CHAPTER 7 *WESTERN CAPE FORUM FOR INTELLECTUAL DISABILITY V GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA*: A CASE STUDY OF CONTRADICTIONS IN INCLUSIVE EDUCATION

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Summary

Using South Africa as the main case study, this article critically explores domestic commitment towards fulfilling the obligations imposed on the state by article 24 of the Convention on the Rights of Persons with Disabilities. Article 24 guarantees a right to inclusive education. The article uses the decision of the Western Cape High Court in the case of Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another (2011) *as the main pivot for discussion. It is argued that despite having an enabling constitutional environment, South Africa has been ambivalent about fulfilling its obligations under the Convention. On the one hand, South Africa has made significant strides in establishing an enabling legal and policy environment for the attainment of inclusive education. Mainly as part of post-apartheid transformation, it has made significant strides in developing equality jurisprudence that comports not just with the notion of inclusive education, but inclusive citizenship generally. On the other hand, the policy background to the* Western Cape Forum for Intellectual Disability *case demonstrates poignantly contradictions in the implementation of inclusive education by the state. The facts reveal a contradiction in state policy that outwardly embraces inclusive education but is inwardly exclusionary.*

1 Introduction

The adoption of the Convention on the Rights of Persons with Disabilities (CPRD) has the potential to bring about a paradigm shift in the treatment of disabled people at a domestic level, including in the education field.[1] An

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1 Convention on the Rights of Persons with Disabilities, GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008.

increasing number of countries have signed and ratified the CRPD.[2] This is a hopeful sign but not a sufficient barometer for measuring commitment to comply with state obligations to fulfil rights in the CRPD. It is trite that states may sign or ratify an international treaty not because of an altruistic desire to internalise an international law norm but for a variety of other reasons, including narrow political self-interest, that have little to do with benefiting citizenry.[3] Article 26 of the Vienna Convention on the Law of Treaties requires states to perform their treaty obligations in good faith.[4] Whether one can find, at the domestic level, laws, policies, and more crucially, programmes that have been implemented in a manner that resonates with the main objectives of the CRPD is a more dependable indicator of domestic commitment towards compliance with treaty obligations.[5] Ultimately, treaty obligations must be 'translated into reality' so that rights-holders at the grassroots level can derive tangible benefits.[6]

Using South Africa as the main case study, this article critically explores domestic commitment towards fulfilling the obligations imposed on the state by article 24 of the CRPD which guarantees individuals a right to inclusive education. More specifically, the article uses the decision of the Western Cape High Court in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another*[7] as the main pivot for discussion. South Africa has signed and ratified the CRPD as well as the Optional Protocol to the CRPD.[8] The thrust of the arguments in this article is that the facts that led to litigation in *Western Cape Forum for Intellectual Disability* show that, like many other jurisdictions, South Africa has been ambivalent about fulfilling its obligations under the CRPD. On the one hand, South Africa has made significant strides in establishing an enabling legal and policy environment for the attainment of inclusive education. Mainly as part of post-apartheid transformation, it has made significant strides in developing equality jurisprudence that comports not

2 As of July 2013, the CRPD had been signed by 156 countries and ratified by 133 countries. Available at: http://www.un.org/disabilities/convention/convention full.shtml (accessed 30 August 2013).

3 A Geisinger & MA Stein 'A theory of expressive international law' (2007) 60 *Vanderbilt Law Review* 78.

4 Art 26 of the Vienna Convention on the Law of Treaties (1969), United Nations, *Treaty Series,* vol 1155, 331.

5 AS Kanter 'The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 287 309-314.

6 United Nations High Commissioner for Human Rights *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, Annex, Plan of Action Submitted by the United Nations High Commissioner for Human Rights, UN Doc A/59/2005/Add.3 (2005) para 22; I Boerefijn 'International human rights in national law' in C Krause & M Scheinin (eds) *International protection of human rights: a textbook* (2012) 631.

7 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another* 2011 5 SA 87 (WCC).

8 South Africa signed the Convention and the Optional Protocol to the Convention on 30 March 2007 and ratified the same on 30 November 2007: *Convention and Optional Protocol Signatures and Ratifications*, available at http//:www.un.org/disabilities/ countries.asp?id=166 (accessed 9 October 2012).

just with the notion of inclusive education but inclusive citizenship generally. On the other hand, the factual background to *Western Cape Forum for Intellectual Disability* demonstrates poignantly contradictions in the implementation of inclusive education by the state. The facts reveal a contradiction in state policy that outwardly embraces inclusive education but is inwardly exclusionary.

More generally, the article highlights the persistent dangers of an embedded double discourse of inclusive education at the domestic level. Inclusive education is an idea that has been globalised. The trend among national authorities has been to concede the imperative of reforming the education system to render it inclusive but without substantially overhauling its discriminatory content.[9] Commitment towards an education system that accommodates the learning needs of diverse learners, including disabled learners is often juxtaposed with state policy and administrative practices that simultaneously promote the exclusion of disabled learners, especially, intellectually disabled learners.[10] The education policy that was challenged in *Western Cape Forum for Intellectual Disability* supports this claim.

This article has five sections. The first section – the present section – is the introduction. The second section provides an overview of inclusive education, especially its normative values. The third section is a summary of the decision of the Cape High Court in *Western Cape Forum for Intellectual Disability*. The fourth section is an appraisal of *Western Cape Forum for Intellectual Disability.* The fifth section is the conclusion.

2 Normative and transformative equality values animating article 24 of the CRPD on the right to inclusive education

The normative impetus behind the CRPD is inclusive equality. It is the imperative of securing equality and human dignity for disabled people in all socio-economic sectors. Article 24 of the CRPD specifically responds to the legacy of exclusion and marginalisation of disabled learners in the education sector. It guarantees disabled learners a right to equality and non-discrimination in state provision of education. More significantly, article 24 breaks new ground by recognising 'inclusive education' as a

9 S Miles & N Singal 'The education for all and inclusive education debate: conflict, contradiction or opportunity?'(2010) 14 *International Journal of Inclusive Education* 1 9; R Slee & J Allan 'Excluding the included: A reconsideration of inclusive education' (2001) 11 *International Studies in Sociology of Education* 173 174; R Slee 'Driven to the margins: Disabled students, inclusive education and the politics of possibility' (2001) 31 *Cambridge Journal of Education* 385 388; LJ Graham 'Caught in the net: A Foucaultian interrogation of the incidental effects of limited notions of inclusion' (2006) 10 *International Journal of Inclusive Education* 3 11-12.

10 Slee & Allan (n 9 above) 173.

discrete human right.[11] The recognition of inclusive education as a human right is largely a culmination of global advocacy for an education system that is inclusive as to accommodate diverse learning needs and capacities. Article 24 constitutes not just a consolidation of the global consensus on Education for All[12] but also the construction of a transformative paradigm for protecting and fulfilling the right to education.

At a more general level, article 24 is part of the larger transformative paradigm of the CRPD. As one of its fundamental premises, the CRPD implicitly embraces the notion of human rights as indivisible, interdependent and interrelated.[13] More than any other existing United Nations human rights treaty in recent times,[14] the CRPD dissolves the dichotomy between civil and political rights and socio-economic rights. It builds on the Covenant on Economic, Social and Cultural Rights[15] in decisively moving away from a neoliberal philosophy that conceives human rights as negative freedoms only. Article 24 is as much an obligation of restraint that requires the state to desist from invidious discrimination based on disability as it is a positive obligation which requires the state to take certain steps to fulfil the right to education of disabled learners.[16] The state is not only enjoined to ensure that disabled persons are not excluded from the 'general education system',[17] it is also required to take positive steps to provide disabled learners with individualised materials and other support so as to facilitate effective

11 CRPD, art 24(1).

12 Global consensus and guidelines on the imperative of an education system that is inclusive of historically marginalised and excluded social groups, including disabled people, and is captured by the slogan Education for All, are contained in many documents that preceded the CRPD, including the following documents: United Nations Educational, Scientific and Cultural Organization *World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs* (1990); World Conference on Special Needs Education: Access and Quality *The Salamanca Statement and Framework for Action on Special Needs Education* Salamanca, Spain, 7-10 June 1994; United Nations General Assembly, Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, GA Resolution 48/96 (1996), Rule 6; World Education Forum *The Dakar Framework for Action, Education for All: Meeting Our Collective Commitments* Dakar, Senegal, 26-28 April 2000; Committee on the Rights of the Child *General Comment No 1: The Aims of Education* CRC/GC/2001/1 (2001); United Nations Educational, Scientific and Cultural Organization *Guidelines for Inclusion: Ensuring Access to Education for All* (2005); Committee on the Rights of the Child *General Comment No 9: The Rights of Children with Disabilities*, CRC/C/GC/9 2007 (2006) paras 62-69.

13 Preamble to the CRPD, para (c); Art 13 of the Proclamation of Tehran 1968, Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968, UN Doc A/CONF 32/41; Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 25 June 1993, UN doc A/CONF 157/24 para 5, Part I.

14 For a discussion on partial fusion of civil and political rights and socio-economic rights, see: C Scott 'The interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights' (1989) 27 *Osgoode Hall Law Journal* 769.

15 International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), adopted 16 December 1966, entered into force 3 January 1976.

16 S Fredman *Human rights transformed: Positive rights and positive duties* (2008) 220-226.

17 CRPD, art 24(2)(a).

education and maximise academic and social development in a way that is consistent with the goal of 'full inclusion'.[18]

Philosophically, the notion of 'full inclusion' in the CRPD ultimately appeals to egalitarian distribution. It calls for transcending notions of equality that are overly built around politics of identity which locate the locus of injustice for disabled people in demeaning representations but overlooking structural inequality.[19] In responding to both social exclusion and material exclusion, article 24 seeks to achieve the objects of what Nancy Fraser, in her critical theory of social justice, has called 'status recognition' for historically 'misrecognised' social groups that suffer from 'status subordination'.[20] For Fraser, the concept of misrecognition is more holistic. It is not just about having one's self-image being distorted by others who do not see the other as an equal such that, in a Hegelian sense, there is no mutual recognition.[21] It is much more. Fraser explains misrecognition in this way:

> Misrecognition, accordingly, does not mean the depreciation and deformation of group identity, but social subordination – in the sense of being prevented from participating as a peer in social life. To redress this injustice still requires a politics of recognition, but in the 'status model' this is no longer reduced to a question of identity: rather, it means a politics aimed at overcoming subordination by establishing the misrecognised party as a full member of society, capable of participating on a par with the rest.[22]

Fraser's point is that to be misrecognised is not simply to be frowned upon or devalued by the attitudes, beliefs or misrepresentations of others. In a more holistic sense, misrecognition is when someone is denied the status of a full partner in socio-economic interactions as a result of institutionalised patterns that stem from social, economic and cultural values. Therefore, repairing the historical exclusion and marginalisation of a social group such as disabled people is not merely a case of responding to a free-standing cultural harm for the reason that such exclusion and marginalisation implicate a larger socio-economic framework.[23] Rather, it also requires eradicating patterns of 'status subordination' of disabled people that arise from 'parity-impeding' structural inequality.[24] Ultimately, the achievement of social justice requires redistribution of

18 CPRD, arts 24(2)(d) & (e).
19 N Fraser 'Rethinking recognition' (2000) 3 *New Left Review* 110.
20 As above, 113-116.
21 The basic premise in the Hegelian model of identity is that identity is constructed dialogically through interaction with others. Where each subject sees the other as an equal but also separate from the other, there is mutual recognition. However, where one is not seen as an equal by the other, such as where one is seen as inferior there is 'misrecognition'. With misrecognition, the effects are that the relationship of the parties to each other is distorted and the identity of the party labelled inferior is injured: Fraser (n 19 above) 109-110; GWF Hegel *Phenomenology of Spirit* (1977) 104-109.
22 Fraser (n 19 above) 113.
23 As above.
24 Fraser (n 19 above) 114.

resources, so as to enable an erstwhile disabled social group. Thus, over and above seeking to achieve 'cultural recognition' of disabled people, a responsive theory of equality should also seek to achieve socio-economic recognition.[25] In a juridical sense, Fraser can be understood as appealing to a notion of positive rights which is built around rights as capabilities and enablement. It is a notion that ultimately coalesces around the imperative of justiciable socio-economic rights.

As part of achieving economic recognition, article 24 transcends the equal treatment or formal equality model so as to embrace substantive equality. Responsiveness to material deprivation through redistributive justice serves to recognise the vicious circle between poverty and disability.[26] Redistribution through substantive equality addresses systemic inequality which would otherwise be left untouched by mere prohibition of invidious discrimination. Redistribution through socio-economic rights is an affirmation of the link between equality and human dignity.[27] Ultimately, article 24 seeks to repair, more holistically, the historical marginalisation and exclusion of disabled learners from not just the education system but also other socio-economic systems that have been constructed on the assumption of able-bodiedness.[28] It does so by putting the primary economic cost of accommodation on society rather than on disabled learners and their families or carers.

The accent in the CRPD, including in article 24, on the duty of the state to accommodate human diversity by, *inter alia*, providing individualised support, is the Convention's greatest transformative potential. The duty to accommodate difference underscores a paradigm shift from an historically dominant understanding of disability as a bio-statistical aberration that resides primarily in the individual.[29] According to this approach, which has been described as the 'medical model' or the 'individual impairment model', physical or mental impairment is the reason why the affected individual cannot participate equally in society.[30] Individualising disability as intrinsic pathology in this way serves to entrench the status quo. It gives normative and ontological validity to binary categories in which one part of humanity is normal but the other is abnormal. In this way, the state is absolved from adjusting existing socio-economic arrangements to accommodate disabled people. Disabled people, including disabled learners, are required to first fit into existing socio-economic arrangements before they can claim equality.

25 Fraser (n 19 above) 116-120.
26 Preamble to CRPD, para (t); E Stone 'A complicated struggle: Disability, survival and social change in the majority world' in M Priestley (ed) *Disability and the life course: Global perspectives* (2001) 50 52.
27 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 51-54.
28 Kanter (n 5 above) 290.
29 JE Bickenbach *Physical disability and social policy* (1993) 61-68.
30 M Oliver *Understanding disability: From theory to practice* (1996) 30-33.

The normative construction of disability under the CRPD is different. It is a ringing rejection of conceiving disability as individual impairment and equality as formal equality. Though in its partial definitional construction of disability,[31] the CRPD acknowledges the link between bodily impairment and disability, at the same time, it signals a departure from the reductionist lens of the 'medical model' or the 'individual impairment model' of disability that conflates functional impairment with intrinsic limitations.[32] Instead, it sees disability through the lens of a 'human rights model' of disability whose ultimate focus is not on identifying intrinsic bodily impairment but on the interaction between impairment and the environment and overcoming systemic barriers in order to accommodate diverse (dis)abilities.[33] The CRPD's focus is on understanding disability as a social phenomenon of restricted or denied socio-economic participation that has an explanation beyond intrinsic bodily impairment. The larger explanation is that disability is the outcome of the manner in which the prevailing socio-economic environment intersects with the body. In this sense, the CRPD subscribes to the 'social model' of disability.[34] It has ushered into mainstream human rights discourse a transformative epistemology of disability that is built around inclusive equality that is aimed at overcoming status subordination.

Article 24 gives concrete expression to the recognition of human diversity by enjoining the state to provide, at all levels, an 'inclusive education' system that is aimed at achieving the 'full development of human potential and sense of dignity and self-worth'.[35] Inclusive education must be directed at 'strengthening of respect for human rights, fundamental freedoms and human diversity'.[36] It seeks to facilitate disabled persons in the development 'of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential'.[37] Inclusive education should also be directed at enabling disabled people to participate equally and effectively in society.[38] If it is to achieve social justice, it should have the potential to yield an education system in which there is 'open access, participatory parity and socio-economic equality' for all learners.[39]

31 Art 1 of the CRPD provides an inclusive rather than exhaustive definition of disability. It says: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.
32 Kanter (n 5 above) 291.
33 As above.
34 On the 'social model' and on critique of the 'medical model' or the 'individual impairment model', see generally: V Finkelstein *Attitudes and disabled people: Issues for discussion* (1980); M Oliver *The politics of disablement* (1990); Oliver (n 30 above); S Linton *Claiming disability: Knowledge and identity* (1998).
35 CRPD, art 24(1)(a).
36 As above.
37 CRPD, art 24(1)(b).
38 CRPD, art 24(1)(c).
39 N Fraser *Justice interruptus: Critical reflections on the 'postsocialist' condition* (1997) 77.

The duty to accommodate disability that is articulated in article 24 makes it abundantly clear that the CRPD departs from a 'one size fits all' school structure and architectural environment, curriculum, and pedagogical theory and practice. To fulfil the right to inclusive education, states must provide disabled learners the support they need to attain 'effective education' but through the 'general education system'.[40] The provision of additional human, financial, and physical resources is crucial to discharging the duty to provide accommodation and ensuring parity in participation among diverse learners in settings, such as the African region, where hitherto disabled learners have largely been marginalised.[41] The goal should be the provision of education on an equal basis with others.[42] Under the Convention, inclusive education includes learning about 'life and social development skills'.[43] Facilitating learning through Braille, sign language, augmentative learning and other alternative modes of learning are part of designing and implementing a curriculum that incorporates a universal design for learning to address a wide range of learning needs.[44] Inclusive education, under the Convention, requires the design and implementation of a curriculum which takes difference into account within a pedagogy which goes beyond imparting scholastic knowledge as to also embrace non-scholastic knowledge and skills, depending on the needs and capacities of the individual learner.

3 Decision of Western Cape High Court in *Western Cape Forum for Intellectual Disability*

The purpose of this section and the next, as alluded to in the introduction of this article, is to appraise whether the South African education system is in compliance with its states obligations under article 24 of the CRPD. Using the decision of the Western Cape High Court in *Western Cape Forum for Intellectual Disability*, the focus of sections three and four is on examining the extent to which the learning needs of learners who have intellectual disabilities are accommodated. Section three outlines the facts and the decision while section 4 focuses on analysis.

40 CRPD, art 24(2)(a).
41 T Chataika *et al* 'Access to education in Africa: Responding to the United Nations Convention on the Rights of Persons with Disabilities' (2012) 27 *Disability and Society* 385 393; African Child Policy Forum *The lives of children with disabilities in Africa: A glimpse into a hidden world* (2011).
42 CRPD, art 24(2)(b).
43 CRPD, art 24(3).
44 CRPD, art 24(3)(a); EM Dalton *et al* 'The implementation of inclusive education in South Africa: Reflections arising from a workshop for teachers and therapists to introduce Universal Design for Learning' (2012) 1 *African Journal of Disability*, available at: http://doi.org/10.4102/ajod.v1i1.13 (accessed 25 March 2013).

3.1 The facts

Section 29(1) of the South African Constitution[45] guarantees everyone a right 'to a basic education, including adult basic education'. Purporting to discharge its constitutional duty under section 29(1) of the Constitution, the state, through the South African Department of Education, established 'full-service or mainstream schools' to cater for the needs of children who were not classified as having intellectual disabilities. It also established 'special schools' to cater for the learning needs of disabled children who were classified as having 'moderate to mild intellectual disabilities'. These were children with an intelligent quotient (IQ) of 30-70. However, the state did not establish any schools for children with 'severe and profound intellectual disabilities'. These were children with an IQ of 20-25 and below 20, respectively. Western Cape Forum for Intellectual Disability (the Forum), a non-governmental organisation which provided care for children with intellectual disabilities in the Western Cape, one of South Africa's nine provinces, brought an application before the Western Cape High Court challenging the constitutionality of state education policy in respect of the non-provision of schools as well as unfavourable financial support for children who were classified as having 'severe or profound intellectual disabilities'.

To determine which of the children with intellectual disabilities would be admitted to special schools, the Department of Education had developed and implemented a screening instrument called the 'National Strategy on Screening, Identification, Assessment and Support' (the NSIAS Strategy).[46] Under the NSIAS Strategy, children who were assessed as eligible for admission comprised children who fell within 'Levels 4 and 5' learning needs. They were considered as in need of moderate to high levels of support. However, children who fell outside Levels 4 and 5 were excluded. These were children with severe or profound intellectual disabilities.[47]

The Department of Education's view was that no amount of education was beneficial for children with severe or profound intellectual disabilities.[48] Such children would have to principally depend on their parents for acquiring life skills but not the education system.[49] The most that the Department could say about the provision of schools for children with severe and profound intellectual disabilities was that 'they *may* be able to access support' at special schools at some point in the future but without indicating the form that such support might take, the extent of the support,

45 Constitution of the Republic of South Africa, 1996.
46 *Western Cape Forum for Intellectual Disability* (n 7 above) para 11.
47 Paras 11-19.
48 Paras 3.9, 17.
49 Para 17.

where the support would be rendered or when precisely it would be rendered.[50]

Through the Department of Education, the state directly funded the education of children admitted to mainstream schools and specials schools, with children in special schools receiving a higher amount per head. However, there was no direct funding made for the education of children with severe or profound disabilities. For these children, the state only made indirect funding of an amount *less* than the funding for children in mainstream schools and special schools. Also, this indirect funding, which the state described as a 'subsidy', was not made through the Department of Education, as was the case with the other children, but through the Department of Health. The subsidy went to organisations such as the Forum which had voluntarily established 'Special Care Centres'. But even the Special Care Centres could not meet the demand for places. In the Western Cape, the Forum could only cater for 1 000 children, leaving 500 children with severe or profound intellectual disabilities without access to a 'special care' facility.[51]

Against this backdrop, the Forum argued that the state was in breach of its constitutional obligations towards children with severe or profound disabilities because it had not provided them with schools. Furthermore, it argued that state financial support for children with severe or profound intellectual disabilities was not only inadequate, but also compared unfavourably with support given to their counterparts. Over and above relying on section 29 of the Constitution, which, *inter alia*, guarantees the right to basic education, the Forum relied on the following fundamental rights that are guaranteed by the Constitution: the right to equality and non-discrimination on the ground of disability (section 9); the right to human dignity (section 10); and the right of children to be protected from neglect and degradation (section 28).

3.2 State's defence of its education policy: *White Paper 6*

The state argued that it had taken reasonable measures to fulfil the constitutional rights to equality and basic education of disabled learners. It highlighted that its efforts had to be assessed in the light of the legacy of gross inequality in the apartheid system of education, the limited resources at its disposal, and competing socio-economic needs. It argued that it was impracticable for the state to meet vast education needs of disabled children all at once. Instead, it could only address the legacy of underdevelopment and inequitable access to education resources incrementally. To show its commitment towards fulfilling its constitutional obligation, the state explained that it was in the process of

50 Para 18 (emphasis added).
51 Para 48.

implementing *White Paper 6*.[52] *White Paper 6* was developed in 2001 as the national Department of Education's flagship policy on inclusive education.

During apartheid, the education system had not only been discriminatory on the ground of race. The education system had also been discriminatory on the grounds of disability, socio-economic class and geographical location, with learners who were black, poor and rural-based faring the worst.[53] Only 20 per cent of disabled learners had access to special schools.[54] The policy articulated in *White Paper 6* sought to transform this unenviable legacy by accommodating the full and diverse learning needs of disabled learners, including learners with severe disabilities so that such learners 'could develop and extend their potential and participate as equal members of society'.[55] To reconcile with scarcity of resources, *White Paper 6* proposed a 20-year time-frame that was divided into short-term, medium-term and long-term goals as the mechanism for progressively implementing inclusive education. Education would be provided through the medium of 'full-service' and 'special schools'.[56] Full-service schools would be 'mainstream' schools catering for a wider range of learning needs, including the needs of learners with 'mild to moderate' disabilities who require 'low intensive support'.[57] Learners with severe and profound disabilities who require 'intense levels of support' would be catered for in special schools.[58]

3.3 The decision

The court found that the state had not taken reasonable measures to meet the learning needs of severely and profoundly intellectually disabled children. More specifically, it found that the state policy in question treated children with severe or profound intellectual disabilities differently in the provision of schools and in the funding of education as to constitute unfair discrimination contrary to section 9(3) as well as a breach of the right to basic education contrary to section 29(1) of the Constitution. The court also found that the policy, necessarily, violated the children's right to human dignity contrary to section 10 of the Constitution as the state education policy had the effect of impairing the dignity of such children as well as stigmatising them.[59] Furthermore, the court held that, contrary to section 28 of the Constitution which guarantees children's rights, the state

52 Department of Education *Education White Paper 6: Special needs education: Building an inclusive education and training system (*2001) (hereinafter referred to as *White Paper 6*).
53 As above, 9.
54 As above.
55 As above, 5.
56 As above, 42-43.
57 As above, 22.
58 As above, 22 and 24.
59 *Western Cape Forum for Intellectual Disability* (n 7 above) para 46.

had neglected the children through failure to provide an education that imparts knowledge and skills.[60]

While the court concluded that all the four constitutional rights relied upon by the applicant, namely, the right to equality, the right to human dignity, the right of children to be protected from neglect and degradation, and the right to education had been violated, it reached its decision principally by applying the right to equality and the right to basic education. To repair the constitutional violations, the court ordered the state to provide basic education of an adequate quality to children with severe and profound intellectual disabilities through making adequate funds and facilities available, including training and hiring of educators and provision of transport to educational facilities. The order was framed as a structural interdict so as to be responsive to individual violations as well as systemic constitutional violations.[61] The state was ordered to report to the court within a year, detailing the steps it had taken to implement the order. In this way, the order sought to ensure a level of supervision by the court in respect of state compliance with the remedy.

In determining the equality and non-discrimination issue under section 9 of the Constitution, the court invoked the test for determining discrimination that had been developed by the South African Constitutional Court in *Harksen v Lane NO & Others*.[62] In accordance with this test, the court asked the question whether the differentiation between children with severe and profound intellectual disabilities and those without such disabilities had a rational connection to a government purpose and ultimately whether it constituted unfair discrimination.[63] It concluded that there was no rational connection, and for this reason, state policy constituted unfair discrimination.[64] The court's reasoning was that imposing the burden of the scarcity of financial resources only on children with severe and profound intellectual disabilities could not be said to be rational.[65] But even if there was a rational connection, the court concluded that the policy was neither reasonable nor justifiable and could not, therefore, be saved by section 36 – the general limitation clause of the Constitution.[66]

Drawing mainly from the leading decision of the South African Constitutional Court on the interpretation and application of socio-economic rights – *Government of the Republic of South Africa & Others v*

60 As above.
61 As above, paras 50-52; C Mbazira 'From ambivalence to certainty: Norms and principles for the structural Interdict in socio-economic rights litigation in South Africa' (2008) 24 *South African Journal on Human Rights* 1.
62 *Western Cape Forum for Intellectual Disability* (n 7 above) para 26; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 53.
63 As above.
64 *Western Cape Forum for Intellectual Disability* (n 7 above) para 26.
65 As above.
66 As above, para 42.

Grootboom & Others[67] – the court was of the view that it could not be said that state education policy which had failed to respond to the needs of learners who were the most vulnerable and had the greatest need, was reasonable, not least because the state had not provided evidence that meeting their needs was unaffordable. The cost of providing education to the small number of children affected was, according to the court: 'small in relation to the overall budget'.[68] The state had failed to justify why the budgetary shortfall that ought to be shared by all learners should fall only on children with severe or profound intellectual disabilities.[69]

In reaching its conclusion, the court also took into cognisance that the right to education of disabled children was more than just a fundamental right under domestic law. It was also an international human right which is recognised under United Nations and regional treaties, including under the CRPD that South Africa has ratified.[70] While conceding that the right to education of disabled children could not be fulfilled all at once, the court could not agree with state policy that excluded children from admission to schools or gave them a lesser priority when allocating financial resources on the ground that children with severe or profound intellectual disabilities were ineducable, not least because such a policy detracted from South Africa's international obligations.[71]

The court also drew support for its conclusion from persuasive foreign jurisprudence.[72] It accepted the applicant's argument that when determining whether the state has complied with its obligation to provide education for intellectually disabled children, education should be conceived in more holistic terms.[73] The court agreed with the human rights proposition that education for disabled learners should be conceived in terms which are broader than merely achieving scholastic objectives.[74] Education for intellectually disabled learners should also be aimed at developing, to the fullest extent, human potential, human personality, and a sense of dignity and self-worth of individual learners.[75]

67 As above, paras 43-45; *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), specifically paras 43-44.
68 *Western Cape Forum for Intellectual Disability* (n 7) para 48.
69 As above, para 29.
70 As above, paras 20-23.
71 As above.
72 As above, para 25. The court cited with approval an Irish decision: *O'Donoghue v Minister for Health* [1993] IEHC2, [1996] 2 IR 20 (27th May, 1993).
73 *Western Cape Forum for Intellectual Disability* (n 7 above) para 19.
74 Implicitly acknowledging the holistic nature of the learning needs of children with intellectual disabilities, the court referred to, paras 20-23: Art 23 of the Convention on the Rights of the Child; Arts 11(1), 11(2)(a) and 13 of the African Charter on the Rights and Welfare of the Child; Art 15 of the Revised European Social Charter; the Preamble to, and art 24 of CRPD.
75 *Western Cape Forum for Intellectual Disability* (n 7 above) paras 19-25.

4 Appraising South Africa's approach to inclusive education

On the one hand, *Western Cape Forum for Intellectual Disability* shows a jurisdiction which, mainly as a result of overarching post-apartheid transformation, has developed an admirable stock of equality jurisprudence and policies that are well placed to promote inclusive education and complement article 24 of the CRPD at a domestic level. On the other hand, the facts that gave rise to the case show a jurisdiction that, at an implementation level, has paradoxically succeeded in perpetuating the apartheidisation of inclusive education. *Western Cape Forum for Intellectual Disability* demonstrates the juxtaposition of equality jurisprudence that is enabling with disabling discourses of inclusive education.

4.1 Indigenous substantive equality jurisprudence

The conclusion by the Western Cape High Court that the state had violated the fundamental rights of children with severe and profound disabilities was inevitable. The conduct of the state in denying these children admission to school as well as equitable funding for education was incompatible with the imperatives of the equality and socio-economic rights jurisprudence that South Africa has developed since 1994. The South African Constitution can be understood through a metaphor of a bridge.[76] The Constitution serves as a conduit facilitating passage from a past where the state played a lasting role in spawning and sustaining grossly unequal citizenship to a future where the goal is the achievement of inclusive citizenship. Equality is the Constitution's key transformative value and right in the attainment of inclusive citizenship.[77]

Equality is a pervasive value and right under the Constitution. It finds its most direct articulation in section 9. The normative content of the right to equality under section 9 and the extent to which it complements the human right to inclusive education under article 24 of the Convention can be gleaned implicitly from the South African Constitutional Court's equality jurisprudence. The Constitutional Court has underlined in several cases that section 9 contemplates substantive equality and not merely

76 E Mureinik 'Bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

77 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248 249-250; D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309 315; M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *South African Public Law* 155 162.

formal equality.[78] The Court's exacting approach to the determination of unfair discrimination is particularly instructive of the Constitutional Court's approach to substantive equality. Sections 9(3) and (4) outlaw unfair discrimination. Section 9 takes cognisance of the historical exclusion of disabled people by listing 'disability' as one of the grounds protected against unfair discrimination. Though it has borrowed from other jurisdictions, the Constitutional Court has developed its own practical test for determining discrimination. In a series of cases but most notably in *Harksen*,[79] the Court enunciated the test for unfair discrimination.

The *Harksen v Lane* test preceded the CRPD and was prompted by South Africa's own historical circumstances. Notwithstanding, it is responsive to disability–related discrimination in a manner that resonates with the CRPD's cardinal purpose of ensuring the full and equal enjoyment of all human rights by disabled persons and promoting respect for their inherent dignity.[80] The *Harksen v Lane* test demonstrates a remarkable convergence between the vision of equality of the South African Constitution and that of the CRPD.

4.1.1 The Harksen v Lane *test: The framework*

The *Harksen v Lane* test entails asking three main questions. These are: (1) whether there is a rational and legitimate reason for the policy, law or practice that differentiates between people or groups of people such as the differentiation that was in issue in the policy adopted by the state in *Western Cape Forum for Intellectual Disability*; (2) whether the differentiation amounts to unfair discrimination; and (3) if the discrimination amounts to unfair discrimination, whether it can be justified under section 36 of the Constitution – the limitation clause.

Though all the three stages of the *Harksen v Lane* test serve important juridical purposes, nonetheless, it is the second stage that is crucial. It is at this stage that a convergence between the South African approach to equality and that of the CPRD is most apparent. The approach that the Constitutional Court has developed to interrogate the second stage has the

78 Eg *President of the Republic of South Africa & Another v Hugo* 1997 (6) BCLR 708 (CC) para 41; *National Coalitionfor Gay and Lesbian Equality & Another v Minister of Justice & Others* 1998 (12) BCLR 1517 (CC) at 1565H–1566A; *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) para 46; *National Coalition for Gay and Lesbian Equality& Others v Minister of Home Affairs & Others* 2000 (1) BCLR 39 (CC) para 62; and *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 26.

79 *Harksen* (n 62 above). The other cases in which the Constitutional Court has developed its test for determining unfair discrimination include: *Brink v Kitshoff* NO 1996 (6) BCLR 752 (CC); *Prinsloo v Van der Linde & Another* 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa and Another v Hugo* (n 78 above); *Larbi-Odam & Others v MEC for Education (North-West Province) & Another* 1997 (12) BCLR 1655 (CC); *Pretoria City Council v Walker* (n 78 above).

80 CPRD, art 1.

achievement substantive equality and human dignity as its ultimate goal. At this stage, the court focuses primarily on eliciting the 'impact' of the discrimination on the complainant and the social group(s) to which the complainant belongs. In determining impact, the factors taken into account include: (a) the position of the complainant in society and whether the complainant belongs to a group that has suffered from patterns of disadvantage in the past; (b) the nature of the provision or power and the purpose it seeks to achieve, including considering whether the provision or power is intended to achieve a worthy and important social goal; and (c) the extent to which the provision or power had affected the rights or interests of the complainant and whether it has caused an impairment of the fundamental human dignity of the complainant in a comparably serious manner.[81] It must be stressed that these factors serve as judicial guidance but without constituting a closed list.[82] Furthermore, no factor is determinative on its own. Rather, it is the cumulative effect of the factors that steers the court towards a particular determination.[83]

The focus on impact requires the judicial inquiry to depart from the abstracted universalism of formal equality and instead to focus on the concretised universalism of substantive equality.[84] In this way, the *Harksen v Lane* approach aspires towards overcoming 'status subordination' in the way espoused by Fraser.[85] It is a situation-sensitive juridical approach that focuses on lives as lived and injuries as experienced by different groups in our society.[86] The approach necessarily entails integrating the standpoint and experience of those at the receiving end of exclusion and marginalisation.[87] Focusing on impact requires judicial sensitivity to social group difference which is tied to social hierarchies that exclude and disadvantage the complainant or members of the social group to which the complainant belongs. It signals a constitutional commitment to remedying systemic subordination and disadvantage in order to achieve a type of substantive equality which integrates human dignity. In focusing on eliciting the impact of the act or norm in question in a larger social context as the crucial factor in determining unfair discrimination, the South African Constitutional Court has followed the approach of the Supreme Court of Canada.[88]

81 *Harksen* (n 62 above) paras 51-53; JL Pretorius 'Constitutional framework for equality in employment' in JL Pretorius *et al* (eds) *Employment equity law* (2001) para 2.6.2.
82 *Harksen* (n 62 above) para 51; Pretorius (n 81 above) para 2.6.2.1.
83 *Harksen* (n 62 above) para 51; Pretorius (n 81 above) para 2.6.2.1.
84 AC Scales 'The emergence of feminist jurisprudence: An essay' (1985-1986) 95 *Yale Law Journal* 1373 1387-1388.
85 Fraser (n 19 above); See the discussion in para two of this article.
86 *National Coalition for Gay and Lesbian Equality* (n 78 above) para 126.
87 As above.
88 A leading Canadian decision in this regard is *Andrews v Law Society of British Columbia* [1989] 1 SCR 143; C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253 259; C Sheppard *Inclusive equality: The relational dimensions of systematic discrimination in Canada* (2010) 38.

In *President of the Republic of South Africa v Hugo,*[89] the Constitutional Court cast the objects of the equality clause not only in terms of eradicating unfair discrimination but also realising human dignity. It said:

> The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.[90]

The Constitutional Court has reiterated the centrality of human dignity in equality adjudication in several other cases.[91] In the context of equality adjudication, human dignity has a distinct orientation and role. Though in other contexts, human dignity can serve multifarious purposes, including the Kantian injunction of treating a person as a person and not as a means to an end,[92] in the South African equality context it has come to play a central and integrated role in the determination of unfair discrimination. Respect for human dignity serves equality by protecting social groups and individuals belonging to protected social groups from being treated as members of a lower caste.[93] It puts an end to notions of hierarchical citizenship or premiere citizenship for some groups that were assiduously and zealously cultivated under colonialism and apartheid.[94]

Human dignity is non-hierarchical. In the South African context, as, indeed, under the CRPD, human dignity cannot depend on functional capacities. Achieving, as a prerequisite, a certain prescribed baseline of functional capacity cannot be what entitles a disabled person to have an equal claim on resources but the fact of being human alone.[95] In this respect, human dignity brings to substantive equality an intrinsically egalitarian human essence which is absent in other transformative discourses such as the genus of 'capabilities approach' that has been developed by Martha Nussbaum, for example.[96]

89 n 78 above.
90 Para 41.
91 See for example: *Prinsloo* (n 79 above) paras 31-33; *Harksen* (note 62 above) para 50; *Pretoria City Council* (n 78 above) para 81; *National Coalition for Gay & Lesbian Equality* (n 78 above) paras 120-129; *Minister of Finance* (n 78 above) para 116.
92 LWH Ackermann 'Equality and the South African Constitution: The role of dignity' (2000) 63 *Heidelberg Journal of International Law* 537 540-542.
93 *National Coalition for Gay and Lesbian Equality* (n 78 above) para 129.
94 A Chaskalson 'The Third Bram Fischer Lecture: Human dignity as a foundational value of our constitutional order' (2000) 16 *South African Journal on Human Rights* 193 199.
95 MA Stein 'Disability human rights' (2007) 95 *California Law Review* 75 77 106-110.
96 MC Nussbaum *Women and human development: The capabilities approach* (2001). Nussbaum's capabilities approach can be contrasted with that of Amartya Sen that is not organised around hierarchical human essences: A Sen *Development as Freedom* (1999) 74-110.

Nussbaum's capabilities approach has a transformative trajectory which has many parallels with substantive equality. Like substantive equality, it is an alternative philosophical approach and standard for thinking about inequality and eradicating disadvantage and marginalisation so as to create conditions that are conducive to parity in socio-economic participation and, ultimately, freedom and full realisation of human rights. The capabilities approach and substantive equality both give rise to normative duties and corresponding rights. Both formulate claims by implicating the state as having a primary responsibility to eradicate systemic inequalities and level the playing field through constructing new notions of entitlement among disadvantaged groups and individuals and socio-economic redistribution. In these respects, Nussbaum's capabilities approach and substantive equality can be said to be equally committed to human freedom and emancipation as to both find confluence in a social model of disability.[97] However, the one important difference the two emancipatory philosophies have is that Nussbaum's 'capabilities approach', unlike its substantive equality counterpart, admits hierarchical human essences that are based on 'essential' functional capabilities.[98]

The main misgiving regarding Nussbaum's notion essential capabilities is that is not immediately open to holistic inclusiveness and participatory democracy.[99] It raises profound questions, including questions about: who does the listing; what goes into the list of essential capabilities and what is left out; and whether the inclusionary criteria do not marginalise groups which have been historically culturally misrecognised such as persons with impairments that impact of cognitive ability and practical reasoning.[100] Ultimately, the discomfiture with Nussbaum central capabilities is about whether they do not inadvertently resurrect the notion of 'normal' bodily capabilities and thus discriminate against disabled people.[101]

Michael Stein has argued that Nussbaum's capabilities approach is under-inclusive in that it is ultimately tethered to notions of 'normal' bodily capacities such that it excludes, for example, those who have mental disabilities that prevent them from achieving 'normal' mental

97 C Baylies 'Disability and the notion of human development: Questions of rights and capabilities' (2002) 17 *Disability & Society* 725.

98 Stein (n 95 above) 77 98-110.

99 The list that Nussbaum has advanced can be summarised as comprising 10 central human capabilities, namely: (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) concern for other species; (9) play; and (10) control over one's environment. It is fair to point out that Nussbaum does not regard the list as exhaustive or incontestable. In Nussbaum's own words, the list is not a 'complete theory of justice'. Rather, it is intended as a basis for determining a decent social minimum which is open to debate: Nussbaum (n 96 above) 74-80.

100 Baylies (n 97 above) 733-734.

101 As above.

'functionings'.[102] Nussbaum's conceptual framework of beginning with a prescribed list of 'central capabilities' sits uneasily with the heterogeneous public sphere of substantive equality in which capabilities have no organic centre. Though Nussbaum's approach is useful in providing a philosophical basis of constitutional principles that ought to guide the state in discharging its responsibilities towards vulnerable groups and individuals, in the end, it is an incomplete guide, precisely because it is under-inclusive. Indeed, Nussbaum's approach is vulnerable to criticism that it is reductionist and insufficiently sensitive to human difference and freedom.[103]

4.1.2 The Harksen v Lane *test and the duty to accommodate*

The duty to accommodate a social group or individual that is excluded or marginalised by prevailing socio-economic arrangements should be understood as part of how South African equality jurisprudence constructs inclusive citizenship. Under the CRPD, the duty to take all appropriate steps to ensure that reasonable accommodation is provided is a general equality and non-discrimination principle.[104] Furthermore, it is also a principle that applies specifically to each of the socio-economic spheres that are addressed by the CPRD, including education.[105] Though not expressly articulated in the *Harksen v Lane* test, reasonable accommodation is, nonetheless, a principle which is implied.[106] The duty to provide reasonable accommodation is integral to the determination of whether there has been unfair discrimination and whether such discrimination can be justified. It is a principle for giving effect to substantive equality by recognising that in order to treat people equally, it may be necessary to treat them differently by accommodating difference. As a non-discrimination principle, the duty to accommodate under the Constitution obtains for all protected grounds and not just disability.

In *MEC for Education: KwaZulu-Natal & Others v Pillay*[107] the Constitutional Court posited the duty to provide reasonable accommodation as part of the achievement of substantive equality under the Constitution. It said that interpreting equality requires equal concern and equal respect which includes treating people differently, if need be, in order to achieve equality rather than identical treatment.[108] Chief Justice Langa, who delivered the leading judgment in *Pillay*, said that at the core

102 Stein (n 95 above) 98-110.
103 K van Marle '"The capabilities approach", "The imaginary domain" and "Asymmetrical reciprocity"': Feminist perspectives on equality and justice' (2003) 11 *Feminist Legal Studies* 255 272-273; S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1 8.
104 CRPD, art 5(3).
105 CRPD, art 24(2)(c).
106 CG Ngwena 'Reasonable accommodation' in Pretorius *et al* (eds) (n 81 above) para 7.2.
107 2008 (2) BCLR 99 (CC).
108 As above, para 103; *National Coalition for Gay and Lesbian Equality* (n 78 above) para 132.

of the principle of reasonable accommodation is 'the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally'.[109] According to the Court, reasonable accommodation ensures that 'we do not relegate people to the margins of society because they do not or cannot conform to certain social norms'.[110]

A society which values dignity, equality, and freedom, as does the society envisaged by the South African Constitution, must, therefore, require people to act positively to accommodate diversity.[111] Against this backdrop it is easy to see that the state was apt to fail in *Western Cape Forum for Intellectual Disability*. It is easy to appreciate why the education policy that was in issue was bound to offend the constitutional guarantee on both equality and human dignity. The policy to exclude children from admission to schools as well as to allocate them the least financial resources on the ground that they did not have the same capacity, or even the need, to learn as their counterparts, amounted to treating them as second-class citizens in a political order in which, like in apartheid times, there is legitimised hierarchical social ranking that serves the interests of a dominant group. It had the effect of perpetuating disadvantage and the scarring of a sense of dignity and self-worth that is associated with membership of a particular social group.

Use of the NSIAS Strategy to determine who was included in, or excluded from, school rather than to identify the learning needs, meant that state policy was insisting on identical treatment and, thus, detracting from substantive equality. Children with severe or profound intellectual disabilities were set to fail the criteria laid down by the NSIAS Strategy. In *President of the Republic of South Africa v Hugo* the Constitutional Court highlighted the importance of transcending a sameness approach when it said:

> We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not be necessarily unfair in a different context.[112]

109 *Pillay* (n 107 above) para 73.
110 As above.
111 Para 75.
112 n 78 above para 41.

In *Western Cape Forum for Intellectual Disability*, state policy did not meet the requirements of substantive equality because it insisted on identical treatment rather than a learner-centred approach. The determination of substantive equality is not an abstract consideration but rather a concrete consideration of the lived experience of the individual and the protected group(s) to which the individual belongs.[113] A blind commitment to sameness of persons, as would be required by formal equality, serves to hide rather than reveal structures of privilege and oppression and their relationship with specific social groups. Social groups do not come to the substantive equality table amorphous, behind a veil of ignorance and stripped of the particularities of their social identities and histories of oppression and marginalisation. Instead they come with their historical disadvantages and vulnerabilities.

The NSIAS Strategy served to universalise the learning capacities of certain groups by treating as an aberration the learning capacities of other groups. In order to be admitted to school or have equal claim on educational resources, children with severe and profound intellectual disabilities were in practice being asked to first become like their counterparts. This is something that was impossible for them to achieve. Put differently, state education policy was trapped, in part, in formal equality. The policy did not have the capacity to treat children with severe and profound intellectual disabilities with equal concern and equal respect. Rather than remedy structural inequality, state education policy in *Western Cape Forum for Intellectual Disability* had the effect of freezing the status quo of the historical exclusion of disabled people from the education system. It had the effect of accentuating rather than ameliorating marginalisation and disadvantage.

4.2 The right to education and South African socio-economic rights jurisprudence

Like the CRPD, the South African Constitution recognises socio-economic rights as justiciable rights. Section 29 of the Constitution, which guarantees the right to basic education, requires the state to, *inter alia*, expend resources within its available resources in fulfilment of the right it guarantees.[114] It is part of a regime of other socio-economic rights that are designed to remedy material disadvantage which would otherwise undermine the realisation of substantive equality and human dignity.

113 *National Coalition for Gay and Lesbian Equality* (n 78 above) para 126.
114 *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) para 9.

In *Khosa & Others v Minister of Social Development & Others*,[115] the Constitutional Court explicitly drew a link between the socio-economic rights, equality and human dignity. The Court highlighted that when vindicating the rights of protected social groups under the Constitution, the determination of entitlement to a socio-economic right and the entitlements to equality and human dignity reinforce each other.[116] The exclusion of a vulnerable protected group from access to a socio-economic right on the basis of a constitutionally protected associational characteristic such as disability has the capacity to found violations of socio-economic rights as well as equality and human dignity. Excluding a vulnerable group, such as children with severe and profound intellectual disabilities, from access to a socio-economic right is not only materially impoverishing but it also negates equal participation in education and has a 'strong stigmatising effect'.[117]

In post-apartheid South Africa, the rationale for socio-economic rights is set against a legacy of gross material deprivation of certain social groups. It will be recalled that one of the important findings in *White Paper 6* is that the provision of education to disabled learners was highly discriminatory leaving a sizeable proportion of learners without any access to schools.[118] If the state were to omit meeting the needs of those that do not have the means to achieve a certain minimum level of survival or human development, the omission would serve to freeze the status quo and perpetuate structural inequality. It would render the promises of a Constitution merely vacuous, especially for historically marginalised and disadvantaged groups such as disabled people. Disabled people are over-represented in the indices of socio-economic exclusion, including exclusion from education, employment, and healthcare.[119] Particularly in a country with an abiding legacy of racial and gender oppression, disability accentuates old inequalities and the vulnerability to poverty of historically marginalised groups.[120]

In the leading case on the interpretation of socio-economic rights – *Grootboom*[121] – the Constitutional Court emphasised that while the courts are not there to make budgetary decisions and allocate resources, as these are prerogatives of the executive, nonetheless, courts have a duty to inquire into the 'reasonableness' of policies and programmes that are aimed at discharging state obligations to fulfil socio-economic rights. Regardless of scarcity of resources, policies and programmes that are intended to fulfil

115 *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* 2004 (6) BCLR 569 (CC).
116 Paras 40-43.
117 Para 74.
118 *White Paper 6* (n 52 above).
119 T Emmett 'Disability, poverty, gender and race' in B Watermeyer *et al* (eds) *Disability and social change: A South African agenda* (2006) 207 221; J Andrews *et al* 'Issues in disability assessment' in Watermeyer *et al* (eds) as above 245 247.
120 Emmet (n 119 above) 207-209.
121 *Grootboom* (n 67 above).

socio-economic rights must be reasonable not only in their conception but also in their implementation. In *Grootboom*, the Court emphasised that even a well intentioned programme will not pass constitutional muster if it lacks reasonableness.

According to the reasoning of the Constitutional Court in *Grootboom*, for a policy or programme to pass constitutional muster, it must, *inter alia*, cater for those in desperate need but within the ambit of available resources.[122] It must not leave out a significant section of the community that is in need.[123] The state is not at liberty to ignore the needs of those who are in a crisis and in desperate need merely in order to make room for longer-term strategies. In *Western Cape Forum for Intellectual Disability*, it was not unreasonable to devise a twenty-year plan to meet the education needs of children with disabilities. This is because the education needs, especially need for schools, could not be met all at once. However, it was unreasonable to exclude children with severe and profound intellectual disabilities from school provision. It was also unreasonable to commit the least state resources to the education of such children. These were children, who ironically, had the greatest education needs. For these children, the best the state could muster was a vague promise that their education needs *might* be met at some point in the future.

4.3 Contradictions

White Paper 6 is trapped in a contradictory philosophy of inclusive education. On the one hand, it reflects commitment towards a social rather than an individual impairment model of disability.[124] It does not assume that barriers to learning primarily reside in the learner. The accent is not on 'mainstreaming' or 'integrating' disabled learners into a pre-existing education system.[125] Rather, the core of the policy is on accommodating disabilities in all the facets of the education system, including the curriculum and the built environment. The emphasis is on identifying and removing barriers to learning by designing the education system and environment with a view to fitting the needs of the learner, including training educators and providing assistive devices. Inclusion of disabled learners is conceived in terms of recognising and respecting diverse learning needs, recognising that all learners have learning needs, and providing support to enable maximum learning and participation in environments that do not segregate disabled learners from their counterparts. The distinction between 'full-service' and 'special schools' seems to be prompted primarily by an understanding that some learners

122 As above, para 44.
123 As above.
124 *White Paper 6* (n 52 above) 24; JE Bickenbach *et al* 'Models of disablement, universalism and the international classification of impairments, disabilities and handicaps' (1999) 48 *Social Science & Medicine* 1173.
125 *White Paper 6* (n 52 above) 17.

may require more intensive support than others and that organisational arrangements may require separate facilities in order to facilitate the development of maximal learning.[126] The policy's intention is to maximise the realisation of the potential of disabled children rather than to segregate.

At the same time, *White Paper 6* shows a remarkable failure to discard old master dichotomies. While it professes to accept and recognise difference, it still reads the disabled body against an implicit normative ideal.[127] There is no evidence that *White Paper 6* has engaged at a deep level with the ontological integrity of intellectually disabled children so as to eschew frameworks that stereotype and marginalise them in the education sector. There is no evidence that the power of naming and normatively scripting difference has been interrogated and democratised with a view to constructing an education system that gives central importance to diversity and participatory democracy as to include disabled people and disabled learners socially, intellectually and culturally in the naming and scripting.[128] On closer analysis, implementation of *White Paper 6* confirms a failure to overcome exclusionary practices and oppressive relations of old.

Use of the NSIAS Strategy to regulate admission to special schools and exclude children with severe or profound intellectual disabilities is a clear indication of state thinking that is still trapped in an apartheidising discourse, and so is its use of funding policy to deny adequate assistance to such children. It shows the resilience of notions of 'special education' that coalesce around intellectual disability as defectiveness.[129] The NSIAS Strategy was organised around IQ tests as the 'objective' classificatory criteria. IQ tests come with a history and archaeology of being used as instruments for stigmatisation and social exclusion.[130] Historically, IQ tests have been used by governments that succumb to eugenic thinking.[131] Though purporting to be an objective scientific calculus for measuring and classifying, ultimately, they cannot disguise the locus of the normative power of who is doing the classifying, under which norms, and for what purposes.[132] In particular, when IQ tests are used as labelling instruments to facilitate excluding learners from the education system rather than identifying need, they serve no less a nefarious purpose as they have served eugenicists.

126 *White Paper 6* (n 52 above) 16 and 21.
127 C Soudien & J Baxen 'Disability and schooling in South Africa' in Watermeyer *et al* (eds) (n 119 above) 149 160.
128 Slee (n 9 above) 393; BB Bernstein *Pedagogy, symbolic control, and identity: Theory, research, critique* (1996) 6-7.
129 Slee & Allan (n 9 above) 174.
130 SJ Gould *The mismeasure of man* (1981) 155-157; S Dubow *Scientific racism in modern South Africa* (1995) 211-212.
131 As above.
132 Soudein & Baxen (n 127 above) 157-158.

5 Conclusion

Worldwide, state education authorities have tended to reduce inclusive education to a banality. They have shielded behind a 'benign commonality' of the vocabulary of inclusive education to give a veneer of inclusiveness.[133] However, on closer analysis, many national education systems continue to relate to inclusive education as 'special education' rather than education within the 'general system of education' as required by the CRPD. They continue to create spatial domains of learning and learners that distinguish between the mainstream and the periphery. Education systems professing to be inclusive have remained protective of the status quo of an education system that excludes rather than includes learners who are different from the mainstream. The CRPD does not require assimilation of disabled learners into the mainstream as that would merely serve to create 'islands in the mainstream'.[134] Rather, it requires treating disabled learners as part of the fabric of the mainstream through a school structure, pedagogy and curriculum that is responsive to the learning needs of all learners.[135]

The achievement of inclusive equality in access to education requires unconditional recognition of previously excluded learners and not equivocal or token notions of inclusion that belie so many triumphant proclamations of inclusive education by national authorities, including South African education authorities.[136] Though the explanation for the continued apartheidisation of the education system even under the rubric of inclusive education can be explicated on failure to follow through policy or to commit resources, the more intractable reason is ideological. It is a result of lack of commonly shared normative and ontological epistemologies of the status of disabled learners. Some types of inclusive education draw impetus from educational philosophies that countenance status subordination. They continue to categorise learners through a binary system that affirms one set of learners as normal but invalidates another set as abnormal. Clearly, the inclusive values that underpin the CRPD are incompatible with the recognition of hierarchical difference. Article 24 refutes rather than affirms the place of binary hierarchies and master dichotomies in inclusive education. The inclusive education policy that was in issue in *Western Cape Forum for Intellectual Disability* failed both

133 Graham & Slee (n 9 above) 277.

134 S Cook & R Slee 'Struggling with the fabric of disablement: Picking up the threads of the law and education' in M Jones & LA Basser Marks (eds) *Disability, divers-ability and legal change (international studies in human rights)* (1999) 327 328.

135 CRPD, art 4(1)(c); A Lawson 'The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn?' (2007) 34 *Syracuse Journal of International Law & Commerce* 563 592.

136 Soudien & Baxen (n 127 above) 149-163; Slee & Allan (n 9 above) 173; L Barton 'The politics of special education needs' in L Barton & M Oliver (eds) *Disability studies: Past, present and the future* (1997) 138; Graham (n 9 above) 3.

the domestic constitutional equality promise as well as that of the CRPD by inscribing hierarchical difference and entitlement among learners.