SUBSTANTIVE EQUALITY FOR DISABLED LEARNERS IN STATE PROVISION OF BASIC EDUCATION: A COMMENTARY ON WESTERN CAPE FORUM FOR INTELLECTUAL DISABILITY V GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

CHARLES NGWENA and LOOT PRETORIUS

ABSTRACT

Disabled learners are a protected group with rights to equality and basic education under the Constitution. Taking substantive equality and the right to basic education seriously requires the state, especially, to commit significant resources and take positive measures to ensure that the education system adequately accommodates the needs of disabled learners. However, the historical exclusion and marginalisation of disabled people from the education system, the finite nature of economic resources and the fact that socio-economic rights are generally realisable incrementally, can easily provide the state with excuses rather than valid justifications for not meeting the learning needs of disabled learners. This is even more so, if disability is understood as something intrinsic to the disabled learner rather than something that also implicates the larger education system and socio-economic environment. The aim of this article is two-fold. Firstly, it uses the decision of the Western Cape High Court in Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa (2010) as an opportunity for interrogating the relationship between substantive equality and socio-economic rights as well as the relationship between the state and its obligations towards private ‘partners’ in the discharge of its socio-economic obligations through the use of so-called state ‘subsidies’. Secondly, and more broadly, the article uses the education policy that was challenged in Western Cape Forum to highlight that disability is a severe site of discrimination. Even in post-apartheid South Africa, where the Constitution protects the equality rights of disabled people, it is easy for state policy that claims to be advancing a transformative agenda to paradoxically become an instrument for giving legitimacy to a disabling discourse. Ultimately, it is argued that when dealing with disability, equality jurisprudence needs a transformative theory of difference in order to guarantee inclusive citizenship.

* Professor of Law, University of the Free State.
** Professor of Law, University of the Free State. The authors wish to thank sincerely the anonymous reviewers of this article for their constructive suggestions.
I Introduction

The Constitution of the Republic of South Africa, 1996 is a transformative constitution. It goes far beyond the mere guarantee of a repertoire of traditional civil and political rights as the prime vehicle for protecting human rights. To describe the long distance travelled by the South African Constitution in transcending classical liberalism and envisioning a new and expansive constitutional order, Karl Klare used the term ‘transformative constitutionalism’. It is a term that Klare used to capture the philosophical and juridical essence of a radically reformed constitutional order that clearly inclines towards an expansive universe of equality, recognises a humanity that is diverse but equal in worth and dignity, inscribes justiciable second-generation rights and horizontality, requires participatory governance, and is historically conscious. Whilst there are different understandings of transformative constitutionalism, there is, nonetheless, wide consensus among commentators and among the judiciary that equality has a central place in transformative constitutionalism. Furthermore, it is also widely agreed that though it is not possible to delineate in a dogmatic way the precise content and parameters of constitutional equality, nonetheless, understanding equality as substantive equality in contrast to merely formal equality, is crucial to the success of the Constitution’s equality goal of transforming the South African society in an egalitarian direction.

Because of the history of pejorative and condescending nomenclature to describe people that suffer from disabilities, it serves us well to explain, at the outset, how we use the terms ‘disabled learners’ and ‘disabled people or persons’ in this article. We do not use the terms to stigmatise and imply people who cannot function like the mainstream because of intrinsic physical or mental limitations or impairments. Instead, we use the terms as a form of naming and empowerment. We use the terms to denote a social group that has been unfairly prevented from equal participation – that is disabled – because of a society and socio-economic arrangements that do not accommodate people who are different from ascribed mainstream human attributes. By using ‘disabled learners’ and ‘disabled people or persons’ rather than the now more widely used ‘people first terminology’ such as ‘learners with disabilities’ and ‘people or persons with disabilities’, our intention is to highlight the role played by existing socio-economic arrangements in the creation of disability. In this way, we reinforce, throughout, our commitment towards a transformative ‘social model’ of disability. It is an understanding of disability that ultimately puts the onus on society to dismantle barriers and accommodate difference. See M Priestly ‘Developing Disability Studies Programme: International Context’ in B Watermeyer, L Swartz, T Lorenzo, M Schneider & M Priestley (eds) Disability and Social Change A South African Agenda (2006) 19, 21–2.


In its short history, the Constitutional Court has been in the vanguard of fashioning a notion of equality that is transformative, breaks from the shackles of formal equality, and seeks to erase systemic patterns of dominance and subordination among social groups. As part of the development of an indigenous jurisprudence of equality, the Constitutional Court has been at pains to highlight that, especially in the light of the legacy of apartheid, the egalitarian goal of substantive equality under the Constitution requires us to think about difference differently. The Constitution requires us to rethink how we have historically categorised human beings and apportioned differential status in ways that have detracted from the recognition of equal worth and dignity. The constitutional injunction is that we start afresh and approach what we see as human differences with a new mindset. When categorising human beings, we should err on the margin of recognising inclusive citizenship. Certainly, we should not exclude some people from equal citizenship on the basis that they have human essences that are different and do not measure up to a socially ascribed norm.

The type of substantive equality that the Constitutional Court has proclaimed commitment towards does not brook the perpetuation of subordinate and inferior social castes that are constructed out of hegemonic socio-political notions of difference. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, Justice Sachs underscored the ethic of inclusive citizenship when he said:

> 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.

Substantive equality is the reason for inclusive citizenship as well as the ultimate juridical value and vehicle through which such citizenship can be realised. It is the achievement of lived equality rather than recognition of equality in the abstract that matters under the South African Constitution. Above all, substantive equality seeks to eradicate underlying patterns of systemic inequality by putting a spotlight on structural inequality and its effect on perpetuating the marginalisation and disadvantage of certain social groups. Substantive equality must mean affirming, in a positive sense,
differences so that they do not become socially embedded sources of exclusion, marginalisation and stigmatisation of certain groups.\textsuperscript{11} Acknowledging difference must mean affirming human beings in all their manifestations, including their socio-cultural and biological manifestations as Justice Sachs alluded to in \textit{Minister of Home Affairs; Lesbian and Gay Equality Project}.\textsuperscript{12} Differentiation that impairs human dignity and stigmatises certain groups cannot pass constitutional muster. This is underscored by the \textit{Harksen v Lane} test for determining unfair discrimination that the Constitutional Court has developed.\textsuperscript{13}

Put in another way, substantive equality beckons us towards a theory of relational differentiation or categorisation that is acutely responsive to the ethics of erasing systemic inequality, respecting human dignity and banishing master dichotomies and their universes of superior and subordinate social castes. It is an equality theory or approach that, as Ann Scales has argued in the context of transformative feminist theory, seeks to ensure that when the law engages in differentiation when deciding questions of the status of ‘different’ human beings, it does so in a manner that is not blinded by ‘abstract universality’.\textsuperscript{14} Instead, the law should be guided by the objective of securing or preserving ‘concrete universality’ so that the equality of every social group and every individual is protected.\textsuperscript{15} The constitutional injunction is not that we should never categorise or recognise difference per se, but that we should resile from giving legitimacy to social constructions of difference that are historically privileged and are used, or can be used, to create and sustain hierarchical human essences as apartheid shamelessly did.

In her work, \textit{Making All the Difference}, Martha Minow develops a thesis of difference that has inclusive citizenship as its goal.\textsuperscript{16} Minow urges us to shift the paradigm that we use for conceiving difference from a focus on differentiating between people for the purpose of creating boundaries, to a focus on differentiating in order to create positive relationships, what Minow calls the ‘social relations approach’.\textsuperscript{17} Henk Botha captures Minow’s ethic of relational difference in a post-apartheid South African constitutional transformative context when he says that, when determining the status and worth of human beings using categorisation, the moral must be to construct categories in relational terms and always conscious of the constitutional imperatives of respecting the human dignity and equality for all.\textsuperscript{18}

Giving concrete expression to substantive equality and the achievement of inclusive citizenship means much more than merely tolerating difference.
It means affirming difference, if need be, through taking positive steps to empower historically excluded and marginalised groups so that they are also enabled or given capabilities to participate as equal citizens in all our socio-economic domains. Indeed, the inclusion of socio-economic rights in the Constitution ensures that constitutional guarantees of equality and human dignity are not rendered meaningless by material deprivation. Against the backdrop of an enabling Constitution and constitutional commitment towards inclusive citizenship, the facts that gave rise to litigation in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*19 must come across as something of a contradiction, to say the least. For, in this case, the state found itself before the Cape High Court defending provincial education policy and practice that differentiated between children with ‘severe or profound intellectual disabilities’ and their counterparts, not for the purpose of achieving Minow’s relational difference,20 but, instead, for the purpose of excluding some learners from access to state funding as well as state schools. The state policy and practice in question had been devised on the assumption that children with severe or profound intellectual disabilities do not have an equal claim to state-funded basic education as their counterparts. The underpinning premise was that the education needs of such children are not only different, but are also of a lower order as not to be compelling.

The purpose of this article is two-fold. In part, it is to appraise the decision of the Cape High Court in *Western Cape Forum* with a focus on interrogating the intersection between substantive equality and the right to basic education. We submit that the Court was patently correct in holding that state education policy and practice that treated children with severe or profound intellectual disabilities differently as to accord them the lowest priority in provision of state education resources, constituted unfair discrimination and a violation of their constitutional rights to equality and basic education. At the same time, we argue, in the main, that the judgment, nonetheless, lacks a systematic analysis of the relationship between substantive equality and socio-economic rights. The judgment fails to draw a more systematic link between the vision of substantive equality in s 9 of the Constitution and the right to basic education as a socio-economic right in s 29(1). We also highlight that the case provides an important opportunity for clarifying the relationship between the state and its obligations towards private ‘partners’ in the discharge of its socio-economic obligations under the Constitution through the use of so-called state ‘subsidies’.

In part, this article also seeks to use the education policy and practice that were challenged in *Western Cape Forum* as a pivot for a broader discussion on the intersection between substantive equality and disability. In this connection, we seek generally to highlight that disability is a severe site of discrimination. The case shows that while disability is constitutionally protected against discrimination, it can be remarkably easy for state policies

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19 (2011) 5 SA 87 (WCC).
20 Minow (note 16 above).
to give the appearance of advancing a transformative agenda when, on closer analysis, they are paradoxically still trapped in a disabling, apartheidising discourse. Unless in their formulation as well as implementation state policies are acutely conscious of disability as a phenomenon that, in a transformative sense, should be understood not so much in terms of intrinsic physical or mental impairment, but as the outcome of the interaction between the body and an unaccommodating socio-economic and architectural environment, the danger of disabling policies will always subsist.

The article highlights how when faced with scarce resources, state education policy and practice touted as securing ‘inclusive education’ found purchase, instead, in a dominant deficit discourse of the body. It is a discourse that served to reinforce a form of somatic difference that is historically privileged. Predictably, it succeeded in disabling rather than enabling learners that were classified as severely or profoundly intellectually disabled. Through an incipient cultural ideology of categorising disabled people not so much for the purpose of identifying need, but, instead, excluding need, the state was able to develop policy that exonerated it from the positive equality and basic education obligations under the Constitution. The outcome, we argue, was a severely contracted citizenship of disabled learners. It was a citizenship that was starkly at odds not just with the notion of inclusive citizenship under the Constitution, but also the notion of inclusive education as articulated in the nation’s flagship policy – *Education White Paper 6: Special Needs Education.*

The contracted citizenship was also at odds with the inclusive orientation of international human rights guarantees on the rights of disabled learners to education.

Ultimately, we argue that when intersecting with disability, substantive equality necessarily opens itself to a transformative theory of difference that has inclusive citizenship as its organising principle and principal objective. Whether it be in the education or other sectors, where there has been historical exclusion and marginalisation of disabled people, the accent of state policy and practice should be on dismantling disabling barriers so as to render the sector accessible and thus facilitate their equal participation in society. The accent should be on providing accommodation rather than on implicating individual impairments as that merely serves to preclude the need for equality and, consequently, freeze the status quo for disabled people.

II *Western Cape Forum: Facts And Decision*

*Western Cape Forum* concerns an application that was brought before the Cape High Court to challenge the constitutionality of state policy and practice for the funding and provision of schools for children who were classified as having ‘severe and profound intellectual disabilities’ in the Western Cape. The application was brought by the Western Cape Forum for Intellectual Disability.
(Western Cape Forum), a non-governmental organisation which provided care for such children in the Western Cape. The respondents were the state at national and provincial levels. As part of the discharge of its constitutional duty to provide basic education under s 29(1) of the Constitution, which says ‘everyone has a right to basic education, including adult education’, the state had established ‘special schools’, through the Department of Education, to cater for the needs of children with ‘moderate to mild intellectual disabilities’. These were children with an Intelligence Quotient (IQ) in the 30 to 70 range22 and could not be admitted to ‘mainstream schools’. However, the state made no equivalent provision for children classified as having ‘severe and profound intellectual disabilities’. These were children with an IQ of 20 to 25 (severe intellectual disabilities) and less than 20 (profound intellectual disabilities).

Over and above differentiation in terms of provision of schools, there was also differentiation in the amount of funding. The amount depended on whether a child was admitted to a mainstream school or a special school, or could not be admitted to either school. Each year, the Department of Education spent R6,632 per child attending a mainstream school, and R26,767 per child attending a special school. However, it made no direct financial provision for children who could not be admitted to a mainstream school or a special school, namely children with severe or profound intellectual disabilities. For such children, the main financial contribution made by the state took the form of an indirect contribution described as an annual ‘subsidy’ of the amount of R5,092 per child. The contribution was made by not so much the Department of Education, but by the Department of Health to organisations such as Western Cape Forum, which provided ‘Special Care Centres’ to cater for their needs. However, demand exceeded supply. Not all children with severe or profound intellectual disabilities could obtain access to Special Care Centres. In the Western Cape, Special Care Centres catered for about 1,000 children in a province with approximately 1,500 children with severe or profound intellectual disabilities.23

Clearly, there was stark differentiation between children with severe or profound intellectual disabilities and their counterparts in state education policy and practice not only in respect of provision of schools, but also in respect of the amount of state funding. Children with severe or profound

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22 In its original conception, IQ testing was intended not so much to measure intelligence in the abstract, but to identify children who were performing below their expected level and were, consequently, in need of ‘special’ education. IQ testing would begin by first assigning an age level to a specific task, which is defined as the youngest age at which a child can perform the task. To administer IQ testing, the child would be asked to begin with tasks for the youngest age (the simplest tasks, as it were) and then progressively partake of a sequence of more demanding tasks until the child can no longer complete the tasks. IQ is the mental age. It expresses the child’s actual performance against the norm expected of the child’s age. A child whose mental score is less than their chronological age is then identified as needing ‘special’ education. While the first test was devised in 1905, a more established version came on stream in 1908. At first, IQ was calculated by subtracting the mental age from the chronological age. In 1912, this method was modified so that IQ is calculated by dividing the mental age by the chronological age and multiplying the result by 100, see SJ Gould Mismeasure of Man (1981) 148.

23 Western Cape Forum (note 19 above) para 48.
intellectual disabilities fared worst in both respects. Against this backdrop, the applicant argued that state education policy and practice constituted an infringement of the fundamental rights of children with severe and profound intellectual disabilities for the reasons that there was no school provision, at all, for such children, and that the only financial contribution that was made by the state was an indirect subsidy paid to non-governmental organisations (NGOs) running Special Care Centres and of an amount that compared most unfavourably with their counterparts. While the applicant sought to vindicate the constitutional rights of the children through alleging breach of the constitutional rights to equality (s 9), human dignity (s 10), basic education (s 29(1)(a)) and the right of children to be protected from neglect or degradation (s 28(1)(d)), the case was principally argued and determined through the application of the right to equality and basic education.

The state sought to defend the constitutionality of its policy and practice mainly by arguing that in the light of scarce resources, it had to balance competing needs against the backdrop of a legacy of massive neglect of disabled learners by the state stemming from apartheid policies. It argued that apartheid had left a legacy of underdevelopment as well as inequitable education services for disabled learners. On account of limited resources and capacity, the state could only meet the education needs in question in the long-term rather than all at once. Prioritisation was inevitable so as to ensure that the right to education of children with severe and profound disabilities would not displace other constitutional rights such as the rights to housing, water, health care and social security. Furthermore, the state argued that, though children with severe and profound intellectual disabilities were currently left out of school provision, they would be adequately catered for in the future. However, the state did not specify the point at which the need for schools would be met in the future. In any event, even in the foreseeable future, the state still predicated the admission to school of children with severe or profound intellectual disabilities upon the children meeting the admission criteria prescribed by the Screening, Identification, Assessment and Support (SIAS) Strategy.

The SIAS Strategy had been developed by the National Department of Education in 2005. On the one hand, the SIAS Strategy served as a tool for determining the nature and level of support for learners with ‘special’ education needs. On the other hand, the SIAS Strategy was used to determine which learners could be admitted to special schools and which learners could not. To be eligible for admission into a special school, a learner had to fall within Levels 4 and 5 of the SIAS Strategy. As Cleaver J highlighted, in practice, the effect of the admission criteria of the SIAS Strategy was that, as a matter of course, it excluded from admission into special schools, children

24 Ibid para 17.
26 Ibid para 11.
27 Ibid.
with severe or profound intellectual disabilities as they could not meet the standard prescribed by Levels 4 and 5.28 Thus, for such children, the SIAS Strategy served as a tool for exclusion rather than identifying individualised learner support. Paradoxically, the SIAS Strategy had been developed as part of the implementation of government’s main policy on inclusive education as laid down in White Paper 6.29 Indeed, ultimately, the state sought to defend its education policy and practice by arguing that the state was in fact implementing White Paper 6.30

White Paper 6 was five years in the making. Its intention was highly benevolent. It sought to radically transform state provision of education so as to cater for children who have historically experienced barriers to learning on account of lack of accommodation of their learning needs by the prevailing education and training system. Kader Asmal, the Minister of Education at the time, described White Paper 6 as post-apartheid landmark policy that was intended to make a radical break with the past and lay to rest the legacy of exclusion that had characterised the provision of education for children with intellectual disabilities during the apartheid years.31 During apartheid, ‘special schools’ had been established to cater for the learning needs of children whose learning disabilities were not accommodated in mainstream schools. However, special schools were beset with significant inequities, not least the apartheidisation of special needs education. As part of maintaining the integrity of apartheid, there was no exceptionalism for disabled learners. The institutional arrangements and funding for special needs education, likewise, systematically aped the racial pyramid as in other socio-economic sectors. The arrangements and funding came complete with spatial segregation and the prioritisation of white disabled learners.32 The best resources were reserved for white special schools.

Over and above apartheidisation, there were other exclusionary factors. Geography was one factor. There were vast geographical disparities in the provision of special schools, with schools concentrated in the Western Cape, Gauteng, KwaZulu-Natal, especially.33 In any event, the admission criteria operated by special schools were rendered highly rigid so as to match the small number of schools available.34 Furthermore, the curriculum that was devised was, on the whole, not learner-centred. The curriculum largely failed to respond to diverse learning needs, causing massive ‘drop-outs and push-outs’.35 The cumulative effect of the prevailing barriers against accessing

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28 Ibid paras 17–9.
29 Note 21 above.
30 Western Cape Forum (note 19 above) para 17.
31 White Paper 6 (note 21 above) 4.
32 Ibid 9.
33 Ibid 14, 36.
34 Ibid 9.
35 Ibid 5. White Paper 6 estimated that about 280,000 learners with disabilities of compulsory school age were effectively ‘lost’ and outside the school system (note 21 above) 9.
special schools was that only a small percentage of learners with disabilities (20%) were being accommodated in special schools.\textsuperscript{36}

White Paper 6 sought to develop state education policy that redresses the past and advances the promise of the Constitution, and not least the promise of an education system that achieves substantive equality, respects the inherent human dignity and equal worth of every learner, and guarantees the right to basic education. In the words of Minister Asmal, White Paper 6 sought to render children with intellectual disabilities a ‘natural and ordinary part of us that we can truly lay claim to the status of cherishing all our children equally’.\textsuperscript{37} White Paper 6 pegged its transformative modality on the establishment of ‘inclusive education’. In essence, White Paper 6 conceived inclusive education in terms of accepting that all children have learning needs, respecting diversity in learning capacities and needs, and acknowledging that all children can learn if given support.\textsuperscript{38} It accepts that different learning needs may arise not just from physical, mental, and developmental impairments or differences in intellectual ability and socio-economic deprivation. Equally significant, different learning needs can also arise from the education system itself from factors such as negative stereotyping of learners, inappropriate curriculum, inappropriate communication, inadequate support services, and an inaccessible architectural environment.\textsuperscript{39} The ultimate goal of inclusive education is the provision of an enabling education system and environment with a view to maximising the capacities of all children and enabling the participation of all learners.

In terms of inclusive primary school provision, White Paper 6 sought to establish two main types of schools – ‘full-service schools’ and ‘special schools’. Full-service schools were ‘mainstream’ schools that would cater for a ‘full range’ of learning needs within a school district.\textsuperscript{40} In these schools, children with ‘mild to moderate’ disabilities who need ‘low intensive support’ would be taught alongside learners without such disabilities. Appropriate support would be given to overcome learning barriers.\textsuperscript{41} Special schools, on the other hand, sought to build on the special schools that had been inherited from the apartheid era. The aim was to augment considerably the old special schools so that they would become ‘special schools/resource centres’ with a capacity to provide ‘intense levels of support’, including support to meet the learning needs of children with severe or profound disabilities.\textsuperscript{42} Special schools would also be located within a school district. Access would be broadened so that special schools would be compliant especially with ss 29(1) and 9 of the Constitution and, thus, no longer discriminatory.\textsuperscript{43}

\textsuperscript{36} Ibid 9.
\textsuperscript{37} Ibid 4.
\textsuperscript{38} Ibid 16–7.
\textsuperscript{39} Ibid 17–8.
\textsuperscript{40} Ibid 22.
\textsuperscript{41} Ibid 22, 24.
\textsuperscript{42} Ibid 26, 29–30.
\textsuperscript{43} Ibid 11.
To reconcile vast current neglected needs with available resources, *White Paper 6* advanced a 20-year plan as a ‘realistic’ timeframe for realising progressively inclusive education. The plan comprised of short-term (2001 – 2003), medium-term (2004 – 2008), and long-term (2009 – 2021) goals. Commensurate with available resources, the number of full-service schools and special schools would be expanded progressively until there was adequate provision for all learners, including learners with severe and profound intellectual disabilities. However, though *White Paper 6* was conceived in an inclusive manner, in the sense of treating all children as individuals with equal learning needs, subsequent policies purporting to implement it did not do so. Subsequent policies treated children with severe or profound intellectual disabilities as a social group that scarcely had learning needs. Any learning needs that this group had were, according to the policies, far less compelling than those of their counterparts such that they did not need to be met in the short- or medium-term, but at some unspecified time in the future. Consequently, subsequent policies differentiated between children with severe or profound intellectual disabilities in terms of the level of financial support and whether to make school provision at all.

Though the state purported to establish special schools in line with *White Paper 6*, the effect of the admission criteria applied by the SIAS Strategy meant that the schools would in fact only cater for children with moderate to mild disabilities – those with an IQ of 30 to 70. The admission criteria assured the exclusion of children with severe (IQ levels of 20 to 35) or profound intellectual disabilities (IQ level of less than 20). This was not so much an implementation of the prescriptions of *White Paper 6* but, rather, the intended outcome of the inclusionary and exclusionary criteria of the SIAS Strategy. From the state’s standpoint, if a disabled child did not meet the admission criteria prescribed by the SIAS Strategy, it was evidence that the child failed to ‘achieve the minimum outcome and standards linked to the grade of education’. The inference was that children who failed to meet the criteria set by the SIAS Strategy were not capable of benefiting from special schools. As Cleaver J observed, in a substantive sense, the thrust of the state’s education policy was ultimately that children with severe and profound intellectual disabilities were ‘ineducable’ as no amount of education would be beneficial for such children. Consequently, any education needs of such children could not be supported by the state directly, but only indirectly through a Department of Health ‘subsidy’ paid to ‘Special’ or ‘Partial Care Centres’ run by organisations such as the applicant.

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44 Ibid 38.
46 *Western Cape Forum* (note 19 above) para 19.
47 Ibid paras 3, 19. In this connection, it is interesting to note that though in the papers submitted to the Court the respondents conceded that children with severe or profound intellectual abilities are able to benefit from education, in oral submissions to the Court, the respondents argued to the contrary as to maintain that such children were ineducable, para 3.9.
The Court found for the applicant, principally holding that state education policy and practice constituted unfair discrimination under s 9(3) of the Constitution as well as a violation of the right to basic education under s 29(1). In respect of the finding of unfair discrimination, the Court gave two main reasons, or at least made two main findings to justify its decision. First, purporting to apply the Harksen v Lane test for unfair discrimination, the Court was of the opinion that this was an instance where there was no rational connection between a legitimate government purpose and differential treatment of children with severe and profound intellectual disabilities as to fail the first stage of the test. This was because the respondents had failed to explain why, instead of being shared among all children, the budgetary constraints had to be borne only by children with severe or profound intellectual disabilities, who according to the Grootboom test happened to be the most vulnerable and were deserving of prioritisation. Furthermore, the respondents had failed to demonstrate what their available resources were, as well as what would have been the additional cost of meeting the education needs of children with severe or profound intellectual disabilities. The Court was also of the view that s 36 of the Constitution – the limitation clause – did not apply as the education policy and practice in question was not a law of general application. But in the event that s 36 applied, the Court said that it would still find for the applicant for the reason that the respondents had failed to justify burdening the most vulnerable group of children and to demonstrate lack of resources to meet the needs of the children.

In respect of the right to basic education, drawing inter alia, from Ex Parte Gauteng Provincial Legislature, the Court said that the respondents had breached s 29(1) of the Constitution in two ways. In a positive sense, the state had failed to provide children with school facilities for basic education and in a negative sense it excluded the children from admission into special schools. The Court interpreted the unqualified nature in which s 29(1) is drafted as, nonetheless, not precluding the state from pleading lack of resources as a justification for meeting given basic education needs. In this instance, however, the state had manifestly failed to justify its failure to meet material need.

48 The Court also held that the respondents’ education policy and practice had violated the children’s right to dignity and the right to be protected from neglect and degradation, Western Cape Forum ibid para 47.
49 Western Cape Forum ibid para 26; Harksen (note 13 above) para 53.
50 Western Cape Forum ibid para 29; Grootboom v Government of the Republic of South Africa 2001 (1) SA 46 (CC). The Grootboom test is discussed in part III of this article.
51 Western Cape Forum (note 19 above) paras 29–30.
52 Ibid para 39.
54 Ibid paras 6, 45; Ex Parte Gauteng Provincial Legislature In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC) para 9.
55 Western Cape Forum (note 19 above) para 29.
More broadly, the Court found that the education policy and practice in question were also contrary to the basic tenets of White Paper 6 as well as international human rights instruments both of which subscribed to the notion of inclusive education. Rejecting the state’s contention that children with severe or profound intellectual disabilities are inherently incapable of benefiting from basic education, it noted that White Paper 6 makes it clear that all children need education. The Court accepted expert evidence that education is beneficial to children with severe or profound intellectual disabilities. It highlighted that provisions of international human rights instruments, including provisions of the Convention of the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the relatively recent Convention on the Rights of Persons with Disabilities specifically address state obligations towards disabled learners. These human rights instruments unequivocally recognise a corresponding individual right to an education that is holistic and is aimed at the full development of the person and a sense of dignity and self-worth so that the learner’s potential is developed to the fullest extent, regardless of disability.

The Court also drew support from a decision of the Irish High Court in O’Donoghue. In that case, it was held that the constitutional obligation imposed on the state by art 42.4 of the Irish Constitution to ‘provide free primary education’ was violated when the state failed to provide school facilities for a child who was physically disabled and profoundly intellectually disabled. In finding against the state, the Irish High Court underlined that the state had discriminated unfairly against disabled children. The state’s obligation was to provide free education to all children without discrimination. This entailed ‘giving each child such advice, instruction and teaching as will enable him or her to make best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be’. It is instructive to note that in O’Donoghue, the Irish High Court refused to accept the state’s argument that a child with profound intellectual disability is ‘ineducable’. It refused to interpret education narrowly as meaning only ‘scholastic’ education. Instead, it adopted a definition of education that was informed by a paradigm shift in the normative construction of education and

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56 Ibid 19.
57 The applicant’s expert submitted that it is necessary to adopt a holistic approach for severely or profoundly disabled children to enable them to develop their ability and potential to the fullest, Western Cape Forum (note 19 above) para 19.
61 Western Cape Forum (note 19 above) paras 20–3.
the purpose it ought to serve. The Irish High Court approached the notion of education from the perspective of growing international consensus that every child needs appropriate education, and that education is a fundamental right that cannot be closed to children that are intellectually disabled. It adopted a child-centred and learner-centred holistic notion of education to mean teaching and training that allows every child to maximise their potential by making best possible use of their inherent and potential physical, intellectual and moral capacities with the active support of the state.

III An Appraisal of the Court’s Decision

(a) Linking substantive equality and socio-economic rights analyses

The facts of Western Cape Forum are illustrative of the extent to which substantive equality and socio-economic rights analyses will be linked as long as the enormous systemic disparities in access to social services remain. Sandra Liebenberg writes that the substantive vision of equality expressed in s 9(2) of the Constitution, namely the ‘full and equal enjoyment of all rights and freedoms’, depends on the realisation of socio-economic rights. Socio-economic rights have an important role to play in advancing a society based on social justice, since such a society implies dismantling structural inequalities in access to economic resources and social services.

The judgment in Western Cape Forum does not explore and apply to the facts at issue the way in which the realisation of access to the relevant socio-economic right (i.e. the right to basic education) underpins the promotion of substantive equality in terms of the commitment to transformative constitutionalism. The Court adopted a somewhat idiosyncratic methodology in its equality analysis, largely ignoring the now entrenched Harksen v Lane analytic steps of inquiry and substantive (un)fair discrimination test.

It appears to have been implicitly assumed that a differentiation based on degrees of intellectual disability qualifies as mere differentiation – and not discrimination on a specified or analogous ground, which it undoubtedly is – and its constitutionality is, therefore, to be adjudged in terms of the rationality requirement as expounded in Prinsloo v Van der Linde. However, as appears from the exposition of the judgment above, the rationality requirement as


64 Harksen (note 13 above) para 53.

65 1997 (6) BCLR 759 (CC) para 25.
applied by the Court in *Western Cape Forum* goes well beyond the relatively modest *Prinsloo* standard of scrutiny, and to some extent it can be claimed that the Court subscribed to a more exacting rationality threshold.

The respondents’ argument that their policy was justifiable because it was rationally connected with a legitimate government purpose (gradually extending services to children with intellectual disabilities in an environment of acute resource scarcity) was rejected for three reasons. Firstly, no explanation was offered as to why the burden of the budgetary shortfall should be carried by the affected children instead of being shared by all. Secondly, it is not justifiable that specifically the most disadvantaged and vulnerable category of intellectually disabled children should be excluded from access to basic education because of resource scarcity. Lastly, the respondents failed to provide a budgetary analysis which shows what resources are available and what would be the additional cost of meeting the rights of the affected children. Although undoubtedly apposite, the first two considerations could, however, be interpreted as not having completely broken out of the shackles of a formal equality approach, since no more than an equal sharing of the burden of resource scarcity is required. As we will argue more fully later, this, on its own, does not provide the full contextual perspective necessary to appreciate and address the unique position of the affected children and their needs stemming from their relatively more severe disadvantage and vulnerability.

To meaningfully correlate socio-economic rights and substantive equality analyses, requires not only a realisation that access to socio-economic rights underpins the realisation of substantive equality, but conversely, that substantive equality ought also to directly inform the constitutional norms for compliance with socio-economic rights obligations. This correlation has also not been explicitly explored and applied in *Western Cape Forum*. Contrary to the textual formulation, the Court did not treat s 29(1)(a) of the Constitution as an unqualified socio-economic right, but subjected it to the normal requirements applicable to qualified socio-economic rights, i.e. reasonableness (understood in *Western Cape Forum* as rationality), progressive realisation and available resources. The correctness of this aside, confining the inquiry regarding the constitutionality of the breach of the right to basic education within the mould of a rationality analysis,

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66 For a systematic and insightful exposition of this reciprocal relationship of interdependence between equality and socio-economic rights, see Liebenberg & Goldblatt (2007) (note 63 above) 341. She argues for an approach of ‘interpretative interdependence’ between equality and socio-economic rights, which ‘encourages courts to consider how the values and purposes underpinning one right (for example equality) may be relevant and useful to the development of the jurisprudence under another right (for example socio-economic rights)’.

67 *Western Cape Forum* (note 19 above) para 29.

68 See in this regard S Woolman & M Bishop ‘Education’ in S Woolman, T Roux & M Bishop *Constitutional Law of South Africa* 2 ed (2007) 57-9 – 57-15. In *Governing Body of the Juma Musjid Primary School v Essay NO* (Centre for Child Law as amici curiae) 2011 (8) BCLR 761 (CC) para 37, the Court categorically stated that ‘[u]nlke some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”’. 
conceptually restricts the possibility of enriching the norms for socio-economic rights compliance in the light of the value of substantive equality. This is self-evident in the case of the low Prinsloo rationality threshold (since in terms thereof temporary prioritisations in access to basic education due to budget constraints would probably qualify as ‘rational’), but, as has been pointed out, even in terms of the Court’s somewhat stricter test, no more than a type of formal equality could in effect be accommodated. In part IV, we will more fully argue the inherent limitations of formal equality as a paradigm capable of exposing and remedying the entrenched structural barriers facing persons with disabilities.

To effectively link substantive equality and socio-economic rights obligations in a coherent doctrinal and methodological sense, would require the development of a normative framework for socio-economic rights compliance similar to the way in which the value of substantive equality has been utilised to produce a substantive (un)fair discrimination test in terms of ss 9(3) and (4) of the Constitution. For this to happen, the value of substantive equality needs to be visibly represented in the jurisprudential framework for the contextualisation of the norms for socio-economic rights compliance. This means, firstly, that substantive equality must be ‘part and parcel of the review standard of reasonableness that the Constitutional Court has developed to determine whether state efforts to realise qualified socio-economic rights are constitutionally sound’, or in the case of unqualified socio-economic rights, of reasonableness in terms of the limitation clause analysis. According to Liebenberg and Goldblatt, the integration of substantive equality into the reasonableness review should incorporate two enquiries: ‘(a) The historical and current social context in which the claimant group is situated’ and ‘(b)

69 The depth of the reach of substantive equality demands on measures intended to give effect to socio-economic rights is aptly captured by Fredman (2007) (note 63 above) 230. She maintains that to demonstrate that eligibility criteria for welfare rights meet the demands of all of the four dimensions of substantive equality she identifies, decision-makers must show that their choice of such measures ‘not only redresses disadvantage, but also promotes respect and dignity, accommodates diverse identities, and facilitates participation or counters social exclusion’. See also Fredman (2005) (note 63 above) 167.


71 For the purposes of this article, we will leave aside the controversy regarding whether the different obligations flowing from the textually qualified and unqualified socio-economic rights have been blurred by the judgments of the Constitutional Court, especially Grootboom (note 50 above) para 71. See, however, Governing Body of the Juma Musjid Primary School (note 68 above) para 37; and Woolman & Bishop (note 68 above) 57-9 – 57-15, regarding s 29(1)(a) of the Constitution in this respect.
The impact of the denial of access to the relevant socio-economic resource or service on this group.\textsuperscript{72}

Such an approach was not yet visible in the Constitutional Court’s reasoning in \textit{Soobramoney v Minister of Health, KwaZulu-Natal}.\textsuperscript{73} The judgment could be criticised for its ‘distinctly utilitarian flavour’\textsuperscript{74} because it divorced the interpretation of the criteria of reasonableness or rationality from a value-based conception of the right in question.\textsuperscript{75} Although the issue of equality was not specifically raised in the case, the Court’s strong cost-benefit rationality focus would therefore also have left little scope for substantive equality to become part of the contextual frame informing the reasonableness requirement, in spite of the fact that the impugned programme involved differentiation in terms of disability and health. In \textit{Grootboom},\textsuperscript{76} substantive equality became more visible in the ‘factors’ developed by the Court to contextualise the reasonableness requirement under s 26 of the Constitution.

The substantive equality influence in \textit{Grootboom} is perhaps most notable in the Court’s emphasis on the necessity of responsiveness to differing degrees of deprivation in devising measures intended to realise socio-economic rights. It held that to be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise.\textsuperscript{77} The most vulnerable and those who suffer under the worst forms of deprivation must therefore be a special focus of any programme designed to realise access to socio-economic rights. An over-all statistical increase in access to socio-economic rights, as such, is therefore not determinative of reasonableness. If the measures, ‘though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test’.\textsuperscript{78} The influence of substantive equality was also apparent in \textit{Minister of Health v Treatment Action Campaign},\textsuperscript{79} where the Court measured the reasonableness of the state’s measures, inter alia, with reference to the differential impact they had on the

\textsuperscript{72} Liebenberg & Goldblatt (2007) (note 63 above) 357. This accords with the view of P De V os ‘\textit{Grootboom}, the Right of Access to Housing and Substantive Equality as Contextual Fairness’ (2001) 17 SAIHR 258, 267, who argues that, at minimum, informing socio-economic rights analysis by substantive equality, ‘implies that any determination of the constitutional acceptability of state action or inaction regarding the realisation of social and economic rights must be conducted with reference to the impact of that act or omission on the group under discussion. This in turn would require an understanding of the structural inequalities in society in general and the specific inequalities between groups in the specific context within which the determination is to take place’.

\textsuperscript{73} 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

\textsuperscript{74} Liebenberg (2010) (note 63 above) 14.

\textsuperscript{75} Ibid.

\textsuperscript{76} Note 50 above. For an extensive examination of the relationship between social and economic rights and the right to equality through an analysis of the decision in \textit{Grootboom}, see De V os (note 72 above).

\textsuperscript{77} Ibid para 44.

\textsuperscript{78} Ibid.

\textsuperscript{79} 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).
excluded group, which is a focus central to the substantive equality inquiry. The same occurred in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*, where the negative impact of the exclusion of foreign permanent residents from social security benefits was decisive in the Court’s finding of unreasonableness.

Secondly, from the above it should also be clear how the value of substantive equality ought to inform the application of the requirement that socio-economic rights must be progressively realised. When so informed, this norm is not just a statistical or quantitative criterion, but also a qualitative one: progressive realisation presupposes equalisation of access to socio-economic rights in a substantive sense. In *Mashavha v President of the RSA*, the Constitutional Court remarked in this regard:

> [t]o pay, for example, higher old ages pensions in Johannesburg in Gauteng than in Bochum in Limpopo, or lower child benefits in Butterworth than in Cape Town would offend the dignity of people, create different classes of citizenship and divide South Africa into favoured and disfavoured areas.

In *Western Cape Forum*, the Court therefore correctly dismissed an attempted justification for the exclusion of the disabled children from basic education based on an appeal to mere statistical incrementalism. It was not enough that considerably more disabled children have been awarded access to basic education since 1994, if that progress has been achieved at the expense of completely excluding the complainant class of disabled children from such education. This, as we highlight in part IV, is a prime example of how negative categorisation causes insensitivity to the needs of the most disadvantaged group of intellectually disabled children and institutionalises inequality.

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80 Ibid paras 90–2, 115–20 (the exclusion of impoverished women and children from potentially life-saving medical intervention).
81 See, for example, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) para 41; *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) para 166; *National Coalition for Gay and Lesbian Equality* (note 8 above) para 126.
82 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).
83 Ibid paras 76–7, 81. According to Fredman (2007) (note 63 above) 231, the exclusion of permanent residents from social assistance benefits demonstrates non-compliance with at least three substantive equality dimensions: ‘Firstly, it did not meet the distributive criterion of redressing disadvantage: permanent residents were a vulnerable group and would in any event be subject to stringent means testing. Secondly, it failed the recognition test: their exclusion had a strong stigmatising effect, creating the impression that permanent residents were inferior to citizens and less worthy of social assistance. Finally, it breached the participation criterion: permanent residents were in effect “relegated to the margins of society and deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution”’. See also Fredman (2005) (note 63 above) 180–2; Albertyn (note 5 above) 256. The judgment is criticised, however, by McLean (note 70 above) 166 for its ‘awkward conflation of socio-economic rights and equality jurisprudence’.
84 See in this respect Liebenberg & Goldblatt (2007) (note 63 above) 357.
85 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC) para 51.
86 *Western Cape Forum* (note 19 above) para 28.
87 Ibid para 29.
(b) Funding as part of the state’s obligations in terms of the right to basic education

In the light of the above, the most important practical issue raised in Western Cape Forum can now be considered. This concerns the state’s relationship with and obligations towards private ‘partners’ in providing services, in this case access to basic education in care centres for children with severe or profound intellectual disabilities. Although not specifically highlighted in the case as such, it is nevertheless worth considering – as an aspect of the content of the right to basic education – the extent of state’s obligations to properly fund private organisations that provide the kind of educational services at issue in this case.88 As was stated above, the Forum for Intellectual Disability’s members were NGOs caring for approximately 1,000 children in the Western Cape with severe or profound intellectual disabilities, who were excluded from state institutions catering for their basic education needs. Although the state establishes and funds special schools which cater for children with intellectual disabilities, children who are severely or profoundly intellectually disabled are excluded from these schools. In terms of state policy, they are not admitted to special schools or any other state schools. The only financial support which the state provides for the special care centres taking care of these children, is a subsidy paid by the Department of Health to successful NGO applicants providing the service, which is considerably less than the amounts spent per child in mainstream and special schools.

State subsidisation of private social service providers is often seen as discretionary financial assistance. In fact, the word ‘subsidy’ seems to suggest just that: an essentially benevolent form of state augmentation of private means to assist the recipient in achieving its goals. Constitutionally, however, this construction is out of place. State funding of privately rendered social services which realise socio-economic rights cannot be evaluated in terms of the pre-constitutional paradigm that the state merely fulfils a discretionary supportive role in assisting private organisations to provide social services as co-responsible ‘partners’ of the state. The guarantee of socio-economic rights in the Constitution has the consequence that the provision of services implied in these rights is an obligation that the Constitution firmly places on the state. The Constitution does not bind any organ of civil society in the same way. Their participation in the provision of social services is voluntary and when funded by the state, it is a function performed on behalf of the latter.

From this follows that the state is never relieved of any of its constitutional obligations when it chooses to make use of private sector entities in the

88 For the purpose of this article, we will also not address the precise contours of a right to basic education within the context of the case, namely education within a care centre functioning outside the formal school structures as envisaged in the South African Schools Act. We will – like the Court – assume that education provided to severely or profoundly intellectually disabled children in these institutions is in principle covered by the right to basic education guaranteed in s 29(1)(a) of the Constitution. See more generally S Woolman & B Fleisch The Constitution in the Classroom. Law and Education in South Africa 1994–2008 (2009) 109; Woolman & Bishop (note 68 above) 57-15 – 57-32.
execution of these duties. In *Western Cape Forum*, Cleaver J also noted that ‘[i]nasmuch as the state currently cooperates and relies on organisations such as the applicant to provide for mentally disabled children, it must be borne in mind that this does not relieve the state from its constitutional obligation’.\(^89\) In particular, the state’s funding of these services must be evaluated on the basis whether, in the words of s 7 of the Constitution, it qualifies as a measure which respects, protects, promotes and fulfils the rights in question, no matter who the actual provider of the service is. In the case of qualified socio-economic rights, the main question is whether state funding of the services provided by private organisations facilitates reasonable access to socio-economic rights. In the case of unqualified socio-economic rights, such as s 29(1)(a), the bar is set even higher. In this case the question should be whether the level of state funding falls short or not of providing the socio-economic goods and services implied in the scope of the right in question, such as basic education in terms of s 29(1)(a).

Terminologically, ‘subsidisation’ is therefore a misnomer incapable of conveying the real nature of the state’s funding obligations towards private sector social service providers. It is a misleading contextual cue for the constitutionally apposite conceptualisation of the respective relationships. The term ‘subsidy’ obscures the position of the state as the constitutionally designated locus of the responsibility to provide the service, either by rendering the service itself or by means of adequate financial empowerment of proxy service providers, such as the Western Cape Forum members. In addition, historically and conceptually, ‘subsidies’ also presuppose a degree of state discretion to provide or deny funding which is incommensurable with its duties in terms of the Bill of Rights.

State funding of privately rendered social services was recently addressed in *National Association of Welfare Organisations and Non-Governmental Organisations v Member of the Executive Council for Social Development, Free State*.\(^90\) In this case, a number of private welfare organisations sought an order, inter alia, declaring the Free State Department of Social Development’s policy in terms of which it subsidised these organisations, in violation of the rights to equality (s 9), access to housing (s 26), health care, food, water and social security (s 27), and children’s right to social services (s 28(1)(c)). It was contended on behalf of the applicants that the department’s subsidies were wholly inadequate to allow them to continue providing the social services concerned. The extent of the provincial government’s reliance on private welfare organisations to provide social welfare services on its behalf is graphically illustrated by the facts of the case in respect of child and youth care centres in particular. In terms of the department’s own strategic plan, about 2,000 beds were needed at the time to address the needs of children in the province, of which approximately only half could be met. Whereas

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89 *Western Cape Forum* (note 19 above) para 24.
90 Case no 1719/10 FS, Judgment 5 August 2010, reported in [2010] JOL 26056 (FB).
the department itself provided only 320 beds, the NGOs provided 764. The disastrous effect of downscaling of services by private welfare organisations due to inadequate funding by the state was therefore clear.

In respect of the child and youth care centres, the applicants not only challenged the inadequacy of the funding to facilitate reasonable access to social welfare services to children in need, but also the discrepancy between the subsidisation of children in state and private child and youth care centres respectively. The department itself accepted that an amount of R4,000 per child per month is the acceptable norm for the costs of caring for a child in a child and youth care centre. In terms of the costing of the Children’s Act of 2005 done by the national Department of Social Development, it had estimated that the amount of R6,000 per child per month would be needed. The amounts actually expended by the Free State department in respect of its own two child and youth care centres were R5,000 and R6,750 per child per month respectively. The subsidy of the department for private child and youth care centres for the 2011/2012 financial year, however, amounted to only R2,091 per child per month. The applicants contended that in spite of their best efforts at fundraising, they were unable to make up the difference. This, inter alia, resulted in the second applicant having had to provide three very basic meals at the cost of only R11.84 per child per day.

In his analysis of the respondents’ financing policies, Van der Merwe J held that it was clear that the funding of private welfare organisations that provide services on behalf of the state has been approached by the department ‘on the basis of subsidies determined as a prerogative of the department’. In fact, the department contended explicitly that ‘whilst [it] has no choice other than to fully fund the facilities operated by it, it funds NPOs on the understanding that … the said funding is merely a subsidy, in other words financial aid intended to supplement [the NGO’s] income’. The Court held this approach to be fundamentally flawed, since the policy fails to identify the department as the primary locus of the constitutional obligation to provide social welfare services. Given the constitutional and statutory duties of the state, he found that the policy fails to recognise, as a fundamental principle of funding, that NPOs that provide care to children, older persons and vulnerable persons in need as well as statutory services, fulfil constitutional and statutory obligations of the department. The Court accepted that it is not unreasonable for the department, when funding private organisations, to take into account that these organisations may have resources of its own apart from state funding.

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92 Ibid para 34.
93 Ibid.
94 Ibid para 31.
95 Ibid para 47.
97 National Association of Welfare Organisations (note 90 above) para 47.
98 Ibid para 48.
However, funding policy must recognise the fact of the state as the bearer of the responsibility to provide services. What can be expected of private organisations which fulfil departmental obligations to contribute from their own resources, cannot be determined arbitrarily. The Court held that to be a reasonable measure in this regard, the policy must contain a fair, equitable and transparent method of determination of what these NPOs are able and should be able to contribute to the provision of care for children, older persons and vulnerable persons in need and statutory services. The department must show that the policy is reasonable in this respect.

Van der Merwe J found it unnecessary to deal with the issue of discriminatory subsidies for child and youth care centres. He held that if the policy is redrafted in accordance with the principles stated above, ‘there should be no question of unfair discrimination’. By implication, therefore, he addressed unfair discrimination as part of the reasonableness requirement in terms of the applicable socio-economic rights. A reasonable funding policy, which is ‘fair, equitable and transparent’, will automatically be free of unfair discrimination. He issued a structural interdict in terms of which the department was ordered to adopt and to implement a redrafted or revised policy in order to address and remedy the constitutional and statutory defects.

Applying the approach adopted in National Association of Welfare Organisations to the facts of Western Cape Forum provides a further means to put the state’s neglect of its constitutional obligations in perspective. Two aspects in particular illustrate the substantive equality-related unreasonableness of its funding of the care centres. Firstly, the fact that the funding originated from the Department of Health and not the Department of Education is in itself significant. As noted above, the Department of Education provided no assistance at all to the care centres. This, in conjunction with the reality that subsidies are made available only where NGOs take it upon themselves to care for these children, suggest a profound unresponsiveness to the educational needs of particularly vulnerable children. Their needs are simply not captured, at all, within the radar of the state’s conception of its duty to provide basic education, either directly or by means of private organisations. In this respect, Cleaver J remarked that:

the fact is that at present children with severe or profound intellectual disabilities are excluded from special schools. More important, White Paper 6 or the current implementation of government policy makes no provision for such children to be catered for by special schools at present. The respondents only say that their objective is to ensure, at an unspecified time in the future, that such children are catered for by special schools.

99 Ibid para 47.
100 Ibid para 49.
101 Ibid para 51.
102 In the sequel to this case, the Court found the submitted revised policy to be non-compliant with the order. The department was allowed a further 90 days in order to submit a newly revised policy. See National Association of Welfare Organisations and Non-Governmental Organisations v Member of the Executive Council for Social Development, Free State (Case no 1719/2010, 9 June 2011). The department’s subsequent application for leave to appeal the order was denied by the SCA.
103 Western Cape Forum (note 19 above) para 18.
Secondly, the subsidy that NGOs receive from the Department of Health is grossly out of proportion with the subsidisation by the Department of Education of children in mainstream and special schools. This is in spite of the fact that the affected children ‘have needs which are much greater than those of children who do not have this degree of disability for the majority of the children have secondary disabilities such as epilepsy, visual and/or hearing impairment and cerebral palsy’. Neglecting the educational interests of the neediest would not have been allowed to enter the policy-formulation process if a notion of substantive equality-informed reasonableness – and not (ostensibly) neutral cost-benefit rationality – had dictated the state’s understanding of its obligations under s 29(1)(a) of the Constitution.

IV DISABELEMNT THROUGH STRUCUTURAL POWER AND NEGATIVE CATEGORISATION

On the face of it, the philosophy of inclusive education, from which White Paper 6 draws its immediate impulse, seems to have been prompted primarily by the need to comply with the imperatives of fulfilling domestic constitutional rights, especially the right to equality and non-discrimination (s 9) and the right to basic education (s 29(1)(a)). White Paper 6 does not, for example, refer to complimentary developments on inclusive education in other jurisdictions or to discourses on inclusive education in the global arena. Nonetheless, it serves well to note that inclusive education is not a peculiarly South African idea. Rather, it is a global as well as increasingly globalised idea about the human rights imperative of bringing inclusive citizenship to the education system.

Implicitly, White Paper 6 represents an appropriation to the domestic sphere, or at least an attempt thereof, of a wider global discourse on developing an education system that ensures universal access through accommodating the needs of all learners and not just the needs of learners that are statistically privileged as the ‘norm’ in mind and body. Inclusive education is a discourse that is driven by the substantive equality imperative of recognising as well as responding affirmatively to diversity. It is aimed at fundamentally reforming the inherently discriminatory nature of the traditional education system, including its pedagogy and its wider physical and social environment, so as to render it responsive to historically excluded and marginalised learners. By seeking to ensure that the education system is universally accommodating and enabling, inclusive education challenges the status quo. In a political sense, it challenges social constructions of learner difference that are embedded and are tethered to a hegemonic norm that acts not only as a yoke for individual disabled learners, but also a yoke for disabled people as a social group.

104 Ibid para 3.10.
The philosophy of inclusive education is aptly captured by the internationalised slogan, *Education for All*.\textsuperscript{105} It is a slogan that in one sense is intended to convey the message that education is a human right. In another sense, *Education for All* seeks to convey the message that all learners are not only able to learn, but more significantly, ought to be *enabled* to learn through the mandatory provision of universal access and material support by the state.\textsuperscript{106} Inclusive education comes out of growing international awareness that disabled children, in particular, are quintessentially an educationally disadvantaged and marginalised group.\textsuperscript{107} They constitute the largest group that has been left out of school as a result of an education system that is biased, and has historically been developed along the axis of catering for the mainstream.\textsuperscript{108} Indeed, as pointed out earlier, one of the findings of *White Paper 6* was that a large number of disabled children were being missed out by the school system.\textsuperscript{109} As part of global redress, the United Nations has given inclusive education an international juridical face through soft laws,\textsuperscript{110} and even more importantly, through human rights treaties.\textsuperscript{111}

Article 24 of the Convention on the Rights of Persons with Disabilities represents the latest as well as the highest universal juridical statement on inclusive education.\textsuperscript{112} It imposes state obligations that are built around inclusive education. Article 24 enjoins States Parties to recognise, without discrimination, the rights of disabled people to education, to ensure the provision of an ‘inclusive education’ system at all levels,\textsuperscript{113} and not to exclude disabled people from the ‘general system of education on the basis of disability’.\textsuperscript{114} This entails, inter alia, providing disabled learners with


\textsuperscript{106} Ibid 10.

\textsuperscript{107} Ibid.

\textsuperscript{108} Ibid.

\textsuperscript{109} *White Paper 6* (note 21 above) 9.

\textsuperscript{110} In this regard, the *Salamanca Statement on Principles, Policy and Practice in Special Needs Education* is widely considered to be the first significant international consensus statement on inclusive education, see World Conference on Special Needs Education: Access and Quality *The Salamanca Statement and Framework for Action* Salamanca, Spain (7–10 June 1994). See also UN Educational, Scientific and Cultural Organization *World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs* (1990); Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, GA res 48/96 December 1996, Rule 6; World Education Forum *The Dakar Framework for Action Education for All Meeting our Collective Commitments* Dakar, Senegal (26–28 April 2000); *Guidelines for Inclusion Ensuring Access for All* (note 105 above); UN Educational, Scientific and Cultural Organization *Policy Guidelines on Inclusion in Education* (2009); Committee on the Rights of the Child *General Comment 1 The Aims of Education* (2001); Committee on the Rights of the Child *General Comment 9 The Rights of Children with Disabilities* (2009), especially paras 66–7.


\textsuperscript{113} Article 24(1) of the Convention on the Rights of Persons with Disabilities (note 60 above).

\textsuperscript{114} Article 24(2)(a) ibid
reasonable accommodation so that they can receive the support they need in order to access effective education.\textsuperscript{115} Furthermore, art 24 makes it abundantly clear that education should be individualised and be learner-centred. Inclusive education is a type of education that is conceived in holistic terms. It is aimed at individualised support that is directed at securing the full development of human potential and sense of dignity and self-worth of the learner.\textsuperscript{116} Thus, at a global level, inclusive education has been explicitly accorded the status of a fundamental right. At a domestic level, an increasing number of countries both in the Global North as well as the Global South have begun to adopt policies, programmes and legislation that are designed to ensure the inclusion of disabled learners.\textsuperscript{117} White Paper 6 is South Africa’s own national flagship policy on inclusive education. But as the facts of \textit{Western Cape Forum} show, it is not the rhetoric of inclusive education that matters, but rather its substantive implementation.

Of course, it must be conceded that inclusive education is not a concept with one shared meaning. As an education philosophy, inclusive education is an evolving and, indeed, protean idea rather than one whose contours and content are complete, agreed and sealed.\textsuperscript{118} Certainly, there are a number of dimensions to inclusive education that remain incompletely developed or even hotly contested. Especially at the implementation level, there is, for example, more than one model of inclusive education, with some models proposing, literally, the inclusion of all learners, but with others proposing the inclusion of some but not all disabled learners.\textsuperscript{119} Segregating learners with disabilities under the aegis of inclusive education is a contested area. It is natural to ask

\textsuperscript{115} Article 24(2)(c), (d) & (e) ibid.
\textsuperscript{116} Article 24(1)(a) & (b) ibid.
\textsuperscript{117} A few of examples can be given. Ireland: In \textit{O’Donoghue} (note 62 above), the Irish Court gave judicial approval to inclusive education as a constitutional right. This aspect of \textit{O’Donoghue} was endorsed by the Irish Supreme Court in \textit{Sinnott v Minister for Education} (2001) IESC 63; (2001) 2 IR 505. The Irish Education Act of 1998 specifically makes provision for inclusive education for disabled persons; United Kingdom: The Education Act of 1996 as amended by the Special Needs and Disability Act of 2011 requires a Local Education Authority to make provision for inclusive education by drawing up an individualised programme for each disabled learner. For a commentary on the application of inclusive education in the United Kingdom and some European countries, see J Schoonheim & D Ruebain ‘Reflections on Inclusion and Accommodation in Childhood Education: From International Standard Setting to National Implementation’ in A Lawson & C Gooding (eds) \textit{Disability Rights in Europe} (2005) 163–95; United States: The United States Federal Courts have held that denying equal education to disabled learners constitutes an infringement of the 14th Amendment – the Equal Protection Clause of the Constitution of the United States. The leading cases in this regard are \textit{Pennsylvania Association for Retarded Children v Pennsylvania} 343 F Supp (1971); and \textit{Mills v Board of Education of the District of Columbia} 348 F Supp 866 (1972). Inclusive education is also regulated by legislation at both a federal and state level. At a federal level, the Individuals with Disabilities Act 20 USC s 1401 is the most important legislation. It requires states and local education authorities to provide education that is ‘appropriate’ for every disabled child and to draw up an individualised programme; Kenya: art 54(b) of the Constitution of Kenya of 2010 provides disabled persons with a right to access educational facilities and institutions that are ‘integrated into society’.
whether it is not a contradiction in terms for a philosophy of education that seeks to be inclusive, and to engender self-esteem and a sense of community rather than apartness, to concomitantly mandate, as an exception to the rule, ‘separate but equal’ education for disabled learners that are deemed to need a level of intensive support that renders it impracticable for them to be taught under the same roof as their counterparts. Indeed, the tenor of inclusive education in White Paper 6 subscribes, in part, to separate but equal education. It distinguishes between disabled children who need ‘low intensive support’, can be admitted to full-service ‘mainstream schools and are taught alongside their counterparts without disabilities, and disabled children who need ‘intense levels of support’, can be admitted to special schools and are taught on their own. The notion of ‘separate but equal’ education has inherent segregating effects. It militates against the values of acceptance, mutual edification, belonging and community that inclusive education seeks to foster.

According to Dianne Pothier, the argument is not that there is no place, at all, for ‘separate but equal’ in the education of disabled children. Pothier concedes that the need to make provisions for individualised learning and other support for learners who are disabled may militate against teaching learners under the same roof. At the end of the day, substantive equality demands a recognition of, and responsiveness to, difference rather than mechanical standardisation. The particular needs and circumstances of the individual learner rather than integrated learning, per se, should remain the primary focus. But given the legacy of marginalisation of disabled people, the appropriateness and implementation of ‘separate but equal’ should always be thoroughly scrutinised so that, however well intended, it does not become an easy way out for the education system. Segregating disabled learners can easily become an executive instrument for preserving the status quo or shielding the inadequacies of mainstream schools. Even where segregated education is apparently chosen by parents as something in the best interests of their disabled children, ‘separate but equal’ should always be thoroughly interrogated. Over and above the importance of not assuming that parents always act in the best interests of their children, it serves well to also ascertain whether the choice is genuinely voluntary. Parental choice might be constrained by, for example, the fact that mainstream schools purporting

120 Stack (note 118 above); D Pothier ‘Eaton v Brant County Board Education’ 18 Canadian J of Women and the Law (2006) 121.
121 White Paper 6 (note 21 above) 39–41.
122 Pothier (note 120 above) 121. Dianne Pothier’s argument is part of a broader critique of the decision of the Supreme Court of Canada in Eaton v Brant County Board Education (1997) SCR 241. In Eaton, the Supreme Court of Canada rejected the argument that the constitutional protection to disabled people under s 15 (the equality clause) of the Canadian Charter of Rights and Fundamental Freedoms mandates a presumption in favour of integrated education for disabled child learners. According to the Supreme Court of Canada, the correct approach is to determine which school placement, whether integrated or segregated, is in the best interest of the child unencumbered by a Charter-mandated presumption in favour of integration.
123 Ibid 126.
124 Ibid 132.
to render integrated learning do not in fact prioritise the learning needs of disabled learners in the same way as their counterparts.\textsuperscript{125} Equally, there are contradictions in the merit system that is used in inclusive education not least because, as Len Barton has argued, even for national initiatives purporting to implement inclusive education, academic excellence that is based on a narrow definition of ability remains the gold standard for recognising a successful education.\textsuperscript{126} The approach to knowledge in traditional education systems remains hierarchically ordered with a premium placed on abstract, individual examinable knowledge.

But notwithstanding subsisting areas of contestation and contradictions, it is accepted that the major edifice of inclusive education is that the state has a positive duty to accommodate diverse learning needs through the creation of an accessible physical environment, curricula, assessment, learning materials and instructional methodologies. The philosophy underpinning inclusive education recognises that barriers to learning are also extrinsic. Barriers can also reside in the education system and learning environment rather than merely in the learner. Many learners are excluded from effective participation or participation, at all, precisely because of failure to recognise and dismantle extrinsic barriers to learning. Thus, it is not just direct discrimination that the state must combat, but equally significant, indirect discrimination on account of failure to accommodate disabled learners.

The notion that the education system and the broader learning environment should be implicated as potential disabling factors is part of a broader and, indeed, major paradigm shift in the human rights conceptualisation of disability. It is a conceptualisation that stems from awareness that our socio-economic arrangements, including our architectural environment are far from neutral. Instead, the prevailing socio-economic arrangements are biased. They assume certain body types and capacities but not others. Consequently, they enable some, but disable others. Inclusive education is part of a paradigm shift from an historical approach of seeing disability in terms only of intrinsic impairment of the individual’s body for which the state may respond through charitable benevolence, to a human rights-based approach that sees disability as a phenomenon that is an outcome of the interaction between real or perceived individual impairment and the environment in which the disabled person finds himself or herself. This rights-based approach to disability has been developed by disability advocacy and activism that have championed the ‘social model of disability’ to highlight disability as social construction rather than intrinsic impairment of the body.\textsuperscript{127} The social model of disability is the

\textsuperscript{125} Ibid 135–6.


cardinal philosophy that shaped the formulation of state obligations under the Convention on the Rights of Persons with Disabilities, the first major international treaty dedicated to the rights of disabled persons.\footnote{128}

Ultimately, the social model of disability implicates the injustice of homogenising structural power. It recognises that disability is socially constituted through embedded knowledge that makes its appearance through, inter alia, the unstated norms of our education system, its schools, curriculum, admission and assessment procedures, learning and instructional methodologies and physical infrastructure that are partial rather than accommodating and assume a learner with a certain physical and intellectual ability. Inclusive education, the social model of disability, and, in the final analysis substantive equality, call for the transformation of the epistemology of our education system and its financial and architectural environment so that diverse needs of disabled learners are also registered within rather than outside or at the periphery of the socio-economic construction of our education system.

Unless, as a society, we vigorously question the epistemological assumptions underlying instruments such as the SIAS Strategy and their attendant normative power, we risk acquiescing in, and giving social legitimacy to, educational philosophies and methodologies that reinforce rather than counter historical marginalisation and exclusion. We risk among other social ills, resurrecting institutional apartheid by another name. While, on the one hand, serving to confer recognition on inclusive education, the SIAS Strategy also served to perpetuate and perpetrate a new injustice through labelling and stereotyping. Writing about disability and schooling in South Africa, Crain Soudien and Jean Baxen highlight the importance of conceding the progressive nature of \textit{White Paper 6} while at the same time taking cognisance of the fact that South Africa remains, as other jurisdictions, vulnerable to a condescending and stigmatising discourse of disability.\footnote{129} The SIAS Strategy was anything but an unbiased, learner-centred instrument for assessing admission into school and concomitant need. Instead, it was an instrument that purported to be neutral but masked an ideology of corporeality that served a particular history and a particular discursive formation of disability.\footnote{130} It was an instrument deeply embedded in master dichotomies that prescribe what is normal and what is abnormal. The SIAS Strategy sent out a clear normative message about which

\begin{thebibliography}{99}
\bibitem{129} C Soudien & J Baxen ‘Disability and Schooling in South Africa’ in Watermeyer \textit{et al} (eds) (note 1 above) 149, 152–3.
\bibitem{130} Ibid 154.
\end{thebibliography}
learners were intellectually acceptable to the education sector and which
learners were not.\footnote{131}{Ibid 155.}

What the SIAS Strategy succeeded in accomplishing was not the
implementation of inclusive education, and the accommodation of children
with severe and profound intellectual disabilities. Instead, it succeeded in
the apartheidisation of the education system through a phenomenon we can
call disablism. Disablism is a useful shorthand for naming disability-related
discrimination in order to highlight its endemic and embedded nature.\footnote{132}{Disablism or its equivalent ‘ableism’ or ‘ablism’ are terms that have been advocated by commentators who wish to highlight that disability-related discrimination is not only an experience of social inequality but also social or political oppression: See for example, Oliver (note 127 above) 51, 100; IM Young Justice and the Politics of Difference (1990) 124, 145, 164.}

Though seldom captured in commentaries, disablism has striking parallels
with apartheid. In so many ways, the historical experience of exclusion and
marginalisation of disabled people mirrors the experience of black people
under apartheid. Like apartheid, disablism builds its narrative of inclusionary
and exclusionary citizenship from a cultural fabrication of the body that labels
or categorises certain body types as normal and thus superior, and others as
abnormal and thus inferior.\footnote{133}{G Goggin & C Newell (eds) Disability in Australia Exposing a Social Apartheid (2004); P Abberley ‘The Concept of Oppression and the Development of a Social Theory of Disability’ (1987) 2 Disability, Handicap & Society 5.}

The SIAS Strategy arrogated to itself the power
to essentialise body types and stereotype difference. Like apartheid, it attached
socio-economic consequences to categorisation, but without involving the
objects of categorisation. The values underpinning the SIAS Strategy were
determined monologically rather than dialogically. The children and parents
of the children ultimately adversely affected by the SIAS Strategy were never
consulted, thus putting paid to participatory democracy. The SIAS Strategy
poignantly underlines the Department of Education, and by implication the
state, rather than disabled learners as the real locus of normative structural
power.

In her seminal work on justice and difference, Iris Young advances the
thesis of a good society that draws its democratic impulse from the ethics of a
heterogeneous public sphere.\footnote{134}{Young (note 132 above).}

An underpinning premise of Young’s thesis is
that that normative reason is dialogic.\footnote{135}{Ibid 116.}

Just and inclusive norms have a better
prospect of being inscribed into our legal and political economy if there is more
than token interaction between social groups, and especially if the dominant
group is compelled to hear the voices of the marginalised group.\footnote{136}{Ibid.} If democracy
means a process of communication across difference and differences in order
to collectively decide the conditions that govern our lives, then all citizens,
and not just the historically privileged groups, should be given an opportunity
to participate as peers that are equal in worth and dignity. That way, we are
able to avail ourselves of the opportunity to check systemic dominance and
subordination. Young’s heterogeneous public sphere can be understood as a universe for the achievement of substantive equality and the eradication of structural power. The import of the heterogeneous public sphere for disabled people is that it puts a check against false universalism that comes from being assimilated to a single universalised standpoint as happened with the SIAS Strategy. A heterogeneous public sphere favours concrete universalism or plurality. It requires disabled people to be measured not by reference to an abstract somatic ideal, but by reference to their unique lived experience and the fact that they have an equal claim to equality, including enablement. In this way, structural power can be democratised and countered as disabled people become participants in the process of societal norm-setting as opposed to being merely the objects of norms set by enabled people.

In Nancy Fraser’s parlance, the global experience of disabled people is one of belonging to a ‘bivalent category’; a social collectivity that has historically been ‘misrecognised’ both culturally and economically. It is the experience of an historical community that has been differentiated, subordinated, denied requisite resources by the state, or even segregated, by legal fiat if necessary. Disabled people have experienced a more enduring type of status subordination. It is subordination that comes out of being essentialised as a social group by homogenising and, at the same time, differentiating structural power and consequently being excluded inter-generationally from equal citizenship, including exclusion from an equal and commensurate claim on state resources. Ultimately, being disabled has historically meant being at the receiving end of structural inequality on the basis of inferiorised corporeal identity that is sustained by a labyrinth of laws, policies, institutional arrangements, and the architectural environment.

Apartheid principally pegged citizenship on race with racial categorisation as its principal determinative instrument. It was not racial categorisation per se that was harmful and devastating, but the premises that informed the categorisation and, above all, the political project it served. In their work on gender stereotyping, Rebecca Cook and Simone Cusack remind us that placing human beings into categories and perceiving or assigning attributes is something we all do as part of becoming human and organising the world around us. However, categorisation is hardly a random process, nor a personal whim, devoid of any value system and normative implications. We categorise for benevolent as well as malevolent purposes.

Apartheid’s racial categorisation was wrongful and pernicious because it carried structural power. Apartheid carried immense political and economic

144 Cook & Cusack (note 142 above) 13.
power and was invoked for the deliberate political project of enabling or maximising the capacities of one group and disabling or minimising the capacities of the ‘otherised’ group(s) and ultimately canonising white supremacy. To those who could not wear the fit of white, apartheid functioned as disablement. It functioned as a potent enclosing structure and barrier that were manifestly immobilising. Under apartheid, the idea of a common humanity endowed with equal worth was sacrilege. The integrity of apartheid crucially depended on constructing dichotomous races. Above all, it depended on elevating white to a master dichotomy and vigorously policing the boundaries in order to construct and maintain a permanent universe of races that are divinely endowed with hierarchical racial essences. Apartheid used racial difference to perpetuate a wrongful stereotype, to stigmatise and to inscript normative identity.

Unless disablism is vigorously contested in ‘post-apartheid’ South Africa, it promises the same deserts. Like apartheid, it principally pegs citizenship on an assumed corporeal norm that affirms the somatic citizenship of those who meet the norm and, incidentally, do the categorisation. It denies the citizenship of those who cannot meet the norm and, in addition, have little control over the power to categorise corporeal norms. Disablism enables one category while simultaneously disabling another. It is a veritable source of structural inequality. As Rosemarie Garland-Thompson aptly observes, the ability/disability system not only differentiates and marks bodies. More than this, it penetrates the formation of socio-economic culture to give legitimacy to unequal distribution of resources, social status and a biased socio-economic and architectural environment so that denying equal participation to disabled people appears natural and even economically efficient.

145 In his speech from the dock in the Rivonia Trial, Nelson Mandela drew an analogy between apartheid and disablement. The speech is reproduced in N Mandela No Easy Walk to Freedom (1990) 188.
147 Ibid 5. It is beyond the scope of this article to explore how societal notions of economic efficiency in market economies that prize competitiveness, self-sufficiency and assume highly autonomous economically productive citizens have been an integral part of the creation of a disabling society in which disabled people who are dependent are seen as a liability to the state. Michael Oliver has written persuasively about how, in an historical sense, the rise of capitalist society and an accompanying individualistic ideology have played a key role in influencing the development of societal structures that devalue disabled people and exclude them from the mainstream of socio-economic life, see M Oliver The Politics of Disablement (1990) 25–59; F Bhabha ‘Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformative Imperative’ (2009) 25 SAHJR 218, 226. Feminist scholarship has been at the forefront of critiquing notions of merit in market economies that derive their impulse from neo-liberal masculinist individualistic ideologies that promote ‘crude autonomy’, and valorise self-sufficiency and independence, leaving no room for the recognition of dependency and vulnerability as experienced by disabled people, see M Fineman ‘Equality: Still Elusive After All These Years’ Emory Public Law Research Paper; A Silvers ‘Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights’ (1998) 13 Berkeley Women’s LJ 81. Part of the feminist response has been to reconceive autonomy so that it is transformative and responsive to the existential reality of human beings as interdependent, see J Nedelsky ‘Reconceiving Autonomy: Sources, Thoughts and Possibilities’ (1989) 1 Yale J of Law and Feminism 7.
Taking substantive equality seriously under the South African Constitution requires us to be particularly wary of categorisation, whether in the realm of policy-making, legislation, or constitutional adjudication. Categorisation frequently has the effect of legitimising status subordination even if that was not the intended outcome. The legacy of apartheid, on its own, ought to be reason enough to make us ultra vigilant. We should guard against allowing our thought processes to be guided by the logic of social group reductionism that draws its impulse and compass from the wellspring of cultural and institutional modes of social division that have historically been oppressive. Such reductionism is precisely what the South African Constitution resolutely disavows and seeks to transform. Taking substantive equality seriously requires us to be equally conversant with the social histories of disadvantage and marginalisation of all protected groups, including political minorities such as disabled people, and not just with the social histories of the politically valorised groups such as racial and gender groups. But more than simply become conversant with the social histories of disadvantage and marginalisation of groups that tend to be politically invisible, it is also essential to become conversant with the urgency of securing equality that goes beyond merely securing the nominal or rhetorical inclusion of such groups.

Cathi Albertyn has argued against a type of transformative constitutionalism that is rhetorically persuasive, but in practice is of limited reach and only manages to achieve token recognition of historically excluded groups, leaving underlying socio-economic relations largely undisturbed. Drawing from the work of Nancy Fraser, Cathi Albertyn and Sandra Liebenberg have implored us not to treat all equality claims as seeking a uniform response, but instead be receptive to the idea that different groups may experience different inequalities. With some groups, equality may be adequately met by fulfilling a political or cultural recognition claim in narrow sense such as by recognising the social or cultural identity of a group that has previously been excluded or marginalised. The decision of the Constitutional Court in *MEC for Education v Pillay*, is an illustration of cultural recognition in the context of the imperative of inclusive citizenship at school.

The main issue in *Pillay* was whether refusal by school authorities to permit a pupil belonging to the Hindu religion to wear a nose stud constituted unfair discrimination under s 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act). The school authorities had declined permission on the ground that wearing a nose stud constituted a breach of the school’s code of conduct. The code of conduct had been designed to maintain uniformity and discipline. Reiterating the nature of equality as

148 Albertyn (note 5 above) 254.
149 Fraser (note 139 above).
150 Albertyn (note 5 above) 255–6.
152 2008 (2) BCLR 99 (CC).
substantive equality under South African law, the Court said that neither the Equality Act nor the Constitution interprets equality as requiring identical treatment.\(^{153}\) Instead, they require equal concern and equal respect which includes treating people differently, if need be, in order to achieve equality. The Court said that the school’s decision constituted unfair discrimination. It was a significant infringement of the pupil’s religious and cultural identity as it had the effect of compelling the pupil to comply with mainstream culture. The Court held that the school had a duty to provide reasonable accommodation as part of recognising cultural diversity.

With other equality claims, however, cultural recognition may be insufficient. Lived inequality may implicate, in addition, economic inequality where the social group has been denied equal or requisite access to economic goods and services. Such is the case with disabled learners. Transformative equality can only be achieved for disabled learners if the state takes positive steps to provide a physical and educational infrastructure, including curricula, admission and assessment procedures, learning and instructional methodologies that are commensurate with recognising diverse learning needs and the equal worth and dignity of every learner. In \textit{Pillay}, Langa CJ remarked in obiter dicta that disabled people can, without any positive action, easily be pushed to the margins of society.\(^{154}\) In \textit{Western Cape Forum}, the state did, indeed, push a group of disabled learners further to the margins of society. State policy and practice fell woefully short of recognising children with severe or profound intellectual disabilities as a social group that requires both cultural and redistributive economic justice.

\section*{V Conclusion}

Historically, education has been a policy sphere in which the prerogatives of the legislature and the executive, especially, have determined issues of entitlement and resource allocation. But this is no longer the case. Though courts will, as part of heeding separation of powers, want to exercise restraint in policy matters, not least in matters involving allocation of resources and pedagogic theory, they concomitantly have a solemn duty to secure the promise of the Constitution to all social groups and individuals. In \textit{Western Cape Forum}, the Western Cape High Court rightly countermanded executive policy and practice that were driven by an insidious and condescending notion of the ineducability of children with severe or profound intellectual disabilities. The policy had the effect of not only depriving a very vulnerable group of children of their fundamental rights to equality and basic education under the Constitution, but also accentuating their stigmatisation. In not so many words, the policy was tantamount to ontologically and normatively according

\(^{153}\) Ibid para 103.
\(^{154}\) Ibid para 74.
low moral status to children who are severely or profoundly intellectually disabled.\textsuperscript{155}

Writing about transformative constitutionalism, Henk Botha has made the point that there is a lurking risk that when racial, gender, disability and other protected grounds are being mediated, subsisting apartheid thought processes will seep into the new legal order to determine human status and individual and group worth.\textsuperscript{156} To counter this risk, there must be a conscious jurisprudential effort at reconceiving categorisation by inter alia abandoning the ‘formalism, objectivism and reductionism’ of the old legal and political orders.\textsuperscript{157} It is a great irony that, even disregarding the Constitution and the Convention on the Rights of Persons with Disability,\textsuperscript{158} which South Africa has ratified together with the Optional Protocol to the Convention,\textsuperscript{159} that in Western Cape Forum the state blatantly flouted its own flagship policy – White Paper 6. This was the state’s flagship policy and had taken several years to develop. It was manifestly intended to be inclusive and yet the state undermined its own policy by falling prey to an embedded discourse of disablism which has long labelled children with severe or profound intellectual disabilities as ‘ineducable’. Western Cape Forum tells us what happens when state policy-makers effortlessly lapse into old ways of thinking and, without any moral compunction, categorise and draw a distinction between what is ‘normal’ and deserving of a claim on state resources from what is ‘abnormal’ and undeserving. Transformation is not just about transcending social hierarchies that were spawned by our colonial and apartheid past. It is more than about race and gender. Transformation, as Aletta Norval has argued, is about creating a new social order that not only breaks with the historical specificity of colonialism and apartheid but also transcends the logic of the institutional modes of social division of the old orders.\textsuperscript{160} The Constitution speaks against the old orders and their master dichotomies most powerfully through substantive equality.

In an introduction to one of a handful of works on disability in post-apartheid South Africa, Brian Watermeyer and Leslie Swartz highlight as well as lament the invisibility of disability consciousness in our contemporary

\textsuperscript{155}Steven Edwards has sought to explain the ‘low moral status’ that is accorded to disabled people by arguing that it derives from an ontological view concerning the nature of ‘the self’ and a normative view concerning the nature of a moral agent that have been shaped by moral values that are highly individualistic. Individualism sees disabled people as ‘dependent’ and not ‘genuine selves’. It conflates social dependence with ontological dependence. Individualism normatively assumes that once a person is not socially independent, he or she is also not ontologically independent and, consequently, less of a person than one who is ontologically independent. Edwards highlights that the terms ‘dependent’ and ‘independent’ are not value-neutral but value-laden, see SD Edwards ‘The Moral Status of Intellectually Disabled Individuals’ (1997) 22 J of Medicine and Philosophy 29, 34–7.


\textsuperscript{157}Ibid.

\textsuperscript{158}Note 60 above.

\textsuperscript{159}South Africa signed the Convention and the Optional Protocol on 30 March 2007 and ratified the same on 30 November 2007 <http://www.un.org/disabilities/countries.asp?navid=12&pid=166#S>.

\textsuperscript{160}AJ Norval Deconstructing Apartheid Discourse (1996) 299.
public discourses on equality. Though the point they make is perhaps obvious, it is, nonetheless, a profound one. It is that, as a marker of difference, disability is neither as well established nor as well understood as race and gender for example. There is need for understanding bodily difference in a manner that is non-hierarchical and does not set disabled people apart. It is an understanding that must comport with a constitution that is transformative and puts a premium on inclusive citizenship. A transformative epistemology of disability requires that we recognise humanity as diverse but, at the same time, equal in worth and dignity. It is through a firm commitment towards the ethic of inclusive citizenship that we can begin to transcend disablism.

161 B Watermeyer & L Swartz ‘Introduction and Overview’ in Watermeyer et al (eds) (note 1 above)