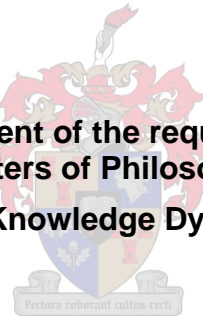# Black Economic Empowerment in South Africa: a Perspective from Jürgen Habermas's Theory of Law and Democracy

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(Decision-making, Knowledge Dynamics and Values)

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Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or part submitted it at any university for a degree.

Signature: …………………………………. Date: ………………………………….

Summary

Socio-economic transformation has been a central point on the agenda of the South African government since 1994. The deeply embedded inequality that is portrayed by socio-economic statistics of the time, justifies this mandate. The Black Economic Empowerment (BEE) strategy is meant to play a key role as an integrated legislative approach towards transformation. However, BEE is an emotionally laden subject that, as a strategy for transformation, attracts criticism from many different sources. The complexities surrounding BEE warrant us to ask whether the current approach towards socio-economic transformation (through BEE) is a legitimate way to address the problems of inequality, unemployment and poverty that the country face.

Jürgen Habermas's theory of democratic law provides us with a theoretical framework that we can use to understand the dynamics of BEE as instrument for transformation. According to Habermas, law can work as a mechanism of social integration in a democratic country like South Africa. Habermas argues that social integration can only take place through law if it is factual and normative at the same time. This also applies to BEE as a law in South Africa. For a law to be accepted as normative, it needs to be seen as legitimate, thus morally and ethically acceptable. These are all prerequisites for the legislated BEE strategy in order to enable social integration.

The linkage of Habermas's theory of democratic law and the practical example of BEE legislation in South Africa, leads to a better understanding of the complexities that surrounds the issue of institutionalised and legislated socio-economic transformation. It does not necessarily provide infallible solutions, but important insight into the current problems.

Opsomming

Sedert 1994 is sosio-ekonomiese transformasie 'n sentrale punt op die agenda van die Suid-Afrikaanse regering. Hierdie mandaat word geregverdig deur die diepliggende ongelykheid wat sigbaar is in die ontwikkelingstatistiek van die tyd. Die Swart Ekonomiese Bemagtiging (SEB) –strategie is veronderstel om 'n sleutelrol te speel as 'n geïntegreerde wetlike benadering tot transformasie. SEB is egter 'n emosioneel-belaaide onderwerp wat as strategie vir transformasie kritiek ontlok van baie verskillende oorde. Die kompleksiteite rondom SEB regverdig ons om te vra of die huidige benadering tot sosio-ekonomiese transformasie (deur SEB) die mees legitieme manier is om die probleme van ongelykheid, werkloosheid en armoede aan te spreek wat die land in die gesig staar.

Jürgen Habermas se teorie vir demokratiese regspraak dien as 'n teoretiese raamwerk wat ons kan inspan om die dinamika van SEB as instrument vir transformasie te verstaan. Na aanleiding van Habermas kan wet werk as 'n meganisme vir sosiale integrasie in 'n demokratiese land soos Suid-Afrika. Habermas verduidelik verder dat sosiale integrasie net kan plaasvind deur 'n wet as die wet terselftertyd feitelik en normatief is. Dit is ook van toepassing op SEB, as 'n wet in Suid-Afrika. Vir 'n wet om normatief te wees, moet dit gesien word as legitiem, dus moreel en eties aanvaarbaar. Hierdie is alles voorvereistes waaraan die wetlike SEB strategie moet voldoen om sosiale integrasie te kan bewerkstellig.

Die analogie tussen Habermas se teorie vir 'n demokratiese regstelsel en die praktiese voorbeeld van SEB in Suid-Afrika, lei tot beter begrip vir die kompleksiteite rondom die kwessie van geïnstitusionaliseerde en wetlike sosio-ekonomiese transformasie. Onfeilbare oplossings word nie noodwendig verskaf nie, maar wel insig in die huidige probleme.

Acknowledgements

Looking back over the process of writing this thesis, I would like to express my gratitude to a few individuals for their support along the way.

I would like to thank my parents, Charel and Annarie, for always encouraging me to be the best that I can. My husband, Johan, I would like to thank for his love and understanding. I want to thank Dr. Hans Müller, my supervisor, for his clear guidance and support throughout this process.

Lastly, I want to thank God for the strength to persevere.

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Chapter 1: Introduction

1   Background

The legislative landscape of South Africa after the political transition in 1994 has been influenced to a great extent by the history of this country – a history of racial segregation and deep inequality. As a result, the main purpose of policy frameworks and legislation after 1994 was to promote transformation on a social, political and economic level in order to equally develop the potential of all South Africans, to eradicate poverty and to change the perception that the rest of the world has of the country. The strategy for Black Economic Empowerment (BEE), as an integrated approach towards transformation, has been instrumental in this pursuit. This strategy is enacted by the Broad-based Black Economic Empowerment Act (No.53 of 2003) and the accompanying Broad-based Black Economic Empowerment Codes of Good Practice.

The BEE strategy has been an important embodiment of legislative transformation in South Africa, and forms an integral part of transformation-driven government policy. However, the BEE strategy does not receive the same acceptance from all South Africans, with different political orientations and cultural backgrounds. This fact, coupled with the reality that BEE drives deep structural change – which is never easy to accept – makes it understandable that there is strong criticism against the strategy. Resentment towards BEE comes from different sources. Some who fall within the previously advantaged group are threatened by BEE because they feel marginalised by it. Some of those who fall within the previously disadvantaged group are threatened by BEE because it does not in their opinion live up to the ideal of broad empowerment for all and only empowers a small group at the top of the income distribution. Some critics may even be in favour of the concept of transformation through BEE legislation, but do not approve of the way that the current strategy has been developed, the results it has reaped up to the present, or its design and focus.

What we gather from these criticisms is that there are a lot of complexities surrounding the issue of transformation through the instrument of BEE. The ANC government is

under pressure to drive a political mandate for socio-economic transformation because they perceive it to be the 'right thing to do', and their vehicle of choice is the BEE strategy and legislation. BEE is necessarily a legitimate cause for the authorities who direct and govern its implementation in the economy. However, there is a perceived gap between the intention of a legitimate transformation strategy and the reality of its unfolding in the economy. We will build on this theme of legitimacy in pages to come.

The theories of the philosopher Jürgen Habermas on democratic law bring a useful perspective to the discussion of BEE legislation. According to Habermas, democratic law has the role of social integration to fulfil. However, this role can only be fulfilled if such a law is at the same time factual and normative. In short, law in a democratic country, though being a set of rules and regulations, also has to be accepted by all actors involved (and not only by legislators) as legitimate guidelines to be followed or at least accepted willingly. They need to accept the law as moral and ethical. Only then can such a law be successful in its endeavour to be a social integrator of modern society in the absence of traditional methods of integration. Only then can we say that such a law is successful as a democratic law.

Linking these ideas of Habermas and the instance of BEE as transformational law in South Africa leads us to ask some fundamental questions: Is the legislative BEE strategy accepted by the people as both factual and normative? In other words, is it a set of rules that those involved respect and accept as legitimate, thus being moral and ethical? We can then also ask whether BEE can function as democratic law work that is a successful mechanism of social integration. Finally we can simply ask how we can understand the dynamics of the institution and implementation and reception of BEE better by virtue of investigating it from a Habermasian perspective.

The first question requires a full empirical analysis that can only really be complete when the process of BEE legislation development and implementation has run its course and wide-ranging data collection has been done. Therefore, we can only establish important dimensions of the process as it stands at the moment. The second question can be nothing else than speculation at the moment if one requires an empirically argued case. However, on a conceptual level one might attempt to answer this question in terms of Habermas'

perspective on what would be required of such a legal process. Therefore, it makes sense to focus our attention on the third question and thereby establish a base for a provisional answer to the second question.

However, why is Habermas's theory chosen as an appropriate theoretical framework? Firstly, his theory of law looks at democratic law in plural societies – being societies that are both culturally and politically divided. Because South Africa falls into this category and is a democratic state, Habermas's theory is a very relevant theoretical framework that we can use to better understand and evaluate the complexities concerning BEE as a law. A second factor that makes the connection between Habermas and BEE plausible is that, as will be shown in later pages, the South African government views BEE as a normative project and not only a factual set of rules. It is not necessarily perceived that way by all actors involved, as the government would have hoped, but it was developed as a transformation strategy with a strong normative values base. This intention is in line with Habermas's theory and therefore we can draw a significant parallel between theory and practice. Through this exercise an example would hopefully be provided of an application of theory to practice, where there is a mutual benefit and increased understanding of both.

2   Jürgen Habermas's theory of law

The first step in this process of reasoning would be to provide a detailed account of the appropriate elements of Habermas's theory. Chapter 2 will be dedicated to this exercise. Habermas's theoretical viewpoint will be positioned within a wider context and the background to his ideas will be explained. It should be emphasised at this point that Habermas's theory is not the only theoretical framework that could be implemented here and it is not superior to all other possible theories. As we have mentioned, Habermas's theory was chosen since it has application value in terms of the present situation of transformational law in democratic South Africa. However, to position Habermas's ideas within a broader theoretical environment, some time will be spent in chapter 2 looking at the criticism of Habermas and reviews of his work.

We will explain in some detail how Habermas's theory of law is grounded in his theory of communicative action. In order to show how valid (and legitimate) law is possible, he starts of by looking at language. He explains how the tension between facticity and

validity (facts and norms) culminates in speech acts and then extrapolates these ideas onto society. The tension between facticity and validity, for him, is managed more easily in a context where the actors share common background knowledge and beliefs. Such a group of people, according to him, shares a *lifeworld*. However, when groups do not share a common lifeworld and they have differing opinions, it is more difficult for them to reach consensus on matters and then the tension between facticity and validity is harder to overcome. In pluralist societies, a common lifeworld is a rarity and therefore we often perceive a tension in these circumstances where a large number of different lifeworlds overlap. Social integration now can take place through democratic law. These ideas will be elaborated on in the pages to come, further showing how Habermas's theory can be a very appropriate instrument to utilise while interpreting context of the transformation of South Africa through BEE legislation.

Habermas explains that one needs to consult both a philosophical and sociological perspective of law to understand the duality inherent in democratic law, following a dual perspective in order to highlight the problematic of democratic law. For him, a theory of law should give consideration to normativity without collapsing in morality and at the same time it should play a central role in a theory of social integration without leaning too far towards social domination[1]. Habermas looks at the sociological theories of Luhmann and Teubner and the philosophical theories of Rawls to explain how we can learn from both these perspectives.

3   Transformation in South Africa

Chapter 2 will be followed by a discussion of transformation in South Africa in chapter 3. Where the discussion was theory-based up to this point, the focus will now turn towards practice as we look at the specific situation of South Africa. We will start off by explaining the general concept of transformation and what it entails. This will lead to a brief discussion of the history that led up to 1994 with the purpose of explaining where the political and social pressure for socio-economic transformation in South Africa comes from. We will also provide the reader with some developmental statistics to explain how we can understand the impact of the history in quantitative terms.

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[1] See Chapter 2, section 5

The democratic government's drive for socio-economic transformation since 1994 will be followed to explain what the process looked like that led up to the implementation of a legislated strategy. We will look at the different policy frameworks and acts that have prepared the ground for BEE and we will focus on how BEE was intended to integrate these into a single legislated strategy. BEE will then be explained as the formalised strategy for transformation after 2000. We will follow the development of the strategy up to the present, looking at the different role players and the relevant documents, in the context in which the process has been and still is taking place. The BEE legislation will also be discussed in terms of its definition, its goals and ideals, as well as its implementation in the economy and society.

The latter part of chapter 3 will provide some critical perspectives on BEE as a formal strategy for transformation. Although a claim will not be made as to whether BEE has been successful or not, we will attempt at providing a significant discussion of the criticism of BEE that has been available at the time of writing this thesis. Throughout the process of explaining and discussing BEE, Habermas's theory will serve as valuable background knowledge. The parallels between the BEE process and Habermas's ideas will be made explicit only at a later stage.

The level of analysis of chapter 3 should be discussed briefly before we commence. There is definitely scope for a more detailed economic and financial analysis of BEE that provides practical solutions for implementation, but that approach will not be followed here. A lot of time will not be spent on the technical details of economic transformation, neither the implications thereof in hard business terms. Rather, a broad, overarching view will be provided of socio-economic transformation with the focus on the government's BEE strategy.

4   An interpretation of BEE in terms of Habermas's theory of law

In chapter 4 the connection will be established between theory and practice; between Habermas's thought process and BEE in South Africa. Certain critical elements of the theory will be used to clarify the realities of South Africa's situation in order to discuss some of the issues mentioned earlier. The central issue here will be whether BEE can

conceivably be successful as a democratic law and thus enable social integration. Of course, we cannot settle the question of whether it has been successful as mechanism of social integration as the process is still on-going.

Chapter 4 will be started off by recalling Habermas's view of society as both lifeworld and system, as well as the process of differentiation that takes place between these two dimensions of society. We will commence by showing how social integration took place in the apartheid era and how this started to change (through what Habermas calls colonisation) in the late apartheid era. This will lead into a discussion of BEE as transformational law with the task of social integration in the current democratic regime in South Africa. The development of the BEE strategy as well as the criticism against BEE will be recollected briefly. BEE will then be discussed in terms of a few central elements or themes from Habermas's theory. Through this discussion, the reader will hopefully receive more insight into the complexities of BEE as well as the application value of Habermas's theory to the realities in South Africa.

It should be emphasised that this thesis does not aim to provide clear-cut answers to all the problems of BEE; nor does it aim to provide solutions for an improved transformation strategy in South Africa. It merely provides an integration of theory and practice in order show how the situation of BEE and the instance of transformation in South Africa can be interpreted in a descriptive manner by making use of Habermas's theory of law. The aim is therefore only to interpret the development process of BEE and the strategy itself by using what Habermas has to offer, thus showing how mutual benefit and increased understanding can be gained for both theory and practice.

Chapter 2: An analysis of Jürgen Habermas's theory of law in a democratic society

1   Introduction

The German author Jürgen Habermas is a member of the Frankfurt School of Critical Theory and a student of Theodor Adorno. Valuing a dual perspective that integrates philosophical and sociological approaches, he engages in discussions in political theory, psychology and legal theory. Richard Rorty[2] labelled Habermas as "the leading systematic philosopher of our time". Habermas can be seen as the last major thinker who embraces the project of the enlightenment and is often criticised by poststructuralists and postmodernists on this point. Nevertheless, he has made it his project to rethink the tradition of critical theory and German social philosophy, following in the footsteps of Kant, amongst others[3].

One of the central themes that Habermas focuses on is developing a normative theory of law in a pluralist, democratic society. He emphasises the role of participation by reasoning citizens and calls this approach "deliberative politics"[4]. The theory of law as set out in his work *Faktizität und Geltung: Beitrage zur Diskurstheorie des Rechts und des demokratischen Rechstaat*[5] (1996) holds practical value for the research problem that is central to this thesis. Habermas' account of the tension between facts and norms (or facticity and validity) as it is applied to modern participatory law, will be studied in this chapter and implemented as theoretical framework that can lead to insights in further discussions.

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[2] Quoted by Stephens, M.1994. "The Theologian of Talk" in the *Lost Angeles Time Magazine.*
[3] Powell, J.L. & Moody, H.R.2003. "The Challenge of Modernity: Habermas and Critical Theory" in *Theory and Science*.
[4] Bohman, J. 1994. *Review of* Faktizität und Geltung, *by Jürgen Habermas*. p 897.
[5] Habermas, J. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. and ed. Rehg, W.

Section 2 of this chapter will inform the reader of the background to Habermas's theory of democratic law. The duality of law and the tension between 'facticity and validity' will be discussed. Section 3 will introduce some of the theoretical concepts that are central to an understanding of Habermas's thoughts. These are the concepts of communicative action, the 'lifeworld' and its interaction with the system, and the colonisation of the lifeworld. Section 4 will then deal with the central question of how valid law is possible by guiding the reader through Habermas's argument. The need for social integration in a society and the role that law can play in this instance will also be discussed here.

In Section 5 the viewpoints of the theoretical schools of philosophy and sociology towards a theory of law, will be explored as Habermas views it. As examples of sociological perspectives, Luhmann and Teubner's work will be discussed and as an example of a philosophical perspective, Rawl's theory of Justice. The section will be concluded with a look at the dual perspective as it is found in the work of Weber and Parsons. Section 6 introduces criticism of Habermas. This section plays a very important role in contextualising Habermas as theorist within a broader history and also in providing reviews of specific works. The conclusion for the chapter follows in Section 7.

2   Background to Habermas's theory

Habermas' theory of law and democracy cannot be studied in isolation as it builds upon a specific theoretical base that he systematically constructs in all his work. There are certain basic ideas that one needs to be aware of in order to acquire a more complete understanding of his position as theorist. Habermas develops a social theory grounded in speech act theory, and he calls it the theory of communicative action. This social theory also gives birth to his ideas around law and democracy. The concept of the lifeworld plays a central role in his work, referring to all the set meanings, memories and standards that a certain homogenous group shares – the common background knowledge that a group already has before they engage in interaction[6]. Habermas' theoretical context – including his ideas regarding the lifeworld, the system, and the way that these work together – will be interwoven here to provide the appropriate background knowledge for the reader.

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[6] Rehg, W. 1996. Foreword to *Between Facts and Norms,* p xvi.

In "Between Facts and Norms", Habermas explains his views on the role of public discourse in democracy. He provides a normative account of the rule of law and the constitutional state in order to bridge the gap between normative and empirical approaches to democracy and explains the social context in which this actualises. He introduces a new paradigm of law, namely procedural law. If a theory of law is not to be "sociologically empty" or "normatively blind" to use Rehg's words[7], it has to follow a dual perspective like the one that Habermas promotes. This becomes even truer in the democratic context. One cannot see law only as a set of rules and regulations, irrespective of the process that brought them to being and whether or not such a process involved the actors that the rules apply to. It is necessary to see both the normative and empirical view. For this reason Habermas views law as a "system of knowledge" as well as a "system of action", or a "set of public norms" as well as a "set of institutions". To illustrate the importance of a dual perspective, we will discuss the sociological and philosophical viewpoints on the matter later on.

The words facticity and validity, though unusual synonyms for facts and norms, provide better translations for the German concepts of *Faktizität* and *Geltung*. It is these concepts that Habermas uses to explain the dual character of modern law, as he understands it. This duality and tension culminates time and again on different levels in a social reality on the one side and in a claim of reason on the other side[8]. Although law is always a system of rules and procedures, these would not have a noteworthy effect in the long run if the people whom they apply to do not also in some way accept them and grant them legitimacy. Any political law has a temporal dimension, but the time during which a law can be regarded as successful in its endeavours will lengthen if the law is regarded as legitimate by those affected.

In the interaction of the fields of politics and legislation, two camps exist: one favours a normative approach and is in danger of loosing touch with social facts; the other chooses an objective approach and risks overlooking all normative aspects[9]. These two can definitely not ignore each other, as that would lead to a narrow disciplinary point of view.

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[7] Rehg, 1996, p xxiii.
[8] Rehg, 1996, p xi.
[9] Habermas, 1996, p 6.

However, the two can also not understand each other totally. The solution is that the one should always be aware of the other's standpoint, theoretical objective, or role in order to respect it and learn from it. Habermas promotes this balance throughout his work.

It will perhaps already be apparent for the reader how the tension between facticity and validity could be applicable in the case of economic transformation and empowerment in South Africa. In order to better understand the inherent challenges and dynamics of transformation, one needs to understand the undercurrents of democratic law making. The basic questions that we need to ask are: How is valid law possible? How can factual rule-based law also be normatively acceptable and legitimate in the eyes of citizens? How could transformation policies and legislation in South Africa also be perceived as valid and thus act as a method of social integration?

Habermas' work is complex and abstract on many levels, and thus needs to be compartmentalised into smaller, confined arguments that are more easily understood in a specific practical context such as the one chosen here. It would not be possible to look at Habermas' total argument, but a certain relevant part of it can be singled out. It is a prerequisite that the reader should firstly remember that there is a whole tradition of other ideas that supports the chosen argument, but that all of this cannot be recalled here in its totality. Secondly, some lines of argumentation will be explained in brief but will perhaps be seen as too summarised, needing to be fleshed out. These are regarded as necessary to understand the bigger picture, but can unfortunately not be explained in more complete terms. The message in its most simple form will be applied to the context of transformation in South Africa to the extent that we can learn from it and understand how the current situation can be better understood and perhaps even better approached by the different stakeholders.

As stated, Habermas' theory of communicative action brings together the "factual generation, administration, and enforcement [of law] in social institutions on the one hand and its claim to deserve general recognition on the other"[10]. The challenge for Habermas is to maintain the duality of firstly claims of reason and secondly the complex social arena in which reason needs to apply, without compromising the importance of

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[10] Rehg, 1996, p xii.

either. He explains this tension on three levels: in language, in modern law and between law and social reality[11]. These levels will be dealt with to describe how Habermas views the tension in each instance and how he understands valid law through the three stages. We will also look at the argument that Habermas makes for a dual perspective of philosophy and sociology, highlighting the value of both and the reasons for implementing both these perspectives as further support for his explanation of valid, legitimate law.

Before we attempt to deal with the tension between facticity and validity, it would prove instructive to provide more background on Habermas' general theoretical base that he works from in order to highlight some of the underlying views that define his approach. For this purpose, something will be said about his theory of communicative action, his use of the concept 'lifeworld' as well as his idea of the colonisation of the lifeworld.

3   Habermas' theoretical base

3.1   Communicative action

Habermas builds on a social theory that is in his opinion cut loose from the bonds of a modern philosophy of consciousness[12]. He plays with the balance between a subjective social theory from the viewpoint of a participant in society, and an objective and rational social theory from the viewpoint of the observer outside society. As mentioned already, the theory of communicative action is a social theory grounded in communication and more specifically, language-in-use or speech acts. Habermas[13] states that "If we assume that the human species maintains itself through the socially coordinated activities of its members and that this coordination is established through communication – and in certain spheres of life, through communication aimed at reaching agreement – then the reproduction of the species also requires satisfying the conditions of a rationality inherent in communicative action." Thereby, he does employ a type of rationality, but moves away from the rationality common to modern philosophy, which is in his eyes merely an historical account of life.

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[11] Rehg, 1996, p xiii-xiv.
[12] McCarthy, T, foreword to Habermas, J. 1984. *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society*. p iv.
[13] Habermas, 1984, p 397.

Habermas, according to McCarthy[14], argues that we share a basic language structure and fundamental rules that provide us with a universal core. In communication, we constantly make claims with regards to the legitimacy of our speech acts in relation to the shared beliefs of our lifeworld. These claims are then defended, criticised, and eventually accepted or rejected. Through this method, understanding is eventually reached and the claim is either made a part of our body of shared knowledge and values, or discarded. Learning can also take place as claims can be corrected.

One would agree that this method of reaching consensus through communicative action would hold water in a society that shares a lifeworld of common background knowledge, but what would happen when a number of different lifeworlds are interacting? Should there not be some kind of common understanding that spreads over different societies with different languages and belief systems – some way to talk to one another and still reach consensus on certain matters? This question leads to a problem that is central to Habermas' project, namely the universal significance of communicative rationality. This links with Habermas' question of to what extent modernisation can be viewed as rationalisation. One can follow this theme throughout his work as he shows how the existence of a universal language is possible on different levels. These themes, however, will not be discussed here.

3.2   The Lifeworld

The idea of the lifeworld (or "Lebenswelt"), according to McCarthy, is a necessary complement to the concept of communicative action. The lifeworld provides actors in society with shared resources and identity traits that are helpful in the process of striving towards a consensus on conflicting validity claims. Reaching consensus on conflicting matters is far easier when the actors involved share a substantive amount of background meaning, in other words, a lifeworld. Actors draw on the lifeworld if they want to form common definitions of certain situations. The lifeworld "lends to everything that happens in society the transparency of something about which one can speak"[15] and therefore brings a common ground that actors can share when they enter into any discourse in

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[14] McCarthy, 1984, p x-xi.
[15] Habermas, 1987, *The Theory of Communicative Action, Volume 2: Lifeworld and System: A Critique of Functionalist Reason*. p 149.

society. Habermas wants to show how the lifeworld is reproduced through communicative action, as claims that are made are either rejected or assimilated with the existing lifeworld knowledge. The concepts of communicative action and the lifeworld can work, according to Habermas[16], as basic categories for a general theory of society.

Culture, institutional orders and personality structures form a part of the lifeworld. It consists then of three different structural components, namely culture, society and personality[17]. These components are reproduced through three different processes, namely cultural reproduction, social integration and socialization, based on the different aspects of communicative action, namely understanding, coordination and sociation. Through these processes, the lifeworld in its totality is symbolically reproduced. It is especially 'society' as structural component of the lifeworld that is important for us to understand, along with its reproduction process of social integration. The societal aspect can only be reproduced though social integration if actors start to share something through common "context-forming horizon(s)"[18]

One should take note at this point, though, that the term lifeworld does not necessarily refer to an ethnic group or political identity, but rather to social and cultural convictions that a person might have. A group of people can share a certain lifeworld because they are all women, or they have the same work environment, or they belong to a certain interest group. One person can therefore also belong to more than one lifeworld and share certain background knowledge with one group, but other background knowledge with another group.

3.3   Lifeworld and system

Habermas does not only speak of the lifeworld, but also of the system. The lifeworld and the system provide contrasting views of society and different angles at studying it[19]. Society can be a lifeworld or it can be a system. In the lifeworld-view, "society is conceptualized as the lifeworld of a social group in which actions are coordinated through harmonizing action orientations" whereas in the systems view "society is

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[16] Quoted by McCarthy, 1984, p xxv.
[17] McCarthy, 1984, p xxv.
[18] Habermas, 1984, p 337.
[19] McCarthy, 1984, p xxvi.

conceptualized as a self-regulating system in which actions are coordinated through functional interconnections of action consequences". One needs to combine these views, according to Habermas, in order to acquire a complete understanding of the dynamics of society. We cannot see the integration of society only as social integration, including in our view only the lifeworld conception of society. If we only acknowledge system integration on the other hand, we reduce society to a self-regulating system with structural patterns that can simply be observed and understood from the outside. Social and system integration are both needed as you incorporate the views of the participant and the observer, a structuralist and functionalist analysis, a hermeneutic and systems-theoretic approach. Society is thus seen as "a system that has to satisfy the conditions of maintenance of socio-cultural lifeworlds"[20]. This view of society is not so simple to grasp at first, but provides significant insights in terms of its application.

Habermas, following Durkheim and Mead, finds that social integration (looking at society as lifeworld) is actually a necessary requirement for system integration (pointing towards society as system). The regulative power of the system can only work effectively if the "socially integrating power of moral and legal rules" is in place[21]. The lifeworld now becomes a "boundary-maintaining system". The interaction between and overlapping of the lifeworld and system has significant implications for society. This model of society can be applied to the instance South African society as well and can possibly lead to insights in the quest of understanding the BEE process that takes place in it.

3.4   Colonisation of the lifeworld

Through the process of social evolution, which is the move from a tribal to a modern society, a growing differentiation takes place between the system and the lifeworld within society. This means that the mechanisms for functional integration are 'decoupled' from the mechanisms for social integration. However, there is also a differentiation taking place within the system and lifeworld respectively. Habermas explains that through differentiation, the rationality of the lifeworld and the complexity of the system grow. The two different levels of differentiation are interconnected as systemic mechanisms

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[20] Habermas, quoted by McCarthy, 1984, p xxvii.
[21] Habermas, 1987, p 115-116.

need to be anchored in the lifeworld (institutionalised) on the one hand and the rationalisation of the lifeworld (of things such as laws and morality) need to take place to institutionalise new ways of system integration. As this process evolves, systemic mechanisms become less tied to social structures. They become more and more independent of the normative structure of the lifeworld and form semi-autonomous subsystems – they are decoupled from the lifeworld[22].

Although a number of different subsystems are decoupled from the "social structures through which social integration takes place", the "lifeworld still remains the subsystem that defines the patterns of the social system as a whole". Therefore systemic mechanisms need to be anchored in the lifeworld and institutionalised. An example of this is the institutionalisation of political power in the modern state through bureaucracy or the operations of the free market economy and the commoditisation of every human relationship and alienation that flows from that[23]. This phenomenon is called rationalisation of the lifeworld. It is important to note that because systemic mechanisms still need to have their roots in the lifeworld, social integration is in fact more important than systemic integration and has to take place as a first step in the process[24].

A "post-conventional level of moral and legal consciousness" is needed when rationalisation of the lifeworld has taken place to the extent explained here. This means that values and norms have to become generalised (and uncoupled from traditional lifeworld structures). As rationalisation increases, actors run the risk of increasing disagreement. The responsibility now falls on the actors themselves to build new definitions for their situations. One way of reducing the risk of disagreement is that the medium for coordinating action now changes from language (communicative action) to 'delinguistified' steering media, such as money and power. These steering media influence decisions through non-linguistic ways. Interactions that are guided by these steering media, "can link up in more and more complex functional networks" without any overarching responsibility being taken for it[25]. Habermas calls this process the

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[22] McCarthy, 1984, p xxviii, xxix.
[23] Habermas, 1987, p 154.
[24] Habermas, 1987, p 312.
[25] McCarthy, 1984, p xxx.

mediatization of the lifeworld and leads to an instrumental rationality, following only a means-ends logic, instead of a communicative logic as followed before.

However, if systemic mechanisms suppress forms of social integration in areas where they cannot be replaced and symbolic reproduction is therefore at stake, the lifeworld is not only mediatized, but in fact colonised[26]. If the competition between system and social integration becomes too much, systemic mechanisms of subsystems (money and power, for instance) restrain social integration, so that colonisation of the lifeworld takes place. It is almost as if the steering media of money and power force a "process of assimilation" on society that degrades the socially integrative force of values and norms[27]. To prevent this colonisation, it is very important to preserve the relationship between social and system integration with the first being a precondition for the second. This theme will hold practical value for our study of BEE in South Africa and will be expanded on at a later stage.

4   How is valid law possible?

This question may sound simple at first, but in the complex domain of the nature of law and the wider socio-political and institutional context in which it operates[28], it does not remain so simple. The question becomes even more complicated when we want to answer it in the context of a pluralist society where a complexity of different subgroups with contrasting worldviews and cultural backgrounds are found to live together. Habermas follows a certain reasoning to explain this possibility, which will be recollected here.

4.1   Language as starting point

Habermas begins by placing the claims of communicative reason right in the middle of the tension between facticity and validity and he does this by making use of 20th century linguistic philosophy. Starting off by explaining the duality inherent in language, Habermas uses a formal-pragmatic approach, following the speech-act theories of John Searle and J.L. Austin[29]. This approach deals not only with grammar, semantics and

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[26] Habermas, 1987. p 196.
[27] Habermas, 1987, p 355.
[28] Rasmussen, M. 1996. *How is valid law possible? A Review of Between Facts and Norms from Jürgen Habermas*. p 22.
[29] Rasmussen, 1996, p 22.

sentence construction, but also with the interaction between speakers based on statement of validity claims.

One prerequisite for members of a language community is that they should all at least speak the same language and thus understand each other's use of words. Even if communication does not occur through words but through signs, these signs should at least have constant and recognisable meanings for actors. A collective language has the same effect as a collective lifeworld: it gives a common background field of understanding. Linguistic events that are recognisable to actors, lends a certain idealising element. Although not the same as the idealism of Plato, it can be likened to this origin. Habermas[30] states: "However far removed today's concept of reason is from its Platonic origins, and however much it may have been changed by paradigm shifts, it is still constituted by a reference, if not to ideal contents, then to idealising, limit conceptions." Communicative action is in this regard the successor of practical reason that still carries its "idealist heritage". The commonality of one language (the "limit conceptions" thereof) provides a type of idealism to communication.

Linguistic philosophy takes over the process of reaching an understanding as communicative action takes over from practical reason, thus it 'redeems philosophy from its commitment to a philosophy of the subject, while at the same time enabling philosophers to give an intersubjective account of rational action without getting mired in the 19th century problems of subjectivity"[31]. The question that Habermas asks now is how an idealising theory such as communicative reason can marry with social reality?

Sentences are linguistic representations of things and not actual idealised meanings. The statement "This ball is red" shows thus not towards a specific red ball, but it is merely a linguistic representation of the fact that the ball is red. According to Habermas[32] authors like Frege, Husserl and Popper misunderstood the idea of meaning as they agreed that thoughts, propositions and states of affairs "enjoyed an ideal being-in-themselves" – a Platonic conception of meaning. The problem with this conception especially becomes

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[30] Habermas, 1996. p 9.
[31] Rasmussen, 1996, p 22.
[32] Habermas, 1996, p 12-13.

apparent when the ideal concepts and the real world need to interact in some way. CS Peirce applied formal analysis to language to explain such interaction.

For Peirce[33] there can only be linguistic representations of things for a certain group that share the background of a lifeworld. For this group, what is real is the same as what is represented in true statements, where a truth claim is a claim raised by an individual and agreed upon by the others. Therefore, actors would be obliged to accept agreements that have been reached in the group as true, provided that claims can be understood as valid and validity in this instance is "validity proven for us". For claims in a group to be understood as valid, a certain process of idealisation needs to exist. There must be certain "pragmatic presuppositions of a counter-factual sort"[34]. In other words there must be certain presuppositions that act on the real world and does not show towards a general theory. Habermas says: "a set of unavoidable idealisations forms the counterfactual basis of a factual practice of reaching an understanding that is directed critically against its own results and can transcend itself"[35].

As Habermas explains, "with each truth claim, speakers and hearers transcend the provincial standards of a particular collectivity [in other words the general theory], of a particular process of communication localised here and now". This results in "transcendence from within", where a community becomes one that does not have limits in terms of space and time. This transcendental quality of truth claims leads us to ask how exactly these claims that were aimed at a secure group with compatible background meanings can now overrule these compatible background meanings and transcend its boundaries – attaining a universal character. It is this transcendence that sets justification of truth claims apart from other forms of social practice. This "unlimited communication community" within time learns how to build bridges and transcend boundaries so as to have a universal discourse in which truth claims can be made irrespective of differing lifeworlds. Participants in such a communication process should accept certain presuppositions (often counterfactual) before they can enter the conversation.

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[33] Quoted by Habermas, 1996, p 14.
[34] Rasmussen, 1996 p 23.
[35] Rasmussen, 1996, p 23.

This view as explained by Peirce is integral to speech act theory, but can also be applied to everyday practice of communication – as Habermas employs it in his own theory of communicative action. The difference between how Peirce used the theory and how Habermas uses it, is that Habermas will not only look at truth claims, but also at other types of validity claims, including claims to subjective sincerity and normative rightness[36].

The tension between facticity and validity, as it works in language, is also a reality in the social interaction that occurs through communicative action. Habermas asserts at this point that what is true for language is actually also true for society[37]. We now need to ask: How do we find a balance between facticity and validity in the context of society, past the point of language? With language we could transcend boundaries if certain counterfactual presuppositions were accepted before the conversation commenced, but what happens in society? The point is that social order actually exists because of the recognition of normative validity claims. The process of reaching an understanding in the context of language is the same as the process of social integration in the context of society. The tension in the case of society should be eliminated or minimized by the actors' own efforts, bringing about social integration. Enacted law is one proposed way in which social integration of this sort can be brought about and the way that Habermas chooses to investigate[38]. This will also be our focus point in later discussions.

4.2   Communicative action as a form of social integration

If language interaction between actors stays only at exchanging information, action coordination can only occur through exerting influence on each other. However, if speech acts play an action-coordinating role, social integration can also take place through language. Only then can language lead to communicative action as Habermas deals with it[39]. The prerequisite for such an event to occur, however, is that actors should not take up the mere role of observer, but should engage as performer. (Actors' own efforts should work off misunderstanding). Language is then oriented towards mutual understanding. Validity claims are raised on the basis of judgement: they are either agreed upon or

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[36] Habermas, 1996, p 16.
[37] Rasmussen, 1996, p 24.
[38] Habermas, 1996, p 17.
[39] Habermas, 1996, p 18

disagreed upon. In the occasion of disagreement, further communications take place. As actors accept claims, it is brought down from the transcendental world right into the reality of the lifeworld, thus it is "detranscendentalized". Peirce's "context-transcending" idealisations are eventually brought down into the heart of communicative practice. "Any speech act therewith refers to the ideally expanded audience of the unlimited interpretation community that would have to be convinced for the speech act to be justified and, hence, rationally acceptable"[40].

On a conceptual, universalistic level, validity claims transcend all contexts of space and time, but here in the present where a claim is raised, it actually needs an answer of acceptance or rejection from actors[41]. In the present, we have to face the element of social acceptance. Now we touch on the dual character of the tension that we know lies between facticity and validity: A claim made transcends contexts (facticity) but here and now it needs to have the support of those affected (validity).

The tension between facticity and validity poses great danger for social integration to take place in the lifeworld, because of the risk that actors would disagree in their processes of testing claims. In the event of a disagreement, actors have a few options: they could ignore the point of disagreement and go on with their interaction, they could try to alter the disagreement by talking about it, they could stop communicating about it, or they could engage in strategic action[42]. Strategic action implies that each actor makes decisions that would benefit him- or herself the best in the eventual outcome.

For Habermas, the conflict resolution that leads to social integration relies on three assumptions. The first is that members must have a common set of meanings on which they can fall back to ensure that they at least understand each other's language. Secondly, all actors must be assumed to be rationally accountable. Thirdly, actors must assume that any claims to justice and truth that serve as building blocks for their acceptable resolution should not falter after the resolution has been finalised[43]. Agreements reached through discussion, however, are always open to challenge and further scrutiny.

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[40] Habermas, 1996, p 19.
[41] Habermas, 1996, p 20-21.
[42] Habermas, 1996, p 21.
[43] Rehg, 1996, p xv.

A common lifeworld is very helpful as it provides actors with a whole set of background meanings and familiarity that they at least agree on. This agreement, however, can also be dangerous. Actors accept the lifeworld's background meaning as established knowledge to such an extent that they do not even question it anymore. The only way to challenge this set of knowledge is to convert it from an established resource to a topic of discussion[44]. The moment when it is made a topic, it is no longer background knowledge. In this process one sees the tension between facticity and validity at work: the background knowledge is idealized as fact, until its validity is challenged.

Another way in which we can see the tension between facticity and validity is in the instance of strong bureaucratic and sometimes archaic institutions. These institutions typically would claim an objective right to authority. From the standpoint of such institutions, the apparent steadfastness of the lifeworld is objectified, depersonalised, and challenged[45]. These institutions granted stability and social integration by their sacred authority, thereby fusing facticity and validity[46]. However, as society becomes more secularised and complexity of different cultures and belief systems start to challenge the authority of these archaic institutions, law takes the role of social integrator, stabilising the tension between facticity and validity.

4.3   Social integration in pluralist societies

It is well-known that a common lifeworld is not always present where actors are engaging around a validity claim. In modern pluralist societies (of which South Africa is a typical example), people are often forced into more and more defined and exclusive political identities while at the same time the world is opening up through the processes of globalisation. There are so many different lifeworlds and such large systemic forces at work, that it is difficult to find common integration through the known traditional methods mentioned earlier. Now law becomes the social integrator. But how does this possibly happen? Again we must ask: How is valid law possible?

Action by actors in a pluralist context become more self-interested and the common good does not seem to play a significant role anymore – often driven by norms. Similarly,

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[44] Habermas, 1996, p 22-23
[45] Habermas, 1996, p 23-24.
[46] Rasmussen, 1996, p 24.

actors engaging in strategic action make decisions that benefit themselves and only themselves. The question that Habermas now poses is: "How can disenchanted, internally differentiated and pluralized lifeworlds be socially integrated if, at the same time, the risk of dissention is growing, particularly in the spheres of communicative action that have been cut loose from the ties of sacred authorities and released from the bonds of archaic institutions?"[47]

In the very likely case of conflict between actors without the security of a shared lifeworld, there are basically two options: actors can either stop the communication altogether or move into the realm of strategic rather than communicative action. Self-driven actors see all the elements of the situation out of their own perspective whereas actors with a similar background understanding rely on their shared meanings. This implies that actors now have to reach a consensus about the "normative regulation of strategic interactions"[48]. They need to decide what the acceptable rules are to follow in the course of strategic action. Social integration should now happen on two levels: firstly there must be de facto restrictions that guide the behaviour of an individual so that the individual must comply, and secondly these restrictions should be a socially integrative force – this becoming possible only when the restrictions are also intersubjectively recognised normative validity claims for the individual. "The type of norms required would have to bring about willingness to comply simultaneously by means of de facto constraint and legitimate validity"[49]. Norms must be imposed, but actors involved should accept them as rational[50].

Valid law must be legitimate law, as actors must want to comply with the law out of respect for it. Habermas[51] distinguishes between de facto validity and legitimacy: De facto validity is determined by the degree to which it is actually implemented and accepted. Legitimacy on the other hand depends on whether a law is regarded as ethical and moral in the view of actors. Legitimacy has an effect on and influence de facto validity. If a law is not legitimate, other methods such as intimidation need to be used to

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[47] Habermas, 1996, p 25-26.
[48] Habermas, quoted by Rasmussen, 1996, p 25.
[49] Habermas, 1996, p 27.
[50] Rasmussen, 1996, p 25.
[51] Habermas, 1996, p 30-31.

make actors follow it. The two types of legal validity mentioned here shows towards two different attitudes that actors can have: an objective or a performative attitude. De facto validity leads to an objective attitude and legitimacy leads to a performative attitude. The legal validity of a norm then implies two things simultaneously: the norm will enforce compliance and it will also be legitimate.

This is how the tension between facticity and validity culminates in the duality of law as we find it in pluralist societies, but how can law be both rational and valid according to all involved? Hobbes explains this by stating that valid law is the only way that we can avoid war by all humans against all humans. Rousseau and Kant claim that legal legitimacy can only be validated through the socially integrated force of the "concurring and united will of all free and equal citizens"[52]. Habermas[53] explains that for Kant the tension between facticity and validity that is inherent in law lies in the fact that law coerces in order to give freedom: "Legal rules posit conditions of coercion, conditions under which the will of one person can be unified with the will of another in accordance with a universal law of freedom". Habermas' solution for the problem is to use both philosophy and sociology to show the reasons why law can in fact be accepted as valid by all involved.

5 Philosophy and sociology

According to Rasmussen, following Habermas, there are two things that a philosophical and/or a sociological theory of law must accomplish. Such a theory must "show how law interfaces with standards of normativity while at the same time not collapsing into morality and it must show how law must be the linchpin in a theory of social integration while at the same time not identifying law too closely with a strategy of social domination"[54]. Philosophers have often made too much of the moral aspect of law (justice) and sociologists on the other hand have faulted in over emphasising the social integrative aspect of law (power). Habermas, however, understands that law cannot be the servant of either power or justice. One needs to mediate between the viewpoints of philosophy and sociology. To indicate how this logic works, Habermas spends some time

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[52] Quoted by Rasmussen, 1996, p 25.
[53] Habermas, 1996, p 28.
[54] Rasmussen, 1996, p 26.

firstly to explain Luhmann's systems theory, as well as the work of Gunther Teubner, as an example of a sociological theory; secondly he explains John Rawls's theory of justice; and thirdly he introduces the dual perspective as Max Weber and Talcott Parsons implemented it. This thought process will now be briefly recollected here. Before we commence, it is necessary to highlight that it is specifically Habermas's interpretation of these theories that will be discussed in this section.

5.1   Systems theory – Luhmann and Teubner

According to Habermas, Luhmann "transposes the philosophy of the subject into a radical objectivism"[55]. With his systems theory perspective, he sees law as just another subsystem of society that operates on its own account, and not as an overarching category that speaks to all others. This is a product of the functional differentiation of society – law is seen from the functionalist view as merely "stabilising behavioural expectations"[56]. Conflicts that come up in the legal sphere are dealt with merely in a binary manner of being legal or illegal, black or white.   As Rasmussen[57] argues, Luhmann totally eliminates the idea of normativity or legitimacy by acceptance of those involved.

Habermas explains that through a systems theory perspective, positivist law as a system finally becomes independent and autopoietic, not responding to the environment in any other terms that those dictated by the system itself – it becomes self-referential. Autopoiesis then has the implications that "the system describes its own components in legal categories and employs these self-thematizations for the purposes of constituting and reproducing legal acts by its own means"[58]. The legal system is, according to Luhmann, independent and cut loose from other subsystems. It cannot have any direct exchange with its environment, nor can it have a regulatory effect on it. Law is reduced to the function of its own administration and does not play any kind of socially integrative

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[55] Habermas, 1996, p 47.
[56] Habermas, 1996, p 48.
[57] Rasmussen, 1996, p 27.
[58] Habermas, 1996, p 49.

role. Habermas states "systems theory has cleared away the last remains of the normativism found in modern natural law"[59].

Habermas notes that this apparent independence of law and the non-interaction between subsystems do not actually make sense, as there is empirical evidence of interdependencies between law and other subsystems. Gunther Teubner, according to Habermas, explains how there is in fact interference between subsystems[60]. Habermas uses Teubner's theory because he has some similar convictions to Luhmann about the functional differentiation of society and autonomous subsystems.

The problem that Teubner addresses is whether there is any type of common language in which subsystems can communicate, or whether the existence of such a language would only be possible if one subsystem resides within another system. Teubner addresses two aspects: The one is how knowledge in terms of other fields such as science, technology, psychiatry, and economics can be rewritten in terms of legal language and thereby taken up into the subsystem of law. The other is the question of law influencing other subsystems, directly or indirectly. The only way that either of these can happen, he decides, is if a general language or general social communication does exist that can mediate between spheres. He calls it "system interference"[61].

Teubner realises that there cannot be a general language between subsystems if there is no interaction or overlapping between them. He proposes that the lifeworld circulates through all spheres of society and has the ability to translate the specific languages and codes of the other spheres or subsystems[62]. The lifeworld acts almost as the centre of society. Ordinary language therefore is multilingual – it is not confined to a specific field in society and it is also tolerant of different viewpoints raised in other areas than its own. Luhmann, though, rejects the idea that the lifeworld itself and would not agree that it can mediate between different subsystems. Habermas notices that this idea of Teubner is actually not that compatible with a theory of law as autopoietic system, as such a system would have to be totally independent and not have the kind of interaction that Teubner suggests.

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[59] Habermas, 1996, p 51.
[60] Habermas, 1996, p 51-53.
[61] Habermas, 1996, p 51-53.
[62] Habermas, 1996, p 54.

However, law functions as the connection between the lifeworld and the subsystems according to Teubner, and therefore law is not seen anymore as an autopoietically independent subsystem of its own. Law operates in a dual position as it functions between "a lifeworld reproduced through communicative action and …code specific subsystems that form environments for one another"[63]. The spheres of politics and economy do not listen to messages in ordinary language, thus only law can translate from the ordinary language into specific codes such as those of power and money. As the "transformer", law makes possible social integration through communication with subsystems. Teubner therefore agrees with Habermas that law is a medium for social integration in the context of a pluralist society.

5.2   Rawls's Theory of Justice

In using systems theory as developed by Luhmann and Teubner, Habermas could explain how law works as a method of social integration. Now, to introduce the other side of the coin, namely the argument for normativity, he introduces the theories of philosopher John Rawls, focusing on his ideas on justice. Rawls explains legitimacy in law through the workings of just institutions. Institutions should (by his belief) be set up in a just and fair way so that they will deserve the "rationally motivated assent of all citizens"[64]. Just institutions then create an environment where all citizens are free to pursue their own goals in a way that do not hinder others to pursue their goals. It is then in the citizens' best interest to live a life of justice. The socially integrative force for Rawls, thus, lies in institutions rather than in law itself. It is not the concept of law that is understood as just, but rather the institutions that uphold it.

This concept, however, can only work if there are institutions that are just in principle. Now we need to ask the question of how this conception of a just society (on the basis of institutional justice) can work in the existing political and cultural context to such an extent that citizens will be willing to reach a conclusion as to what can be seen as just? The term "reflexive equilibrium" is used by Rawls to explain how the "principles of justice reflect only the most reasonable convictions actually held by the population"[65].

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[63] Habermas, 1996, p 56.
[64] Habermas, 1996, p 57.
[65] Habermas, 1996, p 59.

The just institutions then become those that attain the most public support. In the case of public support, there needs to be an "overlapping consensus" amongst citizens for a certain idea of justice to be accepted.

In a pluralist, modern society, a variety of traditions, beliefs and lifeworlds coexist, making it difficult for overlapping consensus to be reached on a great number of matters. Therefore, a theory of justice should only focus on the "political-moral questions of principle" – those that will be found in the value systems of a large amount of the conflicting schools of thought[66]. This "thin theory of the good" (focusing only on a small number of overlapping questions of a political-moral character) should be post metaphysical in nature to be able to be successful to some extent in a pluralist and liberal context. Rawls's conception of the good should be formally defined but cannot engage with the real struggles that take place between conflicting groups in a pluralist society. This is the only type of normativity that can possibly enter a liberal society according to Rawls.

Although Habermas gives some acknowledgement for Rawls's theory of justice, he concludes that it does not sufficiently address the issue of how valid law is in fact possible. The idea of just institutions cannot alone explain the justice of law itself in its legal form; neither can it explain how the tension between legitimacy of law and the facticity thereof works. Habermas explains that a theory of law should then have a sociological as well as a philosophical side, to be able to explain the "normative reconstruction and the empirical disenchantment of the legal system"[67], taking into account the normative element of law as well as the factual element thereof. One should look at both sides of the coin.

5.3   A dual perspective: philosophy and sociology

Habermas looks at the work of Weber and Parsons, amongst others (a broadly neo-Kantian approach) to explain the type of dual perspective that should rightly show how law could be valid[68].

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[66] Habermas, 1996, p 61.
[67] Habermas, 1996, p 66
[68] Habermas, 1996, p 66.

Weber explains that the secularisation of society involves a process of rationalisation, whereby metaphysical orders are denounced, but not the legitimacy of law. The claim to legitimacy now lies in secular authorities, rather than sacred and metaphysical authorities. Habermas feels that Weber follows a selective study of law. For instance, he places too much emphasis on the "functions that law fulfils for the organization and exercise of political power". This relationship between modern law and political power overshadows the role that law plays in social integration. Habermas further explains that, for Weber, law does not receive its final legitimacy through democratic political will-formation, but rather from the legal medium that exercises political power, namely the legal structures of a country and the judicial system's authority. For Weber, law is legitimate if it is rationally constructed. However, Habermas notes that Weber's outlook on government by law is typically German, placing great emphasis on the elitist domination of political parties[69] through their power.

Habermas[70] revises Weber's idea of secularisation by looking at Parsons' and Durkheim's views respectively. Parsons spends some time on the constitutionalisation and juridification of political power. For him, the societal community is the central body from which other systems developed and law makes out the core of the societal community. Parsons studies law not as an instrument for political power through elitist parties, but rather in terms of its own functions. Durkheim explains the evolution of the societal community, as it eventually becomes what we see today as civil society.

Habermas comes to the conclusion that "modern law can stabilise behaviour expectations in a complex society with structurally differentiated lifeworlds and functionally independent subsystems only if law, as regent for a 'societal community' that has transformed itself into civil society, can maintain the inherent claim to solidarity in the abstract form of a believable claim to legitimacy"[71]. Therefore, modern law, central to civil society, can only play the role of social integrator if it can gain enough credulity by citizens affected by the law. Then again, citizens will only accept a law if they can rightly say that this law is believable (it does what it says) and if this law will enforce something

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[69] Habermas, 1996, p 73.
[70] Habermas, 1996, p 73-74.
[71] Habermas, quoted by Rasmussen, 1996, p 28.

that they find legitimate and that is in accordance with their own internalised value system. Public participation is important in this process of legitimisation, as individuals will much rather accept something if they were involved in the development thereof.

6 Criticism of Habermas

An analysis of Habermas's theory would not be complete if we did not also introduce some of the criticism of Habermas and the reviews of his work by others. This is the role of this section. Firstly some general comments will be made to situate Habermas in a broader theoretical environment and secondly specific reviews of his work will be discussed.

6.1 General comments

Powell and Moody[72] provide a general critique of Habermas's work in terms of the viewpoints of different theorists, which will be followed in brief. They explain that amongst Habermas's main critics are poststructuralists and postmodernists. The postmodernist debate (lead by theorists such as Derrida, Baudrillard and Lyotard) indicates that the project of modernity has become obsolete and should be replaced by other ways of thinking about society. The post-modern stream of thought is against any meta-narrative that claims universal value. Habermas' theory of communicative action is for Lyotard such a meta-narrative as it searches for a universal language in society.

According to Powell and Moody there are a few themes that play a central role in postmodernist thought and that stand in contrast to the ideas of Habermas. Firstly, postmodernists are set against the idea of absolute truth. For them, truth is always situational or context-bound. Secondly, fragmentation is emphasised rather than universality, the particular instead of the general. Thirdly, local power is perceived to be more sensible than the central power of for instance the nation state. Decentralisation and democratisation is promoted rather than centralisation. The fourth theme is that reality is not a meaningful concept for postmodernists, as what we perceive as reality is actually simulated. The consideration here again is that reality should not be seen as a universal truth. The last theme is that diversity and difference is valued far more than commonality and homogeneity. These themes all show towards a type of relativism. As we have seen

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[72] Powell & Moody, 2003.

throughout this chapter, Habermas emphasises the need for a common language in society that would give different lifeworlds a way to communicate with one another. He acknowledges the value of integration and strives towards a communicative rationality rather than having only situational guidelines for communication. This is because he values a dual perspective, incorporating both a systems and lifeworld view of society; that of an observer and participant. Although he does not deny the forces of fragmentation through differentiation, he knows that integration is a necessary precondition for society to keep functioning, despite differentiation. Powell and Moody highlights that this is a point on which postmodernists would generally not agree with him.

Apart from criticism based on the pure distinction between Habermas' thought patterns and those of the postmodernists, there are also other criticisms against Habermas that is noted by Powell & Moody[73]. They explain for instance that Niklas Luhmann is of the opinion that Habermas follows too many lines of argumentation and does not explain in advance which of these are relevant and which are only provided as extra information. According to Doorne, Habermas does not distinguish between formal pragmatics (philosophy) and empirical research (sociology). Doorne states that these two fields need to be handled apart from each other and Habermas does not set clear boundaries between the one and the other. Brand and Therborne has similar critique against Habermas' dual approach. According to Powell and Moody, however, Habermas has been successful in "using empirical research in linguistics and moral development to explicate his social theory". They insist that it is because of his speculative epistemology, which retains strong ties with empirical research, that he cannot be seen as a strict Marxist.

Another point of criticism against Habermas (again highlighted by Powell & Moody) is that his theories are not sensitive towards gender and racial inequality. Stanley and Patemen see Habermas' Theory of Communicative Action as a gender blind theory that sets forth an enlightenment tradition where women are inferior to men. However, the feminist philosopher Seyla Benhabib has used some of Habermas' theories in order to

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[73] Powell & Moody, 2003.

create a normative critique of modern society. This action can be seen, according to Powell & Moody, as proof for the contrary of the mentioned critique.

According to another theorist, Freundlieb, some of the classical advocates of critical theory are sceptical of Habermas's approach, especially of his rejection of the philosophy of the subject[74]. Habermas is of the opinion that a philosophy built around the subject should also rely on epistemic certainty. In an essay on Richard Rorty he wrote that the "ideas of 'self-consciousness' and 'subjectivity' imply that the knowing subject can disclose for itself a sphere of immediately accessible and absolutely certain experiences" if it turns its attention to its own representation of objects instead of focusing directly on objects[75]. Habermas says that he can prove that "the whole of Kantian and post-Kantian philosophy of the subject is caught in a certain network of concepts from which it cannot escape and which makes it impossible to conceive of the performative attitude adopted by subjects oriented towards mutual understanding"[76]. Freundlieb explains that, for Habermas, the focus of a social philosophy is in fact the interaction that happens between actors and the mutual understanding that is possible through the theory of communicative action.

6.2   Reviews of Habermas's work

Reviewing Habermas's work *Between Facts and Norms,* Andy Wallace[77] (from the University of Chicago) speaks with praise. He states that it is one of the most significant works in social and political philosophy. However, Wallace highlights one point of critique that will be explained briefly. He suspects that Habermas's "liberal commitment to the neutrality of democratic procedures of rational will formation is…inconsistent with the discourse paradigm that he supports". For Habermas (according to Wallace) neutrality means that justice takes precedence over conceptions of the good life, so that conflicts can be resolved in a just manner if all those affected have a common interest that they feel comfortable with. Wallace, however, does not necessarily agree with Habermas that having such common ground in modern society is possible, or whether Habermas's idea

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[74] Freundlieb, D. 2000. *Why Subjectivity Matters: Critical Theory and the Philosophy of the Subject.* p 299.
[75] Freundlieb, 2000, p 232.
[76] Freundlieb, 2000, p 233.
[77] Wallace, A. 1998. "Review of *Between Facts and Norms: A Discourse Theory of Law and Democracy* by Jürgen Habermas" in *Ethics* . p 625.

of justice does not in fact go hand-in-hand with a modern idea of the good life. Wallace asks the question whether Habermas's narration is really neutral with respect to how best to live one's life. Wallace also proposes that there are more reasons than a mere inconsistency in Habermas's argument, for discarding the idea of neutrality. He explains that if Habermas discarded neutrality, he would not have to provide so much proof for his viewpoint. Further, he says that such a choice would transfer the burden onto the model of communicative rationality, thereby creating a helpful divide between the complex questions of neutrality and rationality.

Joachim Savelsberg[78] from the University of Minnesota criticises in his review of *Between Facts and Norms* that Habermas only engages in arguments with rational choice and systems theorists. He says that Habermas is not in favour of "empiricist" approaches because they disregard the importance of a normative theoretical base – a problem which Habermas wants to overcome through his discourse-theory based model of deliberative democracy. It is suggested, though, that Savelsberg is not convinced of Habermas's success in this endeavour. He does say that this book is of great worth for those who study modern law and democracy, provided that they feel comfortable with the dual approach which aims to be at the same time normative and analytical. A further criticism coming from Savelsberg is that Habermas does not refer to the leading German and American sociological journals of the day. The lack of comparison with other similar theories as well as the lack of empirical evidence for Habermas's thesis means, for Savelsberg, that the gap does not narrow between abstract deductive reasoning and practical problem solving.

Seyla Benhabib[79] of Harvard University also produced a review of *Between Facts and Norms*, in which she says that Habermas searches for the "particles and fragments of an 'existing reason' already incorporated in political practices" of existing democracies. She expresses her doubts, though, as to whether these particles and fragments are enough to build a working democracy. She claims that most criticism of Habermas's work will be focused on his complex combination of metaethics and democratic theory. She feels that

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[78] Savelsberg, J. 1997. "Review of *Between Facts and Norms: A Discourse Theory of Law and Democracy* by Jürgen Habermas" in *The American Journal of Sociology*. p 1737 – 1739.
[79] Benhabib, S. 1997. "Review of *Between Facts and Norms: A Discourse Theory of Law and Democracy* by Jürgen Habermas" in *The American Political Science review*. p 726.

he has dealt too easily with his central argument that a system of rights and democratic sovereignty (or metaethics and democratic theory) can be compatible, and that critical readers would need a better explanation of this dual approach to be able to believe in it. She further thinks that Habermas is perhaps too optimistic about democracy, not saying enough about what she calls "democracy's discontent". She wants to know, for instance, what Habermas would say about the exploitation of the media by charismatic leaders; the strong resistance that is often found in so-called democratic countries against foreigners and immigrants; the "dismantling of the welfare state by neo-liberal governments"; the overwhelming "sense of apathy, cynicism, and disillusionment with the political process visible in so many democracies"; as well as the role that the rise in financial, capital and communication networks have in shaping democracies. These are all, according to Benhabib, absent from Habermas's notion of democracy.

Another reviewer, James Chriss[80], makes a significant point about Habermas's concern with the welfare state that we often find in new democracies. He says that because there is a greater range of rights that have been identified in these contexts, the legal enforcement of these rights actually encroach further and further on the lifeworld, thereby individualising legal claims. These rights become systems intervention in the lifeworld of society. The main problem that Habermas has, according to Chriss, with these social welfare rights is that it is often bureaucratically implemented through a central organisation with little or no participation of citizens. As we have recognised by now, Habermas places great emphasis on public participation as a main component of a successful democracy, especially in the instance of law, where he highlights the necessary normative aspect of law.

Despite these criticisms, there are many reviewers and critics who have great appreciation for Habermas's insights into modern law and democracy. As already mentioned, Wallace thinks that *Between Facts and Norms* is one of the most significant works in social and political philosophy. Bohman[81] states that *Between Facts and Norms* is a "sophisticated critical theory of law and democracy that aspires to narrowing the gap

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[80] Chriss, J. 1998. "Review of *Between Facts and Norms: A Discourse Theory of Law and Democracy* by Jürgen Habermas" in *Theory and Society.* p 418.
[81] Bohman, J. 1994. "Complexity, Pluralism, and the Constitutional State: On Habermas's Faktizität und Geltung" in *Law and Society Review*. p 928.

between democratic ideals and reality". Chriss[82] says that Habermas's linguistic account of social integration is still the best source for understanding the blessings and ills of modernity.

By providing a short summary of critique, this section intended to present the reader with a more complete view of how Habermas fits into a broader spectrum of ideas. It was not the objective to make a stand for or against Habermas, but rather to inform the reader of ways in which others may differ from or agree with Habermas. Having followed these critiques and reviews, it is highlighted again that Habermas's theory of law and democracy, although not superior to other possible options, was chosen as theoretical framework because of its specific relevance and application value with reference to the central research problem.

7 Conclusion

In this chapter we introduced some general concepts that are important in a study of Habermas (such as the concept of the lifeworld and system in society, colonisation of the lifeworld, etc.) and then some more specific ideas regarding democratic lawmaking and the dual character of law (facts and norms). The general concepts were mostly found in Habermas's two-volume work *The Theory of Communicative Action* and his theory of law comes from his work *Between Facts and Norms*. These ideas, however, were integrated through the course of the discussion to build a theoretical framework that can be put to use in this specific context. We will highlight the most important aspects here.

Time and again it is clear that Habermas is in favour of integrated perspective on key opposites in social theory: between participant and observer, structure and meaning, subjective and objective, philosophical and sociological, factual and normative, and system and lifeworld. It would have been clear in the discussion in this chapter that integration is also a key driver behind Habermas's dual theory of law. We can, for instance, learn much from the balance between society as a lifeworld and society as a system. In the lifeworld view of society it is seen as a social group with interaction taking place between actors. The systems view sees society as a self-regulating system with functional interconnections. These views need to be combined, according to Habermas, to

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[82] Chriss, 1998, p 425.

get a dynamic view of society. Out of the ideas of lifeworld and system flow two different types of integration, namely social and system integration. As Habermas explains, social integration is ultimately a prerequisite for systems integration to take place. If there is not some kind of way in which actors can relate to each other on a social level, society as a system will also not be able to develop.

Through social evolution, as society evolves from a tribal to a modern form, growing differentiation takes place within the lifeworld and in the system, but also between the two. As this happens, semi-autonomous subsystems are decoupled from the more traditional mechanisms of social integration, but these subsystems that form still have to be anchored in the lifeworld. This has the effect that general values and norms are necessary to govern and guide the activities of these subsystems (referred to as a post-conventional level of moral and legal consciousness), instead of traditional lifeworld-specific structures.

As Habermas explains, the problem is that actors can disagree about these general norms. One way of reducing the risk is to move from communication to 'delinguistified steering media' such as money and power to steer decisions. If this happens, however, the steering media can link up in more and more complex networks and follow a means-ends logic instead of a communicative logic. This is dangerous because systemic mechanisms, forming more and more complex networks, can suppress the symbolic reproduction of the lifeworld and disturb the balance between system and lifeworld. Habermas calls this incident 'colonisation' of the lifeworld.

Colonisation as explained here can be a threat for modern societies (like that of South Africa) with for instance a strong orientation towards free market capitalism and economic growth, or towards liberal democratic politics. Although these systemic mechanisms are not inherently destructive in nature, they can have a negative effect if a means-ends logic (whether driven by the market or politics) becomes superior to a common moral guideline. The society can even stand the risk of falling apart altogether on both the levels of system and lifeworld. It is therefore of unmistakeable importance that a common moral guideline of some sort, with a linguistic base, is preserved when systemic mechanisms are growing at a very fast pace.

This colonisation that Habermas speaks of can take place if any kind of systemic development in a society (or a country) happens at a very fast pace, and the people who are actors in the relevant society do not spend sufficient time to discuss the moral and ethical implications thereof. Systemic development can refer to a number of different things: from the increased use of technology and the growth of free market capitalism, to a change in the political system of the day or, as a result thereof, in the social relations between different citizens. The political, economic and cultural transformation of South Africa can be seen as a typical example of systemic development. Government and a variety of state, economic, legal and political institutions are being redesigned or invented to establish a new order. Obviously, nothing is completely new but the political pressure to create a different society means that institutions change rapidly and in terms of the political and social imperatives of the time. Such rapid developments mean that an instrumental logic may quickly become the order of the day as the new political leadership has to show that transformation is taking place. However, the necessary moral consideration and dialogue also needs to take place to engender social integration amidst systemic development in the new context. Moral and ethical discussions need to keep up with institutional and systems development in order to preserve the tension between system and lifeworld.

Habermas proposes that law plays the role of social integrator, but what are the prerequisites for law to be able to do this? How can the system of law fulfil this function? On the one hand law consists of rules and regulations that are enforced upon citizens – they have to abide to the law because of its authority. On the other hand this alone would not work in a democratic, liberal context – besides its factual authority, law has to have some kind of legitimacy. This is where we see that law in fact consists of facts and norms, legitimacy and authority. Law needs to balance the tension between facticity and validity in order to be successful in a liberal democratic society as South Africa. Legitimacy needs to enable de facto validity and this can only happen if enough public participation takes place. For Habermas, the participation of citizens is central to building a moral guideline, and thus a law that can preserve social integration.

As democratic law, BEE needs to be accepted as legitimate by all actors involved to be able to contribute towards the social integration of a multicultural South African society.

It must be understood as a just cause – not only by the governing bodies, but also by those who need to comply with the guidelines as well as those who are possible beneficiaries. The implication of Habermas's theory in terms of BEE will be further discussed in chapter 4.

The following chapter will now look at transformation in South Africa in general and the development of BEE in specific in order to learn more of the role of BEE as democratic law. The practice of transformational law will be introduced, set against the backdrop of the socio-economic context of South Africa.

Chapter 3: Transformation in South Africa – an overview

1 Introduction

Since the inception of the first democratic regime of South Africa in 1994, a drive for transformation has been prominent in policy formation processes of the government – on a political, socio-economic and cultural level. During the first few years of democratic rule, the transformation-drive was carried out indirectly through a number of government policies and strategies and after 2000 it was institutionalised by the implementation of specific legislation to govern economic empowerment in South Africa. The main legislation of relevance here is the Black Economic Empowerment Act[83], accompanied by the Codes of Good Practice[84] and several sector transformation charters. Today, after more than a decade of democratic government, we can look back over the whole process of transformation-driven policy formation that took place since 1994 up to the present, and gain some perspective on the tendencies and issues that have presented themselves in the course of the development of a Black Economic Empowerment (BEE) framework – even though it is still on-going and even though a full assessment of the current situation is outside the boundaries of what can be dealt with here.

The aim of this chapter is to follow the process of policy formation that accompanied the institutionalisation of socio-economic transformation in South Africa. This process will not only be described, but it will also be critically discussed in order to allow the current key issues to emerge. As mentioned in the previous chapter, Habermas agrees that one cannot see law only as a set of rules and regulations, irrespective of the process that brought them to being and whether or not such a process involved the actors that the rules apply to. This is why it is of great importance that the environment and context in which transformation has become formalised and legislated in South Africa is sketched. To be

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[83] Government of South Africa. 2003. *Broad-based Black Economic Empowerment Act* (Act No. 53 of 2003).

[84] Department of Trade and Industry. 2007. *The Codes of Good Practice on Broad-based Black Economic Empowerment.*

able to engage the issue from a Habermasian perspective, the development of BEE is to be discussed in terms of both the normative and empirical dimensions.

The first step in this process is to define and explain transformation as a general term. Section 2 of this chapter will be dedicated to this assignment. It is interesting in this regard that, although there are quite a few different fields and contexts in which the word 'transformation' is implemented, one does not easily come across a general and overarching definition of it. It was, however, deemed necessary to delve in the possible available definitions for the purposes of this thesis. Antjie Krog's ideas on transformation as explained in "A change of tongue" (2005) proved to be the most instructive because it is simple and practical.

We will move on to explain the social, political and economic pressure for transformation in South Africa in section 3. For this purpose, the history that led up to 1994 will be discussed briefly to highlight the most important events that played a role in creating the pressure. Statistics will also be provided through the course of the discussion to quantify to some extent the socio-economic situation of the country and the extent of inequality and poverty amongst South Africans.

Section 4 will address the most important steps in the early policy formation process for transformation since 1994, up to the point where the Black Economic Empowerment Commission was assigned to investigate the possibility of institutionalised empowerment through legislation. Consideration will be given to the macro-economic policy of South Africa and how it influenced the policy frameworks for socio-economic transformation. Legislation aimed at transformation and redressing the inequalities of the past will also be discussed.

We will then turn to a discussion of BEE as formal strategy for transformation in section 5. The different phases in the formation of BEE policies and strategies will be explained, as well as some important aspects of the technical implementation of the BEE strategy, what it entails and to whom it applies. We will briefly look at the balanced scorecard and its seven elements as it is defined in BEE legislation, the occurrence of transformation charters, the role of verification agencies, and so on.

This will be followed in section 6 by a discussion of a number of critical perspectives on BEE as situated in the current context of South Africa. The main criticism of BEE as transformation strategy will be discussed, coming from more than one viewpoint. These points of criticism can also guide us to discuss what a legitimacy debate about BEE would entail, in Habermas's terms.

2 Definition of transformation

The term transformation is implemented in many different disciplines, from mathematics and science, to linguistics and politics. It seems to be a word that is often used, but not so often explained in its general definition. A search of the word "transformation" on the internet-based encyclopaedia, Wikipedia[85], produces a number of different contexts in which the word has relevance. In genetics, transformation means "the genetic alteration of a cell resulting from the introduction of foreign DNA". In computing, transformation happens when data changes from one format to a totally different one. Transformation in literature means "the process of taking a foundation, or base text and changing it into a new genre, so that it can support itself without reference to the base text". Devapala Chetty[86] defines economic transformation in his MBA thesis as the building of "a sufficient level of inclusiveness or participation in the drive towards economic prosperity". This means that those who had not previously participated in the economy will now receive the opportunity, as the structure of the participating group is changed. It seems as if transformation always points towards fundamental change or restructuring from an old format into a new, so as to be independent from the old. It shows towards a total change from one form to another.

As mentioned in the beginning of this chapter, the transformation of South Africa has been an important quest for the new ANC government from the start of their reign in 1994, but what exactly does this mean? According to Michael Allen[87] in a study of South Africa's political economy, quite a few discourses intersect in the case of South Africa's transformation. According to him, political economists see it in terms of states and

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[85] Wikipedia: The Free Encyclopedia. 2007. *Transformation.*
[86] Chetty, D. 2005. *An investigation into South Africa's economic progress with special attention to transformation, participation and poverty alleviation*. p 4.
[87] Allen, M. 2006. *Globalisation, Negotiation and the Failure of Transformation in South Africa*. p 9.

markets, as well as capital and labour; sociologists speak of class, ethnicity and gender; legal scholars look at constitutions and public international authority. Allen further explains the Theory of Transformation[88] in terms of political economy, as he quotes it from Halpern (1969) and Brown (1979). He says that "social structures are formed from encounters between people as they act in pursuit of economic, social, and psychological wants". This theory therefore purports that no structures in political economy are actually fixed and that the crucial unit of analysis is relationships between people and groups. The "engine of change" is people and relationships.

Gerber[89] looks at transformation from a political management viewpoint, while studying land reform in South Africa. He says that two different interpretations of democracy[90] inform two types of transformation that could potentially take place. The first, a liberal democracy, depends upon a separation of politics, economy and society. Because the state does not have power over all the spheres, transformation needs to take place through free market forces and civil society. The fundamental nature of the second type, liberationist democracy, is a merging of the spheres of politics, economy and society. In this instance, transformation is driven by the state and not through liberal democratic principles.

The definitions covered here provide useful insights into the nature of transformation out of an economic, a political economy or a political management view respectively. However, it is in the work of South African poet, journalist and prose writer Antjie Krog[91] that we find a clear, simple definition that is not specifically economic or political in its nature but honest in attempting to deal with the normative dilemmas of the matter. Krog's work of prose, *A change of tongue,* follows the change that took place in South Africa during the first 10 years of democracy after 1994. In this book – a combination of story-telling, poetry and prose – Krog provides significant intellectual thoughts around transformation. According to her, two basic elements or parts of the word "transformation" need to be investigated in terms of its linguistic origin, namely "trans" and "form". "Trans" comes from Latin and means "over" or "to the other side", whereas

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[88] Allen, 2006, p18.
[89] Gerber, JA. 2004.
[90] Gagiano & Du Toit, quoted by Gerber, 2004. p 18.
[91] Krog, A. 2005. *A Change of Tongue*. p 135.

"form" as a verb indicates towards giving structure, or creating something. If you combine these two parts, you will see that "transformation" can mean "to form the other side", or "to create that which you are on your way towards". In this sense transformation is an active process that cannot take place without participation – without actors themselves "forming the other side".

It further seems to Krog as if there is a logical progression from change through metamorphosis, ending in transformation. Change does not necessarily mean metamorphosis or transformation, but transformation always means metamorphosis and change as well, and metamorphosis always also implies change. Transformation then is the most all-encompassing concept of the three. This progression is illustrated by Diagram 3.1:

Diagram 3.1:

Change

⇩

Metamorphosis

⇩
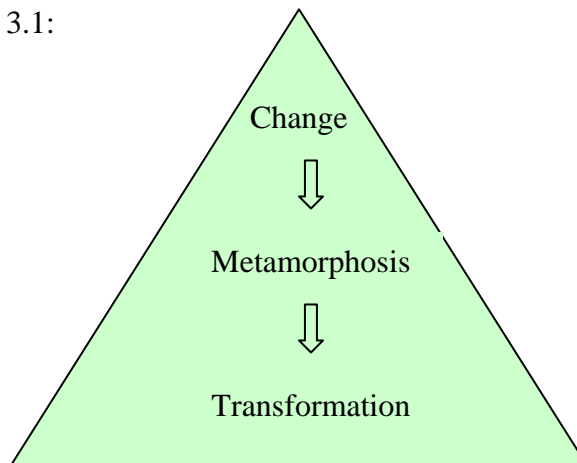
Transformation

Another valuable idea that Krog[92] came across in her studies of transformation, is that people as individuals cannot transform. According to an unknown psychiatrist that she refers to, the concept of transformation would not be found in any psychology handbooks. One can say that a person can experience personal growth or development, but not transformation. The rationale behind this theory is that a person who transforms totally will not be the same person anymore and will lose his or her sense of self. A person can have access to a number of identities to make use of in different circumstances, but that would not equate the total and fundamental change that is intended by transformation. Organisational transformation then does not mean that the

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[92] Krog, 2005, p 138.

people of the organisation changed their identities completely, but merely that they learned to integrate different identities, such as being white, as well as South African, being from the continent of Africa and so on.

Krog[93] mentions the Marxist idea of transformation as another step in an explanation of the term. Karl Marx was of the opinion that the underlying economic base of society needs to change in order to change the way society works on the surface, and a revolution is the only way to initiate such change. A coup d'état would mean a change in the governors of a country, but only a revolution would lead to real deep-rooted transformation and change the economic base of society fundamentally.

Within a democratic system, a revolution is not necessarily needed to initiate transformation, but there exists three distinct phases, as one academic explained it to Krog[94]. In the first phase resources need to be "liberalised" and thus unlocked for all the previously disadvantaged individuals to acquire access to it. Unfortunately, this phase often leads to violence and uproar. It is this unlocking of resources that Marx thought would only be possible through a revolution. In South Africa, this liberalisation took place roughly between 1990 and 1994 – set in motion by FW de Klerk's speech in 1990 when the later President Nelson Mandela was set free from prison.

The second phase in the transformation process is the complete participation of all those affected in decision-making processes and power structures, as well as full representation. In South Africa, we moved into this phase in 1994, when the first democratic election was held and all South Africans were represented for the first time. In the third phase of transformation, democracy needs to filter through to all spheres of society. Although it was at first initiated in the political sphere, it now needs to expand towards the economical, social and cultural spheres of society. It seems as if political transformation sometimes happens with relative ease compared to economic and social transformation, not to mention deep-rooted cultural transformation.

The FW de Klerk Foundation agrees with Antjie Krog when they say in an informational document about transformation and Black Economic Empowerment in South Africa that

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[93] Krog, 2005, p 137.
[94] Krog, 2005, p 136-137.

the concept of "transformation" has a far wider reach than "transition", as the latter merely refers to a "formal change in the political order and power-relationships in a given society" and the former includes the supporting sub-structures, namely economic activity, social interaction, cultural norms and informal power relations[95]. This viewpoint is similar to that of Allen, mentioned earlier in this section.

Looking at the three phases of transformation in a democratic system as explained by Krog, one can say that the successful completion of all three phases can be seen as a measure for successful transformation. It needs to surpass the level of mere liberalisation of resources and representation in political decision-making to reach a point where fundamental change filters through to the economical, social and cultural levels. The problem, however, is to determine such success. When and how would we know that transformation has filtered through to all levels? This is not a question that can be settled on a scientific level and no purely political or economic or sociological analysis will be adequate. It is a normative question that has to be dealt with in an integrated and socially engaged manner knowing that whatever markers are indicated, these will always be contested.

As mentioned, the South African government has taken transformation up as one of the main drivers behind their policy making endeavours since 1994. This objective is visible in the Constitution as well as various policy documents. What we do not know, however, is how successful the government has been in their endeavour to transform and whether they have in fact been successful enough so that actors affected by BEE would grant it legitimacy as a moral and ethical cause. This question will only be explored at a later stage. Now we will rather turn our attention to the pressure for transformation in order to understand why it is so high on the government's agenda. In the next section, the need for transformation in South Africa will be investigated using two focus areas, namely the history of the country and the developmental statistics that is available.

3   The pressure for transformation in South Africa

3.1   A history of unequal development

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[95] Price, quoted by the FW de Klerk Foundation, 2006. *Transformation and Black Economic Empowerment in South Africa*.

One of the main reasons that the government provides to legitimise their drive for transformation and empowerment is the history of apartheid and the structural exclusion that went with it. In the Strategy for Broad-based Black Economic Empowerment, developed by the Department of Trade and Industry (DTI), it is stated that structured exclusion from the economy started in the late 1800's under British colonial reign, although informal marginalisation started even before that[96]. To understand this legitimisation, we need to briefly explore the history of the country since the beginning of the 1900's up to 1994.

In the early 1800's black people experienced a period of development and prosperity in South Africa as more and more of them emerged as entrepreneurs, specifically in agriculture[97]. However, this picture was systematically turned around in the late 1800's and early 1900's, this decline being a direct consequence of the economic and political situation of the time. A series of laws were introduced that deprived black people of rights and privileges that they previously had access to.

The Mines and Works Act of 1911 – commonly referred to as the 'First Colour Bar Act'[98] – reserved a percentage of the jobs in mines for white workers and consequently black workers were not able to improve their job level or salary beyond a certain point. This act was implemented to restrict mine owners in the use of (generally cheaper) black labour as a substitute for white labour. Although not being illegal, black unions were not registered with the Ministry of Manpower until the 1970's and thus the terms of employment in the country were wholly controlled by white unions.

Another main piece of legislation to recall from that time was the Land Act of 1913 that allocated 13% of land in South Africa as 'black reserves'[99]. Black people were hereby prohibited to buy land in any other area than a reserve. Through these formalised and other less formalised measures used during the Apartheid era, black people were systematically marginalised and disadvantaged.

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[96] Department of Trade and Industry, 2004. *South Africa's Transformation: A Strategy for Broad-based Black Economic Empowerment*. p 6.
[97] Louw, L. & Kendall, F. 1986. *Suid-Afrika: Die Oplossing*. p 7-11.
[98] Hazlett, T. 2002. *Apartheid*.
[99] DTI, 2004, p 6.

World War II left a large number of poor white people in South Africa and after 1948 white unemployment was quite a significant problem. The National Party implemented apartheid as an integral part of their governing strategy, partly in order to improve the situation of white people[100]. With the rise of Afrikaner-nationalism, the idea of separate development for black and white people were widely propagated and wholly institutionalised through a variety of apartheid laws. It has been said that apartheid, through these laws, was the world's most successful affirmative action policy[101].

Racial segregation was now implemented on social, residential, cultural, economical and political levels[102]. The Group Areas Act of 1950 was one of the most influential instruments of legislation in this time. One could also mention the Prohibition of Mixed Marriages Act of 1949, the Immorality Act of 1950, the Population Registration Act of 1950, the Suppression of Communism Act of 1950, the Prevention of Illegal Squatting Act of 1951, and the Reservation of Separate Amenities Act of 1953, to name just a few[103].

There were laws that impeded access to capital, prohibited black people to start businesses in large parts of towns and cities, limited black entrepreneurs to have only one business, prohibited them to register companies or partnerships and prohibited them to own business premises[104]. Because of the restrictions on property ownership, black persons did not own any assets that could serve as collateral for loan financing and they were barred from the long-term accrual of capital and economic growth[105].

During the 1970's apartheid started slowly to degenerate. Because of a shortage of white skilled labour, it was announced in 1973 that black people could apply for jobs that required skilled work in white areas. The defence force announced in 1975 that black soldiers would have the same status as their white counterparts[106]. According to

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[100] Hazlett, 2002.
[101] Whiteford, A. & McGrath, M. 1998. *Income inequality over the apartheid years.* p 1.
[102] Louw & Kendall, 1986, p 41.
[103] Wikipedia. 2007. *Apartheid.*
[104] Gelb. 2004. *Economic Growth and Transformation.* p 9.
[105] DTI, 2004, p 6.
[106] Giliomee & Schlemmer, quoted by Hazlett, 2002.

Hazlett[107], the growth of an educated, urban African population with a noticeable black middle class played a great role in raising the cost of enacting apartheid.

3.2   Developmental statistics

The effects of the historical development of South Africa (and the structural discrimination of the apartheid era) during the twentieth century is also mirrored by the available developmental statistics. A general overview of these statistics will be provided here, with the focus on those pertaining to inequality and poverty.

South Africa has been recognised at times as one of the most unequal societies in the world. In a World Bank Development Report of 1992, South Africa has been shown to be the most unequal country, followed by Brazil. In this report it was indicated that the poorest 40% of households in South Africa earned less than 10% of the total income and the richest 10% earned more than half of the total income[108].

According to Whiteford and McGrath[109], the per capita income of white people was 15 times higher than that of black people by 1970 – at the peak of apartheid. During the period of 1917 to 1970, white people earned about 70% of the total income in South Africa and only comprised 20% of the population[110]. Change in income distribution since the 1970's to 1991 have been gradual. White income as percentage of total income has decreased, but still the income data of 1991 indicates a stark inequality. In 1991 white people made up slightly more than 13% of the population but still earned over 60% of the income whereas Africans earned 28% of the income and comprised 75% of the population. In 1991 white people earned an income of 11.7 times higher than black people.

The racial effects of inequality can be highlighted by using the racial composition of income deciles. Whiteford and McGrath[111] indicate that 87% of households in the poorest decile were African in 1975; in fact, African households dominated the poorest six deciles at the time. The situation changed slightly so that in 1991 only the poorest four

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[107] Hazlett, 2002.
[108] Whiteford & McGrath, 1998, p 5.
[109] Whiteford & McGrath, 1998, p 1.
[110] Whiteford & McGrath, 1998, and Hazlett, 2002.
[111] Whiteford & McGrath, 1998, p 6-7.

deciles were dominated by black people. Black representation in the lowest deciles slowly started to decrease and there was an increase in the black representation in the highest two deciles. This indicates towards the development of a black middle class during this period, as already mentioned in the previous section. Leibbrandt, Poswell, Naidoo, Welsch & Woolard confirm this trend[112] (2005).

The Gini coefficient, named after the Italian demographer Corrodo Gini[113], is acknowledged worldwide as one of the most significant measures of inequality. A Gini coefficient of 0 means total equality in a society and 1 means total inequality. The higher this figure is for a certain measured society, the more unequal is the society. Compared to other countries South Africa's Gini coefficient is extremely high. In 1991 a Gini coefficient of 0.68 was measured for South Africa, compared to 0.57 for Columbia, 0.51 for Turkey and 0.50 for Mexico[114].

Gini coefficients inside race groups in South Africa also show large increases for the white and black population groups respectively, from 1975 to 1991[115]. The Gini coefficient for the black (African) group increased from 0.47 in 1975 to 0.62 in 1991 and for the white group the figure increased from 0.36 to 0.46. The South African economy did not experience a very fruitful time during this period of 1975 to 1991. This time was in fact characterised by low and even sometimes negative economic growth, a decline in living standards, high levels of unemployment and high inflation[116]. Sampie Terreblanche[117] asserts that the average annual growth rate of the South African economy was a mere 1.7% between 1974 and 1994 and the per capita income decreased by 0.7% on an annual basis. The unemployment level increased from 20% in 1974 to 30% in 1994. From 1989 until 1994, the budget deficit increased from less than 3% of GDP to over 9% and government debt increased from R100 billion to R250 billion.

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[112] Leibbrandt, M, Poswell, L, Naidoo, P, Welsch, M & Woolard, I. 2005. *Measuring Recent Changes in South African Inequality and Poverty using 1996 and 2001 Census Data*.
[113] Mohr, P & Fourie, L. 1996. *Ekonomie vir Suid-Afrikaanse Studente*. p 126 – 127.
[114] Whiteford & McGrath, 1998, p 8.
[115] Leibbrandt, et. al., 2005.
[116] Mohr & Fourie, 1996, p 141.
[117] Terreblanche, S. 2005. *An Evaluation of Macro-economic Policy in the Democratic Era*.

There have been many opinions on the link between growth and income distribution. According to Merle Holden[118] in an academic report by the Centre for Development and Enterprise, the traditional view is that when countries start to industrialise, inequality would rise and as industrialisation has been running for a few years, inequality would decline again. An inverted U-shape, called the Kuznets curve, would then depict the relationship between growth and inequality. However, according to Holden, more recent studies suggest that inequality steadily declines with industrialisation growth. This trend is consistent with what happened in South Africa, as sufficient growth did not take place in the time from 1970 to 1990 and inequality therefore did not decline, but increased.

Poverty is another indicator that can be used to portray the socio-economic situation of South Africa as a result of its developmental history. Whiteford and McGrath[119] categorises a household as poor if it earns an income of less than the Minimum Living Level (MLL) for African households (calculated by the Bureau of Market Research). They indicate that the former TBVC states (Transkei, Bophuthatswana, Venda, Ciskei), the previous 'homeland areas', have noticeably higher poverty rates than the rest of South Africa. In 1991 76.7% of households in the TBVC states were labelled as poor and 43.3% of households in the rest of South Africa. This is, according to Whiteford and McGrath, largely due to the racial segregation policies of apartheid. However, one should note that these areas are also mainly rural – another possible reason for higher poverty levels.

Racial measurement of poverty further indicates significant trends to monitor as 67% of the black people in South Africa lived in poverty in 1991 and only 6.7% of white people. 38% of Coloureds and 18% of Asians also lived below the poverty line. Of the 9 provinces of South Africa, the Northern Province and the Eastern Cape have the highest levels of poverty as 77% of households in the Northern Province and 72% of households in the Eastern Cape respectively live in poverty. The Western Cape (26%) and Gauteng (23%) house the lowest percentage of poor households.[120] It is perhaps significant to highlight that the Northern Province and Eastern Cape house a very large percentage of the African people in South Africa.

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[118] Holden, M. 2005. "Growth in South Africa" in *The Next Decade: Perspectives on South Africa's Growth and Development*. (Ed. Bernstein, A. & Johnston, S). p 183.
[119] Whiteford & McGrath, 1998, p 14-15.
[120] Whiteford & McGrath, 1998, and Leibbrandt, et. al., 2005.

Although some small improvements could already be noted in the period leading up to the 1990's and a black middle class started to develop, the economic performance and development indicators provided here shows us that transformation in a more structured manner was still desperately needed in South Africa when the new democratic government was inaugurated in 1994. The apartheid regime with its structural discrimination left in the country a highly divided society, and created the need for transformation.

4   The drive for socio-economic development after 1994

As we have mentioned the main focus of the new democratic government of South Africa after 1994 has been socio-economic development, with the specific goal of redressing the inequalities of the past. This focus is also embedded in the Constitution as it places great emphasis on the equality and freedom of all South Africans[121]. One can now proceed to look at the relevant policy frameworks as well as the legislation aimed at transformation to see how these played a role in addressing the problems of an unequal society. Although the policy frameworks mentioned in the next section focus more on economic policy than transformation policy specifically, it informs the way that the government approach transformation as well.

4.1   Policy Frameworks

The Reconstruction and Development Programme (RDP), introduced in 1994, was the first tangible policy driven by government to address inequality and poverty. According to the DTI[122] the RDP "set out a comprehensive plan for mobilising all South Africans towards the final eradication of apartheid and the building of a new democratic, non-racial and non-sexist society and economy". The RDP was developed by the ANC in consultation with a number of private organisations, non-governmental organisations (NGO's) and research institutions. On the ANC's website the official explanation of the role of the RDP is that it is a plan to address social and economic problems such as violence, a lack of housing, a lack of jobs, inadequate education and health care, a lack of

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[121] DTI, 2004, p 7.
[122] DTI, 2004, p 7.

democracy and a failing economy[123]. The aim of the ANC was to attempt at addressing these problems in a holistic, integrated manner through the RDP, a document that built upon the tradition of the ANC's Freedom Charter of 1955. This is an indication that this document was still very much in standing with the ANC's traditional ideas and had a strong political foundation. In retrospect this programme, according to the DTI, lacked focus and overarching strategic framework.

Although the RDP is still viewed as the underlying base for socio-economic policy considerations of the ANC as ruling party, it was replaced as macro-economic strategy by the Growth, Employment and Redistribution (GEAR) Strategy in 1996. In the GEAR strategy, it is explained that its focus is to rebuild and restructure the economy, "in keeping with the goals set in the Reconstruction and Development Programme"[124], specifically the goal to integrate growth and development in one single strategy. At this point in the development of the young South African democracy, the economic growth of 3% per annum did not sufficiently address problems of unemployment, inadequate social service delivery and inequitable distribution of wealth. This new strategy was aimed at addressing these problems amongst others. It has been said[125] that the GEAR strategy marked a new era in the ANC government's economic policy formulation process, with its focus on market growth as a tool to speed up development. According to Greta Steyn in a report on growth and development by the Centre for Development and Enterprise[126], the GEAR strategy was an important step in the evolution of ANC economic policy, but it was not necessarily a "sudden jump". It was rather a "broad, sometimes vague, formalisation of the dominant economic approach within the ANC".

The ANC came from the tradition of a socialist liberation movement with a strong working class support. It was therefore obvious that economists were worried that their economic policy as ruling party would also have the socialist focus that the party had as struggle movement. Economists were relieved when Mandela commented in 1994 on economic policy: "In our economic policies…there is not a single reference to things like

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[123] ANC. 1994. *Reconstruction and Development Programme*.
[124] Government of South Africa. 1996.
[125] Marais, H. 2001. *South Africa: Limits to Change: The Political Economy of Transition*. p 124.
[126] Steyn, G, 2005. "Going for Growth: The ANC Government's Economic Policies" in *The Next Decade: Perspectives on South Africa's Growth and Development*. (Ed. Bernstein, A. & Johnston, S). p 183.

nationalisation, and this is not incidental. There is not a single slogan that will connect us with any Marxist ideology."[127] Prior to 1990, with a number of key leaders in exile or in prison, the ANC did not spend a lot of time on developing an idea of economic policy, and therefore the public was unsure as to what their focus would be in this regard. There are a number of opinions on the choices that the ANC made regarding policy in this era. Marais[128] says that they moved from ideas of developmentalism as you would see it in Eastern European countries in the 1980's to more of a mixed concept with the state still playing a central role by 1989, to a more capital-driven concept later in the 1990's. There is a correlation between this third step of more market-lead policy and the policy focus of the GEAR strategy, which also relied more on the forces of the market and capital.

According to Andreasson, the ANC had three options to pursue after the transition in 1994: They could follow the revolutionary path of "expropriation of the commanding heights of the economy and engage in comprehensive redistribution by compulsion by directly confronting domestic and capital interests" as in the case of Zimbabwe; they could follow the radical reforming path with liberal political institutions, high taxation and nationalisation as expressed by the ANC's Freedom Charter and the RDP; or they could follow the neo-liberal path, opening up to the global economy, promoting a free market system and funding development with growth, hoping that it would filter down[129]. This third option, according to Andreasson, eventually seemed the most promising for the ANC, and the natural way that the world was moving at the time. Not all economists and academics agree that the ANC policy can be explicitly called neo-liberal, but there are some strong proponents of this idea, such as Andreasson.

A number of theorists have very strong criticism against the so-called neo-liberal economic policy that is for them anonymous with the GEAR strategy's approach. One of the strongest critiques is that it does not acknowledge "the sharp structural division between the first and the second economies", as Sampie Terreblanche[130] mentions. The macroeconomic inadequacies of the economy were, according to this policy, to be

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[127] Marais, 2001, p 122.
[128] Marais, 2001, p 123.
[129] Szeftel, quoted by Andreasson, S. 2005. "The African National Congress and Its Critics: 'Predatory Liberalism', Black Empowerment and Intra-Alliance Tensions in Post-Apartheid South Africa" in *Democratization*. p 307.
[130] Terreblanche, 2005, p 4.

restored merely by a trickle down effect from the first to the second economy. The idea is that if economic growth is boosted, it will invariably address socio-economic problems as well. Terreblanche states that the GEAR strategy failed in its attempts to address problems such as unemployment and poverty, as the unemployment rate increased from 30% in 1994 to 42% in 2004[131]. Andreasson[132] notes that "while neo-liberal reforms may be intended to enhance the overall capacity of government, they produce rather different outcomes in divided societies such as South Africa (characterised by generations of uneven development)".

As mentioned, there are different opinions as to whether GEAR was explicitly neo-liberal in its approach or not. Steyn[133] mentions that GEAR's strong focus on the role of the public sector in creating new jobs illustrates in fact that it is not necessarily neo-liberal. This argument, however, will not be followed here in any more detail. Whatever the case may be, the GEAR strategy has been criticised to a great extent in terms of its failures and by 2000 it was clear for policy makers that the strategy did not propel South Africa onto a higher growth path as its intention was. The strategy made a lot of policy assumptions, but did not provide clear guidelines as to how these should be implemented in reality[134].

A recurring theme of all economic policy documents after GEAR had been the fact that something more was needed to improve growth in the economy. In a discussion paper[135] issued by the DTI in May 2002, it is stated that this "something more" should be microeconomic interventions that can assist the macroeconomic policy. BEE is listed as one of these interventions.

4.2 Legislation aimed at transformation

Moving on from the policy frameworks mentioned one can now highlight the legislation that has been intended to guide government policy in transformation. The legislation includes the Promotion of Equality and Prevention of Unfair Discrimination Act, Extension of Security of Tenure Act, Restitution of Land Rights Act, Employment Equity

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[131] Terreblanche, 2005, p 4.
[132] Andreasson, 2005, p 309.
[133] Steyn, G, 2005, p 191.
[134] Steyn, G, 2005, p 191.
[135] Steyn, G, 2005, p 193.

Act, National Empowerment Fund Act, Competition Act, National Small Business Act, Telecommunications Act, Preferential Procurement Policy Framework Act and the Minerals and Petroleum Development Act[136]. Just a few of the mentioned acts will be discussed here as the aim is merely to provide an overview.

The National Small Business Act of 1996 was formulated to assist new small black-owned and black-controlled business. Black entrepreneurship was crucial for the growth of the economy and this act thus had an important role to play in assisting entrepreneurs, specifically small, medium and micro enterprises (SMMEs) through financial and other methods[137].

The Employment Equity Act of 1998 focuses on the constitutional right of equality by promoting the employment of Africans, Coloureds and Indians, as well as women of all races. This act prescribes the submission of an Employment Equity Plan by companies of a certain size in order to monitor their employee figures and ensure that companies have a diverse workforce[138].

The Skills Development Act of 1998 addresses the skills shortage of South Africans. It provides an "institutional framework for national, sector, and workplace strategies to develop and improve the skills of the South African workforce"[139]. In conjunction with this act, the National Qualification Framework has been created to measure the standardised level of any qualification. A levy-grant scheme has also been implemented by which companies that spend a certain amount on skills development, can claim a percentage of their expenses back from the National Skills Fund.

These acts have all been intended to work towards the same goal of deracialising the South African economy. The Land Reform legislation and policies have also played an important role in this regard. The large amount of media coverage is proof of the fact that land remains a sensitive and emotionally laden issue. The Constitution of South Africa protects property rights and also allows for "comparable redress or compensation should

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[136] DTI, 2004.
[137] DTI, 2004.
[138] Department of Labour. 1998. *Employment Equity Act (No. 55 of 1998)*.
[139] Department of Labour. 1998. *Skills Development Act (No. 97 of 1998)*.

the Government consider the expropriation of land"[140]. However, the Constitution also provides for market related solutions. The strategy for Land Reform consists of three legs according to the 1997 White Paper on Land Policy: restitution, redistribution and tenure. The Departments of Land Affairs and Agriculture play an important role in the implementation of this strategy.

The Land Restitution Programme runs in conjunction with the Restitution of Land Rights Act, 22 of 1994 to deal with claims from persons or communities who were dispossessed of land after 19 June 1913 (Date of the Natives Land Act) due to any racially discriminative policy[141]. 67 531 claims were lodged for this purpose by March 1999. The Land Redistribution Programme is focused on providing previously disadvantaged and poor black individuals with land for housing as well as reproductive purposes. Several forms of redistribution can be listed[142]: group settlement with some production, group production, commonage schemes, on-farm settlement of farm workers and farm worker equity. The Government used a basic grant of R16 000 per household, which was supplemented by other funds. The Land Tenure Programme is aimed at providing people (especially labour tenants) with secure tenure to prevent evictions[143]. This is based on the constitutional right that all South Africans have access to legally secure tenure in land. The Land Reform Act of 1996, the Interim Protection of Informal Land Rights Act of 1996 and the Extension of Security of Tenure Act of 1997 have played a role in providing legislation for this leg of the land reform strategy.

4.3   An integrated strategy for socio-economic transformation

All of the above policies, strategies and legislation somehow aim at social and economic development with the main focus of redressing the imbalances of the past. However, it gradually became more apparent for the ANC government that focus was still lacking in their strategic drive for transformation. The government[144] noted that "what has been lacking has been a comprehensive black economic empowerment strategy that draws together the various elements of government's transformation programme in a more

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[140] Sibanda, S. 2001. *Land Reform and Poverty Alleviation in South Africa*.
[141] Sibanda, 2001.
[142] Sibanda, 2001.
[143] Sibanda, 2001.
[144] DTI, 2004, p 11.

coherent and focused way". A common definition and strategic direction needed to be given to the transformation strategy, and out of this need, institutionalised transformation was born in its integrated form: the Black Economic Empowerment (BEE) Strategy.

5   A formalised strategy for empowerment: BEE

The first noteworthy step in the development of BEE as a regulatory framework was the establishment of a BEE Commission in 2001. This Commission was called to life to look at the possibility of a formalised strategy for empowerment guiding the meaningful transfer of ownership in South Africa into the hands of black people. For this purpose, a comprehensive report[145] was released in 2000 with recommendations for the possible targets that could be set for BEE. These targets included that equity participation by black people in the economy should increase to 25%, black people should hold 25% of shares in companies listed on the Johannesburg Stock Exchange (JSE), 40% of executive and non-executive directors of companies listed on the JSE should be black, 50% of state-owned enterprises and government procurement should go to black companies, 30% of the private sector should be black companies and 40% of management (senior and executive) in private companies should be black.

One of the strongest criticisms was that the BEE Commission consisted mainly of black business leaders who had mostly their own interests at heart. The commission's terms of reference were to "develop a clear and coherent vision and strategy for BEE, [to] locate the empowerment project as part and parcel of the transformation of South African Society [and to] examine ways in which black business can speak with a united voice". It was the exclusionist approach of this last mentioned point that unlocked the most criticism partnered with the fact that the commission was appointed by the Black Business Council. The strategy proposed by the commission was also more narrow-based in its empowerment focus, emphasising mainly empowerment through ownership and management control.

In 2003 the Strategy for Broad-based Black Economic Empowerment[146] was released by the Department of Trade and Industry (DTI) as a next step in the process. This strategy to

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[145] Black Economic Empowerment Commission. 2001. *Black Economic Empowerment Commission Report.*
[146] DTI, 2004.

this day serves as an overarching informative document that explains the background to the BEE process: the transformation imperative, the need for transformation and the proposed BEE strategy to address inequality. The strategy document differs in approach to the BEE Commission's report, as it emphasises the need for an integrated strategy that addresses socio-economic problems and at the same time promotes economic growth, but places less emphasis on the development of a united group of black business leaders and the creation of wealth for black businesses. In February 2006 President Thabo Mbeki announced that the BEE strategy should assist Government in halving unemployment and poverty in order to narrow and eventually close the gap between the first and second economies in South Africa[147]. Only a broad, all-encompassing development strategy can attempt this ideal.

Subsequent to the release of the BEE Strategy in 2003, the Broad-based BEE Act (Act No. 53 of 2004) was promulgated. This act presently regulates the BEE process and is aligned with other key transformation legislation such as the Employment Equity Act, the Skills Development Act, the Preferential Procurement Act and the Small Business Act. Section 9 of the Broad-based BEE Act authorises the Minister of Trade and Industry (the Minister) to promulgate Codes of Good Practice (the Codes) that governs the measurement of BEE compliance against targets. The act also authorises the Minister to promote the development of transformation charters in each sector of the economy to guide and inform empowerment practices in a certain sector[148]. The Minister may accept or refuse an application for the gazetting of a transformation charter. These charters can be gazetted under section 12 of the act, or under section 9 – the latter giving it similar status to any other Code of Good Practice.

Following previous draft rounds, the final promulgated Codes were issued on 9 February 2007 by the DTI. The Codes act as the technical guideline for the implementation of BEE, addressing seven different elements: ownership, management control, employment equity, skills development, preferential procurement, enterprise development and socio-economic development. These will be discussed in more detail at a later stage.

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[147] Department of Trade and Industry. 2006. *The Codes Simplified: A Quick Guide to the Finalized Codes of Good Practice*.
[148] Government of South Africa. 2003.

5.1   Defining BEE

The definition of BEE as a strategy has certainly changed quite a lot through the process of formulating the strategy, from the first talk of BEE in the 1990's to the present. There have also been different opinions as to what the definition should be.   Andreasson[149] defines BEE as "a broad set of policies modelled on 'affirmative action' policies elsewhere and intended to provide better access to the marketplace (including education, job training, hiring and promotion) for previously disadvantaged South Africans". A somewhat broader definition is provided by the DTI in the Strategy for Broad-based BEE (2004), saying that BEE is an "integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significant increases in the numbers of black people that manage, own and control the country's economy, as well as significant decreases in income inequalities". In the BEE Act it is stated that "black people" is a generic term that refers to Africans, Indians and Coloureds.

The shift from narrow-based to broad-based empowerment played an important role in developing the concept of BEE. The first ideas around empowerment were focused more on capitalist wealth creation for black people as well as the promotion of a unity between black businesses (as mentioned in the BEE Commission report). Gradually it became important for policy makers to talk about broad-based empowerment rather than only black empowerment, meaning that such a strategy should encapsulate broader socio-economic development. Due to the criticism from various sources that BEE only creates more wealth for a few already rich black capitalists, the term broad-based is now used extensively defining the strategy for BEE and is regarded as the politically correct term. To reiterate this point, the four key principles of BEE as stated in the Strategy for BEE[150] are that it is broad based, inclusive, it is associated with good governance and it is a central part of South Africa's growth strategy.

5.2   The implementation of BEE

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[149] Andreasson, 2005, p 312.
[150] DTI, 2004, p 13.

As already mentioned, the Broad Based Black Economic Empowerment Act of 2003 is the main legislative framework that guides the promotion of BEE in the economy. The Codes supplement this act and explain all the finer details of how BEE should be implemented as well as the intention behind the legislation. Central to the contents of the Codes is the broad-based BEE balanced scorecard that is used to regulate empowerment by measuring targets set by the DTI. In the Codes, detailed instructions are provided for the calculations that must be made to determine an enterprise's BEE score and all the technical specifications and exceptions are thoroughly dealt with.

BEE compliance is a voluntary process for all role players. The following entities are measurable under the Codes: public entities, any other entities that undertake business with an organ of state or any entities that undertake business with an enterprise that is subject to measurement. Entities are categorised as generic enterprises, small qualifying enterprises (QSE) and exempted micro-enterprises (EME). A generic enterprise is classified as having a turnover of more that R35 million per annum, a QSE has an annual turnover of between R5 million and R35 million and the annual turnover of an EME is below R5 million. In previous rounds of draft Codes, these levels were significantly lower, thereby including a large number of the smaller enterprises as generic entities. The announcement of the levels as provided here has brought relief for many small enterprises that were struggling to implement BEE initiatives with limited available fees.

Generic entities are measured on all seven weighted elements according to the standard set of guidelines provided in the Codes (the generic scorecard will follow in Table 1). QSEs are measured according to softer guidelines as they only need to comply with four of the seven elements and all four elements then carry a similar weight. EMEs are exempt from measurement and automatically achieve a high recognition level (recognition levels will be explained at a later stage).

The verification of BEE, also instructed by the BEE Act, is regulated by the South African National Accreditation System (SANAS). Prospective verification agents can apply at SANAS for the status of official verification agent to become authorised in the future to follow standard accreditation criteria and methodology that is developed,

maintained and enforced by SANAS[151]. At the time of writing this thesis, however, no official verification agents have been appointed. Although a large number of active rating agencies such as Empowerdex and EmpowerLogic have been active for some time in providing BEE ratings for some time, these agencies do not have any legal authority to provide an official rating.

5.3   Elements of the Broad-based BEE balanced scorecard

As mentioned, the balanced scorecard plays a central role in the broad-based BEE strategy. It is provided by the DTI in the Codes of Good Practice and legislated by the BEE Act. It is used to quantify empowerment in the economy in terms of a balanced system of points for each of the seven elements that form part of the BEE strategy. The workings of the scorecard will be discussed very briefly as it is explained by the Codes of Good Practice[152]:

The scorecard consists of three core components: direct empowerment, human resource development and indirect empowerment. Direct empowerment is composed out of the elements of ownership and management control; human resource development comprises of employment equity and skills development and indirect empowerment includes enterprise development, preferential procurement and socio-economic development. These three core components of BEE are designed to each benefit a certain stakeholder group: direct empowerment benefits equity holders, executives and other owners and managers of economic resources; human resource development benefits employees and job-seekers and indirect empowerment benefits suppliers, wider communities and other relevant stakeholders. Broad-based BEE, implemented through all three of the components, encourages a multi-stakeholder approach in contrast to the narrow shareholder approach that mainly focuses on ownership and management control. Across the board the participation of black women is specifically encouraged by the "adjusted recognition for gender" that is built into the calculation system. The balanced scorecard is depicted in Table 1 below. Each of the elements is measured according to very specific guidelines that are provided in the Codes. These technical guidelines will not be discussed in detail as it is not deemed necessary for the purposes of this thesis.

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[151] DTI, 2007.
[152] DTI, 2007.

Element	Weighting
Ownership	20 points
Management Control	10 points
Employment Equity	15 points
Skills Development	15 points
Preferential Procurement	20 points
Enterprise Development	15 points
Socio-economic Development	5 points

Table 1: Balanced scorecard for BEE (DTI, 2007)

The ownership element encourages enterprises to increase the number of voting rights and economic interest in the hands of black people, black women, and black designated groups. BEE transactions attract large media exposure and the implementation of an ownership initiative is often seen as the most important step in the BEE implementation process. However, this step only addresses one of the seven elements on the scorecard and should be integrated with the other elements. An ownership transaction also takes a long time to actualise in points on the scorecard as new shareholders need to receive dividends for the realisation points (specified on the scorecard) to be recognised.

Management control encourages the participation of black people on board and top management levels, affording them the right to control economic activities and resources through strategic decision-making. The Codes include a transitional scorecard that will be relevant for the first year after the commencement date (9 February 2007) and this scorecard includes only the elements of ownership and management control. The single implementation of these two is regarded as a narrow-based approach, but is deemed as acceptable during the transitional time, when enterprises can choose to implement the transitional scorecard or the full generic scorecard.

The Employment Equity and Skills Development elements collectively comprise the Human Resource Development core component that focuses on the internal transformation of an enterprise. Together it promotes diversity and development of employees. The Employment Equity Act of 1998 plays an important role in guiding the

calculations for Employment Equity on the balanced scorecard. This element aims to encourage the employment of black people, but especially women and people with disabilities. The ultimate goal is to "achieve the demographic representation of black people in the workplace"[153]. Equity is achieved through the eradication of unfair discrimination, the promotion of equal opportunities as well as the implementation of certain affirmative action measures[154].

The Skills Development Act of 1998 applies to the corresponding skills development element on the scorecard. It aims to encourage the improvement of the skills levels of black people in an enterprise. A Learning Programme Matrix is provided that stipulates the types of training courses that can be acknowledged under this element[155]. Emphasis is also placed on the promotion of learnerships, which are training programmes that consist of a practical and theoretical element, and have been accredited in accordance with the National Qualifications Framework.

Preferential procurement is an important element on the scorecard, as it is the main drive behind the implementation of BEE, albeit a voluntary process in the economy. Government uses its own purchasing power to enforce BEE implementation, thereby creating a good opportunity for black entrepreneurs to enter the economy. When enterprises tender for government projects or sell any goods or services to a government agency, they need to provide a scorecard for BEE. A good BEE status then becomes one of the prerequisites for awarding contracts. These enterprises need points under preferential procurement on their own scorecards and therefore turn to their own suppliers. Enterprises are hereby encouraged to screen their suppliers and accept only suppliers with a high BEE rating. Balshaw and Goldberg[156] speak about the "cascading effect" that is felt through the supply-chain of companies as businesses become drivers not only of their own BEE initiatives but also those of their suppliers. Enterprises are encouraged, through preferential procurement, to purchase goods and services from other

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[153] Balshaw, T. & Goldberg, J. 2005. *Cracking Broad-based Black Economic Empowerment: Codes and Scorecard Unpacked.* p78.
[154] Department of Labour. 1998.
[155] DTI, 2007.
[156] Balshaw & Goldberg, 2005, p 25.

entities with a good BEE rating, as well as from Qualifying Small Enterprises and Exempted Micro Enterprises.

Enterprise development aims at encouraging entities to make contributions – monetary as well as non-monetary – towards the development of black enterprises. This element has been included on the scorecard specifically for the promotion of emerging black business in the economy and usually takes one of two forms: investment in black-owned and black-empowered enterprises as well as joint ventures with black-owned and black-empowered enterprises that result in substantive skills transfer.

Socio-economic development addresses the inclusion of black people in the specific sector that an entity operates, facilitates the promotion of BEE in the sector and encourages entities to engage in corporate social investment activities in the fields of health, education, environmental conservation, poverty alleviation and community development. Under this element businesses are encouraged to make contributions towards these causes and also to align such initiatives with the integrated development plans of government. This last element is the only one that drives businesses to address social development problems in the areas that they operate and therefore enables the BEE process to filter down to the grassroots level of society. However, it is also the element with the smallest weight on the scorecard.

The scores for all the weighted elements are added up to reach a total amount of points out of 100. This score relates to a certain recognition level which instructs an enterprise's BEE status[157]. Table 2 depicts the relationship between a score, recognition level and status. If a certain entity has a recognition level of 6, 60% of the goods and services that other enterprises purchase from this entity, can be acknowledged on their scorecard under preferential procurement. The rationale is that entities will only engage in business deals with those enterprises that have an acceptable score for BEE. Eventually this mechanism will, according to the DTI, encourage most enterprises that participate in the economy to comply with BEE guidelines. Exempt Micro Enterprises are automatically awarded a BEE status of four and therefore a recognition level of 100%, for the purposes of preferential procurement.

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[157] DTI, 2007.

BEE Status	Qualification (Score)	BEE recognition level
Level One Contributor	More than 100 points on generic scorecard	135%
Level Two Contributor	More than 85 but less than 100 points on generic scorecard	125%
Level Three Contributor	More than 75 but less than 85 points on generic scorecard.	110%
Level Four Contributor	More than 65 but less than 75 points on generic scorecard	100%
Level Five Contributor	More than 55 but less than 65 points on generic scorecard	80%
Level Six Contributor	More than 45 but less than 55 points on generic scorecard	60%
Level Seven Contributor	More than 40 but less than 45 points on generic scorecard	50%
Level Eight Contributor	More than 30 but less than 40 points on the generic scorecard	10%
Non-compliant Contributor	Less than 30 points on the generic scorecard	0%

Table 2: Relation between an entity's status, score and recognition level (DTI, 2007)

Although the goal should be for all entities to ultimately strive towards a status of level four, it is difficult to say what an acceptable score will be for. The sector in which a certain entity operates will determine what the benchmark will be in that sector, at a specific time. If most entities score 40 points and thus have a recognition level of 50%, it would mean that an entity in that sector should strive towards a score of at least 40 or even more to secure business relationships.

As mentioned, BEE is driven by the cascade effect of preferential procurement as entities place pressure on their suppliers to provide them with more favourable BEE scores. It is also seen that a favourable BEE score is becoming one of the prerequisites for applications for exporting and other licenses. Through more and more ways BEE compliance is gradually becoming a very important precondition for any business to be successful in South Africa.

5.4 Transformation charters

As previously mentioned, it is stated in the Black Economic Empowerment Act of 2003 that transformation charters for the respective sectors will be gazetted for general information, provided that the major stakeholders in the sector have developed these charters and that it advances the objectives set out in the act. Transformation charters can be gazetted in terms of either section 9 or section 12 of the act. Charters gazetted in terms of section 9 will be accepted as Sector Codes with the same level of formal standing as any other Codes. These will also be legally binding on organs of state and public entities, as the other Codes are. When charters are gazetted in terms of section 12, however, it will merely express the particular industry's commitment to transformation and will not have any binding effect on organs of state or public entities. The Codes will still remain applicable despite the gazetting of a charter under section 12[158].

The Codes of Good Practice provide guidelines for sectors in developing transformation charters. The purpose of these charters is to further explain the implementation of BEE in the context of the specific sector's operations, to modify the generic scorecard (within limits) to better apply to the circumstances of enterprises in the sector, to set sector-specific goals for BEE and to measure the progress towards these goals[159]. Deviations from the generic scorecard and the Codes are limited to a minimum, but a sector specific vision for BEE is definitely encouraged.

At the time of writing this document, a number of sectors have already produced charters. Three of these are gazetted under section 12 of the BEE Act, namely the Financial Sector Charter, the Wine Industry Transformation Charter and the Construction Sector Charter. The Mining Charter and the Petroleum and Liquid Fuels Industry Charter have been gazetted under the Mineral and Petroleum Resources Development Act, but not yet under the BEE Act. The following charters still need to be considered by the Minister of Trade and Industry: the Maritime Support and Services Industry BEE Charter, the Forwarding and Clearing Industry Charter, The ICT Charter, the AgriBEE Charter, the Tourism BEE Charter, the Accountancy Profession Charter, the Advertising Charter, the Engineering

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[158] Government of South Africa. 2003.
[159] DTI, 2007.

Charter, the Forestry Charter, the Health Charter, the HR and Related Professionals Charter, the Liquor Charter and the Property Charter, to name just a few.

5.5   Status of the BEE implementation process

Official and legislated BEE has come a long way since the first words were spoken on the subject. However, a large number of enterprises in South Africa are still avoiding BEE implementation because they reckon that it is too premature to start implementing initiatives at a great cost without the certainty that all the legislation and guidelines are finalised. As explained, the Codes have been promulgated on 9 February 2007 and currently act as the implementation guidelines for all industries. The first year following the promulgation will still be regarded as a transition period and will grant enterprises the chance to familiarise themselves with options available in terms of the implementation of BEE, but soon after that the time for waiting will be over. Ten year targets (against which performance is weighed) have been set for all the elements, but intermediate five year targets have also been set for employment equity and preferential procurement. In the Codes (2007) it is further highlighted that annual reviews will be conducted by the DTI to see how the economy as a whole is performing against the targets (which will be adjusted if need be). The role of verification agents will be very important in standardising the efforts by enterprises towards these targets, in verifying the scorecards of entities on an annual basis.

6   Some critical perspectives on BEE as a formal strategy for transformation

In Section 2 of this chapter, the transformation process in a democratic environment was explained by Krog in three steps[160]. The first step is the liberalisation and unlocking of resources so that all the previously disadvantaged individuals can also have free access thereto; the second step is the complete participation and full representation of all citizens in the political decision-making processes of the country; and the third is the inclusion of all citizens in all spheres of society, namely political, economic, social and cultural. Only once all these steps have been completed, according to Krog, can we finally say that transformation has been successful. South Africa has moved through steps one and two,

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[160] Krog, 2005.

but can we truly say that the completion of step three has been successful? How do you evaluate whether all citizens have access to all spheres of society? This is not a task that we can complete in this study but what we can do is to indicate key debates that rage around one particular aspect of transformation in South Africa.

As mentioned, BEE is an "integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significant increases in the numbers of black people that manage, own and control the country's economy, as well as significant decreases in income inequalities". Further, it is broad-based, inclusive, associated with good governance and a central part of South Africa's growth strategy[161]. The BEE strategy is therefore a tool for transformation that, looking at its goals and definition, should attempt to address not only step one and two, but also step three of the transformation process. We have witnessed a successful political transition in South Africa. This is probably also the step that is the easiest to measure. However, we know that there is still a need for economic, social and cultural transformation and compliance on these levels are not so easy to determine. BEE should contribute in taking transformation to the next level in order to go beyond a mere political transition, but is it, however, successful in such an endeavour? And further even, can it be successful at all? One should believe that actors affected by BEE legislation will grant it legitimacy as a moral and ethical cause if they believe that it at least has the potential to do what it promises.

The previous section has explained the formal strategy for South Africa's transformation in the form of BEE. Specific emphasis has been placed on the policy process that took place during the development of the strategy, as well as the actual contents of the strategy and how it is implemented. This section will deal in more detail with a broad discussion of some critical perspectives regarding the policy process and the success of BEE (thus far) as a legislated strategy for transformation. As BEE implementation has not progressed far enough for us to be able to evaluate it on a quantitative level against its own targets, we will rather steer towards a more qualitative discussion of some selected

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[161] DTI, 2004, p 13.

critical perspectives that come to the fore at this point in the 'life' of BEE in South Africa, and that may influence its legitimacy in the eyes of actors affected.

6.1   BEE within a broader policy framework

Previously in this chapter the economic policy framework of the ANC has been discussed as well as the debates surrounding it. As mentioned, some see the ANC's economic policy as fairly market-driven – contrary to the nature of the ANC as opposition party before 1994. The rationale of such an approach is that economic growth, driven by capitalism, will also address development and improve inequality so that the benefits of growth will filter down to all levels of society. It has been called a top-down redistribution approach. However, Terreblanche[162] points out that South Africa, as a developing country with immense inequality, has the undeniable legacy of a dual economy. He asserts that the macro-economic policy of the ANC has not been able to address the problems of the "first" as well as the "second" economies. According to him it has been "a policy to restore the economic disparities in the 'first economy', while neglecting the socio-economic disparities of the 'second economy'". Some of the criticism against BEE shows towards such a model of first and second economies.

The first wave of BEE initiatives addressed inequality only on a narrow base, and on a high level in businesses, incorporating mainly the areas of ownership and management control. This is gradually changing as the need for a broader approach becomes apparent. One of the biggest challenges of BEE today is in fact that it is a two-fold strategy that is destined to address both economic growth and socio-economic transformation. BEE is labelled by the ANC government simultaneously as an empowerment strategy, an employment strategy, a poverty relief strategy and an industrial strategy[163] that is aimed at improving the economic growth of the country. These are quite high ideals to strive towards through a single strategy. It is perhaps questionable whether BEE will succeed in transforming South Africa on an economic, social and cultural level. It is also questionable whether BEE can be both an instrument of wealth creation as well as a successful instrument of broad-based transformation.

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[162] Terreblanche, 2005, p 7.
[163] ANC, quoted by Maseti, Z. & Southall, R. 2005. *Does Black Economic Empowerment Advance Socio-economic Transformation in South Africa?* p 3.

6.2   Is BEE creating a black elite in South Africa?

The greatest criticism against BEE at this point in the process is that it has only been successful up to the present in creating a black elite or bourgeoisie in South Africa, whereas the poorest of the poor are actually worst off than before. In an article by Burger, Burger and Van der Berg it is pointed out that the percentage of black South Africans that form part of the affluent in South Africa has grown significantly (the affluent is defined here as individuals with a per capita income of more than R22 501 according to 1995 prices). In 1995 22% of the affluent was black and by 2000 this figure increased to 41%. It appears that a large, young, racially integrated generation of affluent is emerging, which can be interpreted as a move towards a racially equal society[164]. However, the first ten years of democracy have seen rises in income inequality, poverty and unemployment and a significant growth of income inequality has specifically been recorded within the black population group[165]. The Gini-coefficient has risen from 0.68 to 0.73 in the period from 1996 to 2001[166], indicating overall inequality in the country to rise significantly during these years. Of all the population groups, Africans prove to be the most unequal group with a within-group Gini-coefficient of 0.66 by 2001, and one should point out that this trend extends thereafter.

It is important to note that the critics of BEE range over the whole political spectrum, including members of the Congress of South African Trade Unions (Cosatu), the South African Communist Party (SACP) and the ANC. According to Judith February in the Democracy Index of IDASA that was published in 2005, both the secretaries-general of the ANC, Kgalema Motlanthe, and Cosatu, Zwelinzima Vavi, indicated in public statements "that even the implementation of the government's own policies of BEE have not always automatically led to the best models of corporate governance being adopted."[167]. In a speech in 2004, Kgalema Motlanthe also said that BEE has manifested in "transfer" rather than "transformation". Money has been transferred from a white to a black elite, instead of transforming the economy as a whole, inside out. Motlanthe also

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[164] Burger, R., Burger, R. & Ven der Berg, S. 2004. Emerging black affluence and social mobility in post-apartheid South Africa. p 27.
[165] Bhorat, H. & Kanbur, R. 2005. *Poverty and Well-being in Post-apartheid South Africa.*
[166] Leibbrandt, et. al., 2005, p 7.
[167] February, J. 2005. *Are the interests of capital compatible with social transformation?* p 58-59.

pointed out that this inability to transform is evidence that capital cannot behave philanthropically, at least not when such deeds interfere with its bottom line. According to him "social consciousness which goes beyond self-enrichment" must be created, a social consciousness that roots "the beneficiaries of BEE in the communities from which they emerged." Motlanthe states that BEE processes should enlarge the economic base and restructure society, so that the accumulation of capital is a by-product of the deep transformation of society and not the other way around.

It is the view of many successful black business men that the present model of BEE is the quickest way to deracialise the economy and that there are no alternative models available, although one should not expect that the present model should necessarily restructure society from the bottom up. One of these successful business men and beneficiary of many BEE deals, Saki Macozoma, said that "it requires a leap of faith to expect a capitalist system to produce socialist outcomes"[168]. However, Turok[169] states that although the new black capitalists in South Africa cannot be expected to turn towards socialism, they can strive to promote a softer and more humane capitalism. Southall's answer to such a type of capitalism is stakeholder capitalism – the third step in the development of capitalism[170]. It is, however, debatable whether such a softer capitalism is possible.

The first stage of capitalism, according to Southall, was that of the Industrial Revolution, where all resources were blindly sacrificed for the means of wealth creation. The second stage of capitalism is characterised by the domination of large enterprises that are even more influential than the state in which they operate, valuing their bottom line profits more than the needs of the surrounding communities and environment. Only in the third stage of capitalism do corporations consider a wider stakeholder group than their own shareholders and do they take on a triple bottom line approach. This stakeholder approach can actually be likened to a broad-based approach towards empowerment as presented by the latest versions of the BEE strategy.

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[168] Seepe. 2007. "Empowerment debate not simply black and white" in *Business Day*.
[169] Cited by Southall, 2005. p 175.
[170] Southall, 2005. p 180.

Nevertheless, it does seem as if the top part of the black population group has benefited the most from BEE initiatives up to the present, looking at the available statistics. Many critics of the model have also claimed that this outcome is due to an inherent characteristic of the BEE strategy: that it is aligned with the ANC government's so-called neo-liberal macro-economic policy and that it is thus directed towards maximising wealth and improving economic growth with the by-product of socio-economic transformation of the lower levels. Although it is valuable to acknowledge the broader policy environment, it is somewhat unfair to say that the official BEE strategy will further develop a black elite in the future, as we will only begin to see the effects of broad-based empowerment as encapsulated by the Codes of Good Practice of 9 February 2007 in about five years' time – when all businesses will have had the time to implement BEE initiatives along these lines. We should also notice that a truly broad-based approach to transformation will not have a distinctly neo-liberal flavour to it as it would mean that government also acknowledges their developmental role and not only their role of facilitating growth through capitalism.

6.3 The affirmative approach of BEE

Another point of criticism against BEE can be highlighted, coming from a recent publication of the BusinessMap Foundation. The BusinessMap Foundation is a South African not-for-profit organisation with the aim of providing independent knowledge and intelligence on economic transformation, to shape and influence debate and policy for civil society, the public and the private sector. The article, titled "Empowerment and its critics", discussed the opposition by many white South Africans of the affirmative approach of BEE.

According to this article, many white people feel that BEE should not be race-based, but should rather empower on the basis of the socio-economic standing of citizens. These people also assert that BEE as a racially discriminative strategy is not very different to previous apartheid practices. Poor white South Africans, they claim, will be locked into poverty forever, merely because they do not qualify for racial privileges. The skills of white South Africans (according to this group) are also totally disregarded as individuals are often employed firstly on a racial basis and secondly for the skills they have. These

affirmative employment practices, according to the article, have sent many white people overseas to search for better job opportunities[171].

The BusinessMap Foundation explains that "policymakers in South Africa along those of many other countries that have decided to adopt policies to promote particular groups for reasons related to their historical exclusion have in effect decided to first correct historical wrongs and take the consequences that go with selection based on criteria other than ability". Many other countries have just not chosen race as their measure for redressing inequalities, but gender, citizenship, or something else. However, the BusinessMap Foundation article explains that selection based on something other than ability and experience, is not acceptable to many white South Africans. The argument of the BusinessMap Foundation is that talent is normally distributed in any homogenous group of people. Therefore, there ought to be enough talented people to appoint in jobs if the percentage of required individuals from a certain group reflects the distribution of society as a whole. However, in South Africa it is often still the case that previously disadvantaged citizens did not have equal educational opportunities to white people and are challenged to move up on a steep learning curve.

There is merit in some of these remarks mentioned in the BusinessMap report and it would surely not reflect true democracy if a BEE strategy would be aligned to displace white people totally from the economy. However, one should remember that policymakers have chosen the present strategy to deracialise the economy in the most efficient way in order to reach a point of equality.

The Employment Equity Act[172] speaks about the fine balance between unfair discrimination and the right to equality that needs to be restored for all citizens. The type of discrimination that was institutionalised in the apartheid era is understood today as being unfair. However, it is not seen as unfair discrimination to take affirmative action measures like those explained in the Act – in the name of redressing inequality and eliminating the disparities in the economy and in society. Affirmative action measures are perceived by some to be plain unfair and unnecessary. However, it is perhaps the only way to address the large problem of inequality that the country still faces. One should

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[171] BusinessMap Foundation. 2007. *BEE 2007: Empowerment and its critics*.
[172] Department of Labour. 1998.

also take note that it would be an incorrect generalisation to make, saying that all white South Africans fall within the category spoken of in this section – especially seeing that many whites have benefited substantially from positive economic development in the last few years.

6.4   Does BEE sufficiently address the need for transformation?

Turning the attention back to the initial question that was posed at the start of this section, we can ask again whether BEE as strategy for transformation is suitable to deliver the deep-rooted change that is needed in South Africa, and whether it can therefore be accepted as legitimate. Although South Africa has witnessed a peaceful political transition, there is still a need for economic, cultural and social transformation. From the broad discussion followed here, it can be gathered that BEE has most probably not achieved the much needed change on these levels. At this moment, however, we are not in a position to measure the success of BEE against its own explicit targets for transforming the economy. We will only be able to do this by 2017 when ten years have passed since the promulgation of the finalised Codes of Good Practice. One can, however, comment now already on the process of development that the BEE strategy followed and the way it is designed.

Unfortunately, as mentioned, the strategy of BEE was rooted firstly in a narrow-based approach, focusing only on the elements of ownership and management control. Although there have been shifts in the approach on a policy level towards a more inclusive, broad-based orientation (incorporating all seven elements and empowering a larger economic base), the initial ideas are still dominant and empowerment is often treated in the media as synonymous with ownership transactions, instead of the whole broad-based package. The broad-based strategy was designed to focus on direct empowerment, as well as human resource development and indirect empowerment in order to advantage a large base of beneficiaries. However, this focus does not seem to actualise at this point, as inequality is still rising within the black population group and critics point towards the increase of a black elite, in part due to the large emphasis on empowerment transactions.

6.5   Seven broad-based elements – the ideal end result

The broad-based approach of the current BEE legislation is intended to facilitate the inclusion of black people on all levels of the economy. This is not necessarily a typical neo-liberal or capitalist-driven approach, as emphasis is placed on the balance between the seven elements, facilitating different levels of economic participation. This strategy is designed to meet the needs of the so-called first and second economies. Whether it will reach this ideal in the future is somewhat questionable.
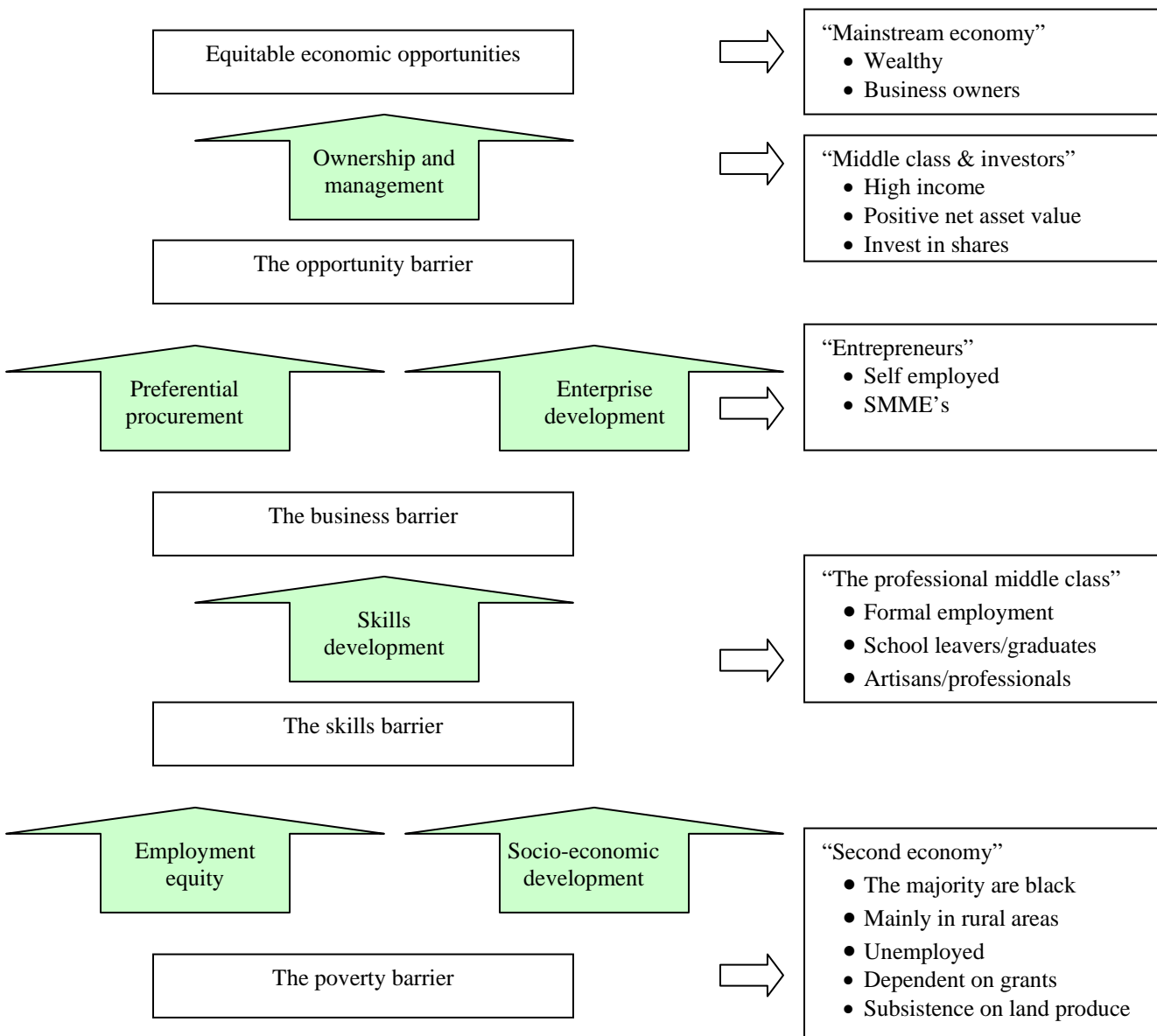
The international audit firm KPMG conducts a yearly BEE benchmarking study to follow the progress of BEE implementation in South Africa. In the most recent study that included 1000 entities from all over the economic spectrum, it was indicated that some progress have been made on the implementation of initiatives focused on ownership, management control, preferential procurement and skills development. However, limited progress has been made on employment equity and enterprise development.

In the report a practical explanation is provided of how the seven elements should conceptually address broad socio-economic transformation needs[173]. According to this report, the elements of employment equity and socio-economic development is designed to break the poverty barrier and move those individuals who are trapped in the second economy (mostly unemployed citizens who depend on government grants and subsistence farming) into the first economy. The next level of empowerment is the development of skills to move more individuals over the skills barrier. If they have acquired the appropriate education and training, they can break the business barrier and enter the professional middle class. The elements of procurement and enterprise development then enable individuals to become self-employed entrepreneurs and investigate business opportunities. The last step of this process is that black individuals are granted opportunity to become involved in businesses on an ownership and management level, thus entering mainstream economy. This is depicted in diagram 3.2 below. One can understand through this explanation that inequality will only increase if only ownership and management level participation is encouraged, but a large number of people are still struggling to break the proverbial poverty and skills barriers.

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[173] KPMG, 2007. 2007 BEE Survey: Making Economic Sense of Empowerment. p 8.

Whether this process will actualise in the economy as KPMG suggests, is still open for debate. The same can be said about whether BEE will have a significant enough influence on transformation and follow the process of deep-rooted change through on a political, economic, social and cultural level. At the moment we can only explore the present criticism of the BEE strategy and hope that we can learn from past mistakes to be able to improve in the future.

Diagram 3.2:

Equitable economic opportunities	⇒	"Mainstream economy" • Wealthy • Business owners
Ownership and management	⇒	"Middle class & investors" • High income • Positive net asset value • Invest in shares
The opportunity barrier		
Preferential procurement	Enterprise development ⇒	"Entrepreneurs" • Self employed • SMME's
The business barrier		
Skills development	⇒	"The professional middle class" • Formal employment • School leavers/graduates • Artisans/professionals
The skills barrier		
Employment equity	Socio-economic development	"Second economy" • The majority are black • Mainly in rural areas • Unemployed • Dependent on grants • Subsistence on land produce
The poverty barrier	⇒	

7 Conclusion

This chapter has attempted at providing the reader with an overview of transformation in South Africa and specifically BEE in its current institutionalised form. The process of policy formation that accompanied the institutionalisation of socio-economic transformation was explained and interpreted to sketch a picture not only of the normative but also of the empirical aspects thereof.

Section 2 discussed the term transformation in order to gain more understanding of what it means as a general term used in many different disciplines, as well as what it means in the context in which it is put into service here. Krog states that transformation is a form of change, but it is necessarily deep and structural in its nature. In political terms it is a change that goes beyond mere transition and also affects the spheres of economy, society and culture. The most important point that we can take out of this discussion is that transformation in South Africa is necessarily fundamental change of the political, economic and cultural systems of the country. If we think back to Habermas's thoughts on society as a system and lifeworld, systems integration is reliant on social integration through a post-conventional moral and legal consciousness. As the complexity of the systems of transformation grow, the moral and ethical discourse need to keep up. BEE can be an instrument for social integration, but we will have to discuss this matter further in the following chapter.

In section 3 the developmental history of South Africa was recollected with a specific focus on the gradual birth of a deeply unequal society, in order to show why it became necessary for deep structural change as embodied in the term 'transformation'. During the apartheid era, racial segregation was implemented on social, residential, cultural, economical and political levels, leaving non-white South Africans behind in terms of growth and development[174]. The results of racial segregation can also be seen in the developmental statistics of the time. By 1970 the per capita income of white people was 15 times higher than that of black people[175]. The Gini Coefficient of the country (explained earlier as a measure of inequality) also indicates that South Africa has housed

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[174] Louw & Kendall, 1986.
[175] Whiteford & McGrath, 1998, p 1.

one of the most unequal societies in the world. The 1970's showed a slight change in the situation as the power of apartheid started to decline. Slowly black South Africans were re-integrated into society and although the change was incremental, black people started to earn a larger percentage of the per capita income of the country.

As explained, the stage was set by the 1990's for more structured change to take place, through the policies and strategies of the new democratic government that was inaugurated in 1994 under the leadership of the ANC and president Nelson Mandela. Section 4 guided the reader through these socio-economic policy frameworks and legislation, implemented since 1994 and aimed at transformation of the economy and society. The Reconstruction and Development Programme (RDP) as well as the Growth, Employment and Redistribution Strategy (GEAR) played important roles in the transformation process. Legislation that should be mentioned are the Promotion of Equality and Prevention of Unfair Discrimination Act, Extension of Security of Tenure Act, Restitution of Land Rights Act, Employment Equity Act, National Empowerment Fund Act, Competition Act, National Small Business Act, Telecommunications Act, Preferential Procurement Policy Framework Act and the Minerals and Petroleum Development Act[176]. Although these policy frameworks and acts helped to a great extent to change the situation in South Africa, the need existed after 10 years of democracy for a more integrated broad-based strategy for transformation, which was introduced in the form of BEE.

Section 5 explained BEE as the formal strategy for transformation since more or less 2001 when the BEE Commission was given the task to assess the need for an integrated transformation strategy. The development of the BEE strategy up to the present was explained in terms of all the relevant documents. Special consideration was given to the definition of BEE, the implementation process thereof, the technical working of the balanced scorecard, the role of transformation charters and the status of the BEE implementation process in the economy. BEE could almost be viewed as a formal system for the transformation of society, in Habermas's terms, bringing systems integration in terms of distributing economic resources of the country.

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[176] DTI, 2004, p 13.

Section 6 was dedicated to a discussion of some selected critical perspectives on BEE as strategy for transformation. It is impossible to evaluate the success of the strategy thus far against its own targets as the final Codes of Good Practice (set of technical guidelines for implementation) have only been promulgated on the 9th of February 2007. However, section 6 provided a broader critical discussion on the development of the BEE strategy, the overarching policy framework that drives it and the critique mentioned by various sources thus far, that may jeopardise the legitimacy of the BEE legislation.

It should be evident through the discussions followed in this chapter that the writers of the BEE legislation intended it as a very legitimate strategy to bring transformation. It is not meant as a technical correction to an already existing system and therefore the need to legitimise the change has always been recognised. As mentioned, the ANC government focused on socio-economic transformation from the start of their rule in South Africa in 1994 and has implemented a large number of policies and acts to drive this process. BEE legislation has been the main driver since more or less 2000. BEE is therefore intended as the 'right thing to do' in order to improve the socio-economic situation of the country by including the previously disadvantaged in the economy. However, from the overview of critical perspectives discussed in section 6, it is clear that BEE is not necessarily accepted as legitimate by all involved. Some say that it is only empowering a small percentage of black elite business figures and others say that it can be equated to reverse racism in its affirmative approach towards change. If the legislation becomes too far removed from original good intentions of a legitimate cause, it will only bring disappointment, anger and alienation – creating a division between the class of actors who support the cause because they benefit from it, and the class of actors who believe it will never benefit them and that there is no intrinsic normative reason why they should still grant it legitimacy as a moral cause.

We will discuss these themes in more detail in chapter 4, looking at the core elements of Jürgen Habermas's theory of law in a democratic society as applied to the policy process that was followed in South Africa since 1994 to institutionalise transformation.

Chapter 4: An interpretation of legislated transformation in South Africa in terms of Habermas's theory of law

1 Introduction

Jürgen Habermas's theory of law in a democratic society was discussed in chapter 2. The theoretical base of his work was explained and his theory of law systematically expounded. The reader will recall that the central argument of Habermas's theory is that democratic law has a dual character – it constitutes at the same time facts and norms. It is through this dual character that law is enabled to act as a method of social integration in modern societies where different lifeworlds overlap.

Chapter 3 started off with a discussion of transformation in South Africa. The definition of a broad concept of transformation was firstly discussed. This was followed by an historical account of socio-economic dimensions of the South African situation before the inauguration of the first democratic government in 1994. Specific emphasis was placed on the various institutionalised and less institutionalised forms of discrimination that characterised this time in South Africa. Developmental statistics were also provided to show the extent of inequality in the country that increases the pressure for transformation. Different approaches to transformation were introduced in the form of the policy frameworks and legislation implemented since 1994. As explained, these approaches laid the groundwork for the formalised and legislated strategy of BEE that was introduced after 2000. The remainder of the chapter was dedicated to an account of BEE in terms of its definition, implementation and some critical perspectives.

At this point, after following the development of transformation-driven legislation in South Africa, as well as the theories of Jürgen Habermas on law in a democratic, pluralist society, the connection between these two discussions needs to be established. It is the purpose of chapter 4 to execute this critical process. In this chapter we will explain how

Habermas's concepts are applicable in the case of South Africa as we discussed it. We will specifically try to show how the BEE legislation process can be interpreted as the process of the development of democratic law in Habermas's terms. In other words, we will look at how Habermas's theory can be applied to the present situation and how such an application can enable a better understanding of the dynamics of BEE. A number of different themes from Habermas (from chapter 2) will be discussed in terms of its relevance for our understanding of legislated transformation in South Africa. The reader should remember that chapters 2 and 3 form the basis for the present discussion and that some ideas that have already been dealt with in detail in the previous chapters, will only be touched on here to show its specific application value.

It is also important to take note that the discussion that follows here will only deal with some of the interpretations that one can highlight in terms of the relevant theory and practice. There may be other themes that can also be argued at length, but because it is not proposed that this thesis provides an all-encompassing evaluation of BEE or application or Habermas, we will limit the choice of themes. It is proposed that some of the most significant connections will be described in order to gain insight through this exercise of application.

2   Society: Lifeworld and system

It would be helpful to start the discussion by turning back to the concepts of the lifeworld and the system as set out in Habermas's theory[177]. As shown in chapter 2, these concepts serve as an important and significant base for his later thoughts on democratic lawmaking. Some ideas around the lifeworld and system are briefly recalled:

Society can be seen as a lifeworld or as a system, but Habermas chooses to incorporate these two contrasting views to get a more complete understanding of the dynamics of society. The lifeworld view of society conceptualises society as the lifeworld of a social group and the systems view conceptualises it as a self-regulating system with no personal attributes. Out of this dual view of society (as a system and a lifeworld) come forth two different types of societal integration, namely systems integration and social integration. Habermas explains that systems integration is actually dependent upon social integration

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[177] See chapter 2, section 3.

– and this is important for our discussion. The socially integrative force of moral rules and values need to be in place in society before the regulative force of the system can work effectively – as we will specifically see in the case of democratic law.

As a society evolves, growing differentiation takes place between the lifeworld and the system. However, differentiation also takes place within the lifeworld and system respectively. The rationality of the lifeworld and the complexity of the system grow; and the two are "decoupled" from one another in the process. However, despite all this differentiation, the system still needs to be anchored in the lifeworld (in other words it must have its roots in a social institution). Semi-autonomous subsystems are decoupled (through differentiation) from the social structures through which social integration traditionally has taken place, but the lifeworld still defines the patterns of the social system as a whole in society. This complex process results in the need for systemic mechanisms to be anchored in the lifeworld and institutionalised, whilst forming semi-autonomous subsystems. One implication of their anchoring the lifeworld is that the values and norms that govern subsystems have to become generalised. It is reiterated that there now needs to be a post-conventional moral and legal consciousness, accepted by the whole society with different lifeworld, to uphold the balance between system and lifeworld, despite growing complexity of systems.

In the current context of South Africa, law is an example of a subsystem that is decoupled from the traditional mechanisms of social integration (such as strong bureaucratic institutions and religious authorities). Another example is the other subsystems through which transformation takes place, namely politics, economics and culture. We will return to these systems shortly. Now we firstly need to point out how the process worked in terms of traditional mechanisms of social integration and specifically in the South African context.

2.1   Traditional mechanisms of social integration in apartheid

Traditionally, one of the ways in which social integration took place was through powerful and dominating institutions. These institutions present themselves, according to Habermas, with "an apparently unassailable claim to authority". Those things that are forbidden by these institutions are protected as the "cognitive and normative expectations

merge and harden into an unbroken complex of convictions linked with motives and value orientations"[178]. These institutions that govern society then become a part of the lifeworld and actors do not have a participative attitude towards the lifeworld, but rather an attitude of an observer, forced into a certain direction by the institution. As Habermas says, the power of the institution enables the fusion of facticity and validity, not because of basic certainties that actors fall back on, but through its claim to authority. This creates ambivalent feelings in actors – it brings both feelings of "terror and enthusiasm…reverence and trembling"[179]. In the apartheid era, the state was one such powerful institution.

As explained, the apartheid state had institutionalised racial segregation through a series of laws that deprived all non-white people living in South Africa of certain basic rights and privileges. These laws banned them for instance to move freely in demarcated areas that were reserved for whites; white and non-white marriages were prohibited; there were separate education systems for white and non-white people; and non-white people were not allowed to attend certain exclusively white schools and universities. Under the banner of Afrikaner-nationalism, these practices were propagated with an "apparently unassailable authority" – in the words of Habermas. The apartheid state can be seen as one of Habermas's bureaucratic institutions. The fact that the apartheid practices built up under the rule of the National Party for almost half a century before the power of the state was broken can be seen as evidence of this. In the institutions of apartheid cognitive and normative expectations merged to such an extent that actors did not support it any longer because they agreed necessarily with its convictions, but just because of its overpowering authority.

The important turning point in a situation like this is reached, for Habermas[180], when society becomes more and more secularised and the complexity of different cultures and belief systems start to challenge the authority of these archaic institutions such as the apartheid state. This process started in South Africa in the 1970's and 1980's and eventually led up to the political transition in 1994. During this time those who were

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[178] Habermas, 1996, p 23.
[179] Durkheim, quoted by Habermas, 1996, p 24.
[180] See chapter 2, section 4.2

discriminated against started to challenge the state in more and more explicit ways: through strikes and boycotts, riots, protest marches, and sabotage attacks[181] - to name just a few. Some of the measures of apartheid started to soften in this time as black people could start to apply again for skilled jobs in white areas and black soldiers could again acquire a similar status in the defence force than that of their white counterparts[182]. There was also a gradual growth in the income of black people that systematically created a black middle class in the country.

As explained earlier, society consists of lifeworld and system and through a process of differentiation between these two, as well as within each of them, semi-autonomous subsystems are decoupled from the lifeworld. What happened in the late apartheid era, in Habermas's terms, is that the subsystem of the growing power of the resistance parties such as the ANC, decoupled from the socially integrative authority of the state to gradually lead to the decline of the power of the state.

2.2   Colonisation of the lifeworld at the end of apartheid

Habermas says that as subsystems are decoupled from the lifeworld but still have their anchors in the lifeworld, values and norms become generalised. Actors who run the risk of disagreement often try to reduce this risk by using methods other than language, in the form of what Habermas calls delinguistified steering media such as money and power. Through what he calls the mediatisation of the lifeworld, these steering media often link up in more and more complex functional networks[183] and later communication is not important anymore. This can become a problem if the symbolic reproduction of the lifeworld is at stake. The lifeworld is then not only mediatised but also colonised as methods of social integration are suppressed by the functional networks. One can say that colonisation took place through the political transition and the preceding decline of the authority of the apartheid state. The apartheid state served as a method of social integration for those who, belonging to a common lifeworld, endorsed the apartheid practices. This lifeworld was challenged by various factors in the transition period: the power of the opposition and the economic pressure that other parts of the world exerted

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[181] Davenport, T.H.R. & Saunders, C. 2000. *South Africa: A Modern History*. p 425-495.
[182] See chapter 3, section 3.1, 3.2
[183] See chapter 2, section 3.4

on South Africa in the form of sanctions – to name just two significant examples. The symbolic reproduction of the lifeworlds of apartheid did not continue after 1994 as a new democratic South Africa awakened.

3 Law as method for social integration after 1994

As we have highlighted, law is one of the examples that Habermas uses to explain the idea of subsystems that are decoupled from the lifeworld. Therefore we can say that law, despite differentiation, still needs to be anchored in the lifeworld. This makes sense also in terms of Habermas's ideas around democratic law with its dual character of being at once factual and normative. As law is anchored in the lifeworld, it is important for it to be accepted by the actors who are members of the lifeworld. That is the only way in which it can have a right to existence.

As explained, Habermas's ideas around the lifeworld and system come from his work *The Theory of Communicative Action* (in two volumes) and his theories on law and legitimacy is found in his work *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. These two systems of ideas are interlinked, but still two separate systems. In this second system of ideas, Habermas indicates that democratic law can in fact bring about social integration. To recall from chapter 2, one of the most important questions that Habermas[184] asks, is: "How can disenchanted internally differentiated and pluralized lifeworlds be socially integrated if, at the same time, the risk of dissention is growing, partially in the spheres of communicative action that have been cut loose from the ties of sacred authorities and released from the bonds of archaic institutions?" In pluralist societies people are often forced into more and more exclusive political identities and at the same time the world is opening up through globalisation[185]. This combination of local and global forces makes it very challenging for actors to integrate on a social level in society.

As said before, social integration is a prerequisite for systems integration and therefore the most basic process that needs to happen in society to make other more complex processes possible. According to Habermas, actors in a pluralist context are actually quite

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[184] Habermas, 1996, p 26.
[185] See chapter 2, section 4.3

self-interested and often make decisions only for their own benefit. Therefore, strategic interaction between actors in society now needs to be guided firstly by law in the form of restrictions that they need to adhere to and secondly these restrictions also need to have normative validity (in other words the people would have to feel comfortable with these restrictions on a moral level). Only then can the restrictions play the role of a socially integrative force.

The restrictions referred to are embodied in the form of democratic law. In terms of law, Habermas distinguishes between de facto validity and legitimacy[186]. The former refers to whether a law is implemented and accepted and the latter refers to whether a law is regarded as ethical and moral. For de facto validity, an objective attitude is needed and for legitimacy a performative or participatory attitude. One needs to be able to move from the objective to the performative role and use both of these attitudes when looking at law. Democratic law, based on these two instances of validity, is for Habermas the only way that we can have a socially integrated society in a plural, democratic context. Since 1994, South Africa has been governed by a democratically elected state. As the archaic institutions of the apartheid era have eroded, the laws of this new regime have to enable social integration in society. However, it is a prerequisite for these laws to be both factual and normative in its nature and application; to have both de facto validity and legitimacy.

It is therefore crucial that a democratic law with the task of social integration should be implemented and accepted by the people to whom it applies and that those people should regard it as a good moral and ethical guideline to follow willingly. Law, central to civil society in a democracy, can only be a socially integrative force if it can gain enough credulity from the citizens affected. In turn, citizens will only accept the law if it is believable and if it enforces something that is legitimate according to the citizens' own value systems. One of the most significant ways to ensure this legitimacy of law is through participation of the public in the law-making process.

3.1   Laws aimed at socio-economic transformation

It has been said that political as well as socio-economic transformation has been on the agenda of the new democratic government from the start. If one acknowledges the fact

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[186] See chapter 2, section 4.3.

that the institutions of apartheid were responsible to a large extent for institutionalised inequality and discrimination, it should prove meaningful that the main drivers behind social integration in the new context should be laws aimed at transformation specifically. A deeply divided society such as that of South Africa can only be integrated by those instruments that are aimed at addressing the problems that created the divide in the first place. Therefore it is proposed here that, although all law in a democratic country should act as a method of social integration, it is the laws aimed at transformation and empowerment that have the largest role to play in our context.

We have also discussed briefly in chapter 3 that the systems of transformation (on political, economic and cultural level) will also be reliant on a general moral and ethical guideline to preserve social integration and maintain the balance between system and lifeworld. Laws aimed at transformation (such as BEE legislation) will play exactly this role in democratic South Africa. In chapter 3 the development of transformation legislation and policy frameworks was followed up to the point where most of these were integrated in the form of the BEE Act of 2003 and its applications. The legislated BEE strategy is now regarded as the government's main tool to address transformation needs. The BEE strategy, encapsulating the BEE legislation, will therefore be evaluated in further discussions with reference to Habermas's theories. 'BEE' here implies the legislated BEE strategy in its totality (and in broad terms) as it was explained in the previous chapter.

4   BEE as transformational law

As highlighted before, Habermas explains that actors with a similar background make decisions with more ease as they can fall back onto their common ground. Where there is no such background, however, disagreement is often a threat and conflict often prevails. In pluralist societies where differentiation has taken place and semi-autonomous subsystems such as law has moved away from the common ground of traditional methods of integration, general values need to apply for a very complex group with different political orientations and identities. This is exactly the case in South Africa, with eleven official languages and many more cultural groups. The country also houses a large number of political parties that citizens can support. In such a situation, actors need to

move towards strategic action. But for this to happen in an orderly way, there need to be normative regulations that guide strategic action. All South Africans who participate in the strategic action need to respect the normative regulations and accept it as moral and ethical.

The legislated strategy for Broad-based BEE was the government's answer for a comprehensive empowerment and transformation strategy that could draw together all the elements of transformation that, in their view, needed to be addressed[187]. The legislated BEE strategy needed to provide the normative guidelines for participants in the economy to interact and engage in such a way that transformation is promoted by the interaction.

4.1   The process and all the relevant documents

As explained, the first step in the process of developing a legislated strategy for transformation was the inquiry of the BEE Commission around 2000. One of the main objectives of this commission was to examine ways in which black business can speak with a united voice. There is a great discrepancy between this first objective and later objectives of the strategy development process. This somewhat exclusionist approach of the BEE Commission (as interpreted in their report) is contrary to the democratic flavour of a truly broad-based approach to transformation. If one thinks about creating a legitimate and normatively acceptable BEE strategy, there are problems with this approach as a first step. The main problem is that the commission consisted of a number of influential black business men, tasked by the Black Business Council, who had capitalist business interests at heart. Wider participation in the process lacked and surely influenced the amount of legitimacy that the BEE Commission's report carried among a wider audience.

The BEE Commission's report was followed up by the Strategy for Broad Base BEE, developed by the Department of Trade and Industry. Already one can say that this strategy was a step closer to the ideal of an instrument for socio-economic transformation as the shift was now made from narrow-based to broad-based empowerment. Whereas the narrow-based concept of empowerment include only the elements of ownership and management control, the broad-based approach includes all the other elements of

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[187] DTI, 2004, p 11.

employment equity, skills development, preferential procurement, enterprise development and socio-economic development. This document was also compiled by the Department of Trade and Industry and not by the Black Business Council. The Strategy for Broad Base BEE, however, is still only an informative document (having in fact a similar status than the BEE Commission Report).

In 2003 the Broad-based BEE Act was issued to serve as the main legislative framework for the promotion of transformation. Today this act still regulates transformation in South Africa, in conjunction with the Codes of Good Practice, issued in its promulgated form in February 2007. The combination of the Act and the Codes is then the current BEE legislation. According to Habermas, this BEE legislation needs to be respected as a moral and ethical guideline in order to be successful in a process of social integration. No we can quickly recall: why is it necessary for social integration to take place? As said before, social integration is a prerequisite for successful systems integration. This implies again that the BEE legislation can only be successful on a factual level if it is firstly successful on a normative level. It can only be successful in its endeavour to transform the inequality in the country by encouraging enterprises to empower black people through ownership, control, employment equity, skills development, enterprise development and socio-economic development if this endeavour is perceived firstly as legitimate. This analogy has even more repercussions: the actual ideal that the legislation proposes not only needs to be legitimate, but also the process that it follows.

Although the ideas of transformation, empowerment and BEE have been prominent in South Africa for more than 10 years, formalised and legislated BEE is still in a starting phase. In the final Codes of Good Practice[188], promulgated in 2007, it was explained that the BEE targets have been set for a ten year period starting in 2007, then moving on towards 2017. It is stated in the Act that BEE verification agents will be appointed to regulate BEE compliance. SANAS (the South African National Accreditation Standard) has been tasked to manage the application process and regulate verification methodology, but at the time of writing this thesis no verification agency has yet been officially appointed. It is therefore very difficult to measure the amount of transformation that has

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[188] DTI, 2007.

taken place through BEE on a quantitative level. It is also therefore impossible to make assumptions about the legitimacy of the BEE legislation based on any quantitative data connected to the targets set in the legislation. This will only be possible in at least five years' time, as interim targets then would have to be reached, as stated in the Codes. Therefore, one would have to rely on qualitative data – meaning opinions of BEE.

As said, BEE firstly needs to be respected and morally accepted (in other words legitimate and normative) before it is followed in a factual manner. Therefore, it is fine to emphasise the normative aspect at a point in time where we cannot yet measure its factual validity. In fact, this is the way it should be, according to Habermas. We will now look at the normative validity of BEE legislation in the way proposed here.

The reader should be reminded that the writers of the BEE legislation have surely intended it to be a very legitimate project, addressing the socio-economic needs of the country in a structured way. However, we have reason to believe that all actors affected do not necessarily agree. The problem is that if the legitimacy and normative validity of BEE legislation fail, it will bring growing alienation and disappointment – driving those actors who do not grant legitimacy, further and further away. Of course, Habermas' idea is not that everyone should agree about the end result of a democratic process of law-making but that the process should effectively be open to legitimacy questions and the relevant actors should feel that they have participated in the process and that the end result is legitimate in that it is the result of their collective and often different contributions.

One can ask who will constitute the 'actors' as we speak of BEE? It was mentioned that BEE compliance is voluntary for actors. Technically, those who can comply voluntarily are public enterprises in the economy, entities that engage in business with the state and entities that undertake business with any enterprise that is already measurable. Entities with a turnover of less than R5 million per annum are exempt from compliance and all entities with a turnover higher than that should either follow the guidelines for generic enterprises or those for qualifying small enterprises. However, it would prove more effective to draw the circle wider and also include those who are indirectly affected by BEE legislation in some way. BEE has the great task of broad-based empowerment and

integration of all South Africans at hand and therefore most South Africans will be influenced and affected by it. One should think, then, that it needs to be viewed by a broader group as ethical and moral in order for it to be successful in its endeavour and not only by those engaging with it on a business level.

4.2   Critique against BEE that threatens normative validity

One of the points of critique against BEE legislation is that it is aimed at the so-called 'first economy' in South Africa only, and that its benefit does not reach the 'second economy'[189]. This dual economy was inherited by the country through its apartheid legacy. Sampie Terreblanche[190] asserts that the ANC macroeconomic policy is aimed at improving economic growth with the by-product of socio-economic transformation. Many believe that the BEE strategy is developed to bring transformation through such a filter-down process and that this approach is not enough. It is also said that BEE legislation is, instead of empowering a broad base, creating a black elite in the country – leaving a large number of black South Africans worst off than before. As mentioned, the Gini coefficient for South Africa (indicating inequality) is rising, despite efforts to transform.

It is significant to note, as explained in chapter 3, that the critics of BEE are not only those South Africans who are not advantaged by the current empowerment policies. BEE legislation is critiqued across the board – also by members of the ANC, Cosatu and the SACP. Kgalema Motlanthe, then secretary-general of the ANC, was quoted by Judith February in the IDASA's Democracy Index[191] to have said in 2004 that BEE has manifested in transfer rather than transformation and that it seems then that capital cannot behave philanthropically.

Another point of criticism is focused on BEE as an affirmative action policy. According to a recent study by the BusinessMap Foundation[192] (a not-for-profit organisation supporting transformation) many white South Africans feel that the affirmative approach of BEE is discriminative towards white people as their skills and knowledge are

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[189] See chapter 3, section 6.1.
[190] Terreblanche, 2005, p 7.
[191] February, J, 2005, p 58 – 59.
[192] See chapter 3, section 6.3.

disregarded by the legislation. A large number of newly qualified white people leave the country because they feel that they will get jobs more easily overseas and they do not see a future for themselves in the South African economy. In the Employment Equity Act[193], it is stated explicitly that unfair discrimination should not take place in South Africa. However, it is not unfair discrimination (according to the Act) to take affirmative action measures that are in line with the Employment Equity Act. This Act is aligned with the BEE Act and therefore this concept applies in both instances.

It is necessary for enterprises to appoint a certain amount of black people in accordance with the BEE legislation, but one can understand that white people who have experienced first hand that they are not considered for a post or not promoted because of their colour, will be negative about their future in the country. However, one needs to realise that an affirmative approach would form part of the solution towards a racially equal society. If the objective of the BEE legislation is to transform the economy to ensure greater participation of black people, then affirmative action would definitely advance such an objective. It is important to note also that the number of white South Africans that are negative towards the affirmative approach would not necessarily be large enough to say that such feelings would affect the general normative validity of the BEE legislation. If this is indeed the case, there are enough South Africans who believe that it is a necessary measure that needs to be implemented – even though there would be differences on exact details of the law and of the extent of its legitimacy.

The critique mentioned in this section is surely threatening, but is it enough to undermine normative validity altogether? Specific criticism has been mentioned of the development process that the BEE strategy followed. It has also been pointed out that BEE has managed to assist in creating a black elite – providing economic benefit for the top part of the black population group but not the bottom. Further, it was highlighted that some South Africans experience the affirmative approach of BEE as discriminatory. It was also mentioned that criticism does not only come from one group, but from across the board. The threat of these criticisms should not be misjudged as the BEE strategy is aligned in

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[193] Department of Labour, 1998.

the future to improve its position in terms of normative validity. A few other important aspects will now be investigated.

4.3   BEE as general language

If the normative validity of BEE is intact and it can play the role of social integrator, it should be written and portrayed in a language and a discourse that all those affected understand – in other words, a general language. Habermas[194] uses the analysis of Teubner to explain that law, as the 'transformer', makes communication between subsystems such as politics and economics possible. It was said in chapter 2 that the spheres of politics and economics do not listen to ordinary language and can only translate ordinary language into the discourse of power and money (not vice versa). These subsystems of society only remain 'intertwined' with one another through the 'multifunctional language' of law. Law "functions as a hinge between system and lifeworld".[195] Therefore, it is crucial that law upholds this position and is not influenced by the other subsystems of society.

This is quite a challenge for BEE as it is a law, but it is also driven to a large extent by the subsystems of power (politics) and money (the economy). Baldauf[196], in an article in the Christian Science Monitor, is one of many who assert that BEE "often seems more like a handout for the powerful few, rather than valuable assistance for many". Many other critics of BEE have argued that it creates a powerful black elite group instead of empowering a large base. Other critics have mentioned that the ANC actually uses BEE as a tool to improve their own political support base and that it is often key individuals who have a direct link with the ANC that are benefiting from large transactions taking place in South Africa. One of these people, Stefan Andreasson[197], argues in an article in the journal *Democratization* that BEE, though "considered in the context of government claims to be pursuing a radical socio-economic transformation", is actually the "principle strategy for embourgeoisement of key ANC cadres and a manifestation of predatory liberalism 'in action'"[198]. Although this is a very radical critique, it does create doubt as

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[194] Habermas, 1996, p 56.
[195] Habermas, 1996, p 55, 56.
[196] Baldauf, S. 2006. "South Africa's new, and few, black rich" in the *Christian Science Monitor*.
[197] Andreasson, S, 2005, 304.
[198] Andreasson, 2005, p 304.

to whether BEE can be the general language that it is supposed to be according to Habermas's theory. It is as if the idea of BEE is so closely linked to wealth creation and economic growth that it is difficult for it to stand uninfluenced by the power of money.

One can also see that money and power has played a large role in the development process that the BEE strategy followed. As explained[199] the BEE Commission was tasked to investigate the need for transformation and issue a report with their findings. However, the Commission, appointed by the Black Business Council, saw it as their role to create a united voice for black businessmen. This role was just as important – if not more important – than the broader transformation imperative. It was only later in the development of the BEE strategy that its focus became more broad-based and that the governing of the strategy was placed in the hands of the Minister of Trade and Industry instead of a group of business leaders.

As seen here, the development process that BEE followed as well as the criticism against it shows us that the ties it has with money and power is dangerous. This leaves us with the problem that BEE will struggle to become a general language in a world overwhelmed by the impacts of power and money.

4.4   BEE as normative discussion

BEE, as general language, should enable a platform for the discussion of the issues concerning transformation. It should provide the opportunity for actors to discuss the normative implications of the systems of transformation. Transformation on a political, economic and cultural level takes place through different systems. BEE also enables the systemic development of transformation on a socio-economic level. BEE legislation is therefore dual in its character as law, not only in being factual and normative, but also enabling systems integration as well as social integration. However, it is the social integration, as emphasised, that should be regarded as a prerequisite for systems integration. BEE should not only be a guideline for a certain system of calculating and rating empowerment to operate, but it should also enable a moral discourse on the topics that are relevant and the issues that come to the fore during the process. Thereby, the systems of transformation can be grounded in the lifeworld.

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[199] See chapter 3, section 5.

4.5   BEE as moral and ethical guideline

As we have said before, BEE needs to be accepted as moral and ethical. For actors to accept BEE, the act itself not only needs to be accepted as moral and ethical but also (and more specifically) the practices that are allowed to take place in its name. Fronting (displayed at large in the media) is a big threat to the credulity and legitimacy of BEE. With fronting is implied any practices that are against the spirit of the act and that does not lead to deep-rooted transformation. It is any superficial action that companies undertake in order to gain the economic benefits of BEE, without actually going through the necessary motions. An example would be to appoint a black director on paper, but not give that director the appropriate responsibility or reward for such a position. If the perception of society is that BEE implementation almost always is synonymous with fronting, the BEE strategy would be in danger of being accepted as immoral and unethical, thereby losing its claim to legitimacy.

4.6   Social integration – born out of struggle

In the very likely event of conflict between actors who do not share a common lifeworld and the security that comes with it, Habermas proposes two options: Actors can either stop communication, or they can move into the realm of strategic action[200]. Habermas emphasises the fact that social integration can only take place if there was some kind of strategic action and struggle. Facticity and validity does not go hand in hand naturally, but creates a constant tension. This tension between facticity and validity need to be minimised by the actors themselves. Through strategic action and tension, conflict resolution will hopefully prevail that enables social integration.

We know just by looking at the debates around BEE in the media that struggle and strategic action is part of its very existence. This fact can either give us hope or discourage us. As we know, social integration cannot take place without strategic interaction between actors. However, it is important to note that struggle will not necessarily lead to social integration. Actors can also reach a point where they decide to rather stop the communication altogether and give up hope – when the conflict endemic in the struggle becomes too much and/or when apathy sets in. The important escape out

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[200] Habermas, quoted by Rasmussen, 1996, p 25.

of this problem (and this have also been mentioned earlier) is that Habermas says that actors need to have a normative regulation for strategic actors to follow.

In the case of BEE the charter process explained in chapter 3 creates a platform for discussions or rather strategic interaction to take place on an industry level. It also provides the normative regulations that should guide BEE discussions. The idea is that the major stakeholders in a certain sector of the economy combine their ideas in the development of the charter for that sector. Representative task teams are normally appointed to determine the greatest transformation needs of the sector and to incorporate the requirements of all the different role players. As explained[201], these charters are developed to guide BEE in a specific sector. Although there are already quite a few sectors in the economy that have started to develop charters, only two of these have been gazetted under section 12 of the BEE Act. Through this status these charters only express the industry's commitment to transformation and the charters do not have the same formal standing as the Codes of Good Practice.

Although the idea is that BEE should become more participative through the charter process that provide a platform for discussions (with the necessary normative guidelines that actors feel comfortable with), this has not actualised to its full extent. It will still be a long time before the charters will be gazetted in terms of section 9 of the BEE Act, having the same formal standing as the Codes of Good Practice. In the meantime, one hopes that the Department of Trade and Industry will understand the importance of participation and will encourage discussion regarding BEE in general and the implications of the Codes of Good Practice in particular, in order to increase the legitimacy that the legislation has.

5   Conclusion

In this chapter we have attempted at providing the reader with a critical interpretation of BEE as transformational law in South Africa, according to the theories of Jürgen Habermas on democratic law. A number of themes from Habermas's theory were selected in order to illustrate how conceptual significance may be drawn from such an integrated discussion. In the process of analysing the relevant points of contact between

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[201] See chapter 3, section 5.4.

theory and practice, quite a number of overlapping themes were found. This makes the analysis more complex, but also potentially more valuable in terms of the insights that it brings.

The discussion was based on the two-fold definition of society as both lifeworld and system, and the interaction between the two. We recall that through the process of differentiation that takes place within each of the two components of society and between them, they are "decoupled" from one another and semi-autonomous subsystems form that break away from the traditional social structures that used to be responsible for social integration. In the absence of these social structures, a general moral guideline is needed to preserve the balance between system and lifeworld. In practice, law is supposed to play this role, but does it happen so easily in practice?

We likened the apartheid state to Habermas's traditional social structures, acting as a method for social integration. In the context of the apartheid state the fusion between facticity and validity often took place not because of common background knowledge of actors but because of the authority of the state. The turning point came in the 1970's and 1980's when those South Africans that were marginalised by the practices of apartheid, started to rebel in more and more explicit ways, opposing the power of the state. In this time the political power of the opposition, as well as the economic power of sanctions on South Africa, gradually led to the transition taking place in 1994 as the systems of the apartheid state fell apart – partly due to the fact that the system of apartheid and its legal, political and economic systems had so colonised the lifeworld of ordinary South Africans (normal human relationships had become totally framed in racial terms and the country was at war with itself) that its legitimacy could no longer be argued – even among those who supported the ideology. Colonisation is thus another theme from Habermas that we integrated into our analysis, illustrating that the apartheid state was in fact colonised by delinguistified steering media such as money and power. With the coming of a new dispensation in 1994 in South Africa, the socially integrative force of the apartheid state and bureaucratic measures that accompanied it, had to be replaced by some other form of social integration.

We have shown that after the transformation of the social structures of apartheid, law can act as social integrator. At this point we turn back to the need for a general moral guideline in situations where systemic developments have moved beyond social structures that they were previously anchored in. The important prerequisite for law, however, to be able to fulfil this role, is that it needs to be factual and normative at the same time, therefore a legitimate set of normative guidelines. This is true for BEE legislation as well.

Some critiques (or opinions) have been mentioned that threaten the normative validity of BEE. It was recalled that BEE, according to some, only empower the so-called first economy in South Africa and not the second economy; promoting only the wealth creation of a small group of black elites. Critique was also mentioned against the BEE legislation's affirmative approach. Some feel that the affirmative approach is very close to discrimination and that it is unfair practice for BEE legislation to promote the inclusion of black people for instance on an employment level, when they are appointed on the basis of their race only and not their skills and expertise. In this regard we conclude that policy makers should be aware of these criticisms and provide the platforms to address them in a participative manner. The key issue from a Habermasian perspective is that the charge that BEE only serves a bourgeois and capitalist elite implies that the systems underlying such a class are again colonising the lifeworld. This matter will be worked out further in the last chapter.

Further, there are a number of themes out of Habermas's theory that have been discussed with direct application to BEE legislation. The first of these themes is that BEE should be able to speak a general language in order to mediate between other subsystems. This is quite a challenge for BEE as it is often in certain cases overwhelmed by the languages of power and money. Because BEE legislation has the objective of creating economic benefit (and also wealth), it runs the risk of being misused by actors for the sake of their own selfish interests, although it was not necessarily intended to do this.

Another point to make is that BEE actually needs to enable a normative discussion of the issues pertaining to transformation in South Africa. To preserve social integration, BEE needs to have a post-conventional moral and legal consciousness. An important

characteristic of such a consciousness is that it should create a platform for discussion in order to ground the systemic developments that sometimes take off at a too fast pace. As deep structural change takes place, albeit on a socio-economic, cultural or political level, there needs to be a moral discourse that keeps it rooted in the lifeworld of actors – social integration can thereby enable more healthy systems integration.

BEE should also be accepted as moral and ethical by actors for it to be able to reach a level of normative validity. One of the problems we face is that the BEE legislation as such would perhaps be respected as a moral guideline, provided that actors understand the pressure for transformation in the country, but that some practices that take place in the name of BEE are not morally acceptable. Fronting practices fall under this category.

The last theme discussed focused on the aspect of struggle. It was once again highlighted that actors need to minimise the tension between facticity and validity by their own actions. Social integration can only be actualised if actors take up the challenge of strategic interaction and engage around the issues that are creating conflicts. For BEE this is good news on the one hand, as we know that debate is already a central part of the current process – we often see the discussion of contentious issues regarding BEE in the media. However, we should take note that strategic action can also fail when actors struggle too much to get common ground and they cease to communicate about issues. It is then important that there are enough generally acceptable normative guidelines for actors to guide their strategic interaction. The inclusive charter process (followed for creating BEE industry charters) provides such normative guidelines. It gives a platform for parties in the BEE process to discuss differences and work together to increase understanding. Although this platform is not fully functional at the current point, we hope that it can successfully facilitate participation in the future. The very fact that initial legislation providing for BEE has been adapted to extend to broad based BEE can be taken as a sign that the relationship between system and lifeworld has the potential to be healthy.

Now we can ask, what will happen if the prerequisites that Habermas sets for a law to be able to act as social integrator, are not eventually satisfied in the case of BEE? It has been said that the writers of the BEE legislation intended it as a legitimate cause – a strategy

that will increase the number of people who manage, own and control resources in the economy and that will address socio-economic inequality. However, on some levels this legitimacy is not achieved amongst all actors affected. We know through the discussion of Habermas's themes in terms of the practical context that the balance between facticity and validity needs to be preserved, to prevent unhealthy tension to culminate. If the BEE legislation fails to earn the status of a legitimate normative guideline, it will fail in its attempt to fulfil systems development on the level of transformation.

Chapter 5: BEE – the dynamics of law and legitimacy

Through this thesis we have applied the theories of Jürgen Habermas to the transformation process in South Africa and to BEE legislation in particular, in order to show how the practical context can be interpreted in terms of the theoretical framework. At this point it would be appropriate to look back and reflect on what we have learned from such an exercise. It is therefore the purpose of this concluding chapter to reiterate the most important discussion points touched on through this process, and to reflect briefly on the significance of using Habermas's theory specifically as instrumental framework. We will start off with the second assignment and then move on to the first.

1   Habermas's theory as instrumental framework

It was not one of the objectives of this thesis to evaluate the value of Habermas's theory as conceptual framework. However, a few words should be said on the framework and on Habermas's theoretical position. Although there are possible other frameworks that could have been used for this interpretive analysis, Habermas's theory was chosen because of the themes of legitimacy and systems in the development of law in democratic societies, and its relevance in the South African context. In summary, Habermas emphasises the role of law as a legitimate project that has the task of social integration in a plural, democratic country that does not anymore have the traditional social structures that used to be responsible for social integration. As we have showed in this thesis, the government of South Africa and the writers of legislation such as BEE also have the intention of putting forward a legislative framework that can fulfil Habermas's requirements – especially that of legitimate law. Therefore we can apply some of the themes in Habermas's theory to the practical context named in a descriptive interpretation.

It is stated in the Constitution that this document, as the ultimate law in the country, should be accepted as legitimate and credible by all South Africans[202]. It is further stated in its preamble that the Constitution should "lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law". These words affirm that South Africa is, according to its Constitution, one of the democratic countries that Habermas writes and theorises about and it shows that legitimacy is a prominent high level objective for the South African government.

Habermas wrote *Between Facts and Norms* at a time that was characterised by a renewed "spread of democratic impulses across the globe" – in the words of his translator, William Rehg[203]. In these new democracies, of which South Africa is one, Rehg explains, the "cultural and infrastructural conditions for democracy and the rule of law must still be consciously constructed". It is therefore good to take Habermas's theories after more than ten years of democracy in South Africa and evaluate whether some of these cultural and infrastructural conditions that Rehg refers to, are now being constructed.

A reviewer of Habermas's work, Bohman[204], says that Habermas is "aligning himself with those contemporary political theorists who emphasise public deliberation and participation". Therefore, if one is searching for a contemporary theoretical framework that focuses on democratic law and the role of participation, Habermas's framework is one of the practical choices. Bohman[205] highlights that *Between Facts and Norms* is a sophisticated critical theory of law and democracy that aspires to narrowing the gap between democratic ideals and reality, showing that a strong participative democracy is an achievable goal, even in complex plural societies. We can add that these are societies like South Africa's. Wallace[206], another reviewer, underscores Bohman's remark by reiterating that *Between Facts and Norms* is one of the most significant works in social and political philosophy and that it provides rich insights into law and democracy.

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[202] Government of South Africa, 1996. The Constitution of the Republic of South Africa.
[203] Rehg, 1996. Translator's introduction to *Between Facts and Norms*.
[204] Bohman, 1994, p 897.
[205] Bohman, 1994, p 928.
[206] Wallace, A, 1998, p 625.

Reviewer James Chriss[207] says that "Habermas's linguistic account of solidarity, namely the bonds that hold members of a democratically self-regulated lifeworlds together through a rationally motivated agreement to reach understanding, is still the best resource for understanding both the blessings and ills of modernity.

We can say with relative ease that Habermas's theory of law and democracy as theoretical framework for this analysis proved to be practical, significant and value-adding throughout the discussion.

At the same time, some limitations may be considered. In spite of some of the commentators arguing that Habermas is well-placed to help us understand the dynamics of newly developing democracies and in spite of the fact that we have found this to be the case, Habermas conceptualised his framework against a very European backdrop. This does not take into consideration the dynamics of a new democracy that is being established in the context of global capitalism while having to deal with racialised inequality locally. The spectre of global systems that are out of the reach of the political processes with such a developing democracy colonising the lifeworld of a local democratic process is real. It is not something that Habermas is unaware of but the notions of system and lifeworld and the possibility of a healthy interaction between the two dimensions is much easier to conceive when one is located closer to the centre of the system than the South African society is. For that reason, we would argue that although a Habermasian perspective can deliver insight into the local dynamics and can help specify the nature of the tension between a new black elite and the aspiring voters and workers of the new democracy, Habermas does not necessarily provide a conclusive answer towards a solution. The nature of the activities that have to be undertaken before a local population will feel that it has a real chance of entering the discussion about lifeworld issues are not delineated by Habermas in *Factizität und Geltung*. This is a matter that requires further consideration. It may be that other work of Habermas, for example work on New Social Movements, can support such consideration but we would probably cast the net wider than that.

2 BEE – interpreted by means of Habermas's theory of law

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[207] Chriss, J, 1998, p 425.

We have showed that the legislative landscape in South Africa post 1994 has been driven to a large extent by the need that developed in the country for transformation on many levels. It has been a political mandate for the governmental leadership from the start to bring transformation on economic, social, cultural and political levels, through various policies and strategies. The justification that leaders provide for this mandate is that the deep structural inequality and poverty that characterised the country in the apartheid era needed to be redressed after 1994.

As explained, various forms of policies, strategies and legislation have been focused on transformation: the Reconstruction and Development Programme (RDP), the Growth, Employment and Redistribution (GEAR) Strategy, the Employment Equity Act, the Skills Development Act, to name just a few. All these approaches lead to the development of an all-encompassing empowerment strategy, under the name of Black Economic Empowerment (BEE).

The BEE strategy was tailored through a process of writing and rewriting the guidelines, until the promulgated Broad-based BEE Codes of Good Practice was released in 2007 to accompany the Broad-based Black Economic Empowerment Act of 2003. This act to date serves as a law that governs socio-economic transformation through the voluntary compliance of entities operating in the economy. We have illustrated that BEE consists of seven different elements that focus on promoting different levels of participation of previously disadvantaged South Africans in the economy. These, to recall, are ownership, management control, employment equity, skills development, preferential procurement, enterprises development and socio-economic development.

This is a legislative framework that was designed by the Department of Trade and Industry with a very legitimate intention in mind. The purpose of the framework is to drive an "integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significant increases in the numbers of black people that manage, own and control the country's economy, as well as significant decreases in income inequalities"[208]. There is a definite normative undertone to this purpose as explained in the Strategy for Broad-based BEE. One can almost see

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[208] DTI, 2004.

that the developers of the framework can argue that if actors to whom it applies know how necessary deep structural change is for the economy, they will surely understand that BEE should be a legitimate cause. In the Strategy for Broad-based BEE, the transformation imperative as well as the legacy of apartheid is explained at some length. This sets the stage for the discussion that follows on the necessity of broad-based empowerment and the contents of the strategy in terms of the seven elements. This document in particular explains the intention of the developers of the BEE framework, more so than any other legal or descriptive document.

However, we have showed in this analysis that the legitimacy of the legislated BEE framework in the eyes of a broader audience (consisting of all actors in the country who are remotely affected by it) is not only dependent on the good intentions of the government and in particular the Department of Trade and Industry. There are in fact other factors that influence legitimacy even more substantially. These range from the way that the process of developing the framework took place, the effects that it has had up to the present in the economy (real effect as well as perceived effect as portrayed in the media), the level of morality portrayed by the type of practices that takes place under the name of BEE, and many more. The criticism of BEE was dealt with in some detail in the body of the thesis and therefore will not be revisited here in any more detail. The point is that there are many threats to legitimacy that stretch beyond the mere good intention of the government.

Turning back to Habermas's theoretical framework, we can say that the legitimacy of the BEE legislation (as perceived by all actors affected) is of the utmost importance if the legislation is to be successful in bringing healthy transformation to the economy and society. How does this application work? Habermas asserts that democratic law is a worthy method of social integration in the absence of traditional (often bureaucratic) social structures. We have explained that the apartheid state can be likened to one of these social structures or archaic institutions that Habermas speaks of. In the absence of the power of apartheid that integrated society by force, law and the processes that lead to legitimate and democratic formation of law, needs to take over that role.

However, in a democratic country law cannot fulfil this role by taking a domineering position and proclaiming a number of rules and regulations that cannot be contested by any citizens. This approach will simply not work in a plural, democratic regime. South Africa with its myriad of political parties, cultures and ethnic groups falls right into this category. In such a context, as explained previously, people are often forced into more and more defined and exclusive political identities while at the same time the world is opening up through the processes of globalisation. These tensions contribute to the need for a law that is not only factual but also normative – therefore, accepted as a moral and ethical guideline by all involved. For Habermas, this tension between facticity and validity, or *Faktizität* and *Geltung*, is critical in preserving the role of law as social integration method.

Why is social integration necessary? We have discussed the two-fold view of society as lifeworld and system and the process of differentiation that takes place within and between the two components. We have also highlighted that if the complexity of the system and the rationality of the lifeworld continues to grow, the two components will eventually become "decoupled" from one another. Although semi-autonomous subsystems form in the process that are detached from the traditional social structures in which they were grounded before, these subsystems still need to be anchored in the lifeworld by a general set of moral guidelines to preserve social integration. If social integration does not take place through this general moral guideline, the subsystems will be more and more autonomous, later following a means-ends logic instead of a lifeworld-logic, leading to what Habermas calls colonisation. Colonisation will decrease the socially integrative force of values and norms and the subsystems will also eventually seize to exist.

In South Africa, one can say that the systems of transformation have also formed subsystems that are decoupling from the lifeworld. BEE as a democratic law should be factual and normative. However, BEE as a mechanism for a very technical transformation of the economy can sometimes be likened more to facts than norms. It can also be likened to system rather than lifeworld. One should be careful then that the system-component of BEE as technical mechanism of transformation does not decouple from the lifeworld to such an extent that social integration does not operate anymore as a prerequisite for

systems integration. For transformation to successfully take place in South Africa, BEE should not only be a set of technical rules, but even more so a moral and legitimate guideline.

There are a few aspects that could enhance the legitimacy of BEE. We have shown that BEE legislation should be written in a so-called 'general language' to be able to act as a 'transformer' as in Habermas's analysis of Teubner. According to this analysis, BEE as law needs to be able to mediate between other subsystems such as power and money. As we have argued, a lot of the criticism of BEE is especially focused on its inability to do this. A platform also needs to be created through BEE for discussions on the moral implications of systemic developments. This discussion will enable BEE to come closer to the ideal of it being a legitimate law, encouraging participation of citizens in a moral and legal discourse on the developments that characterise the time. Furthermore, to enhance the moral and ethical character of the BEE framework, unfair and fraudulent practices that take place in the name of BEE should be minimised. Lastly, strategic interaction should be encouraged in terms of BEE as Habermas emphasises the importance of this in the process that actors need to follow to reach successful social integration. Debates, in a well-structured manner, should therefore be encouraged.

What will the repercussions be if the legislative BEE framework fails as a legitimate law that brings social integration? If social integration does not happen, the growing differentiation of subsystems will bring eventual social alienation. Colonisation will take place and if this process is not turned around, society will fall apart, according to the Habermasian perspective. The problem is that the systems that underlie colonisation are very powerful and well institutionalised in South Africa. Furthermore, the economic component of these systems are global and largely out of the reach of local democratic processes.

Economic sanctions against South Africa were dropped in the 1990's after the political transition has taken place and through this process the country was opened up for increasing international trade. Progressive black business leaders who were the first to grasp the opportunity of economic empowerment also grasped the opportunity of international capital that was available to them. Through this process – a result of

globalisation – the economic subsystems that underlie colonisation have been anchored deeply in international capital that the local forces struggle to govern. Globalisation in itself is not negative, but it brings many challenges. In this instance it brings a challenge for the integration role that democratic law can play within the context of South African transformation. BEE legislation in fact should aim to govern the global components that influence the South African economy, so that these will work for and not against the BEE strategy. We know by now that the only way to do this, however, is through social integration.

Now it is obviously not only the role of BEE legislation to bring integration, but also the rest of the legal system. BEE in fact governs a very small aspect in the greater scheme of laws in South Africa. However, BEE legislation governs transformation specifically. It is the overarching legal framework that guides transformation on a socio-economic level. Therefore, if BEE legislation fails to be legitimate and serve as social integrator, many of those affected by the legislation will be alienated from it to the extent that the systemic mechanisms of transformation will eventually not work properly and not reap the benefits that it is supposed to and that it was designed for.

One possible outcome of this process is that enterprises in the economy will increasingly start to ignore BEE implementation. It is, however, very unlikely that any enterprises would be able to ignore BEE implementation altogether. The framework was in fact designed in such a way that, although it is not compulsory for any entity to comply with the guidelines, there are other forces that drive entities to the point where they cannot ignore or deny the importance of adhering to BEE any longer. An audited BEE scorecard, for instance, is already required for many types of licensing applications and tender proposals. The chances are that if enterprises do not reciprocate, targets that have been set for BEE compliance by 2017 will only be raised and that will increase the problems of legitimacy.

Another possible (and more plausible) outcome is that enterprises will be under increasing pressure to implement BEE initiatives because of market forces, license applications, and more. However, they will just try to do the bare minimum to comply with the guidelines without attempting to contribute to true empowerment. This can mean

for instance that more and more sophisticated forms of fronting will evolve as enterprises try their best to pass the test of the scorecard without carrying transformation in their organisations through in a very real and deep sense. In this case there will also be a growing resentment and negativity towards BEE as a project. Although targets will be reached on paper, a different story will be told by perceptions. The transformation that would be reflected on paper will not be equal to real deep-rooted transformation as intended by the writers of the legislation.

Now one can ask: how accessible is the lifeworld-type dialogue that needs to take place to overcome systemic challenges and address negativity in order to commence on the appropriate path towards legitimacy and social integration? We do not have clear answers and solutions, but we know that this dialogue will be necessary in the future. However, there are more dynamics at play in this situation than merely the internal dialogue in the South African economy on the legal, moral and ethical issues surrounding BEE. Apart from the tensions mentioned between facts and norms, participant and observer, structure and meaning, subjective and objective, philosophical and sociological, factual and normative, and system and lifeworld, there is also the tension between local and global forces that are playing a role and that will influence the outcome of the situation. Although Habermas illustrates the importance of understanding different tensions for us in *Factizität und Geltung*, he does not focus on the effect that the specific tension between local and global systemic forces have.

Within South Africa, local politics play a very important role in guiding BEE. As we have seen, transformation has always been a political mandate for the ANC, governing the country since 1994. There have been ample criticism against the way that the ANC government implemented this through BEE and even representatives from Cosatu, the SACP and from the ANC's own ranks have criticised that the BEE strategy is too market driven- advancing the economic position of a few. One can see that a tension is building up between those who are advanced by the strategy and those who are not; between the unions and the black elite; between optimists who are not necessarily advanced by the strategy but feel that it is appropriate and those who are opposed against its approach and its influence on the economy. The democratic laws in South Africa have the potential to exert some kind of influence over the situation inside the country. We do not have any

guarantees that the laws will be successful as social integrators amidst the tension mentioned, but the there is a possibility for this. This is true of course for BEE legislation as well.

On the other hand, however, we have global forces that also exert pressure on the situation inside South Africa. Global systemic forces come to play through economics as well as politics. As markets open up and more and more opportunities occur for South Africa to engage in international trade, international capital increasingly starts to influence economic decisions in South Africa. In terms of politics one should also acknowledge the role that global politics play through organisations such as the United Nations, African Union, European Union and other. The opinions of these global organisations can also influence policy decisions in South Africa. The point that we want to make is that there are more and more systemic factors that need to be acknowledged – locally and globally. On a local level, law can act as social integrator, but what happens on a global or international level? Is there an inter-cultural ethical and moral code that governs interaction?

It is not our intention to even attempt to answers these questions. We merely want to show that the dynamics at play are perhaps far more complex than what first meets the eye. It does not become clear through this analysis how we can correctly address the problems of BEE, but awareness is created to understand that there are multiple factors that need to be considered. In closing, the Habermasian perspective on BEE shows us that a large number of different opposing forces create tension that need to be understood in order to learn from it – and it is ultimately only through the efforts of actors who are in the playing field that tension between these opposing forces will be integrated.

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