ability to 'purify and cure the society's evils';<sup>160</sup> referring to law's power in the process of social change and a potential remedy to Marx's problem of society's inherited evils. He then creates a link between law and social change by theorising about the transformational capacity of the Constitution which would be a long-term project referred to as 'transformative constitutionalism' and would bring about large-scale social change. As part of his project the enactment, interpretation and enforcement of the Constitution has to be committed, in a democratic, participatory and egalitarian way, to the transformation of social and political institutions as well as power relationships.<sup>161</sup>

In interpreting the Constitution, the Constitutional Court as institution does attempt to play a role as adjudicator and contributor towards the project of transformative constitutionalism which harmonises with Rousseau's theories.<sup>162</sup>

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<sup>158</sup> In *S v Makwanyane*, the Court referred to the transformative capacity of a Constitution to bring about a societal future differing 'starkly' and 'dramatically' from the broken past. *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 BCLR 665 (CC) para 262. See also S Woolman, T Roux & M Bishop *Constitutional Law of South Africa* (2007) 24.

See also 'As this Court has emphasised on many occasions. Our Constitution is a document committed to social transformation' *Mkontwana v Nelson Mandela Metropolitan University & Another* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) par 81

<sup>159</sup> While Rousseau held the legislature responsible for social change, Klare emphasised the role of the Constitutional Court as an institution which future generations would hold responsible for its contribution to social and political transformation. Klare (n 4 above) 146, 172. There exists views that the Constitutional Court cannot truly be transformative as a result of an underlying political agenda. This debate will not be discussed in detail in this mini-dissertation but relates to fears that the judiciary is not impartial or truly independent but biased because of the criteria for judicial appointments which could lead to judges being appointed who have greater concern for the ruling party's values and agenda than that of the Constitution itself. The following illuminating article provides a view on whether this view is potentially unfounded: K Malan 'Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa' (2014) 17 (5) *PER* 1965

<sup>160</sup> Klare (n 4 above) 169

<sup>161</sup> Klare (n 4 above) 150

<sup>162</sup> See also: In *President of the Republic & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC), the Constitutional Court affirmed its awareness of its purpose and responsibility to ensure that when applying the Constitution during adjudication, they have to ensure that it remains true to its' transformative commitment

Rousseau theorised that even if there are good laws, followed by good people, the adjudicator would have to be good and conscientious as well because adjudicative methods can lead to egalitarian social change.<sup>163</sup>

The role of the adjudicator and the Constitutional Court is important because judges make socially significant, value-based decisions which have social and distributive consequences that they are responsible for as their adjudicative practices have the potential to construct the social order.<sup>164</sup> Further to this, Klaassen notes that ‘a court still has to give meaning and substance to the constitutional rights and values even though the meaning thereof is often unclear. This requires of the judge to make a value judgment to give effect and meaning to constitutional rights and values’.<sup>165</sup>

Dror writes that one cannot ‘assign meaning to any part of the law and apply it to concrete cases without regarding the purpose (or purposes) which that part of the law is designed to serve; that purpose constitutes the value (or values) reflected in the law’.<sup>166</sup>

When the Court is applying the Constitution in cases, it is using the purpose and values contained therein and giving meaning to the law or to rights. The Constitutional Court can hence help to set an example of how the human rights and collective values we are striving towards, should be interpreted.

Klare challenged the Constitutional Court in 1998 with the idea that future generations would judge them (the Court) based, essentially, on how they contributed to social and political transformation.<sup>167</sup>

One of the first and almost legendary post-apartheid examples of the Court’s attempt at using its interpretative functions to give meaning to a constitutional right

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<sup>163</sup> Klare (n 4 above) 150

<sup>164</sup> Klare (n 4 above) 164,165

<sup>165</sup> A Klaassen ‘Constitutional interpretation of the so-called “hard cases”’: Revisiting *S v Makwanyane*’ *De Jure* 50 (2017) 1 5

<http://dx.doi.org/10.17159/2225-7160/>

<sup>166</sup> Y Dror ‘Values and the law’ (1957) 17 (4) *The Antioch Review* 440 442

<sup>167</sup> Klare (n 4 above) 146 ,172

or contribute to social transformation is *S v Makwanyane*.<sup>168</sup> It is also an example of how, in terms of Weber's theory, the law was used for restitution instead of repression. The Court interpreted the right to life in section 9 of the Bill of Rights of the interim Constitution, in light of its purpose or value of human dignity for all.<sup>169</sup> Section 9 did not expressly outlaw the death penalty, but the Court interpreted it in order to give meaning and value to the fundamental right, by abolishing the death penalty. The relationship between the power of law and social change is demonstrated in the fact that the Court's interpretation of the right to life brought about social change by ensuring that everyone in society has an inalienable right to life. Judge Chaskalson noted expressly that the Constitution established a new legal order and that the role of constitutional adjudication exists because public opinion cannot be decisive in this new order.<sup>170</sup>

The reason why cases like this and the Constitutional Court's interpretation is important is because, as Judge Chaskalson said, public opinion can be overridden by the courts in the new order<sup>171</sup> so that the values of the Constitution remain supreme. High Court Judge Dennis Davis also previously wrote about the judiciary's ability to shape and mould public opinion.<sup>172</sup>

The Constitutional Court hence attempts to contribute to social change by making sure that the founding provisions relating to the supremacy of the Constitution is achieved and interpreting some of the terms of the social contract the Constitution has with the envisioned, new society. The Court does this by using the Constitution and its values to give meaning to the law, even when it might be against public opinion, to restructure the dynamics of society.

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<sup>168</sup> *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 BCLR 665 (CC)

<sup>169</sup> D Moseneke 'A journey from the heart of apartheid darkness towards a just society: Salient features of the budding constitutionalism and jurisprudence of South Africa' written version of the thirty-second annual Philip A. Hart Memorial Lecture, Georgetown University Law Center on April 4, 2012 page 22

<sup>170</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) para 88

<sup>171</sup> For more on the Constitution's transformative commitment to create a new order by addressing past wrongs by influencing and restructuring all levels of society see also *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) para 163

<sup>172</sup> D Davis *Democracy and deliberation: Transformation and the South African legal order* (1999) 11



Former chief justice Dikgang Moseneke notes that cases like *Makwanyane* and the adjudicative interpretation demonstrate that our constitutionalism is 'value-drenched'.<sup>173</sup> This implies that all law and conduct has to fit into the normative scheme created by our Constitution's fundamental rights and freedoms to create a sort of 'moral citizenship'.<sup>174</sup>

The concern emerges though whether the Court is really able to create Chaskalson's new legal order with transformative fundamental rights, values and freedoms like those contained in the founding provisions of the Constitution, especially if its interpretations and judgements might go against public opinion. It might be unrealistic to think, as per Davis above, that the court can override public opinion.

I mentioned already that in terms of using the Constitution as a metaphorical social contract, the collective, the people of South Africa, are signing over their rights to the Constitution by establishing new values. I also noted that these new values, the 'collective convictions, joint and minimum ideological and normative choices of what a good society should be'<sup>175</sup> are present in the founding provisions of the Constitution.

If a contract is to succeed, all parties to the contract have to be aware of and in agreement with the terms and conditions of the contract, in this case the values and founding principles of the constitutional social contract. If the Constitution's interpretation in court is different from the collective's convictions or public opinion though, as stated by Judge Chaskalson in *S v Makwanyane*, it might be difficult to enforce our social contract because all parties will not feel like they are in agreement. If the new social contract is not enforceable, then incremental social change towards our new society with our new identity and new values will not occur.

This potential problem was noted by Kok. He theorises in his article about law's ability to transform society that, despite the transformative value-based judgements

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<sup>173</sup> As above n 169

<sup>174</sup> As above

<sup>175</sup> As above n 140

from the Courts, results from South African Social Attitudes Surveys show that the public's attitude regarding the death penalty and other progressive issues are not in sync with government policy<sup>176</sup> and that the transformative values of the Constitution have not yet found their way 'into the hearts of South Africans'.<sup>177</sup> He quotes various writers who have found that the post-apartheid Constitution and its progressive core values are not representative of the majority of South Africans who tend to prefer more traditional moral values.<sup>178</sup>

I noted in the previous chapter that when social changes occur on a macro, social structural level – for instance when a new law is introduced – then people have to rationally alter their social actions or behaviours in society on a micro level, according to this change.<sup>179</sup>

By extension, if the project of transformative constitutionalism is to succeed in bringing about incremental social change, the Constitution as a new law with its value-drenched, fundamental rights and freedoms (macro level) has to alter social actions and behaviours in society according to these new rights and values it has introduced.

While the majority of writings about transformative constitutionalism have focussed on the Court and the legal profession, I contend that judgements by the Court that give meaning to rights are useful but will not alter public opinion or social actions and behaviours. The new values still need to be socialised into society in order to be effective. Mandela had the same notion:<sup>180</sup>

If we want the values behind a Bill of Rights to become part of the culture of our people, it is important to recognise that the authority of these values is not

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<sup>176</sup> A 2014 survey by the Department of Justice Constitutional Development's Access to Justice and Promotion of Constitutional Rights Programme in partnership with the Foundation for Human Rights, found that the attitudes of the majority of South Africans towards basic human rights protected in the Constitution, including issues like the death penalty, was negative. 2014 Report of the AJPCR Baseline Survey on awareness of, attitude and access to Constitutional Rights. Published by the Foundation for Human Rights 14

<sup>177</sup> A Kok 'Is law able to transform society?' (2010) 127 (1) *The South African Law Journal* 58 74

<sup>178</sup> As above. Article Footnote 104 quoting U Pillay, M Orkin and R Jowell

<sup>179</sup> D Gauntlett *Media, gender and identity: An introduction* (2002) 106

<sup>180</sup> N Mandela 'Address on the occasion of the ANC's bill of rights conference' in *A Bill of Rights for a Democratic South Africa: Papers and Report of a Conference Convened by the ANC Constitutional Committee* (1991) 9 at 13-14.

ultimately vested in the Constitution as such, nor in the power of the state, but rather in the people who at a certain time in history committed themselves to a process under the rule of law and according to a certain set of principles.

In the next chapter I explore how a restructuring of the new society's normative structure, our new values and new identity, and incremental social change can be achieved by infusing the transformative values of the Constitution, not only into judgements, but into the hearts, as well as minds of South Africans in a more stable, incremental way.

### **3.5 Conclusion**

The relationship between law and social change is demonstrated in the way that society comes together as a collective to create a metaphorical social contract, in the form of a Constitution. The South African Constitution as social contract contains transformative principles encapsulated in the fundamental rights, collective norms and values that South Africans see as necessary for a new, good society and therein lies the potential power the law has to influence our society. Law can be considered to have a powerful relationship to social change because of the transformative legal principles in the supreme law, the Constitution.

This powerful legal instrument can influence society and social change via its relationship with society, as a social contract we agree to, to achieve this redress of the imbalances of the past.

To create this new society based on these transformative principles through the project of transformative constitutionalism, we cannot only rely on the Court to infuse the Constitution's rights and values into society. Infusing these rights and values into society implies an infusion into our hearts as well as our minds. Our Constitutional social contract can only work if all parties are aware of and understand the terms and principles in the contract.<sup>181</sup> This has to be achieved through the process of socialisation.

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<sup>181</sup> 'In the absence of awareness of the change that the Constitution demands, many people in South Africa continue to judge the Constitution not by its potential, or indeed the change that it has in fact brought, but by the perception that "for millions in this country, the effect of the change [brought in by the Constitution] has yet to be felt in a material sense".' Hodgson (n 10 above) 196

## Chapter 4: Education as socialising agent

### 4 Introduction

In chapter 2 I noted that South African society is suspended in a state of transition between cultural, normative and institutional struggles<sup>182</sup> while in chapter 1 I quoted Mandela implying that actions, policies and institutions will influence the creation of a new society.

To create that new society via incremental social change I have thus far illustrated that we can achieve incremental social change by harnessing the power of law in society via Rousseau's idea of a new normative social contract. The terms or principles of this social contract include using, as Moseneke encapsulated it, the Constitution's newly established fundamental rights, collective convictions and 'joint and minimum ideological and normative choices of what a good society should be'<sup>183</sup> through the project of transformative constitutionalism.

I have stated in chapter 3 that, in order for the transformative values of the Constitution to truly find its way into the hearts of South Africans and contribute to social change, the Constitutional Court's role as an institutional source of change is probably not sufficiently effective and the state needs to look to other sources of social change to find a way of infusing those values into society effectively.

Dror theorises that law is an omnipresent or endemic element in every social institution<sup>184</sup> and social change in one institution influences change in another until the whole of society undergoes change.<sup>185</sup> If we use institutions as our main source of social change, and strategically focus on one institution as an influencer and infuser, the slow, sustainable process of incremental social change in all other institutions can be catalysed to eventually effect large-scale societal change. This complies with my original definition of incremental social change.<sup>186</sup>

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<sup>182</sup> As per conclusion of Chapter 2

<sup>183</sup> As above n 140

<sup>184</sup> Y Dror 'Law and social change' (1959) 33 *Tulane Law Review* 787 790

<sup>185</sup> Dror (n 184 above) 789

<sup>186</sup> As per Chapter 2: 'Incremental Social Change occurs where slow and steady changes lead to large scale transformation of social and/or normative structures and even cultural identities'.

In chapter 2 I considered the sources of social change which include institutions.<sup>187</sup> Greenfield's studies on social change and human development will be used in this chapter and include education as a source of change in the process of modern society's evolution.<sup>188</sup>

I contend however, that education is not a single or separate source of social change, but an institution that functions as a socialising agent which affects and enables other institutions as well 'until the whole of society undergoes change' as implied by Dror's institutional domino effect.

I will first explore what a socialising agent is and why institutions can be considered change agents. Subsequently I will demonstrate that education would be the most suitable institution to focus on as institutional source of change and socialising agent of the constitutional values in creating a new South African society.

#### **4.1 Institutions as change agents**

I have established that social change happens through the sources listed in chapter 2 and I mentioned that institutions are not only a source of change but a major change agent.<sup>189</sup> Institutions can therefore potentially affect the other sources of change.

Marx's theories have shown that we still struggle to get away from our inherited evils and traditions and that we have to move away from the established old society's norms, laws and structures. According to Marx, because rulers are the root of social alienation, social change can only occur if we focus on it from an institutional level.<sup>190</sup>

For Durkheim, the movement from mechanic to organic solidarity in society would be based in moral regeneration through institutional change.<sup>191</sup>

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<sup>187</sup> Section 2.3 above: According to Healy's research, similarly to Durkheim's views, social change finds its source in 'demography, the economy, technology, planning, organisations, institutions and culture'.

<sup>188</sup> PM Greenfield 'Linking social change and developmental change: Shifting pathways of human development' (2009) 45 (2) *Developmental Psychology* 401 405

<sup>189</sup> See Section 2.3 above

<sup>190</sup> See Section 1.1 above

<sup>191</sup> A Giddens 'Classical social theory and the origins of modern sociology' (1976) 81 *American Journal of Sociology* 709

Healy mentioned that institutions as a source of change can be seen from a regulatory or constitutive point of view. In terms of the regulatory view the state can intervene in development through institutions<sup>192</sup> externally. The constitutive view gives institutions the responsibility internally of providing the categories of our thought<sup>193</sup> and hence ideologies.

Sen notes that ‘we can discover the area of agreement between Marx and Weber and realise that the emergence of a new social order depends not only on the material crisis of the older society, but also on the capacity of the rising class forces to arrive at the position of economic and ideological command in society’.<sup>194</sup>

In an article referencing Weber’s theories, Kniss writes that ideology, along with economics and politics, explains social change.<sup>195</sup>

Ideology can only gain dominance and influence social change if it has a resource advantage.<sup>196</sup> Numerous institutions and institutionalised actions have to spread the ideology and if those institutions contain a large number of people the adherents of the ideology will obviously also grow.<sup>197</sup>

Ideologies ‘act as a principle or set of principles by which to change society by providing a set of norms that are used as a guide for change through a normative thought process’. Ideologies can therefore be used to change society. Incremental social change from our old inherited evils to a new, good society, must therefore be achieved by infusing the transformative ideologies or norms, principles and values from our Constitution into society.

The transformative ideology I refer to in this context is the founding provisions of the Constitution, discussed in chapter 3, that we need to infuse into the hearts of South Africans.

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<sup>192</sup> Healy (n 15 above) 26

<sup>193</sup> Healy (n 15 above) 27

<sup>194</sup> A Sen ‘Marx, Weber and India today’ (1972) 7 *Economic and Political Weekly* 307 311

<sup>195</sup> F Kniss ‘Toward a theory of ideological change: The case of the radical reformation’ (1988) 49 (1) *Sociological Analysis* 29 31

<sup>196</sup> Kniss (n 195 above) 33

<sup>197</sup> As above

The 'founding provisions' of the Constitution contain the values of human dignity, equality as well as human rights and freedoms<sup>198</sup>, non-racialism and non-sexism<sup>199</sup>. South African citizens are '(a) equally entitled to the rights, privileges and benefits of citizenship; and (b) equally subject to the duties and responsibilities of citizenship.'<sup>200</sup>

Democracy,<sup>201</sup> as well as the supremacy of the Constitution and rule of law,<sup>202</sup> is also mentioned, with the detailed mandate that the Constitution's supremacy has the duty that 'law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.<sup>203</sup>

As I will now demonstrate the spread of an ideology happens through the process of socialisation.

## 4.2 Socialisation and socialising agents

Socialisation, as mentioned in chapter 1, is the process of internalising values and norms to become part of a specific society or group.<sup>204</sup> It is an important concept for purposes of a discussion on social change as it relates to equipping individuals to perform duties as functioning members of society.<sup>205</sup> Hence, if society is not functioning correctly or social change is problematic, it is worth considering whether socialisation in terms of internalising the constitutional values is occurring effectively.<sup>206</sup>

In terms of the spread of ideologies (such as the constitutional idea of an ideal society and the values that support such a society) Saldana states that culture,

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<sup>198</sup> Section 1 (a) of the Constitution

<sup>199</sup> Section 1 (b)

<sup>200</sup> Section 3 (2)(a), (b)

<sup>201</sup> Section 1 (d)

<sup>202</sup> Section 1 (c)

<sup>203</sup> Section 2

<sup>204</sup> M Hirsh *Invitation to sociology of international law* 1 (2015) 7, 8

<sup>205</sup> <http://www.sociologyguide.com/basic-concepts/Socialization.php> and <https://courses.lumenlearning.com/boundless-sociology/chapter/theories-of-socialization/> (accessed 1 November 2018)

<sup>206</sup> <http://www.sociologyguide.com/basic-concepts/Socialization.php> and <https://courses.lumenlearning.com/boundless-sociology/chapter/theories-of-socialization/> (accessed 1 November 2018)

beliefs, values and norms are acquired through learning. Learning happens via agents of socialisation:

Agents of socialization are people, groups and/or institutions that influence self-concepts, emotions, attitudes and behavior. This influence occurs in small groups and in society, and it may be the result of direct and overt explicit social pressure, or it may be subtle, insidious, and unconscious. This influence acts on the individual's attitude, beliefs, and behaviors to conform to the influencing group's beliefs, behaviors, and attitudes.<sup>207</sup>

This definition harmonises with Weber's theory that social actions are not random but create patterns which influence the establishment of societal norms, laws and structures and which subsequently help to understand how social change takes place.<sup>208</sup>

### **4.3 Education as socialising agent**

In chapter 1 I explained that socialising agents are institutions or elements like family, peers, media and education that catalyse and craft the process of socialisation.<sup>209</sup>

The three main traditional agents of socialisation are the family, the community<sup>210</sup> and the school.<sup>211</sup>

As society changes, religious, communal and family values and hence the education they provide, do not stay constant either. Saldana considers the most stable and formal agent of change to be the educational institution of the school.<sup>212</sup>

If we consider Kniss's guidelines that ideologies can only be effectively socialised by institutions that are numerous, have a resource advantage and multiple potential adherents, then it seems as though educational institutions would logically comply with these requirements. If one considers that education in South Africa is compulsory from the age of 7 until the age of 15 that would imply that educational

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<sup>207</sup> J Saldana 'Power and conformity in today's schools' (2013) 3 (1) *International Journal of Humanities and Social Science* 228

<sup>208</sup> RW Hadden *Sociological theory: An introduction to the classical tradition* (1997) 133

<sup>209</sup> M Hirsh *Invitation to sociology of international law 1* (2015) 7, 8

<sup>210</sup> S Amon, S Shamaï & Z Ilatov 'Socialization agents and activities of young adolescents' (2008) 43 *Adolescence* 373

<sup>211</sup> Saldana (n 207 above) 228

<sup>212</sup> As above



institutions contain all future citizens for a minimum of 9 years hence making these institutions a resource with multiple potential adherents.<sup>213</sup>

I mentioned in chapter 2 that sources of social change can function interdependently.<sup>214</sup> Similarly, one agent of change cannot be considered in isolation as there might potentially be an interdependence or even conflict between the agents and the messages they socialise. Therefore it is necessary to also consider the role of family and community as agents of socialisation to establish that education is the most stable and potentially effective socialising agent.

#### **4.3.1 Community and family as socialising agents**

In chapter 2 I noted that the theories relating to societies and social order are important to understand social context and how that affects social change.<sup>215</sup>

Weber theorised that traditional or habitual actions that are part of family and community life explain why people might feel a duty to obey certain customs and rules. These can form the basis of social order.<sup>216</sup>

For social change to occur in this social order, and a movement from the mechanic solidarity of the communal family life towards more modern, organic solidarity, Tönnies's shift from community to society has to occur. Tönnies theorised that the social change from community to society, essential to arbitrary will, and 'unity in plurality' to plurality in unity would affect ideologies, social relations and hence the spread thereof.<sup>217</sup> Additionally, according to Marx, for institutions to effect social change and remedy the alienation caused by rulers, we need to return to being members of a community.<sup>218</sup>

In chapter 2 I also explained how, according to Sablonnière's theories, normative structure changes are a key to social change. Dramatic social change causes a rupture in normative structure<sup>219</sup> and threatens cultural identity. Incremental social

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<sup>213</sup> <https://www.expatica.com/za/education/children-education/education-in-south-africa-803205/> (accessed 27 October 2018)

<sup>214</sup> See above Section 2.3

<sup>215</sup> See above Section 2.1

<sup>216</sup> <http://uregina.ca/~gingrich/319j1503.htm> (accessed 14 August 2018)

<sup>217</sup> See above Section 2.1

<sup>218</sup> See above Section 2.1

<sup>219</sup> As per Section 2.2 Sablonnière defines normative structure as 'the behaviors of most community members whose aim is achieving collective goals. In other terms, when the normative structure is clear,

change, which I argue for, allows old patterns of thought and behaviour and does not threaten cultural identity but simply reshapes it. As mentioned in chapter 2, South Africa needs to move towards a new cultural identity and new normative structure via incremental social change.

As socialising agents, the family and community, linkable to the cultural and demographic sources of change I have mentioned, can have a very strong influence on the individual's ideas of right and wrong and their normative structure according to Weber's theory of traditional authority and the communal, or as Durkheim phrased it, mechanical solidarity.<sup>220</sup> If family and community socialise only traditional values and attitudes into the individual, it is logical to presume that this could impede incremental social change towards modern society and its accompanying organic solidarity.

Greenfield, in reference to Redfield's<sup>221</sup> anthropological prototypes of traditional community versus urban society, uses characteristics of Tönnies's *Gemeinschaft* and *Gesellschaft* to identify exactly where a group of people are in the social change process between community and society.<sup>222</sup>

*Gemeinschaft* or traditional communities are characterised as being economically and infrastructurally less advantaged or developed, small-scale rural communities with little division of labour and low formal schooling. Their normative structure is interdependent, based on traditional and charismatic authority and equality with a high degree of homogeneity or commonness. They adapt socially to collectivist values like sharing, while they are reluctant to adapt to social changes and individualist concepts like rights.

*Gesellschaft* or modern society is characterised by good infrastructure, development and high levels of economic activity. They often have large urban populations, many labour roles and career paths, high levels of literacy and formal schooling. Their normative structure is independent with a high degree of

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people know what to do and when to engage in specific behaviors in order to meet the overarching goals of the collectivity'.<sup>219</sup>

<sup>220</sup> See above Section 2.1

<sup>221</sup> Greenfield referencing the works of R Redfield *The folk culture of Yucatán* (1941) in the article as below

<sup>222</sup> This entire section is based on PM Greenfield 'Linking social change and developmental change: Shifting pathways of human development' *Developmental Psychology* (2009) 45 American Psychological Association 401 - 403

heterogeneity or uniqueness, rational legal authority and based on individualist values like privacy and individual rights. Collectivist, communal values are less important and homogeneity or sameness are not considered progressive enough by them. They are also more receptive and welcoming to social change and to rights-based thinking.

From this description it is evident that there is a gap between 'community' and 'society', not just demographically, but also ideologically in terms of ideas of authority and attitudes to modern society's rights-based thinking.

What makes this community-society dynamic more complex is that the heterogeneity of *Gesellschaft* can lead to small *Gemeinschaft* groupings nestled within.<sup>223</sup> The *Gesellschaft* with its progressive values then functions as a kind of 'host' to the *Gemeinschaft's* communal virtues.<sup>224</sup>

As I noted in chapter 2 South Africa's modern, urban areas still mostly consist of smaller, informal settlements and communities. This demonstrates that South African *Gesellschaft* plays host to small *Gemeinschaft* groupings.<sup>225</sup> Presumably it is partly because of the apartheid legacy and attempts at retarding social change by stifling development in demography as a source of change.<sup>226</sup>

Another potential explanation for the phenomenon of communities within societies is the traditional communal ideological<sup>227</sup> and sociocultural framework of *Ubuntu*.<sup>228</sup> This is explicitly mentioned in the interim Constitution<sup>229</sup> and referred to as a philosophy which is in our national interest.<sup>230</sup>

At its core, *Ubuntu* is a community-centred value framework described as a collective morality which is about interdependence, communality and

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<sup>223</sup> As above

<sup>224</sup> As above

<sup>225</sup> See above Section 2.4

<sup>226</sup> See above Section 2.4

<sup>227</sup> C I Tshoose 'The emerging role of the constitutional value of ubuntu for informal social security in South Africa' (2009) 3 *African Journal of Legal Studies* 12 13

<sup>228</sup> Preamble to 'Building a better world: The diplomacy of Ubuntu', White Paper on South Africa's Foreign Policy, 13 May 2011

<sup>229</sup> C Himonga, M Taylor & A Pope 'Reflections on judicial views of Ubuntu' (2013) 16 (5) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 372

<sup>230</sup> Preamble to 'Building a Better World: The Diplomacy of Ubuntu' White Paper on South Africa's foreign policy 13 May 2011

interconnectedness;<sup>231</sup> essentially a reliance on solidarity in order to survive in communities like townships.<sup>232</sup> *Ubuntu* is not inclined towards individual rights<sup>233</sup> except if it benefits the group and causes a 'duality of individuality and simultaneous unity'.<sup>234</sup> This then potentially explains why in modern, individualist-orientated, urban South Africa there is still the unity of small *Ubuntu*-orientated communities: People's ideological orientation of *Ubuntu* solidarity still inspires them to form homogeneous *Gemeinschaft* communities even in modern, heterogeneous, *Gesellschaft* society.

Durkheim theorised that 'society can survive only if there exists among its members a sufficient degree of homogeneity'.<sup>235</sup> He also said that 'education perpetuates and reinforces this homogeneity by fixing in the child from the beginning the essential similarities which collective life demands'.<sup>236</sup> From this idea he developed the notion that schools essentially create 'transitional communities' between the family and society, or the outside world.<sup>237</sup>

According to Greenfield, sociodemographic characteristics, like those which define *Gemeinschaft* and *Gesellschaft*, influence learning environments and in turn human

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<sup>231</sup> Langa J at para 224 *S v Makwanyane* 1995 3 SA 391 (CC)

<sup>232</sup> C I.Tshoose 'The emerging tole of the constitutional value of ubuntu for informal social security in South Africa' (2009) 3 *African Journal of Legal Studies* 12 13

<sup>233</sup> CE Oppenheim 'Nelson Mandela and the power of Ubuntu' (2012) 3 *Religions* 369 371

<sup>234</sup> Oppenheim (n 233 above) 369 370

<sup>235</sup> <https://revisesociology.com/2017/08/22/functionalist-durkheim-role-education/> (accessed 2 Nov 2018)

<sup>236</sup> As above

<sup>237</sup> AKC Ottaway 'The educational sociology of Émile Durkheim' (1955) 6 (3) *The British Journal of Sociology* 213 219, 220. The transitional community would not imply that people from different cultures do not keep their own traditions/lose them but that a transitional community allows for a balance between the differences. While I focus on select sociological theorists for this discussion, I am also aware that this concept of schools creating a transitional bridge has been mentioned in writings about transformative social justice learning (a topic which I will in future explore and link with this mini-dissertation on a separate occasion). It is worth mentioning though that, in writing about the theoretical contributions of Paulo Freire, Carlos Alberto Torres notes that crossing the borders of cultural difference in education is a central dilemma of social justice learning but also an ethical imperative if education is to empower instead of oppress. [http://www.acervo.paulofreire.org:8080/jspui/bitstream/7891/3919/1/FPF\\_PTPF\\_01\\_0623.pdf](http://www.acervo.paulofreire.org:8080/jspui/bitstream/7891/3919/1/FPF_PTPF_01_0623.pdf) (accessed 14 April 2019)

development.<sup>238</sup> When a shift happens from community to society, the learning and development pathway for children shifts as well.<sup>239</sup>

The learning environment becomes complicated because of the family's and community's role as socialising agents, delivering different normative messages of individualism versus collectivism.<sup>240</sup>

Under these conditions, the theory of social change and human development predicts that children will be subject to cross-cutting currents, in that they will receive both socialization messages at home that continue to be adapted to the more *Gemeinschaft* environment that their parents grew up in and conflicting socialization messages from representatives of the more *Gesellschaft* host society, such as teachers.

Added to that are the complex socialisation messages of *Ubuntu*: collectivist values within individualist modern society.

Greenfield uses the example of a stimulus scenario created by a survey to test the unique value conflict that can occur where a collectivist value-orientated *Gemeinschaft* community is nestled in an individualist *Gesellschaft* host society.<sup>241</sup> The following scenario was posed to the children, asking them what the mother should do: 'Adam and Johnny each get \$20 from their mother, and Johnny buys a T-shirt. A week later Adam wants to borrow Johnny's T-shirt, and Johnny says 'No, this is my T-shirt, and I bought it with my own money.' And Adam says, 'But you're not using it now.'

The parents who were *Gemeinschaft* orientated emphasised the collectivist value of unconditional sharing while the teachers emphasised the values of rights like property and freedom of choice. The children's answers subsequently showed that they were actively constructing adaptations in their thoughts and responses to the environment of having both value systems being taught to them, by choosing the rights-based values over community values like sharing.<sup>242</sup>

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<sup>238</sup> Greenfield (n 288 above) 405

<sup>239</sup> As above

<sup>240</sup> PM Greenfield 'Linking Social Change and Developmental Change: Shifting Pathways of Human Development' *Developmental Psychology* (2009) 45 (2) *American Psychological Association* 401 411

<sup>241</sup> Greenfield (n 240 above) 401 406

<sup>242</sup> Greenfield (n 240 above) 401 412. The fact that children chose between two values systems further demonstrates Weber's notion explained earlier in chapter 2 that 'ethics and values are conscious and intrinsic beliefs which take into account the consequences of behaviour, not just because of the power of will but because of conscious and rational decision. Hence responsibility is taken for the effect of those behaviours on community but also on society as a whole. Thus, while Tönnies saw society and social changes therein to

This implies that using the institution of education, or schools as a transitional community in the shift or social change between community and society and between the different normative and ideological structures can intervene between family and community as socialising agents.

Education as an institutional source of change or socialising agent directs an intervention which is necessary if we are to successfully socialise the rights-based transformative principles of the Constitution into our South African society, especially into the *Ubuntu*, ideologically individualist rights-averse communities within our modern society.

#### 4.4 Conclusion

Lear writes, in reference to Durkheim's theories,<sup>243</sup> that 'every society has its distinctive ideal of what the desirable citizen shall be. It expects its educational system to develop that ideal'.<sup>244</sup>

Maphalala and Mpofu theorise that, in a South African context, the family and community as agents have become 'asocial' and 'unhealthy' sources of socialisation and we need to focus on schools 'for teaching young people how to behave and building ethical and morally conscious citizens through values education'.<sup>245</sup>

Education hence functions as an institutional change agent that assists as a grass-roots rehabilitator of society by socialising new norms, values and ideologies into society in order to create ideal citizens. These new ideologies can contribute to incremental social change towards a new South African society because educational institutions function as transitional communities, thereby echoing Marx's notion that social change will only occur if the social alienation caused by rulers is counteracted by institutions and by people returning to being members of

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be a product of natural wills, Weber acknowledged the role that rationality and conscious decision play in the values and ethics that underlie society and subsequently cause change'

<sup>243</sup> According to Durkheim, he could contribute to society's progress by becoming a teacher and using education to teach people what a 'good society' could be: Jean-Claude Filloux 'Émile Durkheim' *PROSPECTS: the quarterly review of comparative education* UNESCO: International Bureau of Education vol. 23, no.1/2, 1993, p. 303-320 . p1 UNESCO: International Bureau of Education, 2001 J-C Filloux 'Émile Durkheim' (1993) 23 *PROSPECTS: the quarterly review of comparative education* 303 - 320

<sup>244</sup> EN Lear 'Émile Durkheim as educator' (1961) 34 (5) *The Journal of Educational Sociology* 193 196

<sup>245</sup> M Maphalala & N Mpofu 'Embedding values in the South African curriculum: by design or default?' (2018) 38 *South African Journal of Education* 2

a community.<sup>246</sup> If education as an institution contributes to social change, then, according to Dror's theory, this will lead to change in other institutions as well and subsequently to large-scale incremental social change.

In this chapter I have answered the first part of my final research question by explaining how education functions as a socialising agent. The challenge though, is that the transformative ideology of our Constitution, as structured in the founding provisions, does not contain only informal, social norms and values; they are specifically codified legal values and rights with accompanying duties of accountability. We are 'equally entitled to the rights, privileges and benefits of citizenship'; but also 'equally subject to the duties and responsibilities of citizenship'.<sup>247</sup>

In the next chapter I will explore the second part of my research question by indicating how education can socialise the transformative Constitution's legal rights and values into society's hearts and accompanying actions, thereby harnessing the power of law, contributing to transformative constitutionalism and subsequently incremental social change.

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<sup>246</sup>See above Section 2.1: 'For social change to occur, it would have to occur on a structural or institutional level as the rulers are the root of social alienation. To counteract alienation people would have to return to being social members of community where individuals rely on each other'.

<sup>247</sup> Section 3 (2)(a), (b)

## **Chapter 5: Using education as a socialising agent to harness the power of law to contribute to social change**

### **5 Introduction**

I have thus far illustrated that education is the best institutional source of change and socialising agent to create a new South African society. This is done by bridging the gap between different value systems and regenerating our moral and normative structure via the socialisation it achieves in the transitional communities that schools create.

I mentioned in chapter 3 that transformative constitutionalism and the social contract which the Constitution forms with society, cannot succeed if the values associated therewith is not infused into the hearts of people, or simply put, the terms and conditions of our social contract are not communicated and internalised effectively.<sup>248</sup>

It is now necessary to consider if schools can be effective in socialising the content of the values, rights and responsibilities contained in the transformative Constitution. If schools are effective in doing so, we can harness the power of law to achieve our goal of moving from a state of inertia to stable, incremental social change and a new society based on the values and rights of the Constitution.

I will explore this by firstly considering how the Constitution, as a legal instrument, can be effective if it has a proper socialising agent and secondly analysing whether education, as a socialising agent, is currently being used effectively in order to do this.

#### **5.1 Socialising law**

Before putting up a large building, the architect surveys and tests the ground to see if it can support the weight; and in the same way the wise legislator doesn't start by laying down his good laws but by investigating whether the populace they are intended for is in a condition to receive them ... Most peoples, like most men, are teachable only in youth; as they grow old they become impossible to correct. Once customs have become established and prejudices are dug in, trying to reform them is dangerous and useless; the populace

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<sup>248</sup> See above Chapter 3



can't stand having anyone touch its faults, even to remedy them; it's like the foolish and cowardly patients who tremble at sight of the doctor.<sup>249</sup>

Jean-Jacques Rousseau said the above words when considering how the social contract can be effective in society, keeping in mind that, even if the legislature drafts good laws, the people have to be in a condition to receive them and as Weber noted, 'ready for its purpose' in order for good laws to make good people.<sup>250</sup>

Rousseau also refers to the fact that established customs and prejudices, which we have come to define as normative structures in society, are difficult to change or even impossible to correct in the older generations, and hence the youth are the only teachable people in society.

I argued that social change has to occur incrementally via the project of transformative constitutionalism. In chapter 4 I argued that, in this process of social change, institutions have the responsibility of infusing new norms into society in order to cause moral regeneration of the normative structure and subsequently the ideal of a new society as set out in the Constitution.<sup>251</sup>

Langa and Klare theorised that the Constitutional Court and legal practitioners have the responsibility of effecting the project of transformative constitutionalism and I have noted that the Court's role in this process is not sufficient. I hence contend, in agreement with Bestbier, that 'the knowledge of the legal system should not be confined to a professional elite but should be suffused throughout the community'.<sup>252</sup> Hodgson reiterates that 'the constitutional vision requires that a culture of human rights and constitutionalism pervades both legal institutions and society at large'.<sup>253</sup> It is hence insufficient to only use courts and practitioners to socialise the transformative values and rights of the Constitution into society.

Our focus should also not simply be retrospective and on the older generations for whom Marx's tradition of inherited evils are still weighing heavily on their minds.<sup>254</sup> As Rousseau says, we need to focus proactively on the youth to 'make a new

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<sup>249</sup> J Rousseau *The Social Contract* Book 2 Chapter 8 'The people'

<sup>250</sup> As above n 106

<sup>251</sup> See above Chapter 4

<sup>252</sup> Bestbier (n 11 above) 113

<sup>253</sup> Hodgson (n 12 above) 192

<sup>254</sup> As above n 21 and n 22

people' who are ready for good laws and can become good citizens.<sup>255</sup> As mentioned in chapter 4, 'every society has its distinctive ideal of what the desirable citizen shall be. It expects its educational system to develop that ideal'.<sup>256</sup>

I mentioned in chapter 3 that the constitutional blueprint contains common values, rights and responsibilities or metaphoric terms and conditions of our new normative social contract and hence the vision of our new society. The values framework or the 'collective convictions, joint and minimum ideological and normative choices of what a good society should be'<sup>257</sup> can be found in the founding provisions of the Constitution while the Bill of Rights in chapter 2 affirms these values, formally, in the shape of rights and responsibilities.<sup>258</sup>

We now need to consider how to make our transformative constitutional values which have been formalised into rights, as well as the socialisation thereof, effective.

## **5.2 Constitutional principles to be 'effective law'**

Evan theorises that there are factors that determine if a law, which has the intention of producing social change, will be accepted and successfully contribute to change.<sup>259</sup>

According to Evan, implementing a new law requires two steps. The first step involves the law being institutionalised, communicated to the public, and having methods of enforcement created. The second step relates to internalisation by individuals who accept and follow the law.<sup>260</sup>

Our Constitution's values and rights have to then logically be institutionalised, communicated to the public, enforced correctly and then internalised, accepted and followed by society.

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<sup>255</sup> As above n 131

<sup>256</sup> EN Lear 'Émile Durkheim as Educator' (1961) 34 (5) *The Journal of Educational Sociology* 193 196

<sup>257</sup> As above n 140

<sup>258</sup> Section 7. Rights( 1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

<sup>259</sup> Lippman (n 97 above) 367

<sup>260</sup> As above

Kok expanded on Evan's criteria for effective law by adding additional factors to be considered which can influence a law's acceptance, institutionalisation, communication and hence effectiveness. He theorises that an Act's potential to effect change or accomplish its purpose is reliant upon establishing its goals and objectives which in turn helps us to also see its weaknesses.<sup>261</sup>

I have shown that the constitutional blueprint forms the terms and conditions, values, rights and responsibilities of our social contract and hence the goal for our new society. My research thus far has established the following potential weakness: The project of transformative constitutionalism is seen to be the responsibility of, as I mentioned in chapter 1, the Constitutional Court and legal practitioners.<sup>262</sup>

There are other potential challenges in some of Evan's criteria such as that a new law should have an authoritative source<sup>263</sup> and be consistent with existing beliefs and values.<sup>264</sup> More importantly, the new law has to be communicated to the people clearly and understandably as people will not follow laws they do not know about or do not understand.<sup>265</sup>

This links with my statement previously that the social contract as contained in the Constitution cannot succeed if people are not aware of the terms and conditions of the contract.<sup>266</sup>

Kok introduces Bestbier's viewpoint about the role education plays as a socialising agent for law to make it more effective.<sup>267</sup> I contend that a potential way to overcome the challenges and weaknesses listed above would be by using education as a socialising agent to not only communicate but popularise the law, specifically the Constitution, and make it more effective in creating our new society.

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<sup>261</sup> JA Kok 'A socio-legal analysis of the promotion of equality and prevention of unfair discrimination Act 4 of 2000' PhD thesis, University of Pretoria, (2007) 70, 71

<sup>262</sup> As above n 10

<sup>263</sup> Lippman (n 97 above) 367

<sup>264</sup> As above. Also refer to page 43 and 44, footnotes 176 and 177 above regarding the discussion on the values in the South African Constitution (a supposedly authoritative source) which are not yet internalised or necessarily consistent with existing beliefs and values

<sup>265</sup> Lippman (n 97 above) 368

<sup>266</sup> See above Chapter 3

<sup>267</sup> Kok (n 261 above) 82

### 5.3 Education as a socialising agent for popularising the Constitution's values and rights

Kok notes that for a law to be effective it has to be popularised,<sup>268</sup> and as Evan also notes, this implies the law has to be communicated clearly and effectively. As noted in chapter 4, the best institutions to socialise values and norms would be educational institutions. Bestbier believes that the law accomplishes norm changes.<sup>269</sup> Much like Klare, Bestbier speaks of the Constitution's role in creating norm changes in South African society to establish a new order;<sup>270</sup> but like Rousseau, she identifies the problem of changing the existing discriminatory norms.

Society fails, according to Marx, when rulers cause social alienation. In Bestbier's article she quotes Fitzgerald who noted that

[t]hose who do not understand their country's constitution, laws and government are excluded from their democratic birth right ... A person without knowledge or understanding of his laws is not truly at home in his society, and a person not at home in his society soon becomes disenchanting by it, unhappy with it and alienated from it.<sup>271</sup>

This has led to people feeling, what Bestbier calls, a kind of legal impotence.<sup>272</sup> Hodgson refers to this legal impotence as a challenge to transformative constitutionalism which he calls constitutional illiteracy:<sup>273</sup>

Without a constitutionally literate population that understands and embraces the rule of law, constitutionalism in general and the value-set entrenched in our Constitution, notions such as participatory democracy and active citizenship are merely empty legal and political rhetoric. If people are not equipped with the tools required to be active citizens and participate meaningfully in our democracy, transformative constitutionalism will ring hollow.

If the new transformative legal norms and rights are socialised and communicated to the people using the broadest, most impactful and most inclusive socialising agent, this challenge to transformative constitutionalism, the legal impotence and constitutional illiteracy, can potentially be remedied.

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<sup>268</sup> As above n 261

<sup>269</sup> Bestbier (n 11 above) 107

<sup>270</sup> Bestbier (n 11 above) 106

<sup>271</sup> Bestbier (n 11 above) 113 quoting: Fitzgerald 'Law at school – a Canadian viewpoint' 1978 *New Law Journal* 300.

<sup>272</sup> Bestbier (n 11 above) 107

<sup>273</sup> Hodgson (n 12 above) 193

Bestbier theorises that we need to make use of education and schools as a 'nationally inclusive socialising agent' to socialise the norms that law intends to change, and in this context, the post-apartheid Constitutional values and rights.<sup>274</sup> I will now expand briefly on why schools are ideal socialising agents to socialise the post-apartheid Constitutional values and rights.

### **5.3.1 Socialising the Constitution through schools**

In chapter 4 I argued that schools can provide transitional communities where this moral regeneration could essentially occur and new norms and ideologies can be socialised in order to create Rousseau's concept of ideal citizens.

As discussed in chapter 4, the function of schools as transitional communities is especially important as they can influence culture and values by functioning as an institutional source of change where all the members of the institution (the learners) are exposed to the values of the society we are trying to create.<sup>275</sup> In the dynamic South African context of communities within societies, as I explained in chapter 4, traditional, moral collectivist ideologies exist within a society trying to move towards modern, transformative, individualist rights-based ideologies or, as Hodgson calls it, a new culture<sup>276</sup> of constitutionalism and human rights.<sup>277</sup> Schools can hence help create a new culture of constitutionalism and human rights if they function as a socialising agent for the Constitutional rights and values.

Saldana notes that schools are a mirror for society's structure and maintain or change the social order by infusing knowledge, social skills, norms and values.<sup>278</sup>

Educational institutions like schools and teachers, while functioning as a transitional community, can hence potentially transmit and infuse the 'moral ideas' and values of the country. By transmitting these moral ideas and values, or in our context,

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<sup>274</sup> Bestbier (n 11 above) 108

<sup>275</sup> I explain in section 4.3 how schools are institutional sources of change: 'If we consider Kniss's guidelines that ideologies can only be effectively socialised by institutions that are numerous, have a resource advantage and multiple potential adherents, then it seems as though educational institutions would logically comply with these requirements'

<sup>276</sup> This new culture was also referred to in *S v Makwanyane* par 221 'For all of us though, a framework has been created in which a new culture must take root and develop'.

<sup>277</sup> Hodgson (n 12 above) 192

<sup>278</sup> Saldana (n 207 above) 230

infusing the transformative constitutional values and rights into society, schools can contribute to Weber's moral regeneration on an institutional level and create Rousseau's ideal citizens.

During the year 2000, in what they referred to as a 'a climate of anxiety about the need for moral regeneration, and the re-norming of society'<sup>279</sup> the Department of Education formed a working group to decide how the 'citizenship of tomorrow, the common destiny of the South Africa to be' could be achieved by the infusion of the transformational constitutional values into education.<sup>280</sup> The establishment of this working group is in itself evidence of education's potential role as a socialising agent which can socialise the education system's agenda of developing life skills, political aims like good citizenship, democratic freedom and social responsibility and importantly, the norms the law, or the Constitution, intend to change and counter Hodgson's constitutional illiteracy.

Socialising new norms and values created by the law, using education, has been studied by Dror. Dror uses studies of intended social change via law in Turkey, Israel and the USSR to demonstrate his theory that new legal values have to be socialised effectively.<sup>281</sup> In studying how these countries tried to change the existing norms and values in society by introducing new norms through law, he found that this process cannot succeed if education is not used to help facilitate the adoption of these new norms.<sup>282</sup> He also noted, like Evan, that the new laws would struggle to be effective if the norms introduced by them differ from the existing society's traditional norms but Dror notes that this difference can cause a lag in social change.<sup>283</sup>

In an empirical study by Marks, Christian and Greive, they explain that socialising values through education consists of values literacy as well as internalisation of values:<sup>284</sup>

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<sup>279</sup> Manifesto on Values, Education and Democracy (2001) Department of Education. 6

<sup>280</sup> As above

<sup>281</sup> Y Dror 'Values and the law' (1957) 17(4) *The Antioch Review* 440 453

<sup>282</sup> As above

<sup>283</sup> As above

<sup>284</sup> A Marks, B Christian, C Greive 'An analysis of values literacy and internalisation in students commencing high school: A pilot study' (2015) 9 *TEACH Journal of Christian Education* 39 41

[t]his paper defines values literacy as the ability to: understand the nature of values; identify specific values in scenarios; be able to discuss the nature of values; and to provide examples of specific values. On the other hand, the paper uses the term internalisation of values to mean a moderation of mind such that the values begin to characterise both the individual's thought processes and behaviours

The Department of Education's working group on values in education produced a manifesto (hereafter 'the Manifesto') in order to agree on how South African schools should go about infusing the new norms introduced by the Constitution into society. The writers of the Manifesto note that its approach is based on the transformational values of the Constitution and how 'the Constitution expresses South Africans' shared aspirations, and the moral and ethical direction they have set for the future.'<sup>285</sup> Naidoo notes that the Manifesto's strategies affirm that values can't be legislated but must be promoted through education.<sup>286</sup>

The Manifesto 'explores the ideals and concepts of Democracy, Social Justice, Equality, Non-racism and Non-sexism, Ubuntu (Human Dignity), An Open Society, Accountability (Responsibility), The Rule of Law, Respect, and Reconciliation in a way that suggests how the Constitution can be taught, as part of the curriculum, and brought to life in the classroom, as well as applied practically in programmes and policy making by educators, administrators, governing bodies and officials'.<sup>287</sup>

What is apparent is that the Manifesto not only mentions the values of the founding provisions of the Constitution, which I have noted to be the transformative values of the Constitution. It also equates the value and right of human dignity to *Ubuntu*, perhaps in an attempt to use, as Dror and Evan theorises, an existing, traditional value to ensure that the infusion of the new constitutional norms is potentially more effective.

If our Constitution is to effectively use the power of law to contribute to social change, we have to use schools to impart these transformative norms and values along with, by extension, the rights in the Constitution which reflect these values. I have argued thus far that education, specifically schools, should be used as

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<sup>285</sup> Manifesto on values, education and democracy (2001) Department of Education. 3

<sup>286</sup> M Naidoo 'Engaging difference in values education in South African schools' (2013) 10 *Alternation Special Edition* 54 58

<sup>287</sup> As above

socialising agents for the new transformative values and rights introduced by the Constitution. In functioning as a socialising agent for these values and rights, schools can help popularise these transformative values and they might then potentially make the Constitution's goal of transformation more effective. While the Manifesto contains the notion of *Ubuntu* amongst the other constitutional rights and norms, it is now necessary to see whether, in practice, our educational frameworks contain these values and whether they are being socialised effectively via values literacy as well as values internalisation. If these values are socialised effectively, the project of transformative constitutionalism can actually contribute to the process of incrementally changing our society towards the new, morally regenerated society mentioned in chapter 1.

#### **5.4 Law content in curriculum**

Educational principles to be taught are found in the national curriculum which is hence where the transformative constitutional values and rights have to be infused. In terms of using institutions to effect policy and hence change, I found that within the National Curriculum Statement for Life Orientation in 2003<sup>288</sup> there was no mention of any law-related principles to be included in the secondary education system and this was only remedied recently in the 2011 Curriculum and Assessment Policy Statement (CAPS).<sup>289</sup> Implementation is hence still fresh and a work in progress.

According to the 2011 CAPS section headed 'General aims of the South African Curriculum', the purpose of the CAPS is amongst others to equip learners with 'skills and values necessary for self-fulfilment, and meaningful participation in society as citizens of a free country'.<sup>290</sup> CAPS is explicitly based on, amongst others, the principles of social transformation and 'human rights, inclusivity, environmental and social justice: infusing the principles and practices of social and environmental

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<sup>288</sup> Department of Education 2003 a, b, c *National Curriculum Statement Grades 10-12 (General) Life Orientation*

<sup>289</sup> The Department of Basic Education 2011 *Curriculum and Assessment Policy Statement Grades 10-12 Life Orientation*

<sup>290</sup> *Curriculum and Assessment Policy Statement (CAPS) (2011) Section 1.3 (b) 4*



justice and human rights as defined in the Constitution of the Republic of South Africa'.<sup>291</sup>

CAPS hence seems, at least in principle, committed to schools' role as institutions which can socialise and infuse the transformational values and rights of the Constitution into society via the youth. It also references how Life Orientation as a compulsory subject for grades 10 to 12 helps to produce responsible citizens by studying subjects such as the development of the self in society, social and environmental responsibility as well as democracy and human rights.<sup>292</sup> The aforementioned seems to harmonise with our road map of using education as a socialising agent to use the power of law as contained in the transformational constitutional values and rights, to effect social change.

Statistics South Africa established in 2016 that the overall mean years<sup>293</sup> of schooling in South Africa was 10.5 years<sup>294</sup> which would imply that learners are leaving school around grade 10 and 11. The aforementioned would then imply that our focus should be on the law-related content socialised to grades 10 and 11 as they are leaving school to become the citizens envisioned by the CAPS and by extension the Manifesto's values.

I performed a document analysis by studying a Life Orientation handbook for grade 10 and 11 to ascertain to what extent rights-based principles were infused into their learning and ascertained that, for grade 10, their textbook included a brief section on discrimination and summaries of their individual rights from the Bill of Rights along with a mention of the state's accompanying duties to protect or achieve that right,<sup>295</sup> as well as selected rights related to bodily integrity, sexuality and lifestyle.<sup>296</sup> The grade 11 handbook only contained references to learners' individual rights within a relationship<sup>297</sup> and in the event of domestic abuse.<sup>298</sup>

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<sup>291</sup> As above Section 1.3 (c) 5

<sup>292</sup> As above Section 2.1 8

<sup>293</sup> The average number of years spent attending an educational institution. Education Series Volume III: Educational enrolment and achievement 2016 Statistics South Africa Report 92-01-03. Summary Figure 3.16 84

<sup>294</sup> As above

<sup>295</sup> M Pearson *Viva Life Orientation Grade 10* (2014) 47 - 53

<sup>296</sup> Pearson (n 295 above) 153

<sup>297</sup> H Martinuzzi & others *Shuters top class Life Orientation Grade 11* (2012) 26

<sup>298</sup> Martinuzzi & others (n 297 above) 198. I acknowledge a potential limitation to the study of mainly two years of curriculum if one accepts that a curriculum works as a structure of building blocks which is supported

While the inclusion of these principles are theoretically a positive shift towards institutionalising the transformative principles of the Constitution by infusing it into the school curriculum, it is concerning to see that the average school-leaving learner might have a very limited understanding of the transformative Constitutional values and rights, let alone all the content listed in the manifesto, from these textbooks.<sup>299</sup>

In the next section I will explore a pivotal aspect of Bestbier's theory on secondary schools as national socialising agent for law. I will also use my empirical findings from a survey conducted at a secondary school to establish if Dror's notion of lag in social change might be relevant in our context and ascertain whether we are achieving both values literacy as well as values internalisation.

### **5.5 Socialisation testing survey and potential lag**

For the Constitution's legal norms and values to be effective in creating our new society, education has to also be used as an effective socialising agent. In theorising about education's role as a socialising agent, Bestbier noted that the public has to have a basic knowledge and understanding of the law.<sup>300</sup> She qualifies this by noting that this knowledge has to be passed on by instruction and includes a necessity to 'know about the existence or recognition of a particular right, the remedy for its infringement and the remedial processes'.<sup>301</sup>

As noted, our constitutional social contract with the state includes the Bill of Rights which affirms the constitutional values. As with all contracts there are terms and conditions, rights and duties.<sup>302</sup> Hodgson notes that the state's duty to promote the

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by what has been built in previous years as well. Hence to fully ascertain the extent to which the curriculum is infused with legal principles, a broader study would have had more impact.

<sup>299</sup> See also C Ferreira & S Schulze 'Teachers' experience of the implementation of values in education in schools: 'Mind the gap' (2014) 34 (1) *South African Journal of Education* 8. South African researchers Carrim and Keet note that these values could potentially achieve 'maximum infusion' through the concept of the 'hidden curriculum'. The hidden curriculum is 'unspoken or implicit values, behaviors, and norms that exist in the educational setting' and cannot be measured but can contribute to helping infuse values that are not explicit in the curriculum. M A Alsubaie 'Hidden curriculum as one of current issue of curriculum' (2015) 6 (33) *Journal of Education and Practice* 125

<sup>299</sup> As above

<sup>300</sup> Bestbier (n 11 above) 109

<sup>301</sup> As above

<sup>302</sup> In chapter 3 I mentioned that: 'The constitutional blueprint contains common values, rights and responsibilities or metaphoric terms and conditions of our new normative social contract with the state and hence the vision of our new society'

rights contained in the Bill of Rights<sup>303</sup> contains an implicit duty to educate people on their human rights.<sup>304</sup> Without education on these human rights, and the constitutional values from which they were created, our project of transformative constitutionalism will not succeed.<sup>305</sup> Hodgson notes that ‘the duty to educate must be fulfilled in a manner which is co-ordinated, comprehensive, reasonable and effective’<sup>306</sup> and that education ‘must be capable of genuinely empowering people to understand and act on their rights’.<sup>307</sup> Bestbier noted though that, in order to be effective, human rights have to be taught against a background of understanding rights and obligations along with resolution possibilities and mechanisms.<sup>308</sup> The legal impotence previously mentioned by Bestbier, and Hodgson’s constitutional illiteracy, would continue to exist if rights and values are taught without a proper understanding of their obligations, resolutions and mechanisms.<sup>309</sup> The views of Bestbier and Hodgson comply with the notion above that socialising values through education has to include both values literacy and values internalisation.

For education to be an effective socialising agent for the law and the transformative constitutional values and rights, one can hence contend that mere values literacy, a knowledge of the law or existence of a right is valuable, but deeper understanding is needed of the obligations, remedies and remedial processes following the infringement of that right. This deeper understanding or changed thought processes would then lead to changed behaviour as well, which would imply successful values internalisation according to the definition above from Marks, Christian and Greive. Only then will it be possible to say that education is an effective socialising agent in harnessing the power of the transformative constitutional principles to contribute to social change.

The CAPS statement refers to the importance of being able to apply the skills and values learnt in Life Orientation, as mentioned above, to real-life situations.<sup>310</sup>

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<sup>303</sup> Section 7(2) of the Constitution

<sup>304</sup> Hodgson (n 12 above) 203

<sup>305</sup> As above

<sup>306</sup> Hodgson (n 12 above) 204

<sup>307</sup> As above

<sup>308</sup> Bestbier (n 11 above) 116

<sup>309</sup> ‘...such limited learning could prevent the legal subject from obtaining much of the information that could empower him in his daily interactional relationships with other legal subjects. It would still leave him legally speaking, without effective access to the law’ Bestbier (n 9 above) 116

<sup>310</sup> *Curriculum and Assessment Policy Statement (CAPS) (2011) Section 2.1 p8*

If one considers Bestbier's theory together with the CAPS aims and Marks, Christian and Greive's model for values education, learners need to be able to identify or recognise rights-related issues in real-life situations which could affect society and subsequently take the social responsibility they have been taught and apply those values and also contribute to remedying infringements.

In order to obtain some insight into how effective education has been in doing the aforementioned, I conducted quantitative research as per the popularly used definition of Aliaga and Gunderson which relates to 'explaining phenomena by collecting numerical data that are analysed using mathematically based methods (in particular statistics)'.<sup>311</sup> To subsequently make sense of the reasoning behind the quantitative data I also used qualitative research based questions as "a form of systematic empirical inquiry into meaning".<sup>312</sup>

### **5.5.1 Phenomena and hypotheses**

The phenomena that I wanted to explain by using statistics relate to hypotheses resulting from a combination of the theories I have written about thus far including Rousseau, Durkheim, Greenfield, Bestbier, Hodgson and Marks, Christian and Greive.

If schools are being used successfully as socialising agents by creating transitional communities (Durkheim), then the gap between traditional, morally inclined, community- or *Ubuntu*-based ideologies can be bridged towards more modern rights-based, ideology like the constitutional rights and values. If this first hypothesis rings true, schools should be able to socialise the transformative constitutional rights and values in a way that, as Bestbier, Hodgson, Marks, Christian and Greive theorise, would extend beyond a mere values literacy and simply a knowledge of rights and values. Learners would be empowered to understand obligations, remedies and processes so that they can act on these rights or infringements thereof and subsequently realise the transformative values underlying these rights in society. If the second hypothesis rings true, this would result in learners leaving school and potentially becoming the future 'good citizens' of our new society who

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<sup>311</sup> D Muijs *Doing quantitative research in education with SPSS* (2004) 1

<sup>312</sup> [https://ualr.edu/interdisciplinary/files/2010/03/Qualitative\\_Research.pdf](https://ualr.edu/interdisciplinary/files/2010/03/Qualitative_Research.pdf) (accessed 14 April 2019)

are effectively being socialised in the Constitution's 'good laws' (Rousseau) and values via value internalisation, to become people 'ready for its purpose'.<sup>313</sup>

### **5.5.2 Units, variables and population sampling**

Considering the abovementioned statistics relating to school leavers being in grades 10 and 11, a survey in the form of a questionnaire was distributed to grade 10 and 11 learners at a secondary school to ascertain whether the average learner leaving school and becoming part of society, has developed a rights logic or constitutional literacy, which harmonises with the transformative values and rights in the Constitution.

The content of the questionnaire was approved by the Gauteng Department of Education as well as the Research Ethics Committee of the Faculty of Law at the University of Pretoria.<sup>314</sup>

I then obtained permission from the principal of the secondary school concerned, to conduct a survey. The deputy principal subsequently briefed the relevant teachers on administering the questionnaires and ensuring that they were completed.

The questionnaires were then distributed to the learners by their homeroom teachers during the form period of their normal school day on 12 October 2018. The completed questionnaires were then handed in to the deputy principal. I thereafter collected the questionnaires from the deputy principal.

In terms of units and variables<sup>315</sup> my units consisted of 102 learners. The survey had a 98% response rate with only two out of 102 completed questionnaires excluded from the results due to incompleteness. In total I analysed 38 questionnaires from grade 10 and 62 from grade 11. In terms of variables, 56% respondents were female and 44% male. In terms of racial profiles, 50% of respondents identified themselves as being African, 37% Indian and 13% mixed race.

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<sup>313</sup> As above n 106

<sup>314</sup> See addendum 2 and 3

<sup>315</sup> Muijs (n 311 as above) 8

The race profile was a conscious choice as I needed to use a purposive sampling method<sup>316</sup> with respondents who would primarily be from social backgrounds where the socialising agents of family and community had a greater possibility of being *Ubuntu* or communally orientated. To ensure the aforementioned, I chose my population strategically by using a secondary school in an area which was previously classified as a non-white township under apartheid legislation.<sup>317</sup> This conscious choice of demographic or population characteristics links with my discussion in chapter 2 about demographics as a source of change and the Apartheid City. It also links with the notion in chapter 4 that *Gemeinschaft* communities, in this instance the chosen area which was historically a township, are nestled in larger urban areas, in this instance Pretoria. A school in such an area, with this race profile, would hence be where the functioning of schools as transitional communities would be ideal.

### 5.5.3 Instrumentation

Considering that phenomena like learners' ideologies or thinking relating to rights and values do not naturally exist in the form of quantitative data<sup>318</sup> I designed a self-constructed research instrument in order to collect data related to the phenomena by using a survey method with a questionnaire as instrument.

I then manually transferred the quantified phenomena into an Excel spreadsheet to enable statistical analysis of the data.

The questionnaire contained eleven rights- or law-infringement-based, real-life scenarios which is attached as addendum 1 to this dissertation. The main themes of the questions are also displayed in Figure C below. Scenarios were simple daily societal interactions that the learners were either already exposed to or would have to know how to handle in the outside world if they were to become citizens as envisioned by the Constitution's founding principles who are: <sup>319</sup> '(a) equally entitled to the rights, privileges and benefits of citizenship; and (b) equally subject

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<sup>316</sup> '[P]urposive sampling signifies that one sees sampling as a series of strategic choices about with whom, where, and how one does one's research. This statement implies that the way researchers sample must be tied to their objectives.' Palys, T 'Purposive Sampling' *The Sage Encyclopedia of Qualitative Research Methods* 2 (2008) 697.

<sup>317</sup> <https://www.sahistory.org.za/article/pretoria-segregated-city> (accessed 11 November 2018)

<sup>318</sup> Muijs (n 311 as above) as well as n 312

<sup>319</sup> Section 3 (2)(a),(b) of the Constitution.

to the duties and responsibilities of citizenship'. For example, Question 5 poses the scenario: 'Thandi and her boyfriend are having an argument while walking home. Her boyfriend gets angry and hits her.'

On the questionnaire, learners had to then firstly recognise if an infringement of rights had in fact occurred, hence satisfying Bestbier's first criterium namely knowledge of a right. Thereafter they had to identify whether something could be done about the situation or whether there was something they could do to remedy it; thereby satisfying Bestbier's second set of criteria and the CAPS ideal of applying the constitutional values learnt; and an understanding of obligations, remedies or remedial processes following rights or law infringement. This would also demonstrate whether Hodgson's ideal exists in that education of human rights would be considered effective if it empowers people to understand and act on their rights. It would also relate to the Manifesto's definition of accountability or responsibility which 'is the essential democratic responsibility of holding the powerful to account. It is part and parcel of granting power in the first place, and a reminder that there can be no rights without responsibilities'.<sup>320</sup>

To ensure that learners had to deeply ponder situations by ticking in one of three columns whether a real-life issue was either a problem, not a problem or a rights-related problem, the answers had to not all be obvious rights infringements. The aforementioned was explained to the learners by the teachers handing out the questionnaire as well as an example pre-populated at the beginning of the questionnaire to show what would constitute a problem versus a rights-related problem. To protect the integrity of the responses, the scenarios contained a mixture corresponding with the Manifesto's values and hence fundamental, transformative, constitutional rights along with other rights-based issues like road safety, fair labour practices and the ethical treatment of animals.

Questions 3, 7 and 10 were based on discrimination in terms of Section 9 of the Constitution. Question 4 was based on the Section 19 right to education, specifically inclusive education. Question 5 was based on Section 12 of the Constitution and domestic violence. Question 6 was based on non-peaceful protest and Section 17

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<sup>320</sup> *Manifesto on values, education and democracy* (2001) Department of Education 4

of the Constitution. Question 8 was about proper sanitation at schools and hence notionally based on Sections 10, 29 and 28(2).

Questions 1 and 11 were based on Regulation 233 and Section 65 of the National Road Traffic Act 93 of 1996 respectively relating to 'overloading vehicles' like taxis and driving under the influence.

Question 9 was based on Section 29 of the Basic Conditions of Employment Act 11 of 2002.

Although animals do not legally have rights my scenario was based on an infringement of Section 2 of the Animals Protection Act 71 of 1962 as well as Mahatma Gandhi's premise that 'the greatness of a nation and its moral progress can be judged by the way its animals are treated'.

I based my scenarios on social and legal elements that could contribute to making learners good citizens of a new South African society based on the constitutional rights and values and by extension, the Manifesto's values as well.<sup>321</sup>

The questionnaire included a scale for each question to identify if the scenario contained a rights-related issue, a non-legal problem or no problem at all.

Thereafter I subjectively classified their identified solution to the issue as either legally correct or at least legally orientated, or morally correct or at least morally inclined.<sup>322</sup> This classification was done to establish whether their ideologies and values underlying the responses are individualist and constitutionally orientated or literate or alternatively, collectivist and morally or communally orientated but lacking constitutional literacy or legal accuracy. An example of this would be where a response to Question 5 noted that the abuse had to be reported; it would constitute a legally orientated response while a response noting that Thandi's family should intervene and speak to her boyfriend would at least be morally inclined, but not a legally correct solution to the problem of domestic abuse. Legal correctness or accuracy was measured by the current legal position relating to the rights infringed

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<sup>321</sup>An example of the survey is attached as Addendum 1 to this paper.

<sup>322</sup> The classification of responses was done by considering whether a response was legally correct according to the current laws regulating the scenario or if it was not, whether the learner's response at least had some moral undertone. Moral undertones were based on the *Gemeinschaft* ideology of a response that would benefit the community or family but is not the legally correct way to handle a situation.



upon (as found in legislation) while communally moral orientation was based on the description of *Gemeinschaft* ideology described in chapter 4 implying a solution that does not revert to the law or rights-based remedies for help but rather to the victim's family or community.<sup>323</sup>

#### **5.5.4 Results and findings**

In terms of the scale identifying whether a problem was rights-related or not, Figure A demonstrates that overall 61% of learners were able to correctly identify that all the questions contained rights or legal-related infringements while 25% at least considered scenarios to be problematic, although not a rights infringement and 14% could not identify a problem at all.

From these overall responses, I found, as per Figure B, that on average only 23% were able to recognise some kind of legally correct obligation or remedy to a solution. 34% of learners could not recognise their obligation or a potential remedy to a rights infringement at all, 28% identified an incorrect solution to the problem and 15% recognised at least some kind of morally correct response.

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<sup>323</sup> See above 4.3.1

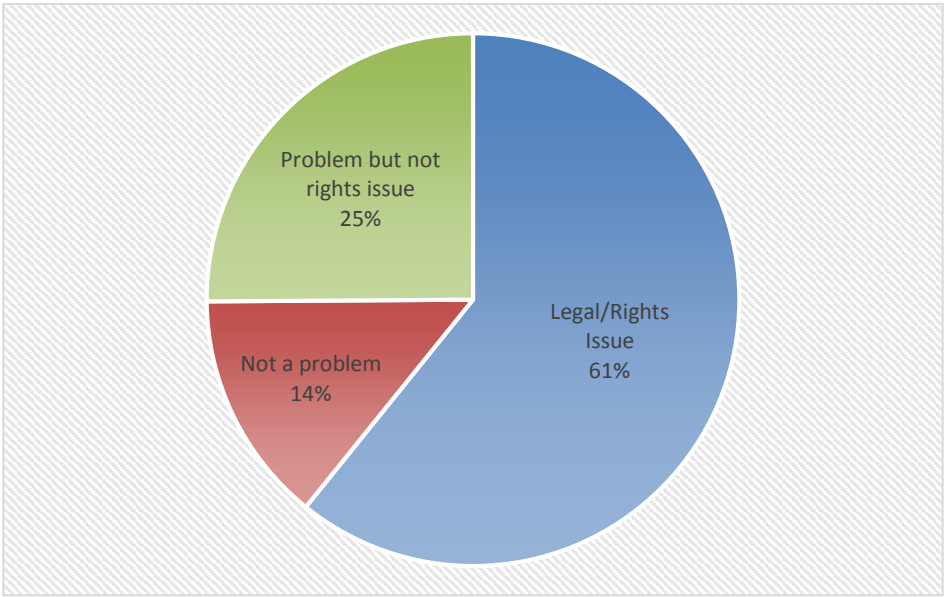


Figure A: Overall answers

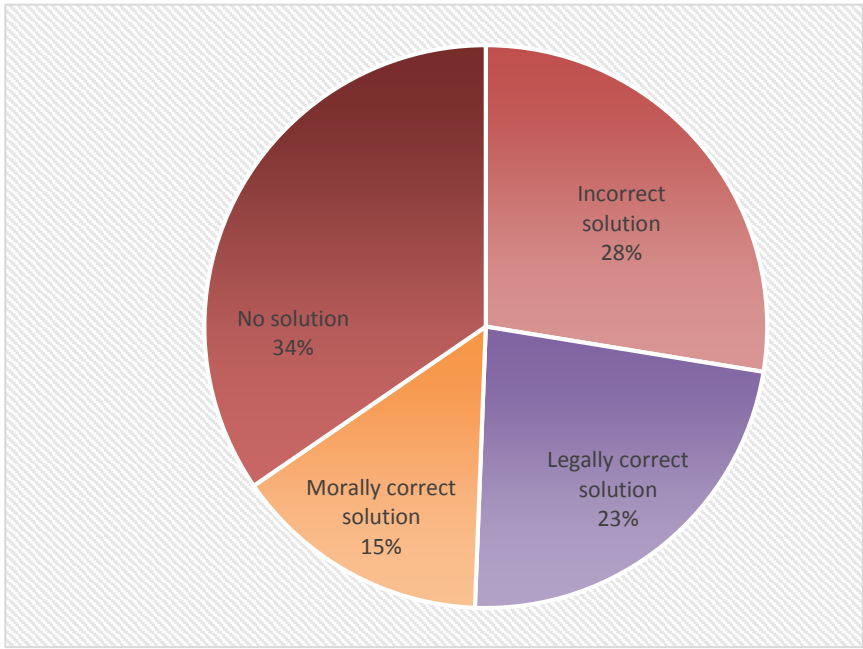


Figure B: Solutions demonstrating identification of obligations and remedies

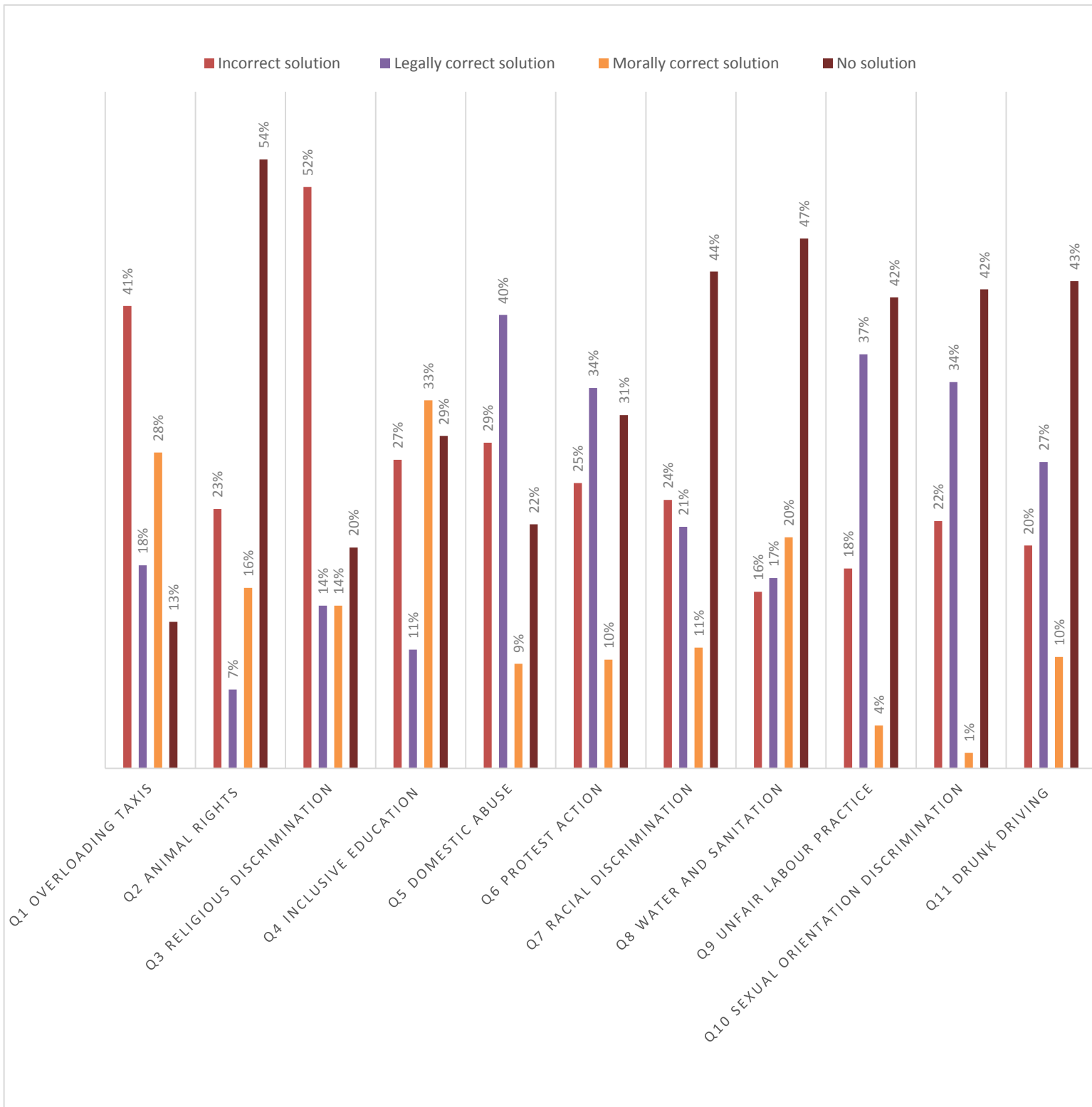


Figure C: Solutions to survey questions as percentage of total responses

From Figure C an interesting observation can be made relating to the inability to identify correct or any solutions especially relating to questions 3, 7 and 10's religious, racial and sexual orientation discrimination – all key transformative constitutional and Manifesto values relating to equality. For six out of the 11 questions one can see from the graph that in most of the responses no solutions were identified for the rights infringements.

These statistics illustrate some very important conclusions to my theories. Firstly, the majority of students were able to recognise when a legal or rights infringement is taking place in a real-life situation, which satisfies Bestbier's first criterium of having knowledge of a right and demonstrates some success in socialising the transformative principles of the Constitution, as well as other socially relevant legal principles – 'good law' which can contribute to making good citizens. This would then at least imply values literacy as per our definition above relating to identification of a value or value-based right.

Secondly, the generally lower identification of purely moral solutions to problems when compared to legal solutions implies that schools are potentially successfully being used as transitional communities, moving towards our new society by socialising the Constitution's modern, legal, individualist-based *Gesellschaft* ideology and moving away from purely moral, communal and collectivist *Gemeinschaft* ideologies. The problem that clearly emerges from the data is that of learners' inability to identify correct or have any solution to the real-life situations I used in the survey.

The concern is that all the scenarios in my survey were essentially rights- and legal-based issues which means that learners are not able to satisfy Bestbier's second set of criteria of an understanding of obligations, remedies or remedial processes following rights or legal infringement. It also then shows a potential constitutional illiteracy from Hodgson's perspectives and a non-satisfaction of the Manifesto's idea of accountability or responsibility.

This concern increases if we consider one of Dror's theories which explains that normal tension exists between legally required behaviour and morally demanded behaviour in society but that this tension can cause a lag in social change 'when social behaviour and the sense of obligation generally felt towards legal norms

significantly differs from the behaviour required by law'.<sup>324</sup> He then notes that 'the concept of lag applies to law and social change in dynamic situations, after either social change or changes in the law occur and no parallel changes and adjustment processes take place in law or society respectively'.<sup>325</sup> The lag implied by Dror then also implies that while there is a values literacy as evidenced above, the internalisation of values, or the change of thought processes and behaviours have not yet effectively occurred.

Although there is clearly progress in education's role as a socialising agent for using law to effect incremental social change, the inability identified above does not only cause concern in terms of Bestbier's criteria but can potentially cause a lag or impediment to social change, as I maintained in chapter 1,<sup>326</sup> because the 'obligation felt towards legal norms significantly differs from the behaviour required by law' and real value internalisation has not yet been evidenced if the responses to the survey are any indication.<sup>327</sup>

## **5.6 Conclusion**

From the theories and empirical data above it would seem that schools, like the one in this specific empirical study, can potentially be used as nationally inclusive socialising agents and transitional communities to infuse at least a values literacy or recognition of the transformative rights and values of the Constitution. What is lacking though is an understanding of obligations and remedies following a rights or legal infringement and the Manifesto's notion of accountability. This could be seen as a minor legal impotency, constitutional illiteracy or unsuccessful values internalisation.

If education is to be used to internalise and infuse the transformative constitutional values and rights into society, thereby harnessing the power of law to effect social change, we see that, based on Dror's notion above, there is a potential impediment to our process of incremental social change or lag, which is found in using

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<sup>324</sup> Dror (n 184 above) 794

<sup>325</sup> As above

<sup>326</sup> See above Chapter 1

<sup>327</sup> Dror (n 184 above) 794

education, specifically secondary schools, as socialising agents. In my next and final chapter I will link this conclusion to the previous chapter's conclusions.

## Chapter 6: Conclusion

In this final chapter I briefly summarise the main arguments and conclusions from each of the chapters thus far and answer each of the research questions.

In chapter 2 I illustrated that social change in a South African context relates to the fact that the struggle for change to a new South Africa is not yet over as, moving from an old South Africa with its 'inherited evils'<sup>328</sup> the burdensome weight of 'the tradition of all the dead generations' still today 'weighs like a nightmare on the brain of the living'.<sup>329</sup>

Our previous generations' social actions created patterns which established societal norms, laws and structures and moral regeneration would lie in institutional change.

The apartheid regime controlled South African society by using institutions to control other sources of social change such as demographics and culture. This resulted in a unique context of communities nestled within societies. Tönnies's notion of movement from community to society and its associated value dynamics hence finds unique application because of the subsequent ideological differences between individualism and collectivism in these communities.

In the context of Sablonnière's typology of social change, the fall of the apartheid regime constituted a dramatic social change and thereafter entered into a state of inertia where we still currently find ourselves. Society still feels the lingering need for positive change but is suspended in a state of transition between various cultural, normative and institutional struggles.

We are aware that social change is always a slow and gradual process, as described in the first published definition thereof,<sup>330</sup> but the only way we can move from a state of inertia to a new society with a new normative structure and identity

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<sup>328</sup> As above n 21

<sup>329</sup> As above n 22

<sup>330</sup> As above n 50

is by focusing more on stable, sustainable and incremental social change in order to create large-scale social change.<sup>331</sup>

In chapter 3 I illustrated that the relationship between law and social change is demonstrated in the way society comes together as a collective to create a social contract, in the form of the Constitution. The Constitution contains transformative principles encapsulated in the fundamental rights, collective norms and values that South Africans see as necessary for a new, good society and therein lie the potential power the law has to influence our society.<sup>332</sup>

Law can be considered to have a powerful relationship to social change because of the transformative legal principles or rights and values contained in the supreme law, the Constitution. The way this powerful legal instrument can influence society and social change is via its relationship with society, as a social contract we agree to, in order to achieve this redress of the imbalances of the past and move towards our new society.

To create this new society based on these transformative rights and values through the project of transformative constitutionalism, we cannot rely only on the Court as an institution to infuse the Constitution's rights and values into society. Our constitutional social contract can only work if all parties are aware of and understand the terms and principles.<sup>333</sup> This has to be achieved not by courts, but through the process of socialisation.

In chapter 4 I argued that education functions as an institutional change agent that assists as a grass-roots rehabilitator of society by socialising new norms and ideologies into society in order to create ideal citizens and contribute to incremental social change towards a new South African society.

The transformative values and rights help to create the ideal new South African society via a normative social contract with society, because it moves us away from

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<sup>331</sup> See above Section 2.3

<sup>332</sup> See above Section 3.5

<sup>333</sup> Hodgson (n 12 above) 196



Marx's inherited evils towards organic solidarity based on basic shared values, via Durkheim's moral regeneration through institutional change.

Our society is complex. There are collectivist-orientated communities nestled within individualist-orientated societies. Schools can help to bridge the ideological gap though and counteract Marx's social alienation that was caused by apartheid rulers, by functioning as transitional communities. In chapter 5 I theorised that, in these transitional communities, the law can be popularised in order to achieve the Constitution's goal of infusing new transformative values and rights into society. These transformative values form the foundation of our new society, new normative framework and new identity.

My empirical studies demonstrated that education is at least to a certain extent succeeding at doing this and achieving values literacy, yet we can also see that within educational institutions as a source of social change we also find a potential impediment to this change. The power of law to influence social change via the transformative constitutional rights and values is possibly stifled by educational institutions not yet successfully infusing values and hence functioning as effective socialising agents.

In keeping with my original goal I have demonstrated and conclude that social change in South Africa cannot be achieved without recognising that the law, specifically the transformative Constitution, has the power to effect change towards a new South Africa but its power is not harnessed because socialisation does not occur effectively enough through education as a socialising agent.

A subject for further research would be how we can remedy this potential impediment. It has been referred to, based on empirical research by South Africans Ferreira and Schulze as well as Rhodes and Roux that there might be a lack of directives and strategies in terms of practically dealing with values in classrooms and a possible gap between policy makers and teachers.<sup>334</sup> Hence, as transformative as the Constitutional rights and values or even the Manifesto's

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<sup>334</sup> Ferreira & Schulze (n 299 above) 2

aspirations might be, the gap between values literacy and values internalisation won't be bridged if a gap remains between the policies and the teachers who are supposed to infuse those values. A recommendation would hence be that, before our metaphorical social contract can succeed in leading to incremental social change via education, the teachers themselves should first be socialised in the terms and conditions of our contract. This as noted would be a subject for further research.

# Addendums

## Addendum 1: Rights logic survey

Dear Learner. Thank you for completing this survey. Please kindly answer all the questions and remember, your opinion is very valuable. Thank you				
Please indicate by circling the answer which applies:				
I am : a) Male or b)Female				
I am of the following race: a) Black b) Indian c) White d) Mixed Race e) Other(specify please): _____				
Scenario	Response a)	Response b)	Response c)	Possible Solutions
<p>Please read the scenarios below and react to it in the columns on the right.</p> <p><b>Example: Thembi tells her best friend Samantha that she is fat and won't be able to find a husband.</b></p>	<p>This is not an issue</p>	<p>It's wrong but not against the law</p>	<p>It's against the law or against someone's rights</p>	<p>If you chose <b>Response b) or Response c),</b> Can something be done about it? (what can you or someone else do about it?)</p> <p>Thembi and her friend should sort it out. Thembi should apologise. If they can't make peace then they should go to the teacher and ask the teacher to help them sort it out.</p>
<p>1. Joe's taxi only has room for 15 people but he decides he can make extra money by squeezing 20 people into his taxi.</p>		X		
<p>2. Your neighbour has a guard dog on a chain in his yard.</p>				

Please read the scenarios below and react to it in the columns on the right.	a) This is not an issue	b) It is wrong but not against the law	c) It is against the law/against someone's rights	Why do you say that? (why is it not an issue or wrong or against the law)	If you chose <b>Response b)</b> or <b>Response c)</b> , Can something be done about it? (what can you or someone else do about it?)
<p>3.</p> <p>You go to a restaurant with your female Muslim friend and they ask her to remove her headscarf because it doesn't suit their dress code</p>					
<p>4.</p> <p>John is in a wheelchair. His school can't afford to build a ramp to enable his wheelchair to get into class so John has to sit outside in front of the door of the class to listen to the lesson.</p>					
<p>5.</p> <p>Thandi and her boyfriend are having an argument while walking home. Her boyfriend gets angry and hits her</p>					

Please read the scenarios below and react to it in the columns on the right.	a) This is not an issue	b) It's wrong but not against the law	c) It's against the law or against someone's rights	Why do you say that? (why is it not an issue or wrong or against the law)	If you chose <b>Response b)</b> or <b>Response c)</b> , Can something be done about it? (what can you or someone else do about it?)
6. Something the government did made you very angry and you decide to take part in a protest and go throw water balloons and filled with paint onto the walls of the union buildings					
7. Sipho applies for a job as an admin person at a bank and is called for an interview; at the interview the employer gives him one look, whispers to the receptionist and walks away. The receptionist tells him that it's ok he can go home, his interview is cancelled; they are actually looking for Indian people for the position					
8. Daniel's school is in a rural area and they have only 1 bathroom for everyone in the school because they can't afford more toilets					

Please read the scenarios below and react to it in the columns on the right.	a) This is not an issue	b) It's wrong but not against the law	c) It's against the law or against someone's rights	Why do you say that? (why is it not an issue or wrong or against the law)	If you chose <b>Response b)</b> or <b>Response c)</b> , Can something be done about it? (what can you or someone else do about it?)
<p>9.</p> <p>You decide to start working a part time job to help pay for your university fees; the employer tells you that you don't need to sign a contract. After your first month of work, your employer tells you he isn't going to pay you this month and there is nothing you can do about it because you didn't sign a contract</p>					
<p>10.</p> <p>During class, a teacher makes a comment about homosexuality and says that gay people are unnatural and will go to hell</p>					
<p>11.</p> <p>Cindy's dad watches a rugby game for 2 hours and drinks a whole six pack of beers. He then decides he wants more beer, gets into his car, and drives to the liquor store</p>					

## Addendum 2: Permission from Gauteng Department of Education for Survey



**GAUTENG PROVINCE**  
 Department: Education  
 REPUBLIC OF SOUTH AFRICA

8/4/4/1/2

### GDE RESEARCH APPROVAL LETTER

Date:	22 May 2018
Validity of Research Approval:	05 February 2018 – 28 September 2018 2018/71
Name of Researcher:	Steenekamp A.
Address of Researcher:	1014 Koos Smal Road Eldoraigne Centurion, 0157
Telephone Number:	072 219 9106
Email address:	annalizesteenekamp@yahoo.com
Research Topic:	Using law and education as socialising agent for social change in South Africa
Type of qualification	LLM: Multidisciplinary Human Right
Number and type of schools:	Three Secondary Schools
District/s/HO	Johannesburg Central, Tshwane North, Tshwane South.

**Re: Approval in Respect of Request to Conduct Research**

This letter serves to indicate that approval is hereby granted to the above-mentioned researcher to proceed with research in respect of the study indicated above. The onus rests with the researcher to negotiate appropriate and relevant time schedules with the school/s and/or offices involved to conduct the research. A separate copy of this letter must be presented to both the School (both Principal and SGB) and the District/Head Office Senior Manager confirming that permission has been granted for the research to be conducted.

The following conditions apply to GDE research. The researcher may proceed with the above study subject to the conditions listed below being met. Approval may be withdrawn should any of the conditions listed below be flouted:

*[Signature]* 23/05/2018

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*Making education a societal priority*

**Office of the Director: Education Research and Knowledge Management**

7<sup>th</sup> Floor, 17 Simmonds Street, Johannesburg, 2001

Tel: (011) 355 0488

Email: Faith.Tshabalala@gauteng.gov.za

Website: www.education.gpg.gov.za

1. The District/Head Office Senior Manager/s concerned must be presented with a copy of this letter that would indicate that the said researcher/s has/have been granted permission from the Gauteng Department of Education to conduct the research study.
2. The District/Head Office Senior Manager/s must be approached separately, and in writing, for permission to involve District/Head Office Officials in the project.
3. A copy of this letter must be forwarded to the school principal and the chairperson of the School Governing Body (SGB) that would indicate that the researcher/s have been granted permission from the Gauteng Department of Education to conduct the research study.
4. A letter / document that outline the purpose of the research and the anticipated outcomes of such research must be made available to the principals, SGBs and District/Head Office Senior Managers of the schools and districts/offices concerned, respectively.
5. The Researcher will make every effort obtain the goodwill and co-operation of all the GDE officials, principals, and chairpersons of the SGBs, teachers and learners involved. Persons who offer their co-operation will not receive additional remuneration from the Department while those that opt not to participate will not be penalised in any way.
6. Research may only be conducted after school hours so that the normal school programme is not interrupted. The Principal (if at a school) and/or Director (if at a district/head office) must be consulted about an appropriate time when the researcher/s may carry out their research at the sites that they manage.
7. Research may only commence from the second week of February and must be concluded before the beginning of the last quarter of the academic year. If incomplete, an amended Research Approval letter may be requested to conduct research in the following year.
8. Items 6 and 7 will not apply to any research effort being undertaken on behalf of the GDE. Such research will have been commissioned and be paid for by the Gauteng Department of Education.
9. It is the researcher's responsibility to obtain written parental consent of all learners that are expected to participate in the study.
10. The researcher is responsible for supplying and utilising his/her own research resources, such as stationery, photocopies, transport, faxes and telephones and should not depend on the goodwill of the institutions and/or the offices visited for supplying such resources.
11. The names of the GDE officials, schools, principals, parents, teachers and learners that participate in the study may not appear in the research report without the written consent of each of these individuals and/or organisations.
12. On completion of the study the researcher/s must supply the Director: Knowledge Management & Research with one Hard Cover bound and an electronic copy of the research.
13. The researcher may be expected to provide short presentations on the purpose, findings and recommendations of his/her research to both GDE officials and the schools concerned.
14. Should the researcher have been involved with research at a school and/or a district/head office level, the Director concerned must also be supplied with a brief summary of the purpose, findings and recommendations of the research study.

The Gauteng Department of Education wishes you well in this important undertaking and looks forward to examining the findings of your research study.

Kind regards



Mr Gurnani Mukatuni  
Acting CES: Education Research and Knowledge Management

DATE: 23/05/2018

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*Making education a societal priority*

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## Addendum 3: Ethical clearance certificate from the University of Pretoria



UNIVERSITEIT VAN PRETORIA  
UNIVERSITY OF PRETORIA  
YUNIBESITHI YA PRETORIA  
Faculty of Law

RESEARCH ETHICS COMMITTEE

Tel: + 27 (0)12 420 5778  
Fax: +27 (0)12 420 2991  
E-mail: [annelize.nienaber@up.ac.za](mailto:annelize.nienaber@up.ac.za)

MS ANNALIZE STEENEKAMP  
FACULTY OF LAW  
UNIVERSITY OF PRETORIA  
PRETORIA  
0002

30 June 2018

Dear Ms Steenekamp

### ETHICS CLEARANCE CERTIFICATE

The Research Ethics Committee of the Faculty of Law at the University of Pretoria has reviewed your application for ethics clearance for human subject research entitled "Human Rights Logic Survey" related to your mini-dissertation entitled **"Using law as a socialising agent for social change in South Africa"** and granted ethics approval for your project.

**Please note that you need to keep to the protocol you were granted approval on – should your documents be amended in due course you will need to submit the amended version to us.**

We wish you success in your research.

Yours faithfully

A handwritten signature in black ink, appearing to read 'A G Nienaber', written over a light blue circular stamp.

**(PROF) A G NIENABER  
CHAIR: RESEARCH ETHICS COMMITTEE (FACULTY OF LAW)**

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