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Realising the Right to Education in  
South Africa: The Role of Law

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# **Realising The Right to Education in South Africa: The Role of Law**

## **Preface**

The main purpose of this research is concerned with the role of litigation and the law in social movements on the ground. It focuses on the South African education movement, examining the impact of litigation on a developing social movement surrounding an underperforming school, Moshesh Secondary School, in the Eastern Cape. The research draws principally upon interviews with public interest education lawyers and pupils at Moshesh. It also draws on a variety of secondary sources that discuss the relationship between the law and social movements, and its ability to impact movement identity, mobilisation and rights consciousness.

I am heavily indebted to the wonderful lawyers at the Equal Education Law Centre in Cape Town, without whom this work would not have been possible. A special thank you must go to Yana Van Leeve, attorney on the Moshesh case, for her insights and expertise. I would also like to thank Lumkile Zani, Ntombesizwe Mkhonto, Vuyisa Mbayi and Sthembile Dantile from Equal Education for all their support during our trip to the Eastern Cape. A huge thank you to Lebo Mojakisane for her help and translating skills during the interviews. I would also like to thank my supervisor, Elizabeth Craig, for her guidance and unfailing patience when it came to bad Skype connections. To everyone who supported my time in South Africa ; thank you, enkosi, ke a leboha, dankie.

This work is dedicated to my wonderful grandparents.

‘As it stands, the South African education system is grossly inefficient, severely underperforming and egregiously unfair.’<sup>1</sup>

It is no exaggeration to say that the South African education system is in crisis. South African schools are amongst the worst performing in the world; indeed in this year’s World Economic Forum Report, South Africa was found to be the global worst for maths and science teaching.<sup>2</sup> A highly complex mixture of factors tainted by the pernicious legacy of apartheid has meant that the education received by young South Africans is still vastly unequal. Indeed, the statistics paint a horrifying picture; in one 2001 study, 65% of 6th grade children in ex-white schools were achieving at the appropriate level, whilst the figure in formerly black-only schools was just 0.1%.<sup>3</sup> For every 100 pupils that start school, only 50 will make it to Grade 12, 40 will pass, and just 12 will qualify for university.<sup>4</sup>

South Africa has yet to witness a mass movement for educational reform, but civil society has recently taken the lead in advocating for change. The potential for law and litigation to bring about this change is crucial. The Equal Education Law Centre (EELC) founded in 2012, was established in light of this fact. The EELC undertakes public interest litigation and advocacy for South African education. It works closely with its sister organisation, Equal Education (EE), which began in 2008 as a movement of students, teachers, parents and community members who advocate for education using analysis and activism.

A particular litigation case surrounding an underperforming school, Moshesh Senior Secondary School in the Eastern Cape, will provide the central case study of the work. The research will examine the way in which the litigation of the courtroom has driven the movement in the classrooms. It will engage with the debate surrounding the effects of litigation on social movements more broadly, and seek to further the discussion through close investigation of the case study. The work will draw on the experience of the EELC, utilising interviews with attorneys at the centre and pupils at Moshesh Senior Secondary School.

In particular, the work will argue that the litigation surrounding the court case at Moshesh has provided the burgeoning social movement there with key resources which have

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<sup>1</sup> Nicholas Spaull, *South Africa’s Education Crisis: The Quality of Education in South Africa 1994-2011*, Report commissioned by Centre for Development and Enterprise, October 2013, p.10.

<sup>2</sup> World Economic Forum, *The Global Information Technology Report 2014*, at [http://www3.weforum.org/docs/WEF\\_GlobalInformationTechnology\\_Report\\_2014.pdf](http://www3.weforum.org/docs/WEF_GlobalInformationTechnology_Report_2014.pdf), p.244, last accessed 25<sup>th</sup> May 2014.

<sup>3</sup> Graeme Bloch, *Building Education Beyond Crisis*, *Development Today*, p.3, at <http://www.dbsa.org/EN/AboutUs/Publications/Documents/Building%20education%20beyond%20crisis.pdf>, last accessed 20th April 2014.

<sup>4</sup> Nicholas Spaull, *South Africa’s Education Crisis*, p.3.

facilitated mobilisation and the construction of a collective identity. It has done this by allowing pupils to draw on the law to construct a narrative of the situation at the school. The dissertation will use the concept of 'legal framing' to analyse this process.<sup>5</sup> It will examine how legal framing has facilitated development of a rights consciousness, in which pupils become aware that they have the right to ask for more, challenging existing power dynamics and the resulting apathy that has become entrenched at Moshesh. Ultimately, the piece will look at the relationship between litigation and social movement mobilisation on the ground; and consider whether a productive relationship between the two can exist in any meaningful sense.

South Africa is a particularly fascinating case study for examining the relationship between the law and social movements. As Yana Van Leeve, the EELC attorney on the Moshesh case, pointed out, the law holds a special significance in South Africa.<sup>6</sup> The Constitution, enacted in 1996, sets out the central tenets of South African society, which are established upon democratic values, social justice and fundamental human rights.<sup>7</sup> Section Two of the Constitution affirms that it is 'the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'<sup>8</sup> Consequently, public interest litigation can use the Constitution as a mechanism of accountability, holding the political leadership to account through the courts. As the Constitution is supreme over parliament, the possibilities of using the law as a powerful tool for social justice are broadened.

Indeed, lawyers and the law have historically played a crucial role in the battle for social justice in South Africa; the work of Nelson Mandela and Oliver Tambo is but one example. Of course, the Constitutional rights that have enabled the court to become a battleground for social justice today were not in existence before 1994. Yet even under apartheid, the law as used as a tool for social justice; unions and activists frequently went to court to contest residential segregation and influx control.<sup>9</sup> More recently, movements have won success through combining litigation in the courts with social mobilisation on the ground. A key example is the 2003 Treatment Action Campaign, which successfully pressured a reluctant government to distribute anti-retroviral medication to those living with HIV and AIDS. Consequently there is already a precedent in South Africa for litigation to work closely with social mobilisation in a successful way. The stage is set for the work of the EELC to be able to make crucial and far-reaching changes.

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<sup>5</sup> Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilisation*, (Chicago: University of Chicago Press, 1994).

<sup>6</sup> Yana Van Leeve, Interview, Equal Education Law Centre, Cape Town, 13<sup>th</sup> August 2014.

<sup>7</sup> Constitution of the Republic of South Africa Act, No. 108 of 1996, Preamble.

<sup>8</sup> *Ibid.*, Chapter One, Section Two.

<sup>9</sup> Steven Friedman and Shauna Mottiar, 'A Moral to the Tale: The Treatment Action Campaign and the Politics of HIV/AIDS', *Centre for Policy Studies* (2014) P.13.

The movement for better education in South Africa is still in its infancy, but it is growing steadily. As Sherylle Dass, Senior Attorney at the EELC stated, after 20 years of democracy, there is beginning to be a sense of restlessness amongst the youth as it becomes increasingly clear that the promise of freedom, of which a fair and equal education was a crucial part, remains unfulfilled. Indeed, she stated that 'the country is sitting at a kind of boiling point.'<sup>10</sup> It is thus a crucial moment to examine the role of the law and litigation on the frontline of the struggle for a better education, and thus a better future, for South Africa's youth.

The dissertation begins with a literature review, which seeks to situate the South African case study within the debate. A methodology will follow in order to outline the approach and method that has shaped the research. We will then delve into the case study, outlining the facts and context of the case. The following chapter will engage with the impact that the litigation has had on identity formation of the movement. It will then look at how litigation has facilitated mobilisation, before a discussion of the theoretical framework of legal framing and rights consciousness that form the backbone of the work. Finally, it will engage with the concepts of power.

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<sup>10</sup> Sherylle Dass, Interview, EELC, 12<sup>th</sup> August 2014.

## Literature Review

The debate surrounding the impact of litigation on social movements essentially falls into two camps. One is the pessimistic, 'legal realist' view epitomised in such works as Joel Handler's still influential *Social Movements and the Legal System* (1978) or Rosenberg's seminal 1991 book *The Hollow Hope*. Rosenberg focuses on key Supreme Court decisions in the United States, such as *Brown vs. Board of Education*, and asks whether they really had as positive an impact on the Civil Rights movement as the accepted wisdom would suggest. For belief in the effectiveness of litigation had previously shaped discussion of courts and social policy on both sides of the political spectrum; conservatives worried that the power of the courts would endanger the democratic process, whilst liberals celebrated the activist nature of the courts.<sup>11</sup> Rosenberg's conclusion is to argue that in fact, the use of litigation tactics for social movements is largely futile.<sup>12</sup> Other legal realists, such as Abel, have gone so far as to argue that 'legal means of resolving problems should be avoided wherever possible, for they tend to reinforce the client's experience of powerlessness.'<sup>13</sup> More recently, scholars such as D'Emilio have followed a similar approach in assessing the judicial decisions surrounding the rights of the lesbian and gay movement in the United States.<sup>14</sup> The entry point for these scholars tends to be the gap between what was prescribed in law and the social conditions in reality.

On the other side of the coin is the view that litigation can be of significant benefit for social movements, and can prove empowering for those involved. McCann's *Rights at Work* is a key text in this debate. McCann examines pay equity struggles in the workplace in the United States, focusing on the role of law and rights in the broader social movement.<sup>15</sup> McCann criticises the positivist 'legal realist' approach of merely assessing the judicial effects of litigation victories for missing the 'constitutive capacity of law'.<sup>16</sup> By focusing on the formal, top-down outcomes of litigation, legal realists are likely to miss the often longer-term consequences for actors involved in social movements. For example, litigation can have a positive role for social movements even where it is unsuccessful in court, as Douglas NeJaime has demonstrated in his 2011 article

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<sup>11</sup> See eg Richard H. Bork, *The Tempting of America: The Political Seduction of the Law*, (New York: Free Press, 1990) for a conservative view, and Ronald M. Dworkin, *A Matter of Principle*, (Cambridge, Mass.: Harvard University Press, 1985) for a liberal view.

<sup>12</sup> Gerald Rosenberg, *The Hollow Hope : Can Courts Bring About Social Change?*, (Chicago: University of Chicago Press, 1993).

<sup>13</sup> Abel, 'Lawyers and the Power to Change', *Law and Policy* 7, (1985), p.5-18 at p.8-9.

<sup>14</sup> John D'Emilio, 'The Marriage Fight is Setting us Back', *The Gay & Lesbian Review*, (2006), at <http://www.gltreview.org/article/the-marriage-fight-is-setting-us-back/>, last accessed 1<sup>st</sup> June 2014.

<sup>15</sup> Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilisation*, (Chicago: University of Chicago Press, 1994).

<sup>16</sup> McCann *Rights at Work*, p.291.

'Winning through Losing.'<sup>17</sup> Drawing on instances from the LGBT-rights and Christian Right movements, NeJaime shows that litigation loss can be used to construct organisational identity and to mobilise constituents; the constraints of the courts which are so often the focus of a legal realist perspective can be mobilised in the process of social change.<sup>18</sup> Analysis such as this, which looks beyond the courts into how social movement actors might use litigation in the construction of meaning and identity, is absent from the legal realist perspective.

This is a glaring omission, for the process of meaning and identity construction is crucial to social movements. Tilly's highly influential definition of a social movement is 'a sustained series of interactions between power-holders and persons successfully claiming to speak on behalf of a constituency lacking formal representation, in the course of which those persons make publicly visible demands for changes in the distribution or exercise of power, and back those demands with public demonstrations of support.'<sup>19</sup> It is evident that the capacity to speak on behalf of a constituency, making demands for the redress of grievances, requires a coherent sense of identity; what it is that the social movement stands for, and what they aspire to achieve. Reflecting this view, Lisa Vanhala argued in 2010 that social movements are not defined solely through their campaigns, but rather 'through the development and identification of shared values, beliefs and aspirations.'<sup>20</sup>

To understand the process of developing these shared attributes, social movement scholars have developed the concept of 'framing'. Framing processes have come to be regarded as a 'central dynamic in understanding the character and course of social movements.'<sup>21</sup> 'Frames' are a medium of interpretation that enable individuals 'to locate, perceive, identify and label occurrences within their life space and world at large'<sup>22</sup>, and which are crucial for social movements to formulate collective identity. For a movement's identity to be coherent, it must mobilise around a shared set of beliefs, symbols and claims in the pursuit of activism. This frequently means translating an experience or condition that had previously been considered acceptable into an injustice that must be remedied. It follows that framing attributes

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<sup>17</sup> Douglas NeJaime, 'Winning Through Losing', *Iowa Law Review*, 96:3, (2011), p.941-1012.

<sup>18</sup> NeJaime, 'Winning Through Losing', p.942.

<sup>19</sup> Charles Tilly, *Big Structures, large processes, huge comparisons*, (New York, NY: Russell Sage Foundation, 1984), p.306.

<sup>20</sup> Lisa Vanhala, 'Social Movements Lashing Back: Law, Social Change and Intra-Social Movement Backlash in Canada', *Special Issue: Social Movements/Legal Possibilities Studies in Law, Politics, and Society*, 54, (2011), p.113-140, p. 120.

<sup>21</sup> Robert D. Benford, David A. Snow, 'Framing Processes and Social Movements: An Overview and Assessment', *Annual Review of Sociology*, 26, (2000), p.611-639, p.611.

<sup>22</sup> Erving Goffman, *Frame Analysis: An Essay on the Organisation of Experience*, Boston, (Mass. : Northeastern University Press 1986), p.21.

responsibility for that injustice to particular social actors or institutions, and consequently prescribes a course of action to ameliorate the injustice.<sup>23</sup>

Translating experiences into injustice and assigning blame to actors often leads to claims that are recognised in law. Thus movement goals are frequently framed around legal norms, which as McCann argues allows the movement to be able to articulate demands coherently, whilst forming a group-based identity.<sup>24</sup> This is a concept that socio-legal scholars have called 'legal framing'.<sup>25</sup>

In particular, a legal framing can facilitate the appropriation of rights discourse by marginalised groups, which is a key tool in the fight for a longer-term improvement in the marginalised group's status. David Engel argued in his 2012 article, 'Vertical and Horizontal Perspectives on Rights Consciousness' that rights consciousness emerges from the interplay between the construction of individual identities, and the discourses available in the social environment for dealing with experience and conflict.<sup>26</sup> This dissertation will argue that the litigation and the experience of law can provide such a discourse. Indeed, Merry found in her 2003 study that the adoption of a rights consciousness actually *requires* experiences with the legal system that confirms that subjectivity.<sup>27</sup> Her claim will be examined in the context of Moshesh.

Litigation can thus introduce and confirm a rights identity; a legal framing of a grievance can emphasise the harm by putting it in formal and official terms, and also create a narrative linked to specific actors, apportioning blame and thus prompting action. The legal realist approach could mask the potentially empowering effect of litigation on social movement actors through focusing too much on top-down, obviously tangible change. Often, the most important type of change in social movements is the changing of mind-sets. Litigation, which can prompt the appropriation of rights consciousness, can be a key element of this process.

As litigation for social change often focuses on the most disenfranchised and vulnerable members of society, a look at how it can affect power relations is crucial. Discourses of power are particularly pertinent in the context of South Africa, which is struggling to come to terms with the potent legacy of apartheid, a system that entrenched inequality in law. Lucie White's *To Learn*

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<sup>23</sup> Anna Marshall, 'Injustice Frames: Legality and the Everyday Construction of Sexual Harrassment', *Law & Social Inquiry*, 28: 3, (2003), p.659-689, p.663.

<sup>24</sup> Michael W. McCann, 'How Does Law Matter for Social Movements?', in *How Does Law Matter?* eds. Bryant G. Garth & Austin Sarat (Northwestern University Press, 1998) , p. 76- 85 at p.84.

<sup>25</sup> McCann, *Rights At Work*, (1994), p.234.

<sup>26</sup> David M. Engel, 'Vertical and Horizontal Perspectives on Rights Consciousness', *Indiana Journal of Global Legal Studies*, 19: 2, (2012), p.423-455.

<sup>27</sup> Sally Engle Merry, 'Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence', *Human Rights Quarterly*, 25: 2, (2003), p 343-381 at p.344.

*and to Teach: Lessons from Driefontein on Lawyering and Power*' offers an extremely persuasive argument for how the law can challenge power dynamics.<sup>28</sup> Although not focused on litigation, it does show that legal strategies can build the power of a community.<sup>29</sup> White's piece uses a South African apartheid-era case study, in which a lawyer and an organiser used varying skills and methods to successfully empower villagers in a white-designated area to mobilise and dissent against their forced removal. White's key contribution was to match each of Steven Lukes' 'dimensions of power' to an aspect of using the law for social change.<sup>30</sup> It is the ability of the lawyer to challenge the 'third dimension' of power, the internalisation and acceptance of domination by the oppressed, which holds particular interest for this dissertation.<sup>31</sup> This dimension, White argues, seeks to stimulate change on the level of social consciousness. In a pedagogic process strongly influenced by Paulo Freire, the lawyer works to facilitate awareness of the domination that the marginalised experience, and to challenge it.<sup>32</sup> It is a crucial aspect of lawyering for social change, and one that, this dissertation will argue, can be facilitated by litigation. White's piece was written in the context of apartheid, but unfortunately, the inequality and deprivation that apartheid fostered continues in many South African schools. Thus it is still a useful lens through which to examine the work of lawyers working for social justice. The focus, then will be on White's 'Third Dimension' of lawyering for social change; how the law, and more specifically, litigation, can cultivate collective identity and rights consciousness, thus helping to liberate marginalised people from internalised oppression in the manner of Freire.<sup>33</sup>

To further understand this process, the dissertation will draw on Felstiner, Abel and Sarat's work 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming.' This piece aims to provide a framework for studying the emergence and transformation of disputes. It does so through identifying three transformations that must take place in order for an injurious experience to become a dispute. The first of these is naming; the acknowledgment that an experience has been injurious.<sup>34</sup> The next is blaming; transforming the experience into a grievance; specifically, attributing an injury to the fault of someone or something.<sup>35</sup> The third is claiming; when the aggrieved voices their concern to the person or entity believed to be responsible, and asks for a remedy. As the authors of the work argue, a significant portion of any

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<sup>28</sup> Lucie White, 'To Learn and Teach: Lessons from Driefontein on Lawyering and Power', *Wisconsin Law Review*, (1988), p.699-769.

<sup>29</sup> Lucie White, 'Lessons from Driefontein', p. 742.

<sup>30</sup> Steven Lukes, *Power: A Radical View*, (London: Macmillan, 1974).

<sup>31</sup> *Ibid.*, p. 26.

<sup>32</sup> Lucie White, 'Lessons from Driefontein', p. 761.

<sup>33</sup> Paulo Freire, *Pedagogy of the Oppressed*, (London: Penguin, 1996)

<sup>34</sup> William L.F. Felstiner, Richard L. Abel, Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...', *Law & Society Review*, 15: 3/4, Special Issue on Dispute Processing and Civil Litigation, (1980 - 1981), p. 631-654, p.633.

<sup>35</sup> *Ibid.*, p. 635.

dispute exists only in the minds of the disputants.<sup>36</sup> The work is relevant because it seems evident that the movement for education in South Africa is fundamentally a dispute. The dispute is constantly between the activists on the ground, who attempt to hold the government accountable for providing education, and government officials, who shirk their responsibilities or place blame on others.

The dissertation will thus synthesise a number of different frameworks in order to provide a more nuanced view of the impact of litigation on social movements. It will take Felstiner et al's argument a step further by situating it in the context of rights discourse, honing in on how the three transformations have enabled pupils at Moshesh to take on a rights identity as they battle for their education. Integrating Lukes' and Whites' work on power, it will assert that constructing a legal or rights identity is an empowering process that can challenge existing power dynamics. Benford and Snow stated in 2000 that despite the ubiquity of frame theory in social movement literature, there have been few studies of the actual contribution of framing processes; the situation has not markedly changed since then.<sup>37</sup> This dissertation will thus aim to contribute to the debate surrounding legal framing and the impact of litigation in the field of education.

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<sup>36</sup> Ibid., p.632.

<sup>37</sup> Benford and Snow, 'Framing Processes and Social Movements', p.632.

## Methodology

The work will engage with an interpretive approach, similar to that adopted by Michael Paris, which is concerned with the shared understandings of activist participants themselves, and how they understand litigation and their social struggle.<sup>38</sup> Interpretivism recognises that the social sciences are distinct from natural sciences because their subjects are human, interpreting and constructing the world through shared meaning.<sup>39</sup> This is in contrast to a realist, positivist approach, as exemplified by Rosenberg, which misses a lot of the complexity and ambiguity that the law as a social force can produce. As Paris argues, 'the commitment to social-scientific positivism means that the researcher is unconcerned with agents' practical consciousness'.<sup>40</sup> The positivist 'legal realist' approach relies on a simple 'cause and effect' mentality. Robert Post explains that Rosenberg's approach 'asks whether one quantifiable variable (court decisions) 'causes' changes in a distinct quantifiable variable (for example, public opinion)'.<sup>41</sup> From this perspective, it appears that the only variables worth examining, in the words of Post are 'those that can be demonstrated to possess causal efficacy'.<sup>42</sup> Therefore it is not surprising that legal realism can miss some of the crucial ancillary effects of litigation, and particularly the impact on the mind-set and consciousness of those involved. For social movement lawyers, this obfuscates one of the most important parts of their role. The lawyers at EELC certainly take their role of educating and shaping mind-sets through the law extremely seriously; the educational aspect of their work is a central part of their vision and mission.<sup>43</sup> Thus a positivist view that only looked at the more tangible effects of law would have been reductionist to the work of the EELC. A more nuanced interpretive account in the on-going case of Moshesh will reveal far more than a positive approach.

The dissertation will also embody a culturalist conception of the law; which McCann referred to as 'law as social practice'.<sup>44</sup> After all, the law does not exist in a vacuum, but interacts with and informs a variety of other discourses. A shift away from an instrumental conception of law towards a constitutive perspective, seeing law as just one of many possible influences that

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<sup>38</sup> See Michael Paris, *Framing Equal Opportunity: Law and the Politics of School Finance Reform*, (Stanford, CA: Stanford University Press, 2010).

<sup>39</sup> Paris, *Framing Equal Opportunity*, p.18.

<sup>40</sup> Ibid.

<sup>41</sup> Robert Post, 'Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate', *Boston University Law Review*, 89, (2009), p.581-587, 584.

<sup>42</sup> Ibid.

<sup>43</sup> Equal Education Law Centre, Vision and Mission, at [http://www.eelawcentre.org.za/vision\\_and\\_mission](http://www.eelawcentre.org.za/vision_and_mission), last accessed 15<sup>th</sup> August 2014.

<sup>44</sup> Michael McCann, *Rights At Work*, p.6.

shape social life, is crucial to a fuller understanding of the law and social movements.<sup>45</sup> As Dupret argues; 'law is not an analytical concept, but only what people claim that law is.'<sup>46</sup> Thus I will draw on Clifford Geertz's interpretive theory, in which he sees law as a cultural code of meanings for interpreting the world; 'law' here, there, or anywhere is part of a distinctive manner of imaging the real'.<sup>47</sup>

My central claim is that the litigation surrounding Moshesh has helped to galvanise the beginnings of a social movement there, through shaping the shared understandings of the pupils involved, creating a legal consciousness and an awareness of rights. This claim cannot be put under the scrutiny of precise measurements that a more simplistic positivist view perhaps could, but that is not the aim. I will make the argument with the use of interviews with lawyers from the EELC, and interviews with the pupils themselves.

The work draws on three months of working with the Equal Education Law Centre in Cape Town, South Africa. Throughout my time there I carried out research and drafting tasks relating to the Moshesh case, allowing me to gain an in-depth knowledge of the intricacies of the case. The centrepiece of the dissertation is two visits to Moshesh school in the Eastern Cape, which took place in June and August 2014. The first visit was with a representative from EE and the attorney on the case at the EELC, Yana Van Leeve. In this visit I was able to sit in on meetings with various stakeholders, and begin to gauge attitudes from my observations.

My second visit was with a team of activists from EE. I joined an educational and awareness-raising trip in which EE endeavoured to develop the limited mobilisation that had occurred at Moshesh through a series of workshops educating the pupils on their rights, and situating their struggle within a historical context. I was able to organise my own interviews with seven of the pupils who were attending these workshops. The pupils who are involved in the movement are known as 'Equalisers'. Equal Education's vision is that Equalisers are the core members of EE, who along with parents, teachers, activists and community members, lead campaigns to 'improve schools in their communities, equalise the education system, and set an example to their peers through dedication to their own education'.<sup>48</sup> Equalisers also hold the majority of the votes at the organisation's National Congress. The Equalisers that I interviewed at Moshesh did have some English, but I wanted to ensure that they fully understood the questions

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<sup>45</sup> See Laura Beth Nielsen, 'Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harrassment', *Law & Society Review*, 34:4, (2000), p.1055-1090, p.1058.

<sup>46</sup> Baudouin Dupret, 'Legal Pluralism, Plurality of Laws and Legal Practices: Theories, Critiques and Praxiological Re-Specification', *European Journal of Legal Studies*, 1, (2007), p.11.

<sup>47</sup> Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology*, (New York, Basic Books, 1983), p.184.

<sup>48</sup> Equal Education Annual Report 2013, at <http://www.equaleducation.org.za/file/2014-06-02-ee-annual-report>, last accessed 1<sup>st</sup> July 2014, p.2.

that I was asking them, so I enlisted the help of one of the EE activists, who spoke their native Sotho, as translator.

I tried to frame the questions as broadly as possible so as not to bias the answers. After all, I was attempting to discover whether or not the pupils interpreted their struggle with a legal or rights-based discourse; as Engel has argued, research that injects the very concepts whose existence is being researched into the interview is methodologically self-defeating.<sup>49</sup> Rather, I sought to have a broad conversation which explored how the Equalisers understood their role in the movement, and to unpick their reasoning behind joining the movement in the first place. In this way, I encouraged the interviewees to frame their own narrative, which I could then analyse to ascertain if a 'legal framing' was present.<sup>50</sup> By staying in the village and attending the school every day for a week, I believe that I was able to overcome some of the challenges of a cross-cultural interview, as I felt that I had built some rapport with the interviewees prior to interviewing them.<sup>51</sup>

I was also able to interview all of the attorneys at the EELC. The attorneys and candidate attorneys attended a presentation of my work, followed by a discussion about some of its key themes.

The dissertation is not attempting to isolate litigation and the law as the central factors which explain everything to do with the movement in Moshesh. It does not claim to be a 'total explanation' of the movement.<sup>52</sup> In fact, it could not be, as the constitutive perspective I have adopted means that law must be seen as just one of many ways of interpreting the world. Rather, my aim is to explore what has happened in Moshesh, and contribute to the debate about litigation and social movements.

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<sup>49</sup> David M. Engel, 'Vertical and Horizontal Perspectives on Rights Consciousness', p. 434.

<sup>50</sup> See Sandra Jovchelovitch and Martin W. Bauer, *Narrative Interviewing*, London: LSE Research Online, (2000), at <http://eprints.lse.ac.uk/2633/1/Narrativeinterviewing.pdf>, last accessed 1<sup>st</sup> June 2014.

<sup>51</sup> See Anne Ryen, 'Cross Cultural Interviewing' in *Inside Interviewing*, ed. James A Holstein and Jaber F. Gubrium, 2003, accessed online at Sage Research Methods.

<sup>52</sup> Edgar Kiser, 'The Revival of Narrative in Historical Sociology: What Rational Choice Theory Can Contribute', *Politics and Society*, 24, 1996, p.249–71, p.258.

## Background

'We write this letter asking for help from you. We have big problems in our school and this lead us to fail, and it also destroy our lives and future...'<sup>53</sup>

The Equal Education Law Centre became involved in litigation surrounding Moshesh Senior Secondary School, a failing school in the rural Eastern Cape, after their sister organisation, Equal Education, was contacted directly by pupils at the school, who wrote them a letter describing the abysmal conditions. Among the many problems were absent teachers (including a headmaster who was not there for nine months), a lack of textbooks, and a crumbling school infrastructure. For many subjects, including maths, there was no teacher at all. Pupils, often with no lesson to go to or textbook to study from, shared space with roaming livestock and passing villagers on horseback; there was no fence to keep them out.

Repeated attempts to contact the local Education District Office, responsible for delivering education services to Moshesh, failed. They were met with no response, or false claims that problems at the school were being dealt with. Consequently, Equal Education asked the EELC if they would launch litigation. In November 2012, the EELC launched proceedings at the Bhisho High Court against the District Director, the Eastern Cape Head of Department and Member of the Executive Council for Education, the Moshesh school principal, the Director General and the Minister of Basic Education, Angie Motshekga.<sup>54</sup> Ten pupils at Moshesh, as well as EE's national chairperson, Yoliswa Dwane, submitted founding and supporting affidavits.

The fundamental rights granted by the Constitution formed a crucial part of the case. The founding affidavit contended that the neglect of Moshesh Senior Secondary School by the national Department for Basic Education and the local Eastern Cape Department of Education was unconstitutional.<sup>55</sup> It asserted that it was a breach of the right to education (Section 29), the right to equality (Section 9) and the right to dignity (Section 10), amongst others.<sup>56</sup> Thus the Constitution provided the fundamental nexus of accountability around which the case revolved. On 13 June 2013, four days before the scheduled hearing of the case, Equal Education and the Eastern Cape Department of Education met to discuss the progress made to resolve the problems

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<sup>53</sup> Letter from Pupils at Moshesh, June 2012, at <http://equalizermagazine.wordpress.com/2012/06/21/please-find-this-in-your-hearts-to-help-us-a-letter-from-learners-in-matatiele-ec/>, last accessed 1<sup>st</sup> September 2014.

<sup>54</sup> EELC Annual Report 2013, at <http://eelawcentre.org.za/sites/default/files/PDF%20LQ%20DOUBLE.pdf>, last accessed 1<sup>st</sup> July 2014, p.26.

<sup>55</sup> Palesa Manyokole, Founding Affidavit in *Palesa Manyokole and Two Others v District Director Maluti and 7 Others Bhisho High Court Case Number 603/12*, at <http://www.equaleducation.org.za/content/2013/04/24/Palesa%20Manyokole%20Founding%20Affidavit.pdf>, Clause 28, last accessed 1<sup>st</sup> July 2014.

<sup>56</sup> *Ibid*, Clause 28.1, 28.4, 28.5.

at the school, and to try and find a way forward. The Eastern Cape Department of Education reported that they had taken some action to address the issues, including suspending the school principal and appointing a new acting principal. The hearing was postponed, on the condition that the department comply with a Settlement Agreement, agreed upon and signed by all parties and declared an order in Bhisho High Court. This 25 point Settlement Agreement set out the steps that the respondents must take in order to address the problems at the school, including filling the vacant educator posts, implementing a catch-up plan for pupils, providing the school governing body with training and ensuring full provision of textbooks and other learning materials. However, almost a year after the settlement, a visit by Equal Education revealed that the vast majority of the order has not been implemented. Indeed, my first visit in June 2014 revealed that there was still no maths teacher, that textbook shortages remained, and that no training had been provided for the school governing body. This compelled the EELC to issue a letter of demand to the District, demanding that the settlement agreement be complied with in full, and warning that failure to comply would result in the EELC's clients once again approaching the High Court for relief. At the time of writing, the applicants were still waiting for a response from the District.

Taking a legal realist perspective, one could certainly take a pessimistic view of the litigation surrounding Moshesh. The lack of change in terms of the conditions at the school that the settlement agreement produced could appear to be in line with Rosenberg's proposition that 'courts are impotent to produce significant social reform'.<sup>57</sup> My experience at the EELC suggests that contemporary social movement lawyers do not trust that courts on their own will bring about reform. Rather they see litigation as just one of several available tactics; the 2014 strategic evaluation of South African public interest litigation asserts that 'public interest litigation is most effective when it is only one part of an overall campaign'.<sup>58</sup> This is well illustrated by another key case taken on by EE and the EELC, the Norms and Standards case, in which the two organisations fought to compel the Minister of Basic Education to publicise binding norms and standards for school infrastructure in South Africa. The Norms and Standards case took a typical format, where EE launched an extensive political campaign prior to any legal action at all. This included contacting government officials, meetings with the Minister and her staff, and a march of 20,000 protestors to Parliament.<sup>59</sup> Thus when litigation was launched, it was in the context of an already well-established campaign.

The attorneys at the EELC were consequently wary at launching litigation in Moshesh without the support base created by a carefully crafted social movement campaign. Sherylle Dass,

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<sup>57</sup> Gerald Rosenberg, *The Hollow Hope*, p.71.

<sup>58</sup> Atlantic Strategic Evaluation, p.134 can I cite this

<sup>59</sup> Equal Education, '20,000 March for Minimum Norms and Standards!', 22<sup>nd</sup> March 2011 at <http://www.equaleducation.org.za/article/20000-march-for-minimum-norms-and-standards>, last accessed 1<sup>st</sup> June 2014.

Senior Attorney at the EELC, had previously worked in litigation for refugees, and found it to be an uphill struggle due to the lack of public support for minorities like refugees in South Africa. With no social movement, it is much harder for litigation to have an impact; 'with refugee work, we tended to find that there's not a lot of policy changes that have come about because there's no social movement backing that type of litigation.'<sup>60</sup> Moshesh, then, was a risk, but one that occurred because the EELC felt that they had no other choice.

Therefore Moshesh is a fascinating case study because it is something of an anomaly. In terms of the EELC's philosophy around the place of litigation in relation to social mobilisation and the work of Equal Education, the Moshesh case actually goes 'back-to-front'. Despite the fact that litigation is usually considered a last resort, with Moshesh litigation was the first thing that the EELC had to do. As Dmitri Holtzman, executive director of the EELC explained, litigation was really the only option open to them, responding as they were to 'a set of really overwhelming facts that were emergency in nature, in the sense that the school was performing so badly, it was such a desperate plea, and a mix of problems that could be dealt with [by litigation] in both the short term and the long term.'<sup>61</sup> That repeated appeals to the District for improvement fell on deaf ears served to further point to litigation as the only possible recourse. It was also felt that the physical infrastructure problems along with the lack of teachers and textbooks were issues that EELC could get a quick victory on through a court case (although unfortunately this was not to prove correct). EE and the EELC were very aware that time wasted deliberating over tactics is time where more pupils slip through the net.

Moshesh thus provides an interesting insight into how litigation can galvanise a social movement where there was not one previously, because litigation was, unusually, the first step that was taken in the case. However, it also reveals the limitations of litigation in a legal realist sense, as real tangible outcomes of the settlement agreement have proved few and far between so far. What the legal narrative has meant on the ground however is fascinating. Despite the fact that the litigation has not, so far, led to decisive change in the conditions at the school, it has led to some intriguing changes in the attitudes of some of the key stakeholders of the school. The next chapters will seek to unpick some of these changes.

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<sup>60</sup> Sherylle Dass, Interview, EELC, Cape Town, 12<sup>th</sup> August, 2014.

<sup>61</sup> Dmitri Holtzman, Interview, EELC, 12<sup>th</sup> August, 2014.

## Identity

'My mom was a checkout girl...

My dad was a garden boy....

And that's why...

I'm an Equaliser, I'm an Equaliser, I'm an Equaliser!'<sup>62</sup>

The construction of a coherent sense of identity is crucial to social movements. Amongst scholars, there is not one consensual definition of what a collective identity is, but it is most frequently understood as an identity generated between individuals. For example, Snow argues that 'its essence resides in a shared sense of 'oneness' or 'we-ness' anchored in real or imagined shared attributes and experiences.'<sup>63</sup> Furthermore, Snow anchors collective identity to a sense of collective agency.<sup>64</sup>

An emerging sense of collective identity was palpable from interviews with the Equalisers, the pupils involved in the movement, in Moshesh. There was a clear sense of, to use Snow's term, 'we-ness' in the way in which they defined their struggle. Equalisers frequently made reference to achieving 'our goals', clearly indicating that the group felt that they were working towards a shared aim rather than one on an individual level. For example, Tiisetso stated that education was important to her because 'it helps us to achieve our goals and to go where we want to go.'<sup>65</sup> Another Equaliser stated that education was key 'to brighten up our future.'<sup>66</sup> A shared sense of 'we' is crucial to motivate individuals involved in a social movement to act together in the shared interests of the collective group.

There was also a clearly delineated line between 'us' and 'them'; a sense of which is central to the collective identity of a social movement. This division is crucial to transforming a grievance into a dispute, but it is also a key part of the forging of an individual's connections with the broader community of the social movement. Interviewees freely used the terms without feeling the need to explain whom they were referring to; 'we' was always the pupils involved in the movement, whilst 'they' always referred to the District, the government; those who were in power.

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<sup>62</sup> An Equaliser song used in protests

<sup>63</sup> David Snow, 'Collective Identity and Expressive Forms', University of California, Irvine eScholarship Repository, 2001, at <http://repositories.cdlib.org/csd/01-07>, last accessed 1<sup>st</sup> July 2014, p.2.

<sup>64</sup> Ibid.

<sup>65</sup> Tiisetso, Interview, Moshesh Senior Secondary School, Queen's Mercy Village, Eastern Cape, South Africa, 31<sup>st</sup> July 2014. Please note that names of all pupils have been changed.

<sup>66</sup> Andile, Interview, Moshesh, 30<sup>th</sup> July 2014.

'We need to make sure they hire qualified teachers. They need to stick to the norms and standards.'<sup>67</sup>

'They must implement all the things that should be in school such as teachers and textbooks.'<sup>68</sup>

The dividing line between 'us' and 'them' appeared to be clear-cut and straightforward in Moshesh. One could speculate that this was aided by the litigation, which clearly marked out the battle lines through the division of applicants and respondents. The pupils did not have an in-depth knowledge of how the court-case worked, but they knew enough to understand who was responsible for their situation, and thus whom they were 'up against' in terms of the struggle for a better education;

'I know that the district agreed to help in court, but they didn't do what they promised.'<sup>69</sup>

This understanding is in contrast to the analysis of the situation given by the District Official himself, which repeatedly blamed the bad attitude of the students and teachers for the abysmal situation at Moshesh.<sup>70</sup>

The 'us' and 'them' divide communicated by the pupils had a strong moral and emotional dimension, which one could argue was expedited by the litigation. The fact that 'they' (the District/ the government) had negated on their responsibilities as clearly set out by the settlement agreement produced a strong emotional response amongst the pupils interviewed. The power of emotion in driving social movements has been somewhat overlooked in recent years, perhaps for fear of making them appear irrational, but it cannot be denied that emotion is a crucial engine for social movements. Indeed, Ruiz-Junco argues that emotions are powerful motivational factors in every phase of a social movement.<sup>71</sup> In the interviews, feelings of sadness and anger were evident.

(when asked how pupils felt about their school after the court case)

'We are crying. We don't see how there is a future with our situation.'<sup>72</sup>

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<sup>67</sup> Makgotla, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>68</sup> Phetoho, Interview, Moshesh, 31<sup>st</sup> July 2014.

<sup>69</sup> Motsumi, Interview, 30<sup>th</sup> July 2014.

<sup>70</sup> Maluti District Circuit Manager, Meeting, 6<sup>th</sup> June 2014.

<sup>71</sup> Natalie Ruiz-Junco, 'Feeling Social Movements: Theoretical Contributions to Social Movement Research on Emotions', *Sociology Compass*, 7:1, (2013).

<sup>72</sup> Jonathan, Interview, Moshesh, 6<sup>th</sup> June 2014.

'The government is supposed to be taking care of the schools. They're not doing that and it's no good.'<sup>73</sup>

These emotions were borne out of the sense of injustice that the failure of the court case generated, providing a catalyst for a sense of collective identity and crystallising the divide between 'us' and 'them'.

One could argue that Equal Education, in their activism work that took place over their month-long trip to Moshesh in July-August 2014, was able to build upon the sense of anger and injustice from the ineffective litigation that had begun to foster a sense of unity amongst the pupils. Equal Education's presence gave the movement a sense of legitimacy, allowing the pupils to develop their burgeoning collective identity with an identity that had in many ways already been created for them. This included the label of being an 'Equaliser', and the backing of an organisation that is currently enjoying a great deal of popular support from South African civil society. Working with Equal Education allowed the pupils access to a number of symbolic resources which Schwalbe and Mason-Schrock deem 'semiotic bricolage', giving substance to the 'we'.<sup>74</sup> These resources include the Equaliser song (as seen at the beginning of the chapter), key words and slogans, and the rhetoric of EE ('Equal Education for all!' 'Every generation has its struggle'.)

The notion of collective identity as a process, rather than an entity in itself, is helpful here. Melucci argues that collective identity is a process because it is repeatedly constructed and negotiated.<sup>75</sup> As collective identity is not static or fixed, this is not to say that the collective identity of the movement in Moshesh can be entirely defined by the court case, either now or in the future. Rather, the unsuccessful litigation provided the pupils with some key resources that they could draw upon to feed the identity and meaning-making processes of a burgeoning social movement, through fostering a clear sense of 'us' and 'them'. Equal Education, whose workshops and activities built upon the existing sense of injustice, helped to facilitate this process.

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<sup>73</sup> Andile, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>74</sup> Michael L. Schwalbe, Douglas Mason-Shrock, 'Identity Work as Group Process', *Advances in Group Processes*, 13, (1996), p.113-47.

<sup>75</sup> Alberto Melucci, 'The Process of Collective Identity' p. 41-63 in *Social Movements and Culture*, ed. Hank Jonhston and Bert Klandermans, (Minnesota: University of Minnesota Press, 2004), p.44.

## Mobilisation

As well as facilitating identity construction, the litigation prompted protest action by the pupils. In May 2014, around 50 pupils, supported by Equal Education, picketed outside their education department's district office. The protest was in direct response to the litigation; more specifically, in response to the fact that the education department had failed to comply with the settlement agreement. It was clear that this was the reasoning behind the protest; one of the pupils was quoted at the time by national newspaper the *Mail & Guardian* stating this and adding that 'government doesn't care about us.'<sup>76</sup>

The motivation behind the picket was further confirmed by interviews with some of the pupils who took part. One pupil who attended the picket, Jonathan, explained why he joined the protest; 'Even now, when go to court, didn't work. So we went there.'<sup>77</sup> Another, Andile, explained his participation by saying; 'I wanted to hear for myself what the District's answer would be after they had promised us teachers.'<sup>78</sup> It is clear from their answers that the failed court case was central to their participation in the protest, providing a crucial point around which to mobilise.

This brings to mind the observations in NeJaime's *Winning through Losing*, in which he argues that litigation loss may actually contribute to the progress of a movement.<sup>79</sup> His article, like this one, stems from an analytical approach that moves the focus away from the implementation and enforcement of judicial decrees, towards the political and constitutive potential of law.<sup>80</sup> NeJaime argues that legal mobilisation and cause lawyering scholars often assume that a litigation loss has a demobilising effect. Indeed, McCann argued that 'eventual defeat in court can sap movement morale, undercut movement bargaining power, and exhaust movement resources'.<sup>81</sup> Of course, in the case of Moshesh, the litigation was not lost; instead the outcome of it, the settlement agreement, proved largely ineffective. Yet many of the points that NeJaime makes about the effect of litigation loss are still relevant here. The disappointment and anger of a failed court case are certainly analogous to that resulting from non-compliance with a settlement agreement. NeJaime argues that litigation loss may raise consciousness and mobilise

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<sup>76</sup> Victoria John, 'Eastern Cape Pupils Picket against shoddy school', 2 May 2014, *Mail & Guardian*, at <http://mg.co.za/article/2014-05-01-eastern-cape-pupils-picket-against-shoddy-school>, last accessed 30<sup>th</sup> May 2014.

<sup>77</sup> Jonathan, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>78</sup> Andile, Moshesh, Interview, 30<sup>th</sup> July 2014.

<sup>79</sup> Douglas NeJaime, 'Winning through Losing', *Iowa Law Review*, 96:3, (2011), p.941-1012.

<sup>80</sup> *Ibid.*, p.945.

<sup>81</sup> Michael McCann, 'How does law matter for social movements?', p.91.

constituents by inspiring outrage, as well as strengthening resolve and a sense of entitlement.<sup>82</sup> This seems to have been the case at Moshesh. Yet given that there was no actual litigation loss there, one could argue that this sense of entitlement was all the stronger; the court had publically validated their grievances with the District, but still nothing had been done. Both Jonathan and Andile, in their statements above, laid the blame squarely at the feet of the District for not complying. In our conversations, there was a palpable sense of anger and disappointment. Another pupil, Makgotla, said that he joined the protest 'to take an action to bring a change. We can't fight for change sitting down. We wanted to pressure the District to bring more qualified teachers for subjects like maths and physics.'<sup>83</sup>

The fact that the District had not complied with the court settlement, then, created a sense of injustice that actually compelled pupils to take action themselves. The non-compliance of the District led pupils to push for accountability, seen in Andile's statement that he wanted an answer from the District, an explanation as to why they had not done what they promised. Indeed, the theme of broken promises was at the core of the conversations about the Protest; 'I know that the District agreed to help in court, but they didn't do what they promised.'<sup>84</sup> Thus the litigation provided a rallying point around which the pupils could mobilise; despite, or perhaps more rightly, because of, the fact that it did not achieve what it set out to do. The failure of the Settlement Agreement so far to create a mechanism of accountability and hold the District responsible increased mobilisation at the grassroots.

The protest was a symbol of the growingly coherent identity of the movement at Moshesh; as Melucci argues, actors produce collective action because they are able to define themselves and their relationship within the environment (other actors, available resources, opportunities and obstacles).<sup>85</sup> However, it also enabled the pupils to further consolidate their identity; a public demonstration is a collective activity that confirms common interests, shared grievances, and common bonds. The fact that Equal Education assisted the pupils in organising the protest further aided the identity-building process. The picket garnered national media attention, helping the pupils to develop a sense of dual identity; as activists fighting for their school, but also as Equalisers fighting for education across South Africa.

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<sup>82</sup> NeJaime, 'Winning through Losing', p.985.

<sup>83</sup> Makgotla, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>84</sup> Motsumi, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>85</sup> Melucci, 'The Process of Collective Identity', p. 47.

## Framing

We have seen the impact of the litigation in aiding to create a sense of oppositional 'us' and 'them' identity in Moshesh, and in helping to mobilise the pupils into protest. However, another crucial way that the law can impact social movements is through legal framing. The law, with its clear narrative of fault that apports blame to specific actors, can be immensely helpful to social movements. As Marshall argues, it provides individuals with a powerful set of interpretive tools in the disputing process.<sup>86</sup>

These tools have been utilised by the Equalisers at Moshesh in order to navigate their own perceptions of the problems at the school, the movement as a whole and their place within it.<sup>87</sup> Even without any substantive legal knowledge, the Equalisers I spoke to drew on legal concepts to frame and organise their ideas surrounding the movement. As Pedriana asserts; 'law is itself a language system. The vernacular staples of law- rights, duties, privileges, prohibitions, remedies, and so on- construct and express ideas of social conflict and their resolution.'<sup>88</sup> Drawing on a legal framework thus often invokes the concept of rights. I argue that the litigation has provided pupils within the movement with the tools to frame their problems through a legal framework, and so to begin developing a rights consciousness.

Drawing on a legal framework has enabled the pupils to transform the situation in Moshesh from a catalogue of problems into a dispute that aims to solve them. Felstiner, Abel and Sarat have broken down the process in which a grievance becomes a dispute into three stages; naming, blaming and claiming.<sup>89</sup> It was fascinating to see evidence of all three stages in the interviews with the learners.

The first step in this series of transformations is the acknowledgment that a particular experience has been injurious; the 'naming' phase. All of the interviewees set out the problems in the school, and the pressing need to solve them. Several of the pupils said that they wanted to 'fix' their school, and listed the things that were wrong with it; 'we have no teachers and no textbooks.'<sup>90</sup> They also clearly understood the ways in which their poor quality of education was harming them;

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<sup>86</sup> Anna-Maria Marshall, 'Injustice Frames, Legality, and the Everyday Construction of Sexual Harrassment', *Law & Social Inquiry*, 28:3,(2003), p.659-689, p.661.

<sup>87</sup> Lisa Vanhala, *Social Movements Lashing Back*, p.10

<sup>88</sup> Nicholas Pedriana, 'From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s', *American Journal of Sociology*, 111:6, p.1718-1761, p.1727.

<sup>89</sup> Felstiner, Abel and Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...'

<sup>90</sup> Mamello, Interview, Moshesh, 30<sup>th</sup> July 2014.

'Education is the key to success. Without education we have nothing. [With a good education] we can develop, and get free. Education makes things easy.'<sup>91</sup>

'In South Africa, there are no jobs for uneducated people.'<sup>92</sup>

Recognising that there is a problem, and being able to clearly articulate it, is crucial to the process of dispute transformation.

The next stage is 'claiming', in which a perceived injurious experience is transformed into a grievance, with an aspect of fault. This is where the law, and a legal framing can provide powerful resources to a social movement. The court case at Moshesh clearly laid the blame with government institutions; the respondents ranged from the District on a local level right up to the National Minister for Education, Angie Motshekga.<sup>93</sup> It seemed evident that even without detailed knowledge of the court case, the Equalisers had absorbed this notion of responsibility. When I asked who was responsible for ensuring that they had a quality education, all of the interviewees stated that it was an obligation of government:

'The government is supposed to be taking care of the schools. They're not doing that and it's no good.'<sup>94</sup>

'The blame is with the district and the government. The government workers don't function well; there is so much corruption.'<sup>95</sup>

'The government must have a role which is why we protested for faster help from the district.'<sup>96</sup>

That the pupils held the government responsible for their failed schooling is not to be taken for granted. In such a remote corner of the Eastern Cape, the notion of government seems very distant and removed. For example, the village that Moshesh is situated in, Queen's Mercy, is still governed by a chief, who owns all of the land. Villagers pay a tithe to him in order to live there. Democracy seems to have barely penetrated; some of the local women EE activists spoke to still hold onto apartheid-era ideas despite twenty years of constitutional democracy. One local lady was shocked to discover that I had been regularly cooking meals for the (black, Xhosa) EE

<sup>91</sup> Jonathan, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>92</sup> Makgotla, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>93</sup> Palesa Manyokole, Founding Affidavit, November 2012, at <http://www.eelawcentre.org.za/sites/default/files/Palesa%20Manyokole%20Founding%20Affidavit%20Final%20pdf.pdf>, last accessed 1<sup>st</sup> September 2014.

<sup>94</sup> Andile, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>95</sup> Motsumi, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>96</sup> Mamello, Interview, Moshesh, 30<sup>th</sup> July 2014.

activists when I was white. Thus the attribution of democratic accountability to the South African government by pupils at Moshesh is very significant.

Indeed, that pupils directly held the government accountable for their education indicates the beginning of a rights consciousness. As the United Nations Office of the High Commissioner for Human Rights asserts, accountability is a cornerstone of the human rights framework.<sup>97</sup> After all, there can be no meaningful rights without responsibilities; human rights are the rights and freedoms to which all are entitled by virtue of being human, whilst accountability ensures that such rights are upheld by assigning duties to those with the power to enforce such rights. The assigning of responsibility ('the blame is with the District and the Government') and the demand for answerability ('I wanted to hear what the District's answer would be after they had promised us teachers') are both crucial to the notion of accountability.

For the notion of accountability to be effective, there must also be a third element to it; that of *enforceability*. As the United Nations defines it, enforceability requires public institutions to put mechanisms in place to ensure that public officials and institutions comply with established standards, imposing sanctions and remedial action in the event of non-compliance.<sup>98</sup> The law and litigation are often central agents in the process. Consequently, a legal framing can be crucial to develop an understanding of the need for enforceability. The notion of enforceability ties in neatly with the final transformation that Felstiner, Abel and Sarat explore; that of *claiming*; asking for a remedy from the person or entity that is believed to be responsible.<sup>99</sup> In Moshesh, the Court Case directly facilitated the final transformation, as ten pupils submitted affidavits. The Protest was also a striking example of the claiming of rights, which was prompted by the litigation. In the interviews, there was a real sense of determination, as well as a view of how to claim the right to a quality education through fighting for accountability. Jonathan explained the idea behind the Court Case;

'It was because of the situation; the problems with the SBG, the teachers, textbooks and the principal. We went to make the department do things. To make the district make a movement.'<sup>100</sup>

Jonathan's words show an understanding that the law can be used as an agent of enforceability to ensure accountability, even without detailed knowledge of how this worked in practice.

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<sup>97</sup> OHCHR publication, 'Who will be Accountable?', (2013), at <http://www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf>, last accessed 1<sup>st</sup> August 2014, p.10.

<sup>98</sup> Ibid.

<sup>99</sup> Felstiner, Abel and Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...', p 635.

<sup>100</sup> Jonathan, Interview, Moshesh, 30<sup>th</sup> July 2014.

Interestingly, he expressed a faith in the law to fix the problem despite the fact that the initial settlement agreement had not been abided by, stating that he would like to see the Court Case happen again.<sup>101</sup> Other pupils also demonstrated the third transformation of claiming, by explicitly stating what they wanted to do to take the movement forward;

'We can write a letter to the District and then to the government.'<sup>102</sup>

'We can make the government listen by writing letters and going to the media.'<sup>103</sup>

Evidently, the ideas for redress were not always of a legal nature; but the very notion of *enforceability* is from the world of law, and a cornerstone of human rights theory.

Without a doubt, the imprint of law was present in the interviews, expressed in the way that the pupils used a legal framing to interpret and organise their narrative. However, they also referred to the law more explicitly, drawing directly upon notions of legal standards as a way of ensuring adequate educational provision. Several pupils, for example, referred to the need for Norms and Standards in education;

[Explaining what the government should do to improve education]

'They should implement Norms and Standards.'<sup>104</sup>

'Since we had Norms and Standards in South Africa we must get quality education.'<sup>105</sup>

'[The government] must implement all the things that should be in school such as teachers and textbooks.'<sup>106</sup>

A grasp of the need for established standards of 'all the things that should be in school' demonstrates a substantial comprehension of the notion of enforceability, which is central to rights consciousness.

Indeed other crucial pillars of human rights, such as universality and equality, were often present in my conversations with the pupils. For example, Tiisetso said that she joined the

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<sup>101</sup> Ibid.

<sup>102</sup> Phetoho, Interview, Moshesh, 31<sup>st</sup> July 2014.

<sup>103</sup> Tiisetso, Interview, Moshesh, 31<sup>st</sup> July 2014.

<sup>104</sup> Mamello, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>105</sup> Makgotla, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>106</sup> Phetoho, Interview, Moshesh, 31<sup>st</sup> July 2014.

movement 'Because I want my school to look like all other functioning schools.'<sup>107</sup> Another pupil, Makgotla, said that he appreciated the role of EE because 'they make sure that education is equal across all schools.'<sup>108</sup> Phetoho even explicitly said that he joined the movement 'to fight for our rights.'<sup>109</sup>

One could argue that using a legal framework to interpret grievances can facilitate a rights consciousness. In Moshesh, the litigation provided the impetus to allow the pupils to interpret their problems with a legal framing. This in turn gave the pupils access to the central concepts of human rights, contributing to the development of a rights consciousness. Merry's important article 'Rights Talk and the Experience of Law' argues that the contribution of law is absolutely crucial in the process of how a person may come to be a 'rights-bearing subject'; that is to understand their problems in terms of rights.<sup>110</sup> Merry contends that the successful adoption of a rights consciousness actually requires 'experiences with the legal system which confirm that subjectivity.'<sup>111</sup> In Moshesh, experience with the legal system through the Court Case has certainly contributed to the adoption of a rights consciousness by the learners. However, it seems that the situation is perhaps more complex than Merry originally argued. For in the case of Moshesh, one could argue that the experience with the legal system actually *did not* in itself confirm the power of the right to education, given that the settlement agreement did not achieve what it set out to. Yet despite, or perhaps because of this, pupils still held on to their belief in the movement and in their right to education.

This is where the role of Equal Education and the Equal Education Law Centre was crucial. Being represented by EE and EELC was evidently a tremendous source of support to all the pupils;

'EE can stand up for us.'<sup>112</sup>

'EE is one that can be of help to us; it can find out what delays the district and government from delivering what they have been promising us.'<sup>113</sup>

However, none of the pupils saw EE or the EELC as an organisation that would do the work for them; instead the pupils depicted it more as an intermediary organisation who could

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<sup>107</sup> Tiisetso, Interview, Moshesh, 31<sup>st</sup> July 2014.

<sup>108</sup> Makgotla, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>109</sup> Phetoho, Interview, Moshesh, 31<sup>st</sup> July 2014.

<sup>110</sup> Sally Engle Merry, 'Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence'.

<sup>111</sup> Ibid, p.343.

<sup>112</sup> Mamello, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>113</sup> Andile, Interview, Moshesh, 30<sup>th</sup> July 2014.

help them to navigate the relationship between themselves and the government. This is crucial, as it shows that the use of intermediary organisations, particularly legally-oriented ones, is not disempowering to individuals within social movements. On the contrary, all of the pupils I spoke to seemed motivated and determined, taking on a large amount of the responsibility to create change upon themselves and seeing EE and the EELC largely as enablers. Motsumi explained why he became involved in the movement;

'I saw there was a problem and wanted to fix it. EE can help us do that.'<sup>114</sup>

Another pupil, Makgotla, said that he became an Equaliser because;

'I saw that being an Equaliser can bring change. I wanted to act as an activist for my school.'<sup>115</sup>

Mamello even placed the collective responsibility for improving education on the pupils themselves, adding 'I don't see why we shouldn't act on the problem.'<sup>116</sup>

Perhaps, rather than a successful encounter with the legal system being crucial to developing a rights consciousness, as Merry argues, *any* encounter with the legal system can help. As we have seen, despite the fact that the settlement agreement has so far not been effective, the pupils at Moshesh were still able to create a coherent collective identity, mobilise into protest, and develop a rights consciousness. The ongoing support of EE and the EELC have played a crucial role in facilitating this. Yet it was the litigation that set the ball rolling; as Lisa Draga, attorney at the EELC stated, in a context of virtual immobility, litigation can sometimes work as a 'lever' to get things moving on the ground.<sup>117</sup>

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<sup>114</sup> Motsumi, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>115</sup> Makgotla, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>116</sup> Mamello, Interview, Moshesh, 30<sup>th</sup> July 2014.

<sup>117</sup> Lisa Draga, Interview, EELC, 12<sup>th</sup> August 2014.

## Power

'the productivity of the law- mobilised by the state and by individual actors- yields new subjectivities and thereby refigures relations of power.'<sup>118</sup>

The notion of power is crucial to understanding social movements. As discussed earlier, the community surrounding Moshesh Senior Secondary School are some of the most marginalised members of South African society. Years of living under apartheid have taken a toll that will take many years to undo. Consequently, many have subconsciously internalised their own oppression to the extent where the conditions under which they live, including an abysmal schooling system, are largely deemed acceptable. This is in line with Steven Lukes' 'Third Dimension of Power'. As Lukes' describes, the third dimension is often the most insidious; it is subconscious power through socialisation, where the most marginalised and oppressed sections of society subconsciously accept and internalise their own subordination.<sup>119</sup> Indeed, tackling this internalised subordination is a crucial problem that the South African education movement must work to solve. This goes some way to explain why the fight for education has not yet become a mass movement in South Africa, leading Deputy Chief Justice Moseneke to remark in 2007;

'I'm surprised that we haven't had one case on the right of access to education in this court [the Constitutional Court] in 13 years... Nobody has come to me and said, 'My son is studying under a tree, there's no chalk, there's no blackboard, the teachers don't come to school every day...'<sup>120</sup>

However, it is evident that the litigation in Moshesh has begun to challenge the sense of apathy that such unequal power relations can produce in the marginalised. It was clear from the interviews that the Equalisers were absolutely aware that their education was inadequate, and were no longer willing to accept it. Lucie White argues that the 'Third dimension of lawyering' seeks to challenge the Third Dimension of power as Lukes conceived it through an educational process.<sup>121</sup> As discussed earlier, the EELC is more than aware of the importance of this aspect of lawyering for social change, and works closely with EE in order to provide it. Freire contends that through the process of reflection and action, subordinated communities can gradually liberate their consciousness from internalised oppression.<sup>122</sup> This process was palpable from the

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<sup>118</sup> Susan F. Hirsch and Mindie Lazarus-Black, eds., *Contested States: Law, Hegemony and Resistance*, (New York: Routledge, 1994), p.13.

<sup>119</sup> Steven Lukes, *Power: A Radical View*, p. 26.

<sup>120</sup> Barron, Chris, 'From courtroom to campus, this is a man in his element', Sunday Times (South Africa), 1 April 2007.

<sup>121</sup> Lucie White, 'Lessons From Driefontein', p.29.

<sup>122</sup> Paulo Freire, *Pedagogy of the Oppressed*, p.164.

Equalisers. As Dmitri Holtzman summed up; 'go to Moshesh three years ago...there was actually not even despondency, it was like 'whatever, this is how things are...'<sup>123</sup> This attitude was nowhere to be found in any of the interviews, or in any of the workshops that I observed. It seems evident that the Equalisers have been able to draw on the law and legal concepts in order to understand, interpret and challenge their own marginalisation, using a legal framework to claim their rights. At the same time, EE and the EELC have been able to capitalise on this through their continued support and presence at the school, including the educational workshops.

### Some Caveats

It is important to point out that the mobilisation at Moshesh is at a very early stage. The pupils who I spoke to are only a very small sample, and are certainly not representative of the Moshesh school community, or the wider community surrounding it. Nor are they intended to be. Rather, they serve as an example as to how litigation can, in some cases, facilitate the beginnings of a social movement. However embryonic it may be, the starting points of a social movement in Moshesh are certainly there.

The dissertation is not trying to argue that litigation should be used as a starting point for any social movement, or that litigation alone can suffice to spark off a social movement. As Dmitri Holtzman opined; 'I would argue that that's a very dangerous way to look at things, it's a very dangerous way to say, we're going to go in and litigate and that's what's going to galvanise this community. Because it has such a high potential of backfiring;'<sup>124</sup> The 'backlash thesis' is central to the pessimistic narrative of legal realism. As Vanhala argues, 'backlash proponents point out that judicial victories are almost always followed by electoral setbacks or other form of social or political counter-mobilisation.'<sup>125</sup> Indeed, the effects of the court case in Moshesh have not been unambiguously positive in terms of the social movement. For example, the director of education for the District, feeling under threat from the litigation, began spreading rumours that EE and the EELC were acting for the Democratic Alliance party, trying to politicise pupils and stir up trouble.<sup>126</sup> This could well have led to pupils and teachers becoming suspicious of EE and the EELC, and the intentions of the movement. Indeed, on my first visit, some of the teachers were nervous about EE's presence at the school, claiming that they were having surreptitious meetings with pupils under the trees and adding 'we don't know what you are telling them.'<sup>127</sup> This could certainly have had a destabilising effect that dissuaded some from joining the movement.

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<sup>123</sup> Dmitri Holtzman, Interview, EELC, 13<sup>th</sup> August 2014.

<sup>124</sup> **ibid.**

<sup>125</sup> Lisa Vanhala, 'Social Movements Lashing Back: Law, Social Change and Intra-Social Movement Backlash in Canada', p.8.

<sup>126</sup> The Democratic Alliance is the governing party for the Western Cape. It is often associated with the white middle class, and has struggled to attract black support.

<sup>127</sup> Teachers Meeting, Moshesh, 6<sup>th</sup> June 2014.

Furthermore, after one of the initial fact-finding visits undertaken by EE and the EELC in 2012, reports reached the EELC that two Grade 12 pupils connected with the movement had been suspended inexplicably.<sup>128</sup> Under the threat of litigation, they were eventually readmitted; but by this time it was less than two months until their matriculation examinations.<sup>129</sup> Thus the litigation, and the presence of EE and the EELC, was not unequivocally positive.

This is important because much of the literature on law and social movements is somewhat compromised by attempting to take a fixed position, through exploring case studies, on what kind of relationship the two can have. Yet it is not clear from Moshesh that it is ever possible to do this. Indeed, the relationship between law and social movement is highly variable; as McCann argues, it is 'contingent on a mix of legal and extralegal social factors.'<sup>130</sup> Even in this one case study, the effect of litigation on the social movement has not been clear-cut. As Holtzman pointed out, there's always an attempt in theorising around the role of the law and rights to create a 'model' for the law and social movements. Yet unfortunately, there is no perfect model; indeed, the EELC has found that sometimes it works in exactly the opposite way to the way they thought it would.

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<sup>128</sup> EELC Annual Report 2013, p. 26.

<sup>129</sup> Ibid.

<sup>130</sup> McCann, 'Law and Social Movements', p.19.

## Conclusion

‘Human rights litigation has empowered individuals even where it has not necessarily constrained perpetrators.’<sup>131</sup>

The above quote, from Van Schaack, seems apt in the context of Moshesh. It is true that the litigation in this remote corner of the Eastern Cape has not achieved everything it set out to do, or even served to successfully hold the respondents to account so far. Yet the experience there has been that litigation, despite its limitations, has served to empower certain members of the Moshesh community.

This dissertation has not tried to argue that litigation has any kind of fixed or intrinsic impact on ordinary people on the ground. Rather, it has attempted to show that the law is inherently multidimensional, and can be drawn upon and utilised by ordinary people in an infinite number of ways. To return to Dupret, ‘law is not an analytical concept, but only what people claim that law is.’<sup>132</sup> Its meanings are many, and socially constructed; ‘the law’ as homogenous monolith does not exist, and thus legal realist attempts to construct it as so are futile.

In the case of Moshesh, litigation has signified a central axis around which to mobilise. Supported by Equal Education and the EELC, the court case provided crucial resources that the Equalisers have drawn upon to form a coherent movement, and ultimately to challenge existing power relations. In the words of Freire:

‘to surmount the situation of oppression, people must first critically recognise its causes, so that through transforming action they can create a new situation, one which makes possible the pursuit of a fuller humanity.’<sup>133</sup>

This evolution is underway in Moshesh, as the litigation has afforded the Equalisers a way to recognise and interpret their situation with a legal framework. Critically, in the manner of Felstiner et al, it has enabled them to name their grievances, attribute blame to those responsible, and finally, to claim redress through protest and movement participation.

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<sup>131</sup> Beth Van Schaack, ‘With All Deliberate Speed: Civil Human Rights Litigation for Social Change’, *Vanderbilt Law Review*, 57, (2004), p.2305-2348 at p. 2347.

<sup>132</sup> Baudouin Dupret, ‘Legal Pluralism, Plurality of Laws and Legal Practices: Theories, Critiques and Praxiological Re-Specification’, *European Journal of Legal Studies*, 1, p.11.

<sup>133</sup> Paulo Freire, *Pedagogy of the Oppressed*, (London: Penguin Books, 1996), p. 29.

Perhaps the most crucial way that the law has been utilised in Moshesh is as a weapon against the apathy and hopelessness that is a result of years of oppression and inequality. The language of the law, brought into the Equalisers' lives by the litigation launched by the EELC, has helped them to create a narrative that is both enlightening and empowering. It has allowed Equalisers to assert that their education doesn't have to be like this, and given them reason to hope for change. Crucially, it has allowed Equalisers access to the notion of human rights, which has empowered and emboldened them to ask for more. In the words of Martha Miller, 'civilisation advances when what was perceived as misfortune is perceived as injustice.'<sup>134</sup> This shift in perception is taking place at Moshesh, and it is human rights, facilitated by the law and the crucial work of EE and the EELC, that is driving it.

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<sup>134</sup> Martha Miller quoted in *Economic and Social Rights and the Right to Health*, (Cambridge:MA: Harvard Law School Human Rights Programme,1995), p.30.