

# DEVELOPING JURIDICAL METHOD FOR OVERCOMING STATUS SUBORDINATION IN DISABLISM: THE PLACE OF TRANSFORMATIVE EPISTEMOLOGIES

CHARLES NGWENA\*

## ABSTRACT

The article contributes towards the development of a disability-conscious jurisprudence of equality that, in Nancy Fraser's parlance, speaks to overcoming the 'status subordination' of disabled people. It uses transformative epistemologies of disability found in the social model of disability and feminism as synergic philosophical resources for imagining an expansive and democratic juridical domain of equality. Ultimately, it appropriates the epistemologies to construct syncretic legal method – disability method – as a normative approach for interrogating and remedying disability-related discrimination and inequality. In the process, the article explores the capacity of transformative epistemologies to enrich rather than supplant the jurisprudence of substantive equality developed by the South African Constitutional Court.

**Key words:** disability, discrimination, equality, rights

## I INTRODUCTION

Though disability is a site of severe discrimination and marginalisation in South Africa, the equality claims of disabled people remain not only unfulfilled,<sup>1</sup> but inadequately acknowledged and understood. Compared to race, gender and sexual orientation, disability has not mustered the same level of political mobilisation and understanding. Disablism remains under-theorised, having received relatively little scholarly and much less judicial attention.<sup>2</sup> The ramifications of disability as a political category and discursive formation are yet to become established in South African equality discourses.

\* Professor, Centre for Human Rights, University of Pretoria.

1 South African Human Rights Commission *Towards a Barrier Free Society A Report on Accessibility and Built Environments* (2002) 3. This article uses the term 'disabled people' in preference to the more popularised 'people or persons with disabilities'. The preferred use of 'disabled people' is strategic naming to implicate an injustice. As highlighted in part II, 'disabled people' describes a social group that has been excluded from equal participation, hence disabled, by unaccommodating socio-economic arrangements: M Priestly 'Developing Disability Studies Programmes: The International Context' in B Watermeyer, L Swartz, T Lorenzo, M Schneider & M Priestley (eds) *Disability and Social Change A South African Agenda* (2006) 19, 22.

2 'Disablism' is a neologism which serves as shorthand in the way that 'racism' or 'sexism' does. 'Disablism' or its variants such as 'ableism' or 'ablism' are terms that find favour amongst commentators who treat disability as the outcome of structural power. See, for example, IM Young *Justice and the Politics of Difference* (1990) 124, 145, 164; M Oliver *The Politics of Disablement* (1990) 77.

Brian Watermeyer and Leslie Swartz draw attention to the relative absence of disability consciousness in the South African political economy.<sup>3</sup>

The painful legacy of institutional racial discrimination shared by all South Africans, and the remarkable emergence of our nation from decades of conflict, have left an awareness of the oppressive appropriation of the race paradigm indelibly etched on the national psyche. Similarly, though more latterly, an awareness of gender as a potentially oppressive marker of differentness has grown amongst the South African populace ... The idea of 'oppression' is firmly attached within South African colloquial culture to the idea of race; however, the marker of disability has yet to achieve this status. *When confronted with the notion of disability, our minds do not turn instinctually to an exploration of possible modes of systematic discrimination and disadvantage. Rather we remain strongly attached to modes of attribution which prize the explanatory system of the body, in accounting for the inequalities we see.*<sup>4</sup>

Race has singularly shaped South African political consciousness and emancipatory struggles.<sup>5</sup> It is no surprise that the signification of disability as a political category and its intersections with systemic inequality are not as well understood as the historical crucible of race. Watermeyer and Swartz<sup>6</sup> criticise medicalised understandings of disability as intrinsic individual impairment. They advocate an alternative understanding of disability as relational difference and as something created by the socio-economic environment, in ways that parallel race and gender.<sup>7</sup>

The major premise of this article is that, in the post-apartheid era, there is need to inflect equality discourses with a richer cultural and political understanding of disability. The last four decades or so have seen the emergence of alternative epistemologies of disability that are transformative, envisaging radical social and institutional change through denaturalising disability and relocating it from intrinsic corporeal deficit to systemic exclusion. Globally, the most widely advocated alternative epistemology of disability has been the 'social model'.<sup>8</sup> It has emerged as a socio-political approach and a counterpoint to bio-medicalised understandings of disability or the 'medical model'.<sup>9</sup> Indeed, the social model provided the overarching political and philosophical backdrops to the conceptualisation of disability under the Convention on the Rights of Persons with Disabilities.<sup>10</sup> However, there are other epistemologies that challenge dominant cultural narratives of disability and call for radical change. Amongst these is feminist philosophy.

3 B Watermeyer & L Swartz 'Introduction and Overview' in Watermeyer et al (note 1 above) 1.

4 Ibid 1 (my emphasis).

5 For example SJ Terreblanche *A History of Inequality in South Africa, 1652–2002* (2002); M MacDonald *Why Race Matters in South Africa* (2006).

6 Watermeyer & Swartz (note 3 above) 1

7 Ibid.

8 JE Bickenbach *Physical Disability and Social Policy* (1993) 135–81.

9 Ibid 61–92.

10 Convention on the Rights of Persons with Disabilities (adopted 13 December 1966, entered into force 3 May 2008) UNGA/61/106 2515 UNTS 3 (CRPD). A Lawson 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn' (2007) 34 *Syracuse J Int L & Commerce* 563; AS Kanter 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 *Syracuse J Int L & Commerce* 287.

Feminism is an insightful conceptual resource for alternative and transformative normative approaches to disability.<sup>11</sup> Its well-honed capacities for understanding difference as relational, unmasking structural power in its singular and multiple forms, and advancing remedial responses which speak to inclusive equality and the ethics of care, place at post-apartheid South Africa's disposal a rich archive for imagining expansive equality for disabled people. As a resource from which to forge and refine juridical tools for a normative understanding of disability in ways that are transformative and egalitarian, feminism has the capacity to deepen, challenge and enrich the theory and praxis of substantive equality developed by the Constitutional Court. It offers one of the most fungible archives of inclusive equality, which can be appropriated by other historically marginalised social groups and not just women. Of course, besides the social model and feminism, there are other epistemologies that can also be used in transformative ways, including Critical Race Theory,<sup>12</sup> Foucauldian analysis<sup>13</sup> and Marxist perspectives,<sup>14</sup> but these are beyond the scope of this article.

When interpreting the equality clause of the Constitution of the Republic of South Africa, 1996, s 9, the Constitutional Court has underscored that, on account of South African historical circumstances, the Constitution is transformative and, furthermore, that the right to equality is central to the transformative design of the post-apartheid constitutional order. In *Minister of Finance v Van Heerden*,<sup>15</sup> for example, Justice Sachs's minority judgment invoked the notions of substantive and transformative orientation to capture the contours of the normative architecture of equality under the South African Constitution. He said:

The whole thrust of section 9(2) is to ensure that equality be looked at from a contextual and *substantive point of view*, and not a purely formal one ... The *substantive approach*, on the other hand, requires that the test for constitutionality is not whether the measure concerned treats all affected by it in identical fashion. Rather it focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a *transformative constitutional philosophy* which acknowledges that there are patterns of systemic advantage

- 11 B Hillyer *Feminism and Disability* (1993); A Silvers 'Reprising Women's Disability: Feminist Identity Strategy and Disability Rights' (1998) 13 *Berkeley Women's LJ* 81; S Wendell *The Rejected Body Feminist Philosophical Reflections on Disability* (1996); EF Kittay *Love's Labour Essays on Women, Equality, and Dependency* (1999); R Garland-Thomson 'Integrating Disability, Transforming Feminist Theory' (2002) 14 *NWSA J* 1.
- 12 FAK Campbell 'Exploring Internalized Ableism Using Critical Race Theory' (2008) 23 *Disability & Society* 151.
- 13 B Hughes 'What can Foucauldian Analysis Contribute to Disability Theory?' in SL Tremain (ed) *Foucault and the Government of Disability* (2005) 78.
- 14 R Slorach 'Marxism and Disability' (2011) 129 *Int Socialism* 129 <[www.isj.org.uk/?id=702](http://www.isj.org.uk/?id=702)>.
- 15 *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved.<sup>16</sup>

The jurisprudence of ‘substantive equality’ has emerged as the most visible and concrete expression of the Constitutional Court’s own juridical understanding of the type of transformative equality envisaged by the Constitution.<sup>17</sup> As a value and a right, it is a jurisprudence rooted in South Africa’s enduring legacy of gross inequalities and the political imperatives of overcoming structural inequality in the post-apartheid era.<sup>18</sup> But whilst the Constitutional Court has developed and applied substantive equality in many cases, it has yet to do so in a case specifically involving disability, at least directly. The nearest it came to adjudicating the intersection between disability and equality was in *Hoffmann v South African Airways*.<sup>19</sup>

The main issue in *Hoffmann* was whether, contrary to s 9(3) of the Constitution, South African Airways had discriminated unfairly against the applicant when it declined to employ him as an air steward on account of his HIV status. It was contended on behalf of the applicant that HIV status was a disability and, thus, a listed ground under the non-discrimination clause. However, the court found it unnecessary to determine this question. It proceeded to resolve the unfair discrimination claim on the premise that though not listed as a protected ground in s 9(3), HIV status was an analogous ground. The court held that excluding the applicant on the basis of HIV status impaired his dignity in a comparably serious manner that constituted unfair discrimination.<sup>20</sup> The court avoided having to consider what would constitute disability as a listed ground in s 9.

*MEC for Education v Pillay* contains orbiter dicta on the intersection between disability and reasonable accommodation.<sup>21</sup> In this case the Constitutional Court drew parallels with disability in the course of adjudicating a discrimination claim on the basis of a religious or cultural practice brought under the Prevention of Unfair Discrimination and Promotion of Equality Act 4 of 2000 (Equality Act). In the course of deliberation, it observed that exclusion from society built solely on ‘mainstream’ attributes impacted more severely on disabled people.<sup>22</sup> Furthermore, it highlighted that under the Equality Act, as well as the Constitution, ‘reasonable accommodation’

16 Ibid para 142 (my emphasis). See also *S v Makwanyane* 1995 (3) SA 391 (CC) para 262; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 57; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) paras 73–4; *Van Rooyen v S* 2002 (5) SA 246 (CC) para 50. The references to race and/or gender as sites for systematic disadvantage in *Van Heerden*, *Bato Star Fishing* and *Van Rooyen* should be understood as merely capturing the more conspicuous features of the architecture of inequality during the colonial and apartheid eras rather than excluding other vectors of inequality such as disability. Furthermore, the reference to race in *Van Heerden* speaks to the particular facts of the case where race-based affirmative action was in issue.

17 C Albertyn ‘Substantive Equality and Transformation in South Africa’ (2007) 23 SAJHR 253.

18 Ibid 254.

19 2001 (1) SA 1 (CC).

20 Ibid para 40.

21 *MEC for Education KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).

22 Ibid paras 74–5.

was a non-discrimination principle, which extended beyond religion to cover all the protected grounds, including disability.<sup>23</sup> However, the court did not specifically explore the intersection between reasonable accommodation and disability other than alluding to some of the positive steps that are required, such as alteration of buildings to render them accessible to disabled people who are not ambulant.<sup>24</sup> Also, the court's interrogation of the normative content of reasonable accommodation did not delve deeper than highlighting that 'more than mere negligible effort is required to satisfy the duty to accommodate'.<sup>25</sup>

This article is set against a backdrop of the paucity of disability-specific jurisprudence in the equality jurisprudence of the Constitutional Court. It seeks to contribute towards the development of a disability-conscious jurisprudence of inclusive equality and care through tapping into the conceptual resources provided by transformative epistemologies of disability. Precisely because the Constitutional Court has proclaimed equality under the Constitution to be substantive and transformative, the article constructs its analytical framework mainly from an archive of transformative epistemologies of disability that appeal to expansive equality. For the purposes of this article, the social model of disability and feminism serve as the philosophical resources for imagining an expansive and transformative type of equality within a democratic domain. Ultimately, the social model and feminism are appropriated to construct a syncretic legal method for illuminating the interstices of disability-sensitive equality in theory and praxis, with a view to enriching rather than supplanting the jurisprudence of substantive equality developed by the Constitutional Court.

As part of linking substantive equality with social justice and empowerment of social groups, the article's analytical framework concomitantly seeks to be responsive to Nancy Fraser's work on critical social theory and recognition.<sup>26</sup> Drawing inspiration from Fraser's work, the ultimate question the article seeks to address is: Taking into account an archive of transformative epistemologies of disability, how can a theory of substantive constitutional equality under the South African Constitution be enriched in order to promote not just cultural recognition, but also economic recognition, distributive justice and care in a context where disabled people are a 'bivalent collectivity'?<sup>27</sup> Alternatively, the article addresses a Fraserian variant of the question, namely: Taking into account an archive of transformative epistemologies of disability, how can substantive equality be enriched to do the juridical job of overcoming 'status subordination' arising from disablism?<sup>28</sup>

23 Ibid.

24 Ibid para 75.

25 Ibid para 76, citing with approval the approach of the Supreme Court of Canada in *Central Okanagan School District No 23 v Renaud* [1992] 2 SCR 970, 984a.

26 N Fraser *Justice Interruptus Critical Reflections on the Postsocialist Condition* (1997) 16–23; N Fraser 'Rethinking Recognition' (2000) 3 *New Left Review* 107.

27 Fraser *Justice Interruptus* ibid 16–23; Fraser 'Rethinking Recognition' ibid 107.

28 Fraser 'Rethinking Recognition' (note 26 above) 113–20.

Structural inequality is the more intractable bane in disablism. In *Justice Interruptus*, Fraser highlights that there are social groups that experience hybrid modes of injustice, suffering both cultural and economic injustice.<sup>29</sup> Such ‘bivalent collectivities’ can only reclaim justice if there is sufficient recognition of the co-existence and interimbrication of cultural and economic harms.<sup>30</sup> Disabled people are quintessentially such a collectivity.<sup>31</sup> To overcome status subordination of disabled people as a bivalent category, a responsive theory of substantive equality ought to be able to achieve two main objectives.

In the first place, to respect human beings as equal in worth and dignity, substantive equality ought to reckon with difference by treating embodiment perceived as different as a constituent part of human variation so as to avoid the dialectics of binaries. Substantive equality should have the conceptual capacity to analyse disability as a metalanguage of the body analogous to race, gender and sexual orientation.<sup>32</sup> As metalanguage, disability represents social and power relations and is a ripe site for dialogic exchange and contestation.<sup>33</sup> Substantive equality should be amenable to treating disability as political and social oppression and a synecdoche for explaining the systematic exclusion and neglect of disabled people, in the same way as it has done for race and gender. Second, to be fully responsive in a disability context, substantive equality should also have conceptual resources for reckoning with the inevitability of human vulnerability and dependence. It should impel society towards ethical responsibility to provide care as part of the realisation of equality within positive relationships. To achieve economic recognition in ways that are transformative, substantive equality should go beyond providing individual remedies to focus on systemic remedies and a radical reordering of society.

The conclusion aside, the article has three main parts. Part I, the Introduction, is an overview of the objectives of the article and its main arguments. Part II considers the value of the social model of disability and feminism as transformative epistemologies of disability and their relevance for a theory and praxis of substantive equality. Part III builds on the social model and feminism to construct syncretic disability-centred juridical method for recognising difference and inflecting substantive equality with transformative epistemologies with a view to overcoming status subordination.

## II SOCIAL MODEL AND FEMINISM AS TRANSFORMATIVE AND SYNERGIC EPISTEMOLOGIES OF DISABILITY

Though developed to address the equality aspirations of disabled people and women, respectively, the social model of disability and feminism are, in many respects, mutually reinforcing when inclusive equality is the overriding

29 Fraser *Justice Interruptus* (note 26 above) 19.

30 Ibid.

31 Ibid 20–1.

32 EB Higginbotham ‘African-American Women’s History and the Metalanguage of Race’ (1992) 17 *Signs* 251.

33 Ibid 253–4.

goal. Disability and gender discrimination share many parallels. This point is highlighted by Rosemarie Garland-Thompson<sup>34</sup> in the course of making a case for Feminist Disability Studies as an important academic inquiry for feminist scholarship:

What is less widely recognised, however, is that this [ascriptions of women as the ‘Other’] collection of interrelated characterisations is precisely the same as is attributed to people with disabilities. Many parallels exist between the social meanings attributed to female bodies and those assigned to disabled bodies. Both are cast as deviant and inferior; both are excluded from full participation in public life as well as economic life; both are defined in opposition to a norm that is assumed to possess natural physical superiority.<sup>35</sup>

The social model and feminism can be used synergically as antisubordination insurgents that implicate, as well as remedy, disability-related inequality. At their confluence and highest level of generality, they both have a discursive capacity to implicate disablism as social oppression and disability as political signification when normatively addressing human difference. Both the social model of disability and feminism insist on accommodation of difference in a manner costless to the group perceived as different from the ‘mainstream’. They can be appropriated to imagine the emancipation of social groups at the receiving end of structures, narratives and praxes that are dominant, undemocratic and oppressive.

The social model and feminism coalesce around revealing as well as checking ‘structural power’, that is, power arising from overlapping and intersecting systems of political and economic misrecognition of other social groups which serves to produce and reproduce relations of inequality and subordination.<sup>36</sup> In the disability context, they both challenge systems of thought and praxis that are interpellative so as to naturalise and hegemonise the ability/disability system. Through counter-hegemonic narratives, the social model and feminism provide the underlying arguments for democratising how society constructs human difference so that there is parity in participation by all social groups, including the historically excluded, in ways that speak to Iris Young’s heterogeneous public sphere.<sup>37</sup> Ultimately, these epistemologies challenge the status quo of an interpellated ability/disability system with a view to influencing distribution of power and economic resources.

The capacities of the social model and feminism to challenge hegemonic notions of human difference, and posit difference as relational rather than hierarchical, have a particular resonance with substantive equality. Substantive equality seeks to eradicate the institutionalisation and sedimentation of social systems that use ‘difference’ to create and legitimise group-based superiority and inferiority as apartheid did. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court captured the equality

34 R. Garland-Thompson *Re-shaping, Re-thinking, Re-defining Feminist Disability Studies* Barbara Waxman Fiduccia Papers on Women and Girls with Disabilities, Centre for Women Policy Studies (2001) <<http://www.centerwomenpolicy.org/pdfs/DIS2.pdf>>.

35 Ibid 7.

36 H Botha ‘Equality, Plurality and Structural Power’ (2009) 25 *SAJHR* 1, 2.

37 Young (note 2 above) 116–21.

objective of substantive equality to transform hierarchical difference into relational difference:

The acknowledgment and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people as they are ... What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference.<sup>38</sup>

What the social model and feminism can add to the Constitutional Court's equality doctrine is how to transpose, in concrete and responsive ways, a substantive equality approach to disability. The social model and feminism have addressed what it means to be recognised and accepted as you are and what is entailed in accommodating the largest spread of somatic difference in ways that speak to inclusive citizenship. Each epistemology can enrich as well as challenge substantive equality. The social model has been in the vanguard of conceptualising disability to spawn a new understanding of equal citizenship and sounding the first major critique of classical liberalism in its treatment of disabled people. The pioneering work of social model theorists such as Vic Finkelstein, Michael Oliver and Colin Barnes reframed disability and succeeded in planting the seeds of a discernible global shift from a charity and welfare model to a rights model in the 80s and 90s.<sup>39</sup>

For feminism, as Rosemarie Garland-Thomson notes, disability has been a late awakening.<sup>40</sup> Notwithstanding, feminist theory comes with a richer and more versatile inclusive equality archive for responding to the generality and particularity of cultural as well as economic misrecognition of women in ways that can be appropriated for other historically marginalised social groups, including disabled people.<sup>41</sup> Much more than its social model counterpart, feminist theory has been in the ascendancy in critiquing classical liberalism's ideology of autonomy and independence and constructing a theory for recognising the substantive equality for persons who may be in situations of intense dependence. Some disabled persons will be persons who are dependent and in need of care in an intense way. Feminism is an important resource for

38 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 134. See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41; *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) para 60.

39 V Finkelstein *Attitudes and Disabled People Issues for Discussion* (1980); Oliver (note 2 above); C Barnes *Disabled People in Britain and Discrimination A Case for Anti-Discrimination Legislation* (1991).

40 Garland-Thomson (note 11 above) 2.

41 AM Jaggar 'Introduction' in A Jaggar (ed) *Living with Contradictions Controversies in Feminist Social Ethics* (1994) 1, 11.

substantive equality, not just for theorising equality in difference but also for conceiving a duty to provide care for those in situations of dependence.

### (a) The social model of disability

The social model was largely pioneered by British sociologists who sought to interpret disability in materialistic terms.<sup>42</sup> It is an iconoclastic approach to disability which reimagines corporeal difference and does not prize the explanatory system of the body as the cause of disability in ways lamented by Watermeyer and Schwartz.<sup>43</sup> For the social model, impairments are a description of the body rather than the cause of disability.<sup>44</sup> The social model implicates, as causative, the environment which intersects with bodily impairments or perceived bodily impairments in a manner that is adverse or unaccommodating. The term ‘disabled people’ is politically conscious nomenclature. It serves to highlight the role of indifferent socio-economic arrangements in disabling people with impairments.<sup>45</sup> To call attention to the role of society as the more disabling cause, an organisation of disabled people that was instrumental in developing the social model said in the context of physical disablement:

In our view, it is society which disables ... *Disability is something imposed on top of our impairments*; by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society.

Thus we define impairment as lacking all or part of a limb, organ or mechanism of the body; and disability as the disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from the mainstream of social activities.<sup>46</sup>

In articulating the social model, Michael Oliver, a leading exponent, said:

disability, according to the social model, is all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on. Further, the consequences of this failure do not simply and randomly fall on individuals but systematically upon disabled people as a group who experience this failure as discrimination institutionalized throughout society.<sup>47</sup>

Significantly, the social model has been important in raising consciousness about the marginalisation and exclusion of disabled people as oppression in the form of the systematic disadvantage suffered on a regular basis by an identifiable group even in a supposedly liberal society.<sup>48</sup> Disablism fits into the

42 Finkelstein (note 39 above); Oliver (note 2 above); Barnes (note 39 above); M Oliver *Understanding Disability From Theory to Practice* (1996).

43 Watermeyer & Swartz (note 3 above) 1.

44 Oliver *Understanding Disability* (note 42 above) 35.

45 See note 1 above; Priestly (note 1 above) 22; C Howell, S Chalklen & T Alberts ‘A History of the Disability Rights Movement in South Africa’ in Watermeyer et al (note 1 above) 46, 47.

46 Union of the Physically Impaired Against Segregation *Fundamental Principles of Disability* (1976) 3 (my emphasis).

47 Oliver *Understanding Disability* (note 42 above) 33.

48 Young (note 2 above) 41.

paradigm of these newer forms of oppression. It is structural in the sense of being deeply embedded and not the fortuitous result of the aberrant choices of a few individuals in society. Its bane lies in ableist 'unquestioned norms, habits and symbols, in assumptions underlying institutional rules and the collective consequences of following these rules'.<sup>49</sup> It matters less that the norms, habits and symbols are not consciously willed or are the acts or omissions of well meaning people in what they regard as ordinary social interaction.

What is crucial when implicating disablism as oppression is that it serves as an 'enclosing structure of forces and barriers that immobilise and reduce' the equality and human dignity of disabled people.<sup>50</sup> Through conceiving disablism as an insidious form of social oppression, the social model has succeeded in raising political consciousness about a new and radical vision of the legal entitlements of disabled people. Its vision represents a paradigm shift from charity and welfarism to a human rights approach to disability. It is a conscious political strategy to depart from a traditional construction of disability which attributes disability to individual intrinsic bodily limitations to a paradigm that raises consciousness about the role played by society and social organisation in the creation and sustenance of disability.<sup>51</sup> Oliver puts a gloss on the social model when he says that it is not an attempt to deal with the personal experience of restrictions of impairment but rather the social barriers of disability.<sup>52</sup>

The equality salience of the social model is on equality of outcome or result through a normative societal obligation to dismantle systematic socio-economic barriers that exclude and marginalise disabled people, consequently precluding equal participation. It has served to disrupt the focus in the medical model on cure and rehabilitation as the main gateways to participatory parity.<sup>53</sup> By putting issues of access and participation at the fore, it requires society to accommodate disabled people as they are. In terms of developing an inclusive jurisprudence of antidiscrimination and equality, the social model can be appropriated to make a crucial difference not so much at the level of cultural recognition, but economic recognition to ensure parity in substantive participation.

Thus, the remedial preoccupation of the social model is not with invidious discrimination but structural inequality emanating from embedded socio-economic arrangements constructed around ableism. The social model envisages a societal obligation to take positive steps to dismantle barriers that stand in the way of equal participation as well. It envisages a society that accommodates diversity. In a Fraserian sense, it anticipates remedial equality

49 Ibid.

50 Ibid, citing M Frye *The Politics of Reality Essays in Feminist Theory* (1983) 11.

51 Oliver (note 2 above) 11.

52 Oliver *Understanding Disability* (note 42 above) 38.

53 C Barnes 'Rehabilitation for Disabled People: A "Sick" Joke' (2003) 5 *Scandinavian J of Disability Research* 7.

in which vertical and horizontal obligations are responsive to the removal of 'parity-impeding' factors.<sup>54</sup>

The social model has its detractors. It has been criticised mainly from within the disability movement for being overly reductionist. A major criticism is that the social model is grand-theorising that effaces embodiment.<sup>55</sup> It is seen as disembodied ontology which over-dichotomises impairment and disability as to remove them from the reality of impairments and the importance of medical interventions in alleviating individual suffering and limitations.<sup>56</sup> Tom Shakespeare and Nicholas Watson criticise the social model for having developed into a 'rigid shibboleth'.<sup>57</sup> They argue that it unduly focuses on extrinsic factors to the exclusion of hearing the personal experiences of those who live with disabilities, including the experience of pain that they see as part of impairment.

At one level, the criticisms of the social model are well placed and highlight the dangers of a meta-narrative of disability that obscures the complexity and diversity of disability and human experiences.<sup>58</sup> Feminist theory has underscored the danger of abstract equality through an essentialist approach, which suppresses particularities and intersectionalities.<sup>59</sup> Indeed, one of the advantages of combining the social model with feminism in the development of disability method in part III of this article is to check the reductionist excess of the social model. Feminism can concomitantly serve to mediate the social model to ensure that the latter does not become a totalising approach which erases the particularities of lived (in)equalities.

At another level, however, it can be argued that the criticisms of the social model are misplaced in that they are at cross-purposes with the main goal of the social model. Defending the social model, Oliver has said that its restitutory value lies, foremost, in the societal duty to dismantle the systemic socio-economic barriers of *disability* rather than addressing the personal restrictions of *impairment*.<sup>60</sup> Its primary remedial site is an unaccommodating socio-economic environment. Proponents of the social model have emphasised that it should not be understood as implying that impairment is irrelevant or that medical or rehabilitative interventions are of no value for the individual.<sup>61</sup>

The social model can enrich the praxis of substantive equality to overcome Fraser's status subordination in two main ways. First, it can bring nuance to the

54 Fraser 'Rethinking Recognition' (note 26 above) 114.

55 T Shakespeare & N Watson 'The Social Model of Disability: An Outdated Ideology' (2002) 2 *Research in Social Science & Disability* 9; D Anastasiou & JM Kauffman 'The Social Model of Disability: Dichotomy between Impairment and Disability' (2013) 38 *J of Medicine and Philosophy* 441.

56 Shakespeare & Watson *ibid*; Anastasiou & Kauffman *ibid*.

57 Shakespeare & Watson *ibid*.

58 S Riddell 'Theorising Special Education Needs in a Changing Political Climate' in L Barton (ed) *Disability & Society: Emerging Issues and Insights* (1996) 83, 89.

59 See discussion on feminism later in this section.

60 M Oliver 'Defining Impairment and Disability: Issues at Stake' in C Barnes & G Mercer *Exploring the Divide: Illness and Disability* (1996) 29.

61 C Barnes 'A Working Social Model? Disability, Work and Disability Politics in the 21st Century' (2000) 20 *Critical Social Policy* 441, 444.

explication of what constitutes ‘disability’ in the interpretation and application of ‘disability’ as a protected category in s 9 of the Constitution in ways that politicise and demedicalise disability so as to implicate the socio-economic barriers as causative factors. Second, against the backdrop of disablism as oppression, it serves to bring to the fore the issue of equal citizenship. It underscores not just the imperativeness but also the normative ordinariness of the duty to provide accommodation as a non-discrimination duty incumbent upon a society committed to substantive equality in citizenship.

(i) *Conceptualising disability*

In part I of this article, it was noted that in *Hoffmann*, the Constitutional Court avoided determining the juridical concept of disability. The social model can fill this gap by pointing the Constitutional Court towards a contextualised conceptualisation of disability for determining who falls within the protected category of ‘disability’ under s 9 of the Constitution and, perforce, under the Employment Equity Act 55 of 1998, and the Equality Act. This would guide the Constitutional Court towards an inclusive and socially responsive definitional template.

To overcome status subordination, a responsive juridical concept of disability should provide protection against the discriminatory impact of attitudinal barriers as well as socio-economic arrangements that assume ‘mainstream’ embodiment. The social model offers a responsive template through its expansive approach towards the conceptualisation of disability. Impairment, whether it is actual or perceived, provides a necessary link with disability but is not the cause of disability or the total explanation. The requirement of ‘impairment’ serves to distinguish the disadvantages associated with disability from those associated with other socially created disadvantages such as race, gender and class.<sup>62</sup> Article 1 of the CRPD exemplifies this contextualised approach. While it retains a notion of ‘impairment’, it transcends it through juxtaposing impairment with the socio-economic environment:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder their full participation in society on an equal basis with others.

As alluded to in part I, the drafting of the CRPD was influenced by a social model approach to disability. Article 1 of the CRPD constructs not so much a definition as an inclusive concept of disability which is responsive to both political and economic recognition of disabled people. It recognises that, whilst there might be myriad interpretations of disability, a juridical concept of disability for equality and non-discrimination purposes must at least implicate actual or perceived impairment, but only as a starting point. Equally important, the conceptualisation of disability must be receptive to implicating socio-economic ‘barriers’ as constituent elements of disability.

62 Bickenbach (note 8 above) 173.

The CRPD's disability concept accepts that impairments and the environment interact to produce the experience of disability when people with impairments cannot participate in society on an equal basis with others. In this way, the concept acknowledges that disability cannot be understood to the exclusion of context and the environment in particular. The conceptualisation of disability in art 1 is transformative. It implicitly envisages transcending not just a medicalised notion of disability but also formal equality in order to achieve substantive equality. The CRPD's approach anticipates the imposition of a societal duty to dismantle barriers or to restructure the socio-economic environment in order to enable disabled people to participate equally.

The conceptualisation of disability in art 1 was deliberately intended by the drafters to be non exhaustive and to avoid a rigid formulation so as to not exclude other groups even if unintentionally.<sup>63</sup> Indeed, the preamble to the CRPD accepts that the concept of disability is an 'evolving one'.<sup>64</sup> This flexible and yet substantive equality-anchored approach to the conceptualisation of disability leaves room for domestic laws to add to the protection engendered by the concept. It would be open, for example, for South African substantive equality jurisprudence not to require impairments to be long-term so as to also include short-term impairments in the protected ambit. Underpinning this inclusive approach was the realisation by the drafters that the definition of disability is both contested and fluid. It does not serve the ends of substantive equality, whose objective is achieving equality of result or outcome, to construct a legalistic and rigid definition when the focus ought to be on dismantling barriers that hinder the full and effective participation of disabled people.

A concept of disability which is inclusive, flexible, and ultimately responsive to both invidious discrimination as well as discrimination emanating from an unaccommodating environment augurs well for substantive equality. What manifests as disability, or is perceived as such, depends on how a particular society is organised, including what it values or devalues politically, economically and culturally, and what kind of parity-impeding barriers it creates. For example, dyslexia need not be a disability in a society that does not value reading and writing but could be a disability in the future depending on the socio-economic development of that society. The Constitutional Court would need to avoid the pitfalls of conceptualising disability in a rigid manner which is overly medicalised, underinclusive and ultimately decontextualised.

Although the Constitutional Court has yet to address the concept of disability, it should be noted that the Code of Good Practice pursuant to the Employment Equity Act has done so.<sup>65</sup> The Employment Equity Act seeks to promote the achievement of constitutional equality in the workplace. The

63 Lawson (note 10 above) 593–5; Kanter (note 10 above) 291–2.

64 Preamble to the CRPD para (e).

65 Department of Labour 'The Code of Good Practice: Key Aspects on the Employment of People with Disabilities' (Code of Good Practice) (2002).

Code of Good Practice provides quasi-legal guidance to the interpretation of the Act in that it must be taken into account when interpreting the Act.<sup>66</sup> The Code defines ‘people with disabilities’ as ‘people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in employment’.<sup>67</sup> The Code’s definition is intended to serve s 6(1) of the Employment Equity Act, which lists ‘disability’ amongst the protected categories, as well as chapter III where ‘people with disabilities’ are a designated group, alongside women and black people. The definition in the Code is, verbatim, the definition found in s 1 of the Employment Equity Act – the definitional section of the Act.

The definition of disability in the Employment Equity Act and Code is under-inclusive.<sup>68</sup> The conceptualisation requires disability to have lasted for a given period of time. The Code interprets the period as 12 months.<sup>69</sup> Prescribing a fixed period is arbitrary and unnecessary. Furthermore, the Code prescribes a minimum threshold of limitation resulting from the disability, requiring the impairment to be substantially limiting. The definition appears to draw from a medicalised concept of disability that is at odds with an expansive notion of equality. In an unfair discrimination claim, especially, it would defeat the objects of substantive equality in the employment context to adopt a conceptualisation of disability that has the effect of excluding from the protective ambit of ss 9(3) and (4) of the Constitution people who experience disability-related discrimination but fall below legally or judicially prescribed thresholds of disability. This has been the experience under the Americans Disabilities Act (ADA).<sup>70</sup>

The ADA requires the disability to be ‘substantially limiting’ before protection against discrimination can be conferred on the disabled person.<sup>71</sup> The prescribed threshold level of functional impairment has disproportionately served to exclude from protection plaintiffs who experience discrimination but do not meet this threshold.<sup>72</sup> Indeed, the exclusionary impact of a threshold requirement under the ADA, in conjunction with its accentuation by the restrictive interpretation given to the ADA by the Supreme Court of

66 Employment Equity Act s 3(c).

67 Code of Good Practice (note 65 above) para 5.1.

68 CG Ngwenya ‘Deconstructing the Definition of “Disability” under the Employment Equity Act: Legal Deconstruction’ (2007) 23 SAJHR 116, 150–1.

69 Code of Good Practice (note 65 above) para 5.1.2.

70 Pub L No 101–336 s 104 Stat 327, codified at 42 USC ss 12101–213 (1990).

71 42 USC s 12102 (2).

72 American Bar Association *Study Finds Employers Win Most ADA Title I Judicial Administrative Complaints* (1998) 22 *Mental & Physical Disability Law Reporter* 403; R Colker ‘Winning and Losing Under the Americans with Disabilities Act’ (2001) 62 *Ohio State LJ* 239; AL Allbright ‘2001 Employment Decisions Under the ADA Title 1 – Survey Update’ (2002) 26 *Mental & Physical Disability Law Reporter* 394.

the United States,<sup>73</sup> have been the subject of trenchant criticism by disability rights theorists and advocates.<sup>74</sup> The ADA was amended in 2008 as a response to the crescendo of criticisms.<sup>75</sup> However, whilst serving to reverse the Supreme Court's restrictive interpretation of the ADA by the Supreme Court, the amendments leave intact the requirement of 'substantial limitation' as a prerequisite to entitlement to antidiscrimination protection under the ADA of 1990. The Supreme Court of Canada, on the other hand, provides a model to emulate when conceptualising disability in s 9 of the Constitution.

Disability is a protected category under the equality clause of the Canadian Charter of Rights and Fundamental Freedoms as well as under federal and provincial Human Rights Codes. The Supreme Court of Canada has followed a purposive and contextual approach, which draws insights from the social model when conceptualising disability. In the *Mercier* case,<sup>76</sup> it emphasised that, when adjudicating disability for the purposes of equality and non-discrimination, the focus of the inquiry should not be on the biomedical origins of the disability or whether and to what extent it causes actual functional limitation. Rather, it should be on whether differentiation on the basis of disability has caused the complainant to experience the loss or limitation of opportunities to participate in socio-economic life on an equal basis with others.<sup>77</sup> The court said that the approach should be 'consistent with the socio-political model' of disability.<sup>78</sup> A similar approach was adopted by the court in *Granovsky*.<sup>79</sup> Referring to 'disability' as a protected category under the Canadian Charter, it said that the true focus of s 15(1) analysis is not on impairment or associated functional limitation but on attitudinal barriers or barriers arising out of failure to accommodate disability.<sup>80</sup>

73 The leading case of *Sutton v United States Airlines Inc* 527 US 471 (1999) was followed in a number of decisions including *Murphy v United Parcel Service, Inc* 527 US 516 (1999); *Albertsons, Inc v Kirkingham* 527 US 555 (1999); and *Toyota Motor Manufacturing, Kentucky, Inc v Williams* 534 US 184 (2002).

74 See for example RL Burgdorf Jr "'Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstruction of the Definition of Disability' (1997) 42 *Villanova LR* 409; WE Parmet 'Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability' (2000) 21 *Berkeley J of Employment and Labour L* 53; CR Feldblum 'Definition of Disability under the Federal Anti-discrimination Law: What Happened? Why? And What Can We Do About it?' (2000) 21 *Berkeley J of Employment and Labor L* 91; M Diller 'Judicial Backlash, the ADA, and the Civil Rights Model' (2000) 21 *Berkeley J of Employment and Labor L* 19.

75 Americans with Disabilities Amendment Act of 2008.

76 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)* [2000] 1 SCR 665 (*Mercier*) paras 76–83; F Bhabha 'Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformation Imperative' (2009) 25 *SAJHR* 218, 232.

77 *Ibid* para 80, citing IB McKenna 'Legal Rights for Persons with Disabilities in Canada: Can the Impasse be Resolved?' (1997–98) 29 *Ottawa LR* 153, 163, 164.

78 *Mercier* (note 76 above) para 77, citing Bickenbach (note 8 above).

79 *Granovsky v Canada (Minister of Employment and Immigration)* (2000) 1 SCR 703.

80 *Ibid* para 39.

*(ii) Accommodating disability*

The conceptualisation of disability under the social model achieves more than cultural recognition. More crucially, it facilitates economic recognition. The *raison d'être* of the social model lies in the societal duty to substantively accommodate difference and bear the attendant costs. Society has a duty to reorganise society in a fundamental way in order to *fully* accommodate equal participation of social groups with different embodiment. Indeed, the model's robust insistence on understanding disability as intrinsic impairment resists an assimilationist model which would depoliticise disability. It serves to overcome the charity model of disability. Placing normative emphasis on a communitarian duty to dismantle exclusionary socio-economic arrangements ensures that disability is not regarded as individual misfortune with a privatised responsibility.

When discussing the *Pillay* case<sup>81</sup> in part I, it was noted that the duty to provide accommodation is an integral part of the Constitutional Court's doctrine of substantive equality but is yet to be substantively applied disability. Although not expressly articulated by the Constitutional Court in the *Harksen v Lane* test for determining unfair discrimination,<sup>82</sup> the duty to accommodate is understood by the court as an integral part of the test. Substantive equality, as enunciated in *Hugo*,<sup>83</sup> accepts that insisting on similar treatment between two persons, where one is already burdened with a disadvantage, merely serves to reinforce a particular norm that has the effect or potential to perpetuate a disadvantage. Insisting on a mechanical application of the principle of equal treatment in all cases would serve to reinforce the status quo. The duty to provide accommodation is a necessary outcome of an equality approach that focuses on impact or results and has rejected formal equality as the operative principle of equality.<sup>84</sup> It is linked to the determination of unfairness under s 9(3) as well as the proportionality analysis in s 36 to determine whether unfair discrimination can be justified.<sup>85</sup>

The Equality Act, which is intended to give legislative effect to constitutional equality, codifies much of the substantive equality jurisprudence of the Constitutional Court that was developed in the early years of the court.<sup>86</sup> It expressly recognises the duty to provide accommodation as a non-discrimination duty. The sections that address unfair discrimination on the grounds of race, gender and disability provide that 'failing to take steps to

81 Note 21 above.

82 *Harksen v Lane* NO 1998 (1) SA 300 (CC) para 53; other cases in which the Constitutional Court has developed its test for determining unfair discrimination include *Brink v Kitshoff* NO 1996 (4) SA 197 (CC); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC); *Hugo* (note 38 above); *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC).

83 *Hugo* (note 38 above) para 38.

84 *Pillay* (note 21 above) paras 76–8; CG Ngwenya 'Reasonable Accommodation' in JL Pretorius et al *Employment Equity Act* (2001) s 7.2.

85 *Pillay* (note 21 above); Ngwenya *ibid*.

86 C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 65–7.

reasonably accommodate the needs of such persons' is a manifestation of unfair discrimination.<sup>87</sup> Furthermore, reasonable accommodation is listed amongst the factors to be taken into account when determining the fairness or unfairness of discrimination. Section 14 provides that when determining whether the respondent has proved that the discrimination is fair, one of the factors to consider is whether, and to what extent, the respondent has taken 'such steps as being reasonable in the circumstances to accommodate diversity'.<sup>88</sup>

The adjudication of unfair dismissal claims has been receptive to the duty to accommodate as a non-discrimination duty.<sup>89</sup> In *SAMWU obo Solomons and City of Cape Town*, the Labour Court said that '[u]nder our new constitutional dispensation, employers are now compelled to make reasonable accommodation for employees with disabilities. Not doing so, will amount to unfair discrimination'.<sup>90</sup> In *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality*,<sup>91</sup> the Labour Appeal Court allowed an appeal under the Labour Relations Act 66 of 1996, finding that a dismissal was procedurally and substantively unfair and contrary to s 188(2) of the Act read with items 10 and 11 of schedule 8 to the Act which embody the Act's code of practice in relation to dismissal. The finding was partly because the employer had failed to consider the duty to provide 'reasonable accommodation' through failure to adequately consider all the medical evidence and exhausting alternatives to dismissal. The court observed that reasonable accommodation was, foremost, a constitutional principle which is implied in the determination of unfair discrimination, and that it had application not only to the Employment Equity Act, but also to the Labour Relations Act.<sup>92</sup> It said that failure to consider the duty to provide reasonable accommodation impacts adversely on both the procedural and substantive fairness of the dismissal under the Labour Relations Act.

In *Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration*,<sup>93</sup> the Labour Court held that the employer's conduct in dismissing an employee on the ground of incapacity constituted a failure to provide 'reasonable accommodation' to an employee who had a disability and had developed severe back pain following a road traffic accident and could no longer discharge her usual duties as a home-loan consultant. A panel of doctors had recommended modifications to the employee's workstation as well as posture training to enable her to perform her duties. The employer failed to act on the recommendations citing cost as the main reason. It refused to bear the cost of an occupational therapy assessment as well as to provide the employee with a headset as had been requested by the employee. Furthermore,

87 Equality Act ss 7(e), 8(h) & 9(c).

88 Equality Act s 14(3)(i).

89 Ngwena (note 84 above).

90 2009 (18) SALGB 8.1.4.

91 2012 (33) *ILJ* 1081 (LAC).

92 *Ibid* para 8.

93 [2008] 4 BLLR 356 (LC).

the employer refused to consider appointing the employee to a flexible working schedule such as a half-day position as an alternative to dismissal. The Labour Court found that the cost of accommodating the employee's needs at work would have been 'infinitesimal'.<sup>94</sup> It held that the employer's breach of the right to equality and non-discrimination through failure to provide an employee with 'reasonable accommodation' was contrary to s 6(1) of the Employment Equity Act.

Thus, the duty to provide accommodation is already enshrined in South African substantive equality. However, it is still at a relatively nascent stage of jurisprudential development in the disability sphere. The social model can add some value to its future growth by inflecting substantive equality with consciousness about the imperative of overcoming the oppressive effects of disablism. Being alive to the social model brings a sharper disability conscious context to the unfair discrimination analysis under s 9(3) to implicate failure to accommodate different embodiment as an instance of unfair discrimination. It is also useful for sensitising courts to the inherent dangers of reaching outcomes that reinforce the status quo when conducting the proportionality analysis under s 36 of the Constitution, balancing the right to equality of a disabled person against countervailing rights or societal interests in the face of a justification for failure to provide accommodation.

Part III of this article will highlight further how, as an integral part of disability method, the social model can inform the juridical premise and application of the duty to provide accommodation. It argues that, in a society saturated with ableism, prevailing juridical notions of accommodating disability, which come tethered to the language of 'reasonable accommodation' as the duty and 'undue hardship' or 'disproportionate burden' as the limits of the duty, need to be received by the Constitutional Court most critically. The malleability of these concepts and their porousness to intuitive arguments and market orientated cost-benefit analyses which tend to obscure 'nonmonetizable' values,<sup>95</sup> especially where cost is raised as a justification for failure to provide accommodation, pose the danger of constraining constitutional equality. Disability method is a counterweight against the pull of proportionality analysis towards insidious ableism and formal equality.

### **(b) Feminism(s)**

The focus in this section is not on treading the same ground as the social model. Rather, it is on highlighting aspects of feminism that can be used to build synergy with the social model in ways that expand equality and overcome the status subordination of disabled people. The focus is also to fill in gaps left by the social model. Feminism is a philosophical resource

94 Ibid para 137.

95 Use of the term 'nonmonetizable' is borrowed from Margaret Radin's work on theory of property where it is used to capture the normative presence of uncommodifiable human values in market transactions, see MJ Radin 'Market-inalienability' (1987) 100 *Harvard LR* 1849, 1917–21. See also the discussion in part III of this article.

for overcoming status subordination because of its normative capacity to implicate hegemonic norms as oppression, conceive difference as relational, and insist on accommodating difference in a manner that is costless to the person or social groups deemed different by hegemonic norms. In these respects, feminism and the social model are mutually reinforcing. Feminism is also an important philosophical resource for envisioning the need for care as equality in situations of extreme physical or mental dependence. In this latter respect, feminism fills a gap in the social model that has largely been developed to respond to the self-determination and independence needs of disabled people. In addition, feminism is able to mediate an essentialising excess in the social model. As highlighted in part II, a major criticism of the social model is that it is too reductionist, as not to recognise the heterogeneity amongst disabled people. On account of its theoretical range, feminism has developed an archive for recognising intersectionalities.

(i) *Implicating ableism as oppression, conceiving equality in difference and accommodating difference*

Appropriating feminism to disability requires first appreciating that feminism is not a single or static body of thought. Rather, it is a repertoire of theories, schools of thought, strategies and praxes which are in flux and at times contradict one another, but have a common design of achieving equalities for women.<sup>96</sup> Liberal feminism, radical feminism, cultural feminism and post-modern feminism are feminisms that offer different equalities.<sup>97</sup> Liberal feminism, with its equality trajectory towards sameness, abstract universalism, neutrality and assimilation, has no conceptual resources for recognising difference in embodiment except as hierarchical. It has no place in substantive and transformative equality as it uses an assimilating Foucauldian ‘normalising gaze’ to measure embodiment according to a prescribed master standard as a condition for conferring equality.<sup>98</sup>

Radical feminism, on the other hand, has ample traction for implicating disablism as oppression and demanding emancipation. In the same way as radical feminism has been used to challenge and break the solipsistic gridlock of an insidiously male saturated world to provide space for women, it can be appropriated to challenge a world saturated with oppressive ableism. Normatively, it is responsive to relational difference and structural inequality.

96 CA Littleton ‘Equality and Feminist Legal Theory’ (1987) 48 *Univ of Pittsburgh LR* 1043, 1044; Garland-Thompson (note 11 above) 3.

97 Feminist taxonomies are constantly evolving and are subject to contestation. The taxonomies adopted in this article ‘liberal feminism’, ‘radical feminism’, ‘cultural feminism’ and ‘postmodern feminism’ are not the only feminist taxonomies, nor do they imply taxonomic consensus amongst feminist theorists. Rather, they serve the purposes of this article. The feminist taxonomies in this article are used in the way articulated by Patricia Cain in PA Cain ‘Feminism and the Limits of Equality’ (1990) 24 *Georgia LR* 803.

98 Michel Foucault summarised the ‘normalising gaze’ as entailing five stages, namely: (1) comparison; (2) differentiation; (3) hierarchisation; (4) homogenisation; and (5) exclusion of the subject not in conformity. M Foucault *Discipline and Punish: The Birth of the Prison* (1977) 182–3; Young (note 2 above) 125–6.

The feminism espoused by Catherine MacKinnon and her adherents is theoretically well positioned to implicate the pervasive dominance of ableism as somatic patriarchy with socio-economic implications.<sup>99</sup>

Reasoning by analogy from MacKinnon's work, discrimination based on disability can be unmasked to reveal the ordinariness of the 'tyranny' of systemic ableism and its oppressive effects on those who cannot meet ableist standards.<sup>100</sup> Feminism reveals the embeddedness of culturally prescribed embodiment as both ontology and epistemology that have assumed the proportions of tenacious structural power that serves to maintain reified, insidious, and naturalised socio-economic dominance of *enabled* people over *disabled* people.<sup>101</sup> It lays bare socio-economic arrangements that assume the normalcy of certain functional capacities. In place of the 'woman question',<sup>102</sup> to implicate systemic ableism behind ostensibly neutral rules and practices that govern socio-economic arrangements, we can ask the 'disabled person question' when framing normative responses to disability. The central question to ask when interrogating disability is: Does the policy or practice in question integrally contribute to the maintenance of an underclass or a deprived position because of disability?<sup>103</sup>

Within the domain of radical feminism, there is feminist thought which lays emphasis not so much on interrogating dominance and subordination, as MacKinnon does, but on accommodating or accepting woman's difference. Christine Littleton's work is an example.<sup>104</sup> Littleton argues for an equality of 'acceptance'. What is crucial is that there is accommodation of 'difference' and that accommodation should be 'costless' to women.<sup>105</sup> In essence, Littleton's gender equality proposition is that: 'The differences between human beings, whether perceived or real and whether biologically or socially based, should not be permitted to make a difference in the lived equality of those persons.'<sup>106</sup> Unlike MacKinnon, Littleton does not dismiss the notion of difference as an artefact of patriarchy.<sup>107</sup> She does not see women as reconstructing equality with a design on fitting into a male world (which would be the basis of MacKinnon's critique of the difference) but rather reconstructing equality to create substantive equality that recognises and accepts diversity without creating a hierarchy of difference.

99 CA MacKinnon *Feminism Unmodified Discourses on Life and Law* (1987); CA MacKinnon *Towards a Feminist Theory of the State* (1989).

100 MacKinnon *Towards a Feminist Theory* *ibid* 238; AC Scales 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale LJ* 1373, 1376.

101 MacKinnon *Towards a Feminist Theory* (note 99 above) 238; CA MacKinnon 'Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence' (1983) 8 *Signs* 635, 638.

102 CA MacKinnon *Sexual Harassment of Working Women A Case of Sex Discrimination* (1979) 117; KT Bartlett 'Feminist Legal Methods' (1990) 103 *Harvard LR* 829, 837; HR Wishik 'To Question Everything: The Inquiries of Feminist Jurisprudence' (1985) *Berkeley Women's LJ* 64, 72–5.

103 MacKinnon *Feminism Unmodified* (note 99 above).

104 CA Littleton 'Reconstructing Sexual Equality' (1987) 75 *California LR* 1279; Littleton (note 96 above).

105 Littleton 'Reconstructing Sexual Equality' *ibid* 1304–14.

106 Littleton *ibid* 1284–5.

107 MacKinnon *Feminism Unmodified* (note 99 above) 33.

Radical feminism is an antisubordination insurgent. It is transformative in ways that have convergence with the social model of disability and, thus, conducive to overcoming Fraser's status subordination. As restitution, MacKinnon's feminism, which frames equality in terms of equal power relations, requires a wholesale dismantling of the existing ableist order with its ableist dominance. Littleton's radical feminism, on the other hand, steers us towards a focus on accommodation. It will be suggested in part III that Littleton's approach has rhetorical rapport with the trajectory of South African substantive equality. Ultimately, the crucial question is whether substantive equality can deliver, as Littleton implies, an accommodation of different embodiment in ways that are 'costless' to disabled people.

(ii) *Equality of care and dependence*

The issue of care to meet the daily needs and promote the self-development of people with severe physical or cognitive disabilities is not usually associated with notions of equality. However, as Colleen Sheppard argues, care ought to be an integral part of how we think about social inclusion in an equal society.<sup>108</sup> To underscore her argument, Sheppard quotes from Patricia Monture who says:

In order to understand equality, people must understand caring. Without understanding caring, we cannot understand 'peoplehood', be it in a community as small as a gathering of a few people to something as large as a global community. Each person must be respected for whom and what they are. Only when we understand caring will we have reached equality.<sup>109</sup>

If we are thinking about equality as care needed by disabled people, cultural feminism is an important conceptual resource. Carol Gilligan has been an arch exponent of cultural feminism.<sup>110</sup> In her influential work, *In a Different Voice*, Gilligan, draws from developmental psychology and psychoanalytic theory to build a thesis around the ethics of care where the preservation of relationships as opposed to the assertion of individual autonomy emerges as one of the core human values.<sup>111</sup> Putting a gloss on cultural feminism, Robin West identifies the 'connection thesis' as one of the successes of cultural feminism.<sup>112</sup> The connection thesis captures the shift in cultural feminism from universally conceiving the individual as an atomistic being separated from society, to conceiving her as existentially and psychologically connected with others.<sup>113</sup>

If transposed to disability, cultural feminism provides a philosophical basis for thinking about a juridical principle of equality that prizes care in ways which reconceive how we relate to autonomy and dependence. By admitting

108 C Sheppard *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (1990) 103.

109 PA Monture 'Ka-Nin-Geh-Heh-Ga-E-Sa-Nonh-Yah-Gha' (1986) 2 *Canadian J of Women and the Law* 159, 159; Sheppard *ibid* 103.

110 C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982). See also D Dinnerstein *The Mermaid and the Minotaur* (1976); N Chodorow *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978).

111 Scales (note 100 above) 1380.

112 R West 'Jurisprudence and Gender' (1988) 55 *Univ of Chicago LR* 1, 15.

113 *Ibid*.

to the imperatives of caring and responsibility for others,<sup>114</sup> feminism dictates that we cannot construct an equality universe without concomitantly inscribing into such a universe normative ethics of caring for others, including those that are dependent. Cultural feminism provides conceptual resources for critiquing formal equality and how it conceives autonomy.

Formal equality prizes autonomy and individual merit. It does not see the need to question the exclusionary ideology which underpins the parameters of that autonomy and merit. Feminists have argued that classical liberal philosophy, from which formal equality is derived, has been constructed around an archive of excessive autonomy. Martha Fineman has argued that positing autonomy in purely masculine individualistic terms promotes 'crude autonomy'.<sup>115</sup> It is an autonomy that mythologises merit and refuses to see that existing socio-economic arrangements benefit some and yet burden others, and that coming to the aid of the burdened is a concomitant part of the duty of substantively realising autonomy in a democracy. Crude autonomy precludes reading into equality dependence, vulnerability and care as components of equality.<sup>116</sup> Formal equality's citizens are, according to Fineman, constructed around the myth of citizens whose capabilities and self-sufficiency cut across all individuals, remaining constant throughout a lifetime.<sup>117</sup> Formal equality leaves no theoretical room for the recognition of dependency and vulnerability.<sup>118</sup>

Feminists have sought not so much to dispense with autonomy, but to reconceptualise autonomy so that it is situated in human relationships.<sup>119</sup> Jennifer Nedelsky concedes that the idea of autonomy has not only stood at the centre of liberal theory,<sup>120</sup> but has also been the prime source from which feminism has derived its language of freedom and self-determination.<sup>121</sup> The language of autonomy has not only been an essential, if not the essential, ingredient in advocacy for feminist freedom; it has also been an essential part of advocacy for other types of freedoms including freedom from disablement. The idea, then, is not to jettison autonomy, but to hybridise it so that it is responsive to both self-determination and communitarianism.<sup>122</sup> Reconceiving autonomy allows feminism not to duplicate the errors of patriarchy in its quest for a liberated self. It invites us to consider the notion of 'reciprocal, relational and unstable identity' as an alternative to a 'centred sovereign perspective

114 Ibid 17.

115 MLA Fineman 'Equality: Still Elusive after all these Years' in JL Grossman & LC McClain (eds) *Gender Equality: Dimensions of Women's Equal Citizenship* (2009) 14.

116 Fineman *ibid* 14; Garland-Thomson (note 11 above) 16–7; Kittay (note 11 above) 4; Hillyer (note 11 above); A Silvers 'Reconciling Equality to Difference: Caring (f)or Justice for People with Disabilities' (1995) 10 *Hypatia* 30; West (note 112 above) 1; J Nedelsky 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) *Yale J of Law & Feminism* 7, 12.

117 Fineman (note 115 above) 13; Nedelsky *ibid*.

118 Fineman *ibid* 14.

119 Nedelsky (note 116 above).

120 *Ibid* 7.

121 *Ibid* 9.

122 *Ibid* 8–9.

and a single presiding consciousness' as part of embracing humanity with boundaries that are susceptible to metamorphosis and unsteadiness.<sup>123</sup>

When appropriated to disability, reconceived autonomy ought to concede, as Garland-Thompson has argued, that the body is not a static or stable anchor of identity, always congruent with corporeal and cultural expectations.<sup>124</sup> Rather, it is unstable, and constantly interacting with history and the environment.<sup>125</sup> Our equality universe ought to recognise variations of embodiment in ways that prize care and assistance in the same way it recognises autonomy and choice, depending on the particularities and needs of the body. A body whose variations or transformations are contradicted or erased by the socio-economic environment both in a physical sense, as well as in an attitudinal sense, is a body that is lacking in justice. Disabled embodiment ought to be entitled to stake its equality claim not on the basis of assimilation, but rather on the basis of *realignment* of the physical and attitudinal environments with disabled embodiment. To refuse to concede this claim is to refuse Fraser's recognition thesis not only in a cultural sense, but also in an economic sense.<sup>126</sup>

Thus, cultural feminism highlights that it would be a mistake to stake the claim for equality as wholly around autonomy. An autonomy-centred approach denies the reality of interdependence as part of the constitutiveness of social relations for disabled people. Disability demands recognition of human interdependence, solidarity and the imperatives of the 'ethics of care' that have been propounded by cultural feminists.<sup>127</sup>

### (iii) *Heterogeneity and intersectionality*

Feminist approaches have sought to provide an alternative to totalising feminisms, especially in postmodernist approaches where 'woman' has no core identity.<sup>128</sup> Instead, 'woman' is constituted under multiple, intersecting and even contradictory structures and discourses which are always in flux.<sup>129</sup> Gender is but only one institution that 'woman' may find herself in as there are myriad of other contexts, experiences and intersectionalities. In Drucilla Cornell's postmodernist 'imaginary domain', for example, women need not share a universal experience of gender oppression in order to realise equality.<sup>130</sup> Whoever they are and wherever they may be located, they can construct freedom and equality without first contesting sex difference.<sup>131</sup> Antiessentialist feminist approaches can be understood as part of an effort to counter feminist hegemonies and correct analytical omissions arising especially from

123 A McClintock *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* (1995) 317.

124 Garland-Thomson (note 11 above) 20.

125 Garland-Thomson *ibid.*

126 Fraser *Justice Interruptus* (note 26 above) 13–6.

127 Garland-Thomson (note 11 above) 16–7, 21.

128 Cain (note 95 above) 838–41.

129 Leading exponents of postmodernist thought include Drucilla Cornell, see D Cornell *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (1999).

130 *Ibid.* xxxii.

131 *Ibid.* xxxvi–xxviii.

Mackinnon's woman as 'sexual subordination' but also Gilligan's woman as 'mother' as constructs that are neither necessary, universal nor always historically true.<sup>132</sup> In this sense, postmodern feminism serves to bridge the sameness/difference dichotomies between erstwhile feminisms.<sup>133</sup>

Feminist approaches that counter essentialism serve the praxis of substantive equality through avoiding the pitfalls of constructing stereotyped equality for disabled people. To be responsive to the equality aspirations of disabled people, substantive equality should seek to be multidimensional rather than rigid in order to be responsive to the universal as well as the particular.<sup>134</sup> This is because there is no *essential disabled person* in the same way that Elizabeth Spelman has argued that there is no *essential woman* when trying to dislodge patriarchy.<sup>135</sup> In *Inessential Woman*, Spelman deconstructs the 'generic woman' in feminism to show that it is a category which has operated in the same exclusionary way as the 'generic man' in Western philosophy to obscure the heterogeneity of women and to assume that the meaning of gender and the experience of sexism are the same for *all* women.<sup>136</sup> In the same way, when interrogating disablism, inclusive equality ought to shun plethoraphobia or fear of the 'manyness' of disablement.<sup>137</sup> It should not seek to rationalise the heterogeneous physicality of disability though a reductionist jurisprudence in which one group of disabled people is conflated with the other or one disabled person is conflated with the other.<sup>138</sup> Cornell would require inclusive equality to capture the subjectivities of disabled people in the 'singularity' and 'complexity of their basic identifications', always contemplating the 'possibility of transformation'.<sup>139</sup>

While embracing the antiessentialist trajectory of postmodernism, we need not throw the baby out with the bathwater. To deconstruct identity on ontological grounds alone, as postmodernism does, is to deny politics. It is to deny, as Katherine Bartlett has argued, systemic oppression as an independent and determinate reality in the lived experiences of a historically marginalised social group.<sup>140</sup> To counter essentialism and a totalising heuristic, postmodernism gives 'woman' only a nominal and fleeting presence in the socio-economic sphere.<sup>141</sup> This is problematic. However incomplete, political totalities that explain power, oppression, and socio-economic domination are indispensable to understanding structural inequality and constructing

132 C Dalton 'Where we Stand: Observations on the Situation of Feminist Legal Thought' (1987) 3 *Berkeley Women's LJ* 1, 7–8; L Alcoff 'Cultural Feminism versus Poststructuralism: The Identity Crisis in Feminist Theory' (1988) 13 *Signs* 405.

133 JC Williams 'Dissolving the Sameness/Difference Debate: A Post-modern Path Beyond Essentialism in Feminist and Critical Race Theory' (1991) 2 *Duke LJ* 296, 323.

134 M Corker & T Shakespeare (eds) *Disability/Postmodernity: Embodying Disability Theory* (2002).

135 E Spelman *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988).

136 *Ibid* ix–x.

137 *Ibid* 2.

138 *Ibid* 3–4.

139 Cornell (note 129 above) xxxvi–xxxviii.

140 Bartlett (note 102 above) 879.

141 Alcoff (note 132 above) 307.

normative responses.<sup>142</sup> To reject commonality and essentialise differences would be to miss out on acknowledging shared patterns of the experience of socio-economic exclusion.<sup>143</sup> What should be avoided are 'crude totalities' so that a measure of synecdochical thinking is retained to render it possible dialectically to relate the parts to a greater whole.<sup>144</sup> Categories that crystallise power in a given polity will often prove indispensable to analysing socio-economic exclusion.<sup>145</sup> Being antiessentialist should not mean dismissing a stable category of difference and its systematic link with oppression. Rather, it should mean acknowledging differences between individuals comprising the category, being context-sensitive and avoiding reifying categories.

### III CONSTRUCTING 'DISABILITY METHOD' TO OVERCOME STATUS SUBORDINATION

The aim in part III is to develop legal method that I describe as 'disability method'. Principally, disability method is a juridical approach for inflecting South African substantive equality with inclusive equality-centred transformative epistemologies of disability discussed in part II. It is an approach for interrogating disablism using ethics of inclusive equality and care drawn and synthesised into syncretic form from the social model of disability and feminism. The overriding goal is to advance legal method that has a plausible conceptual capacity to overcome status subordination in the sense espoused by Fraser and summarised in part I. It is a way of crystallising the value of the social model and feminism to juridical interrogation of disablism.

To describe something as method in a scholarly discourse risks raising expectations that, perhaps, cannot be fulfilled. 'Method' conjures up the notion of invoking an idealised empirically proven instrument for testing a hypothesis to uncover truth in a manner that is repeatable, and verifiable.<sup>146</sup> Writing about method, MacKinnon has said it 'organises the apprehension of truth: it determines what counts as evidence and defines what is taken as verification'.<sup>147</sup> Literally understood, method generates not only an expectation of scientific objectivity, but also an expectation of finality in the truth that method purports to reveal. Certainly, this is not the meaning intended for method in this article. Rather, method is employed in a much more pragmatic and contingent manner largely borrowed from feminism.<sup>148</sup> But why is method important?

142 C West *The Cornell West Reader* (1999) 279.

143 H Irving *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (2008) 35.

144 West (note 142 above) 279.

145 Williams (note 133 above).

146 HH Bauer *Scientific Literacy and the Myth of Scientific Method* (1992) 37–8.

147 MacKinnon 'Feminism, Marxism, Method, and the State' (note 101 above) 527.

148 For example, Bartlett (note 102 above); K Abrams 'Feminist Lawyering and Legal Method' (1991) 16 *Law & Social Inquiry* 373.

**(a) Why method?**

In a seminal article titled ‘Feminist Legal Methods’, Katharine Bartlett espoused the importance of legal method and its connection with substantive outcomes in adjudication.<sup>149</sup> Bartlett sought to develop legal method responsive to the equality needs of a social group (women in the article’s instance) which has historically been at the receiving end of structural inequality. Using feminist approaches, Bartlett developed a method that counters the partiality of androcentric juridical standards which follow certain predictable patterns that exclude women. As remedial and transformative methodology, Bartlett argued for legal method grounded in the experience and equality needs of the excluded group. Concomitantly, she highlighted the importance of not essentialising such experience or needs so as to leave sufficient room for recognising intersectionalities. Disability method can be understood in the same way; as legal method for ensuring that disabled people, in their heterogeneity, are included in the theory and praxis of constitutional equality.

The call to disability method in this article does not imply we are beginning with a tabula rasa. It does not mean that the Constitutional Court has not supplied us, at all, with discernible methodology in equality adjudication. Indeed, some might argue that, on the contrary, the Constitutional Court has already supplied us with such methodology and that nothing more need be done except apply the law diligently. This argument may well be correct. By pronouncing in several cases that equality means substantive equality, and, thus, something different from and much more than, formal equality, and by reading human dignity into equality, it can be argued that the Constitutional Court has already furnished us with legal method for interrogating equality and how to be responsive to the lived experience of disabled people in adjudication.<sup>150</sup>

Explaining the nature of substantive equality under the South African Constitution, Loot Pretorius observes that the Constitutional Court has not left substantive equality to be deciphered from the abstract.<sup>151</sup> Instead, the court has sought to translate its conception of equality into a ‘practical test’ – the *Harksen v Lane* test – for determining unfair discrimination so that substantive equality has a more concrete conceptual form. Equality analysis, especially the determination of whether a particular norm or standard is fair, must focus on the *impact* of the discrimination on the individual before the court. For example, in the *Hugo* case, one of the earliest cases to afford the Constitutional Court an opportunity to expound its interpretation of the equality clause, the court said:

We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical

149 Bartlett (note 102 above) 829.

150 See note 82 above.

151 JL Pretorius ‘Constitutional Framework for Equality in Employment’ in Pretorius et al (note 84 above) s 2.1.

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.<sup>152</sup>

Also, the court has put a gloss on how to determine impact. It has articulated the factors that must be taken into account when determining the effect, at a human level, of the norm or standard that is alleged to have been discriminatory. As part of describing as well as analysing the court's approach to substantive equality, the court has identified a number of 'impact' factors that should be considered in a contextual manner. These include the position of the complainants in society; their vulnerability and history, including whether the group the complainants belong to has suffered from patterns of disadvantage in the past; the purpose, nature and history of the discriminatory provision (whether it relieves or adds to group disadvantage) and the extent to which discrimination affects the rights and interests of the complainants.<sup>153</sup>

Thus, to achieve substantive equality, the Constitutional Court enjoins us to factor into the determination of unfair discrimination the particular histories of marginalisation and oppression. But while the Constitutional Court has supplied us with the principle for equality and a practical test – the *Harksen v Lane* test – for determining unfair discrimination when seeking to vindicate the equality of protected groups, the search for equality is an ongoing ethical duty. For as long as inequalities continue to persist, it cannot end with the *Harksen v Lane* test. More specifically, there is room for sustaining and reinforcing the project of substantive equality with legal methodologies which are informed by intimate understandings of the histories and experiences of disadvantage and marginalisation and equality aspirations of the protected group in question. Patricia Cain aptly captures the justification for searching for new equality methodologies when she says that theoretical constructions of equality are ongoing rather than static and that as long as inequalities and oppression persist, there will always be a need to search for more responsive theories, strategies and practices.<sup>154</sup>

Disability method, then, is not a methodological tool for beginning afresh. Rather, it is methodology for facilitating a more particularised contextualisation of the transformative interpretation and application of the equality clause of the Constitution. The need for a continual search for method is underscored by judicial experience which shows that pronouncing principles is one thing but applying them so that they are consistently and maximally responsive to context is another. Commentators have noted that the Constitutional Court has not always applied substantive equality principles with appropriate understandings of the particular histories of marginalisation

152 *Hugo* (note 38 above) para 41.

153 *Harksen v Lane* (note 82 above) para 51.

154 Cain (note 97 above) 840.

and oppression.<sup>155</sup> This has resulted in ‘perverse outcomes’, meaning outcomes out of synchrony with professed judicial commitment towards substantive equality. Critics point, especially, to the decisions of the Constitutional Court in *President of the Republic v Hugo*, *S v Jordan*, and *Volks NO v Robinson* as tangible evidence of perverse outcomes.<sup>156</sup>

Cathi Albertyn cautions that transformative constitutionalism would be of limited reach if it only manages to achieve formal recognition or nominal inclusion of excluded groups, leaving the underlying socio-economic relations largely undisturbed.<sup>157</sup> Albertyn argues that for equality jurisprudence to be ‘truly transformative’,<sup>158</sup> judges must not only be able to understand systemic inequality, but must also be willing to transcend the legal formalism that is embedded in traditional legal concepts and doctrines and has the effect of constraining transformative possibilities. When dealing with difference, for example, Albertyn’s argument is that courts must not stop at recognising social histories that have resulted in the subordination and disadvantage of some groups and the privileging of others. Instead, courts must go further and deal with difference in a ‘practical and normative manner’.<sup>159</sup>

Thus, whilst the Constitutional Court has given us some guidance on the type of factors to take into account when linking context with determination of unfair discrimination,<sup>160</sup> there is a case for saying that it has yet to develop a more systematic and more detailed juridical template for eliciting context in a manner tethered to substantive outcomes. Writing in the context of the substantive equality jurisprudence of the Canadian Supreme Court, Sheppard has suggested that context can be further elucidated through a broader inquiry that looks at context in its ‘multiple layers’.<sup>161</sup> The layers embrace: the voices and stories of exclusion and discrimination so as to take into account to experiential knowledge; information about institutional policies, practices and systemic dynamics of exclusion; and knowledge of the larger social, and structural realities.

To achieve the goal of dealing with disability in a practical and normative manner, as Albertyn urges, courts would need to be alive to the danger that a failure to adequately contextualise a general or universal principle of non-discrimination can leave difference, particularity and disabled embodiment

155 For example, see S Jagwanth & C Murray ‘Ten Years of Transformation: How has Gender Equality in South Africa Fared?’ (2002) 14 *Canadian J of Women & Law* 255; Albertyn (note 17 above) 253, 265–70.

156 *Hugo* (note 38 above); *S v Jordan* (*Sex Workers Education and Advocacy Task Force as amici curiae*) 2002 (6) SA 642 (CC); *Volks NO v Robinson* 2005 (5) BCLR 446 (CC). For academic criticism of these decisions see, for example, Jagwanth & Murray (note 155 above); Albertyn (note 17 above) 265–70; E Bonthuis ‘Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court’ (2008) 20 *Canadian J of Women & the Law* 1; RJ Cook & S Cusack *Gender Stereotyping Transnational Legal Perspectives* (2010) 49–50, 53–4, 67–8, 116–7, 125–6.

157 Albertyn (note 17 above) 254.

158 *Ibid* 254.

159 *Ibid* 260.

160 For example, stage two of the *Harksen v Lane* test.

161 Sheppard (note 108 above) 165–79.

behind. To succeed in interacting with the disabled body in a responsive way, courts need to have at their disposal not just a set of principles that apply in the same way to all protected groups listed in s 9 of the Constitution. Courts also need to have a more embracing understanding of the particularities of the social context in the way advocated by Sheppard, for example.<sup>162</sup> In this way, courts can begin to dislodge a tradition in judicial reasoning that constantly pines to reduce differences to unity and thereby create a public sphere that generates a dichotomy between the universal and the particular.

In *Hugo*,<sup>163</sup> for example, through failure to particularise a universal principle of equality and unfair discrimination, the court was unable to transform the public sphere of primary childcare to include fathers who are single parents. In the end, the court succeeded in constructing a matriarchy of its own. Contrary to the logic of substantive equality in focusing on impact, the court was of the view that it was not unfair to deny fathers the same benefit as had been extended to mothers under the Presidential Act. It concluded that the 'impact' of the Presidential Act on incarcerated fathers could not be said to impair their right to dignity or sense of equal worth.<sup>164</sup> While purporting to recognise that it was a wrongful stereotype to treat women as primary caregivers with responsibility to raise children, the court ironically ended up perpetuating a stereotype as Justice Kriegler recognised in an incisive dissent.<sup>165</sup> The approach of the majority in *Hugo* can be understood as inconsistency in legal method that stemmed from the pull of gender essentialism where the court was unable to see Hugo as part of a historical advantaged group of fathers as well as distinct from that group.<sup>166</sup>

### **(b) Disability method: the practical framework**

Disability method is methodology for sensitising substantive equality to disability as a protected category under the Constitution. Its point of departure is that, where a constitution has a transformative design, as is the case with the South African Constitution, there is need for an analytical framework which ensures that the interrogation of socio-economic arrangements that exclude disabled people and reparatory justice do not detract from the transformative design. Disability method fuses the social model of disability with feminism to construct a framework for interrogating norms, standards or practices that impact on disabled people. In those cases where the norms, standards, or practices are indifferent and/or exclusionary, disability method requires imagining an alternative that is responsive and inclusionary. In this way, disability method is both analytical as well as transformative.

At a practical level, disability method reflects a commitment towards inclusive equality by insisting that certain interconnected considerations be taken into account when impugning norms, standards and practices which

162 Sheppard (note 108 above).

163 *Hugo* (note 38 above).

164 *Ibid* para 47.

165 *Ibid* para 80.

166 Cook & Cusack (note 156 above) 121.

differentiate in form or substance between *enabled* people and *disabled* people as to constitute barriers to the equal participation of disabled people in society. The interconnected considerations are: (1) whether the norm, standard or practice is conscious about, or oblivious to, disability as social oppression; (2) whether the norm, standard or practice is dialogic in the sense of admitting a plurality of interactive voices and reflecting equal power relations so as to create space for an egalitarian playing field, or is, instead, monologic in the sense of admitting only a dominant voice and reflecting unequal power relations as to privilege an enabled social group and disadvantage a disabled social group; (3) whether the norm, standard or practice admits the experience and equality aspirations of disabled people as a diverse but distinct social group that has been historically excluded or marginalised in ways that do not essentialise disabled people as a group and as individuals; and (4) if the norm, standard, or practice is monologic and exclusionary, how rather than whether it can be reformed to accommodate disability and provide an alternative to existing social structures in a manner that is costless to the person accommodated as part of constructing an inclusive egalitarian society.

It should be stressed that the aim is not to elevate the elements of disability method into sequential legislative edits and, thus, invest the discourse with the ‘austerity of tabulated legalism’.<sup>167</sup> The elements closely intertwine. Ultimately, it is their collective import that matters. In many ways, disability method is a way of ensuring disability consciousness and asking the ‘disabled person question’.<sup>168</sup> It is methodology for ensuring the normative inclusion of what has hitherto been excluded. It integrates into the disablism enquiry what the epistemologies discussed in part II require in order to promote equality and respect human diversity. It is also methodology that serves as an insurgent for dislodging interpellated cultural understandings of disability.

Each component of disability method speaks to a democratic egalitarian domain of inclusive equality.

(i) *Whether the norm, standard or practice is conscious about, or oblivious to, disability as social oppression*

The social model and feminism analyses highlight that disablism is an embedded cultural practice. Consequently, equality adjudication should go deeper than eliciting invidious discrimination in order to unmask oppression. Oppression is antithetical to equality. To be transformative, inclusive equality should treat disablism not as an aberration occasionally experienced individually by disabled people but as systemic oppression. As argued in part II, oppression is structural in the sense of constituting systemic constraints embedded in social matrix. Combating oppression begins by recognising disabled people as a socially constituted category.<sup>169</sup> A social group is a social

167 *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) 328–9.

168 Note 103 above.

169 Young (note 2 above) 42–3.

relation; it exists only in relation to another group.<sup>170</sup> It need not always be constituted through the possession of common inherent characteristics, or by consciously professing its own social or political identity. It can also be constituted through a common experience of exclusion even if the experience is not conscientised at a group level.<sup>171</sup>

Given the heterogeneity of impairments, it is not impairments that constitute disabled people as a social group when thinking about an enduring and more embracing inclusive equality, but a common experience of exclusion from equal participation in society. Part II argued that for the purposes of developing antidiscrimination laws, it is not the type or severity of ‘impairment’ that matters. A common experience of status subordination that is linked to ‘impairment’ is what constitutes disabled people as a social group. In relational terms, *disabled* people are only a group because they exist alongside *enabled* people,<sup>172</sup> that is, a class of people that, historically and in contemporary society, are included in, and, indeed, are assumed or affirmed by, the prevailing socio-economic arrangements. Systematic exclusion or marginalisation is an insidious form of oppression as it excludes a whole category of people from socio-economic participation, subjecting them to material deprivations.<sup>173</sup>

(ii) *Whether the norm, standard or practice is dialogic in the sense of admitting a plurality of interactive voices and reflecting equal power relations so as to create space for an egalitarian playing field, or is, instead, monologic in the sense of admitting only a dominant voice and reflecting unequal power relations as to privilege an enabled group and disadvantage a disabled group*

The epistemologies discussed in part II ultimately challenge structural power. They require the construction of normative values following a democratic process rather than imposition. Being compelled to hear the voices of the social groups and individuals affected is an essential part of constructing normative values. Overcoming status subordination requires engagement with standpoint epistemology.<sup>174</sup> Such an approach is a necessary step in the process of not only understanding the equality claims of disabled people, but also imagining inclusive equality.<sup>175</sup> To argue that the voices of disabled people are an essential part of how we construct the universe of equality is not to argue for normative anarchy or separatism. Rather it is to argue, as Young does, that if normative reason is dialogic, then just norms have a better prospect of being inscribed into our political and legal economy if there is

170 Ibid 44.

171 Ibid 46.

172 KQ Hall ‘Feminism, Disability, and Embodiment’ (2002) 14 *NWSA J* vii, xii.

173 Young (note 2 above) 53.

174 I use ‘standpoint epistemology’ as it has been used in feminist discourse to mean not merely the desirability, but more significantly, the necessity of building knowledge and understanding about equality norms through integrating the lived experience of those that have been excluded, see Bartlett (note 102 above) 872.

175 Bartlett (note 102 above) 872–7.

more than token interaction between different interest groups, especially, if the dominant group is compelled to hear the voice of the marginalised group.<sup>176</sup> If democracy means a process of communication across differences, and decision-making to determine collectively the conditions of our lives in the republic, then communicative ethics require that *all* citizens be accorded an opportunity to participate as peers.<sup>177</sup>

Furthermore, to argue for standpoint epistemology is not to assume that only subalterns have insight into the truth about exclusionary citizenship and the remedial responses. It is not to silence the voice of non-victims on the assumption that they do not know about oppression or to elevate the voices of the victims above reproach so as to render them the only authentic voices. Bartlett puts it neatly when she says that ‘although victims know something about victimization that non-victims do not, victims do not have exclusive access to truth about oppression’.<sup>178</sup> Rather it is to argue for dialogue in the construction of equality so that all stakeholders participate in the making of equality that is grounded in concrete, as opposed to abstract, reality in order to be inclusive.

(iii) *Whether the norm, standard or practice admits the experience and equality aspirations of disabled people as a diverse but distinct social group but in ways that do not essentialise disabled people as a group and as individuals*

When theorising difference and constructing inclusive equality to combat disablism, the category of ‘disabled person’ should avoid the pitfalls of other essentialising conceptualisations which risk becoming abstractions that unwittingly seek refuge in a ‘false universalism’ void of political nuance and heterogeneity.<sup>179</sup> In part II it was submitted that part of the value that feminism brings to the social model is its capacity to be conscious about the dangers of essentialisation. The category of ‘disabled person’ should not mean sameness and singularity, ignoring intersecting social cleavages of difference, including varied histories, varied disadvantages and marginalisations, and varied imbalances of power. In order to render an inclusive equality universe that does not exclude crucial biographical dimensions of disabled people, differences amongst disabled people must be recognised.<sup>180</sup> That way, we avoid constructing yet another patriarchal, standardising and neo-colonising voice that privileges some disabled people and yet disadvantages or excludes others. Equality for disabled people must not be constructed in a manner that renders it a hegemonic standard incapable of reckoning with the particularities

176 Young (note 2 above) 116.

177 Fraser *Justice Interruptus* (note 26 above) 173; Young (note 2 above) 101, 106–7; J Habermas *The Theory of Communicative Competence Volume 1: Reason and Rationalization of Society* (1983); J Habermas *The Theory of Communicative Competence Volume 2: Lifeworld and System* (1987).

178 Bartlett (note 102 above) 875; ML Fineman ‘Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship’ (1990) 42 *Florida LR* 25, 41–2.

179 R Lister ‘Citizenship: Towards a Feminist Synthesis’ (1997) 57 *Feminist Review* 28, 38.

180 Spelman (note 135 above) 14.

of the individual and their varied experiences and needs, as happened with the approach of the majority of the Constitutional Court in the *Hugo* case.

- (iv) *If the norm, standard, or practice is monologic or exclusionary, how rather than whether it can be reformed to accommodate disability and provide an alternative to existing social structures in a manner that is costless to the person accommodated as part of constructing an inclusive society*

Disability method requires *full* accommodation. A supposedly transformative approach for combating disablism loses credibility if it cannot overcome status subordination. Disability method requires accommodation to be ‘costless’ to disabled people. Borrowing from Littleton’s feminist approach, its premise is that accommodation is only achieved when the consequences of difference in embodiment are made costless relative to different social groups.<sup>181</sup> But can the juridical concept of substantive equality render the consequences of difference in embodiment costless?

In part II, it was noted that the duty to provide accommodation is part of the Constitutional Court’s jurisprudence. Substantive equality treats the duty to accommodate as a non-discrimination duty. Moreover, it focuses on equality of outcome or result, at least rhetorically. In this sense, there is convergence between disability method and the court’s substantive equality doctrine. But how deep is the convergence? It is beyond the scope of this article to conduct an exhaustive exploration of the juridical duty to accommodate, save to highlight salient areas of tension or difference with disability method.

The rhetoric from the Constitutional Court’s decisions in cases such as *National Coalition for Gay and Lesbian Equality*<sup>182</sup> and *Fourie*,<sup>183</sup> speaks expansively to accommodating diversity. It supports the idea of accommodation as synonymous with a duty to achieve parity in participation. In *National Coalition for Gay and Lesbian Equality*, Justice Sachs appears to endorse this approach. Citing Littleton, he said that equality does not imply ‘homogenisation’ but rather ‘acceptance and acknowledgment of difference’.<sup>184</sup> In making this pronouncement, Justice Sachs was cognisant that Littleton’s premise of ‘acceptance’ substantively implies asymmetrical treatment of difference aimed at ‘creating symmetry in the lived-out experiences of all members of society by eliminating the unequal consequences arising from difference’.<sup>185</sup> Littleton’s central proposition is that ‘[t]he differences between human beings, whether perceived or real, and whether biologically or socially

181 Littleton ‘Reconstructing Sexual Equality’ (note 104 above) 1284–5.

182 *National Coalition for Gay and Lesbian Equality* (note 38 above).

183 *Fourie* (note 38 above).

184 *National Coalition for Gay and Lesbian Equality* (note 38 above) para 132 fn 44, citing Littleton ‘Reconstructing Sexual Equality’ (note 104 above).

185 *National Coalition for Gay and Lesbian Equality* (note 38 above) para 132 fn 44.

based, should not be permitted to make a difference in the lived equality of those persons'.<sup>186</sup>

It is submitted that, however fulsome, the Constitutional Court's rhetoric on accommodating difference does not tell us enough about how the court responds to an equality claim where parity in economic participation is sought and substantial resources are required. Cases such as *National Coalition for Gay and Lesbian Equality* and *Fourie* essentially addressed political recognition. They concern claimants who were disabled from realising autonomy by legal proscriptions which stigmatised and marginalised their sexuality. The claimants were not asking for redistributive justice to render them capable of realising their equality on parity with their counterparts. In this sense, the cases are illustrations of political recognition where the type of accommodation required was in the form of a 'duty of restraint'.<sup>187</sup>

Jurisprudence on the duty to provide accommodation for disabled persons shows that, when faced with an economic recognition claim, jurisdictions that recognise a duty to provide accommodation, invariably mediate the duty by what is deemed to be 'reasonable'.<sup>188</sup> The duty to accommodate manifests in statutes and judicial principles not merely as 'accommodation' but as 'reasonable accommodation' to highlight its limits. Case law on reasonable accommodation shows that, on the whole, the monetary cost of accommodation serves as the most important criterion.<sup>189</sup> Resources at the disposal of the party with a duty to accommodate are a crucial consideration. The argument is not that the duty to accommodate should be absolute but that the notion of 'reasonable accommodation' opens substantive equality to the insidious and constraining influence of ableist values that are in acute tension or conflict with disability method.

The jurisprudence of 'reasonable accommodation' was first developed in the United States where it served to accommodate religious diversity in the workplace.<sup>190</sup> It allowed employees who could not work on conventional working days on account of religious observation to take time off without suffering a dismissal. Accommodation was only countenanced where the employer would not incur more than de minimis or negligible costs.<sup>191</sup> The duty to accommodate has since been extended to other areas, including disability. Failure to provide 'reasonable accommodation' constitutes discrimination under the ADA.<sup>192</sup> Also, the duty has moved away from the de minimis threshold. Reasonable accommodation is required unless it imposes 'undue hardship'.<sup>193</sup> Undue hardship is 'an action requiring significant difficulty or

186 Littleton 'Reconstructing Sexual Equality' (note 104 above) 1284–5.

187 S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 176.

188 Ngwenya (note 84 above).

189 Ibid.

190 AP Aggarwal *Sex Discrimination: Employment Law and Policy* (1994) 272.

191 *Trans World Airlines Inc v Hardison* 432 US 63 (1977).

192 ADA s 12111(9)(A)-(B).

193 Ibid s 12112(b)(5)(A).

expense', when considered in the light of other relevant factors.<sup>194</sup> This notion of reasonable accommodation has radiated to other jurisdictions.

For example, the Supreme Court of Canada recognises the duty to provide accommodation as a non-discrimination duty under s 15(1) of the Charter of Rights and Fundamental Freedoms. In the workplace, it has been applied to require employers to provide reasonable accommodation short of incurring 'undue hardship' understood as 'undue interference in the operation of business' and 'undue expense'.<sup>195</sup> The court has said that 'undue hardship' means that some hardship is acceptable. In the end, undue hardship is a question of fact to be determined on a case-by-case basis. The indication from the South African Constitutional Court is that it is aligned, more or less, with its counterpart in Canada when delineating the limits of accommodation.

In *Pillay*, the Constitutional Court made some obiter remarks on the extent of the duty to provide 'reasonable accommodation'.<sup>196</sup> Chief Justice Langa said that the difficult question is not whether positive steps should be taken in order to provide accommodation, but how far the community is required to go in accommodating those that are outside the 'mainstream'.<sup>197</sup> Citing the decision of the Supreme Court of Canada in *Renaud*, he said that reasonable accommodation is required unless it would impose 'undue hardship'.<sup>198</sup> At the same time as aligning with Canada, Chief Justice Langa emphasised that what is ultimately determinative is not whether reasonable accommodation is compatible with a 'judicially created slogan' but whether it is consistent with the values and principles under the South African Constitution.<sup>199</sup> He said that, ultimately, the limits of reasonable accommodation are determined by the principle of proportionality.<sup>200</sup>

The main philosophical challenge with the notion of reasonable accommodation, as Roger Slee has argued, is that it is a clause of conditionality.<sup>201</sup> Even under the CRPD, the duty to accommodate is also couched as a clause of conditionality.<sup>202</sup> Unless reasonable accommodation it is interrogated closely, it can serve to exonerate society from equality duties for disabled people that require accommodation which mainstream society regards as an 'undue burden' or 'disproportionate burden' using considerations that put emphasis on the cost of accommodation but without revealing the value placed on achieving equality and respecting the human

194 Ibid s 1211(10)(A).

195 *Central Okanagan School District No 23 v Renaud* [1992] 2 SCR 970 para 20–3.

196 *Pillay* (note 21 above).

197 Ibid para 76.

198 Ibid, citing *Renaud* (note 195 above).

199 *Pillay* (note 21 above) para 76.

200 Ibid.

201 R Slee 'Clauses of Conditionality' in L Barton (ed) *Disability and Society Emerging Issues and Insights* (1996) 107–22.

202 Under art 2 of the CRPD, denial of 'reasonable accommodation' constitutes discrimination on the basis of disability. Art 2 defines reasonable accommodation as 'necessary and appropriate modification and adjustments *not imposing a disproportionate or undue burden*, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms' (my emphasis).

dignity of the individual or the social group that needs accommodation. Perforce, 'reasonable accommodation' means that accommodation is not always 'costless' as disability method would require. Rather, the juridical notion of reasonable accommodation is only costless for disabled people whose accommodation needs fall short of the prohibited threshold.

For disabled people whose needs for economic recognition are above the calibrated legal threshold, 'reasonable accommodation' can serve to assimilate and guarantee only formal equality. For disabled people with accommodation needs that courts are apt to regard as unduly or disproportionately burdensome, reasonable accommodation is a universalising not particularising standard of equality. By exonerating the state from its equality duty when accommodation needs are above a threshold deemed to be reasonable, reasonable accommodation can serve to resurrect a medicalised notion of disability as intrinsic impairment as the moral responsibility for disability is shifted back to the disabled person. In this sense, disability method highlights the limits of substantive equality as developed by the Constitutional Court or any other court for that matter.

It is submitted that in sectors where capitalist ideology and its modes of production tend to reduce human interactions to commodifiable values, disability method can, at least, serve as an antidote to highlight the human values at stake. The workplace is an example. Capitalist ideology of productivity, efficiency and cost-benefit analysis which has been designed for making profit tends to treat labour as an abstract, interchangeable and homogeneous commodity.<sup>203</sup> Disability method can serve to impress that to fulfil the equality and human dignity of employees, the proportionality analysis must necessarily factor in 'nonmonetizable' personal and social values.<sup>204</sup> 'Nonmonetizable' values do not just accrue to the disabled employee but also to other disabled workers, to non-disabled workers and to society as a whole in terms of respect for personhood, diversity and human solidarity.<sup>205</sup> The juridical principle of reasonable accommodation would need not so much to disregard but mediate capitalist values that commodify labour in order to ensure that the reach of equality is not nullified by appeal to cost-benefit analysis.

Another important limitation of reasonable accommodation is that, notwithstanding the horizontal application of the right to equality, where the relationship is a private one, as between a private employer and a disabled person, reasonable accommodation can yield different equalities for different disabled persons who have the same need. Reasonable accommodation privatizes equality in the sense that the prospects of accommodation will be dependent on the fortunes of the individual employer. Where the employer is well resourced, such as when it is a large conglomerate, reasonable accommodation has its greatest prospects of achieving rapport with disability method. In horizontal relationships, there is really no strong incentive for a private party to incur costs that are significant relative to resources at the

203 Slorach (note 14 above).

204 Radin (note 95 above) 1917–21.

205 Ibid.

disposal of the party. In this sense, reasonable accommodation has the weakest rapport with disability method in horizontal relationships.

The argument is not that the private parties, such as private employers, should come under a duty to provide full accommodation even at the expense of making profit. Rather, it is that within a capitalist market economy, full accommodation for disabled people cannot be realised within the context of privatised relationships. Ultimately, the costs of providing accommodation should be borne by society. Unless, the state is willing to offset the costs of accommodation that would otherwise be deemed to impose a disproportionate burden in horizontal relationships, then it must be conceded that reasonable accommodation is not so much a principle of full equality, but instead a principle of highly relativised equality which is tethered to the peculiar economic or financial standing of the party with a duty to accommodate. It inherently discriminates against persons who are severely disabled in horizontal relationships, especially.

Shelagh Day and Gwen Brodsky have asked rhetorically whether accommodation could be an idea of equality or whether by definition it is ‘accommodationist’ and not transformative or egalitarian in vision.<sup>206</sup> The authors have also supplied their own answer. They say accommodation could be an idea of equality if it came to mean making space for the equal participation of diverse groups in socio-economic life through negotiation of rules in order to redress power imbalances among groups.<sup>207</sup> Whilst disability method seeks to achieve ‘accommodation’ in the sense intended by Day and Brodsky, the juridical principle of reasonable accommodation comes across as ‘accommodationist’ to signify how far an ableist world can compromise when redistributive justice is required to overcome status subordination.

#### IV CONCLUSION

In the post-apartheid era, the Constitutional Court has enunciated that substantive and transformative equality is the type of inclusive equality envisaged by the Constitution’s equality clause. The importance of developing inclusive legal methodologies that can be used by interpreters, including judges, as more targeted pointers about how we determine disability-related discrimination or disablism and how we think about remedies cannot be overemphasised. Disability method is a way of sustaining the project of substantive equality. It seeks to ensure that when courts are called upon to adjudicate disablism, they do so using legal method that sensitises juridical enquiry and analysis to constitutional equality norms which are inclusive in a concrete rather than abstract sense and embrace disabled people in the Constitution’s substantive equality promise. It is method predicated on a premise suggested by Bartlett that all legal methods, including theories of constitutional interpretation, shape the substance of the law, and that constitutional adjudication allows for leeway in terms of reaching different

206 S Day & G Brodsky ‘The Duty to Accommodate: Who Will Benefit?’ (1996) 75 *Canadian Bar Review* 433.

207 *Ibid.*

substantive results.<sup>208</sup> Disability method serves to ensure that the interrogation of norms, standards or practices that impact on disabled people is pursued in a manner which is transformative and, is, thus, sufficiently responsive to the equality aspirations of disabled people. It is a strategic method for unmasking old power structures, exclusions and perspectives that were ignored in the past so as to transform disablement into ablement.<sup>209</sup>

Disability method transcends preoccupation with identity strategies. It subscribes to Fraser's thesis in that, in the final analysis, the achievement of meaningful equality, justice and inclusion in a social democracy is not about achieving mutual recognition in the Hegelian sense, as that risks merely achieving reification of political identities but without impacting on structural equality.<sup>210</sup> Rather, it is more crucial to achieve 'status recognition'. Ultimately, a responsive theory of justice and, perforce, a theory of inclusive equality, should have the juridical capacity to emancipate a historically marginalised group not just politically, but more crucially, economically. Inclusive equality, therefore, should have the capacity to repair status subordination flowing from economic harm by implicating the larger socio-economic framework.<sup>211</sup> Repairing economic harm necessarily implicates overcoming economic subordination through redistribution of resources. It requires a theory of equality with a 'multi-dimensional' understanding of inequality.<sup>212</sup> The equality aim should not be to erase group status, but to erase the disadvantages of a political and economic nature that are associated with group membership so that there is parity in participation with other social groups and, ultimately, full citizenship.<sup>213</sup>

The main thesis in this article is that the epistemologies discussed in part II point us towards a multidimensional understanding of equality and a commitment towards overcoming status subordination. Disability method is an attempt to transcend culturally institutionally congealed modes of reasoning and social division that manifest in disablism and can seep into legal reasoning to maintain the status quo. By constructing disability method, it is not implied that legal norms should or will always be fungible with transformative epistemologies of disability. Rather, it is an attempt at addressing one of the components of what Peter Gabel and Paul Harris have described as a 'power-oriented' approach to lawyering as opposed to a 'rights-oriented' approach to capture the idea of strategically using law as part of the armamentaria of a 'Gramscian counter-hegemonic struggle'.<sup>214</sup> It is method that can be used by radical lawyers to question 'the order of things'.<sup>215</sup>

208 Bartlett (note 104 above) 844–5.

209 Bartlett (note 102 above) 844; Abrams (note 148 above) 376.

210 Fraser 'Rethinking Recognition' (note 26 above) 109–13.

211 Ibid.

212 S Fredman 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 SAJHR 214, 225.

213 Ibid 226.

214 P Gabel & P Harris 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982–1983) 11 *New York Univ Review of Law and Social Change* 369, 374, 376; A Gramsci *Selections from the Prison Notebooks* (1971) 275–6.

215 M Foucault *The Order of Things: An Archaeology of the Human Sciences* (1994).