

HUMAN RIGHT TO INCLUSIVE EDUCATION

Exploring a Double Discourse of Inclusive Education Using South Africa as a Case Study

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Abstract

Article 24 of the Convention on the Rights of Persons with Disabilities is a human rights milestone in the recognition of the right of disabled learners to inclusive education. This article explores domestic commitment towards the obligation of the State to provide inclusive education under Article 24 of the Convention. It uses South Africa as a case study. 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 and Another as a pivot for discussion. The case of Western Cape Forum for Intellectual Disability demonstrates State ambivalence towards inclusive education. More generally, the article highlights the persistent dangers of an embedded double discourse of inclusive education that perpetuates the historical exclusion of disabled learners through State rhetoric and praxis that are outwardly committed to inclusive education, but are inwardly exclusionary.

Keywords: discrimination; equality; human rights; inclusive education; intellectual disability

1. INTRODUCTION

The adoption of the Convention on the Rights of Persons with Disabilities (CRPD) in 2006¹ was a watershed event in the struggles for a disability rights-specific global treaty.² The CRPD underscores the endemic and persistent nature of disability-related

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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 (CRPD).

² 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, 586–90; AS Kanter,

discrimination. Part of testing the efficacy of any international human rights treaty lies in determining whether the rights it guarantees can be fulfilled at the domestic level. Domestication of the values espoused and the rights conferred by the Convention is an important barometer for measuring the relevance of the Convention for disabled people at the local level.³ The increasing number of countries that have signed and ratified the Disabilities Convention as well as its Optional Protocol is a hopeful sign,⁴ but not a sufficient barometer for measuring commitment. 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 geopolitical self-interest which has little to do with benefiting citizens.⁵ Article 26 of the Vienna Convention on the Law of Treaties requires States to perform their treaty obligations in good faith.⁶ Whether one can find, at the domestic level, jurisprudence, policies, and programmes that fulfil the main purposes or objectives of the Convention is an important indicator of domestic commitment towards compliance with treaty obligations.⁷ Ultimately, as the United Nations High Commissioner for Human Rights highlighted, treaty obligations must be ‘translated into reality’ so that individuals within the jurisdiction can in fact derive tangible benefits.⁸

This article critically explores domestic commitment towards discharging the obligation imposed on the State by the CRPD with particular focus on obligations imposed by Article 24, which guarantees individuals a right to inclusive education. It

‘The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities’ (2007) 34 *Syracuse Journal of International Law & Commerce* 287; D MacKay, ‘The United Nations Conventions on the Rights of Persons with Disabilities’ (2007) 34 *Syracuse Journal of International Law & Commerce* 323; A Dhanda, ‘Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities’ (2008) 5 *Sur: International Journal on Human Rights* 43; R Kayess and P French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 *Human Rights Law Review* 1.

³ In this article, the term ‘disabled people’ and its extension ‘disabled learners’ are used not for the purpose of describing people with intrinsic disabilities, but rather as a form of naming an injustice. The terms highlight commitment towards a ‘social model’ of disability and an understanding of disability as something which is created and sustained by existing socio-economic arrangements that do not accommodate difference: M. Priestly, ‘Developing Disability Studies Programme: International Context’ in B. Watermeyer, L. Swartz, T. Lorenzo, M. Schneider and M. Priestly (eds) *Disability and Social Change: A South African Agenda* (HSRC Press 2006) 19, 21–22.

⁴ As of 17 March 2013, the CRPD had been signed by 155 countries and ratified by 129 countries, see <www.treaties.un.org./pages/ViewDetails.aspx?src=TREATY&mtdsg> accessed 17 March 2013.

⁵ A. Geisinger and M.A. Stein, ‘A Theory of Expressive International Law’ (2007) 60 *Vanderbilt Law Review* 78.

⁶ Art 26 of the Vienna Convention on the Law of Treaties (1969), United Nations, Treaty Series, Vol. 1155, 331.

⁷ Kanter (n 2) 309–14.

⁸ 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) at para 22; I Boerefijn, ‘International Human Rights, in National Law’ in C. Krause and M. Scheinin (eds) *International Protection of Human Rights: A Textbook* (2nd edn, Abo Akademi Institute for Human Rights 2012) 631.

uses South Africa as a case study and the decision of the Western Cape High Court in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*⁹ as the focal point for discussion. South Africa has signed and ratified the CRPD as well as the Optional Protocol to the CRPD.¹⁰ These are good reasons for inquiring into South Africa's commitment towards the provision of inclusive education as a State obligation 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 developed equality jurisprudence that comports not just with the notion of inclusive education, but inclusive citizenship generally. The equality jurisprudence of the South African Constitutional Court, especially its accent on substantive equality, is instructive for States that are aspiring towards developing indigenous jurisprudence which coheres with the goals of securing inclusive equality and respecting the human dignity of disabled people that are espoused by the CRPD in its preamble and the substantive provisions. On the other hand, South African policy and praxis on inclusive education exemplify a double discourse of inclusive education. The case of *Western Cape Forum for Intellectual Disability*, especially, poignantly demonstrates contradictions in the implementation of inclusive education by the State. The facts that gave rise to the case show the adoption and implementation of State policy that, outwardly, embraces inclusive education, but at the same time is inwardly exclusionary. The administrative measures that South Africa chose to implement inclusive education served double standards. The measures treated some groups of disabled learners as not only different but also as not entitled to State support on the ground of lack of intellectual capacity to benefit from education.

More generally, the article highlights the incipient dangers of an intractably embedded double discourse of inclusive education at the domestic level and as a problem that South Africa shares with many other countries. Whilst inclusive education is an idea that has been globalised, a perennial concern with the implementation of inclusive education at the domestic level is the trend among national authorities to embrace the idea, but without abandoning the old discriminatory systems of education.¹¹ The concern is about institutionalisation

⁹ *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (Western Cape High Court, Cape Town) (*Western Cape Forum for Intellectual Disability*).

¹⁰ South Africa signed the CRPD and the Optional Protocol to the CRPD on 30 March 2007 and ratified the same on 30 November 2007: *Convention and Optional Protocol Signatures and Ratifications*, available at <www.un.org/disabilities/countries.asp?id=166> accessed 9 October 2012.

¹¹ S. Miles and N. Singer, 'The Education for All and Inclusive Education Debate: Conflict, Contradiction or Opportunity?' (2010) 14 *International Journal of Inclusive Education* 1, 9; R. Slee and J. Allan, 'Excluding the Included: A Reconsideration of Inclusive Education' (2002) 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; and L. 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.

of a rhetorical commitment towards an education system that professes to accommodate the learning needs of diverse learners, including disabled learners, but is juxtaposed with administrative practices that paradoxically result in the 'exclusion of the included', as it were.¹² The facts that gave rise to *Western Cape Forum for Intellectual Disability* are a ringing testimony to this concern. They demonstrate the operation of State education policy and practice that resolutely proclaimed a fulsome commitment towards inclusive education but simultaneously promoted the exclusion of some disabled learners.

It will be submitted that the exclusion criteria that prompted litigation in *Western Cape Forum for Intellectual Disability* detracted from diverse learners-centred imperatives. Even more significantly, the criteria detracted from the substantive equality and human dignity imperatives of both the CRPD and the South African Constitution. They had the consequence of undermining to the core, the essence of inclusive education. Furthermore, it will be argued that the exclusion criteria at issue in *Western Cape Forum for Intellectual Disability* were not the outcome of happenstance or mere lack of executive diligence. Rather, an insidious education philosophy was at play. The criteria were the outcome of a conscious retention or reconstruction of old parity-impeding epistemologies of education that treat disability as deficit and not diversity. They were the inevitable result of discourses that treat disability as individual pathology and assign value to culturally specific academic performance or receptiveness of the individual learner. The criteria negated human diversity and denied the naturalness of different intellectual capacities through an implicit appeal to an insidious ideology of dichotomised corporeality. Inevitably, the criteria had the effect of accentuating the stigmatisation and marginalisation of a group – intellectually disabled learners – that was already stigmatised and marginalised.

The article is divided into five sections. The first section is the introduction. The second section examines the philosophy underpinning inclusive education as a value and a normative claim under the CRPD and its relationship with equality and human dignity. It highlights the expansive nature of inclusive education and its incompatibility with cosmetic adjustments to traditional education systems. The third section summarises the facts and the decision of the *Western Cape Forum for Intellectual Disability* case. The fourth section appraises *Western Cape Forum for Intellectual Disability* against the backdrop of the normative standards of the CRPD. It focuses on equality standards and seeks to demonstrate the existence of double standards in the conceptualisation and implementation of inclusive education. Ultimately, this section highlights the co-existence at the domestic level of robust equality jurisprudence with embedded *disabling* discourses in inclusive education. The fifth section is the conclusion.

¹² Slee and Allan (n 11) 173.

2. INCLUSIVE EDUCATION AS A HUMAN RIGHT

In its preamble and substantive provisions, the CRPD impresses upon the imperative of securing equality and human dignity for disabled people in all of the main socio-economic sectors, including the education sector. Article 24 of the CRPD guarantees disabled people a right to equality and non-discrimination in State provision of education. More significantly, it recognises ‘inclusive education’ as a discrete human right.¹³ The recognition of inclusive education as a human right is largely a culmination of global advocacy for an education system that accommodates diverse learning needs and capacities. Article 24 constitutes not just a consolidation of global consensus on *Education for All*,¹⁴ but also the construction of a transformative paradigm for protecting and fulfilling the right to education. To understand the normative implications of the right to inclusive education in Article 24, it serves well to begin by understanding the broader transformative and normative context within which the right is located.

At a more general level, Article 24 is part of the larger transformative paradigm. The CRPD implicitly embraces, as one of its fundamental premises, the notion of human rights as indivisible, interdependent and interrelated.¹⁵ More than any other existing human rights treaty,¹⁶ the CRPD dissolves the dichotomy between civil and political rights and socio-economic rights. In neoliberal discourses, especially, arguments about the polycentricity of socio-economic rights¹⁷ have been used to defend the

¹³ CRPD, Art 24(1).

¹⁴ Global consensus and guidelines on the imperative of an education system that is inclusive of historically marginalised and excluded social groups, including disabled people, which 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 Equalization 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.

¹⁵ Preamble to the CRPD, para (c); Art 13 of Proclamation of Tehran 1968, Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968, U.N. 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.

¹⁶ 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.

¹⁷ L. Fuller, ‘Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353.

rightness of a minimal State,¹⁸ and maintain a seemingly unbridgeable dichotomy between justiciable civil and political rights and non-justiciable socio-economic rights. The CRPD builds on the Covenant on Economic, Social and Cultural Rights¹⁹ 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 as it is a positive obligation.²⁰ The State is not only enjoined to ensure that disabled persons are not excluded from the ‘general education system’.²¹ It is also required to take positive steps to provide disabled learners with individualised materials and other support in order to facilitate effective education and maximise academic and social development in a way that is consistent with the goal of ‘full inclusion’.²²

In responding to both social exclusion and material deprivation, Article 24 not only transcends the formal equality model so as to embrace substantive equality, it also integrates human dignity into its vision of equality. Responsiveness to material deprivation through redistributive justice is recognition of the vicious circle between poverty and disability.²³ Redistribution addresses structural or systemic inequality that 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.²⁴ In *Government of the Republic of South Africa v Grootboom*, the South African Constitutional Court underscored this link when, in the context of adjudicating a right to adequate housing under the South African Constitution, it said that ‘there can be no doubt that human dignity, freedom and equality are denied to those who have no food, clothing or shelter’.²⁵ 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-

¹⁸ C. Puta-Chekwe and N. Flood, ‘From Division to Integration: Economic, Social and Cultural Rights as Basic Human Rights’ in I. Merali and V. Oosterveld (eds) *Giving Meaning to Economic, Social and Cultural Rights* (University of Pennsylvania Press 2001) 39–51. For a robust neoliberal contestation of redistributive justice using rights, see especially: R. Nozick, *Anarchy, State and Utopia* (Basic Books 1974) 149–82.

¹⁹ International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), adopted 16 December 1966, entered into force 3 January 1976.

²⁰ S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) 220–26.

²¹ CRPD, Art 24(2)(a).

²² Ibid, Arts 24(2)(d) and (e).

²³ Preamble to CRPD para (t); E. Stone, ‘A Complicated Struggle: Disability, Survival and Social Change in the Majority World’ in M. Priestly (ed) *Disability and the Life Course: Global Perspectives* (Cambridge University Press 2001) 50, 52.

²⁴ S. Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta 2010) 51–54.

²⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 para 40 (Constitutional Court).

bodiedness.²⁶ It does so by putting the primary economic cost of accommodation on society rather than on disabled learners and their families or carers.

The repeated emphasis in the CRPD, including in Article 24, on the State's duty to accommodate human diversity by, *inter alia*, providing individualised support, is the Convention's greatest transformative modality. The duty to accommodate difference underscores an important philosophical approach to the framing of disability. It is a paradigm shift in the epistemology of disability and a departure from a biomedical perspective. Historically, the dominant understanding of disability is that it is the outcome of a bio-statistical aberration which resides primarily in the individual.²⁷ According to this approach, which has been described as the 'medical model' or the 'individual impairment model', actual or perceived physical or mental impairment constitutes not only the locus of, but also the explanation for, failure by the affected individual to participate equally in society.²⁸

Individualising disability as intrinsic pathology has historically served to entrench the *status quo*. It is an epistemology of disability that draws its impulse from deep structural and cultural mechanisms that, in turn, give rise to powerful discourses of an essentialising and marginalising nature. The discourses create and sustain master dichotomies by naming and essentialising what is normal and what is abnormal, but without interrogating the normative and ontological validity of the binary categories. Hierarchies about who belongs to the mainstream and who belongs to the periphery are created, but without creating discursive space for interrogating the integrity and legitimacy of the hierarchies. It is as if, once created, a statistical norm has integrity and naturalness of its own. In this way, master dichotomies devised by dominant social groups are allowed to produce a universalising effect that gives legitimacy to an abstractly universalised formal equality paradigm. In the end, able-bodiedness becomes the organising principle that is only capable of guaranteeing equality through assimilation or incorporation. Disabled people, including disabled learners, are required to first fit into existing socio-economic arrangements before they can enjoy equality.

In short, the individual impairment model is an epistemology of disability that is inherently incapable of yielding an equality universe in which there is 'open access, participatory parity and socio-economic equality'.²⁹ This is because in both political and economic senses, it fails to recognise difference. It is inherently impervious to recognising disabled people as they are, and to question the fairness of an asserted universal ideal of equality that excludes and marginalises social groups not constituting the organising norm. It fails to challenge existing distributions of social and economic power that overburden disabled people. The construction of

²⁶ Kanter (n 2) 290.

²⁷ J.E. Bickenbach, *Physical Disability and Social Policy* (University of Toronto Press 1993) 61–68.

²⁸ M. Oliver, *Understanding Disability: From Theory to Practice* (St Martin's Press 1996) 30–33.

²⁹ N. Fraser, *Justice Interruptus* (Routledge 1997) 77.

disability under the CRPD is different. It is a ringing rejection of conceiving disability as individual impairment model and equality as formal equality.

In its definitional construction of disability,³⁰ 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.³¹ The CRPD sees disability through the lens of a ‘human rights model’ of disability whose ultimate focus is not on identifying intrinsic bodily impairment but overcoming systemic barriers in order to accommodate diverse (dis)abilities.³² 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. It subscribes to the ‘social model’ of disability.³³ The larger explanation for disability is that it is the outcome of the manner in which the prevailing socio-economic environment intersects with the body. In this way, the Convention, by subscribing to the social model, has ushered into mainstream human rights discourse a transformative epistemology of disability.

The goal of the social model is not to deny that physical or mental impairments have disabling consequences for the individual affected.³⁴ Rather, the social model is ultimately a structural or materialist account of disability.³⁵ Its goal is to challenge the discursive formation of disability as individual pathology in order to leave room for implicating society and its economic and political structures in the creation and sustenance of disability.³⁶ It is an epistemology of disability that is conscious of disability as social oppression.³⁷ Disability is contextualised as a phenomenon materially and historically produced in a structural societal framework. The social model requires society to change as part of a remedial and parity-enabling process of responding to structural inequality and empowering disabled people. The critical transformation that is required is accommodating disabled people as part of mainstream socio-economic arrangements, which have hitherto been exclusionary.

³⁰ Art. 1 of the CRPD provides an inclusive rather than exhaustive definition of disability. It says: ‘Persons with disabilities, includes 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’.

³¹ Kanter (n 2) 291.

³² Ibid.

³³ On the ‘social model’ and critique of the ‘medical model’ or the ‘individual impairment model’, see generally: V. Finkelstein, *Attitudes and Disabled People* (World Rehabilitation Fund 1980); M. Oliver, *The Politics of Disablement* (McMillans 1990); Oliver (n 28); S. Linton, *Claiming Disability: Knowledge and Identity* (New York University Press 1998).

³⁴ Oliver (n 28) 35–37.

³⁵ S. Riddell, ‘Theorising Special Education Needs in a Changing Political Climate’ in L. Barton (ed) *Disability and Society: Emerging Issues and Insights* (Longman 1996) 83, 84–89.

³⁶ Oliver (n 28) 35–37.

³⁷ P. Abberley, ‘The Concept of Oppression and the Development of a Social Theory of Disability’ (1987) 2 *Disability, Handicap & Society* 5.

The duty to accommodate is a non-discrimination duty.³⁸ It should not be understood as a preferential, affirmative action duty that is a privilege bestowed by a benevolent State. The duty to accommodate is aimed at repairing systemic inequality and achieving a substantive equality promise within a juridical paradigm that responds not only to social group need, but equally significant, individual need in order to give full recognition to human diversity. The aim of the CRPD is to render disability an ordinary part of human variation so that disabled people, including disabled learners, are entitled to equal respect and equal concern.

Article 24 gives, *inter alia*, concrete expression to the recognition of human diversity by guaranteeing equal respect and equal concern to disabled learners, and by enjoining the State to provide, at all levels, an 'inclusive education' system which is aimed at achieving the 'full development of the human potential and sense of dignity and self-worth'.³⁹ Inclusive education must be directed at the 'strengthening of respect for human rights, fundamental freedoms and human diversity'.⁴⁰ 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'.⁴¹ Inclusive education should also be directed at enabling disabled people to 'participate equally and effectively in society'.⁴²

The duties to accommodate disability that are articulated in Article 24 make it abundantly clear that the CRPD departs from a 'one size fits all' school structure and architectural environment, curriculum, and pedagogical theory and practices. To fulfil the right to inclusive education, States must, *inter alia*, provide disabled learners the support they need to attain 'effective education' but through the 'general education system'.⁴³ The goal should be the provision of education on an equal basis with others.⁴⁴ Under the Convention, inclusive education includes learning about 'life and social development skills'.⁴⁵ Augmentative learning and other alternative modes of learning are part of accommodating disabled learners.⁴⁶ Inclusive education, under the Convention, therefore, sees the pedagogy of education as going beyond imparting scholastic knowledge to also embrace non-scholastic knowledge and skills, depending on the needs and capacities of the individual learner.

Against this backdrop, the CRPD clarifies, in a human rights context, the normative context of inclusive education. This is important not least because a major dissatisfaction with current practices of inclusive education is that they continue

³⁸ CRPD, Art. 5(3).

³⁹ *Ibid.*, Art. 24(1)(a).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, Art. 24(1)(b).

⁴² *Ibid.*, Art. 24(1)(c).

⁴³ *Ibid.*, Art. 24(2)(a).

⁴⁴ *Ibid.*, Art. 24(2)(b).

⁴⁵ *Ibid.*, Art. 24(3).

⁴⁶ *Ibid.*, Art. 24(3)(a).

to privilege scholastic aptitude.⁴⁷ Though inclusive education has been broadly understood as a paradigm shift in education philosophy and praxis requiring the radical transformation of an education system which has historically separated, marginalised or excluded certain groups of learners, the actual implementation of inclusive education has been varied. In many settings and geographical locations, 'inclusive education' has been other than inclusive. It has not bestowed on all learners a sense of unconditional acceptance, belonging, equal participation and community. Instead, it has continued to create privileged groups of mainstream learners that are juxtaposed with spatial domains of learners who remain at the periphery of the education system and schooling, especially intellectually disabled children.

National authorities have tended to be less than fully committed and to hide behind a 'benign commonality' of the vocabulary of inclusive education in order to give a veneer of inclusiveness.⁴⁸ 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 Convention. They continue to create spatial domains of learners that distinguish between the mainstream and the periphery. In this way, education systems professing to be inclusive have remained protective of a *status quo* that historically excludes rather than includes learners that are different from the mainstream. The Convention does not require assimilation of disabled learners into the mainstream as that would merely serve to create 'islands in the mainstream'.⁴⁹ 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.⁵⁰

Proponents of inclusive education who take a maximal approach towards the goal of accommodating diversity as to require unconditional recognition of previously excluded learners, bemoan the equivocal and limited or token notions of inclusion that belie triumphant proclamations of inclusive education by national authorities.⁵¹ 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 with policy or to commit resources, the more intractable reason, it is submitted,

⁴⁷ Miles and Singer (n 11) 8; D. Philpott, 'Inclusive Education: Reviewing the Criticism to Find Direction', available at <www.mum.ca/edu/faculty/mwatch/win21/philpot.htm> accessed 9 October 2012; L.J. Graham and R. Slee, 'An Illusory Interiority: Interrogating the Discourse/s of Inclusion' (2008) 40 *Educational Philosophy and Theory* 277, 279.

⁴⁸ Graham and Slee (n 47) 277.

⁴⁹ S. Cook and R. Slee, 'Struggling with the Fabric of Disablement: Picking up the Threads of the Law and Education' in M. Jones and L. Bassar Marks (eds) *Disability, Divers-Ability and Legal Change* (Martinus Nijhoff 1999) 327, 328.

⁵⁰ CRPD, Art. 4(1)(c); Lawson (n 2) 592.

⁵¹ C. Soudien and J. Baxen, 'Disability and Schooling in South Africa' in Watermeyer, Swartz, Lorenzo, Schneider and Priestly (n 3) 149–63; Slee and Allan (n 8) 173; L. Barton, 'The Politics of Special Education Needs' in L. Barton and M. Oliver (eds) *Disability Studies: Past, Present and the Future* (Disability Press 1997) 138–59; and Graham (n 11) 3.

is deep-seated ideology. It is the result of lack of commonly shared normative and ontological epistemologies of the status of disabled learners. Some types of inclusive education 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.

3. WESTERN CAPE FORUM FOR INTELLECTUAL DISABILITY

3.1. THE FACTS

The applicant – Western Cape Forum for Intellectual Disability (the Forum) – was a non-governmental organisation. It provided care for children with intellectual disabilities in the Western Cape, one of South Africa’s nine provinces. The respondents were the government at both national and provincial levels with a concurrent constitutional jurisdiction as well as a duty to provide education. The Forum brought an application before the Western Cape High Court challenging the constitutionality of State policy for providing schools and funding the education of children who were classified as having ‘severe or profound intellectual disabilities’. Section 29(1) of the South African Constitution⁵² guarantees ‘everyone a right to basic education, including adult education’. Purporting to discharge its constitutional duty under this section, the State 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’. This category includes children with an IQ of 20–25 and below 20, respectively.

To determine which of the children with intellectual disabilities would be admitted to special schools, the Department of Education developed and implemented a screening instrument called the ‘National Strategy on Screening, Identification, Assessment and Support’ (the NSIAS Strategy).⁵³ Under the NSIAS Strategy, children who were assessed as eligible for admission comprised children who fell within ‘Levels 4 and 5’ learning needs. These were children with moderate to mild intellectual disabilities and were regarded as requiring moderate to high levels of support.

⁵² Constitution of the Republic of South Africa No 108 of 1996.

⁵³ *Western Cape Forum for Intellectual Disability* (n 9) para 17.

However, children who fell outside Levels 4 and 5 were excluded. These were children with severe or profound intellectual disabilities.⁵⁴

The Department of Education's view was that no amount of education would ever be beneficial to children with severe or profound intellectual disabilities.⁵⁵ Such children would have to principally depend on their parents for acquiring life skills.⁵⁶ Ultimately, the Department considered children with severe and profound intellectual disabilities as ineducable. The most 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 the support might take, the extent of the support, where the support would be rendered or when precisely it would be rendered.⁵⁷

The State devised a funding policy that did not make any direct financial provision for the education of children with severe or profound intellectual disabilities. Through the Department of Education, the State directly funded the education of children who were admitted to mainstream schools and special 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, but through the Department of Health. The subsidy went to organisations such as the Forum, which had voluntarily established 'Special Care Centres'. But even Special Care Centres could not meet the demand for places. In the Western Cape, they could only cater for 1000 children, leaving 500 children with severe or profound intellectual disabilities without access to 'special care' facilities.⁵⁸

Against this backdrop, the Forum argued that the State was in breach of its constitutional obligations towards children with severe or profound disabilities. This was because the State had not provided schools for such children. Furthermore, it was because the financial support provided by the State was not only inadequate, but also compared unfavourably with support given to their counterparts without intellectual disabilities as well as those with moderate to mild intellectual disabilities. The Forum relied on the following fundamental rights which are guaranteed by the South African Constitution: right to equality and non-discrimination on the ground of disability (section 9), right to human dignity (section 10), right of children to be protected from neglect and degradation (section 28), and right to education (section 29).

⁵⁴ Ibid paras 11–19.

⁵⁵ Ibid paras 3,9, 17.

⁵⁶ Ibid para 17.

⁵⁷ Ibid para 18. Emphasis added.

⁵⁸ Ibid para 48.

3.2. THE DECISION

The crux of the State's defence revolved around the claim that, following the formal demise of apartheid in 1994, it had inherited a legacy of gross inequality amidst scarce available resources. Furthermore, there were competing socio-economic needs. Consequently, it was not possible for the State to fulfil the vast education needs of disabled children all at once. It could only address the legacy of underdevelopment and inequitable access to education resources incrementally so as to achieve a progressive rather than an immediate realisation of access to education. As evidence of its commitment towards discharging its constitutional obligations, the State said that it had adopted a policy on inclusive education which it was in the process of implementing – *White Paper 6: Special Needs Education. Building an Inclusive Education and Training System*.⁵⁹ *White Paper 6* was developed in 2001 as the national Department of Education's flagship policy on inclusive education.

Drawing from *White Paper 6*, the State argued that it had taken reasonable measures to fulfil the constitutional rights to equality and basic education of disabled children. It highlighted that, in 1994, it had inherited an education system that was bedevilled by massive inequalities. During apartheid, the education system had not only been discriminatory on the ground of race, but also on the grounds of disability, socio-economic class and geographical location, with learners who were black, poor and rural-based faring the worst.⁶⁰ Only 20 per cent of disabled learners had access to special schools.⁶¹ The policy articulated in *White Paper 6* sought to transform this legacy of gross inequality through inclusive education, by accommodating the full and diverse learning needs of disabled learners, including learners with severe disabilities. The goal was to establish an education system in which such learners 'could develop and extend their potential and participate as equal members of society'.⁶² In pursuing this goal, *White Paper 6* sought to comply with new constitutional values, including protecting and promoting the constitutional rights to equality, human dignity and basic education.⁶³

To reconcile with scarcity of resources, *White Paper 6* proposed a 20-year timeframe that was divided into short-term, medium-term and long-term goals as the mechanism for the progressive realisation of inclusive education. Education would be provided through the medium of 'full-service' and 'special schools'.⁶⁴ 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

⁵⁹ Department of Education, *Education White Paper 6: Special Education. Building an Inclusive Education and Training* (Department of Education 2001) (*White Paper 6*).

⁶⁰ *Ibid* 9.

⁶¹ *Ibid*.

⁶² *Ibid* 5.

⁶³ *Ibid* 11.

⁶⁴ *Ibid* 42–43.

'low intensive support'.⁶⁵ Learners with severe and profound disabilities who require 'intense levels of support' would be catered for in special schools.⁶⁶

But regardless of the heavy burden on the State in turning around an unenviable legacy of inequality in the provision of education for disabled learners on the State, and regardless of the inclusive intention of *White Paper 6* and its resonance with the Constitution, the Western Cape High Court, nonetheless, found that the State had not taken reasonable measures to meet the learning needs of children with severe and profound intellectual disabilities. More specifically, the court found 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. The policy had the effect of impairing the dignity of such children and stigmatising them.⁶⁷ Furthermore, the court held that, contrary to section 28 of the Constitution which guarantees children's rights, the State had neglected and degraded the children through failure to provide an education to impart knowledge and skills.⁶⁸

While the court concluded that all four constitutional rights relied upon by the applicant, namely, the right to equality, right to human dignity, right of children to be protected from neglect and degradation, and right to education had been violated, it resolved the case 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 in order grant a remedy that was responsive to individual as well as systemic constitutional rights violations.⁶⁹ The State was ordered to report to the court within a year, detailing the steps it has taken to implement the order. 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 purported to apply the test for determining discrimination which had been developed by the South African Constitutional Court in *Harksen*

⁶⁵ Ibid 22.

⁶⁶ Ibid 22, 24.

⁶⁷ *Western Cape Forum for Intellectual Disability* (n 9) para 46.

⁶⁸ Ibid.

⁶⁹ Ibid para 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.

v Lane.⁷⁰ 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.⁷¹ It concluded that there was no rational connection and that, for this reason, State policy constituted unfair discrimination.⁷² 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.⁷³ But even if there was a rational connection, the court concluded that the policy was neither reasonable nor justifiable and could not be saved by the general limitation clause of the Constitution – section 36.⁷⁴

Drawing mainly from the leading decision of the South African Constitutional Court on the interpretation and application of socio-economic rights – *Grootboom*⁷⁵ – the court was of the view that it could not be said that State education policy which 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'.⁷⁶ 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.⁷⁷

In reaching its conclusion, the Western Cape High Court also took cognisance of the fact that the right to education of disabled children was more than just a fundamental right under domestic law. It was also a human right that is recognised under United Nations and regional treaties, including under the CRPD that South Africa had ratified.⁷⁸ 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 which 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.⁷⁹

⁷⁰ *Western Cape Forum for Intellectual Disability* (n 9) para 26; *Harksen v Lane NO and Others* 1998 (1) SA 300 para 53 (Constitutional Court).

⁷¹ *Western Cape Forum for Intellectual Disability* (n 9) para 26; *Harksen v Lane* (n 70) para 53.

⁷² *Western Cape Forum for Intellectual Disability* (n 9) para 26.

⁷³ *Ibid.*

⁷⁴ *Ibid* para 42.

⁷⁵ *Ibid* paras 43–45; *Grootboom* (n 25) paras 43–44.

⁷⁶ *Western Cape Forum for Intellectual Disability* (n 9) para 48.

⁷⁷ *Ibid* para 29.

⁷⁸ *Ibid* paras 20–23.

⁷⁹ *Ibid.*

The court also drew support for its conclusion from persuasive foreign jurisprudence.⁸⁰ It accepted the applicant's argument that when determining whether the State has complied with its obligation to provide education for intellectually disabled children, the notion of education should be conceived in more holistic terms.⁸¹ It should be conceived in terms that are aimed at, *inter alia*, realising human potential to the fullest extent, developing the human personality, sense of dignity and self-worth at an individualised level, rather than merely achieving scholastic objectives.⁸²

4. REFLECTIONS ON A DOUBLE DISCOURSE OF INCLUSIVE EDUCATION

Western Cape Forum for Intellectual Disability shows, on the one hand, a jurisdiction that, 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 the 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 enabling equality jurisprudence that is complementary to the Convention with disabling discourses of inclusive education.

4.1. INDIGENOUS SUBSTANTIVE EQUALITY JURISPRUDENCE

The holding in *Western Cape Forum for Intellectual Disability* is correct, though the same cannot always be said of the court's reasoning. 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 the children admission to school as well as equitable funding for education was incompatible with the imperatives of the equality and socio-economic rights jurisprudence, which South Africa has developed since 1994.

⁸⁰ Ibid para 25. The court cited with approval an Irish decision: *O'Donoghue (a Minor) suing by his mother and next friend O'Donoghue v The Minister for Health, The Minister for Education, Ireland and the Attorney General* [1993] IEHC2, [1996] 2 IR 20.

⁸¹ *Western Cape Forum for Intellectual Disability* (n 9) para 19.

⁸² Implicitly acknowledging the holistic nature of the learning needs of children with intellectual disabilities, the court referred to: 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 CRPD: *Western Cape Forum for Intellectual Disability* (n 9) paras 19–25.

The South African Constitution can be understood through the metaphor of a bridge.⁸³ The Constitution is a conduit that facilitates 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.⁸⁴ Equality, which is pervasive value and right under the Constitution, finds its clearest articulation in section 9 which says:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly discriminate against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.⁸⁵

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 from the South African Constitutional Court's equality jurisprudence. The Court's exacting approach to the determination of unfair discrimination is particularly instructive. Section 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

⁸³ E. Mureinik, 'Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 South African Journal on Human Rights 31.

⁸⁴ C. Albertyn and B. Goldblatt, 'The Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 South African Journal on Human Rights 248, 249–50; D. Moseneke, 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 South African Journal on Human Rights 309, 315; and M. Pieterse, 'What Do We Mean when We Talk About Transformative Constitutionalism?' (2005) 20 South African Public Law 156, 162.

⁸⁵ Emphasis added.

test for determining discrimination. In a series of cases but most notably in *Harksen v Lane NO and Others*,⁸⁶ the Court enunciated the test for unfair discrimination.

The *Harksen v Lane* test, which precedes the CRPD, was prompted by South Africa's own historical circumstances. Notwithstanding this fact, 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.⁸⁷ The *Harksen v Lane* test is constructed around the premise of the imperatives of achieving substantive equality and respecting human dignity. The test demonstrates a remarkable substantive convergence in the vision of equality between the South African Constitution and the CRPD.

4.1.1. *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 which 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 of the Constitution. In *Harksen v Lane*, the Constitutional Court enunciated the test in the following way:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes or characteristics that have the potential to impair the fundamental dignity of a person as a human being or to affect them adversely in comparably serious manner.

⁸⁶ *Harksen* (n 70). 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 and Another* 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); *Larbi-Odam and Others v MEC for Education (North-West Province) and Another* 1997 (12) BCLR 1655 (CC); *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC).

⁸⁷ CRPD, Art. 1.

- (ii) If the discrimination amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If at the end of this stage of the enquiry, the differentiation is found to be unfair, then there will be no violation of section 8(2).

- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).⁸⁸

The references to section 8 and section 33 of the Constitution in the quote above refer to the interim Constitution of 1993. The references should be understood as respectively equivalent to section 9 and section 36 of the final Constitution of 1996, the current constitution.

4.1.2. *First Stage of the Harksen v. Lane Test: Establishing Rational Connection to a Legitimate Government Purpose*

Establishing whether there is a rational connection to a legitimate government purpose does not impose an onerous burden on the respondent.⁸⁹ This is because it entails applying only a ‘low threshold’ test which is similar to the minimal scrutiny test which has been developed by the Supreme Court of the United States when reviewing laws and regulations that do not involve a ‘suspect classification’.⁹⁰ It suffices that there is a logical connection, however thin or minimal, between the differentiation and the reason for, or purpose of, the differentiation. However, though in *Western Cape Forum for Intellectual Disability* the court purported to follow *Harksen v Lane*, it is submitted that it faltered in its understanding and application of the first stage of the test. This is so notwithstanding that, in its overall determination of the case, the court was correct.

It will be recalled that part of the State’s justification for treating children with severe and profound intellectual disabilities differently was that it could not meet their material needs all at once but only progressively. Meeting their needs required additional financial resources and infrastructure. It required the State to take new positive measures given a general education system that had historically excluded disabled learners. To meet need, the State had devised a long-term plan for transforming a deeply unequal and dysfunctional education sector that it had inherited. These

⁸⁸ *Harksen v Lane* (n 70) para 53.

⁸⁹ J.L. Pretorius, ‘Constitutional Framework for Equality in Employment’ in J.L. Pretorius, M.E. Klink and C.G. Ngwenya (eds) *Employment Equity Law* (Butterworths 2001) paras 2.5.1–2.5.2.

⁹⁰ *Ibid.*

reasons, it is submitted, should have been sufficient to discharge the State's burden at the first stage of the *Harksen v Lane* test. However, the court concluded that there was no rational connection with a legitimate purpose.⁹¹ The court's reasoning was that there was no rational connection because the State had singled out children with severe and profound intellectual disabilities for different treatment and had failed to prove that it did not have sufficient resources to meet the learning needs of the children.⁹² The flaw in the court's application of the first stage was in inquiring not so much into whether there was a rational connection to a legitimate government purpose (which is appropriate) but instead, into the cogency of the differentiation (which is inappropriate).

The first stage of the *Harksen v Lane* test is not intended to inquire into the cogency of the differentiation. At this stage, it is not necessary to establish that the differentiation was the only course open for achieving the purpose or that the differentiation was the most effective way of achieving the legitimate purpose.⁹³ The fact that the means chosen to achieve the legitimate purpose are under-inclusive or over-inclusive does not, on its own, render the means irrational. Equally, the rationality test is not concerned with whether the justification complies with the requirements of the limitation clause – section 36 of the Constitution. The focus of the first stage of *Harksen v. Lane* is not so much on rationality *per se*, but on whether the purpose has *some* legitimacy and *some* connection with the means chosen to achieve it. What the first stage is really seeking to implicate is whether the State acted in a manner that is 'arbitrary, capricious or displays naked preference'.⁹⁴ For these reasons, the rationality test is highly accommodating of the kinds of justifications that can provide a legitimate basis for differentiation. Indeed, in practice, the Constitutional Court tends to gloss over the first stage of the *Harksen v Lane* test for the reason that it is usually met by the State as to scarcely require scrutiny.⁹⁵

4.1.3. *Second Stage: Determining the (un)Fairness of the Discrimination*

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

⁹¹ *Western Cape Forum for Intellectual Disability* (n 9) paras 26, 29–30.

⁹² *Ibid.*

⁹³ *Prinsloo* (n 86) para 36.

⁹⁴ *Ibid* paras 24–26, 36; *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) BCLR 139 (Constitutional Court) at para 17; *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (Constitutional Court) at para 41; and C. Sunstein, 'Naked Preferences and the Constitution' (1984) 84 *Columbia Law Review* 1689.

⁹⁵ Pretorius (n 89) para 2.5.2.

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 following factors are taken into account: (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 has 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.⁹⁶ It must be stressed that these factors serve as judicial guidance, but without constituting a closed list.⁹⁷ The Constitutional Court has left the door open for other factors to emerge as the country’s post-apartheid equality jurisprudence develops.⁹⁸ 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.⁹⁹

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.¹⁰⁰ It is a situation-sensitive juridical approach that focuses on lives as lived and injuries as experienced by different groups in our society.¹⁰¹ This approach necessarily entails integrating the standpoint and experience of those at the receiving end of exclusion and marginalisation.¹⁰² When interrogating unfair discrimination, the *Harksen v. Lane* test embraces a type of equality that is responsive to structural inequality and individual need. Structural inequality is what explains the existence and perpetuation of marginalisation and disadvantage of certain social groups, not least disabled people. It is not so much invidious discrimination which excludes and marginalises disabled people, but more embedded structural inequality that flows from a society that has been built on the assumption of able-bodiedness. A focus on impact puts structural inequality under the spotlight by requiring a synecdochical understanding of the social and historical context within which the alleged inequality and discrimination manifest. Focusing on impact necessarily entails being alive to social group difference that is tied to social hierarchies that exclude and disadvantage the complainant or members of the social group to which the complainant belongs. Ultimately, a focus on impact entails judicial commitment

⁹⁶ *Harksen v Lane* (n 70) paras 51–53; Pretorius (note 89) para 2.6.2.

⁹⁷ *Harksen v Lane* (n 70) para 51; Pretorius (note 89) para 2.6.2.1.

⁹⁸ *Harksen v Lane* (n 70) para 51.

⁹⁹ *Harksen v Lane* (n 70) para 51; Pretorius (n 89) para 2.6.2.1.

¹⁰⁰ A. Scales, ‘The Emergence of Feminist Jurisprudence’ (1986) 95 *Yale Law Journal* 1373, 1387–1388.

¹⁰¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 para 126 (Constitutional Court).

¹⁰² *Ibid.*

to remedying systemic subordination and disadvantage in order to achieve a type of substantive equality which integrates human dignity.

*President of the Republic of South Africa v Hugo*¹⁰³ is one of the earliest cases in which the Constitutional Court laid down human dignity as an integral component of its own interpretive understanding of the meaning and reach of equality under the Constitution's equality clause. 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 purposes of our new constitutional and democratic order is the establishment in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.¹⁰⁴

The Constitutional Court has reiterated the centrality of human dignity in equality adjudication in several other cases.¹⁰⁵ 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,¹⁰⁶ 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. It puts an end to notions of hierarchical citizenship or premiere citizenship for some groups, which were assiduously and zealously cultivated under colonialism and apartheid.¹⁰⁷

At its core, human dignity serves the idea of the equal worth of every human being by virtue only of being a human being. In turn, human dignity is connected to the idea of liberty.¹⁰⁸ It means that the liberty of a person cannot be abridged merely because of a group characteristic that a dominant political order has discredited or deemed to be inferior. It means that in a democracy, individuals and social groups ought to be given autonomy as well as capacity to shape their lives in accordance with their view

¹⁰³ *Hugo* (n 86).

¹⁰⁴ *Ibid* para 41.

¹⁰⁵ See for example: *Prinsloo* (n 86) paras 31–33; *Harksen v Lane* (n 70) para 50; *Pretoria City Council v Walker* (n 86) para 81; *National Coalition for Gay & Lesbian Equality v. Minister of Justice* (n 101) paras 120–129; *Van Heerden* (n 94) para 116.

¹⁰⁶ L.W.H. Ackermann, 'Equality and the South African Constitution' (2000) 63 *Heidelberg Journal of International Law* 537, 540–42.

¹⁰⁷ 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.

¹⁰⁸ M.C. Nussbaum, *Sex and Social Justice* (Oxford University Press 1999) 56–57.

of a good life or their needs. Human dignity is non-hierarchical. It serves not only to dissolve master dichotomies which inform racial, gender, able-bodied essences that are used to give legitimacy to hierarchical social stratification. Human dignity is also the wellspring from which the equality clause of the South African Constitution draws its impulse. It is at the heart of how the equality clause serves to rescue people from a caste-like status and putting an end to their treatment as lesser beings merely because they belong to a particular social group.¹⁰⁹ 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.

Differentiation, *per se*, does not offend equality. However, differentiation that has the capacity to impair human dignity in a serious manner does. In *Van Heerden*,¹¹⁰ the Constitutional Court amplified the place of human dignity in equality adjudication. It explained the rationale of human dignity as an instrument for dissolving hierarchical ordering of social groups when it said:

Human dignity is harmed by unfair treatment... premised on the assumption that the disfavoured group is not worthy of dignity. At times, as our history amply demonstrates, such discrimination proceeds on the assumption that the disfavoured group is inferior to other groups. And this is an assault on the human dignity of the disfavoured group. Equality as enshrined in our Constitution does not tolerate distinctions that treat other people as 'second class citizens, that demean them, that treat them as less capable for no good reason or that otherwise offend human dignity'.¹¹¹

The duty to accommodate a social group or individual that is excluded 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.¹¹² Furthermore, it is also a principle that applies specifically to each of the socio-economic spheres addressed by the CRPD, including education.¹¹³ Though not expressly articulated in the *Harksen v Lane* test, nonetheless, reasonable accommodation is a principle which is implied.¹¹⁴ It is integral to the determination of whether there has been unfair discrimination

¹⁰⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 101) para 129.

¹¹⁰ *Van Heerden* (n 94).

¹¹¹ *Ibid* para 116, citing with approval a decision of the Supreme Court of Canada in *Egan v Canada* (1995) 29 CRR (2nd) 79. Footnote omitted.

¹¹² CRPD, art 5(3).

¹¹³ *Ibid* Art. 24(2)(c).

¹¹⁴ C.G. Ngwena, 'Reasonable Accommodation' in Pretorius, Klink and Ngwena (n 89) para 7.2.

and whether such discrimination can be justified. Reasonable accommodation 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.

In the final analysis, reasonable accommodation should be understood as a logical outcome of the imperative towards substantive equality and the rejection of formal equality under the South African Constitution. It is a principle that is aimed at promoting a model of equality that recognises diversity, historical disadvantage, and the legitimacy of compensatory or distributive justice. 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 and Others v Pillay and Others*,¹¹⁵ the Constitutional Court posited the duty to provide reasonable accommodation as part of the achievement of substantive equality under the Constitution. The Court 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.¹¹⁶

Chief Justice Langa, who delivered the leading judgment in *Pillay*, said that at the core 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'.¹¹⁷ 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'.¹¹⁸ A society that 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.¹¹⁹ In obiter, the Court observed that disabled people are often unable to participate in public or private life because the means to do so have been designed for able-bodied people with the result that without positive action they can easily be pushed to the margins of society.¹²⁰

Against this backdrop it is easy to see that the arguments advanced by the State in *Western Cape Forum for Intellectual Disability* were apt to fail. It is easy to appreciate why the education policy that was in issue was bound to offend both equality and human dignity constitutional guarantees. The policy to exclude children from admission to schools as well as allocate to them the least financial resources on the ground that they did not have the same capacity, or even need, to learn as their counterparts, amounted to treating them as second-class citizens. It had the effect of

¹¹⁵ *MEC for Education and Others v Pillay and Others* 2008 (2) BCLR 99 (Constitutional Court).

¹¹⁶ *Ibid* para 103; *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 101) para 132.

¹¹⁷ *Pillay* (n 115) para 75.

¹¹⁸ *Ibid* para 73.

¹¹⁹ *Ibid* para 75.

¹²⁰ *Ibid* para 74.

perpetuating disadvantage and the scarring of a sense of dignity and self-worth which is associated with membership of a particular social group. The approach to equality and human dignity under the South African Constitution is incompatible with a policy that legitimises hierarchical social ranking and universalises the experience of a dominant 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 dignity 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.¹²¹

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.¹²² 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 them as aberrations from 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

¹²¹ *Hugo* (n 86) para 41.

¹²² *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 101) para 126.

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.

4.1.4. *Third Stage: Justification under the Limitation Clause*

If the discrimination is found to be unfair, then the last stage of the discrimination analysis is to apply a proportionality test by inquiring into whether the respondent can justify the discrimination based on the criteria laid down in section 36 of the Constitution. Section 36 of the Constitution provides that:

The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

As the Constitutional Court explained in *S v Makwanyane*,¹²³ section 36 imports a proportionality test where, as in this instance, the equality claim is balanced against other rights and compelling public interests. To a great extent, the section 36 inquiry covers the same ground as that covered under the second stage of the *Harksen v Lane* test except that it juxtaposes an inquiry on the impact of the differentiation on the complainant with an inquiry into competing interests of other individuals and the general society. Rather than introduce new criteria for determining equality and unfair discrimination, section 36 highlights that fundamental rights cannot be enjoyed in isolation from other competing rights or societal interests. In *Western Cape Forum for Intellectual Disability* the court was correct in determining that the State could derive no comfort from the limitation clause not least because there was no reasonable justification, including financial justification, for the State's policy.

¹²³ *S v Makwanyane* 1995 (3) SA 391 (Constitutional Court) para 104.

4.2. THE RIGHT TO EDUCATION AND SOUTH AFRICAN SOCIO-ECONOMIC 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.¹²⁴ Section 29 is best understood contextually rather than atomistically. It is part of a regime of other socio-economic rights that are designed to remedy material disadvantage that would otherwise undermine the realisation of substantive equality and human dignity. In *Khosa v Minister of Social Development*,¹²⁵ 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.¹²⁶ 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 can lead the Court to find not just violations of socio-economic rights, but also violations of the rights to 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'.¹²⁷

Sandra Liebenberg has argued that the inclusion of socio-economic rights in the South African Constitution is an affirmation of the critical link between human rights and the material conditions that are necessary for human survival and development.¹²⁸ Over and above sustaining life, socio-economic rights are tools for achieving 'capabilities' to enable human beings to be what they can be.¹²⁹ 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 made by *White Paper 6* is that the provision of education to disabled learners had been highly discriminatory leaving a sizeable proportion of

¹²⁴ *Gauteng Provincial Legislature, Ex parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 para 9 (Constitutional Court).

¹²⁵ *Khosa and Others: Mahlaule and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (Constitutional Court).

¹²⁶ *Ibid* paras 40–43.

¹²⁷ *Ibid* para 74.

¹²⁸ S. Liebenberg, 'The Value of Human Dignity in Interpreting Socio-economic Rights' (2005) 21 *South African Journal on Human Rights* 1.

¹²⁹ *Ibid* 2; On the notion of 'capabilities' see: A. Sen, *Development As Freedom* (Anchor Books 1999) 87–110; M.C. Nussbaum, *Women And Human Development: The Capabilities Approach* (Cambridge University Press 2000).

learners without any access to schools.¹³⁰ If the State were to overlook meeting the needs of those who 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 vacuous, especially for historically marginalised and disadvantaged groups such as disabled people. Disabled people are overrepresented in the indices of socio-economic exclusion, including exclusion from education, employment, and healthcare.¹³¹ 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.¹³²

In the leading case on the interpretation of socio-economic rights, *Grootboom*,¹³³ 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, courts, nonetheless, 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 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. In this regard, the Court said:

The State is required to take reasonable legislative and other measures. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. ... An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations.¹³⁴

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.¹³⁵ It must not leave out a significant section of the community that is in need.¹³⁶ The State is not at liberty to ignore the needs of those who are in a crisis and in desperate need in favour of longer-term

¹³⁰ *White Paper* 6 (n 59).

¹³¹ T. Emmett, 'Disability, Poverty, Gender and Race' in Watermeyer, Swartz, Lorenzo, Scheider and Priestly, (n 3) 207–33, 221; R. Watson, M. Fourie and J. Andrews, 'Issues in Disability Assessment' in Watermeyer, Swartz, Lorenzo, Schneider and Priestly (n 3) 245, 247.

¹³² Emmet (n 131) above at 207–209.

¹³³ *Grootboom* (n 25).

¹³⁴ *Ibid* para 42.

¹³⁵ *Ibid* para 44.

¹³⁶ *Ibid*.

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. In a *Grootboom* sense, the State policy in question was patently unreasonable. It constituted the exclusion of a significant section of the community that was vulnerable and in desperate need.

4.3. POLICY EQUIVOCATION

While South Africa has developed an admirable stock of substantive equality and socio-economic jurisprudence for mediating difference and disability to match the goals of the CRPD, its policy orientation remains a veritable field of double standards.

On the positive side, the philosophical orientation of *White Paper 6* professes to accept and recognise disability with equal concern and equal respect. *White Paper 6* reflects commitment towards a social rather than an individual impairment model of disability.¹³⁷ 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.¹³⁸ 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 which 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 may require more intensive support than others and that organisational arrangements may require separate facilities in order to facilitate the development of maximal learning.¹³⁹ The policy’s intention is to maximise the realisation of the potential of disabled children rather than to segregate.

¹³⁷ *White Paper 6* (n 59) 24; J.E. Bickenbach, S. Chatterji, E.M. Badley and T.B. Üstün, ‘Models of Disablement, Universalism, and the International Classification of Impairments, Disabilities and Handicaps’ 48 *Social Science and Medicine* (1999) 1173.

¹³⁸ *White Paper 6* (n 59) 17.

¹³⁹ *Ibid* 16, 21.

At the same time, on the negative side, *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.¹⁴⁰ 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 scripting difference has been interrogated and democratised with a view to constructing an education system which gives central importance to diversity and participatory democracy as to include disabled people and disabled learners socially, intellectually and culturally.¹⁴¹ 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 which 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 coalesces around intellectual disability as defectiveness.¹⁴²

The construction of premiere citizenship under apartheid was predicated on a colonially propagated singular self-serving notion of sameness, namely phenotype. It is a notion whose genealogy can be traced back to the racial caste system that was spawned in eighteenth- and nineteenth-century Europe and whose aesthetic, moral and scientific cultures constructed some bodies as pure, neutral and rational and others as impure, abnormal and mentally degenerate.¹⁴³ Under apartheid the pervasive form of hierarchical status for social groups took a somatic form. By defining dark bodies as inferior bodies to be loathed, feared, avoided, and at the same time subjected to burdens and economic exploitation, apartheid constructed the operative norm for its ideal 'impartial' public sphere.¹⁴⁴ Its monological character rendered it an impossible ideal as dark bodies could not lose their particularity to become white or pass as white and thus be entitled to partake of public affairs in the civic republic. The moral significance of human dignity for equality is that it serves to reject a 'logic of identity'¹⁴⁵ which equates equality with reducing differences to unity and in the process not only denies but more significantly represses difference for the reason that it is predicated on generating stable categories.¹⁴⁶

¹⁴⁰ Soudien and Baxen (n 51) 160.

¹⁴¹ Slee (n 11) 393; B. Bernstein, *Pedagogy, Symbolic Control and Identity: Theory, Research, Critique* (Taylor and Francis 1996) 6–7.

¹⁴² Slee and Allan (n 8) 174.

¹⁴³ I.M. Young, *Justice and Politics of Difference* (Princeton University Press 1990) 123; C. West, *The Cornel West Reader* (Basic Civitas Books 1999) 70–86.

¹⁴⁴ Young (n 143) 96–121.

¹⁴⁵ *Ibid* 97–98.

¹⁴⁶ *Ibid* 98.

In a Cartesian sense, colonial and apartheid racial discourses pined for stable diametrically opposed categories. The discourses were inherently inimical to the notion of heterogeneous embodiment that is not constructed around dominance and subordination.¹⁴⁷ Such a polarity was essential for legitimating the economic exploitation of dark bodies. The orthodox contours of the apartheid discourse, in particular, presupposed that unless a social group could be classified as physically the same, then multiplicity of social groups meant lifelong immutable binary opposition and mutually exclusive categories. The paradox is that even with the benefit of enabling constitutional discourse, the implementation of South Africa's inclusive education policy succeeded in recreating apartheid by another name. The funding policy and school admission criteria which had been devised by the State and were struck down by the court, had not only managed to essentialise intellectual disability but also had become self-serving. They facilitated the exoneration of the State from its equality and non-discrimination obligations.

5. CONCLUSION

In *Minister of Home Affairs and Another v Fourie and Others*,¹⁴⁸ the Constitutional Court indubitably cast emergent constitutional citizenship in terms of an expanding universe. It cast inclusive citizenship in terms of acknowledging as well as accepting difference, not least on account of the memory of apartheid. The Court said:

The *acknowledgment* and *acceptance* of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the *diversity* of the nation.¹⁴⁹

The inclusive education policy which was in issue in *Western Cape Forum for Intellectual Disability* failed both the domestic constitutional equality promise as well as that of the CRPD. The CRPD inscribes into human rights jurisprudence transformative equality. It subscribes to a type of inclusiveness in which non-hierarchical diversity is celebrated. It normatively signals not so much the end of differences, but the end

¹⁴⁷ Ibid 99.

¹⁴⁸ *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (3) BCLR 355 (Constitutional Court).

¹⁴⁹ Ibid para 60. Emphasis added.

of master dichotomies of the body in our socio-economic sectors, including the education sector. Devising inclusive education domestic policies, programmes and jurisprudence which aspire towards the goals of the CRPD requires much more than merely exhibiting gestures of 'benevolent humanitarianism' that are not troubled by questions of equality and freedom.¹⁵⁰ It requires putting equality and human dignity at the centre. The State must begin by interrogating seriously its own sense of what counts as inclusive citizenship and to understand that some constructions of disability are more restrictive of inclusive citizenship than others. It requires seriously interrogating how alterity is managed and devising mechanisms that seek to include rather than to exclude. The goal should be to avoid the trap of reconstructing old dichotomies and pre-empting exclusionary practices that persist in *othering*, albeit, using new parlance. Though South Africa is an abject lesson in the persistence of othering, even after embracing inclusive education, it is but one of many examples worldwide. The rhetoric of inclusive education in which a discourse of inclusion is juxtaposed with one of exclusion is a global ideology that has yet to yield.¹⁵¹

¹⁵⁰ S. Tomlinson, *A Sociology of Special Education* (Routledge 1982) 136.

¹⁵¹ S. Tomlinson, 'Sociological Perspectives on Special and Inclusion' (2001) 16 *Support for Learning* 191, 192.