

'DISABLED PEOPLE' AND THE SEARCH FOR EQUALITY IN THE
WORKPLACE: AN APPRAISAL OF EQUALITY MODELS FROM A
COMPARATIVE PERSPECTIVE

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Declaration

I, the undersigned declare that the work contained in this study for the degree of Doctor of Laws at the University of the Free State is my own independent work and that I have not previously in its entirety or in part submitted it to any university for a degree. I furthermore cede copyright of this thesis to the University of the Free State.

Signed at Bloemfontein on the 31st Day of December 2010

Charles Gideon Ngwena

DEDICATION

I dedicate this work to: the memory of my father, Gideon Sigcau Ngwena, and my mothers, Rosemary Rekai Ngwena, and Claudia Thokhozile Ndlela, who were all gone too soon but remain ever so present in my life; my wife, Patricia 'PD' for your boundless love, irrepressible optimism and unwavering faith in God and family; our children, Khosi, Gideon, and Claudia-Rose, for giving me free master classes on how to become an engaged parent; mighty Khanyisile 'Omz', our first grandchild, for accelerated grandparenthood; and Tata Mandela, the icon of the heroic resistance of the people of South Africa against the gigantic might of apartheid, for inspiring us never to walk away from the cause of imagining inclusive equality as part of reconstructing a country with a fractured and quintessentially bruised racial history.

SUMMARY

Disabled people constitute a historically disadvantaged and marginalized group that experiences discrimination in the workplace among other socio-economic sectors. In this thesis, my focus is on searching for an inclusive type of equality that could inform the interpretation and application the equality clause in the South African Constitution. My aim is neither to arrive at a mathematically constructed abstract type of equality, nor to produce a blueprint of equality that puts finality on the debate on equality. Rather, it is to engage with equality discursively with a view to contributing towards an ongoing development of a juridical as well as philosophical path for constructing the normative architecture of a type of equality that is more responsive to the equality needs of disabled people. The spotlight is on developing a type of equality that is normatively inclusive and transformative as to be capable of sufficiently meeting the quest for political, and more crucially, economic recognition of disabled people.

I use a repertoire of analytical techniques to explore and appraise the inclusiveness and responsiveness of contemporary approaches to equality. At a more general level, the discourse employs comparative analysis. However, whilst comparative analysis in this thesis includes comparing and contrasting the equality jurisprudence of different jurisdictions, and in this instance, comparing and contrasting South Africa with Canada and the United States, it is, nonetheless, a relatively small part of my comparative discourse. It is not the primary sense in which the thesis develops a comparative discourse. The greater part of my discourse employs a comparative approach to mean comparing and contrasting the underpinning moral compasses of formal equality and substantive equality with a view to revealing the capacities of each type of equality to be responsive to the equality aspirations of disabled people.

Over and above comparative analysis, I use, in the main, the historicity of apartheid, the social model of disability, and feminist theory and practices as analytical techniques for interrogating the responsiveness of notions of formal equality and substantive equality. From insights drawn mainly from the social model of disability and feminism, I construct *disability method* as a syncretic and legal method for interrogating the normative sufficiency of equality laws and praxis. Disability method is the study's principal interpretive method for ensuring that the appraisal of pertinent laws, policies or practices is always conscious of the status of disabled people as a disadvantaged and vulnerable historical community, and the imperative of transforming erstwhile culturally, and even more crucially, economically oppressive norms.

I contend throughout the study that law does not carry inherently neutral values that, as a matter of course, allow for searching for alternative paradigms of equality. Ultimately, it is the social construction of disability that holds the key to interrogating equality norms in a serious manner and not merely restating what the legislature and the judiciary proclaim about disability and equality. In this sense, by way of clarifying the methodological and philosophical orientation of this study, it bears stressing that the analytical approach that it adopts differs markedly from conventional legal discourses that *only* use an 'internal critique', as it were, to

critically evaluate legal norms by using norms derived from law in order to determine whether the law is living up to the standards which it professes to hold and whether the justice promised by those standards is being dispensed evenly across all social groups. Though 'internal critique' is part of how some of the arguments in this study are framed, it is only a small part. The greater part of my equality discourse derives from external critique. It derives from appraising the law using ethical or social values that are external to the law but which I argue ought to shape the law.

Using disability method, and drawing from the thesis of a heterogeneous civic public sphere, I situate the normative ethical framework for substantive equality within a type of participatory democracy in which equality is constructed dialogically and not unilaterally or hegemonically. I treat equality as a component of democratic ethics that result not from a given centre but from an egalitarian dialogue between *disabled* people and *enabled* people. I argue for inclusive heterogeneous equality as the operative equality template for eradicating *disablism* in an imagined participatory democracy in which respect for pluralism and the eradication of dominance and subordination among social groups are core foundational ethics.

Key words: disabled people, equality, discrimination, workplace, formal equality, substantive equality, feminism, social model of disability, comparative approach.

OPSOMMING

Gestremde persone vorm 'n histories benadeelde en gemarginaliseerde groep wat diskriminasie in die werkplek as sosio-ekonomiese sektor ervaar. In hierdie proefskrif word op die soeke na 'n inklusiewe vorm van gelykheid gefokus wat die interpretasie en toepassing van die gelykheidsklousule in die Suid-Afrikaanse grondwet inhoud kan gee. Die oogmerk is nie om 'n abstrakte matematieks-gekonstrueerde vorm van gelykheid te ontwikkel of om 'n bloudruk vir gelykheid daar te stel wat veronderstel is om die debat oor gelykheid tot 'n einde te bring nie. Dit is eerder 'n poging om diskursief met gelykheid om te gaan met die oog daarop om tot die voortgaande ontwikkeling van 'n juridiese sowel as 'n filosofiese weg vir die konstruering van die normatiewe argitektuur van 'n tipe gelykheid by te dra wat meer responsief op die gelykheids-behoeftes van gestremde persone kan reageer. Die soeklig val op die ontwikkeling van 'n tipe gelykheid wat normatief inklusief en transformatief is ten einde voldoende in staat te wees om aan die uitdagings deur die politiese en veral die ekonomiese erkenning van gestremde persone gestel te kan beantwoord.

'n Repertoire van analitiese tegnieke word aangewend ten einde die inklusiwiteit en responsiwiteit van kontemporêre benaderings tot gelykheid te ondersoek en te beoordeel. Op 'n meer algemene vlak word 'n vergelykende analise in die diskoers benut. Alhoewel die vergelykende analise wat in hierdie proefskrif aangewend word insluit die vergelyking en kontrastering van die regsposisie met betrekking tot gelykheid van verskillende jurisdiksies - in hierdie geval die vergelyking en kontrastering van die Suid-Afrikaanse regsposisie met dié van Kanada en die Verenigde State - vorm dit egter 'n relatief klein deel van die vergelykende diskoers. Die grootste deel van die diskoers benut 'n vergelykende benadering wat behels die vergelyking en kontrastering van die onderliggende morele rigtingwysers van formele gelykheid en substantiewe gelykheid met die oogmerk om die onderskeie vermoëns van elke tipe gelykheid om responsief op die gelykheidsaspirasies van gestremde persone te kan reageer, te beoordeel.

Benewens die vergelykende analise, word hoofsaaklik die historiese gewendheid van apartheid, die sosiale model van gestremdheid en feministiese teorie en praktyke as analitiese tegnieke vir die kritiese ondersoek na die responsiwiteit van die konsepte van formele gelykheid en substantiewe gelykheid benut. Uit die insigte wat hoofsaaklik van die sosiale model van gestremdheid en feminisme verwerf word, word 'n *gestremdheidsmetode* gekonstrueer synde 'n sinkretiese en juridiese metode vir 'n kritiese ondersoek na die normatiewe aanvaarbaarheid van gelykheidswetgewing en -praktyk. Gestremdheidsmetode is die belangrikste interpretasie-metode in hierdie studie ten einde te verseker dat die beoordeling van spesifieke wetgewing, beleide of praktyke deurentyd bewus bly van die status van gestremde persone as 'n benadeelde en kwesbare historiese gemeenskap, asook die

plig om kulturele en - selfs méér belangrik - ekonomies-onderdrukkende norme te transformeer.

Deurlopend word geargumenteer dat die reg nie inherent neutrale waardes beliggaam wat voorsiening vir alternatiewe paradigmas van gelykheid maak nie. Ten diepste is dit die sosiale konstruk van gestremdheid wat die sleutel tot die kritiese ondersoek na gelykeidnorme met die nodige erns benader en nie bloot die standpunte oor gestremdheid en gelykheid van die wetgewer en die regbank napraat nie. Ten einde die metodologiese en filosofiese oriëntasie van die studie duidelik te stel, word beklemtoon dat die analitiese benadering wat benut word in betekenisvolle opsigte verskil van die konvensionele diskoerse. Die konvensionele diskoerse wend slegs 'n benadering van "interne kritiek" aan ten einde krities regsnorme aan die hand van norme wat van die reg afgelei is te gebruik om te bepaal of die reg voldoen aan die standaard wat dit verklaar na te streef. Voorts word bepaal of die geregtigheid wat deur sodanige standaard in die vooruitsig gestel word, indien dit gelyklik oor alle soiale groepe versprei word, haalbaar is. Alhoewel "interne kritiek" deel vorm van die wyse waarop sommige argumente in hierdie studie geformuleer word, vorm dit egter slegs 'n klein deel daarvan. Die grootste deel van my gelykeidsskoers vloei uit eksterne kritiek voort. Dit ontspring aan die beoordeling van die reg aan die hand van etiese of sosiale waardes wat buite die reg staan, maar wat, soos geargumenteer word, die reg behoort te beïnvloed.

Deur die toepassing van gestremdheidsmetodiek en die benutting van die standpunt van 'n heterogene burgerlike publieke sfeer, word die normatief-etiese raamwerk vir substantiewe gelykheid binne 'n tipe van deelnemende demokrasie, waarin gelykheid dialogies en nie eensydiglik of hegemonies gekonstrueer is, geposisioneer. Gelykheid word as 'n komponent van demokratiese etiek hanteer wat nie vanuit 'n bepaalde sentrum vloei nie, maar voortkom uit 'n egalitêre dialoog tussen *onbemagtigde* en *bemagtigde* persone.

Daar word ten gunste van 'n inklusiewe heterogene gelykheid, synde die operatiewe gelykheidstemplaar vir die uitwissing van onbemagtigdheid in 'n geïdealiseerde deelnemende demokrasie geargumenteer met die oog op die uitwissing van onbemagtigdheid in sodanige demokrasie waar respek vir pluralisme en die uitskakeling van oorheersing en onderdrukking tussen sosiale groepe sleutelgrondleggende etiese waardes vorm.

Sleutewoorde: gestremde persone, gelykheid, diskriminasie, werkplek, formele gelykheid, substantiewe gelykheid, feminism, sosiale model van gelykheid, vergelykende benadering.

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ACRONYMS

ADA	Americans with Disabilities Act
ANC	African National Congress
BCM	Black Consciousness Movement
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CLS	Critical Legal Studies
COIDA	Compensation for Occupational Injuries and Diseases Act
DALY	Disability Adjusted Life Year
EEA	Employment Equity Act
EEOC	Equal Employment Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICF	International Classification of Functioning, Disability and Health
ICIDH	International Classification of Impairments, Disabilities and Handicaps
ILO	International Labour Organisation
INDS	Integrated National Disability Strategy
PAC	Pan African Congress
UN	United Nations
WHO	World Health Organisation

CHAPTER 1

INTRODUCING DISABILITY, EQUALITY AND THE WORKPLACE

Throughout the ages, the treatment of people with disabilities has brought out some of the worst aspects of human nature. Too often, those living with disabilities have been seen as objects of embarrassment, and at best, of condescending pity and charity.¹

1 INTRODUCTION

This study is a discourse at the intersection between equality and disability in the workplace. It seeks to develop normative standards for realising the constitutional right to equality and non-discrimination at the intersection of entry into, and advancement in, employment of *disabled persons*² under South African law. The study draws from comparative approaches to equality. The idea of a comparative approach in this thesis is conceived not only in terms of drawing from comparative law but even more significantly in terms of drawing from competing notions of equality. In terms of comparative law, the study examines the disability-related equality and non-discrimination laws of the United States

¹ Statement by the then United Nations Secretary General, Kofi Annan, welcoming the adoption of the Convention of the Rights of Persons with Disabilities, 13 December 2006 'Secretary General Hails the Adoption of Landmark Convention on the Rights of People (sic) with Disabilities' <<http://www.un.org/News/Press/docs//2006/sgsm10797.doc.htm>> (last accessed 2 January 2007).

² It will be explained later, especially in Chapter 3, that in this study the term 'disabled persons' is used in a specific sense to implicate not so much physical or mental impairments, but to imply the socio-construction of the phenomenon of disability as something that is created by a socio-economic environment that does not accommodate physical or mental impairments.

and Canada with a view to drawing pertinent lessons for South Africa. In terms of competing notions of equality, the study uses formal equality (*de jure* equality) and substantive equality (*de facto* equality) as the main counterpoints that are ultimately anchored in socially constructed norms.

Using the workplace as a pivot for discussion, the study seeks not only to apply equality standards to disabled persons in the workplace according to existing judicial and legislative understandings. Even more importantly, the study seeks to critically evaluate the adequacy of existing equality and non-discrimination standards as part of constructing normative standards that South Africa *ought* to adopt when respecting, protecting, promoting and fulfilling the equality rights of disabled persons. From this perspective, and against the backdrop of disability as a social construct, the study seeks to advance an interpretation that is not only maximally coterminous with a transformative notion of substantive equality under the South African Constitution,³ but is also maximally responsive to the discrimination that is experienced by disabled persons as an historically marginalised and oppressed social group. In the final analysis, the study is intended as a contribution towards advancing, in a normative sense, a plausible transformative interpretation of the right to equality and non-discrimination for disabled people in post-apartheid South Africa.

This chapter serves to introduce the study, and has three main objectives. Firstly, and foremost, it expounds the rationale of the study so as to justify the desirability or even compellability of a study of this nature. As part of articulating the rationale, and, in particular, the focus on the intersection between disability, equality and non-discrimination, the chapter explores the global as well as domestic position of disabled people as a marginalised social group. The chapter also discusses the emergence of disability as an international human

³ Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter 'the Constitution').

rights issue. In this connection, the significance and potential of the Convention on the Rights of Persons with Disabilities (the Convention)⁴ as the first global treaty dedicated to the protection and promotion of the human rights of disabled persons, are acknowledged and to some extent explored.

Secondly, the chapter elaborates on the aims and objectives that were stated at the beginning of this chapter so as to clearly delineate the parameters as well as limitations of the study. The third and final objective is to explain the structure of the study by way of giving a synoptic view of subsequent chapters.

2 RATIONALE

In addressing the rationale, the main question must be whether there is need for a study at the intersection between disability and equality. The short answer would be 'Yes'. Disabled persons are a social group that from historical and contemporary perspectives, constitute a marginalised, vulnerable and disadvantaged group. In a compelling sense, they merit scholarly attention in post-apartheid South Africa where the Constitution decidedly puts a premium on the achievement of equality. In an introduction to a book – *Disability and Social Change: A South African Agenda*, Brian Watermeyer and Leslie Swartz, appositely begin by articulating the invisibility of disability consciousness in the South African political economy. In this regard they say:

If one approached a South African in the streets of Cape Town, Soweto or Polokwane, and asked him or her to provide associations to the notions of 'race', the answers one would gather would be rich, layered and heavily imbued with personal and political signification. The painful legacy of institutional racial discrimination shared by all South Africans, and the remarkable emergence of

⁴ GA Res. 61/611. Adopted on 13 December 2006, and entered into force on 3 May 2008.

our nation from decades of conflict, have left an awareness of the oppressive appropriation of the race paradigm indelibly etched on the national psyche. Similarly, though more latterly, an awareness of gender as a potentially oppressive marker of differentness has grown amongst the South African populace...The idea of 'oppression' is firmly attached within South African colloquial culture to the idea of race; *however, the marker of disability has yet to achieve this status. When confronted with the notion of 'disability', our minds do not turn instinctually (sic) to an exploration of possible modes of systematic discrimination and disadvantage. Rather we remain strongly attached to modes of attribution which prize the explanatory system of the body, in accounting for the inequalities we see.*⁵

What Watermeyer and Swartz are highlighting is that, as a marker of difference and socio-economic disadvantage, disability is neither as historically privileged nor as well understood as race or gender, and that it is time that disability entered public discourse and consciousness in South Africa. In contrast to race and gender, the notion of disability as systemic disadvantage and social oppression does not immediately strike rapport with current national understandings of equality. The equality entitlements of disabled people under the Constitution have yet to be adequately tested and applied by the courts. Moreover, academic commentaries that, in a juridical sense, specifically address the intersection between disability and non-discrimination in post-apartheid South Africa are still few and far between.⁶ In terms of a specific focus on

⁵ B Watermeyer & L Swartz 'Introduction and Overview' in B Watermeyer *et al* (eds) *Disability and Social Change: A South African Agenda* 1-6 at 1. Emphasis added.

⁶ JL Pretorius *et al* *Employment Equity Law* (eds) (2001) § 7; CG Ngwena & JL Pretorius 'Code of Good Practice on the Employment of People with Disabilities: an Appraisal' (2003) 24 *Industrial Law Journal* 1816; CG Ngwena 'Equality for People with Disabilities in the Workplace: An Overview of the Emergence of Disability as a Human Rights Issue' (2004) 29 *Journal for Juridical Science* 167; CG Ngwena 'Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative law: Part I (Defining Disability)' (2005) 16 *Stellenbosch Law Review* 210; CG Ngwena 'Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law: Part II (Reasonable accommodation)' (2005) 16 *Stellenbosch Law Review* 534; CG Ngwena 'Deconstructing the Definition of 'Disability' under the Employment Equity Act: Social Deconstruction' (2006) 22 *South African Journal on Human Rights* 622; CG Ngwena 'Deconstructing the Definition of 'Disability' under the Employment Equity

historically disadvantaged and/or vulnerable groups, post-apartheid discourse on equality has, on the whole, been dominated by discourses on race, gender, HIV/AIDS and sexual orientation. To reach a point where we can accord disability adequate hearing in our equality discourses, we must begin by consciousness-raising.⁷ We must begin by exploring and interrogating what disability means, what it means to be a disabled person in South Africa particularly in terms of the socio-economic impact of exclusion and disadvantage, and what equality and human dignity mean for disabled people in terms of juridical obligations on the state and private individuals. In this way, we can, in a participatory manner, begin to contribute towards the development of a jurisprudence that is specifically responsive to disability, and is apt to yield additional insights to the understanding of equality under the South African Constitution as an expansive and transformative universe that does not privilege any protected social group.

If our goal is to transform old paradigms of inequality so that disability is on parity with, say, race, gender or sexual orientation in terms of achieving full and

Act: Legal Deconstruction (2007) 23 *South African Journal on Human Rights* 116; CG Ngwena & JL Pretorius 'Conceiving Disability, and Applying the Constitutional test for Fairness and Justifiability: A Commentary on *IMATU v City of Cape Town*' (2007) 28 *Industrial Law Journal* 747; Marylyn Christianson 'Disability Discrimination in the Workplace' in E Strydom (ed) *Essential Employment Discrimination Law* (2007) 154-188; CG Ngwena 'The New Disability Convention: Implications for Disability Equality Norms in the South African Workplace' in O Dupper & C Garbers *Equality in the Workplace* (2010) 181-203.

⁷ I am borrowing the term 'consciousness-raising' from feminism where it has been employed as a tool for deconstructing a patriarchal society and reconstructing an inclusive society. In feminism, consciousness-raising describes a process of collaborative and interactive engagements between women to tell personal stories of their experiences not only as a politically oppressed group, but even more significantly, as a politically conscious group in a society that is organized around the normalcy of patriarchal dominance; IM Young *Justice and the Politics of Difference* (1990) 153; KT Bartlett 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829, 831, 863-864; CA MacKinnon *Toward a Feminist Theory of the State* (1982) 242. Catherine MacKinnon goes as far as treating consciousness-raising as 'the major technique of analysis, structure of organization, method of practice, the theory of change of the women's movement': CA MacKinnon 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1983) 8 *Signs* 515 at 519. It is important to see consciousness-raising as a methodology that operates beyond the confines of the particular group at the receiving end of oppression as to enter the public realm through the media, politics and, indeed, the law and its institutions: Bartlett *ibid* 864-865.

socio-economic participation, then part of interrogating disability requires us to engage with standpoint epistemology.⁸ As commentators from feminist perspectives have argued,⁹ such an approach is a necessary step in the process of not only understanding the equality claims of disabled people, but also imagining inclusive equality. Apartheid's ideology of racialism, its mechanisms of domination and their deleterious effects on the subordinated and oppressed could not be uncovered and transformed by merely inquiring from the privileged 'race' about its vision of equality and its own alternative to apartheid, if any, in a reconstructed South Africa without risking reactionary formalism. Hearing the voices of the dominated and oppressed 'races' and their vision of equality and human dignity was a necessary democratic enterprise in reforming apartheid in a participatory way.

⁸ I use the term 'standpoint epistemology' in the manner it has been used in feminist discourse to mean not merely the desirability, but more significantly, the necessity of building knowledge and understanding about equality norms through integrating the lived experience of those that have been at the receiving end of exclusionary social practices. In feminism, epistemology is a science for privileging, as reality, women's understandings about the experience and pain of subordination in a world that has hitherto been over-determined by patriarchy: Bartlett (note 7 above) 872. What epistemology does is to supplant the 'objective' viewpoint of the distant observer with the viewpoint of one who is proximal and engaged: Bartlett *ibid* 873. For present purposes, it suffices to adopt, with necessary modification for disability, Abigail Brooks' definition of feminist standpoint epistemology as 'a unique philosophy of knowledge building that challenges us to (1) see and understand the world through the eyes and experiences of oppressed women and (2) apply the vision and knowledge of oppressed women to social activism and social change: A Brooks 'Feminist Standpoint Epistemology: Building Knowledge and Empowerment Through Women's Lived Experience' in SN Hesse-Biber and P Leavy (eds) *An Invitation to Feminist Method* (2007) 53-82 at 55. At the same time as arguing for the use of standpoint epistemology, I am alive to its limitations, not least the limitation of the underpinning assumption that it is possible to ascertain the typical position of the oppressed group: S Harding *The Science Question in Feminism* (1986). I accept that group identities are multi- rather than uni-dimensional, and flux rather than static or essential. Consequently, it would be a distortion to imagine, for example, that there is a typical standpoint or perspective of a woman or a disabled person on a given question. I reinforce this concession about the essentialist limitations of standpoint epistemology in Chapter 3 of this study.

⁹ Bartlett (note 7 above) 872-877; Brooks (note 8 above) 53-82.

Transformation and transformative constitutionalism¹⁰ would be not so much rendered meaningless, but manifestly incomplete for disabled people, if they failed to integrate the standpoint of disabled people in their enterprise. To argue that the voices of disabled people ought to be an essential part of how we construct the universe of equality is not to argue for normative anarchy or separatism. Rather it is to argue, as Iris Young does, that if normative reason is dialogic, then just norms have a better prospect of being inscribed into our political and legal economy if there is more than token interaction between different interest groups, and, especially, if the dominant group is compelled to hear the voice of the marginalised group.¹¹ If democracy means a process of communication across differences, and decision-making to determine collectively the conditions of our lives in the republic, then communicative ethics require that *all* citizens be accorded an opportunity to participate as peers.¹² That way, we are able to avail ourselves of the opportunity to check systemic dominance and subordination.¹³

It bears stressing, though, that to argue for standpoint epistemology is not to assume that only those that are excluded from citizenship have a unique insight into the truth about exclusionary citizenship and the remedial responses. It is not to silence the voice of non-victims on the assumption that they do not know about oppression or to elevate the voices of the victims above reproach so as to render them the only authentic voices. Catherine Bartlett puts it neatly when she says that ‘although victims know something about victimization that non-victims

¹⁰ In Chapter 3, especially, terms ‘transformation’ and ‘transformative constitutionalism’ and their relevance to this study are discussed.

¹¹ Young (note 7 above) 116.

¹² N Fraser *Justice Interruptus* (1997) 173; Young (note 7 above) 101, 106-107; J Habermas *The Theory of Communicative Competence Volume 1: Reason and Rationalization of Society* (1983); J Habermas *The Theory of Communicative Competence Volume 2: Lifeworld and System* (1987).

¹³ Fraser *ibid*; Young *ibid*; Habermas *The Theory of Communicative Competence Volume 1 ibid*; Habermas *The Theory of Communicative Competence Volume 2 ibid*.

do not, victims do not have exclusive access to truth about oppression'.¹⁴ Rather it is to argue for dialogue in the construction of equality so that all stakeholders participate in the making of equality that is grounded in concrete as opposed to abstract reality as to be inclusive.

In a plural society, we must not only become conversant with the social histories of disadvantage and marginalization that have been visited upon disabled people. Equally important, we must critically engage with historically privileged social constructions of disability and determine the extent to which the underpinning assumptions and old power relations between *enabled people*¹⁵ and disabled people are reconcilable with, or oppositional to, the equality imagined by disabled people. That way, we are able to determine the remedies as well as ascertain the distance that has to be travelled in order to fulfil the equality of disabled people.

In both political and legal senses, what Watermeyer and Swartz are also saying in their introduction to *Disability and Social Change* in the quotation cited above is that we have choices when constructing our equality universe. In the final analysis, disability is not an objective term. Rather it is a social construct that is shaped by power relations. In our search for equality, we must be cognizant of the fact that there are not so much best practices for equality but rather competing practices. In the final analysis, subjective choices must be made but within a democratic paradigm. We must begin by conceding that some understandings of disability are more restrictive of equality and human dignity

¹⁴ Bartlett (note 7 above) 875; See also Martha Fineman who addresses the same substantive point but from a perspective of the 'question of representation' in feminism. Fineman's point is that one does not need to be a member of a social group in order to have a view on the experiences including equality aspirations of that group: ML Fineman 'Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship' (1990) 42 *Florida Law Review* 25 at 41-42.

¹⁵ It will be explained in Chapter 3 that, like 'disabled people, 'enabled people' is also a term used to denote a social construction of disability and to mean people whose physical and mental capabilities are assumed, or better still, affirmed by the socio-economic environment.

than others. It makes a substantive difference to our equality and non-discrimination standards whether we treat disability as a private misfortune and the logical outcome of impairments that are visited upon individuals by the force of nature or happenstance – *the individual impairment model of disability*¹⁶ – where the cost of disability is borne by the individual, or whether we treat disability as something that goes beyond individual bodily impairment and misfortune so as to implicate the manner in which our social environment *systematically* assumes certain bodily norms and thus *systematically disables* those we perceive as having an impairment – *the social model of disability*.¹⁷ If we choose the latter, then, disability becomes something that happens to a social group rather than to individuals as a consequence of how our society is organised. Unless we fully accommodate what we perceive to be bodily difference, disability becomes a form of social exclusion and, indeed, oppression. If we accept, as Ronald Dworkin has argued, that in a liberal society each human being is of equal worth and is deserving of equal respect,¹⁸ our response ought to be to desire to effectively eradicate *disablism*,¹⁹ through not only proscribing aversive attitudes, but also bearing the cost of disability.

In the old dispensation, the colonial discourse, and, latterly, the ideology and practice of apartheid assured that race would become the overarching vector of inequality. However, race was, by no means, a lone vector in the creation and sustenance of inequalities. Ensclosed in, or juxtaposed with, apartheid's legal and political economy was a political and legal economy that also created, perpetuated or entrenched other types of inequalities. Gender is a case in point. Patriarchy was entrenched for all racial groups, albeit, differentially, marking

¹⁶ The individual impairment model of disability is explained in Chapter 3, especially.

¹⁷ The social model of disability is explained in Chapter 3, especially.

¹⁸ R Dworkin *Taking Rights Seriously* (1977) 180-183.

¹⁹ I use the term 'disablism' to mean disability-related discrimination. The normative implications of significance of using the term 'disablism' are explained in Chapter 3.

gender inequality, and women as the prime objects of gender oppression. Women's equality rights were a casualty on account of systemic subordination. For African women, especially, there were intersecting vectors of inequality. Racial discrimination and the paterfamilial traditions of African customs operated as a double yoke. Furthermore, the racialised and distorted type of legal pluralism spawned by the colonial project compounded the gender oppressive effects of African customs.²⁰ Indeed, the distortive effect of colonially moulded African customary norms on property rights, for example, received its highest judicial recognition in *Bhe v Magistrate, Khayelitsha and Others*, where the Constitutional Court echoed Thandabantu Nhlapo in saying:

The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when in the pre-colonial context, everybody under the household was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women.

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²⁰ F Kaganas & C Murray 'Law and Women's Rights in South Africa' in T Bennett *et al* (eds) *Acta Juridica* 1; Y Mokgoro 'Constitutional Claims for Gender Equality in South Africa: A Judicial Response' (2003) 67 *Albany Law Review* 565; T Nhlapo 'African Customary Law in the Interim Constitution' in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 157-166; A McClintock "'No Longer in Future Heaven": Women and Nationalism in South Africa' (1991) 51 *Transition* 104 at 113.

²¹ *Bhe v Magistrate, Khayelitsha and Others* (Commission for Gender Equality as *amicus curiae*), *Shibi v Sithole and Others*, *SA Human Rights Commission v President of the Republic of South Africa and Another* 2005 (1) BCLR 1 (CC) para 89; Nhlapo (note 20 above) 162. See also: *Gumede v President of the Republic of South Africa and Others* (2008) ZACC 23, para 17 where the Constitutional Court said: Whilst patriarchy had always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality...it [patriarchy] was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated customary law of marriage'. On colonial and Apartheid misrepresentation of African customary law, see also: A Claassens 'Women Customary Law and Discrimination: The Impact of the Communal Land Rights Act' in C Murray & M O'Sullivan (eds) *Advancing Women's Rights* (2005) 42-81, 48-51.

Thus, colonial and apartheid legal discourses served to reinforce, but also construct patriarchal cultural traditions resulting for millions of women in overlapping vectors of oppression. The overlap between apartheid and gender inequality often reduced African women to the position of minors in public and private spaces. The outcome was significant impediment in access to socio-economic spheres and the feminisation of poverty, with rural black women faring the worst.²²

Sexual citizenship was another domain of attenuated equality.²³ Sexuality was heavily policed not only across the racially demarcated boundaries,²⁴ but also across sexualities.²⁵ As part of racialising citizenship, 'unlawful carnal intercourse between a white person and a member of any other racial group' was criminalised.²⁶ Heterosexuality was the privileged norm, with 'sodomy' officially

²² Nhlapo (note 20 above) 157, 159-163.

²³ D Bell & J Binnie 'Sexual Citizenship: Law, Theory and Practice' in J Richardson & R Sandland (eds) *Feminist Perspectives on Law & Theory* (2000) 167-186.

²⁴ Jeremy Martens is right in noting that, contrary to what is conveyed in many commentaries, the prohibition of sexual intercourse between white and black people did not start with the Immorality Amendment Act No 21 of 1950, but rather with the Immorality Act No 5 of 1927: J Martens 'Citizenship, Civilization and the Creation of South Africa's Immorality Act, 1927' (2007) 59 *South African Historical Journal* 223 at 225.

²⁵ Section 20A of the Sexual Offences Act No 23 of 1957 and the common law crime of sodomy criminalised sex between males. Sex between males also attracted additional sanctions under various pieces of legislation, including a schedule to Criminal Procedure Act of No 51 of 1977 and a schedule to the Security Officers Act No 51 of 1987; *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC).

²⁶ Commentators have advanced different reasons for the criminalisation of inter-racial sex. Some have argued that the criminalisation of inter-racial sex was part of 'scientific racism' and, as such, a response to the threat of miscegenation and 'race hybridisation' that would contaminate 'white civilization'. Others see the criminalisation as a constituent part of shoring up white supremacy though maintaining notions of 'middle-class respectability' that included not breaching racial boundaries and, thus, not undermining racial hierarchy, respect and dominance: Martens (note 25 above); S Dubow *Scientific Racism in Modern South Africa* (1995) 180-190; A Stoler *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things* (1995) 104-106. A McClintock *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* (1995); For a discussion on 'respectability' as a behavioural norm in racism, sexism, homophobia and other prejudices, see Young (note 7 above) 136-141.

tainted with 'deviance and perversion'.²⁷ However defiant, gay men realised their sexuality at the margins of society, in secrecy and fear and as 'unapprehended felons'.²⁸ The list of cross-cutting and overlapping vectors of inequality is long and includes relatively more recent vectors such as HIV/AIDS where authoritarianism, racism and homophobia shaped early government policy and legal responses.²⁹ When glimpsing at the past, it suffices to note that prior to the new constitutional dispensation, the construction of difference so as to exclude other groups from full citizenship, went beyond racial groups to include several other groups of which disabled people were one.

To say that disabled people were a marginalised group in the old dispensation is, however, not to claim that disabled people were somehow a novel creation of colonialism or apartheid. Rather, it is to highlight that equality for disabled people is not a new need. At the same time, it would be remiss to overlook apartheid's own imprint on the creation and accentuation of disability. As an all encompassing social engineering project, apartheid applied in equal measure to disabled people so as to maintain racial dichotomies between, and hierarchies among, disabled people.³⁰ Disabled people attest, for example, to a state disability grant system that faithfully adhered to the imperatives of apartheid's racial pyramid, with 'White' disabled people receiving the highest amount,

²⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* (note 25 above) para 23.

²⁸ M Gevisser & E Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (1995); E Cameron 'Sexual Orientation and the Constitution: A test Case for Human Rights' (1993) 110 *South African Law Journal* 450 at 455; *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* (note 25 above) para 23.

²⁹ CG Ngwena 'Legal Responses to AIDS: South Africa' in S Frankowski *Legal Responses to AIDS in Comparative Perspective* (1998) 117-167, 125-131; L Grundlingh 'Government Responses to HIV/AIDS as Reported in the Media 1983-1994' (2001) 45 *South African Historical Journal* 124; CG Ngwena 'Responses to AIDS and Constitutionalism (2003) 24 *Obiter* 299 at 305-306.

³⁰ C Howell, S Chalklen & T Alberts 'A History of the Disability Rights Movement in South Africa' in B Watermeyer *et al* (eds) 'Introduction and Overview' in *Disability and Social Change: A South African Agenda* 46-84, 48; South African Human Rights Commission *Towards a Barrier-Free Society* (2002) 11.

'Africans' the lowest and 'Coloureds' and 'Indians' an amount somewhere in between.³¹ The extreme socio-economic disparities between black and white meant that the repercussions of disability would be commensurately experienced along colour lines, with the poorer black group bearing highest costs. The apartheid superstructure also meant that knowledge and experience about disability by, for example, the health care and rehabilitation systems privileged the cultural knowledge and experience of professionals who were not necessarily aware of, or even empathic about, the life and welfare of black disabled people. Kathryn Jagoe captures apartheid's racial imprint on disabled people in the following way:

We have additional problems in South Africa: extreme overcrowding of black hospitals, insufficient training in basic nursing techniques related to long term disabilities, the inappropriateness of knowledge and experience of White therapists taught in "white" medical schools working in "black" hospitals, and the environment of the majority of black people. For example, of what use is it to learn to transfer sideways from a wheelchair to an accessible toilet if you only have a corrugated iron privy in the back yard into which you can't get a wheelchair. But how many white therapists have intimate knowledge of that community? We are separated, by color, from the time we are born, yet they are supposed to teach their "patients" useful skills.³²

The propagation of racial supremacy apart, apartheid-related violence had a hand in creating disabilities. Violence to shore up apartheid as well as violence to counter it created their fair share of physical impairments and disabilities.³³ But

³¹ K Jagoe 'The Disability Rights Movement: Its Development in South Africa'. Available at <<http://www.independentliving.org/toolsforpower/tools6.html>> (last accessed on 26 January 2005). The use of 'Africans', 'Coloureds', 'Indians' and 'Whites' to denote racial groups under apartheid is explained in Chapter 2.

³² Jagoe *ibid*; S Berry 'Overview of Awareness Raising about Disability in South Africa'. Available at < http://www.riglobal.org/publications/media_report/barry.html> (last accessed on 13 August 2008).

³³ For example, the demonstrations in June 1976 by black youth against the compulsory introduction of Afrikaans in 'African' schools were quelled by maximum state force, including

leaving aside apartheid's own imprint on disability, the historical marginalisation of disabled people in South Africa can be said to be unexceptional to the extent that it generally mirrors the experience of disabled people in other parts of the world and the developing world, especially. From a post-apartheid transformative perspective, notwithstanding that the lives of disabled people under apartheid conformed to a racial pyramid, the more salient point to grasp, as Colleen Howell *et al* emphasise, is that all disabled people, black and white, were marginalised.³⁴ All had very limited access, however, differential, to social goods such as employment, education, health services and welfare services.³⁵ It is vitally important, therefore, to ensure that the new constitutional dispensation becomes a transformative vehicle not only for marginalised 'races', genders or sexualities, but also for other less visible social groups with equally compelling equality needs such as disabled people.

3 DISABLED PEOPLE AS A GLOBALLY MARGINALISED GROUP

The marginalisation of disabled people is a universal experience. The recent adoption of the Convention on the Rights of Persons with Disabilities underscores both the global nature of disability-related discrimination, as well as the urgency of protecting and promoting equality for disabled people. South Africa was one of the countries that avidly supported the adoption of the

live ammunition, resulting many youths being shot dead or being left maimed and disabled. After discharge from hospital, many such disabled youths found themselves without any meaningful access to rehabilitation services or employment, and were later to form self-help disability groups as part of reclaiming their dignity: J Nkeli 'How to Overcome Double Discrimination of Disabled People in South Africa' (1998). Available at <<http://www.independentliving.org/docs1/hr5.html>> (last accessed on 28 July 2005); W Rowland *Nothing About Us Without Us* (2004) 7; Howell *et al* (note 30 above) 50. See also Chapter 2 of this study, § 2.3.

³⁴ Howell *et al* (note 30 above) 48.

³⁵ *Ibid.*

Convention.³⁶ South Africa has signed and ratified the Convention as well as the Optional Protocol to the Convention, thus, evincing a clear intention to be bound by the duties imposed by the Convention.³⁷ In any event, irrespective of any signing or ratification, the South African Constitution requires courts to consider international law when interpreting constitutional provisions.³⁸ A sense of the Convention's equality orientation is, therefore, an important and essential aid to thinking constitutionally about disability and ultimately constructing normative responses to unmet equality needs at the domestic level.

3.1 Convention on the Rights of Persons with Disabilities

On 13 December 2006, the United Nations (UN) adopted the Convention on the Rights of Persons with Disabilities.³⁹ On 3 May 2008,⁴⁰ the Convention, and the Optional Protocol to the Convention, which opened for signature on 30 March 2007, came into force after the 20th ratification. In its preamble, the Convention acknowledges fulsomely the plight of disabled people as a globally marginalized group. By way of a response, the Convention, through a rights-based approach, seeks to make a significant contribution towards redressing the profound social

³⁶ Address by Dr EG Pahad, Minister in the Presidency, Republic of South Africa, at 'Towards a Barrier Free Europe for Citizens with Disabilities' Expert Meeting, 25-27 April 2001, Linkoping Concert Hall, Sweden, 25 April 2001. Available at <<http://www.info.gov.za/speeches/2001/0106061245p1001.htm>> (last accessed on 28 July 2005).

³⁷ South Africa signed the Convention and the Optional Protocol to the Convention on 30 March 2007 and ratified the same on 30 November 2007: <http://www.un.org/disabilities/countries.asp?navid=17&pid=166> (last accessed on 25 July 2010). In § 3.2 (below) the status of international law in South Africa is briefly discussed.

³⁸ Section 39(1)(b) of the Constitution.

³⁹ UN Resolution A/RES/61/06; Convention on the Rights of Persons with Disabilities. Available at <<http://www.un.org/disabilities/default.asp?navid=12&pid=150>> (last accessed on 27 May 2008).

⁴⁰ Secretary General Welcomes Entry into Force of Convention on the Rights of Persons with Disabilities and its Optional Protocol. Available at <<http://www.un.org/News/Press/docs/2008/sgsm11494.doc.htm>> (last accessed on 2 January 2007).

disadvantage of disabled people and promoting their equal participation and opportunities in the civil, political economic, social and cultural spheres.⁴¹

When compared with other historically marginalised groups such as racial or ethnic minorities⁴², women⁴³, or children,⁴⁴ for whom the UN General Assembly has long adopted dedicated binding instruments,⁴⁵ the Convention is certainly an overdue recognition that disabled people are quintessentially a historically disadvantaged group that is entitled to equal efforts and attention in the protection and promotion of human rights. It is hard to overlook the momentous nature of the Convention in providing, for the first time ever, a binding treaty that is dedicated to global protection of the human rights of disabled people.⁴⁶ Until the adoption of the Convention, article 23 of the Convention on the Rights of the Child remained the only disability-specific provision in a UN treaty. The Convention marks the culmination of a global struggle to raise global consciousness about disability and to transform disability from a paradigm of welfare and rehabilitation, as was the orientation with the early UN declarations on disability, to a universal rights-based approach with equality at its centre.

⁴¹ Preamble to the Convention.

⁴² Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature, ratification, and accession by the General Assembly resolution 2106 (XX) of 21 December 1965 and entered into force on 4 January 1969.

⁴³ Convention on the Elimination of All Forms of Discrimination against Women. Adopted and opened for signature, ratification, and accession by the General Assembly resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981.

⁴⁴ Convention on the Rights of the Child. Adopted and opened for signature, ratification, and accession by the General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

⁴⁵ T Degener & G Quinn 'A Survey of International, Comparative and Regional Disability Law Reform' in Breslin MI & Yee S (eds) *Disability Rights Law and Policy* (2002) 3-125 at 17-19; AS Kanter 'The Globalization of Disability Rights Law' (2003) 30 *Syracuse Journal of International Law and Comparative Law* 241 at 265-266; Ngwena 'Equality for People with Disabilities in the Workplace' (note 6 above) 173-178; L Manderson 'Disability, Global Legislation and Human Rights' (2004) 47 *Development* 29.

⁴⁶ Prior to the Convention on the Rights of Persons with Disabilities, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities A.G. Res. 1608, 29th Sess., O.E.A. Doc. OEA/Ser. P AG/doc.3826/99 (1999), a regional treaty, was the only dedicated treaty on disability.

In the early years, especially, the disability orientation of UN revolved around prevention and rehabilitation of impairments. This is illustrated, for example, by the adoption by the Economic and Social Council of the United Nations in the 50s of programmes on 'Social Rehabilitation of the Physically Handicapped' and 'Social Rehabilitation of the Blind'.⁴⁷ In the 70s, the UN began to modify its orientation and shift towards a human rights approach. It adopted the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons to address disability as a human rights concern.⁴⁸ However, though the UN declarations were intended to mark a shift from a focus on welfare and rehabilitation to a human rights-based approach,⁴⁹ they, nonetheless, failed to capture the role played by society in creating disability. The origins of disability were still posited as primarily residing in the physical body.

A major limitation with the UN declarations was in conceiving disability as individual impairment that is disconnected from the physical and social environment.⁵⁰ The focus was on rehabilitating the disability and the disabled person to render the affected person as 'whole' as possible so that they could fit into the existing *normal* environment. The declarations had no real insight into

⁴⁷ 'The United Nations and Disabled Persons - The First Fifty Years'. Available at <<http://www.un.org/esa/socdev/enable/dis50y20.htm>> (last accessed on 27 August 2008); MS Stein 'Disability Human Rights' (2007) 95 *California Law Review* 75, 88.

⁴⁸ The Declaration on the Rights of Mentally Retarded People (1971) United Nations General Assembly Resolution 2856 of 1971; and the Declaration on the Rights of Disabled Persons (1971), United Nations General Assembly Resolution 3447 of 1975: Degener & Quinn (note 45 above) 12; Kanter 'The Globalization of Disability Rights Law' (note 45 above) 253-254; Ngwena 'Equality for People with Disabilities in the Workplace' (note 6 above) 173.

⁴⁹ G Quinn & T Degener *Current Use and Future Potential of the United Nations Human Rights Instruments in the Context of Disability*, Chapter 2. Available at <<http://www.sre.gob.mx/discapacidad/paperunhchr02.htm>> (accessed 4 May 2005).

⁵⁰ For example, the Declaration on the Rights of Disabled Persons defined the term 'disabled person' as 'any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities': Ngwena 'Equality for People with Disabilities in the Workplace' (note 6 above) 173-174; Kanter 'The Globalization of Disability Rights Law' (note 45 above) 254.

the normative importance of bringing under the spotlight, the physical and social environment as a major disabling factor. The declarations were conspicuously assimilationist in that they sought to treat everyone by the same rules with a view to integrating disabled people into a supposedly 'normal life'.⁵¹ Doing little to accommodate diversity but insisting on the ideal of equality as sameness and the elimination of all differences is, paradoxically, repressive as it serves to give legitimacy to ableist institutions⁵² and behaviour and thus maintain the status quo.

The 80s and 90s laid the building blocs for a substantive equality approach towards disability. This period saw the UN gradually abandon an assimilationist approach to remedying disability to become receptive towards a more expansive notion of equality for disabled people. In 1982, the General Assembly adopted the World Programme of Action Concerning Disabled Persons⁵³ which in turn was to guide the UN Decade of Disabled Persons (1983-1992).⁵⁴ The cardinal goal under the World Programme of Action was securing 'equal opportunities' for disabled people. For the first time in a UN initiative, the term 'equality of opportunities' was conceived as 'the process through which various systems of society such as the physical and cultural environment, housing, and transport, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, *are made accessible to all*'.⁵⁵ Implicating the social and economic environment as barriers and requiring

⁵¹ For example, over and above using the term 'retarded' that clearly draws a boundary between what is 'normal' and what is 'abnormal' and has the capacity to stigmatise, insult, and lower equality expectations, the Declaration on the Rights of Mentally Retarded Persons, inter alia, sought to promote the 'integration as far as possible in normal life' of mentally retarded persons.

⁵² It will be explained in Chapter 3 that I am using 'ableist' to mean socio-economic arrangements that cater for people that are not disabled.

⁵³ United Nations General Assembly Resolution 37/52 of 3 December 1982; Degener & Quinn (note 45 above) 12; Ngwena 'Equality for People with Disabilities in the Workplace' (note 6 above) 175.

⁵⁴ United Nations General Assembly Resolution 37/52 of 3 December 1982; Degener & Quinn (note 45 above) 12; Ngwena 'Equality for People with Disabilities' (note 6 above) 175.

⁵⁵ United Nations General Assembly Resolution 37/52 of 3 December 1982. Emphasis added.

universal accessibility was an important psychological shift towards the acknowledgment of human diversity and the imperative of providing accommodation as a positive duty. It constituted a significant departure from the construction of normative responses to disability solely around a narrow conception of disability as physical or mental impairment residing in the individual.

Another important development in the 80s and 90s was the attempt to move towards the adoption of a global treaty dedicated to protecting the human rights of disabled people. In 1987, at a meeting of experts convened by the UN to review the implementation of the World Programme of Action, it was recommended that a treaty be drafted to protect the human rights of disabled people.⁵⁶ In the same year and in 1989, Italy⁵⁷ and Sweden⁵⁸ respectively proposed, to the General Assembly, the adoption of a treaty to protect the rights of disabled people.⁵⁹ The proposals failed to muster support for the reason that most Member States were of the view that a special treaty was not necessary and that the rights and interests of disabled people were adequately catered for by existing instruments.⁶⁰ In 1993, as a compromise or halfway measure, the General Assembly adopted the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (Standard Rules).⁶¹

⁵⁶ 'The United Nations and Persons with Disabilities Chronology: 1980's - Present'. Available at < <http://www.un.org/disabilities/default.asp?id=125>> (last accessed on 27 August 2008).

⁵⁷ UN document A/C.3/42/SR.16.

⁵⁸ UN document A/C.3/44/SR.16.

⁵⁹ Ngwena 'Equality for People with Disabilities in the Workplace' (note 6 above) 176-177; Kanter 'The Globalization of Disability Rights Law' (note 45 above) 263-264.

⁶⁰ D Michailakis 'The Standard Rules: A Weak Instruments and a Strong Commitment' in M Jones & LA Bassar Marks (eds) *Disability, Divers-Ability and Legal Change* (1999) 119-130 at 120.

⁶¹ United Nations General Assembly Resolution 48/96 of 20 December 1993 'Standard Rules on the Equalisation of Opportunities for Persons with Disabilities'; Michailakis (note 60 above) 119-130, 120; Degener & Quinn (note 45 above) 13-14; Ngwena 'Equality for People with Disabilities in the Workplace' (note 6 above) 176.

The ground for the equality orientation of the Standard Rules was paved by the World Programme of Action.⁶² Equalisation of Opportunities under the Standard Rules principally means removing barriers so as to ensure that impairments do not disable. The equality duty upon Member States was to ensure that ‘the various systems of society and the environment, such as services, activities, information and documentation are made available to all, particularly persons with disabilities’.⁶³ But while the Standard Rules, unlike the earlier UN declarations, signalled the advent of an approach to disability as a substantive equality issue that does not problematise the impairment, but, instead, implicates the physical and social environment,⁶⁴ the Rules were, nonetheless, a mere resolution of the UN and not part of an international treaty. Whilst the Standard Rules provided Member States with sector-related guidance about implementing equality for disabled people,⁶⁵ and contained a monitoring mechanism,⁶⁶ nonetheless, compliance on the part of the state was voluntary. At best, the Standard Rules were exhortatory ‘soft law’ as their efficacy depended on the beneficence of each member state.⁶⁷

Against this backdrop, the Convention, which was proposed by Mexico in 2001,⁶⁸ and which, in part, is the outcome of advocacy and active participation by

⁶² Michailakis (note 60 above) 120; Degener & Quinn (note 45 above) 14.

⁶³ Standard Rules (note 61 above) para 24.

⁶⁴ Kanter ‘The Globalization of Disability Rights Law’ (note 45 above) 256-257; C Baylies ‘Disability and the Notion of Human Development: Questions of Rights and Capabilities’ (2002) 17 *Disability & Society* 725, 728; Ngwena ‘Equality for People with Disabilities in the Workplace’ (note 6 above).

⁶⁵ Standard Rules 2 to 12 (note 61 above), respectively, provide guidance for the following prescribed sectors: medical care; rehabilitation; support services; accessibility; education; income maintenance; and social security, family life and personal integrity; culture; recreation and sports; and religion.

⁶⁶ Standard Rules (note 61 above), provide for monitoring by a Special Rapporteur of the Commission for Social Development: Part IV, para 2 of the Standard Rules.

⁶⁷ Ngwena ‘Equality for People with Disabilities in the Workplace’ (note 6 above) 176.

⁶⁸ By Resolution 56/168 of 19 December 2001, the General Assembly established an Ad Hoc Committee to consider proposals for a comprehensive convention to protect the rights and dignity of persons with disability. The Ad Hoc Committee met on a number of occasions to

disabled people,⁶⁹ constitutes a milestone. In describing the Convention as a milestone, however, the argument is not that the human rights of disabled

consider proposals. In February 2005, it agreed on a draft convention – the Draft Comprehensive and Integral Convention on the Protection of the Rights and Dignity of Persons with Disabilities: Available at <<http://www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm>> (last accessed on 2 January 2007). On 25 August 2006, members of the United Nations General Assembly reached consensus on adopting a treaty to protect the rights of people with disabilities – the Draft Convention on the Rights of Persons with Disabilities with on 13 December became the Convention on the Rights of Persons with Disabilities. Available at <<http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>> (last accessed on 21 August 2008). The proposal by Mexico for a convention must also be understood against the backdrop of a summit of non-governmental organizations that was convened in March of 2000 in Beijing at which wide international support for a convention dedicated to disability was mustered. The outcome of the summit was the Beijing Declaration on the Rights of People with Disabilities in the New Century that was adopted on 12 March 2000 by the World Summit on Disability. Available at <<http://www.dinf.ne.jp/doc/japanese/intl/z00021/z0002101.html>> (last accessed 21 August 2008); Kanter ‘The Globalization of Disability Rights Law’ (note 45 above) 264. Also, it is interesting to note that in 1999, Rehabilitation International, a global alliance of disabled people’s organizations and experts that seeks to promote and protect the rights of disabled persons, resurrected international interest in a disability-specific convention when it launched its ‘RI Charter for the Third Millennium’, which calls on Member States on UN to support the early promulgation of a UN Convention on the Rights of People with Disabilities. Available at <<http://www.dinf.ne.jp/doc/english/asia/resource/z00ap/vol5no2/united.htm>> (last accessed on 21 August 2008). See also: A O’Reilly (Past President, Rehabilitation International) ‘A UN Convention on the Rights of Persons with Disabilities: The Next Steps’. Paper presented at the General Assembly Meeting of Rehabilitation International Arab Region, 8-9 March 2003, Kingdom of Bahrain. Available at <http://www.disabilityworld.org/01-03_03/news/unconvention.shtml> (last accessed on 25 August 2008).

Furthermore, as is acknowledged in the General Assembly Resolution on the Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, Resolution 56/168 of 19 December 2001, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa 31 August to 8 September 2001, was another catalyst, when in paragraph 180 of its Declaration, it recommended that the General Assembly consider a comprehensive convention to protect the human rights of disabled persons and protection against discriminatory practices and treatment: Available at <<http://www.unhcr.ch/pdf/Durban.pdf>> (last accessed on 22 August 2008).

⁶⁹ As many commentators have remarked that the making of the Convention, including the drafting of its text, took participatory democracy seriously. The Convention departs from previous United Nations declarations and soft law that were conceived without the deliberation and active participation of disabled people. The General Assembly Resolution that established an Ad Hoc Committee to consider proposals for a convention to promote and protect the human rights of disabled persons, inter alia, expressly invited civil society organisations to be part of the process: Resolution on the Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, Resolution 56/168 of 19 December 2001. The Working Group that was established by the Ad Hoc Committee to prepare and present a draft text, included disabled persons and representative organisations of disabled persons as part of civil society component of the Working Group, alongside representatives of Member States, and national human rights institutions: A Dhanda ‘Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disability’ (2008) 5(8) *Sur: International Journal*

people were not covered at all by previous human rights instruments and that the Convention is the first to do so. It was always understood, for example, that the term 'other status' in the equality clauses of the International Covenant on Civil and Political Rights (ICCPR)⁷⁰ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁷¹ implicitly included disability as a protected category.⁷² Rather, the argument is that global awakening about substantive equality for disabled people as a human right was slow in coming.⁷³

on *Human Rights* 43-59 at 52-53; AS Kanter 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities' 34 *Syracuse Journal of International Law & Commerce* 287, 288, 294; D MacKay 'The United Nations Conventions on the Rights of Persons with Disabilities' (2007) 34 *Syracuse Journal of International Law & Commerce* 323 at 327-328; A Lawson 'The United Nations Conventions on the Rights of Persons with Disabilities: New Era or False Dawn' (2007) 34 *Syracuse Journal of International Law & Commerce* 563 at 588-589; R Kayess & P French 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1 at 3-4; 'Ad Hoc Committee on a Comprehensive and Integral Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Available at <<http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>> (last accessed on 22 August 2008); B McSherry 'The United Nations Convention on the Rights of Persons with Disabilities' (2008) 16 *Journal of Law and Medicine* 17, 18. Equally, from a participatory democracy standpoint, it is significant that the Convention provides that civil society and disabled persons and their representative organisations shall be involved and participate fully in the monitoring of compliance with the Convention at state level: Article 33(3) of the Convention. Furthermore, article 43(3) the Convention provides that when nominating candidates for the Committee on the Rights of Persons with Disabilities, State Parties shall give regard to the principle in article 4(3) of the Convention, namely, the principle of consulting with and actively involving disabled persons through their representative organisations: MS Stein & JE Lord 'Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities' (2007) 13 *Texas Journal on Civil Liberties & Civil Rights* 167 at 177-178.

⁷⁰ Articles 2(1) and 26 of the ICCPR prohibit discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*'. Emphasis added. This formulation was in turn derived from article 2 of the Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

⁷¹ Article 2(2) of the ICESCR uses the same formulation as Articles 2(1) and 26 of the ICCPR to prohibit discrimination.

⁷² Ngwena 'Equality for People with Disabilities in the Workplace' (note 6 above) 173; F Mégret 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 *Human Rights Quarterly* 494-516 at 502. In General Comment 5, the Committee on Economic, Social and Cultural Rights took cognizance of the omission to explicitly include disability in the equality clauses of the ICCPR and ICESCR and took the opportunity to say that 'or other status' in these instruments 'clearly applies to discrimination on the grounds of disability': Committee on Economic, Social and Cultural Rights, General Comment 5, UN ESCOR, 1994, Doc No E/1995/22, para 5.

⁷³ UN Document A/C.3/42/SR.16; Degener & Quinn (note 45 above) 13; Michailakis (note 60 above) 120; Kanter 'The Globalization of Disability Rights Law' (note 45 above) 256; Ngwena

The oversight on the part of global human rights instruments such as the ICCPR and ICESCR to formulate equality provisions that explicitly include disability suggests a lack of awareness of the equality needs of disabled people by the drafters rather than an intention that disability be implied.⁷⁴ This omission, taken together with resistance by the General Assembly against a dedicated convention, contributed to rendering invisible the urgency of acknowledging as well as remedying the historical marginalisation of disabled people.⁷⁵ And even more significantly, failure by the earlier human rights instruments to capture in their bland formulations of equality and discrimination the particular experience of disabled people as a group that, more often than not, requires accommodation in order to enjoy equal rights and opportunities, left difference and the imperatives of accommodating difference as part of normative inclusion in a plural and democratic society, unarticulated. The experience of disabled people as a structurally excluded group with different, though not special, needs from the enabled population had been left to extrapolation and at the mercy of the imagination of the interpreter. The Convention is momentous in that it does not leave matters to chance. It is a milestone because it is the first conscious design and implementation of a human rights instrument that textually overcomes the invisibility of disability.⁷⁶

'Equality for People with Disabilities in the Workplace' (note 6 above) 173-178; A Hendricks 'UN Convention on the Rights of Persons with Disabilities' (2007) 14 *European Journal of Health Law* 273; Dhanda (note 69 above) 44.

⁷⁴ In General Comment 5, para 6 (note 72 above) the Committee on Economic, Social and Cultural Rights subscribed to this view.

⁷⁵ Dhanda (note 69 above) 44.

⁷⁶ Kayess & French (note 69 above) 12.

3.2 Equality Orientation of the Convention: An Overview

The Convention on the Rights of Persons with Disabilities recognises difference⁷⁷ and seeks to capture, in substantive terms, the normative inclusion of disabled people in the equality universe. Whilst the human rights provided in the Convention enjoy parity and do not subscribe to a hierarchical order, it is, nonetheless, patently clear that the goal of securing equality and human dignity for disabled people is the glue that holds the Convention together. Equality is the Convention's motif. The chief purpose of the Convention is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.⁷⁸ It is through understanding what equality means under the Convention that we are able to appraise the potential contribution that the discrete but interconnected duties that are imposed upon States Parties by the Convention can make towards departing from the bodily apartheid of old, and constructing an inclusive society in which day-to-day social and economic arrangements are consciously rendered accessible towards disabled people so as to facilitate participation as peers rather than subordinates.

The Convention's focus on equality and human dignity is neither surprising nor fortuitous. The statement at the beginning of this chapter from Kofi Annan,⁷⁹ in which the then Secretary General of the United Nations heralds the advent of the Convention, suggests that, historically, disabled people have been denied both equality and human dignity. Brian Doyle has described the global historical plight of disabled people as one of a minority group sandwiched between two

⁷⁷ Para (i) of the Preamble to the Convention; Article 3(d) of the Convention.

⁷⁸ Article 1 of the Convention.

⁷⁹ Note 1 above.

unenviable extremes.⁸⁰ At one extreme, it is a minority that is at the receiving end of social neglect and unfair discrimination. At the other extreme, it is a minority that can be the object of imposed charity, social welfare and undue paternalism that, in turn, keeps disabled people in a perpetual cycle of dependence and social inferiority.⁸¹ The focus on equality and human dignity, thus, serves to affirm the rights that disabled people have been historically denied as well as to highlight the urgency of eliminating unfair discrimination. The Convention requires respect for difference and acceptance of disabled people as part of human diversity.⁸²

Globally, disability-related discrimination is a well documented bane.⁸³ Disability has been, and continues to be a major impediment to the realisation of equal opportunities. In General Comment 5, when enunciating the obligation of States Parties to eliminate discrimination on the basis of disability, the Committee on Economic, Social and Cultural Rights (CESCR) took cognisance of the endemic nature of disability discrimination. It said:

Both de jure and de facto discrimination against persons with disability have a long history. They range from invidious discrimination such as denial of educational opportunities to more “subtle” forms of discrimination such as segregation and isolation achieved through the imposition of physical and social

⁸⁰ BJ Doyle *Disability Discrimination and Equal Opportunities: A Comparative Study of the Employment Rights of Disabled Persons* (1995) 1.

⁸¹ *Ibid.*

⁸² Article 3(d) of the Convention.

⁸³ United Nations, *Economic and Social Council. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and Disability*, UN Doc. E/CN.4/Sub.2/1991/31. The report was prepared by L Despouy, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The report also appears as: L Despouy *Human Rights and Disabled Persons* (1993); T Degener (ed) *Human Rights and Disabled Persons* (1995); General Comment 5 (note 72 above) para 1; TE Rickard ‘Indices of Employer Prejudice Towards Disabled Applicants’ (1963) 47 *Journal of Applied Psychology* 52; J Ravaut *et al* ‘Discrimination Towards Disabled People Seeking Employment’ (1992) 35 *Social Science & Medicine* 951; AH Nuefeldt & R Mathieson ‘Empirical Dimensions of Discrimination Against Disabled People’ (1995) 1 *Health and Human Rights* 174.

barriers....Through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities.⁸⁴

The CESCR further underlined the global nature of disability discrimination when it observed that while the means chosen to promote full realisation of the economic, social, and cultural rights of disabled people might differ significantly from country to country, nonetheless, there was no single country in which a huge policy and programmatic effort was not required.⁸⁵ In this sense, even countries that have high standards of living are as much in need of realising equal opportunities for disabled people as poor countries.

In thinking about disability and equality, it would be simplistic, of course, to attribute the historical disadvantage and marginalisation of disabled people entirely to a single factor – unfair discrimination – rather than a multiplicity of interconnected factors. Nonetheless, it cannot be gainsaid that unfair discrimination has been a major causative or compounding factor, and that the law has an essential, though not exclusive, role to play in eliminating unfair discrimination. As will be apparent from the observation made by the CESCR in General Comment 5,⁸⁶ discrimination against disabled people is not just a question of aversive attitudes. Even more significantly, it is about unyielding or indifferent socio-economic environments. When constructing constitutional and legislative responses to disability-related discrimination, it is crucial for domestic jurisdictions to bear in mind, as advocates of the social model of disability have

⁸⁴ General Comment No 5 (note 72 above) para 15. See also Committee on the Elimination of Discrimination Against Women General Recommendation No 18 *Disabled Women* (1991) where the Committee took cognizance of the fact that disabled women suffer ‘double discrimination’ and recommended the adoption by state parties of ‘special measures to ensure that they (disabled women) have equal access to education and employment, health services and social security and to ensure that they can participate in all areas of social and cultural life’.

⁸⁵ General Comment No 5 (note 72 above) para 8.

⁸⁶ *Ibid* para 15.

argued,⁸⁷ that though aversive attitudes are part of the manner in which disabled people experience discrimination, the more intractable form of discrimination that the law must concomitantly address is that which takes the form of systematic and egregious exclusion from a world whose social, cultural and economic arrangements have been constructed on an implicit assumption that everyone conforms to a certain biological norm. Thus, it is the apartheid type of exclusion – a social and economic environment that segregates and isolates disabled people – that should be the target of equality efforts even more so than invidious discrimination. To an extent, the Supreme Court of Canada attempted to capture this form of discrimination when, in the course of adjudicating a disability-related unfair discrimination claim under s 15 of the Canadian Charter of Rights and Freedoms,⁸⁸ it said:

Exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. *Rather, it is the failure to make reasonable accommodation to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.* The discrimination inquiry which uses “the attribution of stereotypical characteristics” reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her environment. It is

⁸⁷ M Oliver *The Politics of Disablement* (1990); M Oliver *Understanding Disability: From Theory to Practice* (1996); C Barnes ‘A Working Social Model? Work and Disability Politics in the 21st Century’ (2000) 20(4) *Critical Social Policy* 441; Ngwena ‘Deconstructing the Definition of ‘disability’ under the Employment Equity Act: Social Deconstruction’ (note 6 above) 630-641. The meaning and implications of the social model are followed up in subsequent chapters.

⁸⁸ Chapter 11 of 1982.

recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.⁸⁹

Unless disability-related discrimination is juridically conceived as including failure to accommodate the equality needs of disabled people, then any anti-discrimination response will be incomplete as it will leave much of the historical exclusion of disabled people from economic spheres especially untouched. Failure to accommodate means disability will forever remain trapped in 'otherness'⁹⁰ and thus not be transformed into relational difference in an inclusive society that is committed to socio-economic justice for all. For this reason, it is all the more significant that the new Convention attempts to be responsive to systemic inequality by conceiving lack of *reasonable accommodation* as a form of discrimination.⁹¹

Framing equality as including the duty to accommodate disabled persons opens the door to thinking about equality innovatively and expansively. It opens the door to thinking not just about cultural recognition but also economic recognition of disabled people.⁹² The explicit provision of a duty to accommodate constitutes a shift from the blandness of 'one size fits all'

⁸⁹ *Eaton v Brant Country Board of Education* [1997] 1 SCR 241, para 67. Emphasis added.

⁹⁰ In this study I use 'otherness' in the sense that it has been used in psychoanalytic, feminist, colonial, race and other discourses on discursive identities to convey a dialectic of 'self' and 'other' and to imply the outcome of a process - 'othering' - whereby one group creates and maintains a privileged social identity for itself in a manner that is dependent on attributing to another group different and devalued identity that the attributing group would find objectionable or repugnant for itself: B Watermeyer 'Disability and Psychoanalysis' in B Watermeyer *et al* (note 5 above) 31-44 at 33-34; SL Gilman *Difference and Pathology: Stereotypes of Sexuality, Race, and Madness* (1985); C Kitzinger & S Wilkinson 'Theorising Representing the Other' in C Kitzinger & S Wilkinson (eds) *Representing the Other: A Feminism and Psychology Reader* (1996) 78-82. S De Beauvoir *The Second Sex* (1953) xvi; S Wendell *The Rejected Body: Feminist Philosophical Reflections on Disability* (1996) 60-66; A Mbembe *On the Postcolony* (2001) 2-3; R Miles & M Brown *Racism* (1989) 84-86.

⁹¹ Articles 2 and 5(3) of the Convention.

⁹² I have borrowed the concepts of 'recognition' mainly from the ideas of social justice developed by Nancy Fraser: N Fraser *Justice Interruptus* (1997) 11-39; N Fraser 'Rethinking Recognition' (2000) 3 *New Left Review* 107. In Chapters 3 and 4, I elaborate on the importance of economic recognition as part of vindicating more substantive equality.

provisions in early international human rights instruments towards nuanced, explicit and disability context-sensitive provisions that are intended to secure responsive equality in a diverse and inclusive society that marks out the Convention. The provisions of the Convention that address definitions,⁹³ general principles,⁹⁴ general obligations⁹⁵ as well as the discrete duties imposed by the Convention⁹⁶ are all replete with semantic texture that attempts to give concrete rather than merely abstract expression to normative inclusion of disabled people as part of accommodating human diversity.

In the specific instance of the workplace, the Convention requires the state to recognise the right of disabled persons 'to work on an equal basis with others'.⁹⁷ This entails, *inter alia*, prohibiting discrimination on the basis of disability in respect of all matters concerning all forms of employment and employment conditions.⁹⁸ Even more significantly, it entails recognizing that disabled people have a right to an equal opportunity to gain a living by work freely chosen in a labour market and work environment that is 'open, inclusive, and accessible'.⁹⁹ The provision of 'reasonable accommodation' is an integral duty in the realization of equality of disabled persons in the workplace.¹⁰⁰

It is submitted that the Convention's main project must, ultimately, be understood as the achievement of substantive equality and necessarily a departure from the universality of formal equality. The Convention's chief purpose, which is 'to promote, protect and ensure the *full and equal* enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and

⁹³ Article 2 of the Convention.

⁹⁴ Article 3 *ibid.*

⁹⁵ Article 4 *ibid.*

⁹⁶ Articles 5-33 *ibid.*

⁹⁷ Article 27(1) *ibid.*

⁹⁸ Article 27(1)(b) *ibid.*

⁹⁹ Article 27(1) *ibid.*

¹⁰⁰ Article 27(1)(i) *ibid.*

to promote respect for their inherent dignity’ and its substantive provisions that require the social and economic environment to be rendered accessible to equal participation by disabled people, makes this clear.¹⁰¹ Whilst the precise content of substantive equality (de facto), including the duty to accommodate is open to contestation, it is, nonetheless, a type of equality that is at least distinguishable from formal equality (de jure).¹⁰² Substantive equality takes into account group-related social disadvantages that negate the appearance of individual similarity.¹⁰³ Substantive equality aims to be responsive to structural or systemic inequality and envisages restructuring of power relations. As, indeed, the jurisprudence of countries such as South Africa¹⁰⁴ and Canada¹⁰⁵ illustrates, substantive equality accepts that insisting on similar treatment between two persons where one is already burdened with a disadvantage merely serves to reinforce a particular norm that has the effect or potential to perpetuate a disadvantage and, in the final analysis, freezing the status quo and structural inequality.

I shall argue in subsequent chapters that substantive equality sits well with disability for as long as the duty to accommodate disability is not accorded tokenism and, once again, subjected to the discipline of formal equality. Substantive equality is a form of equality that ought to be responsive to difference as it requires different treatment if that is necessary to achieve an equal impact. Imposing a positive duty to provide accommodation in the determination of unfair discrimination becomes an operative principle for recognising individual as well as group differences as part of protecting and

¹⁰¹ Article 1 of the Convention. Emphasis added.

¹⁰² The meaning and import of substantive equality is explored in Chapter 4.

¹⁰³ JL Pretorius ‘Constitutional Framework for Equality in Employment’ in Pretorius *et al* (note 6 above) § 2.1; S Fredman ‘Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm’ in A Lawson & C Gooding *Disability Rights in Europe: From Theory to Practice* (2005) 199-218.

¹⁰⁴ See the discussion in Chapter 4 especially.

¹⁰⁵ See the discussion in Chapter 4 especially.

promoting equality.¹⁰⁶ Substantive equality also means not essentialising disability, but being alive to the possibility that disability might not be the only vector of difference and disadvantage. In addition to disability, there might be other factors such as age, gender, race or sexuality and so on, that also require juridical attention so as to render a more holistic equality response. In its Preamble¹⁰⁷ and substantive provisions, the Convention recognises intersectionality.¹⁰⁸ It recognizes the existence of heterogeneous disadvantages and not just disability that cumulatively render disabled people disproportionately vulnerable to socio-economic marginalisation. The Convention demonstrates awareness that, for example, other disadvantages, such as gender,¹⁰⁹ minority age,¹¹⁰ and health¹¹¹ that might overlap with disability to compound inequality.

But whilst celebrating the advent of the Convention and, in particular, its aspiration towards an expanded equality universe, it is also important to critically appraise the jurisprudence that it promotes. In this connection, the study will interrogate the conceptualization of what constitutes disability and reasonable accommodation under the Convention as part of a larger discourse on

¹⁰⁶ CG Ngwena 'Reasonable Accommodation' in JL Pretorius *et al* (note 6 above) § 7.1; Ngwena 'Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law: Part II (Reasonable accommodation)' (note 6 above); D Gibson *Law of the Charter: Equality* (1990) 133-137.

¹⁰⁷ See, for example, the following paragraphs of the Preamble to the Convention: para (p) recognising that disabled people may be subject to multiple or aggravated forms of discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, birth, age or other status; para (q) recognising the greater vulnerability of women and girls to violence, abuse, and neglect; para (r) reaffirming that disabled children are entitled to full, equal protection of human rights; and para (s) calling for the incorporation of a gender perspective when promoting and protecting the rights of disabled people.

¹⁰⁸ In Chapter 3, I discuss intersectionality as an integral component of disability method.

¹⁰⁹ Article 6 of the Convention.

¹¹⁰ Article 7 *ibid*.

¹¹¹ Article 25 *ibid*.

applying equality and non-discrimination injunctions to the workplace.¹¹² It will be submitted that by adopting an inclusive approach to defining who falls within the protected group,¹¹³ the Convention holds a salutary lesson for domestic jurisdictions, including South Africa.

In respect of reasonable accommodation, however, it will be argued that though the Convention's prescription of a universal duty to accommodate disabled people is a significant contribution to the advancement of human rights in the workplace, nonetheless, the manner in which the duty is conceived does not appear to envisage fundamentally changing employer driven conventional notions of the requirements of the inherent requirements of the job.¹¹⁴ Under the Convention, the duty to provide reasonable accommodation obtains only where it does not cause a 'disproportionate burden' or 'undue burden' to the employer.¹¹⁵ These juridical thresholds are, in essence, the same as the thresholds that are already employed by several domestic jurisdictions, including the United States, Canada, Australia, the United Kingdom and South Africa. The question, then, is whether the Convention is bringing something substantively new to the discourse by way of expanding the equality universe. It will be argued that by seemingly borrowing the language for a crucial equality concept from existing domestic jurisprudence, including the non-communitarian language of accommodation as 'burden' the Convention risks giving universal legitimacy to a concept that has yet to be rendered sufficiently inclusive by domestic jurisdictions as to fail to discipline the core of exclusionary practices.¹¹⁶ The manner in which domestic jurisdictions have applied reasonable

¹¹² See the discussion in Chapters 5 and 6 of this study.

¹¹³ Article 1 of the Convention says: 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. This definition is considered in Chapter 5 of this study.

¹¹⁴ See the discussion in Chapter 6 of this study.

¹¹⁵ Article 2 of the Convention.

¹¹⁶ Kayess & French (note 69 above) 27.

accommodation suggests that it is a concept that is not only highly malleable, but also comes already heavily imbued with intuitive laissez faire individualistic notions of freedom of contract, merit and competition that give legitimacy to treating the workplace as a site for assimilation; a site for minor rather than major structural changes as to fall short of assuring a level playing field that would be consonant with substantive accommodation.

3.3 Global Size of the Disabled Population

Knowing the size of the population that is at the receiving end of an exclusionary society is useful for appreciating the challenge for the law in eliminating aversive attitudes and more crucially accommodating disability. However, ascertaining the size of the global population that is potentially the object of disability-related discrimination is a challenge mainly for the reason that there are no agreed criteria for defining or classifying disability. Carolyn Baylies is apt in observing that figures on disability tell us a partial story, hiding as much as they reveal.¹¹⁷ Different countries use different criteria. Even within the same country, definitions of disability vary depending on the sector. What is disability for the purposes of health care or rehabilitation may not necessarily be disability for the purposes of eligibility for social welfare benefits or compensation for workplace accidents. Therefore, to say that a person has a disability or that there are a disabled person frequently begs the question. While the meaning of disability is the subject of an on-going inquiry in subsequent chapters, it serves well to make some preliminary observations at this stage as part of reinforcing the rationale for this study as well as introducing the contingent nature of any definition of disability.

¹¹⁷ Baylies (note 64 above) 726.

Some approaches to measuring disability focus on medical or clinical criteria. They focus on the fact of aetiology or pathology of impairment and/or the degree of physical or mental impairment and/or consequent functional limitation. But even when impairment and functional capacity are the agreed criteria, socio-economic developmental capacity is a significant variable. Sophie Mitra highlights the challenge of measuring disability uniformly in a study of safety nets for disabled people in developing countries.¹¹⁸ Differences in knowledge and awareness about impairments and functional capacity across countries as well as differences in infrastructure for diagnosis of impairments and functional capacities and eligibility for disability-related grants and welfare benefits militate against consistent and accurate measurement of disability.¹¹⁹ Because of a greater capacity to diagnose impairment and provide welfare benefits for disability in developed countries than in developing countries, the former can be expected to report a higher prevalence of disability.¹²⁰

Other approaches to measuring disability prevalence, conceive disability more expansively, as the outcome of the interaction between the impairment and the social and economic environment. These approaches include in their ambit of disability, limitations that are occasioned by negative attitudes and lack of accommodation for the impairment in their classification or disability. A particular challenge with disability figures is the tendency to harbour slippage between approaches that see disability as impairment and those that see it as the outcome between impairment and the social and economic environment.¹²¹ What this panoply of approaches to defining disability shows is that it is best to treat

¹¹⁸ S Mitra 'Disability and Safety Nets in Developing Countries' (2005). Social Protection Discussion Paper Series. Available at <<http://www.worldbank.org/sp>> (last accessed on 19 August 2008).

¹¹⁹ *Ibid* 8.

¹²⁰ Mitra *Ibid*; R Yeo 'Chronic Poverty and Disability' (2001) 5. Background Paper No 4, Chronic Research Centre. Available at <<http://www.chronicpoverty.org/pdfs/04Yeo.pdf>> (last accessed on 19 August 2008) 8.

¹²¹ Baylies (note 64 above) 726.

any figures on disability as imprecise and incomplete. Moreover, the multiplicity of approaches tells us that equality for disabled people cannot be normatively framed without concomitantly attempting to decipher the definition of disability itself and the context in which the definition is being sought.

However, notwithstanding the lack of universal criteria for determining who is a person with a disability, in 1993,¹²² in a landmark report on preventing discrimination against disabled people using criteria developed by the World Health Organisation,¹²³ the UN estimated that there were 500 million (about 10% of the world's population) disabled people.¹²⁴ The UN report noted that disabled people who live in countries where economic and social conditions are particularly adverse have little or no prospect of 'living a dignified life, with full participation in society and equality of opportunity'.¹²⁵ Whilst the United Nations report found disability discrimination to be pervasive experience, it

¹²² United Nations, *Economic and Social Council. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and Disability*, UN Doc. E/CN.4/Sub.2/1991/31. The report was prepared by L Despouy, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The report also appears as: L Despouy *Human Rights and Disabled Persons* (1993).

¹²³ The World Health Organisation (WHO) has been the leading agency in attempts to develop internationally agreed indicators of disability for data collection and research on disability. In this regard, in 1980, WHO devised the *International Classification of Impairments, Disabilities and Handicaps* (ICIDH) to define disability. WHO's role in defining disability is elaborated upon in Chapter 3 § 3.2 of this study. At this stage it serves well to note that while ICIDH came to enjoy wide support among governments, especially, it also became the subject of intense criticism not least by disabled people and their representative organs because of the perceived emphasis on individual impairment, notwithstanding the attempt by ICIDH to proffer a definition of disability that was broader than individual impairment: Ngwena 'Deconstructing the Definition of 'Disability' Under the Employment Equity Act: Social Deconstruction (note 6 above) 623-624, 636-637. The criticism of ICIDH prompted WHO to revise it and supplant it in 2001 with new criteria - the *International Classification of Functioning, Disability and Health: World Health Organisation International Classification of Functioning, Disability and Health* (2001); D Pfeiffer 'The ICIDH and the Need for its Revision' (1998) 13 *Disability & Society* 503-523; JE Bickenbach *et al* 'Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps' (1999) 48 *Social Science & Medicine* 1173, 1175-1176. The revised classification is also discussed in Chapter 3 § 3.2 of this study.

¹²⁴ United Nations *Economic and Social Council. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and Disability*, (note 123 above) para 106.

¹²⁵ *Ibid* para 106.

identified the spheres of education, employment, transport, housing, and buildings as particular sites of discrimination.¹²⁶

Population growth aside, the global figure of disabled people is predicted to increase dramatically in both industrialised and developing countries for a number of reasons, including ageing populations, advances in medical science, advances in technology, and violence due to wars and other causes.¹²⁷ It is estimated that by 2050 the number of disabled people will have risen to one billion.¹²⁸ This dramatic increase of the disabled proportion from around 10% to 14% of the global population is attributed to ageing populations especially.¹²⁹ Disability is much higher in older populations where chronic illness is more prevalent. In industrialised countries, populations are ageing significantly due to standards of living and medical interventions that prolong life and, as a byproduct, increase the incidence of chronic illness and age-related impairments. In developing countries, on the other hand, what accounts for an increase in disability is not so much a longer life expectancy but preventable impairments, disease, as witnessed by HIV/AIDS and violence due to internal conflicts and wars. Poverty, in particular, causes as well as aggravates disability.

¹²⁶ *Ibid* para 184.

¹²⁷ *Ibid* para 107; C Barnes 'Rehabilitation for Disabled People: A 'Sick' Joke' (2003) 5 *Scandinavian Journal of Disability Research* 7; P Coleridge *Disability, Liberation and Development* (1993); B Ingstad 'Disability in the Developing World' in GL Abrecht, KD Seelman & M Bury (eds) *Handbook of Disability Studies* (2001) 772-792.

¹²⁸ L Mayhew 'Disability - Global Trends and International Perspectives' (2003) 16 *Innovation - European Journal of Social Science* 3 - 28; C Barnes and G Mercer 'Introduction: Exploring the Divide' in C Barnes & G Mercer (eds) *Exploring the Divide: Illness and Disability* (1996) 11-16. Available at <<http://www.leeds.ac.uk/disability-studies/archiveuk/Barnes/exloring%20the%20divide%20ch1.pdf>> (last accessed on 19 October 2008); Baylies (note 64 above) 726.

¹²⁹ Mayhew *ibid*.

3.4 Disability and Poverty Nexus

It cannot be overemphasized that poverty is a significant variable not only in the accentuation, but also creation of disability. What makes disabled people resemble a class in Marxist analysis is their striking structural overrepresentation in the indices of poverty and economic alienation. Poverty and disability are inextricably linked.¹³⁰ The link is succinctly captured by Ann Elwan who says: 'It is a two-way relationship – disability adds to the risk of poverty and conditions of poverty increase the risk of disability'.¹³¹ In this sense, disability and poverty are the proverbial vicious cycle; a cycle where poverty produces impairment and impairment in a disabling society results in poverty.¹³² In lived experience, the cycle translates into what Emma Stone describes as the 'deprivation trap' of poverty, impairment, disability, powerlessness, isolation and vulnerability. Stone illustrates this trap in the following diagram:

¹³⁰ Mitra (note 118 above) 5; P Coleridge *Disability, Liberation and Development* (1993); DFID *Disability, Poverty and Development* (2000). Available at <http://www.dfid.gov.uk/pubs/files/disability.pdf> > (last accessed on 19 August 2008); A Elwan 'Poverty and Disability: A Survey of the International Literature' (1999). Social Protection Discussion Paper Series, World Bank. Available at < <http://siteresources.worldbank.org/DISABILITY/Resources/280658-1172608138489/PovertyDisabElwan.pdf>> (last accessed on 19 August 2008); R Yeo (note 120 above).

¹³¹ Elwan *ibid* 3.

¹³² E Stone 'A Complicated Struggle: Disability, Survival and Social Change in the Majority World' in M Priestly (ed) *Disability and the Life Course: Global Perspectives* (2001) 50-63, 52.

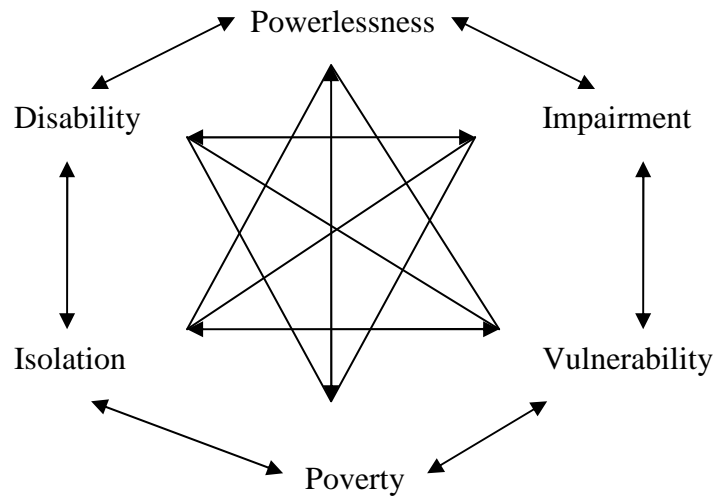


Figure 1. Source: Figure 5.1 in E Stone 'Disability in the Majority World' in M Priestly (ed) *Disability and the Life Course: Global Perspectives* (note 132 above) 53.

When disability is met with societal indifference and lack of meaningful access to education and work, for example, the outcome is a significant constraint on income, or no income, at all, especially in developing country settings where, on average, there is no meaningful welfare provision. Income constraints are accentuated for groups that are already burdened by other intersecting historical forms of oppression such as class, gender and race. Over and above constraints of income, disability adds significantly to the cost of living. Additional medical costs are a feature of most disabilities, depending, of course, on the type of disability. For disabilities in which mobility is limited, other direct costs include adapting the home, transport and personal care.¹³³ While in developing country settings, the family - and often through female members of the household - is

¹³³ Mitra *ibid* 10.

more likely to provide care, even then, as Mitra notes,¹³⁴ this is still a cost to the household in terms of foregone earnings.

Preventable impairments have a correlation with structural inequality. A society that is patterned on class, gender and race, will also mirror that pattern in preventable impairments.¹³⁵ Ultimately, the question is one of the quantity and quality of resources a given society commands, and equally, its commitment towards equitable distribution. Poverty increases the risk of preventable disease-related impairments as seen, for example, in many developing countries.¹³⁶ When commenting on the link between disability and poverty, Rebecca Yeo points out that 70% of childhood blindness and 50% of hearing impairments in Africa and Asia are preventable or treatable impairments.¹³⁷ Gender inequality and the feminisation of poverty in Africa, for example, manifest in impairments from preventable maternal morbidity in sub-Saharan Africa. Rebecca Cook *et al* note that while maternal deaths¹³⁸ are a rare occurrence in the developed countries, they remain a common occurrence in developing countries.¹³⁹ Out of a

¹³⁴ Mitra *ibid*; L Manderson 'Disability, Global Legislation and Human Rights' (2004) 47 *Development* 29 at 34. See also A Lukemeyer *et al* 'Expensive Children in Poor Families: Out of Pocket Expenditures for the Care of Disabled and Chronically Ill Children in Welfare Families' (2000) 62 *Journal of Marriage and Family* 399 (illustrating the position in the United States).

¹³⁵ Baylies (note 64 above) 726;

¹³⁶ The proportion of disability linked to preventable communicable diseases is much higher in the developing world. Before the advent of HIV/AIDS, poliomyelitis, trachoma, onchocerciasis (river blindness), leprosy, malaria and measles were the major 'non-trauma causes of disability among children in the developing world: Elwan (note 130 above) 17.

¹³⁷ Yeo (note 120 above) 15; R Ezegwui *et al* 'Causes of Child Blindness: Results from Schools for the Blind in South Eastern Nigeria' (2003) 87 *British Journal of Ophthalmology* 20; S Gilbert & A Foster 'Childhood Blindness in the Context of Vision 2020 - The Right to Sight' (2001) 79 *Bulletin of the World Health Organisation* 227; International Agency for the Prevention of Blindness 'Blindness, Poverty and Development: Impact of Vision 2020 on the UN Millennium Development Goals'. Available at <<http://www.v2020.org/page.asp?section=000100010015>> (last accessed on 25 August 2008).

¹³⁸ The World Health Organisation defines maternal death as 'The death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes': World Health Organisation *International Statistical Classification of Diseases and Related Health Problems* (1992).

¹³⁹ RJ Cook *et al* *Reproductive Health and Human Rights* (2003) 24.

global estimate of 536 000 maternal deaths each year, only about 3 000 occur in developed countries whilst the rest - 533 000 or 99% - occur in the developing world.¹⁴⁰ Strikingly, over 50% of the deaths that occur in the developing countries occur in Africa.¹⁴¹ Africa and South Asia bear 86% of global maternal deaths.¹⁴² As Cook *et al* point out, for every maternal death, many other women survive illness but with much suffering and disability.¹⁴³

The sustained high prevalence of HIV/AIDS in sub-Saharan Africa is another example of the link between disability and poverty. While sub-Saharan Africa has about 10% of the global population,¹⁴⁴ it is disproportionately represented in HIV/AIDS morbidity and mortality. In 2007, sub-Saharan Africa had 22 million people, that is, 67% of a global total of 32.9 million people living with HIV.¹⁴⁵ An estimated 75% of AIDS-related deaths have occurred in Africa.¹⁴⁶ Furthermore, biology aside, women are more vulnerable to HIV/AIDS on account of gender inequality and the feminisation of poverty.¹⁴⁷ AIDS-related illness is a significant cause of incapacity on the continent. Thus, Elwan's argument that a population

¹⁴⁰ World Health Organisation *Maternal Mortality in 2005. Estimates Developed by WHO, INICEF, UNFPA and the World Bank* (2007) 15.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Cook *et al* (note 139 above) 23.

¹⁴⁴ Africa has an estimated population of 680 000 000 million people which is about 10% of the estimated global population of 6.6 billion people:<
http://library.thinkquest.org/16645/the_people/population.shtml

¹⁴⁵ UNAIDS Sub-Saharan Africa. Available at <<http://www.unaids.org/en/CountryResponses/Regions/SubSaharanAfrica,aasp>> (last accessed on 19 August 2008); R Parker 'The Global HIV/AIDS Pandemic, Structural Inequalities, and the Politics of International Health' (2002) 92 *American Journal of Public Health* 343-347.

¹⁴⁶ UNAIDS *Ibid.*

¹⁴⁷ J Ghosh & E Kalipeni 'Women in Chinsapo, Malawi: Vulnerability and Risk to HIV/AIDS' (2005) 2 *Journal of Social Aspects of HIV/AIDS* 320-332; E Kalipeni, S Craddock & J Ghosh 'Mapping the AIDS epidemic: in Eastern and Southern Africa: A Critical Overview' in E Kalipeni, S Craddock, JR Oppong & J Ghosh *HIV/AIDS in Africa: Beyond Epidemiology* Malden, MA: Blackwell (2004) 58-69. Globally, women account for 50% of people living with HIV/AIDS and 60% of HIV infections in sub-Saharan Africa: UNAIDS 2008 Report on the Global AIDS Epidemic (2008) 33. Available at <
http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/2008/2008_Global_report.asp> (last accessed on 29 August 2008).

that is the poorest, least educated, least employed, and least involved in community affairs is positioned to be disproportionately represented in preventable impairments,¹⁴⁸ has particular resonance for South Africa with its extreme socio-economic disparities and endemic levels of poverty.

Africa's relative poverty on account of low levels of economic development, and Africa's poor infrastructure including transport and communication, history of violent conflicts, communicable diseases, illiteracy and general absence of social security systems, are causative as well as accentuating factors in the making of disability. The socio-economic environment in many parts of Africa can mean that a person who has paraplegia, for example, may be without any mobility, an indoor toilet, or running water.¹⁴⁹ In many African cities, disabled people are visible at street level as beggars. An empirical study conducted by Pascale Allotey *et al*¹⁵⁰ to explore the social determinants of the severity of diseases, shows very clearly that, beyond the clinical manifestation of pathology, the severity of disease is affected by contextual factors, not least socio-economic development and socioeconomic status.¹⁵¹ The study, which focused on comparing, in terms of lived experience, the differences between the severity of paraplegia in Cameroon (a developing country) and Australia (a developed country), found that though there were common experiences of disability and disadvantage, at the same time, there were significant differences that were attributable to the 'development gradient'.¹⁵²

¹⁴⁸ Elwan (note 130 above) 6.

¹⁴⁹ P Allotey *et al* 'The DALY, Context and the Determinants of the Severity of Disease: An Exploratory Comparison of Paraplegia in Australia and Cameroon' (2003) 57 *Social Science and Medicine* 949. Cited in Manderson (note 134 above) 34.

¹⁵⁰ Allotey *et al* *ibid*.

¹⁵¹ The study also found culture and gender as variables.

¹⁵² Allotey *et al* (note 149 above) 952.

Allotey *et al* found that the wheelchairs in Cameroon, in contradistinction to Australia, were of a manual and rudimentary type and that most disabled people needed to be pushed by another person.¹⁵³ Furthermore, in Cameroon, access to a wheelchair was, in the first place, a real challenge. Fifty percent of rural participants and 15% of urban disabled people have no access to a wheelchair.¹⁵⁴ Pressure sores were in general a serious complication rendering paraplegia a terminal condition for many Cameroonians.¹⁵⁵ Also, maintaining personal hygiene was a particular challenge. Many Cameroonian homes had no running water.¹⁵⁶ In the rural areas, especially, toilets were public rather than private, were located more than 100 metres away and required squatting, rendering them manifestly inappropriate.¹⁵⁷ While well-to-do Cameroonians were able to purchase wheelchairs, pay for assistance and exercise a range of career options, their poor counterparts (the majority) were severely limited in their options, with some begging on the streets and others totally reliant on friends and family.¹⁵⁸ Both rural and urban Cameroonians had to contend with poor road infrastructure, inappropriate housing and inadequate health services.¹⁵⁹

Thus, the social and economic environment is a crucial variable when transacting disability. As Marguerite Schnieder puts it, the socio-economic environment can either *facilitate* functioning or it can create *disabling* barriers.¹⁶⁰ The study by Allotey *et al* highlights the cardinal place of distributive justice in remedying disability-related inequality. It shows profound differences in quality of life and participation in society between disabled people in a developing world setting

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* 953.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ M Schnieder 'Disability and the Environment' in B Watermeyer *et al* (eds) (note 5 above) 8-18, 9.

and those in a developed world setting that share the same physical impairment. The study is concomitantly a salutary warning against the temptation to treat impairment as synonymous with the experience of disability. It shows the inappropriateness of universalising experiences when determining the impact of impairment on disabled people with supposedly the same impairment.¹⁶¹ The moral is to focus more on the lived experience as a more reliable indicator of disability.

Equality jurisprudence has an important role to play in ensuring that resources are targeted towards disabled people. Proscribing invidious discrimination is not enough. Fair and equal allocation of resources towards disabled people is a matter that should not be contingent upon the vagaries of political benevolence. It should be rendered a matter of social justice and translated into juridical obligations towards disabled people. This is the mission of the Convention on the Rights of Persons with Disabilities. However, the task of providing an enabling human rights environment cannot be relegated to the Convention alone. The ultimate measure of success is when the Convention makes a significant contribution at a local level in discrimination eliminated and in lives bettered.

To be efficacious, the Convention must ultimately be domesticated in policy and legal norms, and in programmes at sectoral levels. As part of assuring the

¹⁶¹ Indeed, the main argument made Allotey *et al* is that DALY (disability adjusted life year), as a universal instrument for measuring the health of the population with a view to informing health strategy development, priority setting, resource allocation and research and the burden of disease, is an inadequate instrument. This is because the assumptions underpinning DALY assume an average social environment, and ignore the actual social context that impacts on the burden of disease for the individual. Consequently DALY risks exacerbating inequalities by undervaluing the burden of disease in resource-poor settings. DALY measures the years of life lost due to disability from data on morbidity and mortality due that are attributable to a health condition. DALY attaches global severity weights for each health condition assuming an 'average social milieu' and without variation to actual social context: Allotey *et al* (note 149 above) 950-951. For a detailed discussion on DALY, see: CJL Murray 'Rethinking DALYs' in CJL Murray & AD Lopez (eds) *The Global Burden of Disease: A Comprehensive Assessment of Mortality and Disability from Diseases, Injuries and Risk Factors in 1990 and Projected to 2020* (1996) 1-98.

domestication, regional, and even more crucially, domestic human rights systems can play a crucial role in complementing and reinforcing the Convention in all regions of the world, including Africa, but for as long as the indivisibility and interdependence of rights is genuinely embraced. More pertinently, the realisation of socio-economic rights cannot be divorced from the equality equation in disability. Sandy Liebenberg and Beth Goldblatt have argued that developing a jurisprudence that captures the interrelatedness between equality rights and socio-economic rights is key to enabling South African jurisprudence to be more responsive to how group-based discrimination and socio-economic deprivation intersect and reinforce each other.¹⁶² Without the dismantling of socio-economic barriers, meaningful equality and social justice will remain elusive goals. Improved access to resources and services are part of how a society enables its people to realize their full potential and fulfil their human existence.¹⁶³ In *Government of the Republic of South Africa v Grootboom*, the Constitutional Court underscored the centrality of socio-economic rights, inter alia, to the realization of equality when it said:

Our Constitution entrenches both civil and political rights and social and economic rights. All rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2.¹⁶⁴

3.5 African Regional Human Rights Systems and Disability

The African region is gradually awakening to the urgency of addressing the equality needs of disabled people. In recent years, there has been a growing

¹⁶² S Liebenberg & B Goldblatt 'The Interrelationship between Equality and Socio-economic Rights under South Africa's Transformative Constitution' (2007) 23 *South African Journal on Human Rights* 335 at 340.

¹⁶³ *Ibid* 343.

¹⁶⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 23.

regional trend towards raising consciousness about disability as an equality issue. Part of this consciousness is manifesting itself in regional human rights instruments and soft law, which are components of the African regional human rights system. Writing about the promise on regional human rights systems, Dinah Shelton argues that regional systems are indispensable to the effective compliance with UN treaties.¹⁶⁵ According to Shelton, regional systems have a capacity to perform an intermediary function between the domestic system that violates human rights, and the global system which, by virtue of distance, is far removed from the locale as to appear abstract and incapable of providing effective redress.¹⁶⁶ Other than physical proximity, all things being equal, the other virtue of regional human rights systems is that they are better placed to respond flexibly to regional diversity in both substantive and procedural ways. Shared legal, political, socio-economic and cultural histories are more likely to be forged under regional systems given the small member base than under the UN which has 189 or so members with vastly different histories. Shared historical and political experiences serve as ready bases for engendering consensus and concretising human rights protections at the regional level.¹⁶⁷ In many ways, the enormous human rights progress achieved under the European Convention on Human Rights and Fundamental Freedoms,¹⁶⁸ not only at the level of individual redress for state violations of human rights but also at the level of instituting domestic legislative changes for the broader society highlights the advantage of a regional system in concretising human rights at the domestic level.¹⁶⁹

¹⁶⁵ D Shelton 'The Promise of Regional Human Rights Systems' in BH Weston & SP Marks *The Future of International Human Rights* (eds) (1999) 351-398 at 353.

¹⁶⁶ *Ibid.*

¹⁶⁷ GW Magwanya 'Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating the African System' (1999) 10 *Indiana International & Comparative Law Review* 35 at 41.

¹⁶⁸ Adopted on 4 November 1950, and entered into force on 3 September 1953.

¹⁶⁹ Shelton (note 165 above) 396-397.

Africa does not have a regional convention on disability.¹⁷⁰ The visibility of disability in African human rights instruments more or less mirrors that in its UN counterparts. Article 2 - the general equality clause of the African Charter on Human and Peoples' Rights¹⁷¹ - follows the equality clauses of the Universal Declaration of Human Rights (UDHR), ICCPR and the ICESCR in implying disability as a ground contained in 'other status'.¹⁷² However, article 18(4) of the African Charter improves the visibility of disability a little by making specific reference to disabled people by putting the state under a duty to provide 'the disabled' with 'special measures of protection in keeping with their physical and moral needs'. In doing so, the African Charter, which incorporates social and economic rights, is evincing awareness of affirmative disability rights-related obligations. Disability is visible in article 13 of the African Charter on the Rights and Welfare of the Child (African Children's Charter)¹⁷³ which mirrors article 23 of the Convention on the Rights of the Child¹⁷⁴ in explicitly requiring states to make resources available to support disabled children and to render societal spheres accessible to disabled children.

The most recent African regional human rights instrument, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in

¹⁷⁰ The only regional convention on disability, thus far, is the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, AG/RES. 1608, 7 June 1999: Available at <<http://www.oas.org/Juridico/english/sigs/a-65.html>> (last accessed on 28 May 2008). In respect of African human rights instruments, article 2, the general equality clause of the African Charter on Human and Peoples' Rights, follows the UDHR, ICCPR and the ICESCR in implying disability as a ground contained in 'other status'. However, article 18(4) of the African Charter makes specific reference to disabled people by requiring imposing upon the state a duty to provide 'the disabled' with 'special measures of protection in keeping with their physical and moral needs'.

¹⁷¹ Adopted on 27 June 1981, and entered into force on 21 October 1986.

¹⁷² On the inclusive nature of 'other status' in the African Charter, see: R Murray & F Viljoen 'Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and the Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86 at 88.

¹⁷³ Adopted on 11 July 1990, and entered into force on 29 November 1999.

¹⁷⁴ Adopted on 20 November 1989, and entered into force on 2 September 1990.

Africa (Protocol on the Rights of Women),¹⁷⁵ devotes one of its provisions to disabled women. Article 23 of the Protocol on the Rights of Women requires Member States to facilitate access of disabled women to employment, vocational training and decision-making.¹⁷⁶ Furthermore, the article expressly outlaws disability-related discrimination and requires protection of disabled women against violence, including sexual abuse.¹⁷⁷ Though piecemeal in its articulation of equality rights, article 23 is, nonetheless, a welcome trend in raising the visibility of disability in human rights instruments.

At a programmatic level, it is significant that, ahead of the adoption of the Convention, the African Union had already committed itself towards treating disability as a human rights issue. This is most apparent in the adoption by the African Union of the Continental Plan of Action for the African Decade of Persons with Disabilities 1999-2009.¹⁷⁸ The Continental plan, like the Convention, puts equality at its centre. Its chief aim is securing 'full participation, equality and empowerment of people with disabilities in Africa'.¹⁷⁹ As part of securing this objective, Member States are required to formulate and implement national policies and legislation to promote the full and equal participation of disabled people, including: reviewing and, where necessary, amending all legislation that impacts negatively on disabled people; promulgating disability-related legislation aimed at equal opportunities; and amending through the legislature constitutional Bills of Rights to include non-discriminatory clauses on disability.¹⁸⁰ In 2003, the African Union reinforced its commitment towards

¹⁷⁵ Adopted on 11 July 2003, and entered into force on 25 November 2005.

¹⁷⁶ Article 23(a) *ibid.*

¹⁷⁷ Article 23(b) *ibid.*

¹⁷⁸ Available at <http://www.africandecade.org/document-repository/Continental_English.doc/view> (last accessed on 28 May 2008); S Chalklen, L Swartz and B Watermeyer 'Establishing the Secretariat for the African Decade of Persons with Disabilities' in Watermeyer *et al* (note 5 above) 93-107.

¹⁷⁹ Continental Plan of Action, para 16.

¹⁸⁰ *Ibid*, paras 19 and 20.

treating disability as a human rights issue when a Ministerial Conference on Human Rights, *inter alia*, called for the adoption of a protocol to protect the rights of disabled people.¹⁸¹

Notwithstanding the visibility of disability in African human rights instruments, soft law and programmes, ultimately, what is important is to recognise that equality for disabled people cannot be assuaged by the rhetoric of rights alone. Equality responses to disability must be holistic. Taking disability rights seriously means taking distributive justice seriously so that equality does not become vacuous rhetoric that it can easily become. Especially in jurisdictions such as South Africa where there are enormous socio-economic disparities and poverty is endemic, the link between poverty and disability underscores that, in terms of juridical normative responses, the realisation of socio-economic rights is integral to the achievement of equality for disabled people. Thus, the Convention on the Rights of Persons with Disabilities will scarcely realise its potential if there is socio-economic underdevelopment or if States Parties remain indifferent to socio-economic disparities. Equitable access to resources is an essential requisite for equality for disabled people. The Convention makes this important connection between disability and socio-economic rights in article 4(2) which obliges States Parties to undertake to take measures, to the maximum of their available resources, to achieving the full realisation of economic, social, and cultural rights. In this sense, the Convention should not be read as a standalone human rights instrument, but as one that intertwines with, and reinforces other existing instruments, not least the ICESCR and regional human instruments.

¹⁸¹ Kigali Declaration. Adopted by the African Union Ministerial Conference on Human Rights in Africa, May 2003, Kigali, Rwanda, para 20.

4 SOUTH AFRICA

4.1 Disabled People as a Subordinated Group in South Africa

Using individual impairment as a marker, it is estimated that disabled people constitute between 5-12% of the South African population.¹⁸² Data from a census conducted in 2001, which found 5% of the enumerated population to be disabled persons, classifies the types of disabilities as falling into the following categories and respective proportions: sight (32.1%); hearing (20.1%); communication (6.5%); physical (29.6%); intellectual (12.4); and emotional (15.7%).¹⁸³ Sight constituted the largest percentage of disabilities followed by physical and hearing disabilities.

Of course, as with the global statistics, the prevalence of disability and the categories of disability must be ultimately understood in the context of an absence of uniform methodology for eliciting and compiling data. In the case of the Census data, for example, essentially, the enumerator's question was whether the respondent, or a person in their household, had 'any serious disability' that prevented their 'full participation in life activities,' and if yes, whether the disability fell into any of the following closed categories: sight, hearing,

¹⁸² Over and above different definitions of disability, other variables that precluded the gathering of reliable data in South Africa include: the different survey methodologies that are used to collect information; poor service infrastructure in underdeveloped areas; and violence in particular areas at particular times that militate against accessing research areas and subjects: See: Office of the Deputy President *Integrated National Development Strategy* (1997); M Schneider *et al* *We Also Count! The Extent of Moderate and Severe Reported Disability and the Nature of the Disability Experience in South Africa* Report of the Community Agency for Social Inquiry prepared for the Department of Health (1999) 2-5; Statistics South Africa *Census 2001 'Prevalence of Disability in South Africa'* (2005) 6; *Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa 'Transforming the Present: Protecting the Future'* (Taylor Committee) (2002) 101.

¹⁸³ Statistics South Africa *Census 2001* (note 182 above).

communication, physical, intellectual, and emotional.¹⁸⁴ In comprehending these findings allowance must be made for the subjective misunderstanding on the part of the respondent (or even the enumerator). Perceptions of what constitutes 'serious' disability differ. Furthermore, respondents will not always self-identify as there is cultural silence over disability on account of stigma. In any event, as the Census report acknowledges, the question did not include illustrations of what life activities include and exclude.¹⁸⁵ Over and above the inexactness of statistics about the size of the disabled population, and the categories of disability, there is also a lack of rigorous socio-economic data on disability in South Africa that does not readily facilitate drawing categorical findings about the experience of disabled people in South Africa.¹⁸⁶ At the same time, the available socio-economic data is, at least, sufficient for the purpose of making broad findings.

Available evidence supports the proposition that the South African demographic profile of disabled people conforms to a global paradigm of a disadvantaged and impoverished minority that is excluded from economic participation. In a 2002 report - *Towards a Barrier-Free Society* - the South African Human Rights Commission said that disabled people in South Africa 'continue to face barriers that prevent them from enjoying their full civil, political, economic, social, cultural and developmental rights'.¹⁸⁷ Disabled people are overrepresented among the poor.¹⁸⁸ A household survey conducted in 1999, for example, showed

¹⁸⁴ The question posed was: 'Does the person have any serious disability that prevents his/her full participation in life activities? None 0; Sight 1; Hearing 2; Communication 3; Physical 4; Intellectual 5; and Emotional 6': Statistics South Africa *Census 2001* (note 182 above) 8.

¹⁸⁵ Statistic South Africa *Census 2001* *ibid* 11.

¹⁸⁶ The Taylor Committee observed that 'in general quantitative data cannot do justice to the experience of disability, and a more nuanced reading is required for decision making': Taylor Committee (note 182 above) 357-359.

¹⁸⁷ South African Human Rights Commission *Towards a Barrier-Free Society* (2002) 5.

¹⁸⁸ T Emmett 'Disability, Poverty, Gender and Race' in Watermeyer *et al* (note 5 above) 207-233 at 221; Office of the Status of Disabled Persons *Impact of Government Policies Towards People with*

that while less than two percent of households with a monthly income of more than R10 000 were classified as disabled households, the disabled household rate was more than twice as high for households with an income of less than R800 per month.¹⁸⁹

Findings about the low socio-economic position of disabled people in South Africa must be tempered by the fact that, when measured in the context of a country with a very high unemployment rate, in relative terms, disabled households are more likely to have an income, however small, than their enabled but unemployed counterparts.¹⁹⁰ This is because the Social Assistance Act¹⁹¹ provides a means tested disability-related grant,¹⁹² whereas, save for the Unemployment Insurance Fund,¹⁹³ the country has no provision for income grants for those who, without more, cannot find work.¹⁹⁴ Eligibility for income support for disabled people can also be directly or indirectly subsumed under

Disabilities (2003) 89; J Andrews *et al* 'Issues in Disability Assessment' in Watermeyer *et al* (note 5 above) 245-259 at 247.

¹⁸⁹ Stats SA October Household Survey (1999) Available at <<http://www.statssa.gov.za/publications/statsdownload.asp?ppn=P0317&SCH=854I>> (last accessed on 23 August 2008). This survey is analysed in I Woolard 'An Overview of Poverty and Inequality in South Africa'. A Working Paper prepared for DFID (SA) (2002), which is, in turn, discussed in Emmett (note 188 above) 221.

¹⁹⁰ Emmett (note 188 above) *ibid* 221.

¹⁹¹ Act 13 of 2004. Under section 9(b) of the Act, a disability grant is payable to a person who, among other requirements, is 'owing to a mental or physical disability, unfit to obtain by virtue of any service, employment or profession, the means needed to enable him or her to provide for his or her maintenance'. The definition of disability under the Social Assistance Act is discussed briefly in Chapter 5 § 2 of this study.

¹⁹² A disability grant is only available where the disabled person had attained 18 years: section 3(1)(a). Where the disabled person has not attained 18, a primary care giver may be eligible for a child support grant or a care-dependency grant: sections 4 and 6 of the Social Assistance Act respectively.

¹⁹³ Unemployment Insurance (UIF) Act 63 of 2001 as amended by the Amendment – Unemployment Insurance Act. The Unemployment Insurance Fund provides income support for a period of up to 36 weeks, but only to those who have contributed to the Fund whilst in employment and have since become unemployed. It is estimated that only about five percent of unemployed people receive income support from the Fund: N Nuttrass 'Disability and Welfare in South Africa's Era of Unemployment and AIDS' CSSR Working Paper No 147 (2007).

¹⁹⁴ Taylor Committee (note 182 above).

other types of grants under the Social Security Act.¹⁹⁵ These social security provisions are, ultimately, to be understood in the light of the Constitution that requires social assistance to be made available to people who are unable to support themselves and their dependents.¹⁹⁶ This is not to suggest, however, that disabled people are not a deprived social group, but, rather, to highlight the existence of a safety net, however inadequate. Otherwise, it is accepted that the maximum income that a disabled person can derive from a disability grant if they meet the means test, still effectively categorises them as poor.¹⁹⁷ For those who are disabled in the course of employment or by road traffic accidents, the Compensation for Occupational Injuries Act¹⁹⁸ and the Road Accident Fund,¹⁹⁹

¹⁹⁵ Older persons' grants are available for the aged. Section 10 of Social Assistance Act provides for a means-tested pension for women who have attained sixty and men who have attained sixty five. Older person's grants were introduced in the 1920s as a safety net for whites as old age pensions. In 1928 they were extended to other racial groups except 'Africans'. The amounts received were commensurately pegged according to the group's position on the racial pyramid. Parity in grants was only achieved with the demise of apartheid in 1994: A Barrientos Comparing Pension Schemes in Chile, Singapore, Brazil and South Africa' (2002) IDPM Discussion Paper Series, Paper No 67. Available at <<http://ageconsearch.umn.edu/bitstream/30560/1/dp020067.pdf>> (last accessed on 23 August 2008); F Lund 'State Social Benefits in South Africa' (1993) 46 *International Social Security Review* 5-25; S Van den Berg 'Ageing, Public Finance and Social Security in South Africa' (1998) 7 *South African Journal of Gerontology* 3; S Devereux 'Social Pensions in Namibia and South Africa' (2000). IDS Discussion Paper 379. Over and above older persons grants, the following grants are possibilities for disabled persons as direct or indirect support for disability: child support grant which is available to a primary care giver of a dependent child (section 6 of the Act); care dependency grant which is available to a primary care giver in respect of a dependent child receiving permanent care or support service due to her or his physical or mental disability (section 7 of the Act); a foster child grant available to a foster parent provided care to the child; war veteran grant available to a war veteran who has attained 60 and is owing to a physical or mental disability unable to provide maintenance for herself or himself (section 11 of the Act); a grant-in-aid is available to a person who on account of her or his physical condition requires regular attendance by another person (section 12 of the Act); and social relief or distress grant which is available temporarily to families who are in extreme financial need and are unable to meet their most basic needs (section 13 of the Act): A Whitworth *et al* 'A Review of Income Transfers to Disabled and Long Term Sick People in Seven Case Study Countries and Implications for South Africa' Working Paper No 5. Centre for the Analysis of the South African Social Policy, University of Oxford (2006).

¹⁹⁶ Section 27(1)(c) of the Constitution.

¹⁹⁷ Emmett (note 188 above) 221.

¹⁹⁸ Act No 130 of 1993 as amended. See also the Occupational Diseases in Mines Act and Works Act Amendment Act No 208 of 1993 which provides compensation for mining work-related injuries. Many employment-related insurance schemes also cover disability.

respectively, are other possible sources of income by way of compensation for disability. Private insurance is also another source of disability-related income.

A baseline national survey that was published by the Community Agency for Social Enquiry (CASE) in 2000 – one of the few empirical studies conducted to measure the extent and the socio-economic effects of disability in South Africa – revealed an unambiguous picture of disability as substantial disadvantage.²⁰⁰ A census that was conducted in 2001, for example, found that 30% of disabled people had no formal education compared to 13% of the population without disabilities.²⁰¹ With respect to employment, the finding was that 19% of disabled people were employed compared to 35% of their counterparts.²⁰² The annual reports of the Commission for Employment Equity confirm a consistently low level of employment among disabled people.²⁰³ Disabled people are disproportionately reliant on state welfare benefits and benevolence for income support.²⁰⁴ The Census conducted in 2001, identified poverty, social isolation, and exclusion from employment as the key forms of socio-economic exclusions responsible for the disadvantages of disabled people.²⁰⁵ Disabled people as well

¹⁹⁹ Under the Road Accident Fund Act No 56 of 1996, compensation is for loss or injury that is wrongfully caused by another from the driving of a motor vehicle.

²⁰⁰ Community Agency for Social Enquiry *We also count. The extent of moderate and severe reported disability and the nature of the disability experience in South Africa* (2000).

²⁰¹ Statistics South Africa *Census* (note 182 above) 20; See also Schneider *et al* (note 182 above) 22-26.

²⁰² Statistics South Africa *Census* (note 182 above) 21; Schneider *et al* (note 182 above) 28-29.

²⁰³ Commission for Employment Equity *Commission for Employment Equity Report 2003-2004* (2004) x. In this report the Commission for Employment Equity regretted that the proportion of disabled people had remained low at 1% of the workforce. For earlier reports expressing a similar sentiment see the *Commission for Employment Equity Reports* for 1999-2001 and 2002-2003. It is also significant that the 2006-2007 report shows a drop in the level of participation by disabled people in the workplace to 0.7%: Commission for Employment Equity *Commission for Employment Equity Report 2006-2007* (2007) 15, 54.

²⁰⁴ Schneider *et al* (note 182 above) 30-31.

²⁰⁵ Statistic South Africa *Census 2001* (note 182 above) 17.

as their representative organisations attest to a general experience of prejudice and living in a society that does not take accommodating disability seriously.²⁰⁶

In any event, As Tony Emmett notes, because of the legacy of gross socio-economic inequalities, it is a given that disability in South Africa is necessarily mediated by other inequalities, including race and gender.²⁰⁷ Such inequalities manifest, for example, in employment rates, educational opportunities and the availability of assistive devices. A survey conducted by Community Agency for Social Enquiry (CASE) in 1998, found that white disabled people were more likely to be employed than their black counterparts. As with race, gender is an accentuating factor. Disabled women were less likely to be employed than their male counterparts. African disabled children were much more likely to be out of school earlier and less likely to attend schools that offer appropriate education than their white counterparts. The reports of the Employment Equity Commission reflect race and gender disparities not only in the employment levels, but also occupational categories of disabled people.²⁰⁸

Geographical location is another intersecting factor. Urban-based disabled people are more likely to have access to assistive devices that mitigate activity limitations than their rural counterparts.²⁰⁹ This is on account of historical underfunding of social services, underdevelopment of the socio-economic infrastructure, lack of employment opportunities, and the relative poverty in former 'homelands' on account of the skewed pattern of development during both the colonial and apartheid eras.²¹⁰ The legacy of 'racialised geography' as Liebenberg and Goldblatt note, is all too visible today, and manifests, among

²⁰⁶ Rowland (note 33 above).

²⁰⁷ Emmett (note 188 above) 207-208. Statistics South Africa *Census 2001* (note 182 above) 11.

²⁰⁸ See for example, *Employment Equity Report 2006-2007* (note 203 above) 12-15.

²⁰⁹ Emmett (note 188 above) 227.

²¹⁰ *Ibid.*

other forms, in vastly unequal provision of infrastructure and social services between the urban and the rural areas, and between the formal residential areas and informal settlements.²¹¹

The long and short is that a significant portion of the South African population is disabled and that disabled people are a marginalised group. And, moreover, in the South African context, disability is inextricably linked with other vectors of inequality such as race, gender, age and geographical location.

4.2 Why the Workplace Matters

If it can be accepted that disabled people are a marginalized and disadvantaged group in South African society, and that their marginalisation and disadvantage is not the result of haphazard individual acts of discrimination but rather the outcome of systemic discrimination in an unequal social order, another pertinent question to ask insofar as the rationale of this study is concerned, is why focus on the workplace. It is submitted that such a focus is not intended to suggest that disability-related discrimination is not experienced in other sectors. Rather, the workplace provides a convenient, if not poignant, forum for appraising the responsiveness of constitutional equality and antidiscrimination legislation. Whilst invidious discrimination and structural barriers are experienced in all spheres of socio-economic life by disabled people, it is in the workplace that they seem to exact some of their most devastating effects. Exclusion from work accentuates the individual burden of disability. It often means loss of economic independence and perpetual dependence on family, friends or the state. Where there is no meaningful state support, exclusion from work also means poverty. As submitted earlier, poverty and disability are part of a vicious cycle. Economic

²¹¹ Liebenberg & Goldblatt (note 162 above) 351.

exclusion means exclusion from equal participation with peers in a democracy. A sustainable theory of social justice and equality should seek to secure as much as possible inclusion rather than exclusion of all willing workers from the workplace as part of conferring economic recognition.

Furthermore, work also implicates human dignity poignantly. Work is not merely about deriving an income as it would be sufficient, by way of a remedy, to advocate for social welfare support for those who are excluded from work. Work is for many also about identity and self-esteem.²¹² It has great social and psychological significance to most people in that it forms a significant part of most people's conception of their identity and self-worth. Being employed is an affirmation of one's worth.²¹³ Work is crucial to providing one with a sense of inclusion in our modern capitalist societies that are centrally organized around productive entities. It provides an important opportunity for the development of social networks and space for creativity. Highlighting the workplace as an important social institution for disabled people, Michael Waterstone and Michael Stein say:

...employment is a hallmark of true citizenship because it enables individuals to participate meaningfully in society....The workplace is the one social forum that brings diverse communities together. It is where meaningful conversations occur, where meaningful relationships form... Being part of this community is a crucial way for people with disabilities to be full members of society, and to be deemed as such.²¹⁴

²¹² GS Kavka 'Disability and the Right to Work' (1992) 9 *Social Philosophy & Policy* 262, 271-2; C Barnes *Disabled people in Britain and Discrimination: a Case for Anti-discrimination* (1991) chapter 4. Available at <www.leeds.ac.uk/disabilitystudies/archiveuk/Barnes/disabled%20people%20and%20discrim%20ch4.pdf> (last accessed on 2 January 2005). ; L Fagin & M Little *The Forsaken Families: Effects of Unemployment on Family Life* London: Pelican; ME Waterstone & MA Stein 'Disabling Prejudice' (2008) 102 *Northwestern University Law Review* 1351 at 1369-1370.

²¹³ *Ibid.*

²¹⁴ Waterstone & Stein (note 212 above) 1369-1370.

Writing from a property theory perspective, Margaret Radin uses the language of 'incomplete commodification' to capture, at least from the worker's standpoint, the hybrid status of work in ostensibly market transactions.²¹⁵ She argues that in spite of the fact that money changes hands, work is something that straddles between what can be commodified and what cannot be completely commodified. Work is important to the worker as to be partly not amenable to complete commodification because it carries a 'nonmonetizable' personal and social value.²¹⁶ Radin's point is that market rhetoric alone would not be an accurate or holistic way of appreciating the significance of work, precisely because work is not just about how we earn a living, but it also has a non-commercial aspect. Work is also about how we constitute ourselves, and how we flourish as human beings.²¹⁷ Indeed, the manner in which we regulate work though, for example, antidiscrimination requirements, is, according to Radin, partly explicable on the social (as opposed to the economic) meaning that we attach to work as a society.²¹⁸ Such a requirement is an instance of taking into account the 'personhood' of the worker.²¹⁹ Ultimately, the moral to draw from Radin is that, when constructing a normative framework for ensuring equality for disabled people, we would impoverish ourselves as a society if the exercise of market freedom by the employer fails to take into account that self-development of the individual is linked to the pursuit of 'proper social development' and that proper self-development is an integral part of respecting human dignity which must be accorded recognition alongside market desires and preferences in a democracy.²²⁰

²¹⁵ MJ Radin 'Market-Inalienability' (1987) 100 *Harvard Law Review* 1849 at 1917-1921.

²¹⁶ *Ibid.* Radin concedes that this cannot be applicable to every case, of course: Radin *ibid* 1918, footnote 248.

²¹⁷ *Ibid* 1918.

²¹⁸ *Ibid* 1919.

²¹⁹ *Ibid.*

²²⁰ *Ibid* 1905.

Courts have also taken into cognizance that work is not just a mere market transaction. In *Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration*²²¹ the Labour Court took judicial notice of the social worth of work. Justice Pillay said that the normative inclusion of disabled people in the workplace is not only about deriving an income, but is also about self-respect and self-worth. In this respect, Justice Pillay echoed what the Supreme Court of Canada has said in *Reference re Public Service Employee Relations Act (Alta)*²²² about the link between work and human dignity. In the course of adjudicating the constitutionality of a legislative limitation of the freedom of association under the Canadian Charter of Rights and Fundamental Freedoms, Chief Justice Dickson said:

Work is one of the most fundamental aspects in a person's life, providing the means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.²²³

The size of the population that experiences disabilities, and the prevalence of disability discrimination in the South African workplace are, of course, important indications of the magnitude of the challenge for the law. But, as alluded to earlier, the socio-economic data, including that on employment of disabled people, should be understood in the context of a country that has yet to develop more precise data. Over and above imprecise socio-economic data, account must also be taken of the fact that, historically, whilst employers have generally kept records of the racial and gender profile of the workplace, they have not done so

²²¹ *Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration* [2008] 4 BLLR 356 (LC), para 65.

²²² *Reference re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313.

²²³ Para 91.

in respect of disabled people.²²⁴ Of course, this position is expected to change on account of the Employment Equity Act which requires employers to keep data on the numbers of black people, women and disabled people that are in employment as part of the preparation of employment equity plans.²²⁵ However, this duty only applies to designated employers.²²⁶ Moreover, while keeping data on the racial or gender profile of the workplace is simple for reasons due to the high visibility of race and gender, disability is not always visible. While most job applicants and employees ordinarily may have little compunction in disclosing their racial or gender status on application forms and in the workplace surveys, disability is different. For reasons relating to respecting privacy and confidentiality, the data on the workplace profile of disabled people essentially relies on self-reporting except for disabilities that are all too apparent. There is often silence about disability. Some disabled people are unwilling to disclose their disabilities to avoid stigma, or because they do not wish to be treated as such, choosing to identify with the 'mainstream'. All these reasons highlight the importance of further research to yield a more precise picture about the profile of disabled people in the South African workplace. But be that as it may, the data that is available, as discussed later in this section, clearly confirms rather than refutes the existence of a significant section of the population that has a disability of one form or the other and furthermore experiences discrimination across a whole range of sectors including the workplace.

²²⁴ Observation made in the Explanatory Memorandum to the Employment Equity Bill (1997). Available at <<http://www.polity.org.za/govdocs/bills/1997/equity.html>> (last accessed on 29 October 1998).

²²⁵ Part of drawing an employment equity plan requires the employer to ascertain the profile of the workplace in terms of representativeness of people from designated groups in various occupational categories and levels. Sections 16-21 of the Employment Equity Act taken together with the explanation in supplementary guidelines issued by the Department of Labour prescribe the duty to prepare employment equity plans as well as lay down the steps and procedures for such preparation: ME Klink 'Employment Equity Plans' in Pretorius *et al* (note 6 above) § 10.1.

²²⁶ Sections 16-21 of the Employment Equity Act.

The workplace represents a sphere where disabled people encounter some of the most significant barriers. Some of the barriers to employment that confront disabled people can be described as attitudinal. Across territorial as well as cultural borders, disability has been historically stigmatised.²²⁷ As alluded to earlier, society ascribes a sense of otherness to disabled people.²²⁸ This is so particularly for visible impairments that affect appearance. Disability tends to be the most severely stigmatised of all physical differences, over and above race and sex categories.²²⁹ Not surprisingly, attitudinal barriers often manifest as invidious discrimination where a job or promotion is denied regardless of the fact that disability does not limit capacity to carry out the tasks associated with the particular job.²³⁰ Attitudinal barriers can also be the result of benign paternalism. Other barriers are of a structural nature and, as alluded to earlier, they are the more intractable. They are to do with the organisation of the workplace and its surrounding environment. Structural barriers are a consequence of work having been historically organised around familiar or natural images of people that are 'able-bodied' and 'able-minded' with the inevitable exclusion of those that are different. Some structural barriers intersect with disabled people in the form of indirect discrimination where a disabled person is required to meet a requirement which is ostensibly neutral but impacts

²²⁷ E Goffman *Asylums* (1961).

²²⁸ Note 90 above.

²²⁹ H Hahn 'Accommodation and the ADA: Unreasonable Bias or Biased Reasoning' (2000) 21 *Berkeley Journal of Employment & Labour Law* 166 at 175. P Abberley 'The Concept of Oppression and the Development of a Social Theory of Disability' (1987) 1 *Disability, Handicap & Society* 5.

²³⁰ Rickard *et al* (note 83 above); Ravaud *et al* (note 83 above); M Baldwin & W Johnson 'Labour Market Discrimination against Men with Disabilities in the Year of the ADA' (2000) 66 *Southern Economic Journal* 548; KF Hallock *et al* 'Discrimination by Gender and Disability Status: Do Workers' Perceptions Match Statistical Measures?' (1998) 65 *Southern Economic Journal* 245; Productivity Commission *Review of the Disability Discrimination Act 1992* (2004) at A.24. However, not all employers are negative. The study by J Graffam *et al* which found that when employers were questioned about the productivity costs and benefits of employing disabled people, they responded more positively than negatively: Graffam *et al* 'Employer benefits and costs of employing a person with a disability' (2002) 17 *Journal of Vocational Rehabilitation* 1052; Productivity Commission *Review of the Disability Discrimination Act 1992* (2004) at A.18.

adversely and disproportionately on disabled people.²³¹ The historical failure to accommodate disabled people in the workplace through insisting on work arrangements that assume that everyone is able-bodied, assures their systemic exclusion from the workplace.

In South Africa, among disabled people who were 15 years or older, CASE found that 88% were economically inactive and/or unemployed but looking for work compared with 63% of people in the general population.²³² Thus only 12% of economically active disabled people were gainfully employed. A study of over 100 large and small firms covering more than 150 000 employees, found that the proportion of disabled people was less than 1%.²³³ Clearly, disabled people have a much lower rate of participation in the workplace than their counterparts without disabilities. In common with the experience of other jurisdictions, the South African unemployment rate among disabled people is much higher than among people without disabilities. As mentioned earlier in this section, the Commission for Employment Equity has also confirmed the under-representation of disabled people in the workplace in its annual reports.

But whilst available evidence clearly demonstrates a nexus between disability and exclusion from the workplace, it would also be presumptuous to ascribe all the barriers to discrimination by employers. Other variables external to the workplace, not least the nature and extent of the disability, and the level of education and vocational training, serve to guarantee that a substantial reduction of the pool of disabled will, in any event, not be in a position to avail themselves of the labour market on account of lack of appropriate skills. Also, some

²³¹ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1997) 2 LC 6.12.1; JL Pretorius 'Indirect Employment Discrimination' in Pretorius *et al* (note 6 above) § 4.

²³² Community Agency for Social Inquiry (2000) (note 200 above) 28.

²³³ Department of Labour *Technical Assistance Guidelines on the Employment of People with Disabilities* (2003) para 2.

disabilities are excluded by the education, health, transport and other-related systems in such a manner that the disabled person never gets the opportunity to receive education and training that are conducive to acquiring the skills that are needed for the job. Education, as Karen Jung argues, is a crucial component in resisting the disadvantage and downward mobility that are occasioned by long-term or chronic physical or mental impairments.²³⁴ Education is the gateway not only to a better income, but equally important, to more flexible, and more professional employment.²³⁵ However, many disabled people experience relatively poor access to education and vocational training which in turn foreclose the opportunities to acquire the knowledge and skills that are essential for employability.

CASE²³⁶ found that disabled people have markedly poor access to schools both quantitatively and qualitatively. School attendance seems to be good at primary school level, with 79% of the respondents attending mainstream primary school, 12% special school and only 5% were not attending.²³⁷ However, attendance was at its lowest at pre-school and high school levels where it was only 40% and 44% attending mainstream school respectively.²³⁸ The pre-school and high school figures for attendance at special schools, was 10% and 9% respectively.²³⁹ Of immense significance, is the finding by CASE that, although many children with disabilities attend mainstream primary school, they are not necessarily catered for.²⁴⁰ Inclusive education tends to be of an ad hoc nature and is not responsive to special educational needs or disability. There was a collusive tendency by either parents or the education system to 'dump' children into mainstream

²³⁴ KE Jung 'Chronic Illness and Educational Equity: The Politics of Visibility' (2002) 14(3) *National Women's Studies Association Journal* 178-200 at 180.

²³⁵ *Ibid.*

²³⁶ Community Agency for Social Enquiry (2000) (note 200 above).

²³⁷ *Ibid* 23.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

schools irrespective of the capacity of such schools to deliver education tailored to the child's need.²⁴¹ The lack of responsive education at primary school level means, more often than not, that disabled children do not reach high school. A compounding factor is that, at high school level, there is generally a lack of schools with expertise and resources for responding to the needs of disabled children.

Vocational training is generally not available, with 88% of respondents not receiving such training.²⁴² In general, children with intellectual disabilities, such as communication or learning disabilities, have higher levels of school non-attendance than children with physical disabilities. There is a greater lack of support for learners with intellectual disabilities.²⁴³ CASE found that race and poverty were overlapping factors with African pupils in historically African schools experiencing greater disadvantages than their white counterparts in historically white schools.²⁴⁴ It recommended, inter alia, that the state funding formula for schools take into account disability so as to assist the poorest schools as part of factoring in structural inequality in alleviating disability.²⁴⁵ The racial disparities in the provision of appropriate schooling for disabled people on account of previous apartheid policies that allocated resources on a racial basis, was not lost to the white paper on inclusive education – Education White Paper 6 of 2001.²⁴⁶ The moral is that whilst combating discrimination in the workplace is essential, it should not be seen as a singular response. What the empirical findings from the education and vocational sectors show is that ultimately, as is underpinned by the holistic orientation of South Africa's Integrated National

²⁴¹ *Ibid*

²⁴² *Ibid*.

²⁴³ *Ibid* 25.

²⁴⁴ *Ibid* 24-26; C Soudien & J Baxen 'Disability and Schooling in South Africa' in B Watermeyer *et al* (note 5 above) 149-163 at 149-152.

²⁴⁵ *Ibid* 26.

²⁴⁶ Department of Education *Education White Paper 6. Special Needs Education. Building an Inclusive Education and Training System* (2001) para 1.3.

Disability Strategy²⁴⁷ and the Convention on the Rights of Persons with Disabilities, disability requires a multisectoral approach. Specifically responding to discrimination in the workplace is only a partial response. What takes place within the workplace cannot be understood in isolation from other intertwining systems such as education, social security, transport, culture and so on.²⁴⁸ The role of the education sector, especially, in giving disabled pupils academic skills that create capacity for vocational training and employment cannot be overemphasised.

In suggesting that work plays an important role in the realisation of a sense of inclusion and human dignity for disabled people, there is risk of insidiously elevating work above all else, and implicitly normatively prescribing that life without work is life without dignity, productivity, or social value. In the process respect for the human dignity and agency for disabled people is unwittingly lost to capitalist notions of human worth. Though work is a cardinal feature of the modern capitalist state, it need not be the only avenue through which to realise one's self and one's dignity. Rather, the intention behind using work as a pivot for discussion is that it is precisely one of the sites where structural barriers against disabled people wishing to enter work or progress at work are most strong and for this reason work is a theatre for testing the reach of transformative equality or a claim thereof.

²⁴⁷ The Integrated National Disability Strategy is the overarching national policy on disability for South Africa: Office of the Deputy President *Integrated National Disability Strategy* (1997). Available at

< <http://www.info.gov.za/whitepapers/1997/disability.htm> > (last accessed on 22 October 2008) Its main pillars are discussed below in § 5.5.

²⁴⁸ C Barnes 'A working social model? Disability, work and disability politics in the 21st century' (2000) 20 *Critical Social Policy* 441-457 at 444; J Bickenbach 'Disability and equality' (2003) 2(1) *Journal of Law & Equality* 7-15.

I see work as a testing ground for measuring commitment to plurality in a heterogeneous civic public which I have appropriated from Iris Young.²⁴⁹ If work fails to honour status recognition by denying disabled groups space for realising their aspirations in the same way as their enabled counterparts, and insisting on assimilation rather than accommodation, then, it is not just the impairment of private autonomy that is at stake, but also impairment of public autonomy if equality is understood as a constituent element of democracy in a liberal state.²⁵⁰

5 AIMS AND OBJECTIVES

The study does not seek to argue that there is an absolute right to work for disabled people. Rather, the argument is that exclusion from work must, from a standpoint of constitutional equality and non-discrimination comport with an expansive notion of equality the shorthand of which is *substantive equality*. Certainly, disabled people should not be excluded from work for reasons not relevant to capacity to perform the job at hand. Furthermore, even if the reasons for exclusion from work are relevant to capacity to perform the job, the reasons must not, in the end, constitute unfair discrimination taking into account a positive duty to accommodate disability. Ultimately, the study posits the argument for equality for disabled people in employment in terms of a right to equality and non-discrimination which create a corresponding obligation to render the job market and the work environment inclusive rather than exclusive of disabled people.

²⁴⁹ Young (note 7 above) above, see especially chapter 4 of *Justice and Politics of Difference*. In § 6 of this chapter, I very briefly allude to Iris Young's critique of the 'Ideal of Impartiality and the Civic Public' which is the medium through which Young develops a thesis of the heterogeneous civic public sphere. In Chapter 4 of this study, I elaborate on the relevance of the heterogeneous public civic sphere to disability and equality. In Chapter 6, I apply the heterogeneous civic public sphere to accommodation in the workplace.

²⁵⁰ H Botha 'Equality, Plurality and Structural Power' 25 *South African Journal on Human Rights* 1, 12-13.

What the foregoing sections show is that disabled people are disproportionately excluded from work, and that though workplace-related discrimination is not wholly responsible, it is, nonetheless, a significant cause of disadvantage and marginalization as to warrant constitutional gaze. Having put under the spotlight racism, sexism, heterosexism, and HIV/AIDSism and other discriminatory *isms* as maladies in urgent need of remedial equality in the new dispensation, South Africa should, to borrow from Mandela,²⁵¹ continue on its 'long walk to freedom' and add to its constitutional scrutiny disability-related discrimination, or disablism as I choose to call it in this study.²⁵² Against the backdrop of disablism as a social phenomenon, this study seeks to illuminate as well as add substantive content to normative standards for protecting and promoting equality for disabled people in the workplace. More specifically, the study seeks to do the following:

- to critically explore the normative content of equality in post-apartheid South Africa and its import for disability as an historical marker of difference and disadvantage;
- to critically explore the implications of a social construction of disability for a transformative understanding of substantive equality for disabled people under the South African Constitution;
- to critically explore the legal construction of disability as a definitional category for determining the protected class under the non-discrimination clauses of the Constitution and the Employment Equity Act;
- to critically explore the normative content of the duty to accommodate in the workplace disabled people under the Constitution and the Employment Equity Act;

²⁵¹ N Mandela *Long Walk to Freedom* (1994).

²⁵² See the discussion in Chapter 3 of this study.

- to draw lessons from foreign jurisdictions, especially the United States and Canada for the interpretation and application of equality and non-discrimination for disabled people in the workplace under South African law; and
- to draw lessons from international human rights jurisprudence for the interpretation and application of equality and non-discrimination for disabled people in the workplace under South African law.

In this study, the development of a discourse on normative responses to disablism in the workplace under South African law is, in the final analysis, not just a purely constitutional enterprise that is informed merely by what the courts have said. Rather, it is a more encompassing and more discursive exercise that must necessarily seek to interrogate legal norms using social constructions of disability. The discourse, therefore, entails interrogating how the South African Constitution intersects and *ought* to intersect with disablism in order to guarantee equal participation by disabled people. The Constitution sets itself firmly against the creation and perpetuation of inequality. Section 9 – the equality clause of the Constitution – has been interpreted by the Constitutional Court as guaranteeing substantive equality and not merely formal equality.²⁵³ As part of guaranteeing equality, section 9 outlaws unfair discrimination. More pertinently, in outlawing unfair discrimination, the equality clause implicitly recognises the historical marginalisation and disadvantage of disabled people by listing ‘disability’ among the listed grounds for which discrimination is presumptively unfair, as opposed to rendering it an analogous ground for which there is no such presumption. The Constitutional Court, however, has yet to interpret and apply disability as a protected ground authoritatively. In *Hoffmann*

²⁵³ The judicial interpretation of the equality clause of the South African Constitution as importing substantive equality is discussed in Chapter 4 of this study.

v South African Airways,²⁵⁴ the Constitutional Court was afforded the opportunity to at least pronounce on the definitional construction of disability, it declined to do so as the case could be resolved on an alternative ground of protection against unfair discrimination. It is essential to determine how disability discrimination ought to be interpreted and applied by the Constitutional Court.

In order to develop more socially responsive normative standards for combating disablism and realising the constitutional right to equality and non-discrimination at the intersection of entry into, and advancement in, employment of disabled persons, it is necessary to go beyond the Constitution itself so as to also include, in the purview of critical exploration, pertinent domestic legislation, human rights jurisprudence, foreign law, codes of practice and guidelines for legislative and human rights interpretation, policy, and social constructions of disability.

5.1 Legislation

As part of constitutional interpretation, appraising legislation for compatibility with constitutional norms is an integral enterprise. Legislation is often the immediate vehicle for implementing the Constitution. Under South African law, the Employment Equity Act (EEA) is the main legislative instrument for protecting and promoting equality in the workplace through two main routes, namely, combating discrimination, and implementing affirmative action.²⁵⁵ The EEA intersects with disability in two main areas: firstly, in Chapter I of the Act,

²⁵⁴ 2000 (11) BCLR 1211 (CC). This dimension to the *Hoffmann* case is considered in Chapter 5 § 2 of this study; CG Ngwena & S Matela 'Hoffmann v South African Airways and HIV/AIDS in the Workplace: Subjecting Corporate Ideology to the Majesty of the Constitution' (2003) 18 *SA Public Law* 306, 324-325; Ngwena 'Deconstructing the Definition of 'Disability' under the Employment Equity Act: Legal Deconstruction' (note 6 above) 124.

²⁵⁵ Section 2 of the EEA; JL Pretorius 'Constitutional Framework for Equality in Employment' in Pretorius *et al* (note 6 above) §1.1.

which prohibits direct and indirect discrimination, and where 'disability' is listed as a ground protected against unfair discrimination;²⁵⁶ and, secondly, in Chapter II of the Act where 'people with disabilities' are a designated group alongside black people and women and, thus, beneficiaries of affirmative action duties that are imposed on designated employers.²⁵⁷ However, as will be argued in Chapter 5, on its own, the EEA is extremely limited in providing an understanding of the definitional construction of 'disability' and the normative content of equality for disabled people, partly because courts have yet to interpret and apply the disability legal norms in the EEA to an appreciable degree.

Whilst in respect of South African legislation, this study engages with the EEA for the reason that it is the main legislative instrument for regulating the workplace, it should be noted that there are other workplace-related instruments that also impact on disability and equality but will not be given further attention in this study other than acknowledging their relevance in this section. The Labour Relations Act²⁵⁸ intersects with disability by rendering dismissal that is based on 'disability' presumptively unfair unless it relates to the inherent requirements of the job.²⁵⁹ Equally, it should be borne in mind that 'disability' is also a ground protected against unfair discrimination under the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act).²⁶⁰ Regarding the workplace, the Equality Act applies to those areas that are not regulated by the EEA.²⁶¹ To the extent that the Equality Act has more elaborate equality provisions than the EEA, it serves as a useful interpretive aid to the

²⁵⁶ Section 6 of the EEA.

²⁵⁷ Section 13 of the EEA.

²⁵⁸ Act 66 of 1995.

²⁵⁹ Sections 187(1)(f) and 187(2)(a) of the Labour Relations Act.

²⁶⁰ Act 4 of 2000.

²⁶¹ Section 5(3) of the Equality Act.

EEA.²⁶² The Public Service Act²⁶³ intersects with disability in terms of equitable representation. When making appointments, the Public Service Act, inter alia, requires that regard be given to the need to redress the imbalances of the past so as to achieve a public service broadly representative of the South Africa's people including representation of disabled people.²⁶⁴ The Skills Development Act²⁶⁵ is an instrument for achieving equality to the extent that it is designed to facilitate education and training of disadvantaged groups, including disabled people, with a view to promoting self-employment and enhancing employment prospects.

To date, only a miniscule number of South African Court decisions could be said to focus squarely on equality and non-discrimination aspects of disability in the workplace.²⁶⁶ In this connection, I single out two cases as representing a meaningful juridical interrogation of disability in the workplace as to merit comment and analysis in this study. One is *IMATU v City of Cape Town*.²⁶⁷ Where the Labour Court interpreted and applied disability as a protected ground under section 6(1) of the EEA. But even in this case, as will be argued later in this study, the Labour Court's understanding of the definitional construction of disability was in a number of respects wanting.²⁶⁸ The other case is *Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration*,²⁶⁹ where the main issue was whether the employer had done enough to accommodate a

²⁶² JL Pretorius in Pretorius *et al* (note 6 above) § 1.2; OC Dupper 'The Current Legislative Framework' in OC Dupper *et al* (eds) *Essential Employment Discrimination Law* (2007) 22-24.

²⁶³ Act 103 of 1994.

²⁶⁴ Sections 10 and 11 of the Public Service Act; Pretorius in Pretorius *et al* § 1.2.3.

²⁶⁵ Act 97 of 1998; Pretorius in Pretorius *et al* § 1.2.3.

²⁶⁶ *IMATU v City of Cape Town Standard* [2005] 11 BLLR 1084 (LC); See also *Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration* [2008] 4 BLLR 356 (LC), para 65. There are cases in which disability has been raised or considered at an arbitration level. The following are examples of cases in which disability was raised but not directly considered at an arbitration level: *NEHAWU on behalf of Lucas and the Department of Health* (2004) 25 ILJ 2091 (BCA); *PSA obo October v Department of Community Safety, Western Cape* (2010) 19 PSCBC 3.5.1.

²⁶⁷ [2005] 11 BLLR 1084 (LC).

²⁶⁸ See Chapter 5 of this study.

²⁶⁹ Note 221 above.

disabled employee before coming to a view that the employee could be dismissed on the ground of incapacity under the Labour Relations Act. The court answered the question in the negative, finding that the employer had failed to provide reasonable accommodation. It will be submitted,²⁷⁰ *Standard Bank of South Africa* is a promising decision and the first real meaningful application of the duty to accommodate an employee on the ground of disability in the South African workplace.²⁷¹ However, with regard to the definitional construction of disability, the case falls to an extent into the same trap as *IMATU* in adopting the definition of ‘people with disabilities’ under the EEA as the equivalent of the definitional construction of ‘disability’ as a ground protected against unfair dismissal.²⁷² On account of the meagre case law on disability, it is particularly important, therefore, to develop further the substantive content of the legislative interpretation of disability and disability-related discrimination.

5.2 International Human Rights

International human rights jurisprudence is an integral part of this study to the extent that it can both illuminate as well as inform domestic constitutional norms. The earlier discussion on the advent of the Convention on the Rights of Persons with Disabilities, sought, inter alia, to capture a paradigm shift in the globalization of the rights of disabled persons and the ascendancy of a more substantive right to equality in particular. The South African Constitution is receptive to international human rights not least because it was drafted to signal a radical transition from brutishly racist, repressive, insular governance to commitment to democratic, universalistic and aspirationally egalitarian ethos.²⁷³ South African constitutional jurisprudence domesticates international human

²⁷⁰ This argument is substantiated in Chapter 6 of this study.

²⁷¹ See Chapter 6 of this study.

²⁷² This point is elaborated upon in Chapter 5 of this study.

²⁷³ *S v Makwanyane and Another* 1995 (6) BCLR (CC) para 262.

rights norms in various ways by complementing, concretising and even substantively expanding upon fundamental rights that are guaranteed in international human rights treaties.²⁷⁴ As submitted earlier, under the South African Constitution, international human rights are important interpretive guidance.²⁷⁵ Notwithstanding that the Constitutional Court has tended to make minimal rather than maximal use of international law in its deliberations,²⁷⁶ section 39(1)(b) of the Constitution does not merely permit, but more significantly, *requires* courts to take into account relevant international law when interpreting provision of the Bill of Rights, including non-binding international law. Thus, even treaties that have not been ratified by South Africa are within the ambit of international law that courts must consider.

The Constitutional Court has said that international agreements and customary international law provide a framework for understanding and interpreting provisions of the Bill of Rights and as such are tools of constitutional interpretation.²⁷⁷ In this sense, given that advancement of human rights and freedoms is one of the foundational values underpinning the South African Constitution,²⁷⁸ international human rights standards must necessarily constitute persuasive tools of constitutional interpretation. Section 233 of the Constitution,

²⁷⁴ C Heyns & F Viljoen 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' (2001) 23 *Human Rights Quarterly* 483; R Rubio-Marín & MI Morgan 'Constitutional Domestication of International Gender Norms: Categorizations, Illustrations, and Reflections from the Nearsides of the Bridge' in K Knop (ed) *Gender and Human Rights* (2004) 113-152, at 115.

²⁷⁵ Section 2.1 above

²⁷⁶ D Hovell & G Williams 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melbourne University Law Review* 95, 114.

²⁷⁷ *S v Makwanyane* (note 273 above) paras 36-37.

²⁷⁸ Section 1(a) of the Constitution.

even more clearly facilitates the 'constitutionalisation'²⁷⁹ of international human rights standards when it says:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Thus, the courts are being urged by the Constitution to promote the domestication of international law unless there is a clear, irreconcilable clash between international law and domestic law. The role of international law is to facilitate a generous interpretation of the Bill of Rights and thereby accord the rights enshrined therein *maximal* rather than minimal effect.²⁸⁰ The fact that South Africa has signed and ratified both the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention has added significance notwithstanding the absence of domestic legislative incorporation of the Convention. This is apparent, for example, from the deliberation of the Constitutional Court in *Hoffmann v South Africa Airways*.²⁸¹ In that case, as part of coming to a conclusion that exclusion of the applicant from employment on account of his HIV status constituted unfair discrimination, the Court took into account that South Africa has ratified a number of international agreements that proscribe discrimination. The Court said:

The need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution. It also arises out of international obligations. South Africa has ratified a range of anti-discrimination Conventions, including the African Charter on Human and Peoples' Rights. In the preamble to the African Charter, member states undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of

²⁷⁹ J Dugard 'International Law and the South African Constitution' (1997) 1 *European Journal of International Law* 77 at 79.

²⁸⁰ J Dugard 'The Role of International Law in Interpreting the Bill of Rights' (1994) 10 *South African Journal on Human Rights* 208.

²⁸¹ *Hoffmann v South Africa Airways* (note 254 above).

Article 1, member states have an obligation to give effect to the rights and freedoms enshrined in the Charter. In the context of employment, the ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958 proscribes discrimination that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In terms of Article 2, member states have an obligation to pursue national policies that are designed to promote equality of opportunity and treatment in the field of employment, with a view to eliminating any discrimination.²⁸²

The signing of the Convention indicates an intention to be bound by the treaty and to refrain from acts that defeat the object and purpose of the treaty on the part of South Africa.²⁸³ Ratification of an international treaty ordinarily signifies acceptance of the treaty as binding at the domestic level. At the same time, however, it is important not to overstate the domestic reach of international law or capacity thereof. South Africa follows a hybrid approach between monist and dualist traditions of incorporating international law.²⁸⁴ The strongest, and indeed, conclusive evidence that international law emanating from a ratified treaty is binding on South Africa *and* is to be treated as enforceable as any other domestic law is when domestic legislation expressly incorporates the treaty. Whilst section 231(2) of the Constitution provides that ratified treaties are binding on South Africa, section 231(4) of the Constitution, on the other hand, provides that an international agreement becomes domestic law in South Africa when it is enacted by domestic legislation, save in the case of a 'self-executing' provision of an agreement that had been approved by the legislature.²⁸⁵

²⁸² *Ibid* para 51. Footnotes omitted.

²⁸³ Articles 11, 12 and 18 of the Vienna Convention on the Law of the Treaties, adopted on 27 May 1969 and entered into force on 27 January 1980.

²⁸⁴ L Henkin *International Law: Politics and Values* (1995) 67.

²⁸⁵ 'Self-executing' is a legal term of art under international law. The term is generally accepted to have no settled meaning and to be open to different interpretations: F Viljoen *International Human Rights Law in Africa* (2007) 534-535; CM Vasquez 'The Four Doctrines on Self-Executing Treaties' (1995) 89 *American Journal of International Law* 695; ME Olivier 'Exploring the Doctrine of Self-execution as Enforcement Mechanism of International Obligations' (2002) 12 *South African Yearbook of International Law* 99; Dugard 'International Law and the South African Constitution'

Ratification of the Optional Protocol to the Convention is particularly significant as it means South Africa recognizes the competence of the Committee on the Rights of Persons with Disabilities to adjudicate on communications received from individuals or groups alleging violation of the Convention's obligations by South Africa.²⁸⁶

In the realm of workplace-related international law, relevant conventions of the International Labour Organisation (ILO) also constitute important sources of interpretive guidance.²⁸⁷ This is not merely because they constitute international law, and, as such, courts are constitutionally obliged to consider them, but also because the EEA²⁸⁸ is explicitly committed to respecting obligations under ILO Conventions No 111 concerning Discrimination in Respect of Employment and Occupation.²⁸⁹ ILO Convention seeks to promote equality through the proscription of discriminatory workplace policies and practices.²⁹⁰ Though it does not mention disability specifically as a proscribed ground, the principles that it enunciates, have equal application to disabled persons.²⁹¹ Another significant ILO convention is ILO Convention 159 concerning Rehabilitation and

(note 279 above) 83. In the strictest sense, a self-executing international agreement connotes an international agreement that does not require adopting a special domestic measure to render it effective in domestic law because by its very composition it is able to produce a direct effect at a domestic level. In practice though, jurisdictions as well as commentators differ in their understanding and application of the concept of a 'self-executing' provision and for these reasons it is a concept that is best treated as evolving rather than settled. John Dugard observes, for example, that the question whether a treaty is self-executing or not, has for many years been an unsettled matter before the United States Supreme Court and that South Africa will have to forge its own approach: Dugard 'International Law and the South African Constitution' *ibid* 83.

²⁸⁶ Article 1 of the Optional Protocol to the Convention.

²⁸⁷ JL Pretorius 'Constitutional Framework for Equality in Employment' in Pretorius *et al* (note 6 above) § 1.2; OC Dupper 'The Current Legislative Framework' in Strydom (ed) (note 6 above) 28-29.

²⁸⁸ Section 3(d) of the EEA.

²⁸⁹ Adopted on 25 June 1958 and entered into force on 15 June 1960.

²⁹⁰ Article 1 *ibid*.

²⁹¹ Article 1(1) of the ILO Convention 119 proscribes discrimination on the basis of inclusive grounds. The grounds 'include' 'race, colour, sex, religion, political opinion, national extraction or social origin'. It is submitted that disability fits in easily as an analogous protected ground.

Employment of Disabled Persons.²⁹² This convention is specifically aimed at promoting entry into, retention and advancement in, employment of disabled persons.²⁹³

5.3 Foreign law

As an equality and non-discrimination issue, disability is novel under South African law, with case law on disability still at a nascent stage of development. Moreover, on account on the legacy of colonialism and, more particularly apartheid, which derived its sustenance from an ideology of white supremacy, South Africa is a latecomer to antidiscrimination law and the constitutionalisation of equality. For these reasons, it serves well to draw from other jurisdictions that have a longer history in adjudicating equality, instituting legal protection against discrimination generally, and instituting and adjudicating disability-related discrimination in particular. It is singularly important to draw from jurisdictions that have experience in adjudicating disability discrimination. But in engaging in a comparative exercise in respect of constitutional norms that in the South African context are as historically and socially contingent as equality and non-discrimination, it is important to clarify beforehand the premises of the comparisons in this study.

Henk Botha has argued that a comparative study of constitutional adjudication can serve varied adjudicative purposes.²⁹⁴ Where the systems under comparison share common features in terms of underpinning legal assumptions and intended legal outcomes, approaches and principles developed in one jurisdiction that are found to cohere more readily with the legal assumptions and

²⁹² Adopted on 20 June 1983 and entered into force on 20 June 1985.

²⁹³ Article 1(1) *ibid.*

²⁹⁴ H Botha 'Comparative Law and Constitutional Adjudication: A South African Perspective' (2007) *Jahrbuch Des Öffentlichen Rechts Der Gegenwart* 569-598.

intended outcomes can be transplanted to the other as applicable lessons learnt.²⁹⁵ Comparing jurisdictions that share similar constitutional goals promotes shared understandings and constitutionalism that transcends the history, cultural heritage and social mores of the particular nation state.²⁹⁶ In the era of the globalization of human rights, and the incorporation of human rights norms into domestic constitutions, comparative constitutionalism favours transformation of the juridical culture over retaining the status quo.²⁹⁷ It has a tendency to create not only space but also the case for the development of transcultural interpretive methodologies that promote rather than frustrate the realizations of fundamental rights, including the right to equality as shared universal values.²⁹⁸

But notwithstanding the global trend towards a certain degree of universalism and in accepting the legitimacy of constitutionalism and convergence in constitutional interpretive methods,²⁹⁹ jurisdictions are rarely the same when it comes to constitutional identities. While two jurisdictions might broadly share the same values about the primacy of the rule of law, the supremacy of a Bill of Rights, and the necessity of a culture of justification where the state seeks to limit

²⁹⁵ Botha *ibid* 578-579; VC Jackson & M Tushnet 'Introduction' in VC Jackson & M Tushnet (eds) *Defining the Field of Comparative Constitutional Law* (2002) xi-xxi at xii-xii; K Syrett *Law, Legitimacy and the Rationing of Health Care* (2007) 12.

²⁹⁶ Botha (note 294 above) 572-573.

²⁹⁷ Rubio-Marín & Morgan (note 274 above).

²⁹⁸ LE Wienrib 'Constitutional Conceptions and Constitutional Comparativism' in VC Jackson & M Tushnet (eds) *Defining the Field of Comparative Constitutional Law* (note 295 above) 3-34 at 3-4; LWH Ackermann 'Constitutional Comparativism in South Africa' (2006) 123 *South African Law Journal* 497 at 506.

²⁹⁹ There is plethora of literature on the theme of comparative constitutional adjudication. The following references are but examples only: S Choudhry 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819; M Tushnet 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225; H Klug *Constituting Democracy, Globalisation and South Africa's Political Reconstruction* (2000); V Jackson & M Tushnet (eds) *Defining the Field of Comparative Constitutional Law* (note 295 above); LE Weinrib 'Constitutionalism in the Age of Rights - A Prolegomenon' (2004) 121 *South African Law Journal* 278 at 279-280; MA Fineman 'Equality Across Legal Cultures: The Role for International Human Rights' (2005) *Thomas Jefferson Law Review* 1; Botha (note 294 above) 569-598.

guaranteed rights, the detail of the individual jurisdiction's constitution, political and socio-economic history might point towards distinctiveness rather than similarity.³⁰⁰ Consequently, any comparative study must, in order to reflect the contingent nature of constitutional values, concomitantly attend to the distinctive features of each jurisdiction. When drawing statutory interpretation lessons from other jurisdictions, especially, there is always a danger of importing lessons that are inappropriate for the reason that the lessons emanate from legislation that is conceived in a manner that is different from the locale or is intended to regulate jurisdictions that have different political or historical backgrounds or have different social structures from the locale. It is important, then, to be discerning about foreign law, especially where the reliance on foreign law has the effect of limiting rather than expanding fundamental rights.

Reliance on a foreign law without concomitantly exploring it to see whether it is appropriate for South African jurisprudence risks the 'dangers of shallow comparativism' that the Constitutional Court has cautioned against.³⁰¹ In particular, as Justice Moseneke has said, when adjudicating equality, great caution must be exercised not to import inapt foreign jurisprudence which may serve to stultify rather than complement the far reach and wide berth of equality as an historical and context-sensitive value and a right under the South African Constitution.³⁰²

At the same time, it is important not to see the purposes and value of a comparative study as solely subsisting in drawing instructive lessons from

³⁰⁰ Botha (note 294 above) 569-598; Tushnet 'The Possibilities of Comparative Constitutional Law' (note 299 above) 1227.

³⁰¹ *NK v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 35 per O'Regan J; See also *Bernstein & Others v Bester & Others NO* 1996 (2) SA 751 (CC) para 133; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 26; *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) para 29; OC Dupper in *Dupper et al* (note 262 above) 29.

³⁰² *Minister of Finance v Van Heerden* (note 301 above) para 29.

jurisdictions that are similar. There is also analytical value in comparing what is dissimilar. Comparing what is dissimilar, as Botha argues, can serve to facilitate a deeper reflection on, and elucidation of, those features of one's own constitutional norms that are unique and thus point towards a different interpretive destination than what is mandated in other jurisdictions.³⁰³ Furthermore, in those areas where there is room for fashioning a new approach in the absence of a compelling precedent, even a dissimilar jurisdiction can provide room for acquainting the interpreter with competing constitutional visions. Vivian Curran has argued that contrasting one jurisdiction with another even where the jurisdictions are dissimilar can shed light on whether associations that one assumes to be necessary for democracy are correlated by logical necessity or whether the association is historically contingent.³⁰⁴ In any event, comparisons with different jurisdictions facilitate learning about the successes as well as failures of other jurisdictions in a given field. Botha aptly summarises the value of 'comparativism' in the following way:

...increasingly, our knowledge of national legal rules and principles is framed by our knowledge of foreign legal systems. Comparative law provides us with a history of examples and a history of errors. It offers us the possibility to affirm what we have in common with other nations, and to articulate that which sets us (or our legal system) apart. It broadens the range of interpretive possibilities, and often serves to bring the own historical and social context more sharply into focus.³⁰⁵

In this study, comparisons between laws of different jurisdictions have proceeded on the sentiments that Botha articulates. Two main jurisdictions serve as comparators – the United States and Canada. For the purposes of this study,

³⁰³ Botha (note 294 above) 578.

³⁰⁴ VC Curran 'Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives' (1998) 46 *American Journal of Comparative Law* 657 at 660.

³⁰⁵ Botha (note 294 above) 598.

the United States is a useful comparator because of the pioneering nature of the Americans with Disabilities Act of 1991 (ADA) as amended.³⁰⁶ The ADA (and, perforce, its antecedents) has been a global pioneer in terms of legislative regulation of disability-related for discrimination. The ADA took a global lead in formulating a definitional construction of disability for non-discrimination purposes as well as conceiving failure to accommodate disability as unfair discrimination. It will be submitted that, through judicial interpretation, and phenomenal academic commentaries the ADA has generated extensive jurisprudence from which both positive as well as negative lessons can be drawn for South Africa.³⁰⁷ Furthermore, it will be submitted that, in any event, the equality jurisprudence flowing from the equal protection clause of the 14th Amendment of the Constitution of the United States has a markedly different orientation from its South African counterpart in that it is more limited and more formal in nature rather than expansive and substantive.³⁰⁸

The relevance of Canada lies primarily in its closeness to South Africa in interpreting constitutional equality as substantive equality.³⁰⁹ The Supreme Court of Canada has interpreted section 15, the equality clause of the Canadian Charter of Rights and Fundamental Freedoms (Canadian Charter), expansively to mean substantive and not merely formal equality.³¹⁰ Under s 15(1) of the Canadian Charter, disability, or more accurately its equivalent,³¹¹ is listed as one of the grounds protected against unfair discrimination. In Canada, disability is

³⁰⁶ 42 USC §§ 12101-12213. It will be highlighted in Chapter 5 that the ADA was amended in 2008 by the Americans with Disabilities Act of 2008.

³⁰⁷ Chapter 5 of this study.

³⁰⁸ Chapter 3 of this study.

³⁰⁹ The affinity between South African and Canadian jurisprudence is discussed in Chapter 4 of this study.

³¹⁰ Canadian leading cases in this regard include: *Andrews v Law Society of British Columbia* [1989] 1 SCR 143; *R v Turpin* [1989] 1 SCR 1296; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497; *Miron v Trudel* [1995] 2 SCR 203; *R v Kapp* 2008 SCC 41. See Chapter 4 § 7.1 of this study.

³¹¹ Section 15(1) of the Canadian Charter lists disability as 'mental or physical disability'. See Chapter 5 § 3.2 of this study.

also a protected ground under federal legislation and human rights codes at federal³¹² and provincial levels.³¹³

5.4 Codes of Practice and Guidelines

As part of shedding light on the construction of disability and mapping the normative content of the duty to provide accommodation, it is also useful to consider codes of practice of interpretive guidance issued pursuant to domestic and foreign legislation, and international conventions. In the case of the EEA, it is necessary to consider any guidance issued pursuant to the Act. While such guidance does not constitute strict law, nonetheless, it has a quasi-legal status as courts are enjoined by the Act to consider it.³¹⁴ Of particular relevance in this regard is guidance issued by the Department of Labour in 2002 in the form of a code of practice - the Code of Good Practice: Key Aspects on the Employment of People with Disabilities (Code of Good Practice).³¹⁵ The Code of Good Practice is, in turn, supplemented by the Technical Assistance Guidelines on the Employment of People with Disabilities that was issued in 2003.³¹⁶ Codes of practice or guidelines also obtain under the ADA,³¹⁷ Canadian legislation and human rights codes,³¹⁸ and ILO conventions.³¹⁹

³¹² Pertinent examples at federal level are: the Canadian Human Rights Act of 1995, which proscribes unfair discrimination on grounds, inter alia, of 'disability (section 2), and conceives failure to accommodate as discrimination (section 15(2)); and the Employment Equity Act of 1995 which requires employers to implement employment equity for the benefit of 'designated groups', including 'persons with disabilities' by identifying and elimination unfair discrimination, providing accommodation and implementing affirmative action (section 5).

³¹³ See Chapter 5 § 3.2 of this study.

³¹⁴ Section 54 of the EEA.

³¹⁵ Department of Labour *Code Good of Practice: Key Aspects on the Employment of People with Disabilities* Government Gazette 23702 of 19 August 2002.

³¹⁶ Department of Labour *Technical Assistance Guidelines on the Employment of People with Disabilities* (note 233 above).

³¹⁷ Guidelines under the ADA take the form of regulations made under the ADA by the Equal Employment Opportunity Commission (EEOC), as well as the form of guidance provided the EEOC. The pertinent regulations are: Part 1630 - Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act. The EEOC provides a

5.5 Policy

Policy must also be taken into account when constructing constitutional norms for combating disablism. Policy often informs legislative initiatives as well as provides guidance to executive and administrative decision making. A distinctive feature of post-apartheid South Africa is that the policy environment is a manifestly enabling one, including policies for disabled people. It is the programmatic implementation of policy that constitutes a manifest challenge for the new South Africa. At policy level, the position of disabled people as a vulnerable and disadvantaged group and the imperative of accommodation are amply acknowledged. The Integrated National Disability Strategy (INDS)³²⁰ is the overarching national policy response to disability. The philosophical and equality orientation of the INDS, which was developed in 1997, by the Office of the Deputy President, is aptly captured by its vision – ‘A Society for All’. In articulating this vision, the INDS says:

In a society for all, the needs of all citizens constitute the basis for planning and policy and the general systems and institutions of society are accessible to all.

multiplicity of guidance that is subject to periodic update. Pertinent examples are: EEOC Executive Summary: Compliance Manual Section 902, Definition of the Term ‘Disability (2000); EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (July, 2000); EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (October, 2002).

³¹⁸ In Canada, there are guidelines at federal and provincial levels. An example of guidelines at a federal level is: Public Service Commission *Guide for Assessing Persons with Disabilities – How to Determine and Implement Assessment Accommodations* (2007). Available at <<http://www.psc-cfp.gc.ca/plcy-pltq/guides/assessment-evaluation/apwd-eph/index-eng.htm>> (last accessed on 21 October 2008). An example of a guideline at a provincial level is: Ontario Human Rights Commission *Policy and Guidelines on Disability and the Duty to Accommodate* (2000). Available at < <http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2>> (last accessed on 21 October 2008).

³¹⁹ International Labour Organization *Managing Disability in the Workplace. ILO Code of Practice* (2002).

³²⁰ Office of the Deputy President (note 247 above).

By accommodating the structures of society so that they function in a way that meets the needs of all, society mobilises the potential of all its citizens and, consequently, strengthens its development potential.

People with disabilities are a natural and integral part of society as a whole, and should have opportunities to contribute their experience, talents and capabilities to national and international development.³²¹

The main equality thrust of the INDS is one of commitment of resources by the state and the imposition of positive state duties to accommodate disabled people in an inclusive world rather than the assimilation of disabled people into an already loaded socio-economic environment. The duty envisages corresponding rights in disabled persons. The INDS calls for reconstruction and development of the social, political and economic, policy, and legal world with a view to reorientating society towards a society that acknowledges and accommodates human diversity. It means dismantling barriers in the physical and social environment so as to secure *full participation and equalisation of opportunities* for disabled people at all levels of society, including the workplace.³²² Remedying the historical exclusion of disabled people not only calls for resource commitment, but also an integrated holistic response involving virtually all the country's sectors.

The progressive tenor of the INDS is an outcome of many influences. The INDS was conceived not only in consultation with, but also with the active participation of disabled people and disabled people's representative organisations in South Africa.³²³ It was written from a human rights-based approach, with the Constitution and its equality clauses and international human

³²¹ *Ibid.*

³²² *Ibid.*

³²³ Howell *et al* (note 30 above) 67.

rights instruments providing the guiding principles and enabling edifices. The INDS certainly benefited from the human rights advances that had been achieved by the Standard Rules³²⁴ in going beyond the fact of impairment to implicate the social and economic environment and lack of resources as disabling factors. Equally, the INDS drew philosophical support and inspiration from a theoretical perspective on disability that sees the environment rather than the impairment as the problem, namely, the social model of disability.³²⁵ Indeed, the INDS expressly embraced the social model of disability as one of its premises and distanced itself from seeing disability as impairment only.³²⁶ The inclusive tenor of the INDS certainly complements rather than detracts from the Convention on the Rights of Persons with Disabilities. Over and above the INDS, there are other national disability policies that are essentially intended to address specific sectors.³²⁷

5.6 Social Construction of Disability

A pervasive, if not dominant, methodological approach in this study is the treatment of all knowledge, including the law and disability as socially constituted. Socially constituted knowledge is at the same time, social embedded knowledge. The incipient danger with socially embedded knowledge in post-

³²⁴ Office of the Deputy President (note 247 above).

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ In the education sector, for example, the disability policy developed by the Department of Education for meeting the needs of disabled learners is the *Education White Paper 6. Special Needs Education. Building an Inclusive Education and Training System* (note 246 above). The policy's cardinal objectives are developing and implementing programmes that recognise and accommodate the diversity learning abilities and disabilities. There is clear recognition that traditional physical infrastructure, curricula, and assessment, learning and instructional methodologies do not accommodate the diversity of learning abilities and that disabled pupils are disadvantaged by lack of accommodation. The main policy response is *inclusive education* that is guided by the constitutional imperative of equality, human rights and social justice for all learners, and entails fundamental structural adjustments to the physical environment and the curricula.

apartheid South Africa is that we can instinctively claim it as our own in the absence of critical reflection. Without an attempt to critically appraise the germaneness of knowledge, we assure contradictions with our transformative goals. In the context of transforming education curricular in post-apartheid South Africa, Jonathan Jansen makes the point that embedded knowledge 'is not out there' waving a red flag.³²⁸ It cannot easily be read off the outer coating of public curriculum. Instead it makes its appearance in claims, silences and assumptions about knowledge that are concealed in the belief and value system of the substantive architects of the curriculum.³²⁹ Jansen argues that transforming the curriculum requires no less an effort than the transformation of the epistemology of the curriculum.³³⁰ Legal norms are no different. Merely changing the form and not the substance will not do. Transforming disability in post-apartheid South Africa must mean transforming the epistemology of disability.

The study argues that it is not possible to treat law and disability as objective phenomena. One of Michel Foucault's lasting contributions to the construction of knowledge is his proposition that there can be no history of thought outside the systems of thought.³³¹ Whether it be theoretical or practical, knowledge, according to Foucault, is not created in a vacuum. Instead, it is always a matter of the *episteme* – the historical context which determines what ideas could appear, sciences be established, philosophies be reflected and rationalities be formed.³³² Knowledge carries potent normative power and allows categorization of human beings according to a given center.³³³ Disability is first and foremost a social construct. Drawing from Foucault, Henri-Jacques Stiker has argued that there can be no disability or disabled person outside social and cultural constructions

³²⁸ JD Jansen *Knowledge in the Blood: Confronting Race and the Apartheid Past* (2009) 179.

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ H Stiker *A History of Disability* (1999) 14.

³³² M Foucault *The Order of Things: An Archaeology of the Human Sciences* (1994) xxi-xxii.

³³³ *Ibid.*

of disability and that there can be no attitude towards disability outside of society's own reference points and constructs.³³⁴ The study does not in any way assume that socially or culturally constructed knowledge exists as a monolith, but, instead, concedes that embedded knowledge exists in a plural form and is always open to contestation.³³⁵ Different paradigms of thinking about disability, each with its own implications for equality have emerged over time.³³⁶ The study proceeds on the premise that to construct disability norms under the Constitution, and under legislation, it is essential to begin with an understanding about how society and the stratifications within society understand disability.

Against this backdrop, the study not only draws from social constructions of disability. Even more significantly, the study aligns itself with the social model of disability. As will be submitted in subsequent chapters, the social model is a transformative model of disability. It is an understanding of disability that goes beyond the traditional construction of disability as individual impairment so that disability can be understood socially, politically and constitutionally as a form of oppression for which society has a positive obligation to remedy through the social instruments at its disposal including transformative legal norms.

I contend throughout the study that law does not carry inherently neutral values and certainly has no neutral centre. Ultimately, it is the social construction of disability that holds the key to interrogating equality norms in a serious manner and not merely restating what the legislature and the judiciary proclaim about disability and equality. In this sense, it bears stressing by way of clarifying the philosophical orientation of this study that the analytical approach that it adopts

³³⁴ Stiker (note 331 above) 14.

³³⁵ Martha Nussbaum makes this point in her essay on constructing love, desire and care. She says that when we speak of "social construction" or "cultural construction" we should be careful not to suggest that cultures are monolithic and, instead, we should allow sufficient room for plurality, contestation and individual variety: MC Nussbaum *Sex and Social Justice* (1999) 256.

³³⁶ Chapters 4 and 5 of this study, especially.

differs markedly from conventional legal discourses that *only* use an ‘internal critique’, as it were, to critically evaluate legal norms in order to determine whether the law is living up to the standards which it profess to hold and whether justice promised by those standards if being dispensed evenly across all social groups.³³⁷ Though ‘internal critique’ is part of how some of the arguments are framed in this study, it is only a small part. As subsequent chapters will show, an even greater part of the analysis in this study is aimed at putting in the balance the very conceptual or philosophical structure informing legal thought about disability using ‘external critique’, meaning a more radical critical appraisal of the law using values that are drawn from discourses on normative reconstruction or reform of the law. The study engages equality and non-discrimination from a standpoint of normative *reconstruction* which is not dependent on the values that the laws professes to hold but rather on the values that I argue the law *ought* to hold if it is to create an equality universe that is inclusive of disabled persons. Thus, the critical analysis in this study does not shy away from disturbing, in a fundamental way, the assumptions underpinning classical liberalism. Unless the fundamental tenets of classical liberalism are questioned, a supposedly critical analysis of the law that seeks to dislodge the history of discriminatory norms, risks implicitly endorsing the very same legal values that deny disabled persons political and economic recognition.

³³⁷ N Lacey ‘Feminist Legal Theory and the Rights of Women’ in K Knop (ed) *Gender and Human Rights* (2004)13-55 at 43. Writing about the contribution that feminism can make to legal thought, Martha Fineman makes the point that feminist analysis when challenging the law and its institutions is not just about evaluating legal outcomes within a closed value system prescribed by law but it is also about questioning the ‘fundamental concepts, values, and assumptions embedded in legal thought’: Fineman ‘Challenging the Law, Establishing Differences’ (note 14 above) 32.

6 STRUCTURE OF STUDY

The study comprises seven chapters. Chapter 1, the present chapter, is the introduction, which as explained earlier, seeks, in the main, to provide the rationale of the study, and in addition, to explain the aims and objectives of the study as well as give a synoptic view of subsequent chapters. Chapter 2 uses the historicity of apartheid as an aid to the social construction of disability. In this way, the study approaches apartheid from a perspective that is very different from how apartheid is usually appropriated in discourses on equality in the post-apartheid era. Chapter 2 sets out to argue that when thinking about disability, gleaning from apartheid does far more than merely allow us to comprehend the premium that the Constitution puts on respecting equality and human dignity generally. Apartheid is also a site for constructing as well as critiquing a narrative about the body. Apartheid is instructive as a poignant case study on the social construction of *difference* to exclude from citizenships certain groups such as disabled people. The history of social injustice under apartheid and the attempts to repair the injustice through the Constitution are useful adjuncts in the search for a transformative equality paradigm that is responsive to cultural as well as economic aspirations of disabled people.

Chapter 3 impresses upon the cardinal importance of developing interpretive method when appraising normative equality values and rights. It introduces as well as advances an analytical approach for achieving substantive equality for disabled people. The premise of Chapter 3 is that, in a discourse which is aimed at realising equality for disabled people in a *maximal* way, it would not be enough to appraise pertinent laws, policies and practices without at the same time adopting a particular transformative perspective for advancing this objective. Part of the reason why claims to equality can become vacuous slogans, is the absence of a responsive legal methodology for realizing equality rights. In

this connection, the study constructs a method, the *disability method*, as an analytical tool and interpretive method for ensuring that the appraisal of pertinent laws, policies or practices is always conscious of the status of disabled people as a disadvantaged and vulnerable historical community, and the imperative of transforming erstwhile culturally, and even more crucially, economically oppressive norms. The chapter constructs disability method primarily, though not exclusively, from insights drawn from the social model of disability and feminism. It is argued that the social model of disability and feminist thought are useful transformative approaches for giving substantive equality concrete existence at the intersection between disability, equality and the workplace. Chapter 3 explains the meaning and, even more significantly, the transformative purport of terms that are frequently used in this study, not least 'disabled people', 'enabled' people' and 'disablism'. In this connection, Chapter 3 explains why the study prefers the term 'disabled people' to 'people or persons with disabilities'. In part, therefore, Chapter 3 serves as a discursive glossary.

Chapter 4 appraises the approach to equality and non-discrimination under the South African Constitution, but with the approaches to equality and non-discrimination in Canada and the United States serving as comparators. The focus of the exploration is more on revealing the overarching architecture or construction of equality and the social and moral assumptions that underpin different approaches to equality and non-discrimination rather than specifically analysing the minutiae of disability anti-discrimination law which is the subject of Chapter 5 and Chapter 6. In its appraisal of equality, the chapter appropriates Iris Young's critique of 'Ideal of Impartiality and the Civic Public',³³⁸ to argue that equality and non-discrimination laws that are inspired by formal equality are apt to fall short of meeting the notion of substantive equality in a plural

³³⁸ Young (note 7 above). Though Young specifically develops this thesis as the main subject of Chapter 4 of her book, it is, nonetheless, a thesis that she develops throughout the book.

democracy. In respect of an analytical account of equality under the South African Constitution, the chapter interrogates the standards that have been laid down by the Constitutional Court. In respect of the comparators, the chapter argues that the formal equality approach that largely characterises the approaches of the United States makes this jurisdiction, for the most part, instructive in a negative sense, that is, as an example of equality and non-discrimination routes that South Africa should avoid rather than emulate given its commitment to substantive equality. The chapter highlights the position of Canada as different from the United States in that it provides South Africa with salutary lessons on account of the commitment to substantive equality under the Canadian Charter of Rights and Fundamental Freedoms.

Chapter 5 focuses on the legal construction as well as reconstruction of disability for the purposes of determining who falls within the protected class. More specifically, the chapter critically appraises how legislation defines disability and how courts interpret legislative definitions and suggests alternative constructions that cohere more easily with the notion of substantive equality. It is argued that because disability is a contested concept with varied epistemology, competing theoretical perspectives on disability are relevant not only to understanding what the law means, but also what the law ought to mean when it sets out to regulate disability, through inter alia, proscribing discrimination against disability. Whilst there are several paradigms for understanding disability as a social construct, the chapter draws from two main contrasting paradigms – the *individual impairment model* and the *social model of disability*. It is argued that while the individual impairment model is a component of how the law understands disability as a definitional category, we must, concomitantly, be aware of its exclusionary capacity. Its medicalised understanding of disability is apt to distort in a fundamental manner the rationale for antidiscrimination law as a tool for

combating disablism. The social model of disability, on the other hand, has the capacity to deliver an inclusive definitional construction of disability.

Chapter 6 explores the scope and limits of the constitutional duty to provide reasonable accommodation. It is submitted that the recognition of the duty to accommodate is an integral part of the duty not to discriminate and that it is a significant departure from the disabling effects of a purely formal equality approach. At the same time, it is argued that unless sensitized to the disability method, prevailing juridical notions of reasonable accommodation create an illusion of substantive equality only especially for disabled people who are, in a physical sense, distally rather than proximately placed from the merits of the enabled comparator. The manner in which the duty to provide 'reasonable' accommodation has been juridically formulated, not least through the adoption of 'undue hardship' or 'disproportionate burden' as thresholds for the duty to provide accommodation, implicitly appeals to formal equality as the ultimate determinant, and, in the end, only manages to yield a marginally expanded universe of equality. Both chapters 5 and 6 draw in part from the comparative laws of the United States and Canada, and both use the disability method as an analytical tool.

Chapter 7 is the concluding chapter. Though it reflects on preceding chapters, it is primarily about seeking a way forward in conceptualizing equality for disabled people. Ultimately, it is a statement on rethinking the intersection between disability, equality and the workplace.

7 Limitations

As with any study, there are bound to be limitations. Space, time and the need for relevance and coherence impose inevitable constraints. In this connection, the

study has three main limitations. Firstly, it does not focus on disability that is linked with any particular physical impairment, but rather treats disability and impairments generically. Secondly, the study does not address affirmative action save to distinguish it from a non-discrimination duty. Thirdly, the study does not seek to discover, as its outcome or result, a blueprint for equality that is pure and free from error.

7.1 Heterogeneous Nature of Disability and the Danger of Solipsism

In *Inessential Woman*, Elizabeth Spelman, argues for a discerning and inclusive feminist theory and practical approach that does not lead to the erasure of other woman identities.³³⁹ Building on the critiques of feminism by other commentators, and in particular that of Adrienne Rich,³⁴⁰ Spelman argues for a feminism that in its laudable aim of challenging patriarchy, is concomitantly conscious of the dangers of 'solipsism'.³⁴¹ She argues for a feminism that does not wittingly or unwittingly purport to think, imagine or speak for 'other women' as if there was only one woman experience.³⁴² To a point, the comparative study on disability by Allotey *et al* exposed to the present study the folly of trying to universalize the experience of disabled people with the same physical impairment without integrating the environment as a significant variable.³⁴³ Culture and gender were also variables unearthed by the study.³⁴⁴ The

³³⁹ EV Spelman *Inessential Woman* (1988). In Chapter 3 §§ 4.6 & 5, I elaborate on the necessity for a disability approach that avoids falling into the trap of essentialism.

³⁴⁰ A Rich *On Lies, Secrets, and Silences* (1979); Spelman *ibid* 116, 128-130.

³⁴¹ The word "solipsism" is used here in the sense that it was used by Adrienne Rich and adopted by Elizabeth Spelman not so much in its strict etymological sense as the experience of self but to convey a particular group experience: Rich (note 340 above) 299; Spelman (note 339 above) 207, endnote 5.

³⁴² Spelman (note 339 above) 116

³⁴³ Allotey *et al* (note 149 above). Discussed in § 3.4 of this study.

³⁴⁴ *Ibid.*

disfunctionality of a universalising approach is even more compounded when the impairments are of a different nature.

It will be highlighted in Chapter 3 that impairments that are associated with disability are heterogeneous. Some impairments are physical and others are intellectual or sensory. Some are congenital in origin and others are acquired after birth. Some are permanent and others are transient. It is conceded that, in the final analysis, normative responses to disability discrimination should attempt to capture the diversity of impairments in order to achieve maximum efficacy. However, it is beyond the scope of this study to particularise the normative responses to each type of impairment. Rather, the focus of the study is on constructing, at a general rather than particular level, normative responses to the experience of disability-related discrimination in the workplace. The focus is on the development of norms that serve the common interests of disabled people, irrespective of the nature of the underpinning impairment without at the same time advocating for a hegemonic standard.

The discussion in Chapter 3 on methodology concedes that there is no essential disabled person, and likewise, there is no single way of responding to the peculiarities of disablement. In the same way as feminism has come to concede that a generic category of 'woman' is exclusionary, homogenising and solipsistic, this study is premised around the view that a disability discourse that assumes an essential disabled person is bound to fail disabled people. Ultimately, a disability discourse would have to take into account the particular type of disabilities, and the particular types of intersecting marginalisations and disadvantages in order to be responsive to multiple individual experiences. At the same time, as Katherine Bartlett has argued in her defence of the generic categorization of woman in feminism and the appositeness of asking the 'woman question' as feminist analytical tools, while categories are apt to be exclusionary,

the moral is to be vigilant about categorization rather than to abandon it altogether.³⁴⁵ The moral is to always take the trouble to clarify one's standpoint, and to remain watchful, recognizing the ever-present risk of solipsism that comes with generalising the experience of one group for another.³⁴⁶

7.2 Exclusion of Affirmative Action from Focus of Study

However, controversial,³⁴⁷ affirmative action, meaning a measure that is adopted to remedy a history of structural disadvantage and marginalization through the route of group preferment rather than an individualised assessment of disadvantage and need so as to ensure a certain level of participation of that group in a given sphere, including the workplace,³⁴⁸ is, nonetheless, one of the modalities that, South Africa aside, several other jurisdictions, including the United States and India, have adopted as a legitimate instrument for achieving equality.³⁴⁹ Furthermore, affirmative action is a principle that is now enshrined in an increasing number of human rights instruments as a strategy that States Parties may adopt in order to remedy historical marginalization and disadvantage. In this regard, article 5(4) of the Convention on the Rights of

³⁴⁵ Bartlett (note 7 above) 834-835, 847-849.

³⁴⁶ *Ibid.*

³⁴⁷ JL Pretorius 'Affirmative Action' in Pretorius *et al* (note 6 above) § 9.1. In South African political discourse, affirmative action measures, including measures taken under the Employment Equity Act, Black Economic Empowerment and Broad Based Black Economic Empowerment are the subject of ongoing criticism and controversy: Pretorius 'Affirmative Action' *ibid*; M Ramphela *Laying the Ghosts to Rest: Dilemmas of Transformation in South Africa* (2008) 245-267; O Dupper 'The Beneficiaries of Affirmative Action' in Dupper & Garbers (eds) (note 6 above) 301-311. Outside of South Africa, it is perhaps in the United States that affirmative action in the form of racial preference has engendered the most controversy and sharp, if not strident divisions, including, among members of the Supreme Court of the United States: Pretorius *ibid*.

³⁴⁸ Pretorius 'Affirmative Action' (note 347 above) § 9.1.

³⁴⁹ See, for example, the following commentaries that are critical reflections on the conceptualisation and application of affirmative action in different jurisdictions: India: K Sankaran 'Towards Inclusion and Diversity: India's Experience with Affirmative Action' in Dupper & Garbers (note 6 above) 285-299; United States: see generally: BR Gross (ed) *Reverse Discrimination* (1977).

Persons with Disabilities provides that 'specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention'.³⁵⁰

From a substantive equality and justice perspectives, as Loot Pretorius explains, affirmative action is a modality for compensating for the historical exclusion of certain social groups through systemic discrimination.³⁵¹ The argument is that where there is a long history of structural inequality, something more than merely instituting formal equality is required to level the playing field.³⁵² Formal equality, with its neutral standards, may only succeed in freezing the status quo. Positive measures in preference of certain groups, are, therefore, a way of, in part, checking the perpetuation of conscious and subconscious discriminatory practices that may continue to operate, and in part, remedying the injured past of a historically disadvantaged and marginalized group.

The logic of affirmative action is persuasive, tenable but at the same time not unassailable. South African historical context, and in particular, the legacy of three centuries of state ordained racial discrimination that assumed its most brazen and unapologetic form during apartheid, would appear to effortlessly lend themselves to the rationale for affirmative action as a remedial measure.³⁵³ In this connection, as part of the debate that preceded the adoption of the EEA and its affirmative action provisions, Nelson Mandela, the founding President of democratic South Africa, said:

³⁵⁰ Article 4(1) of the Convention on the Elimination of All Forms of Discrimination Against Women; General Recommendation on Temporary Measures; Article 2(1)(d) of the Protocol to the African Charter on the Rights of Women in Africa.

³⁵¹ Pretorius 'Affirmative Action' (note 6 above) § 9.1

³⁵² Pretorius *ibid.*

³⁵³ S Jagwanth 'Affirmative Action in a Transformative Context: The South African Experience' (2004) 26 *Connecticut Law Review* 725.

The primary aims of affirmative action must be to redress the imbalances created by apartheid. We are not... asking for hand-outs for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so a black skin should be the basis of privilege in the future. Nor... is it our aim to do away with qualifications. What we are against is not the upholding of standards as such but the sustaining of barriers to the attainment of standards; the special measures that we envisage to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now, and that those who have been qualified all along but overlooked because of past discrimination, are at last given their due.³⁵⁴

It is not fortuitous, therefore, that affirmative action found its way into the South African Constitution. Section 9(2) of the Constitution provides, inter alia, that 'to promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken'. The approach of the South African Constitution to affirmative action has been to cast it as part of the transformative amamentaria for achieving substantive equality that is at the disposal of the legislature.³⁵⁵ The equality clause of the South African Constitution mandates affirmative action, but does not require it. In *Minister of Finance v Van Heerden*, the Constitutional Court read affirmative action measures mandated by s 9(2) as a composite part of restitutionary substantive equality under the Constitution's equality clause as a whole.³⁵⁶ Also, the equality clause does not name the 'persons' or 'categories of persons' who can be the objects of affirmative and, instead, implicitly leaves the naming to be done by the legislature.

³⁵⁴ Quoted in Explanatory Memorandum to the Employment Equity Bill. Available at <<http://www.polity.org.za/govdocs/bills/1997/equity.html>> (last accessed on 29 October 1998).

³⁵⁵ *Minister of Finance v Van Heerden* (note 301 above); *Public Servants Association of South Africa and Others v Minister of Justice and Others* 1997(5) BCLR 577 (T); *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T).

³⁵⁶ *Minister of Finance v Van Heerden* (note 301 above) paras 28-32; JL Pretorius 'R v Kapp: A Model for South African Affirmative Action Jurisprudence?' (2009) 126 *South African Law Journal* 398.

As a historically disadvantaged and marginalised group, disabled people are a category of persons that easily fit in with the objects of the constitutional mandate for affirmative action. At a legislative level, as alluded to earlier, the implementation of affirmative action is one of the objects of the EEA.³⁵⁷ Section 6(2) of the EEA makes it categorically clear that affirmative action measures consistent with the purposes of the Act do not constitute unfair discrimination. Moreover, the EEA requires designated employers to implement affirmative action measures for the benefit of designated groups of which ‘people with disabilities’ are one.³⁵⁸ In its preamble, and substantive provisions, the Equality Act fulsomely echoes the constitutional mandate for affirmative action measures.³⁵⁹

But whilst affirmative action is part of how we may choose to think about equality and, for this reason, *could* be a pertinent part of a study that is at the intersection between disability and equality such as the present, I have, nonetheless, chosen to exclude it for three reasons. The first reason is a practical one – constraints of space. Doing justice to a topic that is as widely discussed and as controversial as affirmative action demands an entire thesis of its own. The other two reasons are philosophical and even more compelling for me.³⁶⁰ In the

³⁵⁷ Section 2(b) of the EEA.

³⁵⁸ Chapter III of the EEA.

³⁵⁹ Note 260 above. In its preamble, alluding to colonialism, apartheid and patriarchy, the Equality Act recognises that the implementation of equality under s 9 of the Constitution ‘implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences’. In its substantive provisions, the Equality Act enjoins any person interpreting the Act to give effect, inter alia, ‘to the Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination’: section 3(1)(a).

³⁶⁰ I do not presume that the two reasons I give here must be treated as scientific truths as they are contestable. Rather, the reasons primarily serve the purpose of explaining my subjective standpoint.

first place, I believe that arguing for affirmative action as a route to equality for disabled people would not be a useful adjunct to the main arguments that the discourse seeks to advance.

The discourse does not seek to privilege some disabled people on the understanding that benefiting some disabled people but leaving intact the underpinning structural arrangements that create and perpetuate inequality somehow makes up for the equality needs of all disabled people as the implicit reasoning in the 'representativeness' dimensions of affirmative action suggests. Rather, the aim of the discourse is not so much to correct inequitable outcomes for *some* disabled people, but to argue for fundamental change in the manner in which socio-economic arrangements are structured so that they accommodate *all* disabled people. The aim is to ensure the inclusion of disabled people as an entire class in an egalitarian universe of equality so that they can, as of right, be recognised and participate in society at a level of parity with other groups. An underpinning premise in this discourse is that equality as a right ought to be sufficiently responsive to remedying the subordinated status of all protected groups through treating lack of accommodation as a form of unfair discrimination. Affirmative action with its focus on advancing remedies that tweak the outcomes of attitudinal discrimination but leaving structural inequality intact and its modus operandi of only privileging the lucky few decidedly detracts from the main premise of this study.

A second philosophical reason for leaving out affirmative action is that, as a remedial measure, affirmative action can also extract its own cost as to paradoxically undermine the very values and goals that it is seeking to promote. Particularly in a country such as South Africa that is seeking to emerge from a deeply divided past and is committed to celebrating the diversity of its people in equal measure, the question must be asked whether equality as a value needs to

reify group identities, as affirmative action has a tendency to do, in order to redress the past and ensure equal participation in society. However well intentioned or justified, there is a danger that affirmative action can end up distorting distributive claims for subordinated groups as it will inevitably seek to privilege some groups but at the expense of others. In this way, affirmative action risks not only oversimplifying equality claims, but also freezing rather than eradicating the antagonism of the past as entry to economic recognition especially becomes linked with a group association rather than need. Thus, instead of encouraging universalism, inclusion and tolerance, affirmative action can unwittingly become a catalyst for resuscitating the separatism, exclusion and intolerance of old through essentialising and reifying group identities.³⁶¹

In any event, to argue that the state may, if it wishes, accord disabled people special treatment is hardly transformative as it promises disabled people a privilege. It promises disabled people something they do not deserve as of right and can be taken away. Furthermore, it has a potentially stigmatizing effect on the very group that is the object of the benefits. If our focus is on achieving political and economic recognition for *all* subordinated groups and not just some,

³⁶¹ The immediate inspiration for my argument here came from Nancy Fraser: N Fraser 'Rethinking Recognition' (note 92 above). In this article Nancy Fraser is writing about 'recognition claims' and is not writing specifically about affirmative action measures. At the same time, Fraser is writing about any measure that bestows cultural recognition, as, perforce, affirmative action would given its exclusive focus on the group characteristic such as race or gender rather than the economic need of the beneficiary. Her central thesis is about the need to move away from the parochialness of recognition claims that are built around identity politics to the universalism of recognition claims that not only integrate redistribution, but equally important, accommodate the full complexities of social identities. Affirmative action tends to 'drastically simplify and reify group identities': Fraser *ibid* 108. In *Justice Interruptus*, Fraser is more direct and elaborate on the weaknesses of affirmative action as a transformative tool. Her essential arguments are that when it comes to 'redistributive justice' affirmative action only manages to attend to surface allocations but leaving structural inequality intact, and in the process, subliminally marking the beneficiaries as a deficient and insatiable group that is always in need of more allocations to be made. In respect of a recognition claim, Fraser's main argument is that affirmative action fails to achieve transformative recognition in that it accentuates differentiation and in the process fails to destabilize master dichotomies of gender, race and so on: Fraser *Justice Interruptus* (note 92 above) 25-31.

then we should be mindful that the effects rather than the intent of affirmative action risks subverting this goal. So the argument is not that affirmative action is inherently undeserved or that there is no place for it in post-apartheid South Africa, but that it is philosophically and strategically peripheral to the arguments that are central to constructing a sustainable transformative equality universe in this study. But notwithstanding that affirmative action is outside the scope of this discourse, Chapter 6 will, in any event, consider affirmative action for the purpose of differentiating it from non-discrimination as part of illuminating the employer's duty to provide accommodation.

7.3 No equality blueprint

The title of the study – *'Disabled People' And The Search For Equality In The Workplace: An Appraisal of Equality Models From A Comparative Perspective* – implies that the study is premised on searching something that is yet to be found. As will be elaborated in Chapter 4, equality is an elusive concept not only from the standpoint of fulfilling, on the part of the state, its professed commitments to equality, but also from the standpoint of defining its precise content. As Chapter 3 will elaborate, the contribution of this study lies in critiquing formal equality and engaging discursively in a process of searching for a substantive and transformative normative standard of equality rather than establishing an ultimate closed standard of equality. To this extent, the study does not seek to reach a point where a blueprint for equality is established. Rather its focus is critiquing equality approaches that fall short of accommodating disabled people and suggesting how they can be reconstructed to render them more, if not, fully inclusive so that the notion of substantive equality does not degenerate into a vacuous rhetorical device.

But having disclaimed any pretense to finding an equality blueprint, it could also be argued that in a sense, the study lays a foundation for an equality blueprint to the extent that it advances a method for achieving equality for disabled persons – the disability method. The disability method, which is the subject of Chapter 3, is the study’s tentative blueprint, as it were, for searching for equality. The disability method is the study’s interpretive methodology for ensuring that disabled people are not excluded from the equality universe when adjudicating claims for unfair discrimination and that the dominant legal discourse which privileges certain bodily norms is dislodged as a matter of a social and juridical imperative.

CHAPTER 2

CATEGORICAL DIFFERENTIATION: WHAT CAN THE HISTORICITY OF APARTHEID TEACH DISABLISM?

Like gender and class, then, race must be seen as a social construction predicated upon the recognition of difference and signifying the simultaneous distinguishing and positioning of groups vis-à-vis one another. More than this, race is a highly contested representation of relations of power between social categories by which individuals are defined and identify themselves. The recognition of racial distinctions emanates from and adapts to multiple uses of power in society. Perceived as “natural” and “appropriate”, such racial categories are strategically necessary for the functioning of power in countless institutional and ideological forms, both explicit and subtle.¹

1 INTRODUCTION

Commenting on the place of race and caste in American historicity, Kenneth Karst has written that ‘The story of race relations in our country is largely a story of pain, and inhumanity, and guilt. Yet that very history has served as the crucible for the American ideal of equal citizenship’.² And so it is with the South African ideal of equal citizenship, I would submit. Apartheid is South Africa’s own crucible. It is *the* veritable platform from which to comprehend the contingency and the historical-situatedness of the reach of equality as a value and a right in a South African context. Resistance against the institutionalisation

¹ EB Higginbotham ‘African-American Women’s History and the Metalanguage of Race’ (1992) 17 *Signs: Journal of Women in Culture and Society* 251 at 253-54.

² K Karst ‘Why Equality Matters’ (1983) 17 *Georgia Law Review* 245 at 267.

of the racialising and racist ideology of apartheid is what, first and foremost, accounts for the making of the South African Constitution. The consensus that was reached among the political parties at Kempton Park³ was, in large measure, an agreement to end the brazen iniquity and inequity of apartheid and forge a new beginning by creating, as a foundation, a democratic and constitutional order with equality as its 'organising principle'.⁴ Justice Johan Kriegler implied as much in *President of the Republic of South Africa v Hugo*⁵ when he said:

The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable states may underscore their principles and rights. But in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and its organising principle.⁶

The historicity of apartheid serves two main purposes in this study. Firstly, it allows us to be discerning about the limits of comparative law when it comes to constitutional adjudication of equality and non-discrimination under the South African Constitution. Though equality and non-discrimination are norms that are not unique to the South African Constitution, nonetheless, their meaning carries an indigenous branding to the extent that they are norms borne out of apartheid

³ The new constitutional dispensation was borne out of political struggles of emancipation that were waged by various domestic as well as international protagonists against apartheid, but with the African National Congress in the ascendancy. More immediately, however, the new dispensation is a product of an agreement reached following lengthy and often difficult negotiations between the National Party government – the political repository of the apartheid state – and political opponents. Kempton Park, Johannesburg, is symbolic as the place where a multi-party body called the Multi-party Negotiation Process reached agreement on the text of the interim Constitution – Constitution of the Republic of South Africa Act No 200 of 1993 – and the framework for the final Constitution – the Constitution of the Republic of South African Act 108 of 1996: I Currie & J de Waal *The Bill of Rights Handbook* (2005) 4-5; A Sparks *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* (1994); H Ebrahim *The Soul of a Nation: Constitution-Making in South Africa* (1998); I Currie & de Waal *The New Constitutional and Administrative Law Volume I Constitutional Law* (2001) 59-64.

⁴ I have borrowed this phrase from *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) para 74.

⁵ *Ibid.*

⁶ *Ibid.*

struggles. In a study that in part draws equality and non-discrimination jurisprudence from comparative law, acquainting ourselves with apartheid allows us to factor into our discourse the single most distinctive feature of South African constitutional identity. The history of apartheid is indelibly imprinted on the country's political and legal economy. It serves not only as an indispensable backdrop to a nuanced understanding of the transformative nature of equality under the Constitution, but also as an aid to understanding the link between equality and human dignity that is now so well established in South African constitutional jurisprudence.⁷ In short, though equality and non-discrimination are universal and universalising norms, they are at the same time historically and socially contingent.⁸ Whilst we can learn from other jurisdictions, our equality and non-discrimination discourse would be poorer and indeed, merely reductionist, if it simply aimed at importing into home terrain supposedly universal norms without the conceptual capacity to be discerning about norms that are consonant with, as well as distinct from, South African jurisprudence.

Secondly, the historicity of apartheid also offers pertinent lessons for constructing as well as deconstructing the use of bodily difference to deny equal citizenship in disability. As I shall argue in this chapter, apartheid does much more than merely allow us to comprehend the premium that the Constitution puts on equality and human dignity. Apartheid is also instructive as a poignant case study on the social construction of *difference* to create binary human categories and exclude from citizenship certain groups such as disabled people that are perceived to be a departure from a privileged bodily norm. The history of social injustice under apartheid and the attempts to repair the injustice through the Constitution are useful adjuncts in the search for an equality

⁷ The link between equality and human dignity under the South African Constitution is discussed in Chapter 4 of this study.

⁸ H Botha 'Comparative Law and Constitutional Adjudication: A South African Perspective' (2007) 55 *Jarbuch Des Öffentlichen Rechts Der Gegenwart* 569 at 570.

paradigm that is responsive to the aspirations of disabled people. In so seeking to develop a narrative of disability from apartheid, it must be stressed that the argument is not that racism and disablism are completely fungible. Rather, the argument is that, notwithstanding differences in their particularities, there are several points of substantive confluence between the two as to render them mutually instructive when developing a normative framework of equality that is intended to serve a social group that has been historically marginalised and disadvantaged on the basis of categorical somatic difference that is constructed by the dominant discourse.

As a site for the social construction of race, especially, apartheid offers a rich entry point for comprehending the epistemology of disability, the phenomena of oppression and structural inequality that are organised around the hegemony of a socially constructed bodily norm. Though apartheid and disablism do not share the same aetiology and 'physical' particularities, nonetheless, they share common mechanisms and effects in terms of the creation of subordinated difference and exclusionary citizenship. Ultimately, my argument is that the strong disavowal of apartheid under the South African Constitution and political economy is instructive in making a case for the imperative of developing a type of equality that is transformative and in consequence accepts fully the diversity (and not a hierarchy) of bodily forms as part of transcending a fractured and dichotomous past that excluded not just racial groups, but other social groups as well.

It is important to highlight at the outset that as part of developing a narrative of equality and disability from the history of apartheid and the reforms thereof, this chapter does not seek in any way to render a disquisition on apartheid. The history of apartheid is well documented elsewhere, and so is the process that led to the birth of the new constitutional order in 1994. This chapter does not seek to

traverse the same ground or to purport to proffer a historically authoritative view of apartheid. Rather, the aim is to be selective on the historicity of apartheid,⁹ and to focus mainly on those features of apartheid that facilitate appreciating the intersection with equality, non-discrimination and disability. Put differently, the aim of the chapter is to use the ideology and practice of racial classification and discrimination under apartheid as a major component in the development of a critical narrative on disability and equality.

⁹ 'Selective historicity' does not imply abandoning a critical and scholarly approach in order to deliberately manipulate the arguments by drawing aspects that are 'convenient'. Rather, 'selective historicity' means focusing only on aspects that are relevant or essential to the study so that the discourse does not become overwhelmed by the sheer volume of historical facts and interpretation of apartheid to the point of digressing from the objectives of this study. At the same time, I must necessarily concede that even critical and scholarly historicity is, in the final analysis, contestable rather than 'correct' historicity. My concession is not so much do with the well established premise that any historical account necessarily involves choices about what facts to include and what facts to exclude. Instead, the concession is more to do with the fact that our interpretation of historical facts is necessarily coloured by our subjectivities. From the same facts, as the history of colonialism, slavery and the Holocaust demonstrates, our ideologies can allow us to ascribe different interpretations, reach different conclusions and develop different affectivities: JD Jansen *Knowledge in the Blood* (2009) 51-82; J Herf *Divided Memory: The Nazi Past in the Two Germanys* (1997). It is an established phenomenon that perpetrators and victims often experience the causes, effects and justifications of a given incident in history in substantially different ways. Equally, knowledge about a given historical incident is often transmitted to, and received by, future generations in ways that follow a genealogical chain or pathways, so to speak, where understandings about the same incident can follow undisturbed intergenerational perpetrator and victim perspectives: Jansen *ibid*. Jonathan Jansen makes this point about 'transmitted' dichotomized understandings of apartheid in today's South Africa in his thesis on the 'paradoxes of indirect knowledge'. On one side is what can be described as a victim's perspective which sees apartheid as thoroughly dehumanizing and without any redeeming features. On the other side is its counterpart - a perpetrator perspective - which sees apartheid as a virtuous policy that served to defend a people and a civilization under threat but was perhaps wrongly applied from time to time: Jansen *ibid* 58-62. However, my narrative on the historicity of apartheid is not an exercise in choosing between two historical memories of apartheid that Jansen posits, not least because as between an ideology that espouses racial superiority, legally inscribes it and uses brute force to maintain racial supremacy, and an ideology that is organized around the common humanity of humankind, one scarcely finds the kind of close competition that compels one to make an anguished choice. Instead, one finds two fundamentally different worlds with fundamentally different values that allow for patently stark moral choices. Rather, my narrative is about implicating the (in)equality paradigm that apartheid aspired towards. Ultimately, the point of my narrative on the historicity of apartheid is to capture the power of using bio-cultural essence to create a racial oligarchic structure and to argue that allocating human status on the basis of phenotype and physiognomy as apartheid did is something that legal constructions of disability should avoid as it is a potent instrument for creating as well as sustaining inequality.

2 A BRIEF HISTORY OF APARTHEID

The Constitutional Court has made several pronouncements that capture the historical-situatedness as well as the substantive nature of equality in the post-apartheid era.¹⁰ The Court has highlighted that under the South African Constitution, the normative content of the right to equality is different and much more inclusive than equality of a formal nature that one can ordinarily expect to derive, say, from Bill of Rights that were constructed around the premise of classical liberalism where fundamental rights are founded primarily as bastions against vertical tyranny from the state.¹¹ Under the South African Constitution, equality is, above all, a much more inclusive and exacting foundational principle that is historically situated and yet, concomitantly, transformative.¹² To borrow from Lourens Du Plessis, the right to equality under the Constitution is both *memory* and *promise*.¹³ It recalls the nation's past and, at the same time, seeks to prescribe a future that is radically different by drawing from the past,¹⁴ not least the apartheid past.

¹⁰ Some such pronouncements by the Constitutional Court on substantive equality form part of the discussion in Chapter 4 of this study.

¹¹ KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 150 at 152-156.

¹² However, in claiming that equality is a transformative right and value under the South African Constitution, it does not follow that the Constitutional Court's jurisprudence has always vindicated this claim. Indeed, it will be argued in Chapter 4, that the Court's jurisprudence has not consistently lived up to this claim.

¹³ L Du Plessis 'The South African Constitution as Memory and Promise' (2000) 11 *Stellenbosch Law Review* 385.

¹⁴ *Ibid.*

2.1 Apartheid as Apartness

The Afrikaans word 'apartheid', which is derived from Dutch, literally means 'separateness' or 'apartness'.¹⁵ Sampie Terreblanche tells us that the term 'apartheid' was coined by the National Party during the 1948 election campaign.¹⁶ But, as will be submitted later in this section, this is not intended to imply that apartheid began in 1948. As the prime ideology animating the creation and sustenance of a racial oligarchy in pre-democratic South Africa, apartheid was marked by the neglect, denigration, and above all, wanton oppression of the country's black citizens.¹⁷ It was an ideology that was built around a dichotomous or binarised construction of race. Phenotype or gross morphology is what mattered. Under apartheid, the idea of universal human rights as a common denominator was a contradiction in terms, an anathema and sacrilege, not least because truculent disavowal of the universality of humankind was indispensable to the success of the apartheid project.¹⁸ Certainly, apartheid was responsible for immeasurable pain and suffering. Justifiably, it engendered vigorous protest and resistance both within and beyond the borders of South Africa and earned universal opprobrium. The political and constitutional dispensation that was born on 27 April 1994, when the African National Congress was elected to office following the first democratic elections, constitutes a 'peaceful' revolution.¹⁹ It constitutes a rupture, in many ways, with

¹⁵ *Pharos Afrikaans-Engels English-Afrikaans Woordeboek/Dictionary* (2005) (hereinafter *Pharos Dictionary*).

¹⁶ S Terreblanche *A History of Inequality in South Africa 1652-2002* (2002) 312.

¹⁷ 'Black' in this context denotes people that were not classified as 'White' under apartheid racial categories as prescribed by Population Registration Act No 30 of 1950 which introduced mass racial classification as part of the legal implementation of apartheid. Racial classification under this Act is discussed in § 3 below.

¹⁸ See generally: J Dugard *Human Rights and the South African Legal Order* (1978).

¹⁹ Currie & J de Waal *The Bill of Rights Handbook* (note 3 above) 2; R Mathekgka 'The Formulation of the Equality Clause in the South African Constitution: A Juristic Question or a Political Point of Departure' (2003) Transregional Centre for Democratic Studies, New School University, New York 6-7. Available at < <http://www.newschool.edu/tcds/Ralph%20Mathekgka.pdf>> (last

an iniquitous and inequitable past and an historic bridge shepherding South Africans from a cruel and wicked legal system²⁰ to a new dawn of freedom and constitutionalism.²¹

The inauguration of a new constitution in 1994²² and 1996²³ to mark the new political dispensation not only inscribed into the political and legal economy a new culture of human rights when it ushered in a justiciable Bill of Rights built around the democratic values of human dignity, equality and freedom²⁴ which the state has a duty to respect, protect, promote and fulfil.²⁵ Equally significant, it has not been lost to commentators that the Constitution went beyond the classical liberal promise of merely protecting individual liberties against the tyranny of the state by creating, as part of recognising the history of oppressive, exclusionary and, fractious human relations in the country,²⁶ a space for

accessed on 5 April 2008). Though it is tenable to describe the ultimate transition from apartheid to a democratic South Africa as 'peaceful' in that it did not take the form of a violent or armed overthrow of the apartheid state, nonetheless, this should not obscure the fact that the road to a democratic South Africa was marked not just by peaceful negotiations, but also by state violence and counterviolence with thousands of lives lost. Furthermore, however ineffective, both the African National Congress and the Pan African Congress as protagonists against the apartheid state, enlisted armed struggle as part of their liberation strategies: N Mandela *No Easy Walk to Freedom* (1990) 163-183; C Van der Westhuizen *White Power & the Rise and Fall of the National Party* (2007) 143-210.

²⁰ D Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); A Chaskalson 'From Wickedness to Equality: The Moral Transformation of South African Law' (2003) 1 *International Journal of Constitutional Law* 590.

²¹ E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

²² Constitution of the Republic of South Africa Act No 200 of 1993 otherwise known as the Interim Constitution: Currie & de Waal *The Bill of Rights Handbook* (note 3 above) 5-6.

²³ Constitution of the Republic of South Africa No 108 of 1996 otherwise known as the Final Constitution: Currie & de Waal *The Bill of Rights Handbook* (note 3 above) 6. The 1996 Constitution is hereinafter referred to as the Constitution.

²⁴ Section 7(1) of the Constitution.

²⁵ Section 7(2) of the Constitution.

²⁶ To this end, The Preamble to the Constitution says, inter alia:

We the people of South Africa,
Recognise the injustices of the past;
Honour those who suffered for justice and freedom in our land;
.....

transformative constitutionalism.²⁷ The orientation in the Constitution towards substantive rather than formal equality, the recognition of diverse humanity and cultures that are equal in worth and dignity,²⁸ the inclusion of socio-economic rights that require positive action and commitment of economic resources and not merely political rights as justiciable rights,²⁹ the horizontal rather than merely vertical application of fundamental rights,³⁰ the requirement of structures and

Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to:
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

...

²⁷ Karl Klare's article is very pointed on this assertion: Klare (note 11) above; See also C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: The Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 249; D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309; H Botha 'Metaphoric Reasoning and Transformation' (Part 1) (2002) 4 *TSAR* 612; H Botha 'Metaphoric Reasoning and Transformation' (Part 2) (2003) 1 *TSAR* 20; S Jagwanth & C Murray 'Ten Years of Transformation: How Has Gender Equality in South Africa Fared?' (2002) 14 *Canadian Journal of Women & Law* 255; H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in an Transformative Constitution* (2003); W le Roux 'Bridges, Clearings and Labyrinths: The Architectural Framing of Post-apartheid Constitutionalism' (2004) 19 *SA Public Law* 629; M Pieterse 'What Do We Mean When We Talk About Transformative Constitutionalism?' (2005) 20 *SA Public Law* 156; P Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 351; AJ van der Walt 'Transformative Constitutionalism and the Development of South African Property Law' (Part 1) (2005) 4 *TSAR* 655; AJ van der Walt 'Transformative Constitutionalism and the Development of South African Property Law' and (Part 2) (2006) 1 *TSAR* 1; AJ van der Walt 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 *Fundamina* 1; S Liebenberg 'Needs, Rights and Transformation' (2006) 3 *Stellenbosch Law Review* 351; C Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253; T Roux 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?' (2009) 2 *Stellenbosch Law Review* 258. In Chapter 3 and Chapter 4 of this study, the implications of transformative constitutionalism for the constitutional interpretation of equality are considered.

²⁸ Section 9, the equality clause, is the main constitutional provision that is interpreted by the courts and commentators alike as mandating substantive equality which is faithful not only to an expanded universe of equality but also the protection of human dignity. In Chapter 4, especially, the philosophical orientation of equality under section 9 is explored.

²⁹ Section 26 (right of access to housing); section 27 (right of access to health services, food, water and social security); section 28 (children's rights including the right to basic nutrition, shelter, basic health services and social services); and section 29 (right to education) are illustrations of justiciable socio-economic rights that are provided in the Constitution; Klare (note 11) 154.

³⁰ Provisions of the Bill of Rights of the Constitution bind not just the state and its organs but also private parties: Section 8(2) of the Constitution. Section 8(2) of the Constitution permits the direct application of the provisions of the Bill of Rights in a horizontal relationship but only in certain

processes for participatory governance,³¹ and historical consciousness,³² are among the main features that are regarded as substantiating the uniquely transformative design of the South African Constitution.

Naturally, the commitment to racial equality under the Constitution has more immediate political significance. To millions of black inhabitants of South Africa who could not wear the fit of 'white' under apartheid's racial grid, 27 April 1994, a date that is now appositely commemorated as Freedom Day in the nation's calendar, marks 'a joyous daybreak to end the long night of their captivity'.³³ Freedom Day politically and legally stands for the day when, by constitutional fiat, the arch of history decidedly bent towards social justice and buried legally ordained apartheid.³⁴

If juxtaposed with the apartheid imaginary, the Constitution, with its egalitarian bent, must appear as certainly having inscribed into law a new apostasy; a

cases: *Khumalo v Holomisa* 2002 (5) SA 401 (CC); Currie & de Waal (note 3 above) 50-55; Klare (note 11 above) 155.

³¹ Provisions of the Constitution that promote participatory democracy include: section 32 (right of access to information inter alia, held by the state); section 33 (right to fair administrative action); sections 34 & 38 (right of access to the courts); sections 40 & 41 (duty of state to facilitate and adhere to co-operative governance); and section 234 (states' mandate to 'deepen the culture of democracy'); Klare (note 11 above) 155.

³² See Preamble to the Constitution (note 26 above); Du Plessis (note 13 above); P De Vos 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17 *South African Journal on Human Rights* 14.

³³ In the famous 'I Have a Dream' speech, referring to the Emancipation Proclamation signed by President Abraham Lincoln to free Negro slaves in the United States, Martin Luther King, the American civil rights leader, says, 'This momentous decree came as a great beacon of hope to millions of Negro slaves who had been seared in the flames of withering injustice. *It came as a joyous daybreak to end the long night of their captivity*'. <<http://www.americanrhetoric.com/speeches/mlkhaveadream.htm>> (last accessed on 24 March 2008). Emphasis added.

³⁴ This is also borrowed from a speech made by Martin Luther King. When leading a march to Montgomery, Alabama, campaigning for racial equality, King alludes to the moral unsustainability of a system of governance based on racial segregation when he says: 'How long? Not long! Because the arch of the moral universe is long, *but it bends toward justice*': Martin Luther King: A Modern Day Prophet <http://forerunner.com/forerunner/X0064_Martin_Luther_King.html> (last accessed on 19 March 2008). Emphasis added.

hedonistic rejection of the natural racial order under previous regimes. For equality is a pervasive value under the Constitution. While the rights guaranteed in the Bill of Rights enjoy parity and are not ordered hierarchically,³⁵ it is a truism that the right to equality has a pride of place in the pantheon of fundamental rights precisely because of South Africa's apartheid past.³⁶ The right to equality finds explicit expression in the Preamble, in section 9 – the equality clause – and also in section 36 – the limitation clause.³⁷ Section 9, which is the most explicit guarantee of the right to equality, says:

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

³⁵ CG Ngwenya 'HIV in the Workplace: Protecting Rights to Equality and Privacy' (1999) 15 *South African Journal on Human Rights* 516.

³⁶ Currie & de Waal *The Bill of Rights Handbook* (note 3 above) 231; GE Devenish *The South African Constitution* (2005) 47.

³⁷ C Albertyn & J Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *South African Journal on Human Rights* 149 at 149-150.

Section 9, which has been interpreted by the Constitutional Court to import substantive and not merely formal equality,³⁸ fills a singular lacuna in South Africa's political history. It is the epitome of new constitutional values and signals a decisive break with a political and legal order that legitimised discrimination and oppression with excessive zeal. In characteristic vivid and florid language, in one of the earliest cases to come before the newly established Constitutional Court, Justice Ismail Mahomed, then Deputy President of the Court, captured the repudiatory and, at the same time, transformative essence of the new Constitution when he said:

In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification and commitment to a democratic, universalistic, caring, and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.³⁹

The unjust past to which Justice Mahomed was alluding manifested in its most conspicuous form in the institutionalisation of a regimented racial order under

³⁸ The cases in which the Constitutional Court has clearly aligned itself with a more substantive equality sometimes explicitly referring to 'substantive equality' and at other times implying substantive equality, or at least, alluding to something more inclusive than formal equality, include the following: *Brink v Kitshoff NO* 1996 (6) 752 (CC), paras 40-42; *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 41; *Harsken v Lane* 1997 (11) 1489 paras 50-53; *Prinsloo v van der Linde* 1997 (6) BCLR 759 paras 30-33; *City Council of Pretoria v Walker* 1998 (3) BCLR 257, para 46; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) 1517 (CC) para 62.; *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 (CC) paras 41-44; *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 para 26; *Minister of Home Affairs and Another v Fourie and Another* 2006 (3) BCLR 355 (CC) para 60; JL Pretorius *et al Employment Equity Law* § 2.1; Currie & de Wall *Bill of Rights Handbook* (note 3 above) 232-234.

³⁹ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) para 262.

colonial and Union governments, and more particularly, under successive National Party governments with the implementation of apartheid.

2.2 Apartheid as a Collaborative Project of White Nationalism and Capitalist Exploitation

In recalling the history of apartheid, it is important to dispel any misconception of apartheid as a novel and exclusive product of policy, law and practice that began with the ascendancy into power of the National Party in 1948. To ascribe apartheid wholly to the National Party would be tantamount to both historical superficiality and distortion. Though the semantics of apartheid came from the bowels of the National Party and were popularised for the first time in the 1948 'general' election,⁴⁰ it is more accurate to recognise, as Nelson Mandela, the founding president of post-apartheid and democratic South Africa, has said in his biography, that 'apartheid was a new term but an old idea'.⁴¹ Racial segregation and discrimination, as instruments for inscribing white supremacy into the South African political economy using, inter alia, policy and legislation, predate legally inscribed apartheid. Racist laws, policies and practices have their genesis in the country's colonial heritage under British imperialism. Indeed, the weight of historical evidence implicates the English establishment far more than

⁴⁰ Save for the inclusion of the 'Coloured' vote, the 1948 election was a 'Whites' only election. It was only a general election in the sense that, however, racially exclusionary, within a paradigm of a racial oligarchy that enjoyed external recognition in the international arena, including the United Nations, its outcome effectively decided the government of the day. The 'Coloured' vote was, in any event, removed in 1956 from the common roll through the passage of the Separate Representation of Voters Amendment Act No 30 of 1956; C Van der Westhuizen *White Power & the Rise and the Fall of the National Party* (2007) 48.

⁴¹ N Mandela *Long Walk to Freedom* (1994) 104; BM Magubane *The Political Economy of Race and Class in South Africa* (1990) 226.

its Afrikaner counterparts in the creation of an apartheid ideology built around social Darwinism and white supremacy.⁴²

Whilst the etymology of apartheid carries the imagery of aspired absolute physical separation of races, in practice, apartheid was a hybrid form of racism combining elements of both 'dominative racism' as well as 'aversive racism'.⁴³ Apartheid entailed in one sense direct mastery of whites over blacks but also daily associations between blacks and whites especially in the economy and the home where blacks constituted the backbone of much needed menial cheap labour to white households under white supervision (dominative racism). In another sense, apartheid was about professing aversion towards blacks as an inferior and repulsive caste (aversive racism). In both respects, apartheid was the progeny of a colonial tradition spawned by British imperialism. But what distinguished apartheid from British colonial racism is that it was racism which had, as its outstanding features, brazenness, exhibitionism⁴⁴ and lack of apology. Apartheid accentuated both dominative and aversive racism with something approaching religious fervour. It embraced the ideology of racial destiny in which the universe is profusely racialised and unchanging and where races occupy fixed hierarchical positions according to their racial just deserts as determined by whites. Apartheid embraced and nurtured a virulent strain of both dominative and aversive racism that manifested in elaborate and concerted

⁴² Terreblanche (note 16 above) 251-256; S Dubow *Racial Segregation and the Origins of Apartheid in South Africa 1919-1936* (1989).

⁴³ These typologies of racism are suggested by Joel Kovel: J Kovel *White Racism: A Psycho History* (1984) 31-33; IM Young *Justice and the Politics of Difference* (1990) 141-142. Kovel has written about racism from a 'psychohistorical' perspective, meaning a historical perspective that integrates psychology. He posits the psychodynamics of dominative racism in Freudian oedipal terms of sexual object and conquest, and aversive racism in preoedipal terms of fantasies of dirt and pollution and the urge to expel the body standing over and against a purified abstracted subject. Kovel also advances a third type of racism which he calls 'metaracism' to signify a stage where racial supremacy is no longer the animating ideology, and there is no conscious systemic effort to dominate or avoid 'other races' as such, but the configuration of the economy determines the domination of one group by the other: Kovel *ibid* 48-50; Young *ibid* 142.

⁴⁴ JS Ndebele *Rediscovery of the Ordinary* (1991) 38.

social engineering with the aim of creating and sustaining social structures for dominance as well as a physical separation between races. Once blacks had provided their menial labour under the watchful supervision of whites, it was essential to the success of the aversive racism component of apartheid project to maintain physical separation.

Apartheid was practised in Boer as well as British Republics when South Africa was a British Colony.⁴⁵ Christi Van der Westhuizen points out that racial segregation, as a clear and concerted national policy, did not begin in Boer republics.⁴⁶ Instead, its genesis is more closely identified with the South African Native Affairs Commission that was set up by Alfred Milner.⁴⁷ Milner was the British Governor-General of Transvaal and the Orange River Colony at their time of annexation in 1900.⁴⁸ He was a pillar par excellence of the British imperial establishment. As part of advancing British imperialism, he sought to render South Africa maximally responsive to the design of transforming the country into a modern industrial capitalist state. However, unwilling or insufficient black labour stood in the way. Milner sought to overcome this by developing an oppressive and exploitative policy for governing blacks and extracting black labour, not least for the mining sector which was the imperial gem.⁴⁹ To this end, in 1903, the South African Native Affairs Commission (Milner Commission) was set up to examine and co-ordinate 'native' policy and labour issues.

⁴⁵ R First *et al* *The South African Connection: Western Investment in Apartheid* (1973) 66; DK Stasiulis 'Pluralist and Marxist Perspectives on Racial Discrimination in South Africa' (1980) 31 *British Journal of Sociology* 472; Van der Westhuizen (note 40 above) 14; Terreblanche (note 16 above) 179-296.

⁴⁶ Van der Westhuizen *ibid*; Terreblanche (note 16 above) 246; PE Louw *The Rise, Fall and Legacy of Apartheid* (2004) chapter 1.

⁴⁷ Van der Westhuizen *ibid* 15; Louw *ibid*.

⁴⁸ Louw *ibid*.

⁴⁹ *Ibid*.

The Milner Commission, which conducted hearings between 1903-1905, made recommendations, many of which were later to become not only constituent, but also cardinal, parts of the architectural design of apartheid, namely: racial separation of landownership with a clear division of South African territory into prime white areas and deprived African areas (the so-called homelands or tribal reserves); establishment of native locations in white towns; influx control to regulate the movement of blacks into cities; mission-based rather than state schooling for blacks, administration of affairs concerning the welfare of blacks by separate native councils; and black disenfranchisement.⁵⁰ The point is not that this was the first time that racial segregation was being instituted. Racial segregation had long been a practice in the administration of South Africa under both Dutch and British colonialism.⁵¹ Rather, as Van der Westhuizen highlights, the point is that this was the first time that an overarching policy of racial segregation was being prepared for inscription into law.⁵² Terreblanche grasps the nettle in his appreciation of the fact that the Milner Commission became, if not immediately, then certainly in the medium- and long-term, a major part of the edifice for the ideological justification for apartheid, the impoverishment of blacks, and the migrant labour system.⁵³ Indeed, Terreblanche describes the apartheid system that was propagated by the National Party as a system that was scrupulously built on the foundations laid down by the English establishment.⁵⁴

⁵⁰ Van der Westhuizen (note 40 above) 15; Louw *ibid*; Terreblanche (note 16 above) 246. For example, the Native Lands Act No 27 of 1913, which was passed by the Union Parliament and regulated ownership of land, creating 'reserves' for blacks and confining blacks, who were numerically far larger than the whites, to about one eighth of the land mass of South Africa, is a direct progeny of the Native Affairs Commission. The same applies to the 'pass' system and creation of 'homelands'.

⁵¹ Terreblanche (note 16 above) 151-217.

⁵² Van der Westhuizen (note 40 above) 14-15.

⁵³ Terreblanche (note 16 above) 246.

⁵⁴ *Ibid* 313.

Racially discriminatory legislation passed before 1948 was mainly the product of the Union Parliament.⁵⁵ As part of implicating British imperialism in the apartheid project, Terreblanche notes that it is not insignificant, that, apart from the nine years of pact government (from 1924 to 1933) from 1910 when the Union was established up to 1948 when the National Party took office, governance in South Africa was largely under an English establishment.⁵⁶ It can scarcely escape notice, therefore, that the English establishment had a conscious and dedicated hand in entrenching white supremacy through entrenching white political power and racial segregation.⁵⁷ Thus, the dye of unequal citizenship through racial segregation had already been cast when the National Party came to power in 1948.⁵⁸ By then, whites had already been conferred the status of a privileged racial group. They were already protected from economic competition with blacks through state policies and laws sanctioning racially discriminatory remuneration, racial job reservation for whites, spatial demarcation, the pass system and the establishment of reserves for blacks.

Part of the objective behind rendering an historical and material account of the apartheid system which factors in the economic dimension behind the system is to demonstrate that apartheid cannot exclusively be understood in racial terms as if securing racial recognition would be sufficient to remedy the injustices of apartheid. Apartheid was also about economic misrecognition. Apartheid created and sustained an economic underclass. From a Marxist perspective, it became an extension of the capitalist colonial project where race was a

⁵⁵ Examples of discriminatory legislation passed before 1948 include: The Mines and Works Act No 12 of 1911 as amended (prescribed entry into employment on racial lines, reserved jobs for whites, and prohibited industrial action by black mineworkers); Native Lands Act No 27 of 1913 and the Urban Areas Act No 21 of 1923 (divided the country into urban and rural areas and restricted the movement of blacks into urban areas); the Wages Act No 27 of 1925 (prescribed higher wages for white workers).

⁵⁶ Terreblanche (note 16 above) 247.

⁵⁷ *Ibid.*

⁵⁸ Van der Westhuizen (note 40 above) 63.

convenient pawn in the enterprise of class domination by capitalism.⁵⁹ Marxists have argued that what was more important to the success of the apartheid project was the creation of a dispossessed class that would serve as a tightly controlled cheap labour force. International capital nurtured and sustained apartheid.⁶⁰ Thus, the argument is that race was marginal or even superfluous to the enterprise of apartheid.

But while implicating economic exploitation as explaining the genesis of apartheid, it is equally important not to lose sight of the fact that race was ultimately the arch organising principle of apartheid in respect of recognition of human worth and status. Race and racial differentiation are what determined the distribution of social and economic benefits and burdens. Physical appearance, and more significantly 'whiteness' is what earned privilege and empowerment, and 'blackness' is what attracted burden and disempowerment. As critics of the traditional Marxist position on apartheid have pointed out, phenotype rather than ownership of land or capital was the most significant factor determining socio-economic status during apartheid.⁶¹ The relationship between white and black was legally unambiguously inscribed as a relationship of power and disempowerment, of domination and subordination. Frantz Fanon argued for a nuanced application of Marxist economic theory when addressing economic inequalities in the colony whose master dichotomies he saw as quintessentially Manichean. He said:

The originality of the colonial context is that economic reality, inequality and the immense difference of ways of life never come to mask the human realities.

⁵⁹ OC Cox *Caste, Class and Race* (1959); Stasiulis (note 45 above) 466.

⁶⁰ Stasiulis *ibid* 472. First *et al* (note 45 above) 285-286; FA Johnstone *Class, Race and Gold: A Study of Class Relations and Racial Discrimination in South Africa* (1976); H Jaffe *European Colonial Despotism: A History of Oppression and Resistance in South Africa* (1994); De Vos (note 32 above) 14.

⁶¹ PL Van den Berghe *South Africa: A Study in Conflict* (1979) 267-268; Stasiulis (note 45 above) 465; F Fanon *The Wretched of the Earth* (1967) 30-31.

When you examine at close quarters the colonial context, it is evident that what parcels out the world is to begin with the fact of belonging to or not to a given race, a given species. In the colonies the economic substructure is also a superstructure. The cause is the consequence; you are rich because you are white, you are white because you are rich. This is why Marxist analysis should always be stretched every time we have to do with the colonial problem...It is neither the act of owning factories, nor estates, nor a bank balance which distinguishes the governing classes. The governing race is first and foremost those who come from elsewhere, those who are unlike the original inhabitants, 'the others'.⁶²

Therefore, to fail to see race as having played a hegemonic role in the creation of the system of white privilege is to fail to see the single most important factor that held white nationalism together and was concomitantly the principal reason for the oppression of black South Africans. The prosperity of whites and white privileges were directly connected with the exploitation and pauperisation of blacks.⁶³ The maintenance of colonialism and the institution of apartheid served to constantly reproduce conditions of racial oppression and exploitation.⁶⁴ In the final analysis, failure to see race as a central organising principle in the colonial and apartheid political economy constitutes an incomprehensible or even obstinate failure to transcend the totalising effect of orthodox Marxist analysis so as to accept the reality of the subjectivities of those at the receiving end of brutal racist oppression.

Apartheid succeeded in serving as an enabling instrument of white nationalism in more ways than one. It succeeded in inculcating in whites, from the cradle to the grave, a distinct sense of self-determination to achieve permanent political and economic dominion over South Africa on the basis on supremacy that was exclusively based on phenotype. By virtue of being white alone, one had an

⁶² Fanon *ibid*; R Zahar *Frantz Fanon: Colonialism & Alienation* (1974) 25-26.

⁶³ Zahar *ibid* 18.

⁶⁴ *Ibid*.

instant incontestable claim to membership of a privileged caste. Furthermore, whiteness invested one with not only a moral claim to seeing black people as standing in opposition to the self-determination of whites and hence legitimate objects of antipathy and domination in virtually every sphere of life, but also with a moral duty to defend white privilege and rightness of the exploitation of blacks. Whatever differences there were between the English and Afrikaner political constituencies, they paled into insignificance when contrasted with the unity and purpose when it came to maintaining white supremacy and white privileges.⁶⁵ In these ways, apartheid helped not only to create cohesion among whites, but also a sense, or more accurately, an illusion of equal white citizenship in much the same way that the institution of slavery, and later segregation did for whites in the United States.⁶⁶ Indeed, in many ways, the architecture of apartheid, including racial sign posing and spatial demarcation mimicked the idea and institutionalisation of racial segregation that was developed in the southern states of the United States after the American Civil War as to be more than a mere coincidence or casual resemblance.⁶⁷ There is little doubt that proponents of apartheid, including some members of the Milner Commission, learnt their craft, in part, from looking up to their pioneering counterparts in the American South.⁶⁸

2.3 1948 and After: Afrikanerisation of Apartheid

Whilst taking into cognisance that apartheid was a joint ethnic enterprise between the English and the Afrikaners with distinct roots in capitalism, it

⁶⁵ Magubane (note 41 above) 230-231; H Arendt *The Origins of Totalitarianism* (1962) 199-200.

⁶⁶ Karst 'Why Equality Matters' (note 2 above) 269; KW Crenshaw 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 *Harvard Law Review* 1331 at 1370-1372; Higginbotham (note 1 above) 259.

⁶⁷ Terreblanche (note 16 above) 253; See generally J Cell *The Highest Stage of White Supremacy: The Origins of Segregation in South Africa and the American South* (1982).

⁶⁸ Cell *ibid* 192.

cannot be denied that the type of apartheid achieved under successive National Party governments came with its own unique branding. It came with what can be described as the Afrikanerisation of apartheid to denote the accent on promoting Afrikaner nationalism through a magnified essentialisation or reification of racial differentiation to achieve Afrikanerdom. After the coming into power of the National Party in 1948, apartheid unmistakably became not just an extension of Afrikaner nationalism, but also the main vehicle for its attainment.

It is not intended here to discuss Afrikaner nationalism in any detail save to highlight that, by the time the National Party assumed power, racial differentiation as a rationale for evading equality had become an inextricable part of that nationalism. Racism had become a means to an end; an essential strategy for achieving self-determination for Afrikaners. The ideology animating Afrikaner nationalism evaded equality by, inter alia, imagining, more than ever before,⁶⁹ the dangers of *swart oorstroming* or *swart gevaar*⁷⁰ (a National Party slogan in the 1948 election),⁷¹ and *gelykstelling*⁷² at two levels. At one level - a phenotypical one - Afrikaner nationalism, which was heavily dependent on a powerful construction of race, imagined ethnic purity and the Afrikaner patriot's duty to guard against contamination or miscegenation by inferior black races.⁷³ At another level - a political and material or economic one - it imagined Afrikaners as victims sandwiched between exploitation from above by the British

⁶⁹ It is important to appreciate that sloganeering with *swart oorstroming* or *swart gevaar* as part of electioneering, did not start with the 1948 election. Instead, it represented a scaling up of slogans used in earlier elections. Van der Westhuizen notes that the 1929 election was won with an enlarged majority for the National Party on the back of Hertzog's *swart gevaar* campaign: Van der Westhuizen (note 40 above) 222.

⁷⁰ Meaning 'black swamping': *Pharos Dictionary* (note 15 above).

⁷¹ Meaning 'black danger': *Pharos Dictionary* *ibid.*

⁷² Meaning 'equalisation': *Pharos Dictionary* *ibid.*

⁷³ Van der Westhuizen (note 40 above) 12.

colonialism and danger from below by a growing 'uncivilised' black majority.⁷⁴ British colonialism, and not least British notions of ethnic superiority over Afrikaners, its scorched-earth policy and concentration camps that caused the death of 27 000 women and children during the Anglo-Boer war, post-war attempts to Anglicise Afrikaners, the forced urbanisation of Afrikaners by industrialisation where Afrikaners became impoverished and fearful of competing for economic resources with a growing African urban population, a sense of being victimised by foreign capitalist interests are among the factors that did much to veer Afrikaner nationalism towards an aggressive, exclusive and virulent form of nationalism.⁷⁵ Against this backdrop, the scaling up of apartheid became a tool for creating not only political and cultural space, but also economic space for Afrikaners. Apartheid became *the* centrepiece of policy under successive National Party governments.

The scale of racist exclusionary laws, policies and practices ushered in by government after 1948 was unprecedented in the country's history comprising, as it was, of the deliberate intensification and magnification of the scale of racial segregation and discrimination, often with the accompaniment of vitriol and the assistance of the coercive and secretive arms of the state. Thus, the term 'grand apartheid' was coined to denote not just racial segregation but also its scaling up and consolidation into an all pervasive social, economic, political and legal order that was rooted in an all pervasive policy and practice of white supremacy under

⁷⁴ Van der Westhuizen *ibid* 14; Terreblanche (note 16 above) 298-30; Magubane (note 41 above) 246-249. This is not to say that race and ethnicity were the only powerful axes animating Afrikaner nationalism. According to Anne McClintock, gender also featured powerfully in Afrikaner nationalism with men as the embodiment of the political and economic self-determination of the Afrikaner and women as the unsalaried custodians of the moral and spiritual health of the *volk* (meaning people, nation or race) as epitomised by the figure of the self-sacrificing *volksmoeder* (the mother of the nation: *Pharos Dictionary* (note 15 above)): McClintock "No Longer in Future Heaven": Women and Nationalism in South Africa' (1991) 51 *Transition* 104 at 108; Van der Westhuizen *ibid* 9, 55-56.

⁷⁵ Van der Westhuizen *ibid* 45; Terreblanche *ibid* 16.

the hegemony of the National Party after taking office.⁷⁶ In describing the apartheid that was ushered in by the National Party in 1948 as grand apartheid, the intention is to capture the intensity and magnification of the accompanying racial segregation and dehumanisation of black people rather than to create an impression of the implementation of a racial blueprint in waiting as there was none. Deborah Posel who refutes the thesis of apartheid as a 'grand design', has argued that the idea of an apartheid master plan is misleading to the extent that apartheid was in part forged in a piecemeal way through ongoing struggles with the body politic of the state and the National Party.⁷⁷ Though race as an organising principle for governance and citizenship triumphed resoundingly during the hegemony of the National Party, nonetheless, the process of constructing a robust racial oligarchy was in part marked by ad hocism, continuities as well as discontinuities, and even failures and deviations.⁷⁸

Describing apartheid under National Party governments, Mandela has said:

What had been more or less *de facto* was to become relentlessly *de jure*. The often haphazard segregation of the past three hundred years was to be consolidated into a monolithic system that was diabolical in its detail, inescapable in its reach and overwhelming in its power. The premise of apartheid was that whites were

⁷⁶ HCJ van Rensburg 'The History of Health Care in South Africa' in HCJ van Rensburg (ed) *Health and Health Care in South Africa* (2004) 51-108 at 77-79; AJ Christopher *The Atlas of Apartheid* (1994).

⁷⁷ D Posel *The Making of Apartheid 1948-1961* (1991) 5. In support of her arguments, Posel makes the following main observations: that the National Party assumed office in 1948 at a time that there was division in the party over the very essence of apartheid and the place of African labour in the political economy; that the Sauer Report, which had been the election manifesto of the National Party, reiterated rather than resolved party division over the essence and direction of apartheid; that the Apartheid of the 50s was an expedient reaction to consolidate Afrikaner power within the state and the white electorate and that in the 60s there was a second wave of apartheid policies to deal with an anticipated escalation of urban resistance by Africans, through inter alia, restructuring of the state: Posel *The Making of Apartheid* *ibid* 5-8; Van der Westhuizen (note 40 above) 37-38.

⁷⁸ *Ibid*.

superior to Africans, Coloureds and Indians and the function of it was to entrench white supremacy forever.⁷⁹

Over time, social engineering under grand apartheid took the shape of an audacious attempt to reproduce the sort of social stratification that one found in a medieval political and legal order, but at this historical moment using a bio-cultural construction of race as the fundamental organising principle.⁸⁰ In mediaeval society, as Sandra Fredman notes, equality was a heresy as hierarchy, was essential with birth or status being used as organising principles.⁸¹ Martha Minow observes that the legal order in medieval society sought to enforce a social, economic and political system premised on one's station in life.⁸² Apartheid emulated the same through the vehicle of race.

As many commentaries have been quick to highlight, the move towards grand apartheid was not only audacious, but also marked something of an historical irony as the National Party came to power in the very same year - 1948 - that the world, through the United Nations, resolutely decided to adopt a universal instrument for protecting human rights - the Universal Declaration of Human Rights (UDHR).⁸³ The UDHR, which, among other provisions, proclaims the equality and dignity of all humankind,⁸⁴ was spurred by the horrors of the Third Reich. It marked a global revulsion against Hitler's fascist project which, inter alia, saw Aryan differentiation being spawned and used as a nationalist tool for oppressing, maiming or killing those not fitting Aryan specifications. Müller-Hill, an expert on genetics, reminds us that Hitler's nefarious brand of German

⁷⁹ Mandela *Long Walk to Freedom* (note 41 above) 104.

⁸⁰ D Posel 'What's in a Name? Racial Categorisations under Apartheid and their Afterlife' (2001) 47 *Transformation* 52.

⁸¹ S Fredman *Discrimination Law* (2002) 4.

⁸² M Minow *Making All the Difference: Inclusion, Exclusion, and American Law* (1990) 121-123.

⁸³ Van der Westhuizen (note 40 above) 37; M Ramphela *Laying the Ghosts to Rest: Dilemmas of the Transformation in South Africa* (2008) 76; Terreblanche (note 16 above) 333-334.

⁸⁴ Articles 1 and 2 of the UDHR.

nationalism was used as a fascist eugenic tool; a tool for eliminating Jews, gypsies, disabled people and other groups that fell short of Aryan perfection.⁸⁵ In contrast, however, the professed resolve of the architects of grand apartheid especially was not to eliminate blacks, but to establish a permanent *baasskap*⁸⁶ society that could not be unravelled at least in the temporal world.

The notion of a *baasskap* society was underpinned by an assumption not only of a natural racial hierarchy but also racialised gendered hierarchy. A white man – *baas* –, especially, stood as a perpetual master and father figure for the eternally child-like black people who depended on him for their welfare. On the farm, especially, *baasskap* succeeded in producing an ideal cultural, political and economic formation in that its sustenance was not always dependent on naked domination alone, but also on ‘consent’ or accommodation by its objects.⁸⁷ Hegemonic silences by the oppressed and exploited to exclude confrontation and assure a livelihood manifested as consent in daily routine such that the system no longer appeared as coercive,⁸⁸ even if it meant that, from time to time, the *baas* would find it necessary to physically chastise his workers who were after all his children. Sylvain has described the dynamics of relationships between whites and blacks on the farm as epitomising the essence of hegemony as the outcome

⁸⁵ B Müller-Hill *Murderous Science, Elimination by Scientific Selection of Jews, Gypsies and Others, Germany 1933-1945* (1988); B Müller-Hill ‘Lessons from a Dark and Distant Past’ in A Clarke *Genetic Counselling: Practice and Principles* (1994) 133-141. See also the discussion in Chapter 3 § 3.6 of this study.

⁸⁶ The Afrikaans word *baasskap* literally means ‘boss-ship’ or mastership or lordship: *Pharos Dictionary* (note 15 above). It is a term that was used and popularised by the architects of apartheid as well as the National Party to reinforce the message of white supremacy and attendant hierarchical social ordering. In simple language *baasskap* conveys the idea that the ‘white man’ was boss and will always remain so exercising paternalism and guardianship over the servile and lesser dark races: Mandela *Long Walk to Freedom* (note 41 above) 104. For an account that combines a pictorial as well as a narrative of the *baasskap* society, see: D Goldblatt *South Africa: The Structure of Things Then* (1998).

⁸⁷ R Sylvain ‘Bushmen, Boers and Baasskap: Patriarchy and Paternalism on Afrikaner Farms in Omaheke Region, Namibia’ (2001) 27 *Journal of Southern African Studies* 717; J Comaroff and J Comaroff *Of Revelation and Revolution: Christianity, Colonialism and Consciousness in South Africa* (1991) 22 at 26-27.

⁸⁸ Sylvain *ibid* 728-729.

of the 'dialectics of force and consent' that Antonio Gramsci wrote about when describing the nuances in which the domination of one class by another is achieved.⁸⁹

But notwithstanding that apartheid produced some of the structural ambivalence that is a result of victims seemingly legitimising an oppressive system by conniving in its enterprise through accommodation, acquiescence or consent,⁹⁰ it would be gross trivialisation of the tyranny, ferocity and brutality of apartheid to fail to see that it is not so much hegemonic silences that were the principal reason for keeping it afloat, but the use or threat of state sanctioned force. It would be stretching Gramscian consent to breaking point to imagine that those at the receiving end of apartheid were, nonetheless, able to find in the public discourses of apartheid representations of their own interests, identities and feelings,⁹¹ not least because the counterfactuals are not equivocal. Ultimately, apartheid depended on legal sanctification of racism and the brutal suppression of protest for its sustenance.⁹² Thus, it is not consent or even the appearance thereof that, in the end, protected the legitimacy of apartheid, but brutish coercion.

⁸⁹ Sylvain *ibid* 728; A Gramsci *Selections from the Prison Notebooks* (1971) 80. Cited in Sylvain *ibid* 728; Cell (note 67 above) 18-19.

⁹⁰ Cell *ibid* 19; R Fatton *Black Consciousness in South Africa* (1986) 53-54.

⁹¹ Nancy Fraser puts a gloss of Gramscian consent when she says that for such consent to apply, you need people who are disadvantaged by the oppressive system to at least recognise themselves in the discourses of the public sphere. They should at least find in the discourses of the public sphere representations of their own interests, aspirations, life-problems and anxieties to a degree that echoes their own lived experiences, identities and feelings: Nancy Fraser *Justice Interruptus* (1997) 95, footnote 15.

⁹² Of the events of brutal violence to shore up apartheid, the *Sharpeville Massacre* and the *Soweto Uprisings* stand among the most politically remembered. *Sharpeville Massacre*: The event known as the Sharpeville Massacre or Sharpeville Shootings occurred on 21 March 1960, in Sharpeville, when South African police opened fire on unarmed black protesters, killing 69 people. The protesters that were led by the Pan African Congress were demonstrating against 'pass' laws that were used to enforce spatial apartheid by controlling movements of blacks in 'white' South Africa. The black protesters had converged on a police station to bait the police into arresting them for not carrying pass books as they were required to do by apartheid law. Defiance of pass laws became a symbol of popular resistance against apartheid, not least because pass laws were one of the principal routes through which police harassed and arrested black people as part of enforcing apartheid laws: B Pogrand *How can Man Die Better: Sobukwe and Apartheid* (1990) 132-

With the ascendancy into power of the National Party in 1948, the expectations of the architects were that the legitimacy of white supremacy that had been treated as *de facto* under previous regimes would now be rendered *de jure*. Its legitimacy would now be sealed by legal entrenchment under a Westminster style Parliament to become a permanent feature of the landscape. Under a Westminster style of government, Parliament was sovereign and could do no wrong.⁹³ Laws were enacted with a view to thwarting any judicial attempts to second-guess apartheid. For example, to leave the matter beyond peradventure, section 59 of the Constitution Act of 1961⁹⁴ provided that 'no court of law shall be competent to inquire into, or to pronounce upon the validity of any Act passed by Parliament'.

However, even accepting the tenets and legitimacy of the doctrine of parliamentary sovereignty, the apartheid version was a caricature of it and was manifestly wanting in substance. The pervading style of governance was rule by

137; Terreblanche (note 16 above) 348; Magubane (note 41 above) 312-313; Today, South Africa commemorates 21 March as Human Rights Day. Sharpeville is also the site where the Final Constitution was signed into law. *Soweto Uprisings*: The Soweto Uprisings mark resistance by black youth as well as a series of clashes between the youth and the police that immediately revolved around the use of Afrikaans as a medium of instruction in African Schools. In 1974, the National Party government, through the Minister of Bantu Education and Development passed a decree which required the implementation of a 50:50 balance between English and Afrikaans as the mediums of instruction in 'African' Schools from standard five onwards instead of merely English as had been the position prior. The resistance which began as demonstrations progressed to rioting. Clashes with the police occurred over several days in a number of locations in the country, but with 16 June 1976 - the day when up to 10 000 students made their way to Orlando Stadium in Soweto to hold a protest rally and in the process clashed with police - as the high water mark. It is estimated that around 500 or more youth were killed and many more were wounded or disabled by police through indiscriminate shooting; Terreblanche (note 16 above) 351-352; Magubane (note 41 above) 323; C Howell, S Chalklen & T Alberts 'A History of the Disability Rights Movement in South Africa' in B Watermeyer *et al Disability and Social Change: A South African Agenda* (2006) 46-84 at 51-52. Today, the South African political almanac commemorates June 16 as Youth Day.

⁹³ Currie & de Waal *The New Constitutional and Administrative Law* (note 3 above) 13-14, 43-44; S De Smith & R Brazier *Constitutional and Administrative Law* (1994) 68-102.

⁹⁴ Act No 32.

authority and not justification.⁹⁵ An essential pillar of the apartheid authoritarian architectural design was that the Parliament in question was anything other than a Parliament representative of all people. It was a Parliament in which the objects of the *baasskap* society – about 80 percent of the South African population – had no voice except through the subjects of the *baasskap* society, thus, assuring the permanence of the seal.⁹⁶ Etienne Mureinik summed it up neatly when he said that ‘the leadership of the ruling party commanded Parliament, Parliament commanded the bureaucracy, the bureaucrats commanded the people’.⁹⁷ Thus, parliamentary sovereignty became the guarantor of white supremacy.⁹⁸ The police and the armed forces could be relied upon to ultimately enforce the law and protect the integrity of apartheid.

By legally sanctifying and signposting a Darwinian asymmetrical binary category of humanity – on the one hand, a ‘European’ and later ‘white’ race⁹⁹ that was the norm, and, thus, racially superior, healthy, desirable and entitled to a first claim on state resources, and on the other hand, a ‘non-European’ (and later ‘non-white’) race that is deviation from the norm, and thus racially inferior, pathological, undesirable and a burden to the state save for its labour – the apartheid project rendered race as the ‘critical and overriding faultline’.¹⁰⁰ The default category was ‘non-European’ and later ‘non-white’ which depended for a

⁹⁵ Mureinik (note 21 above) 32.

⁹⁶ Chaskalson (note 20 above) 591-592.

⁹⁷ Mureinik (note 21 above) 32.

⁹⁸ Currie & de Waal *The New Constitutional and Administrative Law* (note 3 above) 45-46.

⁹⁹ Initially, racial signposting used ‘European and Non-European’ but later ‘White’ and ‘Non-White’: Van der Westhuizen (note 40 above) 71; Christopher (note 76 above). As Murphy notes, to those unacquainted with apartheid lexicography, especially, ‘European and Non-European’ did not quite capture phenotype as the intended inclusionary and exclusionary criterion, but rather crudely pointed more towards the inhabitants of Europe: ML Murphy ‘Defining People: Race and Ethnicity in South African English Dictionaries’ (1998) 11 *International Journal of Lexicography* 1 at 6-7.

¹⁰⁰ D Posel ‘What’s in a Name? Racial Categorisation under Apartheid and their Afterlife’ (2001) 47 *Transformation* 50 at 52.

meaning about its station in life from its exclusion from Aryan perfection.¹⁰¹ By creating a universe of dichotomous racial categorisation as the cardinal principle for recognising human dignity and determining entitlement not only to political participation, but also to socio-economic goods whether they be recreational amenities,¹⁰² education,¹⁰³ health care,¹⁰⁴ employment¹⁰⁵ and so on, apartheid

¹⁰¹ Some of the key architects of grand apartheid such as Dr Nic Diederichs, Dr Piet Meyer and, of course, Verwoerd, are said to have been influenced by, or are at least associated with, the racial views of the Third Reich to the extent that they were race-obsessed and posited racial differentiation as a kind of 'final solution' but not so much to exterminate the Other, but to subordinate, economically exploit, and spatially separate forever due to irresolvable biological and cultural dichotomies between blacks and whites: Van der Westhuizen (note 40 above) 70; Terreblanche (note 16 above) 301.

¹⁰² The Group Areas Act No 41 of 1950 regulated residential spatial demarcation, planning and development, and prescribed physical separation in residential areas on the basis of race to comport with racial classification under the Population Registration Act. The Reservation of Separate Amenities Act No 49 of 1953 required segregation in access to amenities such as restrooms, parks and cinemas. For a historical account on the implementation of these legislative instruments, see generally: Christopher (note 76 above). Racial segregation in specific recreational spheres such as sport has also been the subject of documentation and analysis: B Murray & C Merret *Caught Behind: Race and Politics in Springbok Cricket* (2004); C Merrett (2005) 'Sport and Apartheid' (2005) 3 *History Compass* 1.

¹⁰³ Inequality in the education sector, as in other spheres, took the form of racially segregated educational facilities and differential access to educational resources at all levels of education. The Bantu Education Act No 47 of 1953 and the Extension of University Education Act No 45 of 1959 were major legislative instruments for imprinting the architecture of apartheid on schools and universities respectively: P Kallaway *Apartheid and Education: The Education of Black South Africans* (1984); KB Hartshorne *Crisis and Challenge: Black Education 1910-1990* (1992); J Hyslop *The Classroom Struggle: Policy and Resistance in South Africa, 1940-1990* (1999); SA Hlatshwayo *Education and Independence: Education in South Africa, 1658-1988* (2000); P Kallaway (ed) *The History of Education under Apartheid, 1948-1994: the Doors of Learning and Culture shall be Opened* (2002).

¹⁰⁴ Equally, health care became an instrument for maintaining white supremacy during the colonial and apartheid eras: C De Beer *The South African Disease: Apartheid Health and Health Services* (1984); M Price, 'Health Care as an Instrument of Apartheid Policy in South Africa' (1986) 1 *Health Policy and Planning* 158-170; M Savage & SR Benatar 'An Analysis of Health and Health Services' in RA Shire (ed) *Critical Choices for South Africa: An Agenda for the 1990s* (1990) 147-167; HCJ van Rensburg & A Fourie 'Inequalities in South African Health Care. Part I: The Problem - Manifestation and Origins' (1994) 84 *South African Medical Journal* 95; HCJ van Rensburg & SR Benatar 'The Legacy of Apartheid in Health and Health Care' (1993) 24(4) *South African Journal of Sociology* 99; African National Congress, *National Health Plan South Africa*, (1994); AR Chapman & LS Rubenstein (eds) *Human Rights and Health: The Legacy of Apartheid* (1998); L Baldwin-Ragavan, J de Gruchy and L London (eds) *An Ambulance of the Wrong Colour: Health Professionals, Human Rights and Ethics In South Africa* (1999); CG Ngwenya 'Substantive Equality in South African Health Care: The Limits of Law' (2000) 4 *Medical Law International* 2000; CG Ngwenya 'Access to Health Care as a Fundamental Rights: The Scope and Limits of Section 27 of the Constitution' (2000) 25 *Journal for Juridical Science* 1; CG Ngwenya 'The Development of the South African Health System: from Privilege to Egalitarianism' in Van der Walt AJ (ed) *Theories of Social and Economic Justice*

became a self-fulfilling prophecy. Apartheid accentuated, created, and at the same time, justified some of the greatest racially stratified socio-economic inequalities in the world.¹⁰⁶

During the heyday of apartheid, persons classified as racially different stood for all time in a hierarchical relationship with one another, but as constituent parts of a well oiled state racial machine servicing a pyramid comprising of whites at the apex, 'Africans' at the nadir and 'Coloureds' and 'Indians' occupying intermediate positions.¹⁰⁷ One of the ironies of apartheid, however, is that, as in

(2005) 179-189; HCJ van Rensburg 'History of Health Care in South Africa' in HCJ van Rensburg (ed) *Health and Health Care in South Africa* (2004) 52-108.

¹⁰⁵ G Standing *et al Restructuring the Labour Market: The South African Challenge*. An ILO Country Review (1996) chapters 4 and 10 especially; Introduction to the Draft Employment Equity Bill, 1997 published by the Department of Labour for public comment <http://llnw.creamermedia.co.za/articles/attachments/05501_draftempequibill.pdf>(last accessed on 19 March 2008); The Preamble to the Employment Act No 55 of 1998 recognises, inter alia, 'that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market'.

¹⁰⁶ It was noted in 1996, for example, that if 'white' South Africa were a separate country it would be positioned 24th in the global HDI context and in the high category while 'black' South Africa would be positioned 128th and in the low category: United Nations Development Programme *Human Development Report 1996* (1996); N Nattrass & J Seekings 'Democracy and Distribution in Highly Unequal Economies: The Case of South Africa' (2001) 39 *Journal of Modern African Studies* 471.

¹⁰⁷ The use, in this study, of the terms 'Africans', 'Coloureds', 'Indians' and 'Whites' or other racialised equivalents (such as 'Natives' or 'Bantu' in place of 'Africans' or 'Asians' in place of 'Indians') that were used by colonial and apartheid governments to denote human collectivities in South Africa is an analytical necessity. The terms are indispensable to my arguments in this chapter in which, in part, I seek to unmask the fallacy of races as essences that are innately differentiated and pegged on a hierarchical scale as to merit differentiated citizenship. As is elaborated upon in this chapter, apartheid legislation and policy, and in particular the Population Registration Act No 30 of 1950, required every person in South Africa to be registered according to their 'racial characteristics.' Obviously, the terms 'Africans', 'Coloureds', 'Indians' and 'Whites' have a racialising and racist history in a South African context, and my parenthesised use of the terms throughout this study is intended to capture this history. However, the official recognition of races in post-apartheid South Africa through instruments such as the Employment Equity Act No 55 of 1998, for example, that are designed to achieve constitutional equality in the workplace, and inter alia, redress the inequities and iniquities of a racially discriminatory past but using precisely the same apartheid racial population classifications to identify beneficiaries of affirmative action measures, raises problems of its own. While the intention behind measures such as the Employment Equity Act is not to bequeath to post-apartheid South Africa a notion of race that was conceived to serve a racialising and racist project, it is hard not to argue that though not racist, the use of race in affirmative action is inevitably racialising. The retention of apartheid

other jurisdictions that have experienced the institutionalisation of racism,¹⁰⁸ it produced a phenomenon of 'racial positioning' even among the excluded and inferiorised 'races'. By creating a subcategorised and calibrated hierarchy of inferiority, as it were, among the 'races' excluded from premiere citizenship, with 'Africans' placed at the nadir, and 'Coloureds' and 'Indians' occupying intermediate positions, apartheid not only succeeded in inculcating in 'Coloureds' and 'Indians' a sense of racial privilege in access to socio-economic goods relative to their 'African' counterparts. Apartheid also succeeded in inculcating a strong sense of relative racial superiority of 'Coloureds' and 'Indians' over 'Africans' and a sense of duty to guard their own racial space against encroachment by 'Africans' using precisely the same racial ideology

racial categories in measures such as the Employment Equity Act albeit for the purposes of redress through affirmative action does, ineluctably, have the unintended consequence of renewing salience on race consciousness and, thus, reifying race, once again, as if it is an objective epistemology. Such an outcome is one of the dilemmas and paradoxes of transformation: Posel 'What's in a Name?' (note 100 above) 51, 67-70; H Botha 'Equality, Plurality and Structural Power' 25 *South African Journal on Human Rights* 1. There are, of course, different understandings of the concept of racialisation: R Miles & M Brown *Racism* (2003) 99-103. In the South African context, however, if racialisation can be understood as a dialectical process of signification within a historical context where race has hardly been a benign signification of collectivities but a heavily ideological evaluative and dichotomised representation of superior Self and inferior Other, then 'official' representation of racialised identities is inimical to South Africa's national project of transformation to the extent that it encourages or even invites the resuscitation of old racial categories that are imbued with notions of racial superiority and inferiority: Miles & Brown *ibid* 101-102. A question that must be posed for another discourse (but not the present one), therefore, is whether, given its ultra racialised past, South Africa can afford to give official salience to racial classifications even for purposes of redress if that has the consequence of paradoxically reifying rather than decentering race, and retrieving race at its moment of disappearance.

¹⁰⁸ Discussing 'Coloured' identity in the then Rhodesia (now Zimbabwe), James Muzondidya gives, as an example of an instance of racial positioning, a resolution that was taken in the mid 1920s by the Umtali (now Mutare) Coloured and Asian School Advisory Board (a board comprising of parents) demanding the removal of 'native' and 'half-caste' pupils from a school designated by for 'Coloureds' and 'Indians' by the colonial government. The parents insisted that admission be limited to 'pure children of coloureds and Indians': J Muzondidya 'Race, Ethnicity and the Politics of Positioning: The Making of Coloured Identity in Colonial Zimbabwe' in M Adhikari (ed) *Burdened by Race: Coloured Identities in Southern Africa* (2009) 156-184 at 164. On racial positioning in the United States, see, for example: LC Ikemoto 'Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"' (1993) 66 *Southern California Law Review* 1581; Charles R Lawrence 'Foreword. Race, Multiculturalism, and the Jurisprudence of Transformation' (1995) 47 *Stanford Law Review* 819 at 829-835.

scripted by apartheid. In this way, the social construction of profusely racialised identities in South Africa though initiated and ultimately controlled by whites who had ultimate monopoly over political and socio-economic power, in some limited ways, paradoxically became to some extent, an ever alluring collusive enterprise between the 'superior' race and the intermediately 'inferior' races.

The phenomenon of racial positioning among the 'intermediately inferiorised races' shows that even a 'race' that is labouring under racial oppression can become consciously complicit in the fable of racial supremacy when it finds something attractive and redemptive in being placed not at the nadir of race, but at least in an intermediate position. A lesson to learn from colonial and apartheid's racial classifications is that the making of racial identity even under a robust racial oligarchy is rarely a one way street that is policed completely by the original maker. A racial identity whose origins lie in 'misrecognition' by the 'master race' can, nonetheless, be appropriated by its 'victims' to the point of flourishing¹⁰⁹ and even being guarded with conspicuous tenacity regardless of the racialised myths that underpinned its original making, especially if it means not occupying the most stigmatised position.¹¹⁰ This phenomenon is particularly evident in the making of the 'Coloured' identity prior to the democratisation of South Africa in 1994.¹¹¹

¹⁰⁹ KA Appiah *In My Father's House* (1992) 178.

¹¹⁰ 'Passing' was one of the phenomenon produced by the racial hierarchies erected by colonialism and apartheid. It was an escape valve for those whose gross morphology allowed them to move from a 'lower' racial category to a 'higher' one. Much of passing took the form of 'Coloured' passing for 'White' much more than 'Native' passing for 'Coloured'. Passing came with benefits as well as burdens. On the benefits side, especially if one managed to pass for 'White', would be premiere access to socio-economic goods, including education and employment. On the burden side, however, one would have to cut oneself from family, relatives and friends as association with family, relatives and friends of a 'lower' racial category could invite official suspicion and loss of the 'passed' category through 'downward' reclassification: RH du Pre *The Rape of the 'Coloured' People* (1992) 90; I Goldin *Making Race: The Politics and Economics of Coloured Identity in South Africa* (1987) 80. G Lewis *Between the Wire and the Wall: A History of South African 'Coloured' Politics* (1987) 164-165.

¹¹¹ Du Pre *ibid.* RH du Pre's book illustrates this point. The pervading equality and racial identity arguments in Du Pre's book - *The Rape of the 'Coloured' People* - are manifestly contradictory or

The subdivision of 'non-white races' into 'Coloureds,' 'Indians,' and 'Africans' was ultimately a calculated political stratagem by a racist and racially dominant class that was keenly aware that numerically it was very small in size compared to the 'Africans' and that it needed 'other races' as buffers to sustain its dominance. Subdividing the exploited races through differentiated inferiorisation, therefore, served to augment white political power through 'divide and rule'. By conferring relative privileges on 'Coloureds' and 'Indians' and legitimising the 'superexploitation' and 'supermarginalisation' of 'Africans'

even unwittingly racist to a point. In one sense the author, a political historian who self-identifies as 'Coloured', laments the racist premises of apartheid and the injustices meted out to all inferiorised 'races'. In another sense, though, the book is plea for the realization of promises of preferential treatment for 'Coloureds' that were made by successive white governments but were not kept as it was essential to the integrity of apartheid, especially, to conspicuously widen the racial distance even between 'Whites' and the intermediately inferiorised races. Du Pre quite unambiguously conveys, almost throughout the book, that he would have been content with a system where 'Coloureds' were treated as 'Whites' notwithstanding that 'other races' are subjected to different and burdensome racial deserts. Du Pre manifestly lacks a vision for formal equality let alone substantive equality, not least because the author's arguments are unwittingly steeped in apartheid racial thinking or an approximation thereof. The author's arguments are based on a racialised or biologised understanding of 'Coloureds' as a 'race' with the same or nearly the same racial essence as 'Whites' as well as on an implicit inegalitarian concession that calibrated racial essence can legitimately determine differentiated citizenship. At the same time, it is important not to paint 'Coloured' self-identity with the same Du Pre brush and point out that Du Pre's viewpoint is merely one of many viewpoints on 'Coloured' identity. In the post-apartheid era especially, other perspectives by commentators who have self-identified as 'Coloured', have sought to assert or argue for a 'Coloured' identity that does not depend on a colonial archive of racial essence for its sustenance, but is, instead, constructed as a sociopolitical reality within a South African socio-political milieu. In this post-apartheid construction of 'Coloured' identity, 'Coloured' people are agents and not merely recipients of a racialised colonial identity and do not necessarily succumb to the confining essence of race, or at least, do not seek to perpetuate a racialised identity that, historically, has nearly always accepted rather than challenged the appropriateness of the colonial archive of 'Coloured' people as a 'mixed race' that is placed somewhere between the superiorised racial essence of 'Whites' and inferiorised racial essence of 'Africans' and is incapable of imagining an alternative collectivity to race. For this post-apartheid representation of Coloured identity, see for example: M Adhikari 'From Narratives of Miscegenation to Post-modernist Re-imagining: Towards a Historiography of Coloured Identity in South Africa' in M Adhikari (ed) *Burdened by Race: Coloured Identities in Southern Africa* (2009) 1-22 at 15-17. See also Michelle Ruiters who departs from a solely essentialised or biologised, or at least, creates space for a non-racialised 'Coloured' identity when she says 'Coloured identities are multiple, fluid and hybrid': M Ruiters 'Collaboration, Assimilation and Contestation: Emerging Constructions of Coloured Identity in Post-Apartheid South Africa' in M Adhikari (ed) *Burdened by Race: Coloured Identities in Southern Africa* (2009) 104-133 at 112.

apartheid was able to frustrate the construction of a strong and united opposition.¹¹² The quadruple racial grid became a device for not only signposting the 'master race' but also creating a buffer system comprised of the not so inferior 'Coloureds' and 'Indians' as racial allies for keeping well at bay the doubly inferiorised 'African' race, the largest group in numerical terms and, therefore, the most threatening to the white citadel.

Spatial demarcation, planning and development, and boundaries for social interaction were all constructed to reconcile with the pyramid's racial design.¹¹³ Racial boundaries were immanent in virtually all spheres of life and were meticulously policed by the state. Deborah Posel reminds us that grand apartheid came not only with accentuated racial segregation, but also the promise of heightened discipline, regulation and surveillance to maintain racial space.¹¹⁴ As testimony to the success of the architects of grand apartheid, the echo of race was heard loudly from the cradle to the grave in the life of every inhabitant of South Africa complete with racialised delivery facilities and cemeteries. Recalling, in his autobiography, the immobilising and immanent nature of being classified as African under the universe of apartheid, Mandela has said:

An African child is born in an Africans Only hospital, taken home in an Africans Only bus, lives in an Africans Only area and attends Africans Only schools, if he attends school at all. When he grows up he can only hold Africans Only jobs, rent a house in Africans Only townships, ride Africans Only trains and be stopped at any time of the day or night and be ordered to produce a pass, without which he can be arrested and thrown into jail. His life is circumscribed by racist laws and

¹¹² Young (note 43 above) 122.

¹¹³ Posel 'What's in a Name?' (note 100 above) 52.

¹¹⁴ Posel *ibid* (note 100 above) 52.

regulations that cripple his growth, dim his potential and stunt his life. This was the reality...¹¹⁵

Apartheid strived to be more than just legal segregation. It strived to be a coherent and holistic doctrine for exclusionary social ordering permeating every sphere of life. Hendrik Verwoerd, a chief, if not the chief ideologue of grand apartheid and its public face, attested to the intention to render apartheid an ordinary part of everyday life when he described it as:

comprising a whole multiplicity of phenomena. It comprises the political sphere; it is necessary in the social sphere; it is aimed at ...church matters; it is relevant to every sphere of life. Even within the economic sphere, it is not just a question of numbers. What is of more importance there is whether one maintains the colour bar or not.¹¹⁶

Apartheid came with an ideology that was aimed at not only making the beneficiaries feel secure with racial differentiation and the attendant iniquitous legal order. Apartheid also strived to convince the oppressed as well as critics of apartheid that apartheid was benign; it was nothing more than the idea of 'separate but equal' that was desired not only by whites, but equally significant by the blacks themselves. Apartheid propaganda promoted an understanding of exclusivity and preferential treatment for whites as non-racist 'separate

¹¹⁵ Mandela *Long Walk to Freedom* (note 41 above) 81. If one deconstructs the gendered language in this quote, it is also apparent that the antiapartheid struggle was subliminally cast as essentially a struggle between black and white male adversaries with women serving as appendages mostly thus reflecting the ubiquity of gender oppression and 'cross-racial' gendered life forms.

¹¹⁶ TRH Davenport *South Africa: A Modern History* (1987) 270 as cited in Chaskalson (note 20 above) 590. Although grand apartheid was an institutional creation coming from the bowels of the National Party and Afrikaner nationalism, nonetheless, Hendrik F Verwoerd, who was Prime Minister of South Africa from 1958 until his assassination in 1966, is widely credited by opponents of apartheid, especially, as the most polarising face of apartheid and its most powerful ideologue: Steve Biko, the founding leader of the Black Consciousness Movement described Verwoerd as an 'able' theoretician guiding the National Party to convert a naked policy of wanton discrimination and segregation into a euphemistic separate development policy: S Biko *I Write What I Like* (1978) 96; According to Mandela, Verwoerd was the 'chief theorist and master builder of grand apartheid': Mandela *Long Walk to Freedom* (note 41 above) 417.

development'.¹¹⁷ To render itself palatable to those at the receiving end, as well as to critics within and outside of the borders of South Africa, laws and policies mandating separate and unequal development were sold as salutary and innocuous ethnic democracy. 'Homelands' or 'Bantustans' built around specious plural democracy were created in order to give legitimacy to the erection of a *cordon sanitaire* around premiere citizenship for whites.¹¹⁸ The ostensible Verwoerdian rationale animating the concept of separate development was the idea of a South Africa made up of several ethnic groups that represent sub-nations – a kind of ethnic democracy in a federal universe. In such a universe different ethnic groups stand the best chance of progressing socially and economically and preserving their human dignity and cultural identities if they do so as separate entities within closed ethnic and political spaces.¹¹⁹ In support of separate development, Verwoerd, as Prime Minister of the Republic, marshalled the following arguments:

¹¹⁷ Terreblance (note 16 above) 300.

¹¹⁸ The expedient apartheid rationale rested on the premises that the 'African' component of the South African population was not South African, but instead belonged to a multitude of 'African' ethnic or tribal groups, and that Western democracy was not suited to 'Africans'. As part of giving recognition to the multi-ethnic composition of South Africa, each African ethnic group would be given space to develop its own nationhood along its own cultural lines but providing it did not, at the same time, claim for its people citizenship and franchise in White South Africa. White South Africa, in turn, would magnanimously recognise the quest for nationhood by granting independence to the 'homeland' on terms dictated by White South Africa in a process purportedly analogous to the decolonization of Africa: Terreblanche (note 16 above) 321-322; AJ Norval *Deconstructing Apartheid Discourse* (1996) 142-145, 160-163; LM Thompson *A History of South Africa* (1995) 191-192. Essentially linguistic groupings were used for creating and delineating a multi-ethnic African universe comprising of the following ten homeland entities: Bophuthatswana (for Tswanas), Ciskei and Transkei (both for Xhosas), Gazankulu (for Tsongas or Shangaans), KwaNdebele (for Ndebeles), KaNgwane (for Swazis), KwaZulu (for Zulus), Lebowa (for Northern Sotho or Pedi), and QwaQwa (for Southern Sothos). The paradigm of using linguistic groupings to create 'homelands' was in line with the colonial imaginary of seeing Africans as immutably born into, and permanently affiliated to, a tribe rather than a nation: Norval *ibid* 149. Indeed, the Promotion of Black Self-Government Act No 46 of 1959, as part of giving legal expression to the apartheid 'homelands' and 'separate development' project, proclaimed in its preamble that: 'the Black peoples of the Union of South Africa do not constitute a homogeneous people, but form separate national units on the basis of language and culture'.

¹¹⁹ Louw *supra* (note 46) 103.

The first is that every group would ...at least be able to exercise control over its own people... Secondly, it could offer opportunities of developing equalities among groups. It could satisfy the desire for the recognition of human dignity.¹²⁰

Another underpinning Verwoerdian supposition was that racial and cultural differences were the cause of friction between different ethnic groups,¹²¹ and that such friction could only be solved by the physical separation.¹²² Seen from this perspective, apartheid was nothing more than 'good neighbourliness',¹²³ and an enabling tool for 'separate freedoms' for races with differences that are polarised and cannot be resolved.¹²⁴ Later, Verwoerd's successor, Prime Minister John Vorster, was barely able to disguise the white supremacist premise of separate development when he pegged its rationale on difference. He said:

...we instituted the policy of separate development, not because we consider ourselves better than others, not because we considered ourselves richer or more educated than others. We instituted the policy of separate development because we said we were different from others. We prize that difference and we are not prepared to relinquish it. That is the policy of separate development.¹²⁵

Leaving aside the frequent recourse to extreme violence as a way repressing political dissent and social protest to maintain the racial difference, the apartheid

¹²⁰ HF Verwoerd 'Speech in the House of Assembly' 23 January 1962. Quoted in Norval (note 118 above) 164.

¹²¹ K Tomaselli *et al* 'Myth Media and Apartheid' (1987) 34 *Media Development* 18-20.

¹²² *Ibid.*

¹²³ Whilst Prime Minister, in a televised interview on the 4th of March 1961, Verwoerd described, with calm fervor and a smile, apartheid as a misunderstood Afrikaans word that is intended to mean 'good neighbourliness'. Available at <<http://itnsource.com/en/EntireArchive/Compilations/Regions/Africa/?ref=%2Fcollections%2F521110601.xml&collName=South+Africa&links=&isDigi=True¤tPageIndex=0>> (last accessed on 3 April 2008). The 'good neighbourliness' sentiment was to be repeated one of Verwoerd's successors, former President PW Botha who expressed no remorse for apartheid: 'Botha uses Court to Defend Apartheid' *World* January 23, 1998 <<http://news.bbc.co.uk/2/hi/49942.stm>> (last accessed on 4 April 2008).

¹²⁴ Van der Westhuizen (note 40 above) 41.

¹²⁵ BJ Vorster 'Extract of Speech at Heilbron on 16 August 1968'. Quoted in Norval (note 118 above) 164.

state openly sought to achieve equanimity with state spawned racial inequalities in a manner resembling the theme in Alexander's hymn *All Things Bright and Beautiful*¹²⁶, where rich men could live in their castles and the poor at their gates, but in blissful harmony in the knowledge that whether of high or of low status, God made them all and ordered their stations in life.¹²⁷

Racial fantasy manifesting as Christian nationalism under the hegemony of the Dutch Reformed Church was part of the strategy for assisting the proponents as well as beneficiaries of apartheid in achieving equanimity with the ideology of white supremacy. Apartheid ideology appropriated the Bible as a justification or balm for racial differentiation. Racial hierarchies became a fulfilment of what was written in the Book.¹²⁸ Whites, or more specifically Afrikaners, were

¹²⁶ The hymn was written by CF Alexander in 1848 for the Anglican Church. <http://en.wikipedia.org/wiki/All_Things_Bright_and_Beautiful> (last accessed on 18 March 2008). My analogy with Alexander's hymn is borrowed from Minow *Making All the Difference* (note 82 above) 122 where Minow is discussing difference, inequality and status in a medieval legal order.

¹²⁷ This is an adaptation from part of the hymn which says:

The rich man in his castle,
The poor man at his gate,
God made them, high or lowly,
And order'd their estate.

¹²⁸ L Thompson *The Political Mythology of Apartheid* (1985); R Müller 'War, Religion, and White Supremacy' (2004) 10(2) *The Princeton Theological Review* 17-27, 18; DJ Bosch 'The Roots of Afrikaner Civic Religion' in JW Hofmeyer & WS Vorster (eds) *New Faces of Africa: Essays in Honour of Ben Marais* (1984) 14-35; A Du Toit 'The Construction of Afrikaner Chosenness' in WR Hutchison & H Lehmann (eds) *Many are Chosen: Divine Election and Western Nationalism* (1994) 115-139.; R Hamerton-Kelly 'Biblical Justification of Apartheid in Afrikaner Civil Religion' in K Keulman *Critical Moments in Religious History* (1993) 161-172; GJ Rossouw 'Essentials of Apartheid' in JW Hofmeyer et al (eds) *1948 Plus 50 years. Theology, Apartheid and Church: Past, Present and Future* 88-104 at 97; JC Pauw *Anti-apartheid Theology in the Dutch Reformed Family of Churches* (2007) Unpublished PhD Thesis, Faculty of Divinity, Free University of Amsterdam (2007) 109-116 <<http://dare.uvu.vu.nl/bitstream/1871/10880/4/7757.pdf>> (last accessed 25 March 2008). It is important, of course, to note that whilst mainstream Afrikaner Christianity became firmly ensconced in the apartheid project, there were some dissenters, albeit few and far between, and clerics such as Beyers Naude and David Bosch are notable exceptions: Müller *ibid* 24. Also, there was opposition to apartheid from 'sister churches' of the mainstream Dutch Reformed Church: Pauw *ibid*.

mythologised as God's chosen people destined for the 'promised land'¹²⁹ and it would be a matter of the Ham's children¹³⁰ – the blackened and cursed group – resigning themselves to the natural and divine order of things.¹³¹ Parallels were

¹²⁹ Müller (note 128 above); A Du Toit 'No Chosen People: The Myth of the Calvinist Origins of Afrikaner Nationalism and Racial Ideology' (1983) 88 *American Historical Review* 920-952. JC van Rooy, chairperson of the Afrikaner Broederbond said this in 1944:

In every People in the world is embodied a Divine Idea and the task of each People is to build upon that idea and to perfect it. So God created Afrikaner People with a unique language, a unique philosophy of life, and their own history and tradition in order that they might fulfil a particular calling and destiny here in the southern corner of Africa. We must stand guard on all that is peculiar to us and build upon it. We must believe that God has called us to be servants of his righteousness in this place: Quoted in Thompson *The Political Mythology of Apartheid* (note 128 above) 29.

The Afrikaner Broederbond is a largely semi-clandestine exclusively male organisation that was formed in 1918 so that it could fervently serve Afrikaner nationalism by being 'wholly devoted to the service of the Afrikaner nation' in all walks of life: Thompson *The Political Mythology of Apartheid* (note 128 above) 46. In 1943, Verwoerd said that: 'The Afrikaner Broederbond must gain control of everything it can lay its hands on in every walk of life in South Africa. Members must help each other to gain promotion in the Civil Service or any other field of activity in which they work with a view to working themselves up into important administrative positions': Quoted in Thompson *The Political Mythology of Apartheid* (note 128 above) 46. More than any other National Party leader, Verwoerd was the first to substantially expand the role of the Broederbond within the state after taking office as Prime Minister in 1958; Posel *The Making of Apartheid 1948-1961* (note 77 above) 242-244.

¹³⁰ The mythology created from the biblical story of Ham is to paint the Bible as telling a story of aversive racism that has divine approval: Kovel (note 43 above) 63-64. The self-serving interpretation of the Bible provides a way out of the scripture that says that all humanity are descended from Adam and Eve who are racially represented in much of Christendom as white. By saying that blacks are direct descendants of Ham upon whom a curse of servitude was placed and thus justifying a master-servant relationship between whites and blacks with the latter destined to remain as fetchers of wood and drawers of water, Christendom is able to claim fidelity to the Adam and Eve thesis: Van der Westhuizen (note 40 above) 56; R Miles & M Brown *Racism* (2003) 25. The account in the Bible is that, after overindulging in wine, Noah is inebriated and falls asleep in his tent. Inadvertently, he is uncovered and his genitals are exposed. Ham, one of Noah's sons, unlike his more obedient siblings who look away and take a garment to cover his nakedness, looks straight at his father's genitals. For this indiscretion and disrespect, with God's approval, Noah punishes Ham not only by banishment, but also by putting a curse of servitude on Ham and his descendants – the Hamites: Genesis 9: 18-27. In racial mythology or fantasies inspired in part by biblical understandings, blackness has not just been a way of marking black people as a racial caste destined to be servile and subordinate. Blackness is also symbolic of what is ugly, sinful and impure. Whiteness appositely has opposite qualities: Kovel *ibid* 61-92; F Fanon *Black Skin, White Masks* (1967) 188.

¹³¹ For example, when he was Minister of Native Affairs, Verwoerd, said this to Parliament to explain segregated and unequal education:

drawn between the Great Trek and the biblical tale of the Israelite's journey to the Promised Land.¹³²

Religious justification for apartheid was achieved over a long period and well before grand apartheid largely in part by forging a link between Christianity and Afrikaner nationalism.¹³³ The Dutch Reformed Church, especially, became an apologist for apartheid and the prime instrument of the theological justification for apartheid.¹³⁴ The church became an enabling instrument as it was gradually transformed into a *volkskerk*¹³⁵, meaning a people's church, and even more pertinently, an ethnic church for serving Afrikaner Christianity, with the boundaries between religion, culture and more significantly Afrikaner nationalism increasingly becoming porous, if not completely blurred. This, of course, was an expedient subversion of Calvinism which is built on the edifice of separation between church and state.¹³⁶ Once church and state could not be distinguished, the church became a veritable and alternative organ for trumpeting white supremacy from the pulpit.

There is no place for him [the Native] in the European Community above certain forms of labour. For this reason it is of no avail for him to receive training which has its aim in the absorption of the European Community, where he cannot be absorbed. Until now he has been subjected to a school system which drew him away from his community and misled him by showing him the greener pastures of the European Society where he is not allowed to gaze. (HK Verwoerd, Minister of Native Affairs, Union of South Africa, Senate Debates, 7-11 June 1954, columns 2595-2622. Quoted in P Kallaway *Apartheid and Education: The Education of Black South Africans* (1984) 92).

¹³² Van der Westhuizen (note 40 above) 12.

¹³³ Müller (note 128 above); Bosch (note 128 above); Du Toit (note 128 above); Hammerton-Kelly (note 128 above); Rossouw (note 128 above); Pauw (note 128 above).

¹³⁴ Jansen (note 9 above) 73.

¹³⁵ Müller (note 128 above); Bosch (note 128 above); Du Toit (note 128 above); Hammerton-Kelly (note 128 above); Rossouw (note 128 above); Pauw (note 128 above).

¹³⁶ Dubow *Scientific Racism in Modern South Africa* (1995) 259.

The principal imaginary of apartheid, as Posel has written, was of a society in which every 'race' knew its place economically, politically and socially.¹³⁷ Apartheid's universe was first and foremost the essentialisation or reification of phenotypes so that they are rendered both a source as well as a justification for differential treatment against the backdrop of white as the biological, social, cultural and legal normative standard. In short, hierarchical racial differentiation was to be a way of life; a social monolith. It was a monolith whose moral parameters became increasingly difficult to question especially for Afrikaners themselves. In the end, Afrikaner nationalism grew to totalising proportions as to invest apartheid with an 'authentic organicity' of closed identities built around racial differentiation.¹³⁸ For Afrikaner nationalism, ethnic loyalties were cut and dry. As Aletta Norval argues, one either stayed within apartheid's racialising and racist horizons or fell outside them risking becoming a traitor to the Afrikaner cause,¹³⁹ a fate that visited the likes of Beyers Naude, a cleric, who impugned the legitimacy of apartheid from the pulpit¹⁴⁰ and Bram Fischer, a lawyer, who took an overt political stance against apartheid.¹⁴¹

3 'COMMON SENSE' AS THE BASIS OF RACIAL CLASSIFICATION UNDER APARTHEID

In its classification of race, apartheid invoked as well as built rather crudely on a (mis)representation of race that had been developed and nurtured in colonial

¹³⁷ Posel 'What's in a Name?' (note 100 above) 52.

¹³⁸ Norval (note 118 above) 301.

¹³⁹ *Ibid* 300.

¹⁴⁰ Note 128 above; R Müller 'War, Religion, and White Supremacy' (2004) 10 *The Princeton Theological Review* 17 at 24; Van der Westhuizen (note 40 above) 52.

¹⁴¹ G Budlender 'Bram Fischer: The Man and the Lawyer' (1995) 8 *Consultus* 161; S Clingman *Bram Fischer: Afrikaner Revolutionary* (1998); S Ellman 'To Live Outside the Law You Must be Honest: Bram Fischer and the Meaning of Integrity' (2001) 17 *South African Journal on Human Rights* 451; D Moseneke 'The Fourth Bram Fischer Memorial Lecture' (2002) *South African Journal on Human Rights* 309.

discourse. The Minister of Interior who was charged with moving the Population Registration Bill that, for the first time in South African history introduced mass racial classification, was quite clear that the intention was to treat race as a social category and that race had a common sense ring to it.¹⁴² Barely concealing the master position of whites in the determination of race in South African political discourse, the Minister said race was no more than:

... the judgment of society-conventions which had grown up during hundreds of years we have been here. ...The intention of the legislature was ... that the classification of a person should be made according to the views held by members of that community.¹⁴³

The official sentiment was that racial classification was something that anyone could effortlessly accomplish at street level using no more than one's social experience as a human being complete with one's subjectivities. Thus, a single glance at *homo sapiens* ought to suffice to enable one to perform the quick mental task of racial classification. The intention was not to rely on palaeontologists or lawyers to do the sorting out, but to merely inscribe into law what, after all, everyone already knew was meant by race in the South African political context, whether they agreed or not. In keeping with this sentiment, lay people would be assigned the day-to-day responsibility of performing the task of racial classification.¹⁴⁴

¹⁴² Posel 'What's in a Name?' (note 100 above) 56.

¹⁴³ Union of South Africa, House of Assembly Debates (1950) Column 3172. Cited in Posel 'What's in a Name?' *ibid* 55.

¹⁴⁴ The first racial classifications were performed in 1951 and were an appendage to census taking. Racial classification was done by census takers. According to Posel, racial classification opened an opportunity for the National Party to extend patronage by awarding short-term employment to loyal unemployed party members with clear views about racial purity. In 1953, the power of racial classification was delegated to all officials of the Department of Native Affairs. In 1969, the power was delegated to all public servants: Posel 'What's in a Name?' (note 100 above) 58.

During the debate on the passage of Population Registration Bill, white parliamentarians echoed the Minister's convictions about the simplicity of racial classification. Some parliamentarians said: '... it (race) is obvious to all; we know the native and if we see a white man, we know that he is a white man'.¹⁴⁵ Others said: 'We... have never experienced any difficulties in distinguishing between Europeans and non-Europeans'.¹⁴⁶ In short, the parliamentarians were reiterating the conviction that racial classification is a simple process of historically-situated political signification. The person doing the classification does not go through a difficult mental process of sorting the wheat from the chaff or relying on random thoughts, but instead can comfortably and instantly draw from a well established pre-existing South African epistemologies of race as an admixture of biological as well as cultural representation as conceived under the hegemony of colonial and latterly apartheid governance. But was it so simple?

Initially, the Population Registration Act divided the South African humanity into three racial groups - 'white', 'Coloured' and 'native'. The Act also supplied determinative criteria which seemed to come straight from a colonial drawer:

A white person is one who in appearance is, or who is generally accepted as, a white person, but does not include a person who, although in appearance is obviously a white person, is generally accepted as a Coloured Person.

A native is a person who is in fact or is generally regarded as a member of any aboriginal race of tribe of Africa.

A Coloured Person is a person who is not a white person nor a native.¹⁴⁷

¹⁴⁵ Union of South Africa, House of Assembly Debates 13 March 1950, column 2823. Cited in Posel 'What's in a Name?' (note 100 above) 56.

¹⁴⁶ Union of South Africa, House of Assembly Debates 13 March 1950, column 2782. Cited in Posel 'What's in a Name?' (note 100 above) 56.

¹⁴⁷ Sections 1 and 5 of the Population Registration Act No 30 of 1950.

But whilst the tripartite classification purported to be faithful to colonial discourse on race, in part, it was a great leap from colonial imaginary and was to prove problematic criteria to apply. While it captured the polar opposites – ‘Whites’ as the highest caste and ‘Natives’ as the lowest caste – it was nebulous on the race at the middle – ‘Coloureds’. The colonial discourse on race was borne out of the perspectives of European explorers. It was a representation of races that refracted a purpose – discovery of new ‘uncivilised’ territory, European conquest and settlement, and finally exploitation of indigenous inhabitants.¹⁴⁸ Thus, the representation of races in colonial discourse was deliberately developed in order to capture and, more importantly register a master dichotomy rather than ‘trichotomy’ to legitimise a master and servant racial relationship between two encounters.

Colonial discourse on race in the South African context, into which apartheid steeped itself, principally imagined two ‘full bloodied’ races¹⁴⁹ – a colonising, innately superior and civilising white race and a colonisable, innately inferior, indigenous black race, members of which were described as ‘natives’. The term ‘natives’ was not used to affirm humanity or to denote the ‘first Africans’ as a people that colonizers could make a genuine effort to understand or co-exist with in conditions of equality in terms of language, ethnicity, religion and so on. ‘Natives’ did not mean the regular or local inhabitants of Africa prior to the arrival of the colonizers and immigrants from Europe. It did not mean people who were possessed of human dignity in the same measure as their European counterparts. Rather, it was colonial nomenclature of a derogatory and belligerent nature to denote the objects of conquest and subjugation. It was used in a racist sense to deny humanity and as a trope for the animal to capture

¹⁴⁸ Miles & Brown (note 107 above) 36; W Jordan *Whites over Black* (1968) 97; Kovel (note 43 above) 14.

¹⁴⁹ Posel ‘What’s in a Name?’ (note 100 above) 55.

fictions of the bestial, raw savage status of the inhabitants of Dark Africa as imagined by Europe at the age of Enlightenment.¹⁵⁰

'Native' was the trope around which colonial governments and their apartheid successors constructed a master dichotomy of 'them' and 'us', and, indeed inscribed into law racial fictions that justified not only hatred and disgust for the 'native' but also racial and imperialistic self-pride and arrogance that could only be appeased by controlling and exploiting the 'native'.¹⁵¹ 'Native' provided colonial and apartheid governments with a ready archive, a complete biography of the 'regular characteristics' - the essence - of the first 'Africans' especially, their limitations.¹⁵² 'Native' as lowly difference from 'White' and a racial stereotype provided the metaphysical foundation for a politics of colonial and apartheid racial domination. It meant that the politics of domination of one social group by another could be comfortably grounded not on common human essences but on 'objectively' hierarchical essences. In material terms, 'native' provided the justification for direct appropriation of the 'natives' supposed territory, exploitation of the 'native's' labour and resources and systematic interference with the native's culture to align it with the project of erecting and sustaining a colonial dispensation of power.¹⁵³ The 'uncivilised' nature of the 'native' also provided the justification for the permanent presence of the progressive pioneer whose benevolent and paternalistic mission it was to promote and protect the interests of the infantile 'native'.¹⁵⁴

¹⁵⁰ Van der Westhuizen (note 40 above) 55.

¹⁵¹ Here I am drawing an analogy from what Edward Said says in his book *Orientalism* about the development and sedimentation of fictions about a particular social group that lend themselves to expedient political manipulation when one social group identifies the other as 'the Other' such as when the West identifies Arabs and Islam as the Other: EW Said *Orientalism* (1979) xvii.

¹⁵² Again here I am drawing an analogy with Edward's Said analysis of the 'racial' attitudes of Occidentals towards Orientals at the time of colonisation: Said *ibid* 39-42.

¹⁵³ A McClintock 'The Angel of Progress: Pitfalls of the Term "Post-colonialism"' (1992) 31 *Third World and Post-Colonial Issues* 84 at 88.

¹⁵⁴ Zahar (note 62 above) 21-22.

Both the 'white' racial caste and the 'native' caste were imagined to possess purity of race save that it was purity of polar and hierarchical opposites. However, at the time that the Population Registration Bill was proposed to a white Parliament, 'Whites' and 'Natives' were not the only races as colonial racist and racialising discourse had long begun the process of (mis)recognising a third racial caste - 'Coloureds' - but had yet to complete the architecture on the essential features and status of the 'Coloured' race.¹⁵⁵ In terms of putting official imprimatur, 'Coloured' was a race in the making rather than a race completely made at the time that the National Party came to power. Prior to the Population and Registration Act, the making of the 'Coloured' race was in a form of official racial typing which was ad hoc rather than systematic as well as self-identification which had yet to achieve the stability of the 'White' and 'Native' races. 'Coloured' was a fluid rather than a fixed racial category. Posel observes, for example, that under the Natives Representation Act of 1936,¹⁵⁶ well educated 'Natives' could submit a petition to be promoted to 'Coloured'.¹⁵⁷

Colonial racial discourse has historically been ambivalent towards 'Coloureds'.¹⁵⁸ In one sense, colonial discourse pathologised 'Coloureds'. They were regarded as 'half-castes' or a 'mixed or hybridised race' and a physical sign of 'miscegenation'.¹⁵⁹ 'Coloureds' were imagined to be the degenerate and unstable

¹⁵⁵ Deborah Posel makes the point that 'Coloured' was part of the hierarchical racial categories employed in segregationist South Africa prior to the apartheid era, but its use was, on the whole, marked by the absence of a 'fixed, officially authorised racial categorisation'. In consequence, people could move in and out of the 'Coloured' category. For example, one could be 'Coloured' for the purposes of accessing work, and yet be 'Native' for the purposes of entering into a customary marriage: Posel 'What's in a Name?' (note 100 above) 54.

¹⁵⁶ Act No 12.

¹⁵⁷ Posel 'What's in a Name?' (note 100 above) 54.

¹⁵⁸ Van der Westhuizen (note 40 above) 60.

¹⁵⁹ P Rich 'Race, Science, and the Legitimation of White Supremacy in South Africa 1902-1940' (1990) 23 *International Journal of African Historical Studies* 665 at 676; Dubow *Scientific Racism in Modern South Africa* (note 136 above) 185-189; Van der Westhuizen (note 40 above) 55; J Martens 'Citizenship, 'Civilisation' and the Creation of South Africa's Immorality Act, 1927' (2007) 59 *South African Historical Journal* 223 at 225.

offspring of white men who had abandoned middle class respectability and fallen prey to the effusive and uninhibited sexuality of 'Hottentot' women.¹⁶⁰ According to this perspective, 'Coloureds' posed a threat to the purity of the white race. But 'miscegenation' was not the only reason for judging 'Coloureds'. In patriarchal colonial imaginary, the resentment of 'Coloureds' was also to do with assuaging the sexual anxieties of white males who feared loss of control of white women who could succumb to the advances of black men.¹⁶¹ Black men were imagined as extraordinarily virile and sexually rapacious.¹⁶²

In another sense, colonial imaginary ascribed to 'Coloureds' a higher status than the objectified 'natives' as exemplified in the extension of the franchise to 'Coloureds' among other privileges.¹⁶³ Though the National Party government was later to take away many of the racial privileges hitherto accorded to 'Coloureds' it, nonetheless, implemented apartheid on the footing or with the sentiment or pledge that when juxtaposed with 'Africans' 'Coloureds' would at least be subjected to a 'softer' brand of apartheid in a number of socio-economic spheres.¹⁶⁴ In colonial racial aesthetics and fiction, 'Coloureds' had a distinct phenotype and physiognomy that lay somewhere between the purity of whites

¹⁶⁰ Here I use 'Hottentot' to describe subjects who were Khoisan in order to convey the racist sense in which it was used by colonialists and their sympathisers. JJ Virey, a French writer who is credited with writing a standard study of race in the early nineteenth-century, described in an essay cited in French Dictionary of Sciences 'Hottentot' women as having a 'voluptuousness' that is developed to a degree of lasciviousness unknown in our climate': *Dictionnaire des Sciences Médicales* (1819) 398-403. The quoted words and phrases are translated and cited in SL Gilman *Difference and Pathology: Stereotypes of Sexuality, Race and Madness* (1985) 85; Dubow *Scientific Racism in Modern South Africa* (note 136 above) 20-24; Miles & Brown (note 107 above) 37.

¹⁶¹ J Hislop 'White Working-class Women and the Invention of Apartheid: "Purified" Afrikaner Nationalist Agitation for Legislation Against Mixed Marriages, 1934-9' (1995) 36 *Journal of African History* 57.

¹⁶² Jansen (note 9 above) 167; A McClintock *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* (1995); AL Stoler *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (2002).

¹⁶³ The 'Coloured' franchise was entrenched into law by the South Africa Act of 1909. It was removed by the National Party government in 1955 as part of apartheid policy following a protracted challenge involving the courts: Van der Westhuizen (note 40 above) 44-48.

¹⁶⁴ Van der Westhuizen note 40 above) 49-50.

and the raw savageness of natives. The colonial imaginary was that 'Coloureds' were educable and could be brought up to middle-class respectability and to a level where they emulated but could not become whites. In a number of areas, including the extension of the franchise and access to semi-skilled jobs, 'Coloureds' were treated preferentially relative to their 'African' counterparts and in line with the colonial imaginary that they were superior to 'Africans'.¹⁶⁵ What the Population and Registration Act did was to ascribe to 'Coloureds' the authority and stability of race, albeit, by draconian means by clearly inscribing into law that 'Coloureds' were not only a distinct race, but also that they were superior to 'natives' but inferior to 'whites'.

But whilst seemingly 'resolving' the ambivalent representation of 'Coloureds' in state discourse on race by according 'Coloureds' an intermediate inferior racial status and not placing them at the nadir of race, as part of clearly distancing 'Coloureds' from 'Whites', apartheid laws policies also began stripping away many of the racial privileges that had historically been extended to Coloureds by colonial governments, including the franchise.¹⁶⁶ Furthermore, apartheid created new problems even on its own terms. 'Coloured' was legally a residual racial caste; it was all that 'White' or 'Native' was not. Apartheid overestimated the ease with which a person's residual racial identity could be told. Gross morphology is not always compliant. Race did not always prove to be the indelible badge on the forehead that apartheid race discourse imagined. Telling the difference between 'Native' and 'Coloured', 'Coloured' and 'White' was not always the easy task it was meant to be, but an exercise in cattle branding for the committees that were charged with the task of classification at first instance.¹⁶⁷

¹⁶⁵ Goldin (note 110 above) 3-73.

¹⁶⁶ Note 163 above.

¹⁶⁷ M Du Plessis & S Peté 'Kafka's African Nightmare – Bureaucracy and Law in Pre and Post-Apartheid South Africa' (2006) 31 *Journal for Juridical Science* 39 at 42-43. Those disgruntled by the racial classification could appeal to a Race Classification Board and ultimately the courts; Du Pre (note 110 above) 87-89.

Families were torn apart because one member was darker than the others or their hair was too woolly and could not pass the 'pencil test' under apartheid's racial grid.¹⁶⁸ The 'racial outcast' could, therefore, not legally continue to live with their family and had to be relocated to their rightful racial home in accordance with the racial spatial demarcations prescribed by the Group Areas Act.

Another problem created by apartheid was that, in the year 1948, to describe everyone who was not a 'white' person or 'a native' as 'Coloured' meant to a large extent the creation of a new race, and one that had not featured fully as a stable race in colonial imaginary. It meant creating a coloured race out of 'indigenous races', 'mixed races' and ethnic groups that had migrated to South Africa as slaves or indentured labour from Malaya, China, and India.¹⁶⁹ Far from being a matter of using common sense, in the end, even on apartheid's own terms, racial classification became a rather messy arbitrary enterprise as the racial groups either did not accurately match 'popular' understandings of race at the street level or the phenotype or physiognomy of an individual simply refused to live up to the expectations of the manual used by apartheid racial classifiers. Crude tests were devised to resolve 'hard' cases; that is, cases where gross morphology did not easily give out the 'race' or could not comply with the expectations of the racial classifiers.¹⁷⁰ The racial tests had the effect not only

¹⁶⁸ The texture of one's hair was used as an important marker of race. The 'pencil test' (or comb test) consisted of running a pencil (or comb) through one's hair. If the pencil (or comb) is halted by tight curls, a person claiming to be 'White', for example, is likely to be classified 'Coloured': R Omond *The Apartheid Handbook* (1986) 26; Du Plessis & Peté (note 167 above) 42-43.

¹⁶⁹ Amendments to the Population Registration Act attempted to improve racial classifications by subdividing the 'Coloureds' into subgroups and removing 'Indian' from a subcategory of 'Coloured' and making it a distinct race. In the end, over and above 'Natives' (later to be rehabilitated to 'Bantu' and then 'Black') at the base of the racial pyramid and 'whites' at the apex, South Africa ended up with seven intermediate racial categories, namely: 'Cape Coloured, Malay, Griqua, Chinese, Indian, Other Asian, Other Coloured': Proclamation No 46 of 1949; Du Pre (note 110 above) 86.

¹⁷⁰ Appearance and social standing were the two operative criteria for determining race. As Deborah Posel has argued, they operated tautologically, one reinforcing the other according to popular bio-cultural perceptions of race: Posel 'What's in Name?' (note 110 above) 53. Close reading of hair on a person's head as well as bodily hair, facial features, complexion, residential

dehumanising those that were being tested but also amplifying as well as normalising racialised reasoning among South Africans. Ultimately, being South African meant first and foremost identifying one's correct racial home within the legally prescribed universe of race. The birth as well as the death certificate would mark race thereby capturing a full biographical cycle of race. To make assurance double sure so that one does miss out on one's racial benefits or escape from one's racial burdens, as the case may be, during one's life, one would be required to possess as proof of one's identity, an identity certificate that records not just one's birth date, gender, and citizenship but also one's race. Such was citizenship under apartheid. As Mandela attested to earlier, race became everything; it became banal and ubiquitous.¹⁷¹

Du Plessis and Peté have described the effects of apartheid after 1948 especially as Kafkaesque to capture the gigantic size of the legal bureaucracy spawned by apartheid, its wicked nature and the oppressive, nightmarish effects and the anguish it exacted on its objects, not least through racial classification.¹⁷² The splitting of families, in particular, as a result of members of the same family being racially classified as falling into different races marked the zenith of the callousness and melancholy of apartheid.¹⁷³ Not surprisingly, the memory of apartheid is indelibly etched in the Constitution. In several cases the Constitutional Court has invoked that memory as part of deciphering contextually the import of not only the constitutional right to equality, but other fundamental rights as well. A pertinent example in respect of the right to equality is *Brink v Kitshoff* where Justice Kate O'Regan J remarked that equality had 'a very special place' in the South African Constitution and that it was not

location, occupation, friends, associates, and food and drink, became signifiers of race in borderline cases: Posel 'What's in a Name?' *ibid* 62-63.

¹⁷¹ Mandela *Long Walk to Freedom* (note 41 above) 81.

¹⁷² The authors are drawing from Franz Kafka's unfinished novel, *The Trial*: Du Plessis & Peté (note 167 above) 40.

¹⁷³ *Ibid* 43.

surprising that equality was a 'recurrent theme' in the Constitution.¹⁷⁴ Justice O'Regan went on to locate the right to equality squarely in South Africa's apartheid past when she said:

Our history is of particular relevance to the concept of equality. The policy of apartheid in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible today in our society. It is in the light of that history and enduring legacy that it bequeathed that the equality clause needs to be interpreted.¹⁷⁵

In short, apartheid became a crude and quite brutish permanent affirmative action programme for whites. To those who were different and could not wear the fit of white, as a system, apartheid functioned as a potent enclosing structure of forces and barriers that were immobilising.¹⁷⁶ Mandela has described the reach and power of apartheid as 'inescapable and overwhelming'.¹⁷⁷ On account of its

¹⁷⁴ *Brink v Kitshoff* (note 38 above) para 32.

¹⁷⁵ *Ibid* para 40; Examples of other cases where the Constitutional Court has directly or indirectly invoked the memory of apartheid in constitutional interpretation are: *S v Makwanyane* (note 39 above) paras 156, 220, 262, 302, 322; *Ex Parte Chairperson of the Constitution Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) 744 para 10; *Shabalala v Attorney-General of the Transvaal and Another* 1995 (12) BCLR 1593 (CC) paras 25-26; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 126; *City Council of Pretoria v Walker* (note 38 above) paras 46-48; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35. *Prinsloo v van der Linde* (note 38 above) paras 20-21, 31; *Executive Council, Western Cape v Minister of Provincial Affairs* 2000 (1) SA 611 (CC) para 44; *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (note 38 above) para 60; *MEC for Education KwaZulu Natal and Others v Pillay and Others* (2007) CCT 51/06 (CC) para 65 : For a critical appraisal of history as an aid to interpreting the South African Constitution, De Vos (note 32 above).

¹⁷⁶ M Frye *Politics of Reality* (1983) 11.

¹⁷⁷ Note 79 above; Mandela *Long Walk to Freedom* (note 41 above) 104.

brutishness, the South African Truth and Reconciliation Commission was moved to affirm that 'apartheid as a system of enforced racial segregation and separation, was a crime against humanity'.¹⁷⁸ As an expression of global condemnation of the heinous nature of apartheid, in 1973, the United Nations General Assembly adopted the International Convention on the Suppression and Punishment of Apartheid¹⁷⁹ so that racial separation and segregation as that perpetrated by the National Party governments are rendered criminal. In 1976, the United Nations General Assembly recognised systematic persecution of one racial group by another such as that which occurred during apartheid as a crime against humanity.¹⁸⁰ Perhaps even more significant, under article 7(1) of the Rome Statute of the International Criminal Court of 1998, 'apartheid' is listed as one of the 'crimes against humanity'.¹⁸¹

4 APARTHEID AND DISABILITY INTERSECTIONS

This section seeks to build an intersection between apartheid and disability. The section asks a much more pointed question, namely: Beyond providing a contextual backdrop to the centrality of equality under the South African Constitution, is there a connection between apartheid and disability? The intersection between apartheid and disability, it is submitted, is ultimately to do

¹⁷⁸ V Jaichand 'The Crime of Apartheid'. Available at <http://www.asf.be/publications/formations_isr_pal_presentation_Vinodh_Jaichand_dec2005_E_N.pdf> (last accessed on 4 April 2008).

¹⁷⁹ Adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973, entered into force on 18 July 1976.

¹⁸⁰ Adopted by the United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, entered into force on 1 July 2002.

¹⁸¹ Under international law, a crime against humanity is the highest level of a criminal offence. Under the Rome Statute, apartheid ranks among other crimes such as murder, extermination and enslavement, when 'knowingly committed as part of a widespread or systematic attack against any civilian population': Article 7.1(j) of the Rome Statute. Apartheid is committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and so committed with the intention of maintaining that regime: Article 7.2(h) of the Rome Statute.

with using socially constructed notions of biological difference in one sense to stigmatise a person, but in another sense to justify exclusion, oppression and inequality. In the end, the person that is so stigmatised or excluded from participation is ultimately disabled from full citizenship.

4.1 Using Difference to Stigmatise Citizenship

Apartheid stigmatised blackness. To be stigmatised is, according to Erving Goffman, to have 'spoiled identity'.¹⁸² To be black or 'non-white' or 'non-European' under apartheid was to possess an 'attribute that is deeply discrediting'¹⁸³ in an epidermalising and epidermalised world.¹⁸⁴ Being black as opposed to being white meant reducing the bearer from a 'whole and usual person to a tainted and discounted one'.¹⁸⁵ Categories that carry stigma are potent immobilising forces. By themselves, categories can, in a Hegelian sense, become a form of oppression that is capable of imprisoning and distorting the self to the point of crippling self-hatred.¹⁸⁶ A positive understanding of the self derives in part from intersubjective approval.¹⁸⁷ Stigma often serves to discourage stigmatised individuals and groups from taking up rights and privileges, and is conducive to the creation and sustenance of a passive sub-class,

¹⁸² E Goffman *Stigma: Notes on the Management of Spoiled Identity* (1963).

¹⁸³ *Ibid* 3.

¹⁸⁴ Young (note 43 above) 123; TF Slaughter 'Epidermalizing the World: A Basic Mode of Being Black' in L Harris (ed) *Philosophy Born of Struggle: Anthology of Afro-American Philosophy from 1917* (1983) 283-287. Thomas Slaughter explains the notion of an epidermalised world as how the stigmatized group experiences discursive consciousness of its lowly status through the body language of the 'superior' group such as through the physical distance that the 'superior' group keeps from the stigmatised group or even a certain nervousness that it displays when compelled by circumstances to share physical space with the stigmatized group: TF Slaughter *ibid*; Young *ibid*.

¹⁸⁵ Goffman (note 182 above) 3.

¹⁸⁶ C Taylor *Multiculturalism and the "Politics of Recognition"* (1992) 25.

¹⁸⁷ A Honneth 'Integrity and Disrespect: Principles of Conception of Morality Based on the Theory of Recognition' (1992) 20 *Political Theory* 187 at 188-189.

and instilling into stigmatised subjects real feelings of inter-generational inferiority.¹⁸⁸

In *Brown v Board of Education*,¹⁸⁹ a case Kenneth Karst aptly treats as standing for much more than judicial condemnation of racial desegregation in schools as to be a leading authoritative proscription of caste under the Constitution of the United States,¹⁹⁰ Chief Justice Warren described racial segregation of black children as something that ‘generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone’.¹⁹¹ Indeed, part of the resistance to apartheid by the Black Consciousness Movement (BCM) was built around countering inter-generational black inferiority complex. The BCM resisted apartheid, in part, by attempting to repair, at a psychological level, the stigmatised and injured dignity of black people. To this end, it sought to instil assertive racial pride and eradicate inculcated submissiveness, by supplanting at aesthetic and cultural levels, an ascribed negative image of blackness with a positive one, and by imagining a future where blacks were in control of their destiny.¹⁹²

Steve Biko, a co-founding and martyred leader of the BCM, was all too aware, for example, that on account of centuries of mythologising ‘Africans’ as a people of low intelligence, uneducable, barbaric, heathen and superstitious beings, African

¹⁸⁸ Assertions about the negative effects of stigma should be read as generalizations rather than invariable universal experiences as there are always exceptions to the rule. Larry Alexander has argued that the effects of stigma and prejudice are contingent on a number of factors and will not be uniform amongst all societies, groups and societies, and historical eras. For some groups, stigma can paradoxically lead to the opposite – a sense of superiority and a redoubling of efforts: L Alexander ‘What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies’ (1992) 141 *University of Pennsylvania Law Review* 149 at 163. See also, Karst ‘Foreword: Equal Citizenship under the Fourteenth Amendment’ (1977) 91 *Harvard Law Review* 1 at 7.

¹⁸⁹ 347 US 483 (1954).

¹⁹⁰ Karst ‘Foreword: Equal Citizenship under the Fourteenth Amendment’ (note 188 above) 21.

¹⁹¹ *Brown v Board of Education* (note 189 above) 494.

¹⁹² Biko (note 116 above) 43-46, 108; Terreblanche (note 16 above) 350-351; Fatton (note 90 above) 57.

children were more likely than not to frown upon their heritage, and that the emancipatory project included working at the psychological level.¹⁹³ When a subordinated social group constantly encounters a stigmatised gaze of culturally and economically dominant social group, and in addition is institutionally constantly compelled to submit to an imposed inferiorised stereotypical identity, it can easily end up internalising the injured identity as objective truth even to the point of developing self-hatred.¹⁹⁴ This is more so when the inferiorised identity is reinforced by an all embracing administrative and legal infrastructure as under apartheid where there were real sanctions for refusing to comply with the stereotype. One of the emancipatory projects of BCM, therefore, was to begin the process of psychologically repairing a damaged self- and group image through asserting the value and specificity of African culture and African civilization so that whiteness is no longer treated as the mode of perfection and blackness a pathological departure from whiteness. More than any other South African liberation movement, the BCM assiduously cultivated the politics of racial identity. BCM worked at a cultural aesthetic level and appropriated the power of naming. Slogans such as 'Black is Beautiful', as elsewhere where blackness was stigmatised, became a way of asserting social identity and repairing an injured Self. Naming allows oppressed groups to produce self-affirming cultures of their own, and to be the subjects and not mere objects of the creation of discursive identities.¹⁹⁵ The idea was not to erase whiteness, but to relativise it; to strip it of its normative dominance so that it stands in an egalitarian relationship with blackness.¹⁹⁶

¹⁹³ Biko (note 116 above) 43, 83-85, 110.

¹⁹⁴ Zahar (note 62 above) 22-23; N Fraser 'Rethinking Recognition' (2000) 3 *New Left Review* 107 at 109;

¹⁹⁵ Fraser 'Rethinking Recognition' (note 194 above).; Biko (note 116 above) 120-121. In Chapter 3 § 3.9, I elaborate on the instrumentality of naming as a transformative and emancipatory strategy.

¹⁹⁶ Young (note 43 above) 166.

Writing about transformation in the post-apartheid era, Mamphela Ramphele, acknowledges, as one of the main challenges facing the new South Africa, overcoming the not insignificant contribution made by colonialism and apartheid towards the creation and sedimentation of an inferiority complex in the minds of the oppressed.¹⁹⁷ Ramphele says:

Apartheid systematised white racism into one of the most successful social engineering projects of the 20th century. It vested colour with socio-economic power that attained a logic that remains deeply embedded in our society. But it is especially the equating of colour with intellectual superiority or inferiority, which predates apartheid, which has left a damning legacy.¹⁹⁸

However, in reacting to racism by asserting racial difference and racial pride as strategies for countering racial dominance there are also risks. There is always an inherent danger of paradoxically retreating into the essentialisation of race to the point of rendering it an albatross. Repeated stress on Africanness or blackness can easily end up as more than an assertion of one's humanity to become an extraordinary sensitivity about an Afrocentric identity.¹⁹⁹ It can produce scripted absolute Africanness or blackness that, time and again, must be proclaimed by its bearers such that it ceases to be a discursive creation of identity that facilitates agency but, paradoxically, the living of an oppositional normative identity that is unlikely to lend itself to constructing and building alliances with 'other races' on the basis of common human interests. Indeed, part of the undoing of apartheid is that it doggedly scripted a profusely racialised Afrikaner identity that was so absolute in its evasion of equality of human beings to the point of admitting only equality with other 'white races' and in the process unwittingly becoming a prisoner to whiteness. Apartheid could only build alliances with non-whites or

¹⁹⁷ M Ramphele (note 83 above) 73-77.

¹⁹⁸ *Ibid* 76.

¹⁹⁹ A Mbembe *On the Postcolony* (2001) 12.

'other races' that were prepared to subordinate themselves and first concede the superiority of the white race as a point of departure. The type of Afrikaner identity that was scripted by apartheid was simply unable to imagine culture without a profusely racialised identity.

In repeatedly proclaiming Africanness or blackness as the antidote to white racism, there is also the risk of creating a separatist racial fiefdom that becomes a source of new inequalities. There is a risk of succumbing to the allure of an identity that seems new and liberating, but is in fact surrender to yet another chauvinist figure of authority that cannot co-exist with the fluidity of identity, heterogeneity and agency. Evelyn Brooks Higginbotham makes this point when she says that by espousing the 'black experience' and the 'voice of the Negro' when countering racism, African American history inadvertently succumbed to the totalising impulse of race and uncritically delivered a 'monolithic black community' that resonated through the black patriarchal voice, oblivious to other axis of subordination such as gender and class and unable to tap into intersectionality.²⁰⁰ In her critique of feminism that centres on raising the visibility of black women in America, Bell Hooks says of 'Black Nationalism' that in the quest to liberate blacks from white racial oppression, and its emphasis on separatism and forming new cultures, it, paradoxically, erected its own foundation for black patriarchy and rendered oppression of women a cultural

²⁰⁰ Higginbotham (note 1 above) 255-256. Nancy Fraser has argued similarly that while socially marginalized groups find advantages in founding alternative social spaces, which she calls 'subaltern counterpublics' in which they can formulate oppositional interpretations of their marginalized identities, interests and needs, they equally run the risk of succumbing to separatism, antidemocratism and antiegalitarianism, marginalizing and excluding others: Fraser *Justice Interruptus* (note 92 above) 81-82. Fraser's point is not that subaltern counterpublics are unnecessary or inherently bad, as they can be a necessity in the face of marginalization and disadvantage, but that they should not constitute self-perpetuating 'enclaves'. Instead they should be part of a 'wider public' so that they are not insulated from the ground rule of parity in democratic participation where no voice is greater than the other: Fraser *Justice Interruptus ibid* 82; Fraser 'Rethinking Recognition' (note 194 above) 112-113.

necessity.²⁰¹ The moral for disability, therefore, is to shun the luring temptation of order and essence that categorisation brings and, instead, embrace the complexity or even chaos of the heterogeneity of disability so that group identities are not reified to the point of denying the multiplicity of social identities, and the complexities of social histories and individual lives. The moral is for disabled people's groups not to become self-perpetuating enclaves in which inter- or intra-group and individual differences are suppressed as part of the sacrifice for the greater good of winning the struggle for the affirmation and the emancipation of disabled people.

For the Pan African Congress (PAC), the way to counter a racial oligarchy that is built on the edifice of racial difference was, in part, to assert the homogeneity of race and the biological unity of the human species even to the point of semantic orthodoxy.²⁰² Robert Sobukwe, the founding leader of the PAC, said this:

The Africanists take the view that there is only one race to which we all belong, and that is the human race. *In our vocabulary, therefore, the word 'race' as applied to man, has no plural form.* ... In Africa, the myth of race has been propounded by the imperialists and colonialists from Europe in order to facilitate and justify their inhuman exploitation of the indigenous peoples of the land. It is from this myth with its attendant claims of cultural superiority that the doctrine of white supremacy stems.²⁰³

²⁰¹ B Hooks *Ain't I a Woman* (1981) 116-117. Sandra Fredman makes a similar point when she warns us that 'status groups' may create oppressive internal hierarchies of their own and become highly intolerant of those that do not conform to 'community norms': S Fredman 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *South African Journal on Human Rights* 214 at 226.

²⁰² EL Ntloedibe *Here is a Tree: Political Biography of Robert Mangaliso Sobukwe* (1995) 115-116.

²⁰³ Robert Sobukwe as quoted in Ntloedibe *ibid* 116.

Sobukwe's position on the meaning of race, which he articulated in 1959 to mark the founding of the PAC,²⁰⁴ was deliberately deconstructionist and, indeed, subversive and heretic in the context of colonial and apartheid racial orthodoxies. It is a position that was ahead of its time in terms of South African political discourses on racial oppression. Indeed, it is a position that resonates with contemporary critical discourses on race.²⁰⁵ Sobukwe sought to disrupt the discourse of racial differences. His point of departure was not that race had an organic centre. Rather, he sought to contest the naturalness and authority of the fact of 'different races' in the first place so that in countering racism, the oppressed 'races' do not end up essentialising race and legitimising racial differences.²⁰⁶ The point Sobukwe was making is that race is political signification and that, by accepting it as a natural category, we unwittingly collude in our own oppression. The collectivities we call races though real in the sense that perceptions are real, are socially imagined rather than biological essences.²⁰⁷ More than this, Sobukwe was saying that in the South African context where colonialism and apartheid were being played out to the fullest, the signification of race using phenotypical features carried oppositional myths and assumptions of social and economic determinism that had roots in European Enlightenment, and, for these reasons, should be vigorously contested as part of the liberation of the oppressed.²⁰⁸ Colonially and apartheid scripted race was not a phenomenon of benign representation and an end itself. Rather, it was a politically expedient instrument for legitimising white supremacy and its counterpart black inferiority. It empowered one and disempowered the other.

²⁰⁴ Ntloedibe *ibid* 109.

²⁰⁵ Miles & Brown (note 107 above); Higginbotham (note 1 above); Kovel (note 43 above); M Omi & H Winant *Racial Formation in the United States from the 1960s to the 1990s* (1994).

²⁰⁶ Miles & Brown (note 107 above) 89-90.

²⁰⁷ Miles & Brown *ibid* 89.

²⁰⁸ Miles & Brown *ibid* 39; M Banton *Racial Theories* (1987) 28-64.

Ultimately, it is the power to stigmatise that matters. Stigmatisation of one group by another is of little consequence unless it is accompanied by power relations.²⁰⁹ The labelling of 'Africans' as 'human but different', 'native' 'bushmen' 'backward', 'savage', 'animal like' 'baboons' or *kaffers*²¹⁰ as was done in colonial and apartheid lexicography in its disparaging depiction of 'Africans'²¹¹ was deeply hurtful. It injured the sense of self-worth and human dignity of 'Africans'. At the same time, it is important to appreciate that the labelling was not done in isolation. It followed the conquest and subjugation of the first Africans. It was part of a strategy for giving objective truth to a stigmatised subordinate status; to the naturalness of a racial inferiority of 'Africans' and socio-economic inequalities as just deserts. Once labelled 'native' or *kaffer* the object had to fit the colonial and Afrikanerised image of one who is diseased, mentally, imbalanced, raving, irrational or childlike in mental simplicity²¹² and in need of perpetual protection and salvation from whites.

Apartheid labelling helps us to understand the relationship between language, stigma and social categorisation.²¹³ While the labels provide us evidence of some of the armamentaria for identity and prejudice,²¹⁴ by themselves they could not have created the structural inequality or oppression that is synonymous with apartheid. It is only when labelling is accompanied by power relations that render the group that does the labelling as dominant, and the group that is labelled as subordinate, that the germ of structural inequality and oppression is firmly sown. Ultimately, as Bruce Link and Jo Phelan argue, the substantive

²⁰⁹ BG Phelan & JC Phelan 'Conceptualising Stigma' (2001) 27 *Annual Review of Sociology* 363 at 375-376.

²¹⁰ 'Kaffer' is an Afrikaans derogatory term for 'Africans'. It is a term that is in the same league of baseness as 'nigger' in the history of slavery, racism and racial segregation in the United States: *Pharos Dictionary* (note 15 above).

²¹¹ Van der Westhuizen (note 40 above) 53-61.

²¹² Young (note 43 above) 128.

²¹³ Murphy (note 99 above) 2.

²¹⁴ *Ibid.*

power of stigma lies in its capacity to cause the stigmatised group to experience status loss and discrimination that leads to unequal outcomes.²¹⁵

In an article titled 'Rethinking Recognition' Nancy Fraser advances, albeit in a different context, the arguments that Link and Phelan are making.²¹⁶ Writing about the place of recognition in a theory of social justice, Fraser cautions us about the pitfalls of constructing an incomplete theory of social justice as a consequence of conceiving the attainment of social justice only in terms of cultural recognition without concomitantly integrating claims for economic recognition. Her argument is that though the Hegelian model of identity²¹⁷ yields important insights into the psychological deleterious effects of racism, sexism, colonialism, cultural imperialism and so forth, by itself, it is an incomplete model for an inclusive and more durable recognition claim to the extent that it has a tendency to reify group identity and yet displace redistributive claims that are essential to the facilitation of equal participation among citizens.

Fraser's thesis is that misrecognition is not a 'free-standing cultural harm' but a more encompassing harm.²¹⁸ Her plea is that in modern capitalist societies where misrecognition extends beyond the cultural sphere as to manifest across sectors, including the labour market, misrecognition is not simply the process and experience of being devalued by the beliefs and misrepresentation of others. Misrecognition must implicate a larger social framework. Misrecognition is also

²¹⁵ Link & Phelan (note 209 above) 367.

²¹⁶ Fraser 'Rethinking Recognition' (note 194 above) 107.

²¹⁷ Fraser 'Rethinking Recognition' (note 194 above) 109-110. Fraser explains the basic premise in the Hegelian model of identity as saying that identity is constructed 'dialogically', through interaction with others. Where each subject sees the other as an equal and also separate from the other, there is 'recognition'. However, where one is not seen as an equal by the other, such as where one is seen as inferior there is 'misrecognition'. With misrecognition, the effects are that the relationship of the parties to each other is distorted and the identity of the party labeled inferior is injured: Fraser *ibid* 109; GWF Hegel *Phenomenology of Spirit* (1977) 104-109.

²¹⁸ Fraser 'Rethinking Recognition' (note 194 above) 110.

about being denied the status of a full partner in a democracy. Hence, to repair the misrecognition, it is more useful to think of recognition as 'status subordination' rather than group identity.²¹⁹ In this connection, Fraser says:

Misrecognition, accordingly, does not mean the depreciation and deformation of group identity, but social subordination – in the sense of being prevented from participating as a peer in social life. To redress this injustice still requires a politics of recognition, but in the 'status model' this is no longer reduced to a question of identity: rather it means a politics aimed at overcoming subordination by establishing the misrecognised party as a full member of society, capable of participating on a par with the rest.²²⁰

The import of putting the spotlight on status subordination is not to discard the importance of repairing an injured self-image. Rather, it is to remind us that over and above achieving political acceptance and self-esteem, it is just as important to attend to the dimension of allocation of resources so as to repair economic inequality arising from 'parity-impeding' structural inequality that has been historically linked to misrecognition.²²¹ Ultimately, the achievement of social justice will require redistribution of resources. It will entail removing parity-impeding economic factors, and supplanting them with parity-enabling factors.

4.2 Using Difference to Perpetuate a Wrongful Stereotype and Inscript Normative Identity

The legitimisation of apartheid through its legal inscription of the hierarchy of race functioned no less as an inscription of a harmful stereotype. In *Gender Stereotyping*, Rebecca Cook and Simone Cusack take us through the epistemology

²¹⁹ *Ibid* 113.

²²⁰ *Ibid* 113.

²²¹ *Ibid*.

of gender stereotyping and the place of the law in its elimination.²²² Stereotyping through 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. We stereotype for benevolent as well as malevolent or contradictory reasons.²²³ Stereotyping allows us to bring a sense of order to what we see and, in the process, we are able to maximise our understanding of what we see as well as our sense of prediction.²²⁴ However, stereotyping becomes wrongful and pernicious when it carries social power and is invoked for the deliberate purpose of maximising the human capacities of one group and minimising the capacity of an 'otherized' group.²²⁵ Part of the aetiology of wrongful stereotyping lies in assigning difference for malevolent or hostile purposes.²²⁶

Writing about racial stereotyping Sander Gilman says that stereotyping is never a random mental process or a personal fluke of imagination.²²⁷ Rather, it is always anchored in a particular social context and is necessarily protean. The creation of the racial grid under apartheid served to stereotype racial worth against the backdrop of an historical context of colonial conquest, racial domination and exploitation in which white emerged as Self and black the Other.²²⁸ Racial stereotyping became the concrete expression of a Manichean perception. It was necessary to create and sustain a vocabulary and an emotion of polarised difference between Self and the Other with the Other constantly threatening to stand over and against the Self unless it is subjected to constant surveillance and discipline. Because perceptions are real, it was not necessary to

²²² RJ Cook & S Cusack *Gender Stereotyping: Transnational Legal Perspectives* (2010).

²²³ *Ibid* 13.

²²⁴ *Ibid*.

²²⁵ *Ibid* 17.

²²⁶ *Ibid*.

²²⁷ Gilman (note 160 above) 20.

²²⁸ Gilman *ibid* 18-35.

test the truth of the perceptions. Qualities assigned to the Other by the Self need not bear any external reality as internal coherence is all that is required. Stereotyping draws in part from the wellspring of fantasy. The alchemy of myth and unconscious deformation are part of the psychological matrix of stereotyping.²²⁹

The stereotyping of 'Africans' as uneducable for example, translated into rendering them incapable or unworthy of decent education save for 'Bantu' education and membership of professions and academic institutions, for example. In this way, the stereotype functioned not merely to deprive 'Africans' of higher education and professional achievements, but even more perniciously, it served to script normative identities,²³⁰ that is, identities that describe as well as prescribe generational attributes roles and behaviours to which 'African' men and women, by magisterial fiat if necessary, *ought* to conform. The labyrinth of apartheid laws complete with a set of Bantu education institutions and 'ethnic' universities were designed to give the stereotype the force and authority of law and custom.²³¹ The moral for disability is that equality jurisprudence should seek to comprehend as well as dislodge stereotyping of disabled people.

4.3 Using Difference to Create Disabled Citizenry

The global experience of *disabled* people is one of being differentiated and separated from *abled* people. It is a history of being stigmatised and essentialised on the basis of the body, and being excluded from citizenship on the basis of bodily difference, if need be, with the assistance of the legal system. Apartheid principally pegged citizenship on race and racial difference. A theme that is

²²⁹ *Ibid* 35.

²³⁰ Cook & Cusack (note 222 above) 18.

²³¹ *Ibid* 36.

developed throughout this study is that the exclusion, oppression and inequality that disabled people endure, emanate from socio-political constructions about bodily difference that assign the cost of difference to the person who is labelled as different. Citizenship is about the relationship between individuals and their societies.²³² It is not just the relationship between the individual and the state that is a component of citizenship (vertical relationship), but also the relationship between individuals (horizontal relationship). As a social, political and legal concept, citizenship defies an exhaustive definition and finite resolution. Indeed, as David Bell and Jon Binnie remark in their commentary on sexual citizenship, in citizenship one is dealing with a contested concept.²³³ It is a concept that is both inclusionary and exclusionary, with the grounds of inclusion and exclusion multi-layered, flux, and expanding and contracting in response to prevailing articulations of citizenship in a given context and polity.²³⁴ At the same time, a defining characteristic of citizenship, or at least full citizenship, is that it is bestowed upon those that are *full* members of a given historical community so that they stand equal with respect not only to duties but more crucially rights that are endowed by citizenship status.²³⁵

In thinking about equality and disability in the South African context, at a rhetorical level at least, it can be argued that whilst one might not be able to map all the parameters of citizenship, at the same time, the Constitution or at least the interpretation thereof by the Constitutional Court, opens itself to a much more inclusive type of citizenship than hitherto, leaving little room for 'exclusion from

²³² M Oliver *Understanding Disability: From Theory to Practice* (1996) 44.

²³³ D Bell & J Binnie 'Sexual Citizenship: Law, Theory and Practice' in J Richardson & R Sandland (eds) *Feminist Perspectives on Law & Theory* (2000) 167-168; R Lister 'Citizenship: Towards a Feminist Synthesis' (1997) 57 *Feminist Review* 28.

²³⁴ Bell & Binnie *ibid* 168.

²³⁵ TH Marshall *Citizenship and Social Class* (1950) 28-29; Lister (note 233 above) 28.

within'²³⁶ the nation state. It is clear that while apartheid's universe employed morphological difference to exclude, the trajectory under the new constitutional dispensation clearly points towards the opposite; it points towards an expansive, transformative, but a yet to be completely concretised cosmopolitan notion of citizenship. In *Minister of Home Affairs and Another v Fourie and Another*²³⁷, the Constitutional Court indubitably cast *emergent* constitutional citizenship in terms of an expanding universe; in terms of acknowledging as well as accepting difference, not least on account of the memory of apartheid. The Court said.

The *acknowledgment* and *acceptance* of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the *diversity* of the nation.²³⁸

The construction of premiere citizenship under apartheid was predicated on a colonially propagated singular self-serving notion of sameness, namely phenotype. It is a notion whose genealogy can be traced back to the racial caste system that was spawned in eighteenth- and nineteenth-century Europe and

²³⁶ Here I am alluding to the fact that citizenship can also be excluded 'from without' such as when citizenship excludes migrants and asylum seekers: Lister (note 233 above) 36-38.

²³⁷ *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (note 38 above).

²³⁸ *Ibid* para 60. Emphasis added. In Chapter 4, however, I argue that the rhetoric of full, inclusive equality in cases such as *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (note 38 above) should not be accepted dogmatically as a 'judicial truth' not least because it was uttered in a context of meeting the equality claim of complainants who were primarily seeking cultural or political recognition (in this case, recognition of same-sex marriages) rather than economic recognition which entails redistributive justice and allocation of economic resources as would be the case with disabled people seeking accommodation in employment.

whose aesthetic, moral and scientific cultures constructed some bodies as pure, neutral and rational and others as impure, abnormal and mentally degenerate.²³⁹ Michael Omi and Howard Winant tell us that Europe's celebrated philosophers, including Hegel, Kant, Hume and Locke and Voltaire spared little energy to propagate virulent racist views.²⁴⁰ Voltaire, for example, saw not so much *homo sapiens* but, instead, different human species with the 'negro race' definitely fairing as the 'greatly inferior' race.²⁴¹ Equally, David Hume saw innately superior and innately inferior races when he said:

I am apt to suspect the negroes and in general all the other species (for there are four or five different kinds) to be naturally inferior to the whites. There never was a civilised nation of any other complexion than white, or even any individual eminent either in action or speculation.... Such a uniform and constant difference could not happen in so many countries and ages, if nature had not made an original distinction betwixt these breeds of man. Not to mention our colonies, there are negro slaves dispersed all over Europe, tho' low people without education will start up among us, and distinguish themselves in every profession.²⁴²

European science privileged European body types and facial features as the perfection of human form whilst different bodies as faces were classified as less developed or degenerate.²⁴³ Degeneracy lay, as Sander Gilman and others²⁴⁴ have pointed, out in gross morphology. They lay in skin colour, hair texture, facial features, shape of head, location of eyes, structure of genitals, buttocks, hips,

²³⁹ Young (note 43 above) 123; C West *The Cornel West Reader* (1999) 70-86.

²⁴⁰ Omi & Winant (note 205 above) 63; West (note 239 above) 82-84; See also: Appiah (note 109 above) 52; N Thiong'o *Decolonising the Mind* (1986) 18.

²⁴¹ *Ibid* quoting from Voltaire as quoted, in turn, in TF Gossett *Race: The History of an Idea in America* (1965) 45; West (note 239 above) 83.

²⁴² Quoted in RH Popkin 'The Philosophical Basis of Modern Racism' in C Walton & JP Anton *Philosophy and the Civilizing Arts* 126-165 at 184. Cited in: SJ Gould *The Mismeasure of Man* (1981) 41; West (note 239 above) 83.

²⁴³ Young (note 43 above) 128; West (note 239 above) 75-82.

²⁴⁴ Gilman (note 160 above) 156-158, 191-194; Young (note 43 above) 128; West (note 239 above) 78-80.

chest, breasts and so on, which could be observed or measured using comparative anatomy *amarmentaria* and given 'scientific validity'. Saul Dubow captures the significance of anatomy as race when he says that to nineteenth-century Europe, physiognomy became a 'powerful means of registering 'otherness''.²⁴⁵

Iris Young analyses racial oppression in part through the body. She sees racism as contingent upon the existence of a group that is defined by a dominant discourse as having an ugly body that must be feared, avoided or hated.²⁴⁶ The exhibition of the semi-undressed person of Saartjie Baartman in Britain and France during her life as well as her body parts after her death, stands not only as testimony to the presence of egregious forms of racial and gender degradation in Europe at the time, but also captures poignantly how nineteenth-century Europe received African bodies as pathologised abnormal objects that merited a mastering gaze by the subject.²⁴⁷ To a nineteenth-century European aesthetics

²⁴⁵ Dubow *Scientific Racism in Modern South Africa* (note 136 above) 23.

²⁴⁶ *Ibid* 123.

²⁴⁷ R Garland-Thomson 'Integrating Disability, Transforming Feminist Theory' (2002) 14 *National Women's Studies Association Journal* 1 at 7; A Fausto-Sterling 'Gender, Race, and the Nation: The Comparative Anatomy of Hottentot Women in Europe, 1815-1817' in J Terry & J Urla (eds) *Deviant Bodies: Cultural Perspectives in Science and Popular Culture* (1995) 19-48; Young (note 43 above) 127. Gilman (note 160 above) 88, 94. Saartjie Baartman was a poor, unlettered woman of Khoisan descent who was spirited out of the then Cape Colony and exhibited between 1810 and 1815 in London and Paris in pursuance of a plan hatched by three men – Alexander Dunlop, Pieter Cesars and Hendrick Cesars. Ostensibly, Saartjie was to render a contract for services, earn some money and return home. In reality, however, she was to be the object of financial and sexual exploitation. Though euphemistically exhibited as an exotic woman, in reality she was exhibited as an 'ethnic pornographic' object: C Crais & P Scully *Sara Baartman and the Hottentot Venus* (2009) 54-57, 72-81; R Holmes *African Queen* (2007) 25-32. Following her death from tuberculosis in 1817 at the age of 45, a leading French scientist, Georges Cuvier dissected her body and removed body parts including genital parts. As part of his anatomical findings, Cuvier, who was sexually fixated on Baartman's genitalia, drew parallels with an orangutan and the lowest order of human species to confirm a thesis of physical affinity between apes and black people. Baartman's genitalia were put on display in a Paris Museum of Man: Dubow *Scientific Racism in Modern South Africa* (note 136 above) 23. In practice, though, Cuvier was only reiterating a racial theory that he had already concluded and popularised even prior to his encounter with Baartman. In 1812, he had described Africans as 'the most degraded of human races, whose form approaches that of the beast and whose intelligence is nowhere great enough to arrive at regular government': G Cuvier *Recherches Sur Les Ossements Fossils* Vol 1 (1812) 105, as cited in Gould

and culture, Baartman was not only racially deformed, but she also epitomised a deformed sexually degenerate dark race.²⁴⁸ Baartman's genitalia in particular was pathologised and rendered the central image and episteme of the black female representing 'lasciviousness, corruption and disease'.²⁴⁹ Forced to line up for calibration using a 'normalising scientific, aesthetic and moral gaze' mastered and controlled by a European investigator, Baartman clearly failed the test, and, indeed, was destined to fail the test as her body was deviant. Exclusion was her just desert under a normative gaze.²⁵⁰

The pathologisation of Baartman's dark and different body can be understood as symbolising the challenges that Western philosophical, political, and cultural tradition has historically experienced with comprehending foreign non-European worlds.²⁵¹ It is, according to Achille Mbembe, a tradition in which that which is not 'I' poses an insurmountable difficulty which can only be resolved by denying the existence of any 'self but its own'. The idea that we have 'concretely

(note 242 above) 36. Saartjie Baartman is also known as 'Sara or Sarah Bartmann'. Rachel Holmes alerts us to controversy attending to her name. Saartjie was the name she used in life. It is an Afrikaans name derived from Dutch. Used affectionately and sentimentally, it means 'little Sara'. Its Afrikaans form, according to Holmes, captures an intensity of affection and care which is lost when the name is anglicised to Sara or Sarah. At the same time, as Holmes cautions us, Saartjie carries '-tjie' as a suffix which when used in a context of unequal relations between the namer and the named, conveys contempt, belittlement and subordination for the named. Where the unequal relations are of a racial nature, as what obtained at the time of her birth, then Saartjie would also have been racially pejorative depending on whom the namer was. Many commentaries have used Sara or Sarah in part to distance themselves from any racist connotation in Saartjie, and in part to use the name Saartjie was given when she became a Christian convert in 1811 in Britain. However, I have chosen to use Saartjie on the understanding that, Saartjie who spoke Khoisan and Dutch, lived her life, however tragic, as Saartjie and was called by that name by those who were affectionate towards her, including her family: Holmes *ibid* xii-xiv; Crais & Scully *ibid* 9, 107-109.

²⁴⁸ *Ibid.*

²⁴⁹ Gilman (note 160 above) 85-94; Dubow *Scientific Racism in Modern South Africa* (note 136 above) 23.

²⁵⁰ Michel Foucault summarised the 'normalising gaze' as entailing five stages, namely: 1) comparison; 2) differentiation; 3) hierarchisation; 4) homogenisation; and 5) exclusion. M Foucault *Discipline and Punish* (1977) 182-183; Young (note 43 above) 125-126.

²⁵¹ Mbembe (note 199 above) 2.

and typically, the same flesh'²⁵² became a problematic for Western philosophical and political tradition when faced with different phenotypes and physiognomies. Mbembe argues that the classificatory system that European culture used for Africa and its inhabitants took Othering to the extreme.²⁵³ The system read difference as not meaning 'not to be like' in the sense of being non-identical but meaning 'not to be at all' (nothingness).²⁵⁴ The classification produced an Africa that was a 'Dark Continent' that stood for a void and an African people that epitomised absolute otherness.²⁵⁵

In support of the Enlightenment thesis, Cornel West sees the absolute otherness and discursive exclusion of dark bodies in European modern discourse as the inevitable outcome of a European normative gaze.²⁵⁶ The European classificatory system that was self-referencing and used forms of scientific investigation, rationality, Cartesian epistemology and European aesthetic and cultural norms to set the parameters and draw the boundaries of knowledge. In this way, the unintelligibility and even illegitimacy of asserting equality in beauty, culture and intellectual capacity between black and white bodies was assured.²⁵⁷ Against this backdrop, the scaling of bodies under colonialism and apartheid and the doctrine of white supremacy were neither an innovation nor an aberration but rather a logical application of a normative gaze that was rooted in Western scientific claims and Enlightenment. If ever Baartman's anatomy measured up to European humanity it was to the 'lowest' and 'most disgusting' classes of European 'prostitutes' who, like the objectified 'Hottentot', had pathological genital physiognomy.²⁵⁸ The significance of racially differentiated genitals, as

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Ibid* 4.

²⁵⁵ *Ibid* 2.

²⁵⁶ West (note 239 above) 75.

²⁵⁷ *Ibid.*

²⁵⁸ Gilman (note 160 above) 94.

Sander Gilman has written, is that it was, in no small measure, part of validating the scientific thesis of hierarchical racial difference and in turn racial superiority and inferiority.²⁵⁹ It conveniently connected physiognomy with moral and intellectual capacities.

Apartheid fitted the colonial design to create illegitimate racial hierarchies as an instrument for acquiring, retaining and legitimating state power and deploying it to subjugate, dominate and exploit blacks for current and future generations of whites and capital. It is a notion that is antithetical to citizenship in a humane and progressive sense. To be a citizen means to be included; it means to be recognised and to have one's human dignity respected and to be an empowered participant at both a vertical and horizontal level. Citizenship is about participating actively and meaningfully in the social, political and economic social order of society at all levels.²⁶⁰ Kenneth Karst says that when a person is treated as inferior, as part of a dependant caste rather than an equal being, and, in consequence, rendered a non-participant, citizenship is violated and so are equality and human dignity.²⁶¹ Hence the principal target of emergent citizenship in post-apartheid South Africa must necessarily be to not only rescue groups from caste-like status, but also to empower historically marginalised groups so that they can participate as equal citizens both politically as well as economically.²⁶²

²⁵⁹ Gilman (note 160 above) 83-91, 112.

²⁶⁰ Karst 'Why Equality Matters' (note 2 above) 248.

²⁶¹ *Ibid*; Karst 'Foreword: Equal Citizenship under the Fourteenth Amendment' (note 188 above) 6.

²⁶² Karst 'Foreword: Equal Citizenship under the Fourteenth Amendment' *ibid* 11.

4.4 Disabusing Apartheid: Difference is Relational and not Categorical!

In *Making All the Difference*,²⁶³ Martha Minow explores how we come to recognise people as belonging to different groups and the implications for doing so. Minow's work, which explores how we differentiate between things and people to create difference, is instructive for deconstructing apartheid and finding a link between constructions of race under apartheid and constructions of bodily difference when transacting disability. She analyses how difference is perceived, created, organised and transacted, both linguistically and substantively, by individuals, and more significantly, by social institutions, not least the law. Minow accepts that organising perceptions about difference along a certain line, such as categorisation, is part of how we try and make sense of the world on a daily basis.²⁶⁴ However, the line we follow and the consequences we attach to categorisation are far from inevitable but are, instead, choices we make.²⁶⁵ They are choices with social and moral implications.²⁶⁶ Categories create boundaries that are critical to legal assumptions about individuals and groups in society. The purpose to which we deploy categorisation is crucial to our conception of equality.

When we label people through positive and negative categorisation, as apartheid did, and, as will be argued, as disability does,²⁶⁷ it is not a neutral exercise but a process of both relational empowerment and disempowerment. Depending on which side of the boundary the individual or group falls, it is a process of

²⁶³ Minow (note 82 above).

²⁶⁴ *Ibid* 53.

²⁶⁵ *Ibid* 4, 54-55.

²⁶⁶ *Ibid* 4.

²⁶⁷ See Chapter 5 of this study, especially.

enabling one individual or group and *disabling* the other. The same happens when we unreflectively separate the ‘normal’ individual or group from the abnormal, and the autonomous individual from the dependant. Categorisation using the medium of difference can serve to expand or contract the citizenship of disabled people depending on our subjective purposes and interests.

Drawing mainly from the work of George Lakoff and Mark Johnson on cognitive theory metaphors, Henk Botha uses the *container* metaphor to characterise the nefarious purpose of racial categorisation under apartheid.²⁶⁸ An apartheid container was used to construct an ‘objective reality’ arising from the logic of separation and exclusiveness based on racial differences.²⁶⁹ Depending on one’s ‘race’, one was either inside or outside the container. Criteria were supplied to determine, in the event of a dispute about inclusion into, or exclusion from the container. ‘Racial differences’ became ‘physical barriers’ as, indeed, intended by the architects of the container.²⁷⁰ In the final analysis, one’s place in relation to the container became social, economic and political destiny. The container became so much a deeply ingrained and normal part of South African jurisprudence, through repeated legislative and judicial processes that legitimated and sanitised apartheid. For this reason, Botha argues that there is latent 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 status and individual and group worth unless there is a conscious jurisprudential effort at reconceiving categorisation by inter alia abandoning the ‘formalism, objectivism and reductionism’ which were the

²⁶⁸ Botha ‘Metaphoric Reasoning and Transformative Constitutionalism’ (Part 1) (note 27 above); Botha ‘Metaphoric Reasoning and Transformative Constitutionalism’ (Part 2) (note 27 above). Of the works by George Lakoff & Mark Johnson, Botha draws, especially, from G Lakoff & M Johnson *Metaphors We Live By* (1980).

²⁶⁹ Botha ‘Metaphoric Reasoning and Transformative Constitutionalism’ (Part 1) (note 27) 623-627.

²⁷⁰ *Ibid* 624.

hallmarks of mediating racialised life during the age of the container.²⁷¹ In her discourse on deconstructing apartheid, Aletta Norval advances a similar argument when she says that creating a new social and political order that goes 'beyond' apartheid means not only breaking with the historically specific features of apartheid, but also transcending the logic that informed its instituted modes of social division.²⁷²

According to Ann Scales what we need is a theory of differentiation or categorisation that can assure us 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' and instead is guided by the objective of securing or preserving 'concrete universality'.²⁷³ In order to reconceive categorisation, it is submitted, we must begin with clarifying our purpose. If our goal is to create an expanded universe of equality, then we can categorise difference and reconceive difference in order to perceive, create, organise and transact a citizenship that is inclusive; a citizenship that expands rather than contracts in response to a socially constructed notion of difference. When determining the status and worth of human beings using categorisation, the moral according to Botha must be to construct categories in *relational* terms and conscious of the constitutional imperatives to respect dignity, equality and freedom for all. Minow illustrates how we can construct relational difference when we are asked to mediate disability. She says:

If difference is no longer presumed inherent in the "different person", but instead a feature of a comparison drawn between people, the relationships

²⁷¹ Botha, *Metaphoric Reasoning and Transformative Constitutionalism* (Part 2) (note 27 above) 31.

²⁷² Norval (note 118 above) 299.

²⁷³ AC Scales 'The Emergence of Feminist Jurisprudence' (1986) 95 *Yale Law Journal* 1373, 1387-1388. What Ann Scales is arguing for is part of the staple of feminist arguments that I discuss more fully and, indeed, appropriate as part of developing the disability method in Chapter 4 of this study.

behind the comparison become salient and crucial. A student in a wheelchair is different only in relation to those who are mobile on foot, and this difference is significant only in relation to institutions that have made this difference matter by placing steps before each entrance and by using doorways too narrow to be used by a person in a wheelchair. The meanings of many differences can change when people locate and revise their relationships to difference. The student in the wheelchair become less “different” when the building, designed without him in mind, is altered to permit his access.²⁷⁴

Minow urges us not to become complacent about accepting legal categorisations. Unless we impugn rather than accept blithely juridical assumptions underpinning difference by using a methodology for countering historically privileged assumptions of difference, the law may only serve to reinforce a form of difference that is historically privileged and the outcome will be continued marginalisation and disadvantage of certain groups.²⁷⁵ Absent critical reflection, the law, following the austere traditions of legal formalism, will merely restate, in a legal form, social constructions of difference devised by dominant groups in society. As the apartheid universe shows, constructions of difference that are historically privileged can, with the assistance of the law, easily be used to create and sustain a hierarchy of humanity and in the process eviscerate human dignity and exonerate the state from the imperative of universal equality. In *Dred Scott v Sandford*,²⁷⁶ the Supreme Court of the United States justified a lower form of citizenship for black people by reading into the country’s constitution socially constructed racial difference. The Court was certain that black people could not be citizens of the republic because at the time that the Constitution was adopted, they had been ‘considered as subordinate and inferior’²⁷⁷ and were, thus, implicitly excluded from the term ‘the People of the United States’ that is

²⁷⁴ Minow (note 83 above) 12.

²⁷⁵ *Ibid* 74-78.

²⁷⁶ 60 US (19 How) 393 (1856).

²⁷⁷ *Ibid* 404-405.

mentioned in the Preamble to the Constitution. The moral, therefore, is to reflect critically about assumptions that create self-serving difference and be aware of their insidious effect on the law before we confer privileges and impose burdens under a veneer of impartial juridical authority. Equality has implications for resource allocations to alleviate burdens, and in turn, resource allocations reflect particular notions of equality.²⁷⁸ It behoves advocates of equality to appreciate the *unstated assumptions* that have the effect of legitimising inequality.²⁷⁹

By way of a methodology for countering historically privileged assumptions of difference, we should construct countervailing assumptions. Minow says we should ask ourselves how we have come to assume that difference is intrinsic, and the norm used to delineate difference is objective.²⁸⁰ We must ask how we have come to treat those that are sanctioned to interpret and apply difference as interpreting and applying difference neutrally and without a subjective perspective.²⁸¹ Equally, we must ask how we have come to dismiss, as irrelevant, the competing perspectives of those labelled as different by a majority that wields social, political or legal power.²⁸²

If those with social power are allowed to arrogate to themselves the exclusive privilege to assign to others labels of difference that carry consequences in terms of rights and obligations, or at least are not challenged, the outcome is often exclusion from, rather than inclusion into citizenship. The result is often a denial rather than affirmation of the humanity of others. In the final analysis, we must ask how we have come to arrive at a point where, with equanimity, we accept as natural, inevitable and good existing institutional arrangements that treat one set

²⁷⁸ M Rioux 'Towards a Concept of Equality of Well-being: Overcoming the Social and Legal Construction of Inequality' (1994) 7 *Canadian Journal of Law and Jurisprudence* 127.

²⁷⁹ Minow (note 83 above) 50-78.

²⁸⁰ *Ibid* 53-60.

²⁸¹ *Ibid* 60-65.

²⁸² *Ibid* 66-70.

of human beings as normal and the other set as different and abnormal.²⁸³ Minow's thesis is that, if our project is about inclusive equality, then we should shift the paradigm we use to conceive difference from a focus on distinguishing between people for the purpose of creating boundaries to a focus on the relationships within which we perceive differences and draw distinctions;²⁸⁴ a shift to what Minow calls the 'social relations approach'.²⁸⁵ We need not accept given assumptions about difference, as differences inhere not so much intrinsically, but relationally. Instead, we should seek to challenge the status quo by scrutinising the assumptions and subjecting them to the challenge of countervailing armamentarium. In this regard, our starting points as countervailing assumptions should be:

Difference is relational, not intrinsic. Who or what should be taken as the point of reference for defining differences is debatable. There is no single, superior perspective for judging questions of difference. No perspective asserted to produce "the truth" is without a situated perspective, because any statement is made by a person who has a perspective. Assertions of a difference as "the truth" may indeed obscure the power of the person attributing a difference while excluding important competing perspectives. Difference is a clue to social arrangements that make some people less accepted and less integrated while expressing the needs and interests of others who constitute the presumed model. Any social arrangements can be changed. Arrangements that assign the burden of "differences" to some people while making others comfortable are historical artefacts.²⁸⁶

From a feminist perspective, what apartheid did was to create not so much difference, which can be rendered neutral because it leaves open to debate the

²⁸³ *Ibid* 79-70.

²⁸⁴ *Ibid* 15.

²⁸⁵ *Ibid* 110-114, 173-224.

²⁸⁶ *Ibid* 52-53.

question of value, but *Otherness* which is discredited and stigmatised.²⁸⁷ Apartheid created racial *Otherness* and succeeded, for the beneficiaries at least, to develop around it a self-perpetuating logic for legitimising hierarchical human worth and distributing benefits and burdens commensurately. Feminism has challenged *Otherness* in its construction of gender. As part of the struggle for equality for women, feminism has been challenging formal equality discourses with countervailing assumptions that are designed to put under scrutiny, the basis upon which difference between man and woman has been historically constructed. Using *the Other* as an analytical tool in feminist discourse, in her seminal work, *The Second Sex*, which was first published in 1949, Simone De Beauvoir said this about social construction of woman in patriarchy:

...humanity is male and man defines woman not in herself but as relative to him.... She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute – she is the Other.²⁸⁸

De Beauvoir's powerful analysis is a tool for deconstructing apartheid's racial grid and unmasking white as the 'patriarchal' point of reference. Disablism invites the same analogy. Disablism, as I argue, in this study, is also a site for deconstructing *The Second Body*. By deconstructing patriarchy, radical feminism has succeeded in unmasking an apartheid relationship between man and woman that has been historically sustained by a pattern of patriarchal power that normalises with the assistance of legal rules the traditional role of woman. A major contribution of feminism has been the enrichment of equality discourses through challenging formalistic constructions of equality that use an abstract

²⁸⁷ S Wendell *The Rejected Body: Feminist Philosophical Reflections on Disability* (1996) 60-76.

²⁸⁸ S De Beauvoir *The Second Sex* (1953) 16.

yardstick of neutrality and undifferentiated sameness as the universal norm.²⁸⁹ In the result, feminism has created new space for debate and for discovering new relationships and new possibilities for change. By insisting on grounding abstract universal conceptions of equality in the context of the lived lives of women, feminism has created the space for imagining the liberation of groups that are historically differentiated and subordinated.

In feminist constructions of difference, it is 'sexual apartheid'²⁹⁰ that has historically created and sustained the domination of men over women in society. Rebecca Cook argues that patriarchy has been reluctant to concede that its institutions and practices are oppressive to women not only because such a concession entails losing privileges that are considered as 'natural' and 'necessary' for the running of families, economies and the state, but also because such a concession ultimately means implicating patriarchy as a violator of equality.²⁹¹ It means facing a new reality of women as equals with all that it entails in terms of losing patriarchal power.²⁹² Not surprisingly, an inexhaustible stock of justifications has always been at the disposal of patriarchal institutions and systems to justify subordination of women as *the Other*. Like its predecessor, British imperialism, grand apartheid was never short on rationalising non-white as *the Other*.

²⁸⁹ Scales (note 273 above); CA Littleton 'Restructuring Sexual Equality' (1987) 75 *California Law Review* 279; CA Littleton 'Equality and Feminist Legal Theory' (1987) 48 *University of Pittsburg Law Review* 1043; C Dalton 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (1988) 3 *Berkeley Women's Law Journal* 1-13 at 8; Albertyn & Goldblatt (note 27 above) 251; K van Marle 'The Capabilities Approach: 'The Imaginary Domain' and 'Symmetrical Reciprocity': Feminist Perspectives on Equality and Justice' (2003) 11 *Feminist Legal Studies* 255.

²⁹⁰ This is a term used by Rebecca Cook to highlight the systemic and pervasive socio-economic and political nature of women's inequality: RJ Cook 'The Elimination of Sexual Apartheid: Prospects for the Fourth World Conference on Women' (1995) 5 *American Society of International Law. Issue Papers on World Conferences* 2.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

In their work on racism, Robert Miles and Malcom Brown analyse the phenomenon of racism that manifests in the dialectic of Self and the Other and highlight its unity as characterising the core of racism which in the past has underpinned some of most vicious forms of racism.²⁹³ They argue that the type of ‘white supremacy’ racism that characterises the racisms of the Ku Klux Klan, Nazi Germany and apartheid, is an epitome of a coherent and historically specific dialectic of Self and the Other that is more threatening and more insidious to the extent that it prioritises ‘superiorisation’ of the Self.²⁹⁴ The Third Reich was predicated on the Self as the Aryan Race and the Other as the Jewish race. Self was attributed excessively positive characteristics (*autoracisation* or other racialisation) and the Other excessively negative characteristics (*heteroracisation* or other racialisation).²⁹⁵ Self was pure and the Other impure. Equally significant, part of the construction of Self and Other entailed imagining the Self as competing with the Other and engaged in desperate struggle for survival. Laws were passed to protect the Aryan race from economic competition with the Jews and to maintain racial hygiene, including laws preventing marriage and sexual relations between Germans and Jews. Ultimately, the Third Reich succumbed to the allure of a more lasting solution - extermination.

Apartheid constructed its own historically specific dialectic of Self and the Other. The dialectic was created out of *autoracisation* and *heteroracisation* and was fuelled by the dangers of *swart oorstroming*²⁹⁶ or *swart gevaar*,²⁹⁷ and *gelykstelling*²⁹⁸ through the agency of Afrikaner nationalism which painted Afrikaners as a white ethnic group fighting not only for its own economic space, but even more

²⁹³ Miles & Brown (note 107 above) 84-86.

²⁹⁴ *Ibid* 85.

²⁹⁵ *Ibid* 85. Miles and Brown appropriate the terms *autoracisation* and *heteroracisation* from the work of Taguieff: PA Taguieff *La Force du Préjugé* (1987).

²⁹⁶ Meaning ‘black swamping’: *Pharos Dictionary* (note 15 above). See § 2.3 above.

²⁹⁷ Meaning ‘black danger’: *Pharos Dictionary* *ibid*. See § 2.3 above.

²⁹⁸ Meaning ‘equalisation’: *Pharos Dictionary* *ibid*. See § 2.3 above.

significantly, as a race under siege and fighting for moral survival of white values. Apartheid was an indispensable political tool for protecting white civilisation and the white race against adulteration and hybridisation. In this way, apartheid imbued its own construction of Self and the Other with political expediency and moral exorcism.²⁹⁹ The dialectic reached its own historical zenith in the years of National Party rule during which the doctrine that there are intrinsic, immutable racial differences between black and white people was carried into law. Racial classification became a daily lived experience. Apartheid designed racial difference and used racial difference to justify imposition of racially-based hierarchical social arrangements, including the distribution of benefits and burdens to reflect differential racial worth and needs. If to be equal was to be racially the same, then to be different was to be unequal.³⁰⁰

The attraction of science, as Jonathan Jansen, observes is that it is far more reliable than human knowledge in its discovery of the truth.³⁰¹ Its laws can eliminate uncertainty and rule out ideology. At the same time, science is controllable knowledge.³⁰² As in other parts of the world such as the United States, from time to time, the ideology of white supremacy in South Africa, enlisted science, including phrenology,³⁰³ craniometry,³⁰⁴ and intelligence

²⁹⁹ Tomaselli *et al* (note 121 above).

³⁰⁰ Minow (note 83 above) 50.

³⁰¹ Jansen (note 9 above) 180.

³⁰² *Ibid.*

³⁰³ Phrenology: Phrenology is a 'science' of determining mental capacities by measuring the size of localised brain areas, the theory being that the larger the size of the localised part, the greater the cerebral capacity. Phrenology was first developed at the end of the eighteenth-century and Frans Joseph Gall is recognised as the founding figure. Using phrenology, whites were assigned the status of *races frontalis* to mark their premiere position for possessing the largest anterior parts of the brain that are associated with mental functions whereas blacks were assigned the status of *races occipitals* for a premiere position in respect of anterior parts of the brain that are associated with mundane tasks, involuntary movements, sensation and emotion: Gould (note 242 above) 92, 97-98. Paul Broca, a French professor of clinical surgery, was an eminent phrenologist whose main hypothesis was that human races occupied positions on a linear scale of mental capacities. Stephen Gould, in his robust critique of biological determinism, says this of Broca's scientific approach: 'He traversed the gap between fact and conclusion by what may be the usual route –

testing,³⁰⁵ to identify intrinsic biological differences and, thus, show that racial differences were not only fixed and deep but also that the differences demonstrated that black was inferior to white.³⁰⁶ The 'objective' and

predominantly in reverse. Conclusions came first and Broca's conclusions were the shared assumptions of most successful white males during his time ... Broca and his school used facts as illustrations, not as constraining documents. They began with conclusions, peered through their facts, and came back in a circle to the same conclusion': Gould *ibid* 85.

³⁰⁴ Craniometry: Craniometry is a 'science' that developed as a byproduct from phrenology at the end of the eighteenth-century, and was based on the theory that brain size and intelligence were correlated. Dubow *Scientific Racism in Modern South Africa* (note 136 above) 29; Gould (note 242 above) 57-60, 64-65, 82-112; Using craniometry, for example, Samuel Morton, an Philadelphia-based doctor and staunch defender of slavery, purported to show in two published works that whites had the biggest brains, blacks the smallest, and that the American Indians occupied an intermediate position: SG Morton *Crania Americana* (1839); SG Morton *Crania Aegyptiaca* (1844); Dubow *Scientific Racism in Modern South Africa* *ibid* 28-29; Gould *ibid* 53-54.

³⁰⁵ Intelligence testing: Intelligence testing refers to Intelligence Quotient testing (IQ) which was pioneered by Alfred Binet, a French psychologist, who incidentally, had abandoned craniometry in favour of psychological methods as more dependable methods for measuring intelligence. However, 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 in need of 'special' education. The 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 then 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 for or the intellectual abilities expected of for 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 and 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: Gould (note 242 above) 148; Dubow *Scientific Racism in Modern South Africa* (note 136 above) 211-212. As IQ became popular, its use was extended beyond the original purpose of identifying pupils in need of 'special' education. In the United States, especially, IQ testing was to become yet another instrument for giving legitimacy to biological determinism against a backdrop of a history of slavery, prevailing racial segregation and doctrine of white supremacy in the same way as phrenology and craniometry had attempted to do. Starting from an assumption that intelligence is something that can be abstracted and measured on a linear scale for each individual (an assumption that was not shared by Binet), IQ testing was to become not so much an instrument for identifying school children requiring 'special' education as had been the original design, but, instead, an instrument for reifying and consolidating racial ranking by 'proving' that whites had an innately better intellectual capacity than blacks and that this was an outcome of genetic inheritance: Gould *ibid* 155-157.

³⁰⁶ Rich (note 159 above) 665; For a view on the use of science to justify racism in the United States see R Horsman *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* (1981) 43-61, noted in KW Crenshaw 'Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) *Harvard Law Review* 1331 at 1370-71, footnote 149; Dubow *Racial Segregation and the Origins of Apartheid in South Africa 1919-1936* (note 42 above); Norval (note 118 above) 31-32; ML Fick 'Intelligence Test Results of Poor White, Native (Zulu), Coloured and

authoritative value of science, including IQ testing, in resolving, once and for all, the troubling question of equal citizenship *vis a vis* the 'native' who was, after all, suspected to suffer from arrested development³⁰⁷ and recapitulation,³⁰⁸ was not lost to colonial discourse. Max Linde, a psychiatrist based in Cape Town, articulated the prevailing colonial sentiment of racially differentiated intelligence and scientifically valid calibrated citizenship when in 1937 he said:

There can be one, and only one adequate reason justifying differentiation, and that is if the native can be proved to have an inferior intelligence to the European. In that case, that is, if he is really at the mental level of the child, we obviously cannot trust him with the vote or with other privileges of full citizenship.³⁰⁹

Stephen Gould, Saul Dubow and other writers have highlighted the considerable effort and ingenuity that were employed by craniometrists to ensure that the scientific racial inquiry always yielded inscribed racial identities.³¹⁰ For example,

Indian School Children and the Educational and Social Implications (1929) 26 *South African Journal of Science* 904.

³⁰⁷ In the early twentieth-century especially, the theory that Africans had arrested cerebral development was popularised in colonial and scientific discourses through the alchemy of medical science, anthropological findings and, indeed, travel writers. The thesis was that the anatomical and physiological differences between the brains of whites and blacks were such that an adult African at best attained the cerebral development of the average seven- or eight-year old European. This was because African brains stopped growing after puberty and indeed, thereafter they deteriorated. The most widely shared explanation for arrested development among scientists was the theory of premature closure of the brain sutures in Africans which stymied any further cerebral growth: Dubow *Scientific Racism in Modern South Africa* (note 136 above) 198-204.

³⁰⁸ Recapitulation is an evolutionary theory that was established in the nineteenth-century and was used, *inter alia*, to validate racial hierarchies. It is a theory that is based on the notion of retracing or reconstructing evolutionary lineage. The hypothesis is that when an individual grows, they pass through a series of stages that represent adult ancestral forms. As Stephen Gould observes, recapitulation served to confirm that the ancestral lineage of races had progressed to different levels of development. Some races progressed further than others. More specifically, the theory was used to confirm that adults of the inferior black race were at the evolutionary stage of development of the children of the superior race. In this way, recapitulation became not just a biological deterministic tool, but also a tool for organizing racial hierarchies.

³⁰⁹ Cited in Dubow *Scientific Racism in Modern South Africa* (note 136 above) 210.

³¹⁰ Gould (note 242 above) 73-112; Dubow *Scientific Racism in Modern South Africa* (note 136 above) 29.

if craniometry revealed that 'Negro' and 'Nordic' skulls had the same characteristics in terms of a dolichocephalic (long-headed) head shape, then new criteria such as prognathism (measurement of the projection of the face and jaws beyond the forehead) and nasal indices (measuring the relative breadth to height of the nose) were introduced to fit into a script where anatomical characteristics of whites eventually trump those of their black counterparts.³¹¹ George Curvier, a leading French scientist got round the uncomfortable finding that 'primitive' races frequently turned out to be large brained by suggesting that the large brain size of 'primitive' races was caused by development of the posterior region of the brain (the less cerebrally significant) and not the frontal region of the brain (the more cerebrally significant).³¹²

In the case of intelligence tests, differences between groups of white children were apt to be explained in terms of environment differences, while heredity was the explanation proffered for differences between black and white children.³¹³ More than this, low IQ performance among whites was treated as a problem that could be remedied through socio-economic intervention.³¹⁴ As Paul Rich notes, behind much of the race science was the assumption that there was some form of racial order and hierarchy in which the white, Anglo-Saxon race, occupied the premiere position.³¹⁵ Iris Young aptly captures the unsparing all out search for 'objective' standards to legitimise the supremacy of white bodies over dark ones when she says:

In the developing sciences of natural history, phrenology, physiognomy, ethnography, and medicine, the gaze of the scientific observer was applied to

³¹¹ Dubow *Scientific Racism in Modern South Africa* *ibid.*

³¹² *Ibid* 29-30.

³¹³ Rich (note 159 above) 679; Dubow *Scientific Racism in Modern South Africa* (note 242 above) 223-232.

³¹⁴ Dubow *ibid* 225-226.

³¹⁵ Rich (note 159 above) 667.

bodies, weighing, measuring, and classifying them according to normative hierarchy. Nineteenth-century theorists of race explicitly assumed white European body types and facial features as the norm, the perfection of human form, in relation to which other body types were either degenerate or less developed. Bringing these norms into the discourse of science, however, naturalized them, gave the assertions of superiority an additional authority as truths of nature.³¹⁶

In the end, the science of investigating racial differences became, foremost, the science of validating preconceived racial differences. Science about races, as Stephen Gould notes, became advocacy masquerading as objectivity.³¹⁷ Gould says that eminent scientists would begin with their conclusions, peer through their facts and come back in a circle to the same conclusion about races.³¹⁸ The conclusion, in turn, stemmed from an assumption that there were human races and that they could be ranked on a linear scale of human worth.³¹⁹ The genius of proving hierarchical racial differences using craniometry, for example, lay in selecting criteria for testing a hypothesis and modifying or abandoning the criteria if the outcome proved inconvenient such as when it suggested that human variation might be ramified and random,³²⁰ and that the overall genetic differences among races is astonishingly small.³²¹ Instead of using information about genetic difference to benefit humankind, the science of race became a racist and racialising science.

³¹⁶ Young (note 43 above) 128.

³¹⁷ Gould (note 242 above) 85.

³¹⁸ *Ibid.*

³¹⁹ *Ibid* 86.

³²⁰ *Ibid* 73-112.

³²¹ *Ibid* 323.

5 CONCLUSION

This chapter began with an epigraph from Evelyn Brooks Higginbotham that succinctly captures race as socio-political signification as well as a discursive formation complete with the hidden premises of power relations and structures beneath what appears to be a benign biological characteristic.³²² Charles Lawrence echoes Higginbotham when he says that race and racial categories are social rather than natural categories.³²³ They are discursive formations created by culture, politics, and ideology.³²⁴ Race is a category of identity that is not pre-social, pre-given or essential,³²⁵ but is, instead, socially constituted. It is a category that is constituted by available cultural meanings into which one is placed and/or places themselves.³²⁶ Racial categories are contingent both in time and space.³²⁷ Certainly, those whose human dignity is injured by being an ascribed 'spoiled' racial identity need not accept the identity as inevitable or immutable but one that is open to vigorous political contestation and transformation. The argument is not that race, as a collectivity, is an illusion, but that it should not be given an essence and a centre that it does not and, indeed, cannot have.

Minow's social-relations approach and feminism are important tools for deconstructing historical constructions of difference. Both approaches tell us that the process of differentiating human beings to create a hierarchical structure or binary divide – one superior and another inferior – can scarcely be described as neutral. Rather, it starts from a certain vantage point – a claimed point of

³²² Higginbotham (note 1) above.

³²³ CR Lawrence 'Foreword. Race, Multiculturalism, and the Jurisprudence of Transformation' (1995) *Stanford Law Review* 819, 835.

³²⁴ *Ibid.*

³²⁵ N Dolby *Constructing Race* (2001) 9; Omi & Winant (note 205 above) 55-61.

³²⁶ Dolby *ibid.*; Omi & Winant *ibid.*

³²⁷ Dolby *ibid.*; Omi & Winant *ibid.*

normality – so that assumptions about inferiority can be made of that which deviates from the ‘norm’.³²⁸ The monopoly of constructing the racial binary divide and its amplification into a quadruple grid, lay exclusively in a ‘white state’ which naturally prescribed for whites the dominant racial position; the position of the premiere caste and paradigm of humanity.³²⁹ If ‘white’ was the vantage point and essential, then, certainly, ‘non-white’ was inessential.³³⁰ Non-white was inferior, discredited and the object of stigma. It was the default category.³³¹

What disability can learn from apartheid is that, over hundreds of years, social groups dominant in South African society were able, through a self-serving bio-social cultural construction of race borrowed from Europe, to construct hierarchical difference around phenotype and prepare the ground for the canonisation of white supremacy and black inferiority in the Population Registration Act of 1950. Apartheid created an historically situated dialectic of Self and the Other. Legal sanctity was ascribed to difference for the specific purpose of subordinating and oppressing, at an all encompassing level, groups that were perceived to be different to the point of creating lasting structural inequality. Though its mechanisms of oppression differ, like apartheid, disability is predicated upon the notion of difference and apartness; a notion of Self and the Other.

At a somatic level, apartheid was really an anatomical dialectic of Self and the Other where unity was formed when white physiognomy and black physiognomy simultaneously embraced and repelled through a set of imagined attributes some positive and some negative but wholly at the behest of a

³²⁸ Minow (note 82 above) 50; Wendell (note 287 above) 61.

³²⁹ Wendell *ibid* 61.

³³⁰ De Beauvoir (note 288 above) 16.

³³¹ S Lipton *Claiming Disability: Knowledge and Identity* (1998) 14.

conquering valourised white Self. To borrow from De Beauvoir, the apartheid's racial grid created not just *Second Races* ('Coloureds' and 'Indians'), but also a *Third Race* ('Natives', 'Bantu' or 'Africans').

The ideology of apartheid and its categorical differentiation of races raises the question that Said asked of Orientalism, albeit in a gentler form, which is: Can one divide human reality, as indeed human reality seems to be genuinely divided, into clearly different cultures, histories, traditions, societies, even races, and survive the consequences, humanly?³³² The outcome of a supreme effort to divide people into distinct races with distinct characteristics and citizenships, as apartheid did, was not only the polarisation of the distinctions with all the oppression and violence it took to maintain the distinctions, but also the legal banishment of space for fruitful mutual and respectful encounter between different cultures, traditions and societies that were moulded into apartheid races.³³³ In the process, the humanity of cultures, traditions, and societies that were 'misrecognised' by apartheid was sacrificed at the altar of racial bigotry and exploitation. And no less significant, the humanity of the perpetrators of apartheid was also lost. In short, to answer Said's rhetorical question, apartheid did not and could not survive humanly its racial project. Though apartheid was formally interred with the inauguration of a democratic constitution in 1994, it left a racially bruised people in its wake.

Apartheid bequeathed to democratic South Africa a profusely racialised people; a people that from cradle to the grave were constantly subjected to laws policies and propaganda on the naturalness and logic of accepting racial essences and racial positioning as the prime gateway to citizenship. Apartheid bequeathed a people without an archive of mutually shared common citizenship or common

³³² Said (note 151 above) 45.

³³³ *Ibid* 46.

egalitarian ethos and communitarian values to draw upon as a single nation when building democratic South Africa save for the political consensus reached at Kempton Park to begin afresh and a Constitution which mandates, and more significantly, requires a new beginning. Against this backdrop, equality as a value and a right has an important role to play in building inclusive citizenship not just in a racial sense, but in a more holistic sense.

If permitted to reign, disablism is equally a form of bodily apartheid that fractures citizenship.³³⁴ Society cannot survive the consequences of disablism humanly. Unless contested and checked, disablism divides humanity into bodily forms and impedes a fruitful and respectful encounter between bodily histories. Disablism requires us to accept the logic of bodily essences as the key to citizenship. Its creation and effects have enormous reach and power. Disablism is just as oppressive in psychological and socio-economic senses as racial oppression. Indeed, the parallel between disability and apartheid was not lost to Mandela in his speech from the dock in the *Rivonia Trial*.³³⁵ Towards the final stages of his august speech from the dock, Mandela invokes the metaphor of disability as part of capturing the socio-economic straightjacket imposed on 'Africans' under apartheid's universe and their irrepressible quest for freedom so that they could participate as equal citizens and in a democratic South Africa. Mandela said:

Africans want to be paid a living wage. Africans want to perform work which they are capable of doing, and not which the Government declares them to be

³³⁴ A number of commentators on disability have drawn a parallel between apartheid and disability. For example: 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(1) *Disability, Handicap & Society* 5.

³³⁵ Rivonia, a place in Johannesburg, is where in 1964 Nelson Mandela and his political comrades Govan Mbeki, Ahmed Kathrada, Denis Goldberg, Raymond Mhlaba, Andrew Mlangeni, Elias Motsoaledi, Walter Sisulu were convicted for sabotage and conspiracy to overthrow the Government and sentenced to life imprisonment: Mandela *No Easy Walk to Freedom* (1990) 189.

capable of. Africans want to be allowed to live where they obtain work, and not to be endorsed out of an area because they were not born there. Africans want to be allowed to own land in places where they work, and not to be obliged to live in rented houses which they can never call their own. Africans want to be part of the general population, and not to be confined to living in their own ghettos... Africans want a just share in the whole of South Africa; they want security and a stake in society *Above all, we want equal political rights, because without them our disabilities will be permanent.* I know this sounds revolutionary to the whites in this country because the majority of voters will be Africans. This makes the white man fear democracy.³³⁶

The constraints that are imposed on *disabled* people by the manner in which society is arranged are not unlike those that emanated from apartheid. Segregation under apartheid strikes a chord with the exclusion from ‘mainstream’ society that is experienced by *disabled* people. Like racial differentiation under apartheid, the construction of difference revolves around dichotomised able-bodiedness and able-mindedness that is necessary to give dominance and legitimacy to a master position. Like its apartheid counterpart, it is no less a form of oppression.³³⁷ Oppression, in all its manifestations became the most palpable effect of occupying a subordinate position in apartheid’s universe of difference. Those classified as ‘Africans’, ‘Coloureds’ and ‘Indians’ experienced, albeit in differential measure, all of Young’s³³⁸ five faces of structural oppression, namely, exploitation, marginalisation, powerlessness, socio-cultural imperialism, and violence at the behest of the apartheid project. Disabled people suffer much the same. They too are outside an apartheid container that only provides entry to those that comply with a socially constructed bodily norm.

³³⁶ The speech is reproduced in Mandela *No Easy Walk to Freedom* *ibid* 188.

³³⁷ Abberley (note 334 above); M Oliver *The Politics of Disablement* (1990) 68-70.

³³⁸ Young (note 43 above) 39-65.

The process of creating difference and locating it in the person labelled 'human but different' whether it be in respect of race, gender, sexuality, disability or some other differences does not take place in a vacuum but, in relation to a valorised hegemonic norm. It is, as Minow points out, a relationship not of equality but superiority and inferiority.³³⁹ Difference that is pegged to a hegemonic norm acts not only as an individual yoke but a structural one. Once a person is labelled as different, they, and others fitting the label, become asymmetrical, subordinated and disempowered and those fitting the label become symmetrical, affirmed and empowered. The cost of difference, as apartheid shows, is borne by the person and group labelled different. Except by way of charitable beneficence, the state is absolved from any obligation to remove or ameliorate resultant inequalities. Indeed, the labelling process takes place within an oppressive environment in which existing social arrangements are systematically assumed to be fair by those with the requisite dominance and power to do the labelling.

Thus, understanding apartheid is invaluable not only to appreciating the epistemology of racial oppression, but also the epistemologies of other types of oppression that arise from or are secured through cultural constructions of sameness and difference. Apartheid is really a case study par excellence of the process of *Othering* that has been appropriated by feminism, anticolonial and other emancipatory discourses.³⁴⁰ Apartheid captures *Otherness* as binary opposition rather than relational difference. It shows that social identities are not essential. Rather, they are constructed within a particular political context, and in this instance, through the might of imposition rather than inclusive democratic deliberation so as to serve a political project of domination and subordination. Being white was the prerequisite for equality. To be white during apartheid was

³³⁹ Minow (note 82 above) 50.

³⁴⁰ Watermeyer 'Disability and Psychoanalysis' in B Watermeyer *et al* (note 92 above) 33-34.

like man in patriarchy. It was to be part of a sovereign superior caste that could not share the world in equality with black, *the Other*, that was 'dependant' and 'heavily handicapped'.³⁴¹

From the legacy of apartheid, we are able to fathom not only the value, but also the urgency of equality under the new dispensation. From apartheid we are able to see how the project of maintaining group power over another is achieved through treating that other group as different in a demeaning way. If repeated over time and accompanied by socio-economic power, the differentiation in a demeaning way becomes so much part of the customary practice; it becomes something akin to a gender role that is 'culturally naturalized as an intrinsic characteristic of social relations'.³⁴² The result is a denial of the other group's human dignity and equality aspirations. The subordinated group is deprived of its culture, history, spiritual and material well-being and, foremost, its right to full citizenship.

The lesson from apartheid is not that categorisation of social groups is inherently wrong and harmful or that one should abolish race as something that is only an illusion of the mind. Rather, it is that if it should become necessary to categorise human beings by differentiating bodily forms, the moral ought to be to shun *Otherness* so that we do not devalue others, but instead remain faithful to universal respect for human dignity and equality. The aim is not to deny cultural differences among human beings, or, for that matter, to deny the reality of those who see or feel race, or those who see or feel disability. Rather, as Said argued in his discourse on Orientalism, the aim is to challenge robustly the notion of human difference built around certain chosen forms if that difference implies a

³⁴¹ De Beauvoir (note 286 above) 20-21.

³⁴² Cook & Cusack (note 222 above) 41-42, citing observations made in a Shadow Report on Mexico to the CEDAW; AS Fraser 'Becoming Human: The Origins and Development of Women's Human Rights' (1999) 21 *Human Rights Quarterly* 853 at 855.

‘frozen reified set of opposed essences’ around which a whole archive of adversarial knowledge for separating human beings and polarising social groups is constructed or even inscribed into law as happened with dogged insistence with apartheid.³⁴³

What post-apartheid South Africa calls for is equality jurisprudence that is both inclusive and transformative and does not leave certain social groups bruised, oppressed and separated. Using an analogy borrowed from a discourse on race, we need an equality jurisprudence that is able to see through disability, not as something ‘stable’ with biological essence as a mark of identity or as a malady waiting to be diagnosed and treated by an omniscient medical profession using objective science, but, instead, as something ‘unstable and decentered’ capable of being transformed by political struggles and a responsive equality paradigm.³⁴⁴ To borrow from Evelyn Brooks Higginbotham, when essentialised, disability becomes the ‘metalanguage’ of the body. Like race, it represents social and power relations and is a site for dialogic exchange and contestation.³⁴⁵ Transformative disability jurisprudence should seek change that anticipates disrupting, in a radical manner, systemic patterns of advantage and disadvantage based on group status.³⁴⁶ It should seek to eradicate somatic dominance and privilege and, instead, level the playing field between those that are *disabled* and those that are *enabled* by existing social arrangements. For, existing socio-economic arrangements are far from neutral.

³⁴³ Said (note 151 above) 350.

³⁴⁴ Higginbotham (note 1 above) 252; M Omi & H Winant *Racial Formation in the United States from the 1960s to the 1980s* (1986) 68; R Miles *Racism* (1989) 69-98.

³⁴⁵ Higginbotham (note 1 above) 252.

³⁴⁶ Albertyn & Goldblatt (note 27 above) 249; Klare (note 11 above) 150; *Minister of Finance and Another v Van Heerden* (note 38 above) para 142.

CHAPTER 3

DISABILITY METHOD AS TRANSFORMATIVE METHOD

Methods shape substance, first, in the leeway that they allow for reaching different substantive results. Deciding which facts are relevant, or which legal precedents apply, or how applicable precedents should be applied, for example, leaves the decisionmaker with a wide range of acceptable substantive results from which to choose. The greater the indeterminacy, the more the decisionmaker's substantive preferences, without meaningful methodological constraints, may determine a particular outcome. Not surprisingly, these preferences may follow certain patterns reflecting the dominant cultural norms.¹

1 INTRODUCTION

Chapter 1 focused on the rationale for the study. It outlined the aims and objectives of the study as well as its scope. Chapter 1 also introduced the methodological approach of this study but by way of an overview only. Chapter 2 sought to draw lessons about equality and non-discrimination from the historicity of categorical racial differentiation and exclusionary citizenship under apartheid. It highlighted the kind of hierarchical equality we ought to avoid when searching for a paradigm of responsive equality. Chapter 2 also drew parallels between apartheid and disability, and argued that if it should become necessary to construct difference for the purposes of determining human worth and status in post-apartheid South Africa, we should avoid constructing difference that is built around binary opposition so as not to repeat the mistakes

¹ KT Bartlett 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829, 844-845. Footnotes omitted.

of apartheid of using difference to stigmatise citizenship, perpetuate wrongful stereotype and ultimately to disable from citizenship a whole humanity. Instead, we should aspire towards a transformative paradigm of difference where difference is relational rather than categorical and where the legal recognition of difference is consonant with the constitutional goals of protecting human dignity, equality and freedom. What Chapter 2 did not do, however, was to construct a more concrete and substantively discernable legal method for transforming legal norms to render them transformative and consistently faithful to inclusive equality. This task falls to the present chapter.

This chapter focuses on the methodological component of the discourse. It takes the discourse forward by highlighting the cardinal importance of developing legal method, and in this case *disability method*, as an analytical, interpretive as well as transformative approach for advancing the constitutional project of substantive equality for disabled people. The premise is that if substantive equality is the agreed destination under the equality clause of the South African Constitution,² then transformative method must necessarily become an integral part of ensuring that the trajectory towards substantive equality does not lose its bearings as well as its momentum.

The concepts of ‘transformation’, transformative constitutionalism’ or their equivalents, though not explicitly mentioned by the South African Constitution, are, nonetheless, concepts around which many post-apartheid discourses on equality have revolved. Generally speaking, it can be argued that the preponderance of socio-political academic commentaries on South Africa in the

² Both Chapter 1 and Chapter 2 alluded to substantive equality as the equality that the Constitutional Court has said is required by the equality clause. This chapter assumes the premise of substantive equality for the purposes of facilitating the development of disability method. In Chapter 4 the nature and trajectory of substantive equality under South African jurisprudence as developed by the Constitutional Court is more fully explored.

post-apartheid era which must now number into several thousands, if not millions, are, in the final analysis, about transformation. This is because, in one sense or the other, the commentaries have sought to interrogate the formulation, interpretation or application of values and rules in the post-apartheid era against the backdrop of a Constitution that is widely understood as requiring not just change, but fundamental change. It is trite that, as a discipline, law has no exclusive claim on interrogating or advancing transformation. Other disciplines, including, philosophy, history, sociology and natural sciences, are equal partners to conversations about transformation. At the same time, however, the point should not be lost that, in a constitutional state, the law, and more specifically the Constitution, is not only the wellspring from which transformation draws its legal mandate, but, equally important, it is also the template against which transformation will authoritatively be tested to see whether it has been accurately framed and adequately implemented. As might be expected, there are commentaries that have specifically sought to bring the concepts of transformation and transformative constitutionalism under explicit jurisprudential scrutiny.³

³ K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: The Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 249; D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309; H Botha 'Metaphoric Reasoning and Transformation' (Part 1) (2002) 4 *TSAR* 612; H Botha 'Metaphoric Reasoning and Transformation' (Part 2) (2003) 1 *TSAR* 20; S Jagwanth & C Murray 'Ten Years of Transformation: How Has Gender Equality in South Africa Fared?' (2002) 14 *Canadian Journal of Women & Law* 255; H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003); W le Roux 'Bridges, Clearings and Labyrinths: The Architectural Framing of Post-apartheid Constitutionalism' (2004) 19 *SA Public Law* 629; M Pieterse 'What Do We Mean when We Talk About Transformative Constitutionalism?' (2005) 20 *SA Public Law* 156; P Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 351; ; AJ van der Walt 'Transformative Constitutionalism and the Development of South African Property Law' (Part 1) (2005) 4 *TSAR* 655; AJ van der Walt 'Transformative Constitutionalism and the Development of South African Property Law' and (Part 2) (2006) 1 *TSAR* 1; AJ van der Walt 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 *Fundamina* 1; S Liebenberg 'Needs, Rights and Transformation' (2006) 3 *Stellenbosch Law Review* 351; C Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253; T Roux 'Transformative Constitutionalism and the Best

In one of the earliest, and now frequently cited, academic commentaries to employ the concept transformation as part of explaining the juridical values animating the normative content of equality under the South African Constitution, Cathi Albertyn and Beth Goldblatt described 'transformation' in the following manner:

We understand transformation to require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material advantage based on race, gender, class, and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.⁴

In the same volume that Albertyn and Goldblatt published their commentary, Karl Klare also published a commentary in which the term 'transformative constitutionalism' was used possibly for the first time in discourse on the South African Constitution in order to capture, in normative terms, constitutional law-making and adjudication under a post-apartheid constitution. Klare described transformative constitutionalism as:

...a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in an historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be

Interpretation of the South African Constitution: Distinction without a Difference? (2009) 2 *Stellenbosch Law Review* 258.

⁴ Albertyn & Goldblatt (note 3 above) 249. Footnote omitted.

inadequately captured by the phrase 'reform' but something short or different from 'revolution' in any traditional sense of the word.⁵

The concepts of 'transformation' and 'transformative constitutionalism' or their equivalents do not only manifest in academic commentaries, but equally significant, they manifest in the jurisprudence of the Constitutional Court as values animating constitutional interpretation and requiring, at the very least, disturbing the status quo ante in a significant manner. Witness, for example, the following statement made by Justice Albie Sachs in *Minister of Finance and Another v Van Heerden* in the context of adjudication centering on the application of the equality clause of the Constitution to affirmative action:

The whole thrust of section 9(2) is to ensure that equality be looked at from a contextual and substantive point of view, and not a purely formal one... The substantive approach, on the other hand, requires that the test for constitutionality is not whether the measure concerned treats all affected by it in identical fashion. Rather it focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a *transformative constitutional philosophy* which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved.⁶

⁵ Klare (note 3 above) 150.

⁶ *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) para 142. Emphasis added. See also *S v Makwanyane* 1995 (3) SA 391 (CC) para 262: 'What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting ...future'; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 57: '[The Constitution] is a document that seeks to transform the status quo ante into a new order'; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) 490 (CC) paras 73-74 footnotes omitted: 'South Africa is a country in transition. ...Our constitutional order is committed to transformation or our society from a grossly unequal society to one "in which there is equality between men and woman and people of all races". In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities'; *Van Rooyen v S* 2002 (8) BCLR 810 (CC) para 50, footnotes omitted: 'This Court [Constitutional Court] has on more than one occasion stressed the transformative purpose of the interim Constitution and the 1996 Constitution. This transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to

Justice Sachs was quite categorical in saying that there is a distinction between pure formal equality which section 9(2) of the South African Constitution rejects and contextual or substantive equality that it aligns itself with. And there was a rationale for this constitutional choice according to Justice Sachs. He said that formal equality which 'is based on a status-quo-oriented conservative approach' was tenable in countries where 'a great degree of actual equality or substantive equality had already been achieved'.⁷ With the equality approach of the Supreme Court of the United States in mind and seeking to distance South African equality jurisprudence from it, he went on to say of formal equality that 'it looks at social situations in a neutral, colour-blind and gender-blind way and requires compelling justification for any legal classification that takes account of race or gender'.⁸

The purpose of this chapter is not so much to interrogate what 'transformation' or 'transformative constitutionalism' entail. The chapter accepts 'transformation' and 'transformative constitutionalism' as points of departure, and as philosophical concepts or ideas that have acquired the status of constitutional interpretation values, and, at the very least, imply reconstructing, at a systemic level, the socio-economic order so that the status quo under colonial, and more particularly, apartheid dispensation, is fundamentally changed. This is not to imply, of course, that the concepts are not contested or that the concepts have a stable organic centre. I accept that there are different understandings of transformation and transformative constitutionalism, and, certainly, there should

1994 were largely under the control of whites and, in particular, white men'. It is important to understand substantive equality as not privileging race and gender. The references to race and/or gender as sites for systematic disadvantage in the quote from *Bato Star Fishing* and *Van Rooyen* should be understood as merely capturing the more conspicuous features of the architecture of inequality during the colonial and apartheid eras rather than an exhaustive identification of the vectors of inequality.

⁷ *Minister of Finance v Van Heerden* (note 6 above).

⁸ *Ibid.*

not be a closed understanding of what the concepts mean.⁹ Indeed, commenting extrajudicially, both Justice Dikgang Moseneke (Deputy Chief Justice)¹⁰ and Justice Pius Langa J (then Chief Justice)¹¹ have said that the juridical meaning of transformation is highly contested and that the relationship between transformation as a value and the content of legal rights defies easy definition. At the same time, as I argue throughout this study and in Chapter 4 especially, that notwithstanding the indeterminate space the concepts allow in terms of deriving a precise meaning about the content of attendant rights, a historical and contextual reading of the Constitution mandates an expansive reading of transformation. A generous reading of the Constitution allows for use of transformation or transformative constitutionalism as concepts that capture a trajectory towards changing society in a *major* rather than a minor way. I argue that the interpretation and application of the right to equality for disabled people needs to take place against this backdrop if it is to succeed in repairing an injured past and more importantly eradicating systemic advantage and disadvantage based on somatic difference.¹² Furthermore, I support Klare's argument that transformative constitutionalism is not a neutral concept and that its sustenance and credibility requires candidly owning up to, rather than masking, political space in constitutional adjudication.¹³

In post-apartheid South Africa, equality has a central place in transforming the old into the new. Marius Pieterse and others¹⁴ are correct in arguing that among

⁹ Pieterse (note 3 above) 156.

¹⁰ Moseneke (note 3 above) 315.

¹¹ Langa (note 3 above) 351.

¹² In Chapter 4, which focuses on equality, I provide arguments for my assumption about the tenability of transformation and transformative constitutionalism as concepts envisaging radical change. In Chapters 5 and 6 on the legal construction of disability, I seek to sustain the argument for radical change.

¹³ Klare (note 3 above) 150-151.

¹⁴ Pieterse (note 3 above) 162; Albertyn & Goldblatt (note 3 above) 249-250; Moseneke (note 3 above) 315; Albertyn 'Substantive Equality and Transformation in South Africa'(note 3 above) 244-245)

the transformation-orientated provisions of the Constitution, the equality clause, which the Constitutional Court has interpreted as importing substantive equality in contradistinction to mere formal equality, is the most pivotal. This is not to say that equality litigation is the only route to achieving and sustaining transformation of equality. It is conceded that law as an instrument of social change is secondary to broader political struggles. Rather, it is to argue that equality as a value¹⁵ and a right¹⁶ is central to providing a constitutional edifice for transforming power relations towards an egalitarian goal in a society where systemic inequality has abounded historically and there is political consensus on the need for such a transformation. The Constitutional Court has implied as much when highlighting the centrality of the right to equality to the Constitution's objects.¹⁷ By the same token, I agree with the premise that transformative equality at least entails examining the context in which the violation of the order has taken place with a view to unmasking and eradicating systemic and entrenched disadvantages so as to be responsive to lived experience and to maximise human potential.¹⁸ Thus, the manner in which we conceive equality and non-discrimination is crucial if we are going to make a difference to disability. If we are to be assured of departing from the status quo, which Justice Sachs sought to disavow in *Minister of Finance v Van Heerden*¹⁹ so as to *always* capture the transformative design of the South African Constitution, we need to develop approaches or methods that are consistent with this design. Method is a way of committing those charged with interpreting the Constitution to remain faithful to its transformative design.

¹⁵ Preamble and sections 1(a) and 7(1) of the Constitution.

¹⁶ Section 9 of the Constitution.

¹⁷ See for example: *Frazer v Children's Court, Pretoria North* 1997 (2) BCLR 153 (CC) para 20; *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) para 74; *Minister of Finance v Van Heerden* (note 8 above) para 22.

¹⁸ Pieterse (note 3 above) 159.

¹⁹ 2004 (6) SA 121 (CC) para 142.

Some might be inclined to argue that the Constitutional Court has already supplied us with a methodology for securing substantive equality in constitutional adjudication and that nothing more needs to be done except apply the law diligently. They may well be correct. By pronouncing equality as meaning substantive equality, and, thus, something different from and much more than, formal equality,²⁰ and by reading human dignity into equality,²¹ it can be argued that the Constitutional Court has already furnished us with a method for interrogating equality that is sufficiently transformative and responsive to the lived experience of disabled people. Explaining the nature of substantive equality under the South African Constitution, Loot Pretorius observes that the Constitutional Court has not left substantive equality to be deciphered from the abstract.²² Instead, the Court has sought to translate its conception of equality into a 'practical test'²³ for determining unfair discrimination so that substantive equality has more concrete conceptual form in South African jurisprudence. As will be elaborated in Chapter 4 clear evidence for this obtains in the Court's insistence, at a rhetorical level at least, that equality analysis, and especially, the determination of whether a particular norm or standard is fair, must focus on the impact of the discrimination on the individual before the court. For example, in *President of the Republic of South Africa v Hugo*, one of the earliest cases to afford the Court an opportunity to expound its interpretation of the equality clause, the Court said:

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

²⁰ See the discussion in Chapter 4 of this study.

²¹ *Ibid.*

²² JL Pretorius 'Constitutional Framework for Equality in Employment' in JL Pretorius *et al* (eds) *Employment Equity Law* § 2.1.

²³ *Ibid.*

goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not.²⁴

Also, the Court has put a gloss on how to determine impact. It has articulated the factors that must be taken into account when determining the effect, at a human level, of the norm or standard that is alleged to have been discriminatory. As part of describing as well as analysing the Court's approach to substantive equality, Pretorius captures the 'impact' factors in the following statement:

To determine whether the overall impact of a discriminatory measure is one which furthers the goal of equality or not, a number of contextually relevant factors must be considered. These include the position of the complainants in society; their vulnerability and history (for instance whether the group the complainants belong to has suffered from patterns of disadvantage in the past); the purpose, nature and history of the discriminatory provision (whether it relieves or adds to group disadvantage) and the extent to which discrimination affects the rights of the complainants.²⁵

Thus, to achieve substantive equality, the Constitution enjoins us to factor into the determination of unfair discrimination the particular histories of marginalisation and oppression. But whilst the Constitutional Court has supplied us with the principle for equality, there is room for suggesting that the project of substantive equality needs to be embellished, reinforced and sustained by legal methodologies that are informed by intimate understandings of the histories and experiences of disadvantage and marginalisation and equality aspirations of the particular protected groups. My central argument or rationale for searching for method is that, pronouncing judicial principles is one thing, and

²⁴ *President of the Republic of South Africa v Hugo* (note 17 above) para 41.

²⁵ Pretorius 'Constitutional Framework for Equality in Employment' (note 22 above) § 2.1. Footnote omitted.

applying them so that they are consistently and maximally responsive to context is another. An observation made by Saras Jagwanth and other commentators is that substantive equality principles have not always been applied with appropriate understandings of the particular histories of marginalisation and oppression resulting in perverse outcomes, meaning outcomes that are out of synchrony with the professed judicial commitment towards substantive equality.²⁶ Critics point to the decisions of the Constitutional Court in cases such as *President of the Republic v Hugo*, *S v Jordan* and *Volks v Robinson* as tangible evidence of inconsistent juridical application of substantive equality.²⁷

Cathi Albertyn cautions us about a type of transformative constitutionalism that in practice is of limited reach and only manages to achieve formal recognition or nominal inclusion of excluded groups, leaving the underlying socio-economic relations largely undisturbed.²⁸ Albertyn argues that for equality jurisprudence to be 'truly transformative',²⁹ judges must not only be able to understand

²⁶ S Jagwanth & C Murray 'Ten Years of Transformation: How Has Gender Equality in South Africa Fared?' (2002) 14 *Canadian Journal of Women & Law* 255; R Kruger 'Sex Work from a Feminist Perspective: A Visit to the Jordan Case' (2004) 20 *South African Journal on Human Rights* 138; N Fritz 'Crossing Jordan: Constitutional Space for (Un)Civil Sex' 20 *South African Journal on Human Rights* 230; D Meyerson, 'Does The Constitutional Court of South Africa Take Rights Seriously? The Case of *S v. Jordan*' (2004) *Acta Juridica* 145; S Jagwanth 'Expanding Equality' in C Murray & M O' Sullivan (eds) *Advancing Women's Rights* (2005) 131-148; E Bonthuys 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 *Canadian Journal of Human and Law* 1.

²⁷ *President of the Republic v Hugo* (note 17 above); *S v Jordan* 2002 (11) BCLR 1117 (CC); *Volks v Robinson* 2005 (5) BCLR 446 (CC). Jagwanth & Murraray (note 26 above); Jagwanth (note 26 above); Kruger (note 26 above); Albertyn 'Substantive Equality and Transformation in South Africa' (note 3 above) 265-270; U Jivan & D Perumal, 'Let's Talk About Sex, Baby'—But Not in the Constitutional Court: Some Comments on the Gendered Nature of Legal Reasoning in the Jordan Case' (2004) 17 *South African Journal of Criminal Justice* 368, 374; E Bonthuys & C Monteiro 'Sex For Sale: The Prostitute As Businesswoman' (2004) 121 *South African Law Journal* 659, 673 (2004); Meyerson (note 26 above); Bonthuys 'Institutional Openness and Resistance to Feminist Arguments' (note 26 above); E Bonthuys, 'Women's Sexuality in the South African Constitutional Court', (2006) 14 *Feminist Legal Studies* 391, 395. The criticisms of the decisions of the Constitutional Court in the *President of the Republic v Hugo* and *Volks v Robinson* cases are followed up in Chapter 4 of this study.

²⁸ Albertyn 'Substantive Equality and Transformation in South Africa' (note 3 above) 254.

²⁹ *Ibid* 254

systemic inequality, but must also be willing to transcend the legal formalism that is embedded in traditional legal concepts and doctrines and has the effect of constraining transformative possibilities. When dealing with difference, for example, Albertyn's argument is that courts must not stop at recognising social histories that have resulted in the subordination and disadvantage of some groups and the privileging of others. Instead, courts must go further and deal with difference in a 'practical and normative manner'.³⁰ Individuals and groups that have historically been subordinated and disadvantaged must not only be affirmed and given 'social recognition'.³¹ Equally, future forms of difference must be rendered non-hierarchical in both a formal and substantive sense so that space for meaningful participation of historically marginalised groups is created.³² In short, the accent must be on overcoming a subordinated status and removing parity impeding factors that are peculiar to the subordinated group.³³

Precisely because, commonalities aside, protected groups have different histories of marginalisation and oppression,³⁴ I argue that there is ample justification for revisiting, as it were, the judicial approach to substantive equality so that while it speaks to the universal human condition, it concomitantly and consistently speaks to the particular social groups. As part of speaking to particular social groups, substantive equality must speak to particular equality claims. In this connection, drawing from the work of Nancy Fraser,³⁵ commentators on equality and socio-economic rights such as Cathi Albertyn³⁶ and Sandra Liebenberg,³⁷ implore us not to treat all equality claims as seeking a uniform response, but

³⁰ *Ibid* 260.

³¹ *Ibid*.

³² *Ibid*

³³ N Fraser 'Rethinking Recognition' (2000) 3 *New Left Review* 107.

³⁴ Pretorius 'Constitutional Framework for Equality in Employment' (note 22 above) § 2.1.

³⁵ N Fraser *Justice Interruptus* (1997); Fraser 'Rethinking Recognition' (note 33 above) 107.

³⁶ Albertyn 'Substantive Equality and Transformation in South Africa' (note 3 above) 255-256

³⁷ S Liebenberg S 'Needs, Rights and Transformation: Adjudicating Social Rights in South Africa' in T Lovell (ed) *(Mis)recognition, Social Inequality and Social Justice: Nancy Fraser and Pierre Bourdieu* (2007) 177 - 201.

instead to be alive to the fact that different groups may experience different inequalities. With some groups, equality may be met adequately by fulfilling a 'recognition' claim in a narrow political or cultural sense such as by recognising a social identity and culture that have hitherto been oppressed or subordinated.³⁸ With others, social recognition may be insufficient as lived inequality may implicate economic deprivation and unequal access to economic goods. For such claims, therefore, equality may only be fulfilled if requisite resources are provided in a positive sense.³⁹

The argument is not that equality claims for social inclusion and those for economic inclusion are mutually exclusive as the claims overlap for many excluded groups. Rather, it is that when adjudicating equality claims, transformative possibilities can only be achieved if courts are not only attuned to the social histories and positions of the excluded groups, but are also willing to fashion remedies that are attuned to particular equality claims, especially resource claims. The moral for disability is that when addressing the equality needs of disabled people, extreme care must be taken to avoid judicial outcomes that only manage to address social inclusion, but leave the cost of economic inclusion to be borne privately by disabled people.

Furthermore, I would argue that, because equality is a contested concept, and, as Albertyn and Goldblatt note, a site of struggle over the nature, extent and pace of transformation,⁴⁰ developing methodologies for sensitising interpreters, including the courts, about how we determine 'impact' and how we think about

³⁸ Albertyn (note 3 above) 255; Fraser *Justice Interruptus* (note 35 above) 16-23; Fraser 'Rethinking Recognition' (note 33 above) 113-114; Liebenberg 'Needs, Rights and Transformation' (note 37 above) 179).

³⁹ Albertyn (note 3 above) 255; Fraser *Justice Interruptus* (note 35 above) 16-23; Fraser 'Rethinking Recognition' (note 33 above) 116; Liebenberg 'Needs, Rights and Transformation' (note 37 above) 179.

⁴⁰ Albertyn & Goldblatt (note 3 above) 250.

appropriate remedies, is a way of occupying strategic space in equality adjudication. In short, the argument is not so much that we have a clean slate in terms of dearth of judicial method for interpreting and applying substantive equality. Rather, it is that, over and above the practical test that the Constitutional Court has developed for determining equality and unfair discrimination, we need to turn our minds to the importance of developing more targeted group-specific transformative methods for mapping the parameters of substantive equality so as to protect as well as advance the transformative design of the Constitution. Disabled people call for such an effort as they have yet to be visibly recognised in South African jurisprudence and lived experience. Writing from a feminist perspective, Patricia Cain aptly captures the justification for the search for new equality methodologies when she says that theoretical constructions of equality are ongoing rather than static and that as long as inequalities and oppression persist, there will always be a need to search for more responsive theories, strategies and practices.⁴¹

Against this backdrop, this chapter advances a method – *disability method* – as a methodological tool for facilitating a tailoring or contextualisation of the transformative interpretation and application of the equality clause of the Constitution so that it engages disabled people in a manner that is sufficiently context-sensitive. Chapter 1 introduced the methodology of this study insofar as indicating the relevance and necessity of critically appraising social constructions of disability, domestic laws, foreign laws, international laws, policies, and guidelines against the yardstick of substantive equality. Chapter 1 also alluded to ‘internal’ but more particularly ‘external legal critique’ as providing the critical vantage point of this study.⁴² What this chapter seeks to do is to provide the substance of the interpretive method of this study. It seeks to expound the

⁴¹ P Cain ‘Feminism and the Limits of Equality’ (1990) 24 *Georgia Law Review* 804, 840.

⁴² Chapter 1 § 5.6 of this study.

content of the methodology for not only critiquing disability-related social theories and laws, but also ultimately searching for a socially responsive equality paradigm.

The disability method I seek to develop and advance is predicated on a premise suggested by Katherine Bartlett that all legal methods, including theories of constitutional interpretation, shape the substance of the law, and that constitutional adjudication allows for leeway in terms of reaching different substantive results.⁴³ Disability method, then, is a tool for ensuring that the interrogation of norms, standards or practices that impact on disabled people is pursued in a manner that is transformative and, is, thus, sufficiently responsive to the equality aspirations of disabled people. It is a strategic method for ensuring that the adjudication of norms that impact on disabled people always seeks to unmask old power structures, exclusions and perspectives that were in the past ignored.⁴⁴

2 DISABILITY METHOD

2.1 Analytical and transformative tool

To the best of my knowledge, I am seeking to conceive and apply disability method in a novel sense. I am conscious, of course, that to describe something as novel or as method in a scholarly discourse risks raising expectations that, perhaps, cannot be fulfilled. As a concept, method conjures up the notion of invoking an idealised empirically proven instrument for testing a hypothesis to

⁴³ Bartlett (note 1 above) 844-845.

⁴⁴ Bartlett (note 1 above) 844; K Abrams 'Feminist Lawyering and Legal Method' (1991) 16 *Law & Social Inquiry* 373, 376.

uncover the truth in a manner that is repeatable, and, thus, verifiable.⁴⁵ Writing about method, Catherine MacKinnon says it 'organises the apprehension of truth: it determines what counts as evidence and defines what is taken as verification'.⁴⁶ If literally understood, method generates not only an expectation of scientific objectivity, but also an expectation of finality in the truth that method reveals. Certainly, this is not the meaning intended for method in this discourse. Rather, I employ method in a much more pragmatic and contingent manner that is largely borrowed from feminism.⁴⁷

⁴⁵ HH Bauer *Scientific Literacy and the Myth of Scientific Method* (1992) 37-38.

⁴⁶ C MacKinnon 'Feminism, Marxism and the State: An Agenda for Theory' (1982) 2 *Signs* 515, 527.

⁴⁷ There is a wealth of literature that addresses feminist method. However, much of it does not, and, indeed, need not necessarily draw a distinction between discoursing feminism as a broader theoretical and practical discipline on the one hand and maintaining a focus on method as a legal analytical approach on the other, not least because the two are inextricably linked, feminist legal method being the progeny of feminist doctrinal thought. Against this background, the following commentaries in which philosophical doctrine overlaps with legal method, represent not the whole, but merely a selection of the main literature that I have used to construct the feminist-inspired arguments in this chapter: Bartlett (note 1 above); HR Wishik 'To Question Everything: The Inquiries of Feminist Jurisprudence' (1985) 1 *Berkeley Women's Law Journal* 64; LM Finley 'Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate' (1986) 86 *Columbia Law Review* 1118; AC Scales 'The Emergence of Feminist Jurisprudence: An Essay' (1986) *Yale Law Journal* 1373; CA Littleton 'Equality and Feminist Legal Theory' (1987) 48 *University of Pittsburg Law Review* 1043; CA Littleton 'Reconstructing Sexual Equality' (1987) 75 *California Law Review* 1279; CA MacKinnon *Feminism Unmodified: Discourses on Life and Law* (1987); CA MacKinnon *Towards a Feminist Theory of the State* (1989); M Minow 'Beyond Universality' (1989) *University of Chicago Legal Forum* 115; C Dalton 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (1988) 3 *Berkeley Women's Law Journal* 1; CA Littleton 'Feminist Jurisprudence: The Difference Method Makes' (1990) *Stanford Law Review* 751; DL Rhode 'Feminist Critical Theories' (1990) 42 *Stanford Law Review* 617; M Fineman 'Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship' (1990) 42 *Florida Law Review* 25; Cain (note 41 above); Abrams (note 44 above); H Charlesworth 'What are "Women's International Human Rights?"' in RJ Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 58-84; A Silvers 'Reprising Women's Disability: Feminist Identity Strategy and Disability Rights' (1998) 13 *Berkeley Women's Law Journal* 81; H Charlesworth 'Feminist Methods in International Law' (1999) 93 *American Journal of International Law* 379; D Cornell *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law* (1999); R Garland-Thomson *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature* (1997); R Garland-Thomson 'Integrating Disability, Transforming Feminist Theory' (2002) 14 *National Women's Studies Association Journal* 1; S Wendell *The Rejected Body: Feminist Philosophical Reflections on Disability* (1996); E Spelman *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988); C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982).

For the purposes of this study, disability method is a practical methodology for sensitising substantive equality to disability under the Constitution. Its point of departure is that, where a constitution has a transformative design in the sense of seeking to radically alter the inequality status quo in a progressive manner, as is argued to be the case under the South African Constitution,⁴⁸ then, socio-economic arrangements that exclude disabled people detract from that design and must be commensurately reformed in order to dislodge structural inequality which assures systemic advantages and disadvantages. In its most conspicuous form, disability method fuses the social model of disability with feminism with the intention of constructing a framework for interrogating norms, standards or practices that impact on disabled people so as to determine whether the norms, standards or practices are responsive to the equality needs of disabled people. In those cases where the norms, standards, or practices are indifferent and/or exclusionary, disability method requires imagining an alternative that is responsive and inclusionary. In this way, disability method is both analytical as well as transformative.

2.2 Practical Framework

At a practical level, disability method reflects a commitment towards substantive equality by insisting that certain interconnected considerations be taken into account when impugning norms, standards and practices that differentiate in form or substance between enabled and disabled people as to constitute barriers to equal participation of disabled people in society. The considerations are:

1. whether the norm, standard or practice is conscious about, or oblivious to, disability as social oppression;

⁴⁸ Chapter 4 of this study.

2. whether the norm, standard or practice is dialogic in the sense of admitting a plurality of interactive voices and reflecting equal power relations so as to create space for an egalitarian playing field, or is, instead, monologic in the sense admitting only a dominant voice and reflecting unequal power relations as to privilege an enabled group and disadvantage a disabled group;
3. whether the norm, standard or practice admits the experience and equality aspirations of disabled people as a diverse but distinct social group that has been historically excluded or marginalised; and
4. if the norm, standard, or practice is monologic and exclusionary, how rather than whether it can be reformed to provide accommodation, that is, to provide an alternative to existing social structures in a manner, and is costless to the person accommodated as part of constructing an inclusive egalitarian society.

I derive the above elements or disability questions primarily from a reading of the social model of disability, feminism and substantive equality. But whilst the social model of disability and feminism comprise the distinct architecture of the disability method, it bears emphasising that other critical social and legal theories that share the same goal of inclusive equality as the social model and feminism could also have been employed by this study to found an analogous methodology. The goal of inclusive equality is not unique to the social model of disability and feminism. Indeed, from time to time, the study critiques equality using critical approaches or theories that are not necessarily drawn from the social model of disability and feminism.

In the sections below, I summarise the social model of disability and feminism, but only with a view to explaining disability method as their progeny. It must be emphasised at the outset that the aim is not to elevate the above four elements of

the disability method into sequential legislative edits and, thus, invest the discourse with the ‘austerity of tabulated legalism’.⁴⁹ All the elements closely intertwine. Ultimately, it is their collective import or spirit that matters. Put differently, and borrowing from feminist method, as is elaborated in the section below on feminism, disability method is, in many ways, a way of ensuring asking the ‘disability question’.⁵⁰ It is a methodology for ensuring the inclusion of what has hitherto been excluded. It integrates into the equality discourse at hand, what has been learnt from feminism and the social model of disability about ways of ensuring that in a society that is committed to respecting diversity, hegemonic norms that have historically served to exclude and subordinate other social groups are unmasked and reformed. In this sense, disability method is as much a diagnostic technique as it is a remedial one.

In the final analysis, what is crucial is that, jurisprudentially, disability method does the job of, to borrow from Nancy Fraser, ‘status recognition’,⁵¹ in a social democracy that professes a commitment to substantive equality. Ultimately, disability method is a method that seeks emancipating a politically, and more crucially, economically subordinated status through recognising not just the cultural harm visited upon disabled people, but more significantly, economic harm by implicating the larger socio-economic framework.⁵² There are essentially two dimensions to the disability method. One dimension seeks to ensure that in a society committed to democracy and equality, there is no hierarchy of the worth of social groups and that disabled people are valued in the same way as others in a cultural sense. The other dimension seeks to ensure that disabled people are

⁴⁹ I borrow this expression from Lord Wilberforce’s view of what ought to be avoided when interpreting a constitution as supreme law as opposed to parliamentary legislation: *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) at 328-329.

⁵⁰ As is explained in the section on feminism, feminist methods have asked the ‘woman question’: Bartlett (note 1 above) 836-849; Wishik (note 47 above).

⁵¹ Fraser ‘Rethinking Recognition’ (note 33 above) 113.

⁵² *Ibid.*

able to participate as full partners in society so as to enjoy meaningful equalities. The latter dimension necessarily implicates overcoming economic subordination through reallocation of resources. Thus disability method envisages a 'multi-dimensional' understanding of substantive equality,⁵³ and one whose primary aim is not to erase group status, but to erase the disadvantages, both of a political and economic nature that are associated with group membership so that there is parity in participation with other social groups and ultimately full citizenship.⁵⁴ Both the political and economic dimensions must be addressed for equality to deliver more than just token citizenship to disabled people.

In *Justice Interruptus*, Fraser reminds us that there are social groups that experience hybrid modes of injustice in the sense of suffering both cultural and economic injustice.⁵⁵ Such 'bivalent collectivities'⁵⁶ as Fraser calls them, can only reclaim justice if there is sufficient recognition of the co-existence and inter-imbriation of cultural and economic harms. Disabled people are quintessentially such a collectivity in the same way as groups that have been marginalised by race and gender.⁵⁷ The consequences of disablism that were described in Chapter 1, paint a social group that is not only accorded low social esteem, but even more fundamentally, has a socio-economic profile in terms of general exclusion from employment and overrepresentation in low-paid menial work, and in poverty and reception of social welfare benefits that strikingly approximates a subordinated class in Marxist parlance.

For disabled people, therefore, the remedy is not either cultural recognition or redistribution. Simply valourising cultural identity to redress, for example,

⁵³ S Fredman 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *South African Journal on Human Rights* 214 at 225.

⁵⁴ *Ibid* 226.

⁵⁵ Fraser *Justice Interruptus* (note 35 above) 19.

⁵⁶ *Ibid*.

⁵⁷ Fraser used racial and gender groups as examples of bivalent collectivities: Fraser *ibid* 20-21,

demeaning attitudes and stereotypes will not be sufficient as both cultural and economic recognition are needed. Equally important, the redistribution must be of a type that does not paradoxically merely affirm an existing subordinate status but is, instead, transformative. Thus, thinking about the economic subordination of disabled people in terms of augmenting welfare benefits is not enough. It is equally important to respond by putting under a critical equality gaze the very sources of the injustices such as labour market practices which ensure that work is organised in such a manner that only enabled people can discharge the inherent requirements of the job. Disability method seeks to promote the transformative nature of the remedy by requiring accommodation rather than assimilation of disabled people.

The next two sections summarise the philosophical tenets and content of social model of disability and feminism and explain their connection with disability method.

3 A SOCIAL MODEL READING OF EQUALITY⁵⁸

To ask in the process of equality adjudication, as does disability method, the following questions: whether a norm, standard or practice that is alleged to be discriminatory is conscious about disability as social oppression; whether its normative framework is dialogic; whether it reflects equal power relations as between disabled and enabled people; whether it reflects the experience and equality aspirations of disabled people as an historically excluded and marginalised group; and whether any exclusionary norm, standard, or practice can be reformed in a manner that is costless to disabled people, is, in essence to

⁵⁸ While this section is an original contribution in the sense that it is my own work, nonetheless, it draws heavily from an article that was published in 2006 as: CG Ngwena 'Deconstructing the Definition of 'Disability' under the Employment Equity Act: Social Deconstruction' (2006) 22 *South African Journal on Human Rights* 622.

do the work of the social model of disability.⁵⁹ In Chapter 1 of this study, by way of an introduction, I alluded to two main alternative ways of conceiving disability for the purposes of equality and non-discrimination, namely, the *individual impairment model* and the *social model of disability*. Underpinning these two approaches is the fact that disability is quintessentially a contested concept. There are, as Deborah Stone has observed, multiple understandings of disability precisely because disability carries social complexity.⁶⁰

Unless the criteria for determining disability are supplied, disability has the potential to become an amorphous concept devoid of any neat identity or boundaries.⁶¹ When conceived as individual impairment, disability has the potential to include a limitless range of people who at some stage in their life experience physical or mental restrictions that are regarded to be a departure from the 'norm' or have the experience of being treated as such. Some restrictions may be permanent and others temporary. Some might be severe and others mild. Disability includes people with sight, hearing, communication, physical, intellectual and emotional restrictions. Disfigurement, illness, disease, and the physical and mental limitations that are a natural consequence of aging can all be subsumed under disability, and so can people with latent conditions that do not cause any physical or mental restrictions.

The boundaries between disability and ability are porous rather than rigid.⁶² The term disability is often used indiscriminately to mean the actual limitation or impairment in bodily or mental function as well as the impact or outcome of

⁵⁹ Here, I am paraphrasing the elements of disability method that are laid down in the previous section.

⁶⁰ D Stone *The Disabled State* (1985) 116.

⁶¹ M Putnam 'Developing a Framework for Disability Identity' (2005) 16 *Journal of Disability Policy Studies* 188 at 194.

⁶² CJ Kudlick 'Disability History: Why We Need Another "Other"' (2003) 108 *The American Historical Review* 763. Available at < <http://www.historycooperative.org/cgi-bin/printpage.cgi> at 7 (last accessed 21 February 2008).

such limitation of impairment.⁶³ The label of disability can also arise from self-identity or it might be assigned by society, professionals and institutions. Culture is an important variable in naming disability as Rosemarie Garland-Thomson argues. To Garland-Thomson, the ascription of disability can function as an organising principle for clustering ideological categories such as sick, deformed, crazy, ugly, old, maimed, abnormal or debilitated all of which serve to devalue bodies that do not conform to a cultural standard.⁶⁴ Thus, disability is a concept that is not susceptible to a rigid, incontestable definition, and much depends on the context. In the final analysis, disability is less categorical and more relational.⁶⁵ It is capable of a construction that is so fluid and so encompassing as to include virtually everyone at some stage in their lives.⁶⁶

⁶³ C Baylies 'Disability and the Notion of Human Development: Questions of Rights and Capabilities' (2002) 17 *Disability and Society* 725 at 727 and endnote 1 at 737.

⁶⁴ Garland-Thomson 'Integrating Disability, Transforming Feminist Theory' (note 47 above) at 5-6.

⁶⁵ M Bury 'Defining and Researching Disability: Challenges and Responses' in C Barnes & G Mercer (eds) *Exploring the Divide: Illness and Disability* (1996) 18-38. Also Available at <http://www.leeds.ac.uk/disability-studies/archveuk/Barnes/eloring%20the%20divide%20ch1.pdf> at 4 (last accessed on 19 October 2008).

⁶⁶ Wendell (note 47 above) 11-13; T Shakespeare 'What is a Disabled Person?' in M Jones and LA Basser Marks (eds) *Disability, Divers-ability and Legal Change* (1999) 25-34; J Penney 'A Constitution for the Disabled or a Disabled Constitution? Toward a New Approach to Disability for the Purposes of Section 15 (2002) 1 *Journal of Law & Equality* 83 at 86; JE Bickenbach *Physical Disability and Social Policy* (1993) 21; BJ Doyle *Disability Discrimination and Equal Opportunities: A comparative Study of the Employment Rights of Disabled People* (1995) 4-8; M Jones & LA Basser Marks 'Law and Social Construction of Disability' in Jones and Basser Marks (eds) *ibid* 3-34; H Hahn 'Accommodations and The ADA: Unreasonable Bias or Biased Reasoning' (2000) 21 *Berkeley Journal of Employment & Labour Law* 166-192 at 168-172; SR Bagenstos 'Subordination, Stigma and "Disability"' (2000) 86 *Virginia Law Review* 397-534 at 404-405; The Child Health Policy Institute and the South African Federal Council on Disability *Social Options for People with Disabilities in South Africa: an International and Comparative Review*. Report prepared for the Committee of Inquiry into a Comprehensive Social Security System (2001) 13; Public Service Commission *Report on Disability Equity in the South African Public Service* (2002) 17; E Klink 'People with Disabilities' in MP Olivier *et al* (eds) *Social Security* (2003) 311-342, 313; A Hans 'Introduction' in A Hans and A Patri (eds) *Women, Disability and Identity* (2003) 11-39, 13-14. United Nations, *Economic and Social Security Council. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and Disability*, UN Doc. E/CN.4/Sub.2/1991/31, para 100.

As part of mediating the contested nature of disability, different schools of thought about disability have emerged. Competing theoretical perspectives on disability are relevant not only to understanding what judges mean when they interpret disability. They are also invaluable for shaping legal construction as well as normative responses to disability. If invoked creatively and positively with the human dignity of disabled people uppermost, they enable the courts and other legal or quasi-legal decision-makers to move away from static traditional assumptions about disability as mere biological determinism.⁶⁷ The field of disability studies, the disciplines of philosophy and social sciences, as well as disability rights movements have been particularly instrumental in developing theoretical frameworks for understanding the phenomenon of disability. These frameworks, as Mary Crossley notes, do not only tell us what society does about disability, but they also tell us what society *ought* to do about disability.⁶⁸ The frameworks provide us with new paradigms for understanding the social, political, and cultural construction of disability. Likewise the frameworks offer courts rich insights into the epistemology of disability and, in the process, create room for the normative legal reconstruction of disability.

In essence, two models – the ‘individual impairment model’ and the ‘social model’ – have emerged as the major competing paradigms for understanding the epistemology of disability.⁶⁹ These models, which are at times referred to as the

⁶⁷ M Crossley ‘The Disability Kaleidoscope’ (1999) 74 *Notre Dame Law Review* 621-716, 627.

⁶⁸ Crossley *ibid* 649.

⁶⁹ Jones and Basser Marks ‘Law and Social Construction of Disability’ (note 66 above) 4-6. I do not argue, however, that these are the only paradigms. There are, of course, other paradigms of the social construction of disability. For example, Jerome Bickenbach analyses the social construction of disability in terms of three rather than two models, namely: 1) the biomedical model (a term synonymous with the individual impairment model); 2) the economic model (which looks at disability in terms of economic efficiency); and 3) the socio-political model (a term synonymous with social model): Bickenbach *Physical Disability and Social Policy* (note 66 above) 16. Bickenbach describes the economic model as the product of the welfare state. It is a model that looks at disability in terms of economic analysis. Its main goal is to find the most economically efficient means of state responses to disability using a cost-benefit ratio analysis. According to Bickenbach, the primary rationale of the economic model is the distribution and reduction of the costs

‘biomedical model or medical model’ and ‘socio-political model’ respectively,⁷⁰ are not models in a strict scientific sense, but rather contrasting approaches to, or paradigms for, conceptualising disability as well as constructing normative responses.

3.1 Individual Impairment Model: The Medicalised Model

The individual impairment model is an outcome of the medicalisation of disability. Historically, the medicalisation of disability is a striking feature of the societal response to disability. The assumption has been that when bestowed by doctors, the label of disability is apolitical and morally neutral as it can be objectively verified scientifically and clinically.⁷¹ The larger cultural context has been ignored. The source of disability has traditionally been cast in purely physical or mental terms that rarely implicate society the construction of disability. Disability resides in the individual, with the physical or mental limitation constituting not only the locus of, but also the explanation for, failure

imposed by disability. When disability adversely affects productivity, the economic model seeks to counteract the effect through stratagems such as vocational rehabilitation, creation of employment and provision of social insurance: Bickenbach *Physical Disability and Social Policy* (note 66 above) 93-134. It is submitted that, as a model of disability, the economic model can be said to be in part aligned with the medicalised individual impairment model or a logical progression thereof. It is a model that assumes impairment and functional limitation and for this reason shares some of the criticisms that have been made of the medicalised individual impairment model. The term ‘liberal model’ has also been used to describe a model of disability that is based on the need to compensate, through redistribution of resources, people with disabilities for ‘natural disadvantages’: Penney (note 66 above) 86-87. Penney links the liberal model with the thinking of Dworkin and Kymlicka: R Dworkin ‘What is Equality? Part II: Equality of Resources’ (1981) 10 *Philosophy and Public Affairs* 283-345 at 296-299; W Kymlicka *Contemporary Political Philosophy* (1990) 97.

⁷⁰ JE Bickenbach *et al* ‘Models of Disablement, Universalism, and the International Classification of Impairments, Disabilities and Handicaps’ (1999) 48 *Social Science & Medicine* 1173; S Brisenden ‘Independent Living and the Medical Model of Disability’ (1986) 1 *Disability, Handicap & Society* 173; Bickenbach *Physical Disability and Social Policy* (note 66 above) 61-92; JE Bickenbach ‘Disability and Equality’ (2003) 2 *Journal of Law & Equality* 7-15, 8.

⁷¹ EA Pendo ‘Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation’ (2002) 35 *University of California Davis Law Review* 1175 at 1198.

to participate fully in society.⁷² Once diagnosed, disability must be cured or rehabilitated in order to integrate or assimilate the affected person into society. In critical theoretical perspectives on the phenomenon of disablement, this response to individual impairment by the biomedical profession has come to be described as the 'medical model' or 'bio-medical model'⁷³ to signify a preoccupation with the medical aspects of disability. The individual impairment model or the medical model has been described by one commentator in the following terms:

The defining characteristic of the medical model is its view of disability as a personal trait of the person in whom it inheres. The individual is the locus of the disability and, thus, the individual is properly understood as needing aid and assistance in remedying the disability. Under this view, while the cause of impairments may vary, the disabled individual is viewed as innately, biologically different and inferior. The physical difference of the individual is often apparent, and the nondisabled see the individual's inferiority and resulting social disadvantage as flowing from that physical difference. Thus, according to the medical model of disability, the disabled individual's problem lies in her impairment.⁷⁴

The individual impairment model is a progeny of the dominance of the field of biomedicine where functional determinism is the litmus test for a healthy body.⁷⁵ Biomedically, health can be objectively established and empirically observed. Disability is a departure from a biostatistical norm. It is a manifestation of physical, cognitive or sensory deficit, and thus a disease state. Likewise, the assumption is that disability can be measured and verified clinically. When inquiring about disability, the primary focus is on functional impairment that has an aetiological base. Whilst the individual impairment model developed out of a

⁷² LL Rovner 'Disability, Equality and Identity' (2004) 55 *Alabama Law Review* 1043-1099, 1047.

⁷³ Bickenbach *et al* 'Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps' (note 70 above) 1173; Brisenden (note 70 above); Bickenbach *Physical Disability and Social Policy* (note 70 above) 61-92.

⁷⁴ Crossley (note 67 above) 649-650.

⁷⁵ Pendo (note 71 above) 1196.

professional need to diagnose and treat or cure illness, in practice it has often served as no more than a tool for assessing the extent of functional limitation and facilitating determination of entitlement to disability-related compensation or social welfare provision.⁷⁶

3.2 World Health Organisation's Catalytic Role in Reinforcing the Individual Impairment Model?

However unintended, the World Health Organisation (WHO) has contributed towards the sustenance of the individual impairment model but as part of a process to develop universal criteria for determining disability.⁷⁷ Part of what WHO did was to provide a more consistent approach to the definition used in disability. In 1980, WHO published a taxonomy of disabilities – the International Classification of Impairments, Disabilities and Handicaps (the ICIDH)⁷⁸ – that has been very influential in the definitional clarification of disability. Rightly or wrongly, the ICIDH has been associated with the reinforcement and sedimentation of the individual impairment model in the social construction of disability. The ICIDH was inspired by a mainstream conception of science as something that is not only objective, but is also normatively pure as to found a universal definition of disability.⁷⁹ The ICIDH conceived disability in terms of a tri-partite typology involving 'impairment', 'disability' and 'handicap'.⁸⁰ Though

⁷⁶ Hahn 'Accommodations and the ADA: Unreasonable Bias or Biased Reasoning?' (note 66 above) 168-9.

⁷⁷ Bickenbach *et al* 'Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps' (note 70 above) 1174-1178.

⁷⁸ World Health Organisation *International Classification of Impairments, Disabilities and Handicaps: A Manual of Classification Relating to the Consequences of Disease* (1980).

⁷⁹ Bickenbach *Physical Disability and Social Policy* (note 66 above) 29.

⁸⁰ The ICIDH defined impairment as 'any loss or abnormality of psychological, physiological, or anatomical structure or function'. In essence, impairments are measurable deviations from biomedical norms. They include the existence or occurrence of an anomaly, defect or loss in a limb, organ, tissue or other structure of the body, or a defect in a functional system or mechanism of the body, including the systems of mental function. Disability is 'any restriction or lack

at a textual level the ICIDH's approach to disability took cognisance of the role played by society and the environment in imposing disadvantage and limitations of people who have disabilities, at the same time, it gave the impression that the more decisive factor in terms of disabling effects is 'impairment' in the sense of 'any restriction or lack of ability to perform an activity in the manner or within the range considered normal for a human being'. It is the focus on impairment that has engendered criticism especially from disability advocates and theorists to the extent that it is seen as overlooking the socio-cultural environment in the construction of disability.⁸¹ Certainly, the manner in which the ICIDH explained, for example, the 'disadvantage' arising from disability as well as put a gloss on 'handicap' seemed to exonerate negative societal attitudes towards disability and an unaccommodating or indifferent physical environment as compounding or even causative factors. In this regard, the ICIDH said:

*Disadvantage accrues as a result of the individual being unable to conform to the norms of his universe. Handicap is thus a social phenomenon, representing the social and environmental consequences for the individual stemming from the presence of impairments and disabilities.*⁸²

What this statement failed to do was to unambiguously highlight the disabling role played by an environment that is indifferent to disability. By alluding to an inability to 'conform to the norms of his universe' the ICIDH seemed to be concomitantly saying that it is the medical condition - the physical or mental impairment - rather than the environment that is the main disabling factor. The tripartite typology in the ICIDH represents a medicalised notion of disability.

(resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being'. A handicap is 'a disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex and social and cultural factors) for that individual'.

⁸¹ Shakespeare 'What is a Disabled Person?' (note 66 above) 29.

⁸² *Ibid* 29. Emphasis added.

In fairness to WHO, it is important to highlight that as part of responding to criticism about the medicalised nature of the ICIDH, WHO has revised its taxonomy of disability. In place of ICIDH, there is now the International Classification of Functioning, Disability and Health (the ICF).⁸³ While the ICF retains the foundational concept of impairment, it is built around a more interactive model of disability where the dynamic relationship between health status as an intrinsic characteristic and the physical and social environment as extrinsic factors are unambiguously acknowledged so as to provide a coherent view of the different dimensions of health at both biological and social levels.⁸⁴ It adopts what has been described as a “biopsychosocial” model of disability.⁸⁵ Bickenbach *et al* are of the view that it would not be accurate to describe the ICF as having adopted a social model, and that the ICF is more of a synthesis or hybrid between the medical and social models. But whatever the more appropriate epithet to describe the ICF, it is certainly a departure from the perceived medical orientation of the ICIDH and finds resonance with the social model of disability to the extent that it clearly takes cognisance of the fact that the environment can create disability.⁸⁶

⁸³ World Health Organisation *International Classification of Functioning, Disability and Health* (2001).

⁸⁴ Bickenbach *et al* ‘Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps’ (note 70 above) 1183-1186; Crossley (note 67 above) 646. The ICF employs three operational concepts – ‘impairment of body structure and function’, ‘activity limitations’ and ‘participation restrictions’. Impairment refers as before to problems in the function or structure of the body. Activity limitations are the difficulties an individual may face in executing activities. Participation restrictions are the problems an individual may experience in involvement in life situations. The use of ‘impairment’ in ICF ensures that disability remains linked to the health status of the individual who has or is said to have a disability. However, impairment is not the overbearing characteristic that it is in ICIDH. The ICF does not require that disability must principally be understood through impairment. Any of the three concepts is, or all three are, a manifestation of the phenomenon of disability. The ICF avoids the diametrical relationship between normal and abnormal that was present in the ICIDH in favour of measuring ranges of participation and limitations as part of a continuum of abilities and disabilities. Significantly, the ICF does not classify a certain section of the population as people with disabilities on account of failure to conform to prior norms.

⁸⁵ Bickenbach *et al* ‘Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps’ (note 70 above) 1183.

⁸⁶ C Barnes ‘A Working Social Model: Disability, Work, and Disability Politics in the 21st Century’ (2000) 20 *Critical Social Policy* 441 at 443.

3.3 Medicalisation of Disability: The Equality Flaws

The medicalisation of disability has not come without virtues. Far from it, the medicalisation of disability represents a clinical reality and opens the door to diagnosis, treatment and/or rehabilitation. Furthermore, medicalisation allows disability to be understood in a rational sense. Historically, disability has been the subject of superstition and moral innuendos across cultures.⁸⁷ Paula Berg has observed that prior to the rise of science and modern medicine, both illness and disability were largely viewed as the external expression of the individual's sinfulness and moral impurity.⁸⁸ For persisting disabilities, punishment, and even the killing of the disabled person was considered appropriate. Indeed, in some parts of Africa some types of physical disabilities still attract severe punishment or even death on account of superstitious beliefs.

In the *Last Civil Rights Movement*, Driedger writes that traditional communities in Africa have an ambivalent relationship with disability.⁸⁹ In one sense, it has attempted to integrate everyone into society and assigned each disabled person an equal role. On the other hand, some traditional communities have

⁸⁷ DW Anderson 'Human Rights and Persons with Disabilities in Developing Nations of Africa' (2004). Available at www.samford.edu/lillyhumanrights/papers/Anderson_Human.pdf (last accessed on 1 December 2008); C Barnes 'Theories of Disability and the Origins of the Oppression in Western Culture' in L Barton (ed) *Disability and Society: Emerging Issues and Insights* (1996) 43-60 at 49-51; M Bhambani 'Societal Responses to Women with Disabilities in India' in Hans and Patri (eds) (2003) 77-88, 78; PE Berg 'Ill /Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law' (2000) 18 *Yale Law & Policy Review* 1 at 5-6; WE Parmet 'Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability' (2000) 21 *Berkeley Journal of Employment and Labor Law* 53 at 56.

⁸⁸ Berg (note 87 above) 5.

⁸⁹ D Driedger *Last Civil Rights Movement* (1989) 12-13. African folklore promotes attitudes of tolerance and respect for individual differences: Anderson (note 87 above) 4; Kisanji 'Attitudes and Beliefs about Disability in Tanzania' in B O'Toole & R McConkey (eds) *Innovations in Developing Countries for People with Disabilities* (1995) 51-70. Also available at <http://www.aifo.it/english/resources/online/books/cbr/innovations/Skisanji.pdf> (last accessed on 1 December 2008).

simultaneously held on to superstitious beliefs and myths linking disability to sins committed either by the disabled persons themselves or their parents or forebears. Albinism, for example, can still bring about the killing of the sufferer or the forced exile of parents and their family.⁹⁰ Viewed in this context, the medical model provides an objective scientific explanation for impairment. Equally, medicalisation of disability is an essential tool for collating reliable data about the aetiological base of disability and the medical needs of disabled people.⁹¹ At the same time, medicalisation of disability comes at a price, not least for equality. The shortcomings of the medicalisation of disability insofar as equality is concerned can be summarised as: the colonisation of the body and the suppression of agency; stigmatization of the body; and legitimization of exclusionary citizenship.

3.4 Colonisation of the body and the suppression of agency

The medicalisation and institutionalisation of disability invite parallels with colonial power where new territory is invaded, and the original inhabitants subjugated and disciplined to the point of rendering them objects of control rather than subjects with agency. Colonial power necessarily thrived on thwarting the power to self-determine on the part of the colonised. Colonialism was a form of social control that necessarily depended on an untrammelled disciplinary monologue rather than a mutual dialogue between equal parties. Michel Foucault and Ivan Illich's powerful critiques on the institution of

⁹⁰ Human Rights Newsletter 'Killing of Persons with Albinism: A Crisis in East Africa Human (2008). Available at <<http://www/document-repository/Newsletters-no.1%202008.pdf> > (last accessed on 1 December 2008); JR Bennett 'East Africa's Albino Underworld' December 14, 2009. Available at <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?Ing=en&id=110488> (last accessed on 14 September 2010).

⁹¹ Bickenbach *Physical Disability and Social Policy* (note 66 above) 103.

medicine as a form of social control, as Caroline Gooding has noted, hold true for the medicalisation of disability.⁹²

Historically, as Morrison observes, the values of the medical profession have been shaped, first and foremost, by the importance of science and scientific research.⁹³ The tradition in medicine has been to view the human body as something docile;⁹⁴ as something that can be reduced to a collection of isolated parts which become clinical sites that can be surveyed and improved upon when they become defective.⁹⁵ Within this paradigm, human life is reduced to mere biological life and the biographical and socio-cultural dimensions to human life are lost.⁹⁶ Communication with the patient becomes unnecessary as the patient is deemed to have surrendered to the care of the professional. Such paternalism is, of course, inimical to the democratisation of knowledge and to power-sharing between doctor and patient. Reductionism and paternalism necessarily undermine the autonomy and dignity of the patient as the doctor, guided by science, becomes an omniscient expert and the patient an ignorant and passive recipient of a benevolent service.

In the disability context, medical reductionism and paternalism are inclined towards producing and perpetuating a hierarchical configuration in the management of disability, with experts at the helm and people with disabilities in passive and subordinate positions. In Foucauldian terms,⁹⁷ the medical model produces a power relationship where service providers - the doctors, occupational health specialists and social workers - become the powerful, but the

⁹² M Foucault *Power/Knowledge: Selected Interviews and other Writings* (1980); I Illich *Limits to Medicine* (1976); C Gooding *Disabling Laws, Disabling Acts* (1984) 18.

⁹³ D Morrison 'A Holistic Approach to Clinical and Research Decision-Making: Lessons from the UK Organ-retention Scandals (2005) 13 *Medical Law Review* 45 at 55.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ M Foucault *Power/Knowledge: Selected Interviews and other Writings* (1980).

consumers of the service - disabled people – become the powerless. Clive Barnes laments the institutionalisation of disability through the generation of a thriving and costly ‘disability industry’ involving state institutions, private business and charitable organisations that are administered by professionals whose roles serve to assure and reinforce the presumed inadequacies and dependence of disabled people.⁹⁸ Michael Oliver sees the medicalisation of disability as resulting in the colonisation of disabled people’s lives by a vast army of professionals when political action would be a more appropriate response.⁹⁹

Medicalisation fosters, in Talcot Parsons’ parlance, a ‘sick role’ and reinforces dependence.¹⁰⁰ Disabled people become identified primarily as passive patients that are consigned to a subordinate dependent role, with no decision making power.¹⁰¹ Medicalisation fails to see beyond medical solutions and, in the process, needlessly casts disabled people as persons who are in need of care and are incapable to making a contribution to society. Those with disabilities that are not susceptible to cure or rehabilitation become, in Crossley’s words, ‘a potent symbol of the limitations and failures of modern medicine, and, thus, may be

⁹⁸ Talcot Parsons, the American sociologist, is credited with the origins of the concept of the ‘sick role’: Crossley (note 67 above) 650; Berg (note 87 above) 7. The ‘sick role’ describes how the fact of professionally rendering an individual a patient creates a social order in which that individual is released from social responsibilities such as working, but in consequence becomes dependent on charity: T Parsons *The Social System* (1951) 428-479; T Parsons ‘Definitions of Health and Illness in the Light of American Values and Social Structure’ in EG Jaco (ed) *Patients, Physicians, and Illness. Sourcebook in Behavioral Science and Medicine* (1958) 165-187. On application of the ‘sick role’ to people with disabilities, see: G DeJong ‘Independent Living: From Social Movement to Analytic Paradigm’ (1979) 60 *Archives of Physical Medicine and Rehabilitation* 435 at 440-441.

⁹⁹ M Oliver ‘Defining and Disability: Issues at Stake’ in Barnes & Mercer (eds) *Exploring the Divide* (note 65 above) 29-54. Also available at <http://www.leeds.ac.uk/disability-studies/archiveuk/Barnes/eloring%20the%20divide%20ch1.pdf> at 4 (last accessed on 19 October 2008).

¹⁰⁰ Crossley (note 67 above) 650; Parsons (note 98 above); Bickenbach *Physical Disability and Social Policy* (note 66 above) 81-82; Illich (note 92 above) 97-98.

¹⁰¹ Bickenbach *Physical Disability and Social Policy* (note 66 above) 81-83; C Barnes ‘Independent Living, Politics and Implications’ (2004) <<http://www.leeds.ac.uk/disability-studies/archiveuk/Barnes/Jane's%20paper.pdf>> (last accessed on 1 December 2008); K Jagoe ‘The Disability Rights Movement: Its Development in South Africa’ <<http://www.independentliving.org/toolsforpower/tools6.html>> (last accessed on 1 December 2008).

shunned or abandoned by medical providers'.¹⁰² Simon Brisenden, a self-identifying disabled person, sums up the fostered patient role in this way:

The problem, from our point of view, is that medical people tend to see all difficulties solely from the perspective of proposed treatments for a 'patient', without recognizing that the individual has to weigh up whether this treatment fits into the overall economy of their life. In the past especially, doctors have been too willing to suggest medical treatment and hospitalization, even when this would not necessarily improve the quality of life for the person concerned. Indeed, questions about the quality of life have been portrayed as something of an intrusion upon the purely medical equation. This has occurred due to failure of imagination, the result of the medical profession's participation in the construction of a definition of disability which is partial and limited. This definition has portrayed disability as almost entirely a medical problem, and it has led to a situation where doctors and others are trapped in their responses by a definition of their own making.¹⁰³

Ivan Illich describes this authority medicine to pronounce on disease and perforce, disability, as 'diagnostic imperialism'.¹⁰⁴ In the workplace, for example, it is doctors who certify one is entitled to sick leave. Unless a patient, who has the bodily experience of disability, exhibits symptoms that can be confirmed within a medico-scientific paradigm, his or her experience will be rendered invalid, with adverse consequences in terms of access to benefits and entitlements, and to a sense of well-being and confidence in self-identity. But the trouble with a medical paradigm because of its claim to scientific rigour is that it rarely concedes the possibility of error or incomplete knowledge and, instead, tends to convey its findings in terms of certainties.¹⁰⁵ Medicine does not acknowledge a democratic mediation of a cognitive conflict between the doctor and the patient

¹⁰² Crossley (note 67 above) 650.

¹⁰³ Brisenden (note 70 above) 173-178.

¹⁰⁴ Illich (note 92 above) 85.

¹⁰⁵ Wendell (note 47 above) 126.

and if conflict arises it is the epistemic experience and authority of the patient that is invalidated. It is the patient who must shoulder the full responsibility for disabilities that do not fit into medical epistemology. Illness and disability do not exist until recognised by the doctors.¹⁰⁶ A case in point is the experience of sufferers from myalgic encephalomyelitis (ME).¹⁰⁷ Before ME was medically validated and given a medico-scientific name, sufferers in many jurisdictions were dismissed as malingering and denied recognition as patients or people with disabilities for purposes of access to social security or disability benefits.¹⁰⁸

Over and above the capacity to impose a label of disability that might be inappropriate or unwanted, it must not be overlooked that, paradoxically, the medical model also has the capacity, through its diagnostic power, to deprive one of a disability label that is desired notwithstanding one's bodily experience of disability.¹⁰⁹ Whilst the stigma associated with the label of disability, is, of course, unwelcome, nonetheless, being recognised by others as a person with a disability might be a prerequisite to a number of desired goals such as securing sympathy and empathy from friends and family, accessing health care services and disability-related benefits, membership of, and self-identity with, disability movements and organisations, and, indeed, entitlement to protection under discrimination law.

¹⁰⁶ Wendell (note 47 above) 128; T Jeffreys *The Mile High Staircase* (1982) 183.

¹⁰⁷ This is an immune dysfunction syndrome which manifests primarily as chronic fatigue. It is medically known as Chronic Fatigue Syndrome (CFS) and was, for a time, colloquially referred to as 'yuppie flu'. CFS is now recognised by the World Health Organisation as a neurological disorder: P Grant 'Chronic Fatigue Syndrome' <http://www.medicineau.net.au/clinical/medicine/CFS.html> (last accessed on 1 December 2008); Holmes GP *et al* 'Chronic Fatigue Syndrome: A Working Case Definition' (1988) 108 *Annals of Internal Medicine* 387-389.

¹⁰⁸ Wendel (note 47 above) 129-130; Crossley (note 67 above) 694-695.

¹⁰⁹ Wendell (note 47 above) 25.

3.5 Stigmatisation of the Body

The medicalisation of disability is stigmatising or at least accentuates stigma that is attached to disability. The biological determinism inherent in medicalising disability legitimises a dichotomy between normality and abnormality. In medicalisation, there is no continuum of human abilities representing human diversity, but rather a binary divide between what is normal and what is abnormal. The connotations of defectiveness and biological inferiority in the dichotomy between what is normal and abnormal are hard to obscure. Failure to conform to the norm means that one is labelled as deviant not only in a biological, but also in a social sense. The essentialisation of race in colonial and apartheid discourse, as was argued in Chapter 2, had this outcome, which was, in any event, an intended outcome. As with race, to be bodily 'defective' biologically is to have a 'spoiled identity'.¹¹⁰ It is to have an 'attribute that is deeply discrediting' and one that reduces the bearer 'from a whole and usual person to a tainted and discounted one'.¹¹¹ Stigma is linked to what others see as 'undesirable traits' that are universally discrediting.¹¹² The dichotomy in medicalisation is stigmatising to the extent that it imposes upon those labelled, 'undesired differentness'.¹¹³ It reinforces the idea that disabled people do not possess characteristics that society regards as normal or expected.

Whilst the link between stigma and discrimination might appear axiomatic, it deserves some comment, not least because, as will be submitted in Chapter 6 that to render anti-discrimination law effective, legislative or judicial constructions of disability must be alive to the nexus between stigma and discrimination. A construction of disability that is oblivious to the link between stigma and

¹¹⁰ E Goffman *Stigma: Notes on the Management of Spoiled Identity* (1963).

¹¹¹ *Ibid* 3.

¹¹² *Ibid*.

¹¹³ *Ibid* 4-5; Bagenstos (note 66 above) 437.

discrimination, defeats the ends of anti-discrimination law. To be stigmatised is at the same time to suffer discrimination. As was argued in Chapter 2, drawing in part from Bruce Link and Jo Phelan, without the socio-economic power to discriminate, the concept of stigma cannot hold.¹¹⁴ It is not simply the labelling of another person as different and having undesirable characteristics that matters, but more crucially the operationalisation of the labelling process by a socio-economically dominant group.¹¹⁵ It is not the mere beliefs of the dominant group that matter, but their stigmatising-related behaviour towards the group that is in a less powerful position. Stigma has real consequences for persons that are placed in the undesirable category. Stigma leads to status loss and unequal outcomes for the labelled group when contrasted with the culturally dominant group that does the labelling.¹¹⁶ A single characteristic perceived by others as undesirable is used to disqualify the whole person from becoming part of the mainstream and in turn provides a justification for not treating that person as an equal.¹¹⁷

Stigma creates social hierarchies and is a site for the creation and perpetuation of structural inequality.¹¹⁸ Of course, not every person within the stigmatised group will experience exclusion or suffer the same adverse outcomes. Nor is it being suggested that every person with a disability is trapped irreversibly in disadvantage. As with people outside the stigmatised group, life chances of people inside the stigmatised group will be determined by other characteristics,

¹¹⁴ BG Link & JC Phelan 'Conceptualising Stigma' (2001) 27 *Annual Review of Sociology* 363, 370; Chapter 2 § 4.1.

¹¹⁵ *Ibid* 375-376; M Minow *Making All the Difference: Inclusion, Exclusion, and American Law* (1990) 51.

¹¹⁶ Link & Phelan (note 114 above) 371-372.

¹¹⁷ KL Karst 'Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation' (1995) 43 *University of California and Los Angeles Law Review* 263 at 286; KL Karst 'Why Equality Matters' (1983) 17 *Georgia Law Review* 245 at 248-249.

¹¹⁸ Link & Phelan (note 114 above) 371.

including class, gender, race, income, education and so on.¹¹⁹ The crucial point though is that stigma leads to a pattern of disadvantage and creates an underclass. When thinking about equality and equal participation in a society committed to democracy, Kenneth Karst has argued that 'it is not only doing that matters but also belonging'.¹²⁰ Denial of equal status, treatment of someone as inferior causes stigmatic harm; it dissolves the human ties we call acceptance'.¹²¹ Unless we are vigilant, a medical diagnosis of disability can equally taint the disabled person and dissolve equal membership of the republic.

3.6 Legitimisation of Exclusionary Citizenship

History tells us that if legal constructions of disability blindly follow medicalisation of disability, the outcome can be the legitimisation of drastic erosion of equality rights. The global history of state and judicially-sanctioned eugenic policies and laws is testimony enough to the spectre of supposedly pure medical science as an instrument for not only perpetuating inequalities through labelling, but also legitimising, in a positive sense, gross invasions of human rights.¹²² In Nazi Germany, eugenic-based sterilisations were ordered as an instrument for accomplishing nationalistic ideologies of 'genetic and racial hygiene'.¹²³ Hereditary Health Courts presided over by a judge and supported

¹¹⁹ *Ibid* 380.

¹²⁰ Karst 'Why Equality Matters' (note 117 above) 248.

¹²¹ *Ibid* 249.

¹²² In this context, eugenics refers to a school of thought that once held a pride of place in genetic medicine especially before the Second World War. The 'eugenics movement' advocated the view that human species can be improved through the elimination of 'inferior, or 'defective' genes not only by persuasion but even more frequently by compulsion: P Reilly *Genetics, Law and Social Policy* (1977); DRJ Macer *Shaping Genes* (1990) 214-235; D Suzuki & P Knudtson *Genethics: The Ethics of Engineering Life* (1990) 22-23; DJ Kevles 'The Historical Politics of the Human Genome' in DJ Kevles & L Hood (eds) *The Code of Codes* (1992) 3-37, 4-12; J Glover 'Eugenics and Human Rights' in J Burley (ed) *The Genetic Revolution and Human Rights* (1999) 101-124.

¹²³ RN Proctor *Racial Hygiene: Medicine under the Nazis* (1988); B Muller-Hill 'Lessons from the Dark and Distant Past' in A Clarke *Genetic Counselling: Practice and Principles* (1994) 133-141,136-

by two doctors performed the perfunctory role of confirming the medical diagnosis of a genetic defect.¹²⁴ However, eugenic practices have not been the preserve of fascist states. Before the Second World War especially, many democracies succumbed to eugenic policies and practices, sometimes with the assistance of the courts.¹²⁵ In *Buck v Bell*,¹²⁶ the Supreme Court of the United States succumbed to eugenic thinking and sanctioned a gross invasion of human rights when it upheld a statute of Virginia which authorised the compulsory sterilisation of the people that were diagnosed to be ‘mentally retarded’ for the ‘protection and health of the state’.¹²⁷ The Court accepted the evidence of a now discredited eugenicist that the applicant, Carrie Buck, who had been committed to a state institution was ‘feeble-minded’ and ‘promiscuous’ and that it was in the interest of the state to sterilise her. Writing for the majority, Wendell Holmes J said that:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can

138; Macer (note 122 above) 221; H Biesold *Crying Hands: Eugenics and Deaf People in Nazi Germany* (1999); M Russell *Beyond Ramps: Disability at the End of the Social Contract* (1998).

¹²⁴ Müller-Hill (note 123 above) 137.

¹²⁵ Macer (note 122 above) 217-222.

¹²⁶ 274 US 200 (1927); PA Lombardo ‘Three Generations, No Imbeciles: New Light on *Buck v Bell*’ (1985) 60 *New York University Law Review* 30, 32; RL Burgdorf & MP Burgdorf ‘The Wicked Witch is Almost Dead: *Buck v Bell* and the Sterilization of Handicapped Persons’ (1977) 50 *Temple Law Quarterly* 995, 997, 1007; See also: JB Gest ‘Eugenic Sterilization: Justice Holmes v Natural Law’ (1950) 23 *Temple Law Quarterly* 306; JB O’Hara & TH Sanks ‘Eugenic Sterilization (1956) 45 *Georgia Law Journal* 20; CP Kindregan ‘Sixty Years of Compulsory Eugenic Sterilization: “Three Generations of Imbeciles” and the Constitution of the United States’ (1966) 43 *Chicago-Kent Law Review* 123; Fester EZ ‘Eliminating the Unfit - Is Sterilization the Answer?’ (1966) 27 *Ohio State Law Journal* 591.

¹²⁷ Lombardo ‘Three Generations, No Imbeciles’ (note 126 above); RL Hayman ‘The Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent’ (1990) 103(6) *Harvard Law Review* 1201, 1206-1211.

prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover the cutting of Fallopian tubes.¹²⁸

Wendell Holmes J concluded with the following infamous remark:

Three generations of imbeciles are enough.¹²⁹

The unambiguous, but chilling message of social Darwinism in Holmes J's pronouncement is that biological difference can detract from equal moral worth and socio-economic utility and that there must be limits to tolerance for certain biological differences.¹³⁰ *Buck v Bell* is an instance of the legal system accepting a reified construct of disability in the form of 'mental retardation' without stopping to inquire into its cultural construction and the prejudices that it carried.¹³¹ *Buck v Bell* had the effect of legitimizing sterilizations on account of 'feeble-mindedness' throughout the United States. Across the entire United States, 60 000 Americans were sterilized over seven decades.¹³² Scholarship has subsequently demonstrated clearly that Carrie and thousands of others were the victims of the now discredited science of eugenics.¹³³ Those that were sterilised were mainly young women that came from socio-economically deprived

¹²⁸ 274 US 200, 207 (1927).

¹²⁹ *Ibid.* The reference to 'three generations' is to Carrie Buck, her mother and Carrie's daughter. At the age of 17, Carrie bore a child. The Court said that the child was borne out of an act of 'immorality, but subsequently it transpired that the child was in fact been borne out of a rape. At the age of 6 months, Carrie's child was diagnosed as 'not quite normal' but this was part of a concerted effort to marshal evidence for persuading the courts to support the sterilisation of Carrie. Carrie's 52-year-old mother was treated by the Court as similarly afflicted with mental retardation, but without taking trouble to inquire into the truth of the label of mental retardation: Lombardo 'Three Generations, No Imbeciles' (note 126 above) 50-55; Burgdorf & Burgdorf (note 126 above) 1006-1007.

¹³⁰ Hayman (note 127 above) 1207.

¹³¹ *Ibid* 1248.

¹³² Reilly (note 122 above) 126; Lombardo 'Three Generations, No Imbeciles (note 126 above) 31; PA Lombardo 'Taking Eugenics Seriously: Three Generations of ??? are Enough?' (2003) 30 *Florida State University Law Review* (2003) 191 at 202.

¹³³ Lombardo 'Three Generations, No Imbeciles (note 126 above); Lombardo 'Taking Eugenics Seriously' (note 132 above) 216-217.

backgrounds.¹³⁴ This evidence suggests that the criteria for diagnosing people possessing genetic defects that were a threat to society were discriminatory on grounds of sex and class. Those that were institutionalised such as Carrie presented the advocates of eugenics with particularly captive and vulnerable subjects who could easily be made to fit into the paradigm of a now discredited science.

3.7 Social Model

The essence of the social model of disability is that disability is socially constituted.¹³⁵ Ultimately, disability is not an intrinsic bodily impairment residing in the individual. Rather it is a social phenomenon of restricted or denied socio-economic participation that is the outcome of the manner in which the socio-economic environment intersects with bodily impairments or perceived bodily impairment in an adverse and unaccommodating manner. Here, I use 'bodily' inclusively and as a shorthand to mean all that is perceived by society to fall short of culturally imagined bodily and mental normalcy. The salience of the social model is on barriers that are little to do with chance occurrences, but rather are systematically created by the socio-economic order and stand in the way of equal participation. To eliminate disability as systemic exclusion and marginalisation, therefore, requires society to focus not so much on health care interventions to treat or rehabilitate individual bodily impairments, though such interventions are important or even essential at an individual level, but on dismantling the socio-economic barriers and holistically accommodating the

¹³⁴ MDA Freeman 'Sterilising the Mentally Handicapped' in MDA Freeman (ed) *Medicine, Ethics and the Law* (1988) 55-84 at 58.

¹³⁵ V Finkelstein *Attitudes and Disabled People* (1980); M Oliver *Social Work with Disabled People* (1983); M Oliver *The Politics of Disablement* (1990); M Oliver *Understanding Disability: From Theory to Practice* (1996); S Linton *Claiming Disability: Knowledge and Identity* (1998); C Barnes 'The Social Model of Disability: A Sociological Phenomenon Ignored by Sociologists?' in T Shakespeare (ed) *The Disability Reader: Social Science Perspectives* (1998) 65-78.

needs of those with bodily impairments or perceived impairments. The overall aim is to secure systemic rather than ad hoc changes in social configurations. Michael Oliver, a leading exponent of the social model, explains the social model in this way:

...disability, according to the social model, is all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on. Further, the consequences of this failure do not simply and randomly fall on individuals but systematically upon disabled people as a group who experience this failure as discrimination institutionalized throughout society.¹³⁶

It bears stressing that for the social model, impairments, though important in another context such as health care, are a description of the physical body rather than the cause of disability.¹³⁷ Disability implicates social oppression rather than impairment as the cause of disability in the same manner as, say, skin colour is a description of the physical body but racism is what was implicated in the creation and sustenance of apartheid. As Oliver argues, causation is what is at stake in the social model.¹³⁸ The social model is a conscious political strategy to depart from traditional constructions of disability that attributes disability to individual bodily impairment to a paradigm that raises consciousness about disability as socially constituted and implicates society and social organisation in the creation and sustenance of disability.¹³⁹ It is a transformative epistemology of disability that is ultimately aimed at achieving recognition of disabled people by overcoming a subordinated status. Oliver puts a gloss on the social model when

¹³⁶ Oliver *Understanding Disability* (note 135 above) 33.

¹³⁷ *Ibid* 35.

¹³⁸ Oliver *The Politics of Disablement* (note 135 above) 11.

¹³⁹ *Ibid*.

he says that the social model is not an attempt to deal with the personal restrictions of impairment but rather the social barriers of disability.¹⁴⁰

3.8 Disabled people as an oppressed social group

Conceiving disabled people as a marginalised and disadvantaged group, however heterogeneous, is an essential premise of the social model. In Chapter 1, the marginalisations and disadvantages that are visited upon disabled people across a range of socio-economic spheres, including the workplace, were explored at length. Disability method goes far beyond combating invidious discrimination as it seeks to transform the marginalised and disadvantaged status of disabled people. In terms of achieving its transformative design, disability method is result-orientated in two ways. Firstly, it seeks to transform how we perceive disabled people as a group so that we begin to ascribe their limitations to society collectively rather than to them individually. Secondly, disability method seeks to transform the marginalised and disadvantaged group status so that disabled people as a group move from being *disabled* to being *enabled*, and in the process, imposing a positive duty on society to dismantle barriers to equal participation.

In conceiving disabled people as a group, disability method does not argue that disabled people are necessarily a homogeneous group with a consciously formed cultural group identity. Unlike, for example gender or racial identity that is formed at the earliest stages of child development, disability is different. Some disabled people, as Anita Silvers argues, slide precipitously into a disability identity and others progressively depending on how the disability manifests.¹⁴¹ Others, yet still, and perhaps the majority, will neither consider nor acquire

¹⁴⁰ Oliver *Understanding Disability* (note 135 above) 38.

¹⁴¹ Silvers 'Reprising Women's Disability' (note 47 above) 100.

disability as a core identity. What marks disabled people as a social group is a subordinated status and not an aspired associational status nor commonalities in terms of impairments, cultural heritage, geographical location nor political identity, although these elements might be present among people sharing certain types of impairments.¹⁴² When viewed, as impairment or as partly constituted by impairment, especially, disability is a heterogeneous category with no common physical markers. In this way, as Jenny Bangsund argues, disability functions as a category of social grouping that is distinct from markers such as race, gender or sexuality where there is a shared cultural history.¹⁴³ The assertion of a stable, centred disability identity is ultimately destined to fail. Disability identity is apt to be in constant flux partly on account of the shifting nature of what is considered 'normal' in a given society and partly on account of the material contexts of disabled bodies that admit heterogeneous rather than uniform

¹⁴² Nora Groce's study of a community in Martha's Vineyard (an island off the eastern coastline of the United States that is part of Massachusetts) that has had a resident population with an unusually high proportion of hereditary deafness for more than two centuries, is frequently cited as illustrating deafness as an example of impairment around which distinct communities with a common language, culture and positive identities have developed. Groce, an anthropologist, found that deaf people were integrated in the community. They spoke sign language and that people who were not deaf used sign language to communicate with them such that the community in which they lived was bilingual and people who could not use sign language were the outsiders: N Groce *Everyone Here Spoke Sign Language: Hereditary Deafness on Martha's Vineyard* London: Harvard University Press (1985); Minow *Making All the Difference: Inclusion* (note 115 above) 85; Linton (note 135 above) 64-67, 108-109. See also: P Farb *Word Play: What Happens when People Talk* (1975), which is a study of a community in the Amazon where the whole community used sign language and deaf people were fully included. Cited in Oliver *Politics of Disablement* (note 135 above) 16-17; L Cohen *Trains Go Sorry: Inside a Deaf World* (1995), on positive cultural affinity in residential schools for pupils that are deaf. However, it is important to note that other commentators, such as Anita Silvers, contest the idea of 'disability culture' among people with hearing impairment preferring to recognise it as a 'deaf culture', that is something narrower, meaning cultural and social practices limited to persons whose primary language is Sign: Silvers 'Reprising Women's Disability' (note 47 above) 100-103. More than merely contest the existence of disability culture, Silvers argues that promoting or contriving such a culture can be inimical to engendering intersectionality to the extent that 'collectivising' disabled people can estrange them from the groups they belong. Silvers 'Reprising Women's Disability' *ibid* 102.

¹⁴³ JC Bangsund *Dwelling Among Mortals: Narratives of Disability and Revelation in Twentieth Century American Fiction*. Unpublished Doctoral Dissertation presented to the Faculty of the Department of English, McAnulty College and Graduate School of Liberal Arts, Duquesne University (2007) 6-7. Available at < <http://cdm256101.cdmhost.com/cdm-> (last accessed on 1 February 2008).

physiological or cognitive experiences.¹⁴⁴ What disability offers, instead, is a decentred, and highly malleable and mutable identity.

Highlighting the heterogeneity of disability, Rosemarie Garland-Thomson says that there is little somatic commonality between a person who is blind, a person who is epileptic and one who is deaf.¹⁴⁵ From an anthropological perspective, such persons have no shared cultural heritage or common physical experiences.¹⁴⁶ Rather, what renders them as a social category or social group is a shared experience of exclusion from societal arrangements and, in many instances, stigmatisation.¹⁴⁷ What principally constitutes disabled people as a social group is the common experience of being left out in the socio-economic domains that are constructed around culturally imagined bodily normalcy. It suffices that the experience of exclusion is a general one. It is not necessary for the experience to be lived by each and every member of the group. This is not to say of course that disabled people do not form collective identities around political consciousness.¹⁴⁸ Rather, it is to say that where identities are formed, disability consciousness rather than disability culture with distinct social structures is what impels as well as explains disability social movements.¹⁴⁹

Acknowledging the heterogeneous nature of disability and the absence of a monoculture has implications for how we construct anti-discrimination responses. It means that collective strategies for remedying disablism must go side by side with remedying the impact of disablism on individuals. Because the heterogeneous nature of disability produces not only difference between the

¹⁴⁴ *Ibid* 14.

¹⁴⁵ Garland-Thomson *Extraordinary Bodies* (note 47 above) 14-15.

¹⁴⁶ S Barnatt 'Disability Culture or Disability Consciousness' (1996) 7 *Journal of Disability Studies* 1.

¹⁴⁷ Garland-Thomson *Extraordinary Bodies* (note 47 above) 14-15; CH Liachowitz *Disability as a Social Construct* (1988) xi.

¹⁴⁸ Barnatt (note 146 above).

¹⁴⁹ Barnatt *ibid* 2- 3; Silvers 'Reprising Women's Disability' (note 47 above) 100-103.

disabled and the enabled but between different types of disability, we cannot presume that adjusting the socio-economic environment to accommodate a particular type of disability will work for others.¹⁵⁰ Arguing against collectivising disability perspectives and accepting one disabled voice as speaking for all others, Anita Silvers tells us that to be disabled often means to be exceptionally vulnerable to, and unduly limited by policies, practices, and environments that are designed to apply uniformly on the basis of what is common to a class.¹⁵¹ It matters less even if that class comprised of disabled people. To Silvers, to be governed by a disability group norm is no more advantageous than being governed by a gendered norm.¹⁵²

In *Justice and the Politics of Difference*, Iris Young reminds us that groups are socially constituted categories and that there are a variety of ways rather than a single way in which a social group might be constituted.¹⁵³ In the final analysis, a social group is not a thing in itself or something that has immutable identity.¹⁵⁴ Instead, a social group is a social relation; it exists only in relation to another group.¹⁵⁵ A social group need not always be constituted through the possession of common inherent characteristics, or by consciously professing its own social or political identity. It can also be constituted through a common experience of exclusion and social oppression even if the experience is not conscientised at a group level.¹⁵⁶ According to Young, whether a group counts as an oppressed group depends on whether it has a collective experience of being at the receiving end of what she describes as the five faces of oppression, namely: exploitation;

¹⁵⁰ Silvers 'Reprising Women's Disability' (note 47 above) 103.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ IM Young *Justice and the Politics of Difference* (1990) 42-43.

¹⁵⁴ *Ibid* 43.

¹⁵⁵ *Ibid* 44.

¹⁵⁶ *Ibid* 46

marginalisation; powerlessness; cultural imperialism; or violence.¹⁵⁷ Oppression is structural in the sense of systemic constraints that are embedded in social matrix.¹⁵⁸ It suffices that any of these phenomena, that is, exploitation, marginalisation, powerlessness, cultural imperialism or violence, are collectively experienced by a group but not just a few individuals as repeated experiences rather than once-off experiences.¹⁵⁹ In a word, *disablism* is what constitutes disabled people as a social group. It is the common experience of exclusion due to an unaccommodating socio-economic environment that renders disabled people a social group. In relational terms, disabled people are only a group because they exist alongside *enabled* people,¹⁶⁰ that is, a class of people that, historically and in contemporary society, are included in, and, indeed, are assumed or affirmed by, the prevailing social and economic arrangements.

In this study, I use the term 'disablism'¹⁶¹ aware of its etymology as a neologism, but as part of method. Use of this word is not just as convenient shorthand, but also as part of raising consciousness, and rendering visible the need for using a term in our equality discourse that conveniently and instantly conveys the type of discrimination that disabled people face, as the shorthand of racism or sexism does, for example. Disablism is shorthand for denoting not only aversive,

¹⁵⁷ *Ibid* 38-65.

¹⁵⁸ *Ibid* 41.

¹⁵⁹ *Ibid*.

¹⁶⁰ KM Hall 'Feminism, Disability, and Embodiment' (2002) 14 *NWSA Journal* vii-xiii, xii.

¹⁶¹ 'Disablism' or its equivalent 'ableism' or 'ablism' are terms that have tended to find favour only among those commentators that treat the experience of disablement as not only the experience of structural inequality, but also social oppression. See, for example: Young (note 153 above) 124, 145, 164; Oliver *The Politics of Disablement* (note 135 above) 77; M Oliver *Understanding Disability* (note 135 above) 51, 100; Lipton (note 135 above) 9; D Diniz *et al* 'Disability, Human Rights and Justice' (2009) 11 *Sur* 61. Some authors adopt other equivalents to convey the same notion of systematic exclusion and oppression. For example, Harlan Hahn adopts 'physicalism': H Hahn 'Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas' (1994) 4 *Southern California Review of Law & Women's Studies* 97 at 99. Henri-Jacques Stiker explores why 'disablism' or its equivalent is missing from regular historical discourses on discrimination and why so many terms that are used to describe disability highlight the negative residing in the individual such as '*dis-ability*, *impairment*, and *mal-formation*': H Stiker *The History of Disability* (1999). Cited in Kudlick (note 62 above) 12.

stereotypic attitudes towards, or invidious discrimination against, people that are perceived to have impairment. Equally, and even more significantly, disablism also means the systematic exclusion and marginalisation of disabled people in an *ableist* or *disabling* society. Such exclusion and marginalisation are less an outcome of conscious attitudes, but more an outcome of unquestioned norms that become ensconced in institutional organisation and rules. A disablist society unconsciously or subconsciously *disables* people by assuming that people who are not disabled – *abled* people – are the norm or standard for the day-to-day socio-economic organisation of society in public and private spheres, including health, education, transportation, architectural, and work spheres. Disablism imposes a burden on disabled people that diminishes their claims to human dignity and equality. Ultimately, disablism is marginalising, and marginalisation is a form of social oppression. As Young, argues, marginalisation is an insidious form of oppression which excludes a whole category of people from socio-economic participation and subjects them to material deprivations.¹⁶²

3.9 What's in a name?:¹⁶³ 'Disabled people' as transformative lexicon

In this study, naming, meaning giving a name to what has not been named before, or giving a different name to what has been named before (that is, renaming) so as to highlight an injustice and call for remedial justice is an integral part of disability method. Naming is an advocacy strategy that is not peculiar to disability but is also employed in other emancipatory discourses. Writing about the significance of naming in their work on gender stereotyping, Rebecca Cook and Simone Cusack have said:

¹⁶² Young (note 153 above) above 53.

¹⁶³ The immediate inspiration for this subheading comes from Deborah Posel's article discussing racial categorizations under apartheid: 'What's in a name? Racial Categorisations under Apartheid and their Afterlife' (2001) 47 *Transformation* 50.

The ability to eliminate a wrong is contingent on its first being “named,” by which is meant that a particular experience has been identified and publicly acknowledged as a wrong in need of legal and other forms of redress and subsequent prevention. Naming is an important tool for revealing an otherwise hidden harm, explaining its implications, and labelling it as a human rights concern, grievance, or possible human rights violation. Once a wrong has been named, it is then possible to identify whether it is a form of discrimination and set about the task of securing its elimination through the adoption of legal and other measures.¹⁶⁴

Cook and Cusack argue that because law is privileged in that it has the capacity to publicly and authoritatively proclaim and transform an unacknowledged harmful experience into one that ought to be universally recognised as a legal wrong that is entitled to redress, it is all the more worthwhile to appropriate law as an important adjunct in naming.¹⁶⁵ Disability is a germane area for naming precisely because it is a prime site of unacknowledged harmful experiences that clamour for transformative reconceptualisation and redress at both an individual as well as systemic level. And yet, the challenges of naming cannot be underestimated. Disablism has yet to be fully understood, not least because society has historically treated the locus of disability as residing in the individual rather than in society. As Cook and Cusack point out, it is much harder to succeed in naming as wrong something that is already deeply ingrained in our minds as reflecting the natural order of things and an intrinsic part of our social relations.¹⁶⁶

¹⁶⁴ R J Cook & S Cusack *Gender Stereotyping: Transnational Legal Perspectives* (2009) 38. Footnote omitted; Ann Scales describes ‘naming’ as critical to feminism and as a political term that implies rejecting a world constructed for women by patriarchy in favour of a world reclaimed and determined by women and their experiences: Scales (note 47 above) 1383.

¹⁶⁵ Cook & Cusack (note 164 above).

¹⁶⁶ *Ibid* 41-42.

Language is central to naming. Names or labels linked with disability are not neutral categories but are part of language and, therefore, socially constitutive in a normative sense. Dale Spender captures the constitutive power of language when he says that we use language not only as a means of ordering or classifying the world, but also ‘manipulating’ the world.¹⁶⁷ We create our own realities through language, including instituting our own subjective notions of a hierarchically ordered universe, correcting perceived historical inaccuracies and injustices or conveying a new-found sense of political emancipation or empowerment. The controversy around the renaming of streets and places in post-apartheid South Africa by African National Congress-led municipal, provincial or central government authorities where African names have replaced Afrikaner names captures aptly naming and renaming as sites for political and power contestation.¹⁶⁸ The controversy shows that in the South African political economy, as indeed in other political economies, street or place names have not always been neutral geographical nomenclature. Often, they are used by those that do the naming as political currency for celebrating conquest or emancipation. The renaming of places and streets in contemporary South Africa is a reversal of names changes that occurred throughout the nineteenth- and twentieth-centuries when colonial domination and white nationalism were putting a visible seal on the conquered territory and subjugated peoples.¹⁶⁹

¹⁶⁷ D Spender *Man-Made Language* (1985) 3; Littleton “Reconstructing Sexual Equality” (note 47 above) 1281-1282.

¹⁶⁸ J Lubbe ‘Pleknaamverandering in Suid-Afrika: ‘n historiese oorsig’ (‘Name Changing in South Africa: An Historical Overview’) (2007 (1) *Acta Academica* 54-52. In this article, Johan Lubbe discusses name changes under different political dispensations in South Africa’s history (from the Dutch colonial settlement at the Cape in 1652 to the period after 1994 when the African National Congress came to power) and shows how name changing has been used by those wielding political power as a ‘symbolic recourse’ and a tool for ‘political transformation’; E Truter ‘Die proses van naamsverandering, met spesiale verwysing na Oliver Tambo International Lughawe’ (‘The name-changing process, with special reference to Oliver Tambo International Airport’) (2007(1)) *Acta Academica* 83-109; P Lubuschagne ‘Pretoria or Tswane? The Politics of Name Changes’ (2006) 31 *Journal for Contemporary History* 49-61; B Meiring ‘Toponymic Innovation and Social Change’ (1994) 8 *Nomina Africana* 65-79.

¹⁶⁹ JD Jansen *Knowledge in the Blood* (2009) 30; E Jenkins *Falling into Place: The Story of Modern South Africa Place Names* (2007). This is not to suggest that name changing is a political imperative in

According to Michael Oliver, when people label an object, they are ascribing a meaning to, and, at the same time, conveying an orientation towards, or relationship with, the objects.¹⁷⁰ The orientation will not only manifest in mundane interactions with the object, but will also manifest in social policy, and, of course, in other public regulatory norms, including the law.¹⁷¹ Language is a powerful medium for not only communicating, but also reproducing power, as is evident in formalised systems of racial segregation. Take, for example, the use of the 'k-word' and 'n-word' in the cultural representation of black people in the institutionalisation and enforcement of apartheid¹⁷², slavery and racial segregation in the United States,¹⁷³ respectively. For this reason, the 'politics of

post-apartheid South Africa nor that it is always conducive to pluralism. Name change should not overlook the political argument that part of rebuilding common and shared citizenship in a country such as South Africa that was severely fractured by state ordained racism and deeply inculcated racial divisions and may, paradoxically, call for retaining some of the names associated with conquest as gestures of political reconciliation and political magnanimity.

¹⁷⁰ Oliver *The Politics of Disablement* (note 135 above) 2-3.

¹⁷¹ *Ibid.*

¹⁷² The 'k-word' stands for *kaffer*. The use of *kaffer* as an instrument for racial domination in the colonial and apartheid era was discussed in Chapter 2 of this study. See also: Littleton "Reconstructing Sexual Equality" (note 47 above) 1281-1282.

¹⁷³ The 'n-word' stands for 'nigger'. But to understand the place of naming in the history of slavery, racism and the struggles against racism in the United States, one has to go beyond words such as 'nigger' that instantly convey culturally recognised animus in the person doing the naming so as to also consider a fuller repertoire of naming that includes words such as 'Negro' or 'negro', 'Coloured' or 'coloured', or 'Black' or 'black' or 'African-American'. Kimberlé Crenshaw makes the point that the naming of Americans of African descent has been part of not just their subjugation, but also their emancipation. As part of illustrating naming as subjugation, she cites, as one example, WEB DuBois' argument that at first 'Negro' was used in upper case, but was later dropped to a lower case 'negro' in order to give legitimacy to the institution of slavery so that the status of enslaved people could cohere more readily with their political and legal recognitions as mere property rather than an ethnic group that is entitled to equality. On the emancipation side, Crenshaw uses Black (in upper case) and African-American as claimed rather than ascribed or 'othered' identities to reflect Black and African-American as denotation of a specific cultural group that requires use of a proper noun in the same way as Asians or Latinos do. She describes the embrace of African-American as a 'self-definition' that symbolises agency and an ongoing effort to break free of the subordinate self-identity that is intelligible only through reference to a white norm: KW Crenshaw 'Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 *Harvard Law Review* 1331, 1332, 1385; WEB DuBois (1971) 2 *The Seventh Son* 12-13.

language'¹⁷⁴ is integral to a discourse on disability, especially one that aspires to go beyond correcting a derogatory term and question the neutrality of established norms with a view to expanding the equality universe for disabled people.

Use of 'disabled people' as the social group that is at the centre of the discourse and is the primary object of protection against discrimination and the target of substantive equality, is much more than a convenient category. It is a conscious political or ethical choice. It is appropriate to proffer a preliminary clarification of the term 'disabled people' for three main reasons that are tied to method. First, a clarification is important in order to eschew disparaging, offensive or unrepresentative terminology that has been used in the past. Second, a clarification is important in order to explain why the term 'disabled people' rather than the more widely used 'people with disabilities' coheres more harmoniously with the discourse. Third, a clarification is important in order to concede the limitations of the term 'disabled people' and, thus, avoid essentialism and reification of disability identity.

Terms that describe people that are perceived by others as different are not a mere matter of semantics. They are rarely neutral and, instead, tend to be sensitive political categories. Words, as Lynne Murphy says, have socially charged meanings and have a capacity to respect as well as demean, to represent as well as misrepresent.¹⁷⁵ Laurence Clark and Stephen Marsh take this observation further when they say that the language used to describe disabled people is not only a reflection of what society thinks about disabled people, but is

¹⁷⁴ Wendell (note 47 above) 77-81; IK Zola 'Self, Identity, and the Naming Question: Reflections on the Language of Disability' (1993) 36 *Social Science and Medicine* 167-173.

¹⁷⁵ ML Murphy 'Defining People: Race and Ethnicity in South African English Dictionaries' (1998) 11 *International Journal of Lexicography* 1.

also an indicator of normative responses.¹⁷⁶ As with race, sex or gender, descriptions of disabled people that locate disability as solely residing in the individual can wittingly or unwittingly serve to reinforce structural inequality by perpetuating attitudes, systems and practices that maintain or create social and economic barriers.¹⁷⁷ Epithets that describe a social group, especially one that has historically endured stigma and social subordination, stand a better chance of respecting human dignity when they do not perpetuate offensive, unrepresentative or socially oppressive lexicons. Furthermore, the lexicography used to describe a historically marginalised group stands a better chance of promoting human dignity and engendering acceptance by that group when it emanates from, or approximates as much as possible, self-descriptions rather than when it is assigned or imposed by a dominant group. As Susan Wendell says, part of asserting the value of our bodily sameness and differences is when we all take control of language to describe ourselves.¹⁷⁸ Michael Oliver reminds us about change in the naming of HIV/AIDS as a salutary lesson in self-empowerment.¹⁷⁹

When HIV/AIDS first entered public discourse, naming was appropriated exclusively by bio-medical professionals. HIV/AIDS was a confounding novel disease and bio-medical professionals were naturally privileged to be the first to explain to the public the little that was known about the disease. Those afflicted with HIV/AIDS were variously described as ‘HIV-infected people’, ‘AIDS

¹⁷⁶ L Clark & S Marsh ‘Patriarchy in the UK: The Language of Disability’ (2002). Available at <www.leeds.ac.uk/disability-studies/archiveuk/Clark,%20Laurence/language.pdf> (last accessed on 1 December 2008).

¹⁷⁷ Clark & Marsh (note 176 above) 1; C Barnes *Disabled People in Britain and Discrimination* (1991) 2. M Priestly ‘Developing Disabilities Studies Programmes: The International Context’ in B Watermeyer *et al* (eds) *Disability and Social Change: A South African Perspective* (2006) 22.

¹⁷⁸ Wendell (note 47 above) 77.

¹⁷⁹ M Oliver ‘Defining Impairment and Disability: Issues at Stake’ in C Barnes & G Mercer (eds) *Exploring the Divide: Illness and Disability* 29-54. Available at <<http://www.leeds.ac.uk/disability-studies/archiveuk/Oliver/exploring%20divide%20ch3.pdf>> (last accessed on 19 October 2008).

victims' or 'AIDS patients'.¹⁸⁰ However, the naming of HIV/AIDS was not just a matter of objectively describing bodily pathology, and those afflicted with the disease. Against the backdrop of absence of lack of effective treatment, naming by health professionals sought to convey, in part, notions of the defeat, passivity, helplessness and dependence of permanent patients awaiting death as the inevitable outcome. The sexual dimension to the spread of HIV was a factor in the naming. The epidemic first came to light as a 'gay disease'. Naming by health care professionals and the broader community was not neutral. Rather, it sought, among other objectives, to convey a sense of diminished communitarian obligations towards, and separation from, those that were perceived to be sexually licentious as to be morally flawed.¹⁸¹ There was a tendency, for example, to refer to those that contracted HIV through blood transfusion or perinatally as 'innocent victims'.¹⁸² Thus, an ambience of judgmentalism, stigmatisation and widespread discrimination at all levels of society surrounded the naming.¹⁸³ What is remarkable, though, is that those at the receiving end of the labelling were able, over a relatively short period of time, to appropriate the labelling and transform the label to People with AIDS (PWA) through raising consciousness, deliberation and activism.¹⁸⁴ PWA or its equivalents, is now the universally used term in international and domestic discourses, including by UN agencies such as the WHO. As a term of advocacy, it conveys not just pathology of the body, but

¹⁸⁰ D Altman *Power and Community: Organisational and Community Responses to AIDS* (1994).

¹⁸¹ D Miller *Living with AIDS and HIV* (1987); G Walker *In the Midst of Winter* (1991); PI Ahmed (ed) *Living and Dying with AIDS* (1992); L Grundlingh 'The Nature and Development of HIV/AIDS Historiography' (1997) 29 *Acta Academica* 1-26; CG Ngwena 'HIV in the Workplace: Protecting Rights to Equality and Privacy' (1998) 15 *South African Journal on Human Rights* 513 at 514.

¹⁸² M Blumenreich & M Siegel 'Innocent Victims, Fighter Cells, and White Uncles: A Discourse Analysis of Children's Books about AIDS' (2006) 37(1) *Children's Literature in Education* 81; UNSECO Fresh Tools for Effective School Health 'What's in a Word?' (2004). Available at <http://www.unesco.org/education/fresh> (last accessed on 3 November 2008).

¹⁸³ C Bastos *Global Responses to AIDS: Science in Emergency* (1999) 23-49.

¹⁸⁴ Altman (note 180 above) 59. The name and acronym were cemented as resolutions of a meeting that was held in Denver, USA, by HIV/AIDS groups. The resolutions of the meeting became known as the 'Denver Principles: Bastos (note 183 above) 36.

also the social and political aspirations of those that are afflicted or affected with HIV/AIDS. PWA, or its equivalent, signifies empowerment rather than passivity and expectation of death. The term conveys demands of a people seeking their due in terms of respect for equality, human dignity, and inclusive decision-making.

Disabled people have historically been the object of condescending and derogatory sobriquets. Terms such as 'idiots', 'the retarded', and 'the feeble-minded' to describe people with mental impairments, and 'cripples', 'the handicapped', and the 'disabled' to describe those with physical and/or mental impairments, have at different points in history been the common currency for describing disabled people.¹⁸⁵ Such terms have generally been assigned to, rather than appropriated by, disabled people. The terms have constituted social labelling, connoting a negative and socially tainted status, and conveying a sense of a people that are *abnormally* different from the 'norm', with the accent on physical or mental incapacity that is implicitly blamed on the individual. Catherine Kudlick¹⁸⁶ describes derogatory sobriquets as 'condemnations' that are more than just offensive labels but are used to construct and reinforce power relations. Condemnations have historically marked out disabled people as people who were unable to do things for themselves, and are at the mercy of social benevolence, without any claim to enforceable rights.¹⁸⁷

Part of reclaiming equality and human dignity for disabled people, therefore, requires renaming as a transformative tool for discarding derogatory and condescending epithets and appropriate new epithets that are respectful and

¹⁸⁵ Doyle *Disability Discrimination and Equal Opportunities* (note 66 above) 4-6; Clark & Marsh (note 176 above); Bickenbach *Physical Disability and Social Policy* (note 66 above) 21. Shakespeare 'What is a Disabled Person' (note 66 above) 25.

¹⁸⁶ Kudlick (note 62 above) 4.

¹⁸⁷ *Ibid.*

enjoy acceptance among the marginalised people. The current popular use of the term 'people with disabilities' (PWD) in social and legal discourse is part of remedying historical distortions of social and legal identity as well as acknowledging or asserting rights to human dignity and equality of people with disabilities. The term PWD is largely a product of self-ascription that is intended to dislodge a slander. It arose primarily out of a desire by disability rights advocates as well as disability organisations that are led by people with disabilities to rid themselves of negative labels and appropriate language that resonates with the idea of disability as, no less, an ordinary variation of humanity that is entitled to equal worth.

The juxtaposition of 'people' with 'disabilities' in 'people with disabilities' is intended to counter connotations arising from terms such as 'the handicapped', 'the disabled', or 'the lame' that refer to people solely by the physical or mental impairment they have or are believed to have. The lexicography behind PWD is what is described as 'people-first language'.¹⁸⁸ It is intended to counter the tradition of objectifying physical or mental conditions and using them as means for identifying persons. Commenting on the significance of the terminology used to describe beneficiaries of the Americans with Disabilities Act, Robert Burgdorf has explained people-first language in the following way:

Phraseology is a significant issue with regard to disabilities. Over the past decade something of a revolution has occurred in the terminological preferences of individuals with disabilities and organizations representing them. One strain of this revolution is what may be called a "people first" preference, which

¹⁸⁸ RL Burgdorf 'The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute' (1991) *Harvard Civil Rights-Civil Liberties Law Review* 413-414; RL Burgdorf "'Substantially" Limited Protection from Disability Discrimination: The Special Treatment Model and Misconceptions of the Definition of Disability' (1997) 42 *Villanova Law Review* 409, 411; RL Burgdorf *Disability Discrimination in Employment Law* (1995) 15-23; T Titchkosky 'Disability: A Rose by any Other Name? "People-First" Language in Canadian Society' (2001) 38.2 *CRSA/RCSA* 125.

recommends that the personhood identifier, presented as a noun – “individual,” “person,” “people,” “citizen,” “American,” etc. – should precede the designation of differentness from others, which should be tacked on subsequently as a prepositional phrase – “with a disability,” “with mental retardation,” “with visual impairment,” “with epilepsy” etc. This formulation is preferred over traditional adjective/noun phrasing, e.g., “the disabled person,” “mentally retarded children,” and “hearing-impaired people,” and it is strongly preferred over phrases that turn the disabling condition into a noun, as “the disabled,” “an epileptic,” “the blind” etc.¹⁸⁹

People-first language seeks not only to avoid offensive terminology but also to promote human dignity and equality. By juxtaposing ‘people’ with ‘disabilities’, the physical or mental conditions that are regarded as burdensome by society are not elevated to the point of becoming the most important part of identifying a person with a disability. People first language can be understood as implying both a relationship with, as well as a separation from, disability.¹⁹⁰ The implicit but deliberate emphasis in ‘people with disabilities’ is on *people* rather than disabilities.¹⁹¹ The emphasis is an affirmation that people with disabilities are part of human diversity. They are ordinary people who happen to experience disabilities and are entitled to full and equal protection of their human rights.

The term ‘people with disabilities’ owes its origins to international disability movements and disability discourses that emerged in the late 60s to advocate for disability rights primarily by challenging the traditional explanation of disability as an individual misfortune and implicating the socio-cultural environment in

¹⁸⁹ Burgdorf ‘The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute’ (note 188 above) 414, footnote 7.

¹⁹⁰ Zola (note 174 above) 170; Wendell (note 47 above) 78;

¹⁹¹ Doyle *Disability Discrimination and Equal Opportunities* (note 66 above) 4-6; Bickenbach *Physical Disability and Social Policy* (note 66 above) 20-21; RL Burgdorf ‘The Americans with Disabilities Act: Analysis and Implications of a Second Generation Civil Rights Statute’ (note 188 above) 414, footnote 7; J West *The Americans with Disabilities Act: From Policy to Practice* (1991) xi; S Wendell (note 47 above) 77-81; RL Burgdorf “‘Substantially’ Limited Protection from Disability Discrimination (note 188 above) 411, footnote 1; Parmet (note 87 above) 53.

the creation of disability.¹⁹² However, though the term entered into social and legal discourse in the 70s, it only became established in the 90s. The initiatives of the United Nations that began in the 80s to promote the human rights of people with disabilities, including the adoption by the United Nations General Assembly of the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*¹⁹³ in 1993 and the issue by the Committee on Economic Social and Cultural Rights in 1994 of *General Comment 5 on Persons with Disabilities*¹⁹⁴ that are discussed in Chapter 1 have been catalytic in promoting wide use of the term in human rights discourse. The popularisation of ‘people with disabilities’ or its semantic equivalent ‘persons with disabilities’ is apt to continue with the recent adoption of the Convention on the Rights of Persons with Disabilities.

Against this backdrop, preference for ‘disabled people’ in this study merits further explanation. Preference for ‘disabled people’ is not intended to suggest that it is a term that is infinitely better than all other terms or that it is universally accepted. Rather it is because ‘disabled people’ is more in tune with the methodology of this study. Naming should not only seek to dislodge a slander and expunge from the discourse offensive words. Naming is also a site for creating new normative realities as part of advocacy.¹⁹⁵ Many British disability movements, advocates, and theorists are opposed to the term ‘people with disabilities’ and not because it has any offensive connotations but because it is seen as misleading about the social construction of disability. Clark and Marsh

¹⁹² Barnes ‘A Working Social Model: Disability, Work, and Disability Politics in the 21st Century’ (note 86 above) 441.

¹⁹³ United Nations *Standard Rules on the Equalization of Opportunities for Person with Disabilities* A/RES/48/96 85th Plenary Meeting, 20 December 1993.

¹⁹⁴ Committee on Economic, Social and Cultural Rights, *General Comment 5 Persons with Disabilities* UN ESCR, 1994, Doc. No. E/1995/22.

¹⁹⁵ Oliver ‘Defining and Disability: Issues at Stake’ (note 65 above) 29-54. Also Available at <http://www.leeds.ac.uk/disability-studies/archveuk/Barnes/eloring%20the%20divide%20ch1.pdf> at 5-6 (last accessed on 19 October 2008).

capture the essence of such opposition to the 'people with disabilities' when they say that:

The British civil rights movement has rejected the term 'people with disabilities', as it implies that the disabling effect rests within the individual person rather than from (sic) society. The term 'disabilities' when used in this context refers to a person's medical condition and thus confuses disability with impairment. In addition it denies the political or 'disability identity' which emerges from the disabled civil rights movement...¹⁹⁶

The essential argument is that 'people with disabilities' is misleading to the extent that it appears to assign disability to the individuals that are affected rather than to society. It is as if disability is a private matter that should be remedied by the individual affected. It is said that 'people with disabilities' has the tendency of conveying the impression that disability is something that can only be understood in relation to attachment to individuals, thus denying the role of the social environment in disabling people that have physical or mental impairments.¹⁹⁷ In this way, 'people with disabilities' may serve to unwittingly displace a redistributive claim. If the premise is that disability is caused by societal failure to accommodate people with physical or mental impairments, then 'disabled people' is arguably a more appropriate term in that it implicates society in the disabling of a social group.

Disabled people is not a term for drawing attention to impairments, and signalling the need for respecting disabled people as a people with a cultural and social identity that is equal to everybody else's. Rather, it is a term of advocacy. It is a term that is intended to galvanise society into dismantling the disabling

¹⁹⁶ Clark & Marsh (note 176 above) 2.

¹⁹⁷ M Priestley 'Developing Disability Studies Programme: International Context' in Watermeyer *et al* (note 177 above) 19-30 at 21-22.

socio-cultural barriers.¹⁹⁸ Put differently, an important consideration in the preference for 'disabled people' as opposed to 'people with disabilities' is that, from a social justice perspective, this study, to use the parlance of Nancy Fraser, goes far beyond merely seeking 'cultural recognition' for disabled people as to ultimately make a case for the 'economic recognition' of disabled people.¹⁹⁹ The study is not about identity politics. Whilst it is important that disabled people should emerge from the equality universe with a repaired esteem and self-image having successfully contested or resisted culturally imposed demeaning images, as might be realised from the tenets underpinning people first language in 'people with disabilities', what matters more to this study is the economic dimension to disability; it is overcoming the economic subordination of a social group that has historically been excluded from the socio-economic sphere. As argued in Chapter 1, the more serious and intractable disabling factor in disability is not the demeaned cultural representation, but the economic barriers to equal participation on account of failure to accommodate disabled people. Ultimately, what is crucial to achieving equality is for society to accept the normative duty to dismantle socio-economic barriers so as to repair an economically subordinated status.

In defence of the term 'people with disabilities', however, it must be conceded that there is rarely one correct form of describing a social group. Experience with other categories shows that even self-categories cannot speak for everyone. The discourse on race and ethnicity shows, for example, that lexicons that describe marginalised groups, including even those emanating from self-descriptions, are rarely homogeneous or static, but are frequently diverse and constantly evolving,

¹⁹⁸ Union of the Physically Impaired Against Segregation *Fundamental Principles of Disability* (1975) 14; Barnes *Disabled People in Britain and Discrimination* (note 177 above).

¹⁹⁹ Fraser 'Rethinking recognition' (note 33 above).

reflecting, inter alia, pluralism and new forms of political consciousness.²⁰⁰ They need not be chosen for all time or be used in all contexts.²⁰¹ Identities are flux and people come in and out of categories. It would be an exercise in futility, therefore, to try and reach consensus on the use of a homogenous term. For advocacy purposes, what is crucial is that any epithet that is chosen to denote a category must consciously avoid offensive language, seek to challenge rather than privilege disablist norms, and genuinely seek to be representative and be respectful of human dignity. On this score, it is submitted that both 'people with disabilities' and 'disabled people' are dignified and representative terms to use. Both terms enjoy wide use among people with disabilities themselves, and disability organisations and movements. When faced with two or more equally appropriate terms, therefore, it is really a case of choosing shorthand that has the best possible rapport with one's discourse rather than a statement that one term is infinitely better than the other.

In the final analysis, though, it is not the use of shorthand per se that matters, but context. Without clarifying context, it would not be possible to say that, on the face it, as argued by some disability theorists that 'people with disabilities' is understood as locating the disabilities within the individuals and thereby implicitly exonerating the role played by society in the creation of disability. The form of terminology alone does not always capture the underpinning socio-political dimensions. As the above quotation from Burgdorf implies, unless context is given, even the term 'disabled people' itself might be understood as

²⁰⁰ ML Murphy 'Defining People: Race and Ethnicity in South African English Dictionaries' (1998) 11(1) *International Journal of Lexicography* 1-33; ML Murphy 'Defining Racial Labels: Problems and Promise in American Dictionaries' (1991) 11 *Dictionaries* 43-64. Cornel West makes the observation, for example, that though 'black culture' in the United States has appropriated naming in self-descriptions, in line with a continued quest for naming that overcomes or at least combats historical 'black invisibility namelessness', it has, at the same time, not succeeded in settling on any one definitive term. Self-names have been in constant flux from 'colored, Negro, black, Afro-American, Abyssynian, Nubian, Bilalian, American African, American, African to African American': C West *The Cornel West Reader* (1999) 108.

²⁰¹ Wendell (note 47 above) 71-72.

offensive and as conveying negative connotations about an individual who is recognised and treated by others primarily by what he or she cannot do. Ironically, it is precisely to avoid this connotation that 'disabled people' is resisted in some quarters and 'people with disabilities' is preferred²⁰²

Whether one uses 'disabled people' or 'people with disabilities' or some other epithet to rename disability, it signifies a political challenge and process of the reconstruction of disability not by outsiders but by the oppressed group itself. It constitutes a challenge to disability as a culturally fabricated metaphysical essence that conveys as real, objective and universal, what are in fact the perspectives of enabled people.²⁰³ It is an instance of a refusing to coincide, as Young says, with a devalued, objectified and stereotypic image that is imposed from outside in favour of possibilities that respect and protect self images and aspirations.²⁰⁴ Renaming facilitates the removal of offensive language, recounting of the group's memory of social oppression, the advancement of positive definition of itself, and the advancement of political consciousness as a concomitant strategy for pluralising norms.²⁰⁵ Better still, renaming can become an adjunct in the reconstruction of equality that is transformative in the sense of giving us a language for 'unlearning'²⁰⁶ ableist ways of thinking and in the process accepting the legitimacy and imperative of removing socio-economic barriers to participation.

In preferring to use 'disabled people', I am, therefore, mindful that it is not the last shorthand. Also, I am mindful that, 'people with disabilities' or its equivalent

²⁰² Bickenbach *Physical Disability and Social Policy* (note 66 above) 21; Committee on Economic, Social and Cultural Rights, General Comment 5 Persons with Disabilities UN ESCR, 1994, Doc. No. E/1995/22 para 4.

²⁰³ Young (note 153 above) 58-61.

²⁰⁴ Young (note 153 above) 60.

²⁰⁵ Young (note 153 above) 153-154.

²⁰⁶ J Penelope *Speaking Freely: Unlearning the Lies of the Father's Tongues* (1990) 213; B Hillyer *Feminism and Disability* (1993) 45.

'persons with disabilities' is the currently preferred legal term of art that is employed in South African legislation²⁰⁷ codes of practice²⁰⁸ and guidelines,²⁰⁹ and in international human rights documents. In respect of international human rights documents, the equivalent of the term 'people with disabilities' received its highest acknowledgment in the adoption of the Convention on the Rights of Persons with Disabilities in 2006.²¹⁰

4 FEMINIST READING OF EQUALITY

4.1 Feminism and critical legal theory

Without detracting from the utility of social model as transformative method, the study also enlists a feminist reading of substantive equality. In appropriating feminism to disability, I do not claim originality. Rather, I am taking advantage of the august contribution that feminism has made towards understanding law as socially constituted. In the last thirty years or so, feminism has been at the vanguard of the most persistent and trenchant critiques of formal equality. Feminism has contributed immeasurably towards unmasking patriarchal power and illuminating, in a sophisticated manner, structural inequality and the abstractness, or more pertinently, the partiality of formal equality. Along with other inclusive equality theories and approaches, it has allowed us to imagine equality as a value and a right that ought to be rendered responsive to the lived

²⁰⁷ Employment Equity Act No 55 of 1998. In Chapter 3 of the Act, 'people with disabilities' are one of the designated groups and, thus, beneficiaries of affirmative action measures.

²⁰⁸ Department of Labour Code of Good Practice: Key Aspects on the Employment of People with Disabilities Government Gazette No 23702 of 19 August 2002.

²⁰⁹ Department of Labour Technical Assistance Guidelines on the Employment of People with Disabilities (2003).

²¹⁰ UN Resolution A/RES/61/06.

experience and aspirations of not only women, but also other historically oppressed groups.²¹¹

Feminist commitment to end the subordination of women, as Alison Jaggar argues, is a veritable case study for learning about the capacity of women centred ethics to be responsive to oppression in its singular as well as multiple forms, bias, and the need for emancipatory justice not just for women but for other groups as well.²¹² Furthermore, in recent years, a steadily growing number of feminists and disability theorists have turned their attention to disability as a category that is not only amenable to feminist theory, but, equally significant, can, in turn, also deepen, challenge and enrich feminism itself.²¹³ In this regard, Susan Wendell's book, *The Rejected Body*²¹⁴ has been among the pioneering works.

Wendell has developed a feminist disability discourse that, in many ways, seeks to achieve what social model theorists advocate by stretching the equality universe through questioning cultural assumptions underpinning socio-economic arrangements. She says the following, recounting her personal

²¹¹ Dalton 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (note 47 above) 10.

²¹² A Jaggar 'Introduction' in A Jaggar (ed) *Living with Contradictions: Controversies in Feminist Social Ethics* (1994) 1-17 at 11.

²¹³ J Morris 'Personal and Political: A Feminist Perspective on Researching Physical Disability' (1992) 7 *Disability, Handicap and Society* 157-166; Hillyer (note 206 above); Wendell (note 47 above); R Garland-Thomson *Extraordinary Bodies* (note 47 above); Silvers 'Reprising Women's Disability' (note 47 above); A Silvers 'Formal Justice' in A Silver *et al* (eds) *Disability, Difference, Discrimination: Perspectives in Bioethics and Public Policy* (1998); KQ Hall 'Feminism, Disability, and Embodiment' (2002) 14 *National Women's Studies Association Journal* vii-xiii; Garland-Thomson 'Integrating Disability, Transforming Feminist Theory' (note 47 above); A Herndon 'Disparate but Disabled: Fat Embodiment and Disability Studies' (2002) 14 *National Women's Studies Association Journal* 120-137; C Lacom 'Revising the Subject: Disability as "Third Dimension"' in *Clear Light of Day and You Have Come Back* (2002) 14 *National Women's Studies Association Journal* 138-154; KE Jung 'Chronic Illness and Educational Equity: The Politics of Visibility' (2002) 14 *National Women's Studies Association Journal* 178-200.

²¹⁴ Wendell (note 47 above).

experience with struggling to open a door at her workplace when her health was impaired:

The cultural habit of regarding the condition of the person, not the built environment or the social organisation of activities, runs deep. For example, it took me several years of struggling with the heavy door to my building, sometimes having to wait until someone stronger came along, to realise that the door was an accessibility problem, not only for me, but for others as well. And I did not notice, until one of my students pointed it out, that the lack of signs that could be read from a distance at my university forces people with mobility impairments to expend a lot of energy unnecessarily, searching rooms and offices. Although I have encountered this difficulty myself on days when walking was exhausting to me, I interpreted it, automatically, as a problem arising from my illness (as I did with the door) rather than a problem arising from the built environment having been created for too narrow a range of people and situations. One of the most crucial factors in the deconstruction of disability is the change of perspective that causes us to look in the environment for both the source of the problem and the solutions.²¹⁵

In enlisting feminist theory as a methodological adjunct, I am mindful of the risk of distorting, through oversimplifying and homogenising, what is eminently a rich, highly nuanced and highly differentiated discourse. As a caveat, it bears stressing that it would not be every feminist that will construct disability in the way Wendell does, for example. Furthermore, it is important to appreciate at the outset that, in the strictest sense, there is no grand feminist theory, as such, to explain, in totality, feminism.²¹⁶ Nor, for that matter is such a theory necessarily desired or desirable.²¹⁷ If it can be accepted that the work of grand social theory is to explain a particular social phenomenon at the highest level of abstraction

²¹⁵ Wendell (note 47 above) 46. Footnote omitted. Emphasis added.

²¹⁶ Catharine MacKinnon, for example, makes this point when introducing her own theoretical work on feminism: MacKinnon *Towards a Feminist Theory of the State* (note 47 above) x; Dalton 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (note 47 above) 7.

²¹⁷ C Smart *Feminism and the Power of Law* (1989) 70-72; Charlesworth 'What are "Women's" International Human Rights?' (note 47 above) 67.

and in an all-embracing manner so that it is universally applicable,²¹⁸ then, feminism does not purport to be such a theory. Feminist discourse has deliberately eschewed embracing unified, totalising abstract theory in favour of the concrete precisely because it is abstraction that has historically shielded institutionalised norms from scrutiny and universalised the subjective experience of dominant patriarchal values as objective values.²¹⁹ Ann Scales puts a gloss on this point when she says:

Feminism rejects “abstract universality” in favor of “concrete universality”. The former conjures differences – it elevates some to dispositive principles and defines others out of existence – and makes maleness the norm. The latter reinterprets differences in three crucial ways. First, concrete universalism takes differences to be constitutive of the universal self. Second, it sees differences as systematically related to each other, and to other relations such as exploited and exploiter. Third, it regards differences as emergent, always changing.²²⁰

In part, feminism can be seen as a critique of the legal system that succeeds in alerting us that law is neither objective nor neutral.²²¹ In deconstructing law and unmasking the ‘politics of law’, feminism shares many similarities with Critical Legal Studies (CLS),²²² and has, indeed, been a beneficiary of the insights of the Realists.²²³ CLS’ contribution to an emancipatory discourse has been unmasking the ideology of dominance behind the law that is designed to present law as fair

²¹⁸ Fineman ‘Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship’ (note 47 above) 27-30; Oliver *Understanding Disability* (note 135 above) 130.

²¹⁹ Scales (note 47 above) 1385, 1388; Minow ‘Beyond Universality’ (note 47 above) 137; However, liberal feminism which is explained below as feminism that subscribes to formal equality functions by embracing rather than distancing itself from an abstract totalising theory of equality to the extent that equality is achieved once women are treated the same as men.

²²⁰ Scales (note 47 above) 1388. Footnote omitted.

²²¹ Scales (note 47 above) 1400.

²²² Littleton ‘Reconstructing Sexual Equality’ (note 47 above) 1283; C Dalton ‘An Essay in the Deconstruction of Contract Doctrine’ (1985) 94 *Yale Law Journal* 997-1114; R Unger ‘The Critical Legal Studies Movement’ (1983) 96 *Harvard Law Review* 561; D Kairys (ed) *The Politics of Law: A Progressive Critique* (1982); Wishik (note 47 above) 64-77, 66; R Gordon ‘Unfreezing Legal Reality: Critical Approaches to Law’ 15 (1987) *Florida State University Law Review* 195.

²²³ Scales (note 47 above) 1400; Wishik (note 47 above) 64.

and thus support the status quo including existing social inequalities. There are points of confluence between CLS and feminism. Both critical theories are united in challenging distribution of power. CLS and feminism are both committed to the project of unmasking traditional liberal legalism to show that it comes with an ideology for legitimizing existing patterns of power and dominance. Both approaches employ deconstructive and critical narratives as methodological tools.²²⁴ But as Deborah Rhode argues, despite these points of confluence, feminism and CLS are not one and the same.

Feminism not only takes gender as a central category, but also goes much further than CLS.²²⁵ While CLS bequeathed to feminism an understanding about how law is not, as the positivists claimed, an objective enterprise in which subjective morality, economics and politics are neutered, feminism seeks to radicalise rather than merely expand and illuminate legal reasoning.²²⁶ Critiquing the law and diagnosing the harm of legal norms that serve the purpose of legitimising and maintaining existing patriarchal dominance is a necessary process for feminism but only as a beginning rather than a destination.²²⁷ The criticism is that CLS appears to have made critiquing the law a destination.²²⁸ Also, rather like the totalising discourse of orthodox Marxism, CLS has failed to accord due recognition to the hegemonic roles of race and gender as principally explaining the subordination of black people and women, for example.²²⁹ In this connection, Kimberlé Crenshaw has said that one of the major shortcomings in CLS' focus on critiquing liberal legal ideology is that it presents a less than adequate narrative

²²⁴ Rhode 'Feminist Critical Theories' (note 47 above) 619.

²²⁵ Rhode 'Feminist Critical Theories' (note 47 above) 627-638 ; Scales (note 47 above) 1400; R West 'Deconstructing the CLS-Fem Split (1986) 2 *Wisconsin Women's Law Journal* 85. Here, I am generalising, of course. As will be apparent later in this section, postmodern feminism departs from the premise of taking gender as an organising principle.

²²⁶ Rhode 'Feminist Critical Theories' (note 47 above); DF Brosnan 'Serious But Not Critical' (1987) 60 *Southern California Law Review* 259.

²²⁷ Wishik (note 47 above) 66-67.

²²⁸ Crenshaw 'Race, Reform and Retrenchment' (note 173 above) 1356-1357.

²²⁹ Crenshaw *ibid.*

of how racial domination was constructed and sustained in the US legal and political economy.²³⁰ CLS fails to explain that coercion rather than consent was what principally created the oppressive world of Black people.²³¹

CLS and feminism also part ways in their divergent approaches to the place and significance of a rights discourse in challenging distribution of power and marginalizing law. Rhode observes that CLS has, on the whole, treated rights-based strategies as ineffective and illusory means of securing political reform.²³² Indeed, to the extent that CLS sees the institution of law as playing a legitimating function, it would be consistent with CLS thinking to see a rights discourse as not only an ineffective restatement of the problem,²³³ but even more significantly, also destructive of progressive social change.²³⁴ In a legal environment that subscribes to liberal legalism, it is true that as part of a sub-component of hegemonic political superstructure, law has conceptual limitations arising from ideological constraints. It cannot, by itself, secure seismic change as in many ways it seeks to maintain a status quo. However, to be alive to the limits of law as an instrument for social change is one thing, but to be dismissive of law, as CLS seems to do, is quite another.

Though feminism has also been critical about the efficacy of a rights-based approach for the same reasons as CLS,²³⁵ nonetheless, it has largely stopped

²³⁰ *Ibid* 1357.

²³¹ *Ibid* 1357.

²³² Rhode 'Feminist Critical Theories' (note 47 above) 632-634.

²³³ *Ibid* (note 47 above) 633-634.

²³⁴ DA Freeman 'Legitimising Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine' (1978) 62 *Minnesota Law Review* 1049 at 1349-1369; M Tushnet 'An Essay on Rights' (1984) *Texas Law Review* 1363-1364;

²³⁵ Fineman 'Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship' (note 47 above) 43; Charlesworth 'What are "Women's International Human Rights?"' (note 47 above) 60-61; H Charlesworth, C Chinkin & S Wight 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613 at 635-638; Smart (note 217 above).

short of outright dismissal.²³⁶ Feminist discourse has engaged law critically, while concomitantly retaining legal strategies as arsenal for challenging the dominant discourses in law. Certainly, the fact that traditional liberal legalism tends to see rights in terms of vindicating the rights of an abstracted individual in an individualistic society is a problem for feminist discourses that wish to use rights collectively to empower a social group such as disabled people through eradication of systemic disadvantage, marginalisation and poverty. At the same time, feminism, or at least a large part of it, does not deny that law can be reconstructed so as to render it an emancipatory tool in a rights discourse. Ultimately, as some feminist and critical race discourses²³⁷ have argued, the question whether a rights discourse can make a positive impact must be evaluated contextually and historically.²³⁸

A rights discourse that is framed in such a way that the claims of individuals are inextricably bound with collective claims, can impact positively on the recognition of community, not least in securing symbolic victories that raise public consciousness about oppression and foreground or augment political

²³⁶ G Binnion 'Human Rights: A Feminist Perspective' (1995) *Human Rights Quarterly* 509 at 514.

²³⁷ Critical race discourses are discourses that are the progeny of Critical Race Theory (CRT). CRT is a scholarly movement that was pioneered by African Americans against the backdrop of the history and institutions of slavery and segregation in the United States. It has sought to place the deconstruction of race at the centre of analyzing racial discrimination and racial oppression and developing emancipatory and transformative strategies in much the same way as feminism has put deconstruction of woman at the centre of transacting the historical disadvantage and marginalization of woman and developing emancipatory and transformative strategies for women. According to Richard Delgado and Jean Stefani, the objects of CRT include: transforming relationships among race, racism, and power; placing a rights discourse in a more holistic context that includes economics, history, and group self-interest; questioning the very foundations of a liberal order including the assumptions that surround enlightenment, rationality and the neutrality of constitutional principles; and transforming hierarchical racial and other social orders: R Delgado & J Stefani *Critical Race Theory: An Introduction* (2001) 2-3.

²³⁸ C Romany 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in Cook (ed) (note 47 above) 85-115 at 90-91; Rhode 'Feminist Critical Theories' (note 47 above) 635; M Minow 'Interpreting Rights: An Essay for Robert Cover' (1987) *Yale Law Journal* 1860 at 1875-1877; Crenshaw 'Race, Reform and Retrenchment' (note 173 above) 1364-1366; Charlesworth 'What are "Women's International Human Rights?"' (note 47 above) 1 61; M Becker 'The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics' (1998) 209 *WM & Mary Law Review* 209.

activism, especially where a social group is starting from a position of manifest disadvantage and marginalisation.²³⁹ It is not essential that the victories be necessarily legal in character for a rights-based discourse to impact positively on emancipatory struggles. Martha Minow has argued that it can be sufficient that rights-based strategies invest individuals and communities with 'rights consciousness' that allows them to imagine as well as act in the light of rights that have hitherto not been conceded by public authorities.²⁴⁰ Minow's thesis is that rights should not be conceived of as necessarily limited and coterminous with positive law.²⁴¹ Furthermore, in jurisdictions such as South Africa where the Constitution professes a commitment to substantive equality and transformation as to invite reconstruction of traditional legal values and norms, it would be pointless abstinence not to put the rights discourse to test on its own terms.²⁴² But even if the underpinning legal ethos does not profess a commitment to substantive equality or transformation, the very fact that law has a legitimating function is paradoxically why it ought to be enlisted an adjunct to advocacy. Cook and Cusack reminded us of the potential of law as an instrument for change when they argued that because law is privileged, it is all the more worthwhile to appropriate it as one of the tools in naming.²⁴³

²³⁹ P Gabel 'The Phenomenology of Rights-Consciousness and the Pact of Withdrawn Selves' (1984) 62 *Texas Law Review* 1563 at 1590.

²⁴⁰ Minow (Interpreting Rights) (note 239 above) 1867.

²⁴¹ Minow *ibid.*

²⁴² The outcome and aftermath of the decisions of the Constitutional Court of South Africa in *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 are instances that illustrate that a rights discourse need not be in vain. In this case, the Constitutional Court effectively countermanded government policy that had excluded from accessing treatment at the expense of the state, 90% of women who needed treatment for the prevention of mother-to-child transmission of HIV. On account of the decision, the South African government was forced to concede a change in policy and to implement universal access to treatment for the prevention of mother-to-child transmission of HIV at public facilities: CG Ngwenya 'Access to antiretroviral Therapy to Prevent Mother-to-child Transmission of HIV as a Socio-economic right: An application of section 27 of the Constitution (2003) 18 *South African Public Law* 83.

²⁴³ Cook & Cusack (note 164 above) 38; Crenshaw 'Race, Reform and Retrenchment' (note 173 above) 1366-1369.

In any event, unlike CLS the feminist project does not aspire to mould law into an objective and neutral reality. Feminism is not about disaffirming subjectivity. Rather, it seeks to candidly acknowledge and integrate subjectivity and politics into law as a way of not only challenging and countering historically privileged interests, but equally important, assuring a redress of power imbalances in an imagined alternative that allows what has been excluded, devalued or undermined to be recognized and included and given space to survive and flourish.²⁴⁴ In this sense, feminism is a political theory and a legal method that puts under the spotlight issues of power with a view to radical change.²⁴⁵ It is not just a diagnostic tool, but is also a transformative one. In its radical form, it is a result-orientated discourse;²⁴⁶ it is a form of action that fuses theory and practice to achieve certain ends.²⁴⁷

Feminism can be described as a repertoire of theories, schools of thought, strategies and praxis that, at times, even contradict each other, but have, as their main enterprise or rallying point, the design of achieving equalities for women in a universe that has been dominated by patriarchal norms.²⁴⁸ Martha Fineman has described feminism as a 'theory of middle-range' to capture the intermediate but concrete nature of an analytical approach that falls somewhere between storytelling and grand theory.²⁴⁹ Feminism is not, however, a monolithic discourse. Indeed, sometimes the term 'feminisms' rather than feminism is used

²⁴⁴ Rhode 'Feminist Critical Theories' (note 47 above) 619.

²⁴⁵ Fineman 'Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship' (note 47 above) 42

²⁴⁶ Fineman 'Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship' (note 47 above) 33; Scales (note 47 above) 1401, 1402; Charlesworth 'Feminist Methods in International Law' (note 47 above) 380.

²⁴⁷ Wishik (note 47 above) 71.

²⁴⁸ Littleton 'Equality and Feminist Theory' (note 47 above) 1044.

²⁴⁹ Fineman 'Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship' (note 47 above) 27-30. Fineman adopts the term 'theory of middle range' from the sociologist Robert Merton: R Merton *On Theoretical Sociology: Five Essays, Old and New* (1967) 39, 68.

to convey the diversity of feminist approaches.²⁵⁰ Whilst the achievement of equality is the common goal or aspiration in feminist theory, there is no consensus about approaches to equality and, ultimately, the meaning of equality.²⁵¹ There is no feminist equality. Rather there are feminist equalities. As my intention is not to render a disquisition on feminism but rather to locate feminism as a constituent part of my methodology, and, perforce, a useful discourse for developing norms responsive to the equality needs of disabled people, it suffices to identify and explain the strand(s) of feminist theory (ies) or school(s) of thought that I am appropriating from feminism. To do so necessitates, first, having a sense of the different methodologies or theories that feminism offers.

4.2 Heterogeneous domain of feminism

There are several approaches to categorising feminist thought and the equality paradigms that feminism yields or, more accurately, aspires towards. However, trying to categorise feminism is a delicate exercise. Each ascribed or claimed category is fraught with dangers of distortions and oversimplification as might be expected of a concept that is transacted from multiple perspectives. Notwithstanding this limitation, to illuminate my methodology, I choose an approach to categorization that facilitates ultimately attempting to locate the intersection between feminism, substantive equality and disability method. For my purposes, feminism is only useful to the extent that it can deconstruct disability as part of implicating socially constructed inequalities and suggesting alternatives to the existing order. From this standpoint, I find Patricia Cain's taxonomy of feminism valuable, but always accepting that Cain's taxonomy is not sacrosanct. Not only are there alternative taxonomies, but the taxonomies

²⁵⁰ Littleton 'Feminist Jurisprudence' (note 47 above) 753, footnote 11.

²⁵¹ Cain (note 41 above) 804.

themselves are constantly evolving and always subject to contestation.²⁵² Cain describes four schools of thought within feminism, namely: liberal feminism; radical feminism; cultural feminism; and postmodern feminism.²⁵³ Indeed, when choosing these categories Cain is careful not to ascribe to them an essence. She is careful to enter a caveat and point out that there are other ways of categorising feminist thought.²⁵⁴ In any event, the feminist categories are not intended to convey the idea of rigid contours as the contours are porous and ‘feminists slip in and out of the categories’.²⁵⁵

4.3 Liberal feminism

Cain describes liberal feminism as the earliest type of feminism. It is a feminism that is built around a libertarian notion of women and men as equally situated rights bearing autonomous, rational beings that are capable of making individual

²⁵² Littleton ‘Feminist Jurisprudence’ (note 47 above) 752, footnote 10.

²⁵³ Cain (note 41 above) 803.

²⁵⁴ Cain (note 41 above) 841; Rosemarie Tong categorises feminist thoughts into: Marxist, radical, psychoanalytic, socialist, existentialist, and postmodernist thought: R Tong *Feminist Thought* (1989) 101. For Hilary Charlesworth, the strands in feminism approximate Cain’s but leave out postmodernism: Charlesworth ‘What are “Women’s International Human Rights?”’ (note 47 above) 61-67. For Josephine Donovan, the categories are: cultural feminism, feminism, and Freudianism, feminism and Existentialism: J Donovan *Feminist Theory: The Intellectual Traditions of American Feminism* (1985). Christine Littleton uses two categories to mark different feminist approaches to equality - symmetrical and asymmetrical - approaches: C Littleton ‘Reconstructing Sexual Equality’ (note 47 above) 1291-1304. In 1997, speaking to feminism generally but more specifically United States feminism, Nancy Fraser conceived feminism in terms of both chronological as well as philosophical phases. The first phase began in the 60s and lasted until the mid 80s where the principal proponents as well as antagonists were ‘equality feminists’ (who saw women as the same and gender difference as an instrument and artifact of patriarchy) and ‘difference feminists’ (who saw women as of equivalent value but different feminine voices). The second phase began in the mid 80s and lasted until the early 90s and marked a shift towards ‘difference feminism’ to counter culturally specific stereotyping of feminine gender identity so as to admit other identities and acknowledge other axes of subordination, including class, race ethnicity and sexuality. The third and current phase is a feminism that focuses on ‘multiple intersecting differences’. This is a phase that focuses on ‘antiessentialism’ (to mark all identities as inherently repressive and all differences as inherently exclusionary) and ‘multiculturalism’ (to mark a positive view of all group identities that are claimed or asserted): Fraser *Justice Interruptus* (note 35 above) 173-188.

²⁵⁵ Cain (note 41 above) 841.

choices and, therefore, ought to be treated the same.²⁵⁶ The philosophical basis for this type of equality is the Aristotelian maxim that like cases ought to be treated alike.²⁵⁷ The argument is that women are not unlike men in reason and rationality and, therefore, ought to be treated the same as men. The 'similarly situated test' becomes the legal criterion for determining unfair differentiation and achieving equality. Liberal feminism is assimilationist in orientation as it seeks to secure gender neutrality, and, in the process, seeks to minimize or even deny differences between men and women.²⁵⁸ Indeed, any differences are treated as irrelevant to an equality principle that is neutral towards sex and, therefore, transcendent.²⁵⁹ In terms of legal reform, the project of liberal feminism has been to dismantle barriers that prevent women being treated like men in public space by, for example, asserting women's rights to enter occupations previously closed to them.²⁶⁰ Liberal feminism's equality promise is 'sameness' with the male standard as the reference point.²⁶¹ In short, in Cain's categorisation, liberal feminism is formal equality.

4.4 Radical feminism

Turning to 'radical feminism', Cain begins by pointing out that it is a type of feminism with more than one variety, and thus, cannot easily be defined.²⁶² For this reason, like Cain,²⁶³ rather than attempt to describe the varieties of radical feminism, it is more helpful to describe the unity among the radical feminist

²⁵⁶ Cain *ibid* 829.

²⁵⁷ Cain *ibid* 818.

²⁵⁸ Fineman 'Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship' (note 47 above) 35.

²⁵⁹ Scales (note 47 above) 1377.

²⁶⁰ Fineman 'Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship' (note 47 above) 34-35; Charlesworth 'What are "Women's International Human Rights?"' (note 47 above) 63; Littleton Feminist Jurisprudence (note 47 above) 759.

²⁶¹ Charlesworth 'What are "Women's" International Human Rights?' (note 47 above) 64.

²⁶² Cain (note 41 above) 832.

²⁶³ Cain (note 41 above) 832.

varieties as a way of highlighting their salience, and, more pertinently, describing how the varieties differ from liberal feminism. Three main points can be made in this regard. Firstly, unlike liberal feminism, rather than invoke men as a reference points or comparators for inscribing into equality norms that determine what is equal and similar, radical feminism is alive not only to similarities, but also differences - material, psychological, physical, social, and cultural - between women and men.²⁶⁴ Radical feminism challenges the assumption in liberal feminism that women have to be like men before they can claim equality.²⁶⁵

Secondly, unlike liberal feminism, radical feminism seeks to be responsive to structural inequality by recognising women as an historically marginalised, subordinated social group.²⁶⁶ Radical feminism seeks to raise consciousness about the source of inequality, namely society, and more specifically, patriarchy. It implicates patriarchy as an institution and power relation that, historically, has created and sustained the social, political and legal dominance of men over women.²⁶⁷ It is a feminism that shuns abstract and theoretical legal equality which is oblivious to the material and other constraints that women find themselves under in a world already defined by patriarchal norms.²⁶⁸ If the premise of a liberal theory of equality is that social context is irrelevant when computing equality because individuals are presocial, then, the premise of radical feminism is the exact opposite.²⁶⁹ Radical feminism seeks to dislodge formal equality precisely because women are not presocial. Women are not just an aggregation of individuals accidentally and erratically discriminated against,

²⁶⁴ Cain (note 41 above) 832-833; Fineman 'Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship' (note 47 above) 37.

²⁶⁵ C Chinkin 'Gender Inequality and International Human Rights Law' in A Hurrell & N Woods (eds) *Inequality, Globalization and World Politics* (1999) 95-121 at 107.

²⁶⁶ Cain (note 41 above) 832.

²⁶⁷ Cain (note 41 above) 833; Fineman (note 47 above) 32.

²⁶⁸ Dalton 'Where We Stand' (note 47 above) 5.

²⁶⁹ Littleton 'Feminist Jurisprudence' (note 47 above) 758, 760.

as would be the position dictated by the underlying tenet of classical liberalism. Rather, they are a socio-economic class that is created by, and is situated in, a society where there is unequal power and systemic discrimination.²⁷⁰

To Catharine MacKinnon, a pioneer and the leading exponent of the most radical variety of radical feminism, patriarchy is the most hegemonic and tenacious system of power in history, exhibiting metaphysical perfection that is legally privileged.²⁷¹ The domination of patriarchy is so insidious and so powerful that unless there is consciousness raising, it is hard to discern its essence.²⁷² To capture the ordinariness of the 'tyranny'²⁷³ of patriarchal norms inherent in, and perpetuated by, the legal system, MacKinnon says:

Through legal mediation, male dominance is made to seem a feature of life, not a one-sided construct imposed by force for the advantage of the dominant group. To the degree that it succeeds ontologically, male dominance does not look epistemological: control over being produces control over consciousness, fusing material conditions with consciousness that is inextricable short of social change. Dominance reified becomes difference. Coercion legitimated becomes consent. Reality objectified becomes ideas; ideas objectified become reality. Politics neutralized and naturalized becomes morality. Discrimination in society becomes nondiscrimination in law.²⁷⁴

Thirdly, and as a corollary, because patriarchy is neither neutral nor objective, radical feminism has a restitutionary goal. It seeks to present a radical alternative to a preexisting order so as to repair the subordination of woman and restore her dignity. This requires, at the very least, dismantling the existing order with its patriarchal dominance and taking positive steps to give substance to framing

²⁷⁰ *Ibid.*

²⁷¹ C MacKinnon *Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence* (1983) 8 *Signs: Journal of Women in Culture and Society* 635 at 638; Scales (note 47 above) 1377.

²⁷² Scales (note 47 above) 1388; Littleton 'Reconstructing Sexual Equality' (note 47 above) 1280.

²⁷³ Here I am borrowing from Anne Scales: Scales (note 47 above) 1376.

²⁷⁴ MacKinnon *Towards a Feminist Theory of the State* (note 47 above) 238.

equality in terms of equal power relations. Equality is ultimately about redressing distribution of power not only in the public sphere but also the private sphere. To interact with patriarchy in a manner that is both diagnostic as well as therapeutic as to repair the subordinated and exploited being or status of woman, radical feminists have asked the *woman question*. According to MacKinnon, the central woman question should always be: whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status.²⁷⁵ The woman question has established itself as a tool for practical reasoning and consciousness-raising in feminist discourse. Katherine Bartlett says this about the woman question:

In law, asking the woman question means examining how law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The woman question assumes that some of the features of the law may be not only non-neutral in a general sense, but also 'male' in a specific sense. The purpose of the woman question is to expose those features and how they operate, and to suggest how they might be corrected.²⁷⁶

What ultimately informs the woman question, as Rebecca Cook explains, is the conviction in feminist legal approaches that the law is not neutral and that we start with women's unjust subordination partly on account of law's failure to accommodate women's reality.²⁷⁷ The woman question becomes a strategy for reformulating and reinterpreting law so that it takes into account the plurality of society, prevents violation of women's rights and provides redress where there

²⁷⁵ MacKinnon *Feminism Unmodified* (note 47 above); Charlesworth 'What are "Women's International Human Rights?"' (note 47 above) 66-67; C MacKinnon *Sexual Harassment of Working Women* (1979) 117; Wishik (note 47 above) 64.

²⁷⁶ Bartlett (note 1 above) 837. Footnote omitted.

²⁷⁷ RJ Cook 'International Protection of Women's Reproductive Rights' (1992) 24 *New York University Journal of International Law* 645 at 672-674.

are violations.²⁷⁸ The woman question can be asked at a high level of generality as, say MacKinnon does, or in more expansive terms.²⁷⁹ Ultimately, the woman question is a practical test and method for not only interrogating law for gender bias from the standpoint of women as an historical community, but also imagining a domain with equality for other historically marginalized groups such as disabled people. Asking the disabled people question in place of the woman question means inquiring into whether laws are failing to take into account the experiences and values that seem to be more typical of disabled people than enabled people. It means not assuming the neutrality of law but rather seeking to expose the enabled people bias of our laws and the marginalisation of disabled people.

Within the domain of radical feminism, some feminists lay emphasis not so much on interrogating dominance and subordination, as MacKinnon does, but on accommodating or accepting woman's difference. Christine Littleton's feminist approach is an example.²⁸⁰ While subscribing to the thesis of a male dominated world - a 'phallogentric' world - Littleton argues for an equality of acceptance.²⁸¹ What is important to Littleton is that accommodation of

²⁷⁸ *Ibid.*

²⁷⁹ For example, Heather Wishik would ask several women centered questions, namely: (1) What have been and what are now all women's experiences of the 'life situation' addressed by the doctrine, process or area of law under examination; (2) What assumptions, descriptions, assertions and/or definitions of experience - male or female, or ostensibly gender neutral - does the law make of this area; (3) What is the area of mismatch, distortion, or denial created by the differences between women's life experiences and the law's assumptions or imposed structures?; (4) What patriarchal interests are served by the mismatch?; (5) What reforms have been proposed in this area of law or women's life situation? How will these reform proposals, if adopted, affect women both practically and ideologically?; (6) In an ideal world, what would this woman's life situation look like, and what relationship, if any, would the law have to this future situation?; and (7) How do we get from here?: Wishik (note 47 above) 72-75.

²⁸⁰ Littleton 'Reconstructing Sexual Equality' (note 47 above) 1279; Littleton 'Equality and Feminist Legal Theory' (note 47 above) 1043.

²⁸¹ As Littleton points out, phallogentrism was coined by French feminists as an analysis and critique of society as social institutions created from a male perspective. Littleton uses the term with an emphasis on patriarchy as an insidious and complex form of male domination: Littleton 'Reconstructing Sexual Equality' (note 47 above) 1279-1281.

'difference' should be 'costless' to women.²⁸² In essence, Littleton's proposition for reconstructing an equality that is enmeshed in gender is that: 'The differences between human beings, whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived equality of those persons'.²⁸³ Thus, unlike MacKinnon, Littleton does not dismiss the notion of difference as an artifact or construct of patriarchy.²⁸⁴ Littleton does not see women as reconstructing equality with a design on fitting into a male world (which would be the basis of MacKinnon's critique of the difference) but rather reconstructing equality to create substantive equality that recognises and *accepts* diversity without creating a hierarchy of difference.

Certainly, radical feminism refutes formal equality's claims to neutrality and objectivity. It rejects as partial the premise of similarly situatedness in liberal feminism. Under radical feminism, equality is *gendered* equality rather than *sex* equality. The project of radical feminism is to challenge and, ultimately, break the solipsistic gridlock of insidiously male invested liberal legalism to give equal space to a female standpoint, and, thus, provide women with an alternative in a shared universe.²⁸⁵ In this way, radical feminism is best understood as a challenge to both patriarchy and liberal feminism.

²⁸² Littleton 'Reconstructing Sexual Equality' (note 47 above) 1304-1314.

²⁸³ Littleton 'Reconstructing Sexual Equality' (note 47 above) 1284-1285.

²⁸⁴ In *Feminism Unmodified*, for example, MacKinnon says this to mark her dismissal of the difference approach as, ultimately, objectionable male-referenced equality:

The philosophy underlying the difference approach in that sex is a difference, a division, a distinction, beneath which lies a stratum of human commonality, sameness. The moral thrust of the sameness branch of the doctrine is to make normative rules conform to this empirical reality by granting women access to what men have access to: to the extent that women are no different from men, we deserve what they have. The differences branch, which is generally seen as patronizing but necessary to avoid absurdity, exists to value or compensate women (by which is meant, unlike men) under existing conditions.

C MacKinnon *Feminism Unmodified: Discourse on Life and Law* (note 47 above) 33.

4.5 Cultural feminism

Of cultural feminism, Cain says that it is a variant of radical feminism but with a salience on embracing woman's difference and conceding to hearing her distinct voice.²⁸⁶ Carol Gilligan has been both a pioneer and an arch exponent of cultural feminism.²⁸⁷ In her leading work, *In a Different Voice*, Gilligan, who has drawn from developmental psychology and psychoanalytic theory, builds her thesis, empirically, around modes of problem solving between boys and girls that approximate gender categories, but without overgeneralising.²⁸⁸ Gilligan associates boys with the 'ethic of rights' or 'ethics of rights' meaning that they tend to treat individual autonomy as a paramount value, make moral decisions in a legalistic adversarial, exclusionary way.²⁸⁹ By contrast, Gilligan associates girls with the 'ethic of care' meaning they tend to make decisions using equitable principles to find a unique solution for each problem, looking at context and valuing inclusive outcomes.²⁹⁰ Girls tend to value preservation of relationships rather than individual autonomy.²⁹¹ They have mothering qualities.

In a universe where women have been historically excluded, the inferences that can be drawn from Gilligan's work when thinking about equality are perhaps obvious. The main inference drawn by feminists is that legal systems privilege a male perspective and marginalize a female perspective.²⁹² Gilligan's work is

²⁸⁵ MacKinnon *Towards a Feminist Theory of the State* (note 47 above) 239; Scales (note 47 above) 1376.

²⁸⁶ Cain (note 41 above) 835-836; Charlesworth 'What are "Women's International Human Rights?"' (note 47 above) 58-84, 65.

²⁸⁷ Gilligan *In a Different Voice* (note 47 above); See also ND Dinnerstein *The Mermaid and the Minotaur* (1976); N Chodorow *The Reproduction of Mothering* (1978).

²⁸⁸ Scales (note 47 above) 1380.

²⁸⁹ Gilligan *In a Different Voice* (note 47 above) 164, 174.

²⁹⁰ *Ibid* 164.

²⁹¹ *Ibid* 29.

²⁹² Charlesworth 'What are "Women's International Human Rights?"' (note 47 above) 65.

telling us that it is not just a matter of male psychology and female psychology having different values. It is also a case of male psychology constituting the 'self' and opposing the female 'other', and thus invalidating and, perforce, excluding from the equality universe what is not male. Repairing female exclusion does not mean incorporating in an assimilationist manner female needs into male needs such that patriarchy incorporates women.²⁹³ Rather it means rejecting the professed objectivity and neutrality of a male constituted self, and fundamentally altering the manner in which we conceive equality and adjudicative principles so that values that are associated with women are in fact equally valued by the legal system and socio-economic structures.²⁹⁴ An important illustration that has implications for the development of responsive disability jurisprudence is how cultural feminism has reconceived autonomy.

Putting a gloss on cultural feminism, Robin West identifies, as one of the successes of cultural feminism, its 'connection thesis'.²⁹⁵ The connection thesis seeks to capture the dimension in cultural feminism that departs from universally conceiving the individual in masculine terms as an atomistic being that is separated from society to conceiving her as existentially and psychologically connected with others.²⁹⁶ It offers an alternative to the patriarchal notion of autonomy as entailing not just freedom but also *separation* from others. It is a thesis that has moral implications in that it admits the imperatives of caring and responsibility for others.²⁹⁷ It dictates that we cannot construct an equality universe without concomitantly inscribing into such a universe normative ethics of caring for others, including those that are dependent. An underpinning assumption in arguments for substantive equality

²⁹³ Scales (note 47 above) 1383.

²⁹⁴ Rhode 'Feminist Critical Theories' (note 47 above) 624.

²⁹⁵ R West 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1 at 15.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid* 17.

is that we are a society in which individuals are part of a whole that is in part organized around communitarian duties towards one another. Accommodating disabled people is one such societal duty. Cultural feminism would recognize such a duty as part of the ethics of care.

In her thesis, *Developing a New Jurisprudence of Gender Equality in South Africa*, Narnia Bohler-Muller, drawing from Carol Gilligan's ethics of care, observes that, not only as children, but also as adults, we spend our lives in networks of care and dependence and yet universal theories of justice have emphasized our dignity and moral worth without concomitantly impressing upon our vulnerability and dependence.²⁹⁸ What ethics of care does is build a bridgehead between justice and care and in so doing captures our human condition as vulnerable to both oppression and *abandonment*.²⁹⁹ In the final analysis, Gilligan's ethics of care is dialogic.³⁰⁰ It resonates with Young's heterogeneous civic public.³⁰¹ It is a voice that must necessarily be added to our equality universe. In Chapter 4, drawing in part from feminism, I argue for an equality paradigm that recognises the fact of dependency and not merely the universalised atomistic autonomy as part of the human condition.

The work of cultural feminists, however, including that of Gilligan has not gone unchallenged, including challenge from within feminism. MacKinnon, in particular, has received Gilligan's work rather sceptically, describing Gilligan's findings artifacts of patriarchal oppression.³⁰²

²⁹⁸ N Bohler-Muller *Developing A New Jurisprudence of Gender Equality in South Africa* Unpublished thesis submitted in partial fulfilment of the requirements for the degree of Doctor Legum in the Faculty of Law, University of Pretoria (2005) 48-49.

²⁹⁹ Bohler-Muller (note 298 above) 49, citing C Gilligan 'Moral Orientation and Moral Development' in Kittay & Meyers *Women and Moral Theory* (1987)19-33 at 20.

³⁰⁰ Bohler-Muller (note 289 above) 49.

³⁰¹ Young (note 153 above) Chapter 4; Chapter 2 § 2.4 of this study.

³⁰² MacKinnon *Feminism Unmodified* (note 47 above) 39.

4.6 Postmodern Feminism

Cain explains the hallmarks of postmodern feminism as feminist thought that says that there is no single theory of equality that works for all women because there is no 'essential' woman, and that the route to equality lies in reconstructing woman without recourse to essentialism.³⁰³ Rather than adopt the bipolar relationship of domination and subordination that is true of men and women relations and is true under MacKinnon's analysis, postmodern feminism shuns a confining, rigid paradigm of the plight of women. Under postmodernism, woman has no core identity, but is instead constituted under multiple, intersecting and even contradictory structures and discourses that are flux rather than static.³⁰⁴ Gender is but one institution that women may find themselves in. Race, class, sexual orientation, religion, ethnicity, language, geographical location and other realities and not just patriarchy connect with how women and the human condition constitute themselves.³⁰⁵ A major postmodern feminist criticism of radical feminism, and in particular, the genre advocated by MacKinnon is that in preoccupying itself with gendered identity as an exclusive category, it produces unintended adverse outcomes. It becomes exclusionary and fails to capture the diversity and totality of women's experiences.³⁰⁶ It fails to include the diversities of class, culture race, sexuality, religion and so on when computing woman's social position. Its unintended outcome is that it is inherently exclusionary as well as hegemonic.³⁰⁷ It creates a mythical 'generic' woman as *the* authentic female voice.³⁰⁸

³⁰³ Cain (note 41 above) 838-841.

³⁰⁴ Bartlett (note 1 above) 877-878.

³⁰⁵ Dalton 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (note 47 above) 8; Bartlett (note 1 above) 834.

³⁰⁶ Bartlett (note 1 above) 834.

³⁰⁷ E Spelman *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988).

³⁰⁸ *Ibid* 187.

Under postmodern feminism, the category of woman is multiple rather than unitary as not to permit one woman to be replaced by another.³⁰⁹ In this way, postmodern feminism can be seen as part of a struggle to redefine (in)equality and reconstruct woman to counter a new hegemony arising especially out of Mackinnon's woman as 'sexual subordination' but also Gilligan's woman as 'mother' as constructs that are neither necessary, universal nor always historically true.³¹⁰ The import of the antiessentialist and deconstructive thrust in postmodernism is to be skeptical about all identities, and, more than this, to treat all identities as inherently repressive and all differences as inherently exclusionary.³¹¹ Ultimately, there is no objective identity.

Drucilla Cornell, an arch exponent of postmodern feminism, describes her feminism as 'ethical feminism'. It is a feminism that is built not on what women *are* but on the remembrance of the *not yet*.³¹² Cornell, who has built her feminism from the work of deconstructionists and psychoanalysts,³¹³ challenges the universal reality or necessity of patriarchy as the condition for humanity in search of what she calls 'new choreographies of sexual difference'.³¹⁴ For Cornell an 'imaginary domain' is the equality universe where *all* women can create their own equality. Cornell's work is, in part, a critique of radical feminism of the type espoused by MacKinnon, especially, in which the real world is static, is socially constructed by men and women come to challenge the social arrangements.³¹⁵ In

³⁰⁹ Cain (note 41 above) 839; Dalton 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (note 47 above) 8.

³¹⁰ Dalton 'Where We Stand: Observations on the Situation of Feminist Legal Thought' (note 47 above) 7-8; L Alcoff 'Cultural Feminism Versus Poststructuralism: The Identity Crisis in Feminist Theory' (1988) 13 *Signs* 405.

³¹¹ Fraser *Justice Interruptus* (note 35 above) 181.

³¹² D Cornell 'The Doubly-Prized World: Myth, Allegory and the Feminine' (1990) 75 *Cornell Law Review* 644, 645.

³¹³ In *Beyond Accommodation*, Cornell primarily draws from the work of the deconstructionist, Jacques Derrida, and the psychoanalyst, Jacques Lucan: Cornell *Beyond Accommodation* (note 47 above) xvi.

³¹⁴ Cornell *Beyond Accommodation* (note 47 above) xx.

³¹⁵ In the introduction to *Beyond Accommodation*, Cornell explicitly says so.

Cornell's imaginary domain, women need not share a universal or identical experience of oppression in order to realise equality.³¹⁶ Whoever they are, and wherever they may be located, they do and can construct freedom and equality without first contesting sexual difference. Cornell says:

...the aesthetic idea of the imaginary domain implies that women not only can but are in the process of representing and rerepresenting the meaning of their "sex". That is one of my fundamental disagreements with Mackinnon, for whom the real world is socially constructed by men. Women do not, and cannot, do the construction – even of themselves – because they are not "creators" in a world of male domination....freedom is not a static condition we achieve once and for all. Nor is it something absolutely foreclosed to us by male domination. Instead, it is a process of struggle we engage in, in part by resignifying the personas of femininity, and the meanings given to our "sex" so to express and represent who we are in our singularity, and in the complexity of our basic identifications. This is not "difference feminism" as it has often been understood to be affirming women's difference from men. The focus is not on how women actually are different from men, but on the possibility of transformation, always of transformation.³¹⁷

5 CONNECTING FEMINISM WITH DISABILITY METHOD

With its profound insights about women as a cultural construction, and an historical community, feminist discourse has the potential to profoundly deepen disability discourse. Because the feminist project is ultimately about taking women seriously and challenging patterns of hierarchical power that exclude and degrade women and imagining an alternative,³¹⁸ it holds salutary lessons for disability. Disablism is also about patterns of hierarchical power that have exclusionary and degrading effects. The fact that there is no homogenised

³¹⁶ Cornell *Beyond Accommodation* (note 47 above) xxxii.

³¹⁷ *Ibid* xxvi-xxviii.

³¹⁸ Minow 'Beyond Universality' (note 47 above) 116.

feminist voice but multiple voices to constructing, reconstructing and deconstructing equality should not deter us from learning from feminism. Indeed, it would be a mistake to see the diversity of approaches as aimed at nullifying one another. It would be a mistake to see the discourse of feminism as necessarily compelling one to choose a particular variety of feminist theory as correct and a shibboleth and the others as wrong. More pertinently, it would be a mistake to lose sight of the transformative potential of feminist thought merely because of the different voices in which feminism speaks. It is better to see the different feminist voices as strength rather than a weakness; as multiple ways and strategies of responding to multiple patterns of hierarchical power and exclusion rather than internal inconsistencies or theoretical incoherence.³¹⁹

Paradoxically, the seemingly discordant rather than concordant voices are feminism's prized success. The feminist project is about seeking new discursive spaces and encouraging rather than discouraging a proliferation of voices so that there is no hierarchical structure of voices, but instead a plurality of perspectives.³²⁰ The different voices are best understood as ongoing conversations that are managing to yield a rich discourse. Feminism is a constantly evolving discourse with no finite boundaries that is forever imagining the alternative precisely for the reason that equality is a social construct. Christine Littleton argues that it is best to think of the different feminist approaches as complimentary rather than binary or oppositional formations for the reason that they are all intended to expose the oppression of women and ultimately secure equality for women.³²¹ This is the perspective from which I appropriate feminism to disability method in this study.

³¹⁹ Minow *ibid* 135-136.

³²⁰ N Bohler-Muller *Developing a New Jurisprudence of Gender Equality in South Africa* (note 298 above) 181.

³²¹ Littleton 'Equality and Feminist Theory' (note 47 above) 1046.

The 'sex discrimination approach' of liberal feminism alerts us to injustice of irrational prejudice and stereotyping and is already a part of our discourse of classical liberalism for eliminating invidious discrimination. Radical feminism highlights domination of one group by another and consequently social oppression. It ought to be part of our substantive equality discourse as it lays bare structural inequality. It is radical feminism that introduced to our equality discourse asking the *woman question* as a way of not only unmasking patriarchal domination and woman subordination, but also imagining a possibility where domination is disabled and meaningful context-sensitive equalities are created. Cultural feminism enriches our substantive equality discourse by highlighting that equality lies not in ensuring that our humanity is the same, but in respecting and accommodating, in equal measure, diversity. Postmodernist thought puts a brake on essentialising and, perforce, stereotyping the type and content of equality for disabled people.

Thus, in constructing equality, we must be flexible rather than rigid as there is no *essential disabled person* in the same way that Elizabeth Spelman has argued that there is no *essential woman* when trying to dislodge patriarchy.³²² In *Inessential Woman*, Spelman deconstructs the 'generic woman' in feminism to show that it is a category that has operated in the same exclusionary way as the 'generic man' in Western philosophy to obscure the heterogeneity of women and to assume that the meaning of gender and the experience of sexism are the same for *all* women.³²³ Drawing from Spelman's arguments for an inclusive feminist thought, we can also say that disability method should shun plethoraphobia and not seek to rationalize the multiple physicality of disability though a reductionist

³²² Spelman (note 47 above).

³²³ *Ibid* ix-x.

jurisprudence in which one group of disabled people is conflated with the other or one disabled person is conflated with the other.³²⁴

Therefore, the category of 'disabled person' should avoid the pitfalls of other essentialising epithets that have become or have risked becoming abstractions that have unwittingly sought refuge in 'false universalism' and are voided of political nuance.³²⁵ The category of a 'disabled person' should not mean sameness and singularity, ignoring intersecting social cleavages of difference, including varied histories, varied disadvantages and marginalisations, and varied imbalances of power. In order to render an inclusive equality universe that does not exclude crucial dimensions of disabled people,³²⁶ disability method must take differences among disabled people into account.³²⁷ That way, we can avoid constructing a patriarchal disability universe that privileges some disabled people and yet disadvantages or exclude others. Of necessity, disability method must hear the plethora of voices of disabled people so as to give legitimacy to an equality paradigm that hears voices that have hitherto been silenced or excluded and not merely the dominant voices.³²⁸ As part of hearing the multiplicity of voices, disability method like heterogeneous feminism, must include the experience of all demographic groups, including genders, classes, ethnic groups, sexualities and races.³²⁹ One disabled group or one disabled person cannot represent all disabled groups or all disabled persons.³³⁰ Disability method must be able to capture hybridity and syncretism if it is to claim non-hierarchical representativeness.

³²⁴ *Ibid* 3-4.

³²⁵ F Williams *Social Policy: A Critical Introduction* (1989) 118; R Lister 'Citizenship: Towards a Feminist Synthesis' (1997) 57 *Feminist Review* 28 at 38; A McClintock 'The Angel of Progress: Pitfalls of the Term "Post-colonialism"' (1992) 31 *Third World and Post-Colonial Issues* 84 at 86.

³²⁶ Spelman (note 47 above) 14.

³²⁷ *Ibid* 162.

³²⁸ *Ibid* 162.

³²⁹ *Ibid* 163.

³³⁰ *Ibid* 164.

We must, therefore, be open to recognising difference, that is, difference as heterogeneity in which no variety is privileged even among disabled people. Equality for disabled people must not be constructed in a manner that renders it a shibboleth and a hegemonic standard. Anita Silvers has argued for a construction of disability feminism that eschews the oppressive aspects of feminist identity strategies.³³¹ Silvers poignantly captures the dangers of an incomplete or even oppressive disability theory when she says that the fact that cultural feminism valorizes traits that are traditionally associated with femininity, means it also propagates 'tyranny of the normal feminism'.³³² It means it cannot hold an emancipatory prospect for disabled women who do not and cannot have traits that approximate a definitive paradigmatic gender identity role on account of social and physical barriers.³³³ Barbara Hillyer makes much the same point when she argues for a more integrated feminist theory of disability that factors in the reality of dependence and does not construct equality on the premise of woman as independent and productive as that would inherently disenfranchise many disabled women.³³⁴

Disability method can, therefore, learn from feminist, race and sexuality discourses that have already begun building an archive of enriching equality discourse through taking heterogeneity and intersectionality seriously. Feminist, race and sexuality discourses have argued that any antidiscrimination approach that is constructed around a single-axis of subordination and disadvantage is apt to generate patriarchy of its own as it will inexorably marginalise individuals and social groups who suffer from subordination and disadvantages that cannot

³³¹ Silvers 'Reprising Women's Disability' (note 47 above) 82.

³³² *Ibid* 86.

³³³ *Ibid* 84-85.

³³⁴ Hillyer (note 206 above) 9-19.

be addressed by the tightly drawn axes.³³⁵ Alluding to shortcomings in the conceptualization and application of gender and race discrimination law as single axes, Kimberlé Crenshaw has said that 'both feminist theory and antiracist politics have been organized, in part, around the equation of racism with what happens to the Black middle-class or to Black men, and the equation of sexism with what happens to white women'.³³⁶ The moral is to be conscious of intersectionalities so as to reflect generalities as well as particularities of subordination and disadvantages when constructing and applying an emancipatory antidiscrimination response. Vectors of discrimination, particularly for those that are caught up in a vicious cycle of disability and poverty tend to be compounded rather than linear. An effective antidiscrimination approach should seek to expose and transfigure several categories of discrimination simultaneously.³³⁷

Cornell and other proponents of postmodern feminism steer us towards the proposition that, in advocating equality needs of disabled, we must go beyond legal narratives that traditionally gravitate towards hegemonic, universalizing tendencies so that we are able to see the particular as much as the general. Woman has no core identity. Her identity is neither finite nor stable, but flux, always open to construction and reconstruction, and deconstruction.³³⁸ To affirm

³³⁵ K Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139; B Hooks *Feminist Theory from Margin to Center* (1984) 17-65; DL Rhode 'The "Woman's Point of View"' (1988) *Journal of Legal Education* 39; Spelman (note 47 above); A Rich 'Compulsory Heterosexuality and Lesbian Existence' (1980) 5 *Signs* 631.

³³⁶ Crenshaw 'Demarginalizing the Intersection of Race and Sex' (note 335 above) 152; See also K Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour' (1991) 43 *Stanford Law Review* 1241.

³³⁷ Silvers 'Reprising Women's Disability' (note 47 above) 88.

³³⁸ K Van Marle 'Love, Law and the South African Community: Critical Reflections of 'Subject Intimacies' and 'Immanent Subjectivity' in H Botha *et al* (eds) *Rights and Democracy in a Transformative Constitution* (2003) 231-247, 232; Patricia Cain makes the point that the term postmodern feminism itself can be said to be an oxymoron to the extent that it is feminism that repudiates woman as occupying a generalisable socio-economic position or identity: Cain (note 41 above) 838.

what is feminine, an essentialist or naturalist theory of woman is unnecessary.³³⁹ Standpoint epistemology allows us to hear the voices that have been hitherto suppressed.³⁴⁰ It allows us to hear the voices that have been devalued and inaccessible.³⁴¹ At the same time, there is an inherent danger of hearing only one recolonising standardising voice.³⁴² Postmodernism puts a brake on neocolonialism through treating standpoint epistemology with suspicion. While standpoint epistemology allows us to hear the voices that have been hitherto suppressed by relocating the source of knowledge from the oppressor to the oppressed, as Bartlett observes, postmodernism questions the validity of such knowledge.³⁴³

Postmodern feminism tells us that there is no essential woman, and, perforce, there cannot be a universal voice of woman. Disability is heterogeneous not only from the standpoint of the multiplicity of impairments but also from the standpoint of varied group and individual experiences of disablement. Likewise there is no essential disabled person, and no universal disabled persons' voice. To be inclusive, disability method must be sensitive to heterogeneity of disability and diversity and pluralism of equality aspirations. However crucial, understanding the salient features of the socio-economic position of a social group as part of understanding structural inequality must not stand in the way of understanding the particular experience of the disabled person before us and their own unique equality aspirations, and equally valid voices.

³³⁹ Cornell 'The Doubly-Prized World: Myth, Allegory and the Feminine' (note 312 above) 75 *Cornell Law Review* 644.

³⁴⁰ In Chapter 1 of this study, I extolled the virtues of standpoint epistemology, but also alluded to its limitations.

³⁴¹ Abrams (note 44 above) 385-387.

³⁴² Abrams (note 44 above) 385-387.

³⁴³ Bartlett (note 1 above) 877.

At the same time, to attempt to deconstruct identity on ontological grounds alone, as postmodernism does, without factoring in the parity-impeding nature of a domain where there is structural socio-economic inequality is to deny politics. It is to deny, as Bartlett argues, the fact of oppression as an independent and determinate reality in lived experience.³⁴⁴ It is to give woman only a nominal presence in socio-economic reality in a bid to counter essentialism and a totalizing heuristic.³⁴⁵ Totalities that elide and elude difference and heterogeneity deny individuality and distort histories in a bid to construct one grand narrative or epistemology.³⁴⁶ At the same time, however, incomplete, political totalities that explain power and oppression, socio-economic domination and subordination are indispensable to the epistemology of structural inequality and to the design and implementation of our emancipatory struggles.³⁴⁷

What should be eschewed are crude totalities so that, as Cornel West has argued in the context of critiquing criticism of Marxism by poststructuralists, a measure of synecdochical thinking is still retained to render it possible to dialectically relate parts to a greater whole.³⁴⁸ Denying the fact of oppression is a form of heuristic self-immobilization that seems manifestly incomplete for constructing an emancipatory methodology for equality.³⁴⁹ Indeed, as some feminists have argued, to be antiessentialist does not mean disavowing feminism and dismissing the category of woman as meaningless.³⁵⁰ Rather, it means constructing a nuanced feminism when it comes to defining the subjects. It means a feminism that acknowledges differences between women, but is, at the

³⁴⁴ Bartlett (note 1 above) 879.

³⁴⁵ Alcoff (note 310 above) 307.

³⁴⁶ West *The Cornel West Reader* (note 200 above)

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid* 279.

³⁴⁹ Fraser *Justice Interruptus* (note 35 above) 183; Rhode 'Feminist Critical Theories' (note 47 above) 620.

³⁵⁰ See for example, the position of feminists in the United States who have been critical of 'mainstream' feminism as marginalizing the experiences of black women: Hooks (note 335 above); P Hill Collins *Black Feminist Thought* (1990).

same time, able to construct a political and social theory of engendered citizenship that admits solidarity among woman on the basis of the common political experiences that women share as women.

When faced with a repertoire of feminisms, a way forward, then, is not an either or approach, but to take from each strand of feminism its emancipatory capacity and integrating it into an equality project. In the final analysis, feminism is a tool for deconstructing and transforming disability. Its manner of interrogating social systems for bias, diagnosing exclusionary and oppressive vectors, and imagining alternatives, in many ways, provides a readymade tool to disability, thus, rendering it unnecessary to reinvent the wheel. As Rosemarie Garland-Thomson argues, a feminist theory is a potent instrument for unseating the dominant assumption of disability as intrinsic impairment.³⁵¹ Garland-Thomson suggests that if disability needs a transformative archive and template for understanding disability as a category of analysis and knowledge, and if it needs to understand disability as a cultural trope and an historical community, then feminism offers, at its disposal, well honed skills for achieving such objectives.³⁵² According to Garland-Thomson, feminism is a standing theory for discerning and dissecting the 'ability/disability system. In this regard she says:

The informing premise of feminist disability is that disability, like femaleness, is not a natural state of corporeal inferiority, inadequacy, excess, or a stroke of misfortune. Rather, disability is a culturally fabricated narrative of the body, similar to what we understand as fictions of race and gender. The disability/ability system produces subjects differentiating and marking bodies. Although the comparison of bodies is ideological rather than biological, it nevertheless penetrates into the formation of culture, legitimating an unequal

³⁵¹ Garland-Thomson 'Integrating Disability, Transforming Feminist Theory' (note 47 above) 6.

³⁵² *Ibid* 2.

distribution of resources, status, and power within a biased social and architectural environment.³⁵³

Thus, it is submitted, to do the work of feminism when thinking about disability, is also, like the social model, to ask whether a norm, standard or practice is conscious about disability as social oppression, whether it reflects equal or unequal power relations as between disabled and enabled people, whether it admits the experience and equality aspirations of a disabled people as a diverse but distinct social group that has been historically excluded or marginalised, and whether it accommodates or can be reformed to accommodate disabled people in a manner that is costless to them as part of constructing a fully inclusive society that treats each person as a person of equal worth.

6 CONCLUSION

This study is as much an attempt to construct a method, as it is an attempt to apply a method for searching for an equality paradigm that comports with the equality aspirations of disabled people. This chapter has addressed the former, namely, construction of a method for analysis. Subsequent chapters will attend to the latter, namely, application. There is an inevitable tentativeness rather than finality in this exercise given the 'novelty' of disability method. In the context of this study, disability method is best understood as an exploratory approach that is aimed at yielding substantive equality in a maximal way. Whether one describes it as a mere approach or perspective rather than method is not crucial as the arguments in this chapter do not hinge upon accepting the label 'method'. Rather, the appeal of disability method, I submit, hinges upon accepting the argument that, as analytical and interpretive tools, the social model of disability

³⁵³ *Ibid* 5.

and feminism have insights to offer to an inquiry that is aimed at yielding substantive equality.

From a social justice perspective, I shall argue in the next chapter that disability method is a methodological expression of the idea of participatory democracy and a contextualisation of the idea of a heterogeneous public sphere.³⁵⁴ Iris Young has argued that just decision-making structures must be democratic in the sense of ensuring a voice and a vote to all groups affected by the decision.³⁵⁵ ‘Real participatory structures’, according to Young, require real interaction with actual people with their differences – geographical, ethnic, gender and so on – so that there is genuine rather than token representation of distinct voices.³⁵⁶ Disability method seeks just that; it seeks ‘parity of participation’³⁵⁷ between enabled people and disabled people. It necessarily rejects formal equality in favour of substantive equality for the reason that formal equality is not dialogic and is woefully insufficient to ensure participatory parity. Formal equality has a propensity to universalise particular privileged experiences and standards and exclude from its universe social groups that are different from, or are labelled different by, dominant social groups. These arguments are developed more fully in the next chapter.

Our history as society where disablism has been entrenched means we start with a world that is ‘incomplete’ and ‘biased’.³⁵⁸ We start with a universe where

³⁵⁴ Young (note 153 above) 116.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

³⁵⁷ I have borrowed this phrase from Nancy Fraser’s conception of social justice: Fraser *Justice Interruptus* (note 35 above); Fraser ‘Rethinking Recognition’ (note 33 above) 115.

³⁵⁸ Here I draw, by way of analogy, from Christine Littleton’s feminist analysis of patriarchal domination: where, in a commentary on equality, she says: ‘A history of almost exclusive male occupation of dominant cultural discourse has left us with more than incompleteness and bias. It has also created as self-referencing system by which those identified as “male” are more highly valued than those identified as “female” even when they appear to have little or nothing to do with either biological sex’: Littleton ‘Reconstructing Sexual Equality’ (note 47 above) 1280.

physical and mental impairment are devalued and ableist norms are the natural self-referencing system. Unless we are vigilant, the law insidiously transforms these dominant bodily norms into a reality.³⁵⁹ Disability method is part of that vigilance. And, as argued, naming is part of the transformative goal of disability method. If a seismic change about the way we conceive disability is what is required, then the naming of disability should be treated as an important adjunct for engendering a transformative discourse. When renaming is done by disabled people themselves, especially, it is not only a form of self-empowerment, but also an insurgency as it seeks to dislodge disability from its construction as intrinsic impairment to instate an aspired and different reality. To say that a person is a *disabled person* is also to say that we live in a society where the person has been *disabled* by society through *disablism*. Therefore, as part of realising equality and restitution, the person must necessarily be *enabled*. Accommodating disabled people in a manner that is costless to them is a way of re-envisioning and reconstructing the universe of equality.

This is ultimately a rights-based discourse. Notwithstanding the limitations of law in effecting major social change, it would be an anomaly at South Africa's finest hour of constitutionalism to dismiss a rights discourse as fostering false consciousness. As part of a conscious rather than blind faith in rights discourse, the study is advancing a transformative vantage point for interpreting the equality and non-discrimination rights of disabled people under the South African Constitution. As part of advocacy, I am, therefore, mindful of the

³⁵⁹ Here I draw from extrajudicial observations made by Justice Claire L'Heureux-Dubé of the Supreme Court of Canada where, in a commentary on equality, she says: '...domination always appears natural to those who possess it, and the law insidiously transforms the fact of domination into a legal right. Inequality permeates some of our most cherished and long-standing laws and institutions. Our obligation, therefore, is to reconsider our assumptions, re-examine our institutions, and re-visit our laws, always keeping in mind the reality experienced by those whom 'nature' did not place in a dominant position': C L'Heureux-Dubé 'Making a Difference: The Pursuit of Equality and a Compassionate Justice' (1997) 13 *South African Journal on Human Rights* 335 at 338.

advantage of invoking a method that could have a reasonable prospect of achieving plausibility within the discourse of the Constitution. I have conceived disability method as a more socially grounded way of focusing on equality needs of disabled people rather than a disembodied substitute for the approach that the Constitutional Court has developed for transacting equality. Disability method is steeped in the inclusive values that underpin the Constitution as I shall argue in the next chapter. While disability method seeks to guide as well as constrain the choices open to the constitutional adjudicator, it concomitantly does not necessarily seek to expunge, for example, the *Harksen v Lane* test³⁶⁰ that the Constitutional Court has developed as an inclusive interpretive modality for determining unfair discrimination. Rather, disability method seeks to sharpen as well as expand the Court's interpretive methods and to situate those methods in a heterogeneous public sphere. Disability method seeks to add to the existing repertoire of techniques so that equality norms and standards are specifically responsive to the substantive equality claims of disabled people. The idea is not simply to project the social model or feminist model on the equality clause of the Constitution with a view to securing deserts that are partial towards disabled people only. On the contrary, I seek to argue for the virtue of disability method as method that facilitates the transformative design of the Constitution, including transformative equality not just for disabled people but for all marginalised social groups.

³⁶⁰ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489. The *Harksen v Lane* test for determining unfair discrimination will be discussed in Chapter 4 § 6.1 of this study.

CHAPTER 4

EQUALITY, COMPARATIVISM AND THE HETEROGENEOUS PUBLIC SPHERE

The traditional public realm of universal citizenship has operated to exclude persons associated with the body and feeling - especially women, Blacks, American Indians and Jews. Many contemporary theorists of participatory democracy retain the idea of a civic republic in which citizens leave behind their particularity and differences. Because such a universalist ideal continues to threaten the exclusion of some, the meaning of "public" should be transformed to exhibit the positivity of group differences, passion and play ¹

1 INTRODUCTION

Comparing and contrasting formal equality with substantive equality is a juristic technique for searching for a more responsive type of equality for disabled people. This chapter employs comparativism in two senses that are complimentary. First and foremost, it employs comparativism in a philosophical sense to mean comparing and contrasting the moral compasses of formal equality and substantive equality respectively with a view to revealing the capacities of each type of equality to be responsive to the equality aspirations of disabled people, and more immediately, to disability method. Secondly, the chapter employs comparativism in a more conventional sense to draw similarities and distinctions between the South African substantive equality approach and the equality approaches of Canada and the United States.

¹ IM Young *Justice and the Politics of Difference* (1990) 97.

It serves well to highlight that the focus of this chapter is more on revealing the overarching philosophical architecture or construction of equality and the social and moral assumptions that underpin formal equality and substantive equality approaches to equality and non-discrimination rather than specifically analysing the minutiae of disability anti-discrimination law as that is the subject of Chapter 5 and Chapter 6. The rationale for such a focus is that, unless we are conversant with the moral assumptions underpinning a particular architecture of equality, we cannot proceed to a stage where we can decipher the potential value and utility of a given comparator to South African jurisprudence and its application in the workplace. A focus on the moral content of equality is also germane not least because, as I argue in this chapter, the concept of equality from which the norm of non-discrimination derives its sustenance, is not only an eminently malleable concept, but is also historically situated. Whilst equality appeals to universal values, and has a universalising effect or potential, its concrete form as well as realisation are often closely tied to unique national identities and philosophical predilections.

Historically, the philosophy underpinning equality has always been open to promoting substantively different moral values. Some equality values are the product of abstract universalism that stems from a discourse that reflects societal power configurations that protect the vested interests of the politically and economically powerful majorities or minorities. Equality values and norms that seek to protect dominant and powerful majorities or minorities are inevitably anti-egalitarian and necessarily disadvantage or exclude historically marginalised groups. Other equality values are the product of a critique of abstract universalism, have an inclusive goal as their impulse, and envisage or aspire towards a heterogeneous equality universe in which historically marginalised and subaltern groups imagine equality on no less egalitarian and

democratic premises than their historically dominant counterparts. The arguments in the previous chapter, and in particular, the arguments for disability method, were ultimately arguments for a heterogeneous equality universe.

In Chapter 1, it was suggested that the gap in the development of South African disability jurisprudence could be filled partly by gleaning from foreign laws, especially those that have a longer history of intersecting with equality generally, and disability-related discrimination in particular.² It was also submitted in Chapter 1 that comparative equality jurisprudence opens the possibility of learning from the experiences of other jurisdictions providing, of course, the ‘dangers of shallow comparativism’ are heeded as the Constitutional Court has warned.³ Comparative law can allow South Africa to illuminate and expand upon its own understanding of equality and non-discrimination by drawing lessons from analogous foreign jurisprudence.⁴ But as Henk Botha has argued, even where the comparators are different and, therefore, cannot yield analogous lessons, comparative jurisprudence can, nonetheless, enhance our understanding about what is unique about our own indigenous laws.⁵ In its legal form, comparativism can alert us to what should be avoided either because it is not comparable, or because it is apt to restrict the scope of imperatives under the South African Constitution and, thus, impoverish the legitimate expansive equality claims of disabled people.

² Chapter 1 § 5.3 of this study.

³ *Ibid*; *NK v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 35 per O’Regan J; See also *Bernstein & Others v Bester & Others* NO 1996 (2) SA 751 (CC) para 133; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 26; *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) para 29.

⁴ Chapter 1 § 5.3 of this study.

⁵ *Ibid*; H Botha ‘Comparative Law and Constitutional Adjudication: A South African Perspective’ (2007) *Jahrbuch Des Öffentlichen Rechts Der Gegenwart* 569-598; VC Curran ‘Dealing in Difference: Comparative Law’s Potential for Broadening Legal Perspectives’ (1998) 46 *American Journal of Comparative Law* 657 at 660.

Against the backdrop of disability method as interpretive method, I argue that South African equality jurisprudence, which aspires towards egalitarianism and, indeed, professes an unambiguous commitment towards transformative equality, should guard against importing into domestic disability jurisprudence comparative equality paradigms that are formed from formal equality and would serve to impoverish rather than enrich, and worse still, restrict rather than expand, its own equality paradigms. When compared with most other jurisdictions, the South African approach to equality and non-discrimination offers, or has the potential to offer, much more than a mere enlightened approach. It offers much more than what formal equality that is tied to traditional liberalism can offer. South Africa's equality paradigm, as was argued in Chapter 2, is an historically anchored approach. It draws its impulse from the crucible of apartheid. The South African Constitution supports not just a progressive approach, but more significantly, a transformative substantive approach to equality which has egalitarian features that are amenable to disability method responsiveness. Even on a global league table of progressive equality paradigms, in contemporary times, South African equality jurisprudence represents one of the most expansive types of jurisprudence for those who are committed to the idea of equality as substantive equality and as something that implies much more than formal equality.

In respect of comparative law, I shall argue that the formal equality approaches that largely, though not exclusively, characterise the equality approach of the United States renders this jurisdiction, for the most part, useful but only in a negative sense, that is, as an example of an equality and non-discrimination route that South Africa should seek to avoid rather than emulate, as it is philosophically not on the same egalitarian plane as the country's commitment to substantive equality as a value and a right. For this reason, the equality jurisprudence of the United States is least positioned to be responsive to

disability method. Put differently, it is South Africa which is in the ascendancy of embracing transformative equality rather than the United States notwithstanding that South Africa is a latecomer to protecting equality in general and non-discrimination in disability in particular. Canada is different, however.

Canada provides South Africa with complimentary lessons for framing a type of substantive equality that can be rendered responsive to disability method. Loot Pretorius has aptly observed that Canadian equality jurisprudence provides more than a mere chance comparator for South African equality jurisprudence.⁶ Not only does the constitutional jurisprudence of the South African Constitutional Court and the Canadian Supreme Court share a similar commitment to substantive equality, but also, notwithstanding some minor differences, their respective jurisprudence have developed substantively broadly similar methodological approaches to determining unfair discrimination, not least in its departure from formal equality and embrace of substantive equality as evidenced especially on the emphasis on context and impact of the alleged discrimination on the complainant in the determination of unfair discrimination.⁷ Furthermore, both jurisdictions have integrated human dignity into the determination of equality. For these reasons, it is submitted that Canadian equality jurisprudence is a compelling comparator for South Africa in terms of drawing analogous lessons.

In seemingly advocating shielding South African equality jurisprudence from invasion by the restrictive equality waters of the United States, I simultaneously enter two main caveats. Firstly, South African equality jurisprudence is not without its own significant shortcomings. From time to time, South African equality jurisprudence has been hostage to internal contradictions. In this

⁶ JL Pretorius 'R v Kapp: A Model for South African Affirmative Action Jurisprudence?' (2009) 126 *South African Law Journal* 398.

⁷ *Ibid.*

connection, it will be submitted that though the Constitutional Court has claimed substantive equality as *the* paradigm of equality that is enjoined by the Constitution's equality clause, the Court has not always been faithful to a consistent commitment to, and application of, its own understanding of substantive equality. Not surprisingly, the Constitutional Court has opened itself to well deserved charges of inconsistency as well as legal formalism that are at odds with the transformative trajectory of substantive equality as equality that recognises a more holistic universe of equality and seeks to remedy structural conditions that create and perpetuate systemic inequalities among disadvantaged and marginalised groups in society.⁸ In this connection, the chapter will select, for analysis, two cases that have come before the Constitutional Court, namely, *President of the Republic of South Africa v Hugo*,⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice*,¹⁰ as case studies for understanding the South African Constitutional Court's approach to substantive equality as well as appraising its commitment to substantive equality on its own terms and through the disability method.¹¹

⁸ S Jagwanth & C Murray 'Ten Years of Transformation: How Has Gender Equality in South Africa Fared?' (2002) 14 *Canadian Journal of Women & Law* 255; D Meyerson 'Does the Constitutional Court of South Africa Take Rights Seriously? The Case of *S v Jordan*' (2004) *Acta Academica* 138; S Jagwanth 'Expanding Equality' in C Murray & M O'Sullivan (eds) *Advancing Women's Rights* (2005) 131-148; E Bonthuys 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 *Canadian Journal of Women and Law* 1; C Albertyn (2007) 23 'Substantive Equality and Transformation in South Africa' *South African Journal on Human Rights* 253; R Robson 'Sexual Democracy' (2007) 23 *South African Journal on Human Rights* 409; C Albertyn 'Constitutional Equality in South Africa' in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75-96; RJ Cook & S Cusack *Gender Stereotyping: Transnational Legal Perspectives* (2010) 49-50, 53-54, 67-68, 116-117, 125-126.

⁹ *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC).

¹⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

¹¹ Though the two cases that I have selected are sufficient for serving my discourse, they are by no means the only cases that have the capacity to illustrate consistency as well as inconsistency in the application of substantive equality on the part of the Constitutional Court. In terms of illustrating inconsistency, especially, there are also other illustrative cases such as *Jordan v The State* 2002 (6) SA 642 (CC); and *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) which I also comment upon in § 6.2 below as part of a broader commentary on *President of the Republic of South Africa v Hugo* (note 9 above).

By way of a second caveat, I argue that whilst the Constitutional Court has applied substantive equality to vindicate political or cultural recognition, the jurisprudence on substantive equality and economic recognition has yet to crystallise so as to nail the Constitutional Court's colours to the mast. The cases in which the Constitutional Court has adjudicated on equality have, on the whole, been about social or political exclusion as exemplified especially by the Court's now well established jurisprudence on recognition of equality in sexual orientation and same-sex relationships across a whole range of social spheres. Though claims for economic inclusion have reached the Constitutional Court, nevertheless, the Court has yet to develop and muster the level of sophisticated or elaborate exegesis of substantive equality that it has commanded when adjudicating claims for social or political inclusion.

The chapter otherwise concedes that in the final analysis, the idea of equality, whether it be formal or substantive, egalitarian or anti-egalitarian, is inherently partial. In his analysis of the secular basis for equality, the moral philosopher, Robert Veatch, makes the point that equality claims, however well argued, are ultimately about starting from moral suppositions, presumptions, or intuitions.¹² It is never possible to adduce decisive proof for equality as a normative value.¹³ Very much like religion, equality 'dogmatics' are in essence an expression of subjective faith in a particular vision of a just society and an attempt to understand and expound equality so as to render it a coherent doctrine.¹⁴ Like dogmatics of the Christian Church, equality dogmatics science is less about constructing a definitive case for a given notion of equality as *the* universally

¹² RM Veatch *The Foundations of Justice* (1986) 89.

¹³ *Ibid.*

¹⁴ *Ibid* 89-90; Writing about dogmatics in the Christian Church, Karl Barth, the existential theologian, argued eloquently that, even to the faithful, Christian dogmatics science, at its best, could never be an undertaking of supreme wisdom and final art for the reason that it does not fall from Heaven but is, instead, reflected upon by mortals in an attempt to understand, expound, and mould it into a coherent doctrine: K Barth *Dogmatics in Outline* (1949) 9-14.

morally correct notion or the only absolutely correct notion.¹⁵ Instead, equality dogmatics are more about responding to the impulse of subjectivity and not the pursuit or fulfilment of an unassailable truth.

In a pluralistic universe, consensus as to how we comprehend equality cannot be guaranteed, nor can they be a last word on the architecture of equality. This is not to say, of course, that all that equality advocates need do is assert a given type of equality, express abiding faith in it, and then expect to be absolved from having to justify their own vision of equality. Rather, it is to highlight the subjective nature of equality. In the temporal world, and more specifically, in a democratic society, we ought to accept that we have a moral duty to justify our subjective visions so that, as a normative ethic, equality can be situated within the matrix of a broader coherent doctrine of democratic ethics. This is the approach that, for example, John Rawls adopts when laying the building blocs of his *Theory of Justice*.¹⁶ At the same time as conceding that there is no necessary truth in any theory of justice, Rawls is conscious of the indispensability of constructing a theory of justice that is *coherent* and thus can be justified. Alluding to the hermeneutics of the 'original position' he says:

In arriving at the favoured interpretation of the initial situation there is no point at which an appeal is made to self-evidence in the traditional sense either of general conceptions or particular convictions. I do not claim for the principles of justice proposed that they are necessary truths or derivable from some truths. A conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.¹⁷

¹⁵ Barth *ibid.*

¹⁶ J Rawls *Theory of Justice* (1971).

¹⁷ *Ibid* 21. On Rawls' 'original position' see note 148 below.

We saw in Chapter 2 that apartheid proclaimed its own vision of equality and, indeed, devoted intellectual energy to justifying its normative ethics, including appropriating theological justifications. But it was a conception of equality that was hard to sell for the reason that it was built exclusively on an archive of racial essences. It could only appeal to disciples and congregants of racial essences and white supremacy. From the standpoint of those committed to ethics of a common humanity and democracy, though apartheid had coherence, it was a coherence that was not just deeply antidemocratic and illiberal, but ruthlessly oppressive. Thus, it is not just coherence which matters when constructing equality, but also the political wellspring from which equality draws its moral sustenance.

In this chapter, I choose to call the broader doctrine of ethics within which equality must be situated *participatory democracy*. I do not use the term 'participatory democracy' in a narrow sense to mean political participation. Instead, I use the term as a convenient shorthand for a domain of imaginary citizenship in which, ultimately, there is full political as well as economic recognition for disabled people as an outcome of a substantive type of equality that is borne of a dialogue between disabled people and enabled people. I conceive participatory democracy in this chapter not as something new but as a logical extension or application of disability method. It will be recalled that disability method seeks to erase patterns of dominance and subordination in favour of admitting a plurality of interactive voices, each reflecting equal power relations so as to create space for an egalitarian playing field.¹⁸ The ultimate goal of disability method is inclusive citizenship in which political and economic recognition are universally enjoyed. Where a prevailing norm or standard does not accommodate disabled people, there is a duty to reform it in a manner that is costless to disabled people so as to achieve an inclusive egalitarian society.¹⁹

¹⁸ Chapter 3 § 2.2 of this study.

¹⁹ *Ibid.*

Disability method implicates distributive justice in that redistribution of resources is an integral as well as central part of discharging the duty to accommodate difference.

In arguing for substantive equality as dialogic equality that is encapsulated in disability method, I further draw support from Iris Young's seminal work, *Justice and the Politics of Difference*, and her robust critique of the 'Ideal of Impartiality and the Civic Public'.²⁰ Taking my cue from Young, I argue for inclusive heterogeneous equality as the operative equality template for transacting disablism in an imagined participatory democracy in which respect for pluralism and the eradication of dominance and subordination among social groups are foundational ethics.

The chapter begins by acknowledging the pervasive as well as elusive nature of the idea and ideal of equality.

2 IDEA AND IDEAL OF EQUALITY

Equality has a universal pull and occupies a pride of place in our intuitive notions of a good and just society regardless of whether we are liberals, socialists or communists.²¹ It is not just democratic regimes that purport to champion equality in their body politic and jurisprudence. Even decidedly oppressive regimes opportunistically attest commitment to the respect for equality and find it more worthwhile to breach or manipulate its imperatives rather than deny altogether its existential moral force. Nicola Lacey's observation that in the post-Second World War era the endemic inception of a 'human rights culture' across

²⁰ Young (note 1 above). Though Iris Young specifically makes this thesis the subject of Chapter 4 in *Justice and the Politics of Difference*, it is, nonetheless, a thesis that is developed throughout her book.

²¹ DM Beatty *The Ultimate Rule of Law* (2004) 76.

the globe has seen even oppressive regimes attempting to bring themselves within the fold of a human rights discourse, highlights the pervasive rhetorical power of equality.²² Political movements and advocates seeking to reform what they experience as unjust political systems, often make equality their rallying cry. Even if an oppressive regime is recalcitrant and unyielding, the demand for equality at least leaves the regime with a moral case to answer and generates sympathy not only within but also from outside the borders of a given jurisdiction. The struggle against apartheid is a case in point. Anti-apartheidism was championed not only from within, but also beyond the borders of South Africa. Many countries as well as many international civil society organisations and protest movements took strong anti-apartheid positions against the South African government, including the imposition or the galvanisation of economic sanctions.

Preambles and substantive provisions of United Nations²³ as well as regional human rights instruments²⁴ routinely recite equality and non-discrimination as

²² N Lacey 'Feminist Legal Theory and the Rights of Women' in K Knop (ed) *Gender and Human Rights* (2004)13-55 at 35.

²³ For example, the preamble to the Universal Declaration of Human Rights begins by recognising that the 'the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world: UN General Assembly Resolution 217A (III) of 10 December 1948. This recognition is reiterated in the preambles to International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. On substantive provisions of UN instruments that address equality and non-discrimination, see for example: article 1 and 2 of the Universal Declaration of Human Rights; articles 2 and 3 of the International Covenant on Civil and Political Rights, 999 UNTS 171, adopted on 16 December 1976, and entered into force on 23 March 1976; and article 3 of the International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, adopted on 16 December 1966, and entered into force on 3 January 1976. There are also UN instruments with a specific equality and non-discrimination focus for particular social groups and arch examples are: the International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (GA Res 2106A), adopted on 21 December 1965, and entered into force on 4 January 1969; the Convention on the Elimination of All Forms of Discrimination against Women, UNGA Res 34/180, UN Doc A/34/46, adopted on 18 December 1979, and entered into force on 3 September 1981; and the Convention on the Rights of Persons with Disabilities.

²⁴ On regional instruments see for example, article 14 of the European Convention on Human Rights, adopted on 4 November 1950, and entered into force on 3 September 1953; article 2 of the American Declaration on the Rights and Duties of Man, OAS Res XXX, adopted by the Ninth

an inherent right, thus, purportedly affirming a universal truth about equality as a foundational human value and right. On non-discrimination, article 2 of the Universal Declaration of Human Rights set the pace for subsequent UN and regional human rights instruments when it said that: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. It was submitted in Chapter 1 that equality as a value and a right is the motif of the Convention on the Rights of Persons with Disabilities (the Convention).²⁵ Promoting, protecting and ensuring 'the full and equal enjoyment of all human rights and fundamental freedoms is a chief purpose of the Convention.²⁶ The preponderance of domestic constitutions recite guarantees of the right to equality in the substantive provisions of their Bills of Rights. And yet it is trite that as an idea and an ideal, equality is both complex and deeply contested.²⁷ Unless, the underpinning values animating a given conception of equality are candidly articulated, equality can become a vacuous slogan and one that attracts derision and scepticism rather than serious attention.

Philosophers concede that giving value and content to equality is a difficult exercise on account of its protean character.²⁸ Equally, judges concede that

International Conference of American States (1948); article 24 of the American Convention of Human Rights 1114 UNTS 123, on 22 November 1969, and entered into force on 19 July 1978; and article 2 of the African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3/Rev.5, adopted on 27 June 1981, and entered into force on 21 October 1986; and article 2 of the Arab Charter on Human Rights, reprinted in C Heyns (ed) *Human Rights Law in Africa*, Vol. 1 (2004) 733. The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, AHG/Res.240 (XXXI), adopted on 11 July 2003, and entered into force on 25 November 2005, exemplifies a regional human rights instrument with a specific focus on the achievement of equality for a specific social group – women.

²⁵ Chapter 1 § 3.2.

²⁶ Article 1 of the Convention.

²⁷ DM Douglas & N Davis 'Introduction' in N Davis & DM Davis (eds) *Redefining Equality* (1998) 3-12, 4; R Dworkin *Sovereign Virtue. The Theory and Practice of Equality* (2000) 2; I Currie & J de Waal *The Bill of Rights Handbook* (2007) 230.

²⁸ Veatch (note 12 above) 119;

equality is a challenging concept. In *Andrews v Law Society of British Columbia*, for instance, Justice William MacIntyre of the Supreme Court of Canada described equality as a concept lacking in precision, and far more elusive than any of the other rights in the Canadian Charter of Rights and Fundamental Freedoms.²⁹ In one sense, the elusiveness of equality lies in the difficulties of explicating its substantive meaning.³⁰ Not only are there numerous concepts of equality, but also, as Eva Kittay has argued, buried in each evocation of equality are conflicting suppositions of equality.³¹ Whilst philosophical notions and ideas about justice as the recognition of human dignity and the achievement of fairness, fair treatment, liberty and fraternity, solidarity, egalitarianism and parity in democratic participation variously stake out the rationale for, as well the compass of equality, as a concept, equality defies simple definitions. In another sense, the elusiveness of equality is about the manifest failure by states to honour their professed equality commitments. Regrettably, equality is often visible in the rhetoric of law only rather than in lives lived.

Equality is an age-old idea that has been evolving with time and place ever since it made its entry into philosophical discourse. Conceptually, equality has always remained fluid and malleable. Elizabeth Spelman reminds us that Aristotle, the Greek philosopher, to whom credit for the normative principle of republican formal equality is routinely ascribed in philosophical and legal discourses, was 'inegalitarian to the core'.³² Aristotle's universe of equality did not include

²⁹ *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143; D Gibson *The Law of the Charter: Equality Rights* (1990) 59.

³⁰ EF Kittay *Love's Labour: Essays on Women, Equality, and Dependency* (1999) 7; MLA Fineman 'Equality: Still Elusive After All These Years' in J Grossman & L McClain (eds) *Social Citizenship and Gender* (2009) 11. Available at <http://ssrn.com/abstract=14249661> (accessed on 24 March 2010); K Nielsen *Equality and Liberty: A Defence of Radical Egalitarianism* (1985) 5.

³¹ Kittay (note 30 above) 7.

³² EV Spelman *Inessential Woman* (1988) 9.

women or slaves.³³ He advanced an elitist notion of equality and felt no compunction whatsoever in justifying the domination of men over women, intellectuals over menial workers, and masters over slaves. Indeed, Aristotle regarded inequality as a necessary good in 'well-ordered' society.³⁴ The philosophical justification for inequality was that although all human beings have human essence, different classes possess different *essences* with some, such as men and masters, commanding greater essences than others and, thus, entitled to dominant societal positions in accordance with the hierarchy of human essences.³⁵

Thus, proclamations of equality as a universal truth have always been conceived simultaneously with proclivities towards, and stratagems for, excluding certain inferiorised social groups from equal citizenship. Critiquing formal equality, Ann Scales puts it in another way when she says that the objective standard in equality left the Greeks plenty of room for immoral discretion.³⁶ In Aristotle's time, rationality which was deemed not to reside in women,³⁷ and freedom which was deemed not to reside in slaves³⁸ were used as tenable justifications for denying equality to women and slaves. The basis of a good and well ordered-society was for human beings to perform their different roles and assume their different positions in society according to the stations prescribed for them by nature.³⁹ It was, for example, the role of women to bear children, to be companions to their husbands and to provide menial services within the

³³ Aristotle *Nomachean Ethics*; Aristotle *The Politics of Aristotle* (Trans. E Baker) (1946) Book III; Spelman (note 32 above) 9-11, 37-56. Spelman observes that Plato held the same view of an inegalitarian concept of equality.

³⁴ Spelman (note 32 above) 9, 37-50.

³⁵ *Ibid* 10-11, 37-50.

³⁶ AC Scales 'The Emergence of Feminist Jurisprudence' (1986) 95 *Yale Law Journal* 1373, 1379.

³⁷ Spelman (note 32 above) 9-11, 37-50; S Fredman *Women and the Law* (1997) 1-38; S Fredman *Discrimination Law* (2002) 3, 5; Aristotle *Nomachean Ethics* (note 33 above); Aristotle *Politics* (note 33 above).

³⁸ Spelman (note 32 above) 9-11, 37-50.

³⁹ *Ibid* 39.

household. In contrast, it was the role of men as the natural rulers to function outside the household, in the *polis*.⁴⁰ In this way, Greek philosophers chose a standard that, through conscious design, assured the survival of male and master privileges while perpetuating female and slave subordination.⁴¹

Though seventeenth-century philosophers improved on their earlier Greek counterparts in democratising equality and raising its republican status, nonetheless, they also expounded equality in a manner that preserved its durable capacity and proclivity towards yielding a self-serving partial equality universe. In this connection, for example, John Locke's *Second Treatise* that was written in 1690, espoused equality that was mired in double-standards. On the one hand, it sought to advance the idea of equality as a universal good that is anti-feudal and opposed to hierarchies of caste and birth, but is, instead, derived from natural law and social contract theory. On the other hand, the *Second Treatise* barely departed from earlier Athenian wisdom when it saw no contradiction in juxtaposing a recognition that 'men are by nature all free, equal and independent' with a recognition of the rightness or even necessity of the servitude of wives, children, servants and slaves.⁴² Locke's conception of equality carried a thick residue of monarchical and feudal powers. It could only be coherent if equality was to be understood primarily as an ethic for emancipating males from a feudal yoke and ringfencing despotic space for the patriarchal heads of households of his time. Furthermore, Lockean equality was a vision of equality that could only be coherent in a political sphere which countenances a sharp divide between the public and private realms with state authority confined to the public realm, leaving the private realm untouched and in the capable

⁴⁰ *Ibid.*

⁴¹ Scales (note 36 above) 1379.

⁴² J Locke *Two Treatises of Government*. P Laslett (ed) (1988) §§ 86 and 95; Fredman *Discrimination Law* (note 37 above) 5.

hands of the patriarchs.⁴³ Lockean equality is an indication of how seventeenth century liberal thought was incapable of comprehending the extent to which law and its institutions determine differentially the rights and privileges of family members empowering some - males - and disabling some - women and children, especially.⁴⁴

Eighteenth-century emergent institutions of democracy constructed their own justifications for privileged citizenship. For instance, it is trite to observe that the founding fathers of the Constitution of the United States had an acutely expedient relationship with equality. Whilst the American War of Independence was fought on the principles of Enlightenment that rejected class and religious privilege, the founding fathers' vision of a republic that professes commitment to liberty and equality was conceived simultaneously with implicit notions of exclusionary citizenship 'from within' and the preservation of patriarchal privileges.⁴⁵ The constitution that was framed in 1787 did not envisage including slaves, free blacks, debtors, paupers, Indians and women in the domain of equal constitutional rights bearers.⁴⁶ Though the American Constitution expressed fundamental rights in universal terms, it was a document primarily intended to serve the interests of white propertied adult males.⁴⁷ The eighteenth- and nineteenth-century institutions of colonialism similarly expediently evaded equality by treating the colonial peoples as human but of a lower order and, therefore, entitled to less equality as just deserts. As will be observed later in this chapter, racial segregation in the American South was for a long time

⁴³ G Binnion 'Human Rights: A Feminist Perspective' (1995) 17 *Human Rights Quarterly* 509, 516.

⁴⁴ MC Nussbaum *Sex and Social Justice* (1999) 63-64.

⁴⁵ Young (note 1 above) 156-157. On the notion of exclusionary citizenship from within, see Chapter 2 § 4.3 of this study; R Lister 'Citizenship: Towards a Feminist Synthesis' (1997) 57 *Feminist Review* 28.

⁴⁶ T Marshall 'Reflections on the Bicentennial of the United States Constitution (1987) 101 *Harvard Law Review* 1; RB Ginsburg & B Flagg 'Some Reflections on the Feminist Legal Thought of the 1970s' *University of Chicago Legal Forum* 9 at 12.

⁴⁷ *Ibid.*

countenanced under the Supreme Court of the United States on this basis notwithstanding the adoption of 14th Amendment. In the twentieth-century, apartheid followed suit in its zealous application of a racially anchored doctrine of hierarchical citizenship for the four races that comprised its racial universe. Far from being irrational, immorality aside, apartheid had internal coherence to the extent that it treated likes alike using the notion of different races with different racial essences in much the same way Plato's and Aristotle's notions of different human essences and commensurately different citizenships as just deserts.

My ultimate point is that, unless challenged, disablism, likewise, easily provides its own coherent justifications for evading equality when it marks disabled bodies as incapable, dependent and incomplete.⁴⁸ The moral behind the malleability of equality is that, in the final analysis, equality is a social construct.⁴⁹ Its language and content cannot be divorced from the distribution of power in a given society, and in fact are shaped by it. As feminists, especially, have shown, the language and content of equality can be deconstructed as well as reconstructed as a means of challenging partial equality and recreating inclusive equality.⁵⁰ Indeed, the disability method that was developed in Chapter 3 is precisely predicated on the premise that equality is a social construct and that we can inscribe our own equality subjective realities to contest and alter a disadvantaging and marginalising status quo.

Writing about equality under the American Constitution, Kenneth Karst has described it as something that is more in the nature of a culturally specific

⁴⁸ R Garland-Thomson 'Integrating Disability, Transforming Feminist Theory' (2002) 14 *National Women's Studies Association Journal* 1 at 7.

⁴⁹ P Cain 'Feminism and the Limits of Equality' (1990) 24 *Georgia Law Review* 803 at 805.

⁵⁰ CA Littleton, 'Reconstructing Sexual Equality' (1987) 75 *California Law Review* 1279 at 1283. See the discussion in Chapter 3 of this study generally.

evolving ideal rather than a philosopher's universe.⁵¹ The commitment to democratic values, including respect for equality, among a given community of nations does not necessarily translate into a homogeneous approach to equality as a juridical concept primarily because a community is made up of heterogeneous social groups that wield different levels of socio-economic power and have competing notions of what constitutes a good society. Juridical formulations of equality are commensurately tied to subjective ethical and political values and goals. Sandra Fredman aptly captures the contested nature of equality as well as heterogeneous visions of a good society when she says:

The choice between different conceptions of equality is not one of logic but of values or policy. Equality could aim to achieve the redistributive goal of alleviating disadvantage, the liberal goal of treating all with equal concern and respect, the neo-liberal goal of market or contractual equality and the political goal of access to decision-making processes.⁵²

Judy Fudge makes a similar observation when she says that equality can be informed by the values of traditional liberalism or it can be infused with social democratic values,⁵³ and that the openness and generality of equality as a concept leave courts with a duty to identify as well as elaborate upon the values that equality is intended to serve.⁵⁴ Thus, equality has no inherent or intrinsic meaning.⁵⁵ On its own, equality has no organic centre save a normative duty to serve a yet to be articulated or concretised conception of justice. Ultimately, it is not the proclamation of equality that is key to unravelling its genus, normative

⁵¹ KL Karst 'Why Equality Matters' (1983) 17 *Georgia Law Review* 245 at 249.

⁵² Fredman *Discrimination Law* (note 37 above) 2.

⁵³ J Fudge 'Substantive Equality, the Supreme Court of Canada, and the Limits of Distribution' (2007) 23 *South African Journal on Human Rights* 235 at 237.

⁵⁴ *Ibid.*

⁵⁵ CLC L'Heureux-Dubé 'Making a Difference: The Pursuit of Equality and Compassionate Justice' (1997) 13 *South African Journal on Human Rights* 335, 336; WB Griffith 'Equality and Egalitarianism: Framing the Contemporary Debate' (1994) 7 *Canadian Journal of Law and Jurisprudence* 5 at 7.

imperatives and precatory goals, but rather its substantive content. In this sense, Peter Westen, in a much cited article, was correct in describing equality as an empty concept.⁵⁶ In the end, we need a standard for determining which persons are alike and what amounts to treating them alike.⁵⁷ For equality not to become a cliché and a term of unspecified genus, the standard that we choose cannot be happenstance but must, in turn, be derived from a particular conception of justice that is morally tenable.⁵⁸ To borrow from Fredman's typology of equalities, ultimately, we may need to ask whether the person in whom equality resides is entitled to equality as mere formal equality, or something more such as equality of opportunity or equality of results.⁵⁹ In the alternative, we may, as I seek to argue, be candidly politically committed and peg our equality conception on a particular democratic vision. That way, we are able to render equality not just more concrete, more intelligible and more susceptible to democratic deliberation and participation, but also more transparent and accountable.

3 EQUALITY TYPOLOGIES

Whilst equality can be described as comprised of multiple varieties, at a high level of generality and as a juridical principle, the notion of equality is amenable to being subsumed under two broad types – formal equality and substantive equality. In her book, *Discrimination Law*, Sandra Fredman describes formal equality as the most basic concept of equality – the Aristotelian model – which

⁵⁶ P Westen 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537. Note, though, that Westen's thesis in this article went much further than merely arguing that equality needs substantive content as to develop a thesis that equality has no moral force as a principle and that it should be removed from philosophical and legal discourses. I am implicitly distancing myself from this extended thesis. For a critique of Westen's article see: K Greenvalt 'How Empty is the Idea of Equality?' (1983) 83 *Columbia Law Review* 1166; Karst 'Why Equality Matters' (note 49 above) 247-250; Gibson (note 29 above) 59-62.

⁵⁷ Karst 'Why Equality Matters' (note 51 above) 247.

⁵⁸ L'Heureux-Dubé (note 55 above) 345.

⁵⁹ Fredman *Discrimination Law* (note 37 above) 7-16.

says that likes should be treated alike.⁶⁰ The counterpoint to formal equality, according to Fredman, is substantive equality, meaning, at the very least, equality that goes beyond a mere demand for consistent treatment of likes as to require equality of result or outcomes.⁶¹ According to Shelagh Day and Gwen Brodsky, the distinction between formal and substantive equality is a distinction between equality that only looks at facial treatment (formal equality) and equality that is concerned about eliminating conditions that create inequality (substantive equality).⁶²

Writing about the constitutional framework for equality in employment in South Africa, Loot Pretorius echoes Fredman's typology of equalities in categorising equality in terms of formal equality meaning equality as similar treatment and substantive equality as something more than formal equality as to import equality that takes into account underlying patterns of structural inequality.⁶³ Cathi Albertyn puts a gloss on South African aspirations as well as orientation towards substantive equality when she says that the call for substantive equality has come from particular understandings of inequality that are rooted in political, social and economic cleavages between social groups.⁶⁴ Substantive equality is an orientation that sees inequality not as an arbitrary or fortuitous occurrence, but as something that is systemic and embedded in the socio-economic fabric of society socio-economically.⁶⁵ The corollary is that eradicating

⁶⁰ *Ibid* 6.

⁶¹ *Ibid* 11-16.

⁶² S Day & G Brodsky 'The Duty to Accommodate: Who Will Benefit?' (1996) 75 *Canadian Bar Review* 433, 461.

⁶³ JL Pretorius 'Constitutional Framework for Equality in Employment' in JL Pretorius *et al* *Employment Equity Law* (2001) § 2.1; See also: Greenwalt (note 54 above) 1168; Gibson (note 29 above) 62; L'Heureux-Dube (note 55 above) 338; Day & Brodsky (note 62 above) 461; MA Fineman 'Equality Across Legal Cultures: The Role of International Human Rights' (2004) 27 *Thomas Jefferson Law Review* 1, 3-4; Currie & de Waal (note 27 above) 232-233.

⁶⁴ Albertyn 'Substantive Equality and Transformative Equality in South Africa' (note 8 above) 253.

⁶⁵ *Ibid* 254.

inequality in a substantive way necessarily entails a commitment to achieve substantive equality through eradication of systemic inequalities.

Thus, it is around formal and substantive notions of equality that contemporary discourses of equality as well as the rationale of antidiscrimination law can be explained. Though both formal equality and substantive equality share a common goal in that both are concerned with securing justice by treating every person as of equal moral worth,⁶⁶ nonetheless, on closer analysis, they represent manifestly competing visions of equality and, ultimately, competing notions of justice and democracy.

4 FORMAL EQUALITY

4.1 An Overview of Main Shortcomings

The philosophical coherence of formal equality as the Aristotelian model of equality stems from the premises that 'justice considers that persons who are equal should have assigned to them equal things'⁶⁷ and that 'there is no inequality when unequals are treated in proportion to the inequality existing between them'.⁶⁸ Simply put, the injunction is that persons who are alike should be treated alike, and persons who are not alike should be treated differently in proportion to their unlikeness. The focus of formal equality is procedural fairness, that is, a focus on treating people who are in the same position – *similarly situated* – in the same way – *similar treatment*. Formal equality, according to Pretorius, is predicated on the liberal notion of similarity of treatment in which

⁶⁶ Veatch (note 12 above) 122.

⁶⁷ Aristotle *Politics* (note 31 above) Book III, xii, 1282b.

⁶⁸ *Ibid* Book V, i, 1301a.

equality is seen as neutrality, as symmetrical application of law irrespective of group status and group-related conditions.⁶⁹

In a universe where difference at a social group level does not exist and structural inequality does not subsist, formal equality would not only be a virtuous paradigm of equality, but would also be the ideal paradigm. The virtues of formal equality can be gleaned from Richard Wasserstrom's imaginary universe of equality in which race or biological sex would be the equivalent of eye colour.⁷⁰ In such a universe, equality would do what most people would like it to do, that is, affirm the equal worth of every human being by treating them in an identical manner. In the process, formal equality would, as Wasserstrom argues, succeed in commanding three main virtues. Firstly, it would put paid to arguments for treating people differently on the basis of distinctions such as race, sex and physical impairment that have been used to construct exclusionary criteria and limit equality citizenship. Secondly, formal equality's insistence on procedural fairness would command respect through the application of consistent treatment and the absence of any inherent contradictions. Whenever race, sex or disability is raised as a reason for treating a person differently, the claim would be automatically treated with suspicion. In this way, formal equality would appease our intuitive sense of justice as meaning treating people according to the same standard without exception to any personal characteristic. Thirdly, in the absence of structural or subsisting inequality, formal equality would free the potential of every person as arbitrary distinctions no longer function as enclosing barriers or headwinds. In short, formal equality, in a procedural sense, meets the ethic of participatory democracy in which there are no institutions or positions that are closed to anyone on the basis of individual characteristics and there are no dominant or subordinate groups.

⁶⁹ Pretorius 'Constitutional Framework for Equality in Employment' (note 63 above) § 2.1.

⁷⁰ RA Wasserstrom 'On Racism and Sexism' in B Boxill (ed) *Race and Racism* (2001) 307-343.

There is little doubt that formal equality has been a galvanising force in the emancipatory struggles of historically marginalised groups and, indeed, it would be a mistake to underestimate its reach. When Nelson Mandela said in his defence at the *Rivonia Trial* that, 'Above all we want equal rights because without them our disabilities will be permanent', it appears that he was appealing to formal equality, that is, treating black people in the exactly the same way as white people were treated and implicating the moral wrongness of treating black people differently.⁷¹ Likewise, in his *I Have a Dream* speech,⁷² Martin Luther King alluded to a colour blind society, and by implication, to the ideal of formal equality as the normative equality ethic in a democracy where 'all men are created equal'. In the speech King expressed a hope and a conviction that one day his four children would 'not be judged by the colour of their skin but by the content of their character' so that phenotype becomes an irrelevant and arbitrary consideration when conceiving equal citizenship in a democracy. The movements that secured suffrage for women in Britain and the United States that are associated with 'first wave' feminism based their arguments on formal equality.⁷³ Thus, historically formal equality has been a formidable equality modality for combating attitudinal or invidious discrimination.⁷⁴ It has played an august role in inspiring, sustaining and vindicating liberation struggles,

⁷¹ The speech is reproduced in N Mandela *No Easy Walk to Freedom* (1990) 188; Chapter 2 footnote 336.

⁷² ML King 'I have a Dream' <<http://www.americanrhetoric.com/speeches/mlkihaveadream.htm>> (Accessed March 24, 2008). The points I am making here in connection with Mandela and King's speeches and the formal equality model they implicitly appeal to have been prompted by Charles Lawrence's article 'Race, Multiculturalism, and the Jurisprudence of Transformation' (1995) 47 *Stanford Law Review* 819. Lawrence's thesis is that part of the flaw with the Supreme Court's 14th Amendment jurisprudence is that it has been largely developed around a formal equality premise. His point about King's speech is that like the jurisprudence itself, it is both a product as well as a reinforcement of the American model of equality as formal equality: Lawrence *ibid.* 823.

⁷³ Lacey (note 22 above) 13-14, 19-20.

⁷⁴ S Fredman 'Facing the Future: Substantive Equality under the Spotlight' in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 15-40 at 17.

including struggles against colonialism, sexism and racism. In the end, formal equality stands not so much as an ineffective principle of equality but as an incomplete principle.

Though the notion of equality as fairness that resides in treating people the same is intuitively morally compelling, it is a totalising principle that seems woefully inadequate in its responsiveness to varied lived experiences. Fredman provides a useful summary of the main shortcomings with the formal equality approach.⁷⁵ She cites four main deficiencies. Firstly, there is the lack of clear moral criteria for ascribing similarity and difference. To make her point, Fredman asks the question: 'When can it be said that a particular distinction is a legitimate or illegitimate distinction for treating people differently?'⁷⁶ A mere assertion of equality does not provide internally coherent and sufficiently determinative criteria for resolving concrete disputes. The narrative on apartheid in Chapter 2 shows all too clearly that, on its own terms, apartheid cohered with a notion of formal equality. Trapped in its own self-serving paradigm of racialised and racist reasoning, apartheid purported to use formal equality to give legitimacy to the rationality of treating 'different races' differently in proportion to their respective racial essences. Once you proved your 'race' you had an unassailable claim to be treated the same as members of your racial caste. Thus, formal equality would not be out of place in a society that allocates hierarchical citizenship on the basis of characteristics such as gender, race, sexual orientation and so on for as long as the criterion for hierarchy was applied consistently and an attempt, however unsatisfactory and self-interested, was made by the dominant social group to explain the moral cogency of the hierarchy. Ultimately, the crucial consideration for Aristotelian equality is proportional equality according to proportional

⁷⁵ Fredman *Discrimination Law* (note 37 above) 7; See also Fredman 'Facing the Future' (note 74 above) 17-18.

⁷⁶ Fredman *Discrimination Law* (note 37 above) 7; Gibson (note 29 above) 58-59; PW Hogg *Constitutional Law of Canada* (2007) 616.

deserts. In this way, as Scales reminded us earlier, formal equality comes to us already endowed with sufficient discretion for drawing immoral distinctions.⁷⁷ Kai Nielsen's robust rejection of formal equality is based, in part, on the ready susceptibility of formal equality to comfortable compatibility with vastly different moral theories, including 'radically inegalitarian' theories.⁷⁸

The second problem is that treating people the same comes with no substantive underpinning value.⁷⁹ Formal equality, Fredman argues, is agnostic about substantive outcomes.⁸⁰ A statute that criminalises only gay sexuality, for example, could, if impugned for unfair discrimination, be remedied simply by also criminalising lesbian sexuality, thus equalising the two parties at a lower level of equality, that is 'levelling down' (that is treating everyone equally badly) instead of 'levelling up'.⁸¹ The third deficiency is not so much the need for a comparator but an inappropriate comparator.⁸² Differential or discriminatory treatment under the formal equality approach will only become apparent by drawing a comparison with a person (the comparator) who is similarly situated but has been treated more favourably. But of course, as Fredman argues, the comparator comes with an assumption that he or she is the norm.⁸³ The comparator is a universal and universalising subject. In the universe of formal equality, equality resides in the elimination of differences.⁸⁴ Formal equality's comparator reinforces dominant norms and standards.⁸⁵ The outcome is a

⁷⁷ Scales (note 36 above) 1379.

⁷⁸ Nielsen *Equality and Liberty* (note 30 above) 4.

⁷⁹ Fredman *Discrimination Law* (note 37 above) 8.

⁸⁰ Fredman 'Facing the Future' (note 74 above) 17.

⁸¹ Fredman *Discrimination Law* (note 37 above) 8. As an illustration of levelling down, Fredman cites the decision of the Supreme Court of the United States in *Palmer v Thompson* (1971) 403 US 217, 91 S Ct 1940 in which a city succeeded in meeting constitutional equality by closing down all its swimming pools instead of opening formerly segregated pools to blacks: Fredman *Discrimination Law* *ibid* 8.

⁸² Fredman *Discrimination Law* (note 37 above) 5.

⁸³ Fredman *ibid* 9.

⁸⁴ S Fredman 'Equality: A New Generation' (2001) *Acta Juridica* 214, 231.

⁸⁵ Albertyn 'Substantive Equality and Transformation in South Africa' (note 8 above) 259.

'conformist' or 'assimilationist' type equality that is abstracted from a universal individual and is disembodied from, rather than allied to, the lived experience of the individual who has experienced the discrimination or the social group that has experienced structural inequality.⁸⁶ However well intended, the assimilationist ideal in formal equality is an oppressive ideal which demands conformity. It does not secure equality justice for groups that have equality aspirations that cannot be served by assimilation and erasure of subjective identities.⁸⁷ The standard chosen for applying formal equality has no necessary neutrality.

The fourth deficiency is that formal equality is indifferent to the socio-economic status of the particular person for particular groups. It does not envisage the imperative of treating people that are different *differently* in order to achieve equality.⁸⁸ Formal equality is oblivious to the fact that difference is tied to social hierarchies and that social groups that occupy subordinate positions suffer disadvantage and exclusion.⁸⁹ In its desire to universalise, it also assumes that persons and groups are in the same socio-economic positions. Formal equality does not see the need to impose a positive duty to treat people 'unequally', as it were, in order to achieve a level playing field of equal outcomes. Thus, the issue of positive or affirmative state measures to raise the unequal to a more equal position simply does not arise as it is outside the premises of formal equality.⁹⁰ The duty to dismantle an already constituted socio-economic world that self-serves the norm also remains outside the dominant discourse of formal equality. Equally, formal equality does not have a substantive redistributive goal except

⁸⁶ Freeman *Discrimination Law* (note 37 above) 9-10; Pretorius 'Constitutional Framework for Equality in Employment' (note 63 above) § 2.1; Hogg *Constitutional Law of Canada* (note 76 above) 617-618.

⁸⁷ Young (note 1 above) 158.

⁸⁸ Freeman *Discrimination Law* (note 37 above) 10.

⁸⁹ Albertyn 'Substantive Equality and Transformation in South Africa' (note 8 above) 260.

⁹⁰ MLA Fineman 'Equality: Still Elusive After All These Years' (note 30 above).

redistribution which is incidental, in a procedural sense, to treating people in the same way.

Economic deprivation and unequal access to socio-economic goods, especially, stand in the way of equal participation for some social groups. Left unattended, such deprivation is a manifestation of economic injustice, and perforce, inequality. The disabled body provides formal equality with sufficient room for immoral discretion and the construction of an exclusionary standard of equality that leaves economic injustice unchallenged.

4.2 Formal Equality and the Disabled Body: The Paradigm of a Monologic Discourse

From the discussion in the preceding section, a question to ask is whether formal equality serves or has the capacity to serve disabled people? The answer is yes, but with severe limitations. Formal equality can, at best, only promise a highly attenuated and highly circumscribed citizenship for disabled people. Indeed, the limitations of a purely formal approach for constructing antidiscrimination law specifically to protect disabled people are precisely what animate the search for a more inclusive equality paradigm in this study. When contrasted with equality that is envisaged by disability method, formal equality yields a type of equality manifestly lacking in holistic responsiveness. When projected on disability, all that would seem to be required to achieve equality for disabled people under a formal equality paradigm would be prohibition of invidious discrimination and stereotyping so that disabled people are considered not on the basis of their bodies, but by the 'content of their character', so to speak.⁹¹ Formal equality conceives inequality as the outcome of conscious arbitrary or irrational action of

⁹¹ Here I am evoking Martin Luther King's demand that I alluded to earlier: Note 72 above.

a few individuals. It does not see a fundamentally unequal society beyond errant individuals that, from time to time, are given to act arbitrarily or irrationally or with animus towards disabled people. Formal equality's primary objective is to prevent future stigmatisation and stereotyping, but without attending to any underpinning structural inequality or questioning the representativeness of the bodily merits of the enabled comparator.

When conceived with a view to only combating irrationality or animus, formal equality does not have the conceptual capacity to see political, social and economic arrangements that are fostered and entrenched by the socio-economic systems and power relations that assume that ablebodiedness is the norm and provide the greater explanation for the exclusion of disabled people from the workplace and other spheres than invidious discrimination. Once invidious discrimination is prohibited, by one fell swoop, formal equality purports to secure the full equality domain of disabled people. In the workplace, for example, as Chapter 6 will elaborate, what formal equality is inherently incapable of fathoming, are the equality needs of disabled people who are excluded because of the manner in which the workplace or the job is structured does not accommodate their disablement such that they are compelled to perform the job in precisely the same manner as their enabled counterparts. A person who can only perform the job after adjustments have been made when her or his enabled counterpart does not require adjustments, is according to a formal equality paradigm unsuited for the job. For formal equality, the manner in which the job and the workplace have been structured is a given and a starting point. What remains is for the worker to command merit for the job. If a disabled person can perform the job in the same way as his or her enabled counterpart, then the disabled person brings himself or herself under the protection guaranteed by formal equality.

By using an *enabled* person as the comparator, formal equality is assured to fail disabled people. A comparator who is an enabled person is a person who is conveniently located in a socio-economic environment that has been constructed on the assumption that everyone is able-bodied. Such a comparator is necessarily an *assimilated* comparator and is least positioned to point us towards an inclusive equality universe. Formal equality denies human diversity by ignoring the physical and mental impairments of the disabled person and, instead, focusing only on bodily features that resemble, or more accurately ought to resemble, the comparator when constructing its own likeness paradigm. It follows, therefore, that formal equality is optimally functional when the disabled person possesses, as much as possible, the bodily constitution and functional capacities of the enabled person. Conversely, formal equality is maximally dysfunctional when the disabled person is far removed from the abstracted somatic merits of the enabled person. This is not an injustice peculiar to disabled people, but also obtains for other groups whose equality needs can only be met by requiring recognition of difference and departure from the abstract universality of formal equality. Indeed, radical and cultural feminist criticisms of liberal feminism are precisely about the injustice of requiring women to be first like men before they can be admitted to the universe of equality.⁹² In a word, formal equality perpetuates bodily apartheid by requiring a disabled person to possess the bodily 'merits' of her or his enabled counterpart. It creates, as was argued in Chapter 2 in respect of apartheid, master dichotomies. Formal equality creates a binary category of humanity once it is committed to using a 'normal' human being as the norm. In this way, like apartheid which implicated dark bodies as not meriting equal treatment as they were a departure from 'white', formal equality implicates the disabled body as the faultline.

⁹² See discussion in Chapter 4 § 3 of this study.

Because, apart from outlawing invidious discrimination and stereotyping, formal equality does not have the conceptual wherewithal to deal with difference, it is inherently incapable of conceiving a rationale for adapting the socio-economic environment to *enable* disabled people as part of discharging legitimate antidiscrimination duties. By evading the duty to accommodate social groups that are different, formal equality functions as a potent instrument for creating and sustaining legal formalism that gives validity to the legitimacy of 'container' jurisprudence that Henk Botha criticised.⁹³ Container jurisprudence constructs objective reality out of the logic of reductionism, separation and exclusiveness. It sees difference from the norm as 'absolute otherness' or deviance, which connotes exclusion that ineluctably signals that the state is freed from any equality obligations.⁹⁴ To be substantively admitted into the universe of formal equality, the disabled body would first have to be rehabilitated to make it as whole as possible like its comparator or it should, by feat of sheer determination, overcome disablement. If rehabilitation or determination succeeds in replacing the deficit in the disabled body, then the once disabled body can now claim entitlement to equality. With this logic of bodily effacement as a precondition to equality, formal equality is part of an oppressive and insidious legal discourse on assimilation that characterised the early years of United Nations involvement in disability.

From the discussion in Chapter 1,⁹⁵ it will be recalled that, initially, United Nations instruments on disability conceived the disabled body as individual impairment and saw their mission primarily in terms of welfare provision and rehabilitation. The disabled body was treated as the locus of disablement. The

⁹³ H Botha 'Metaphoric Reasoning and Transformative Constitutionalism' (Part 1) (2002) 4 *TSAR* 612; H Botha 'Metaphoric Reasoning and Transformative Constitutionalism' (Part 2) (2003) 1 *TSAR* 612, 623-627; See discussion in Chapter 2 § 3.2 of this study.

⁹⁴ Fredman 'Equality: A New Generation' (note 84 above) 230.

⁹⁵ Chapter 1 § 2.2.1.

deficit lay in the body and not the socio-economic environment. Equality salvation was contingent upon the disabled body being rendered as whole as possible or being made to function and perform in the same manner as the enabled body so that it could fit into the existing environment, including the workplace. When narrowly conceived, rehabilitation, as Henri-Jacques Stiker has argued, is a trope for a culture and a society that is rigid rather than pluralist and only reckons with the disabled body by dissolving it into a greater single social whole.⁹⁶ Part of the reason why the Convention on the Rights of Persons with Disabilities is momentous is precisely because it marks a paradigm shift from disability as welfare and rehabilitation to disability as the recognition of a more substantive form of equality in difference that requires society to accommodate disabled people rather than require them to fit into a disabling socio-economic environment. In this way, the Convention parts with the ideology of formal equality.

Another related but major limitation of formal equality for the disabled body is that the enabled comparator is a product of a competitive society and is alienated from the ethos of interdependence and vulnerability. Formal equality prizes autonomy and individual merit and does not see the need to question the exclusionary ideology that underpins the parameters of that autonomy and merit. Liberalism that is politically positioned on the right, especially, such as that espoused by Robert Nozick, finds purchase in equality as a right only on condition that it is completely purged of the language of imposed solidarity or communitarianism and is situated in a society that is made up of 'individuals with separate lives' and has ecumenical reverence for private property⁹⁷ Contesting the notion of equality of opportunity, Nozick has said:

⁹⁶ H Stiker *A History of Disability* (1999) 128.

⁹⁷ R Nozick *Anarchy, State, and Utopia* (1974) 33; R West 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1-2. I use the term 'neoliberalism' not to imply all liberalism, but only to denote liberalism that has a manifestly conservative orientation and rigidly aligns itself

The major objection to speaking of everyone's having a right *to* various things such as equality of opportunity, life, and so on, and enforcing this right, is that "rights" require a substructure of things and materials and actions' and *other* people may have rights and entitlements over these. No one has a right to something whose realization requires certain uses of things and activities other people have rights and entitlements over. Other people's rights and entitlements to particular things... and how they choose to exercise these rights and entitlements fix the external environment of any given individual and the means that will be available to him. If his goal requires the use of means which other have rights over, he must enlist their voluntary co-operation.⁹⁸

Neoliberalism is an instance of rugged and rapacious individualism. It is liberalism that requires equality to be highly respectful of private property to the point of serving mainly as an adjunct rather than an obstacle to a non-redistributive competitive free market.⁹⁹ According to this perspective, a moral distinction must be drawn between what is *unjust* and what is *unfortunate*.¹⁰⁰ Being disabled through a natural lottery, albeit an unfortunate event, is a naturally occurring inequality but it is not unjust, so the argument goes. While disability is something that *can* be deserving of charitable assistance, it is not

with formal equality finding substantive equality unacceptable, including the idea of taking into account the social context of the person claiming equality and whether they have suffered from or belong to a group that has suffered marginalization and disadvantage as part of redressing inequality. Otherwise, I accept Martha Nussbaum's critique of feminism that in its critique of liberalism, it has tended to paint liberalism with the same broad brush missing the sub-categories. It has tended to essentialise liberalism treating it as a monolithic concept or single position and failing to concede that liberalism represents a 'family of positions' some of which are conservative and restrictive of equality and some of which are more egalitarian and are necessarily expansive of equality: Nussbaum *Sex and Social Justice* (note 44 above) 57-59. I concede, as Nussbaum has argued, that there are liberal positions that are consistent with communitarianism and solidarity, not least the liberalism espoused by John Rawls. As one illustration, Nussbaum makes the observation that human agents in Rawls' 'original position' are united by the goal of building a community on terms that are mutually beneficial: Nussbaum *Sex and Social Justice* *ibid* 60; Rawls (note 16) above.

⁹⁸ Nozick (note 97 above) 238. Emphasis original. Footnote omitted.

⁹⁹ J Nedelsky 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7, 15-18.

¹⁰⁰ Veatch (note 12 above) 105.

tantamount to vesting the disabled person with a moral claim for redress on the part of society.¹⁰¹ What neoliberalism seems least prepared to concede is that using the might of enablement to require disabled people to first assimilate before they can partake of a competitive free market is a form of unbridled dominance that rules out the idea and ideal of an egalitarian dialogue in a democracy.

Formal equality fits in with a neoliberal vision of society to the extent that it is constructed around a myth of citizens who are able and autonomous rather than disabled and dependant. Formal equality's citizens are, according to Martha Fineman, citizens whose capabilities and self-sufficiency cut across all individuals and remain constant throughout a lifetime.¹⁰² But, of course, neoliberal values of autonomy are ultimately built around a particular social construct. One of the contributions made by cultural feminist thought has been to question the assumptions underpinning liberal values of autonomy as well as to inscribe into the way we think about equality and how we can factor into equality an existential reality of human beings as interdependent rather than independent. Feminists have sought not so much to dispense with autonomy, but to reconceptualise autonomy so that it is not disembodied from greater society and is, instead, situated in human relationships.¹⁰³

Jennifer Nedelsky concedes that the idea of autonomy has not only stood at the centre of liberal theory,¹⁰⁴ but has also been the prime source from which

¹⁰¹ Nozick (note 97 above) 236-238; HT Engelhardt 'Health Care Allocation: A Response to the Unjust, the Unfortunate and the Undesirable' in EE Shelp (ed) *Justice and Health Care* (1981) 127-137 at 123; Veatch (note 12 above) 105.

¹⁰² Fineman 'Equality: Still Elusive After All These Years' (note 30 above) 13; Nedelsky 'Reconceiving Autonomy' (note 99 above).

¹⁰³ Nedelsky 'Reconceiving Autonomy' (note 99 above); J Nedelsky 'Reconceiving Rights as Relationships' (1994) 1 *Review of Constitutional Studies* 1.

¹⁰⁴ Nedelsky 'Reconceiving Autonomy' (note 99 above) 7.

feminism has derived its language of freedom and self-determination.¹⁰⁵ Feminism's most powerful impulse is the idea of women as free agents who are liberated from domineering patriarchal social institutions and values and are in a position to shape their own lives through making choices that are respected on the basis that women are persons of equal human worth and dignity and are entitled to autonomy.¹⁰⁶ The language of autonomy has not only been an essential if not the essential ingredient in advocacy for feminist freedom, but has also been an essential part of advocacy for other types of freedoms including freedom from disablement. The idea, then, is not to jettison autonomy and render it dispensable, but to hybridise it so that it coheres not only with the value of self-determination, but also communitarianism which recognises the inherent social nature of human beings.¹⁰⁷ Nedelsky's ultimate argument is for a feminism that reconceives autonomy; a feminism that is able to retain autonomy whilst at the same time rejecting its atomistic character that was spawned by traditional liberalism. In this way, feminism can become more socially grounded so that it not only manages to diagnose gender inequality and patriarchal dominance but is also able to imagine an equality universe in which lived experience, including the reality of interdependence, is an integral part of the framework for constructing responsive equality. Reconceiving autonomy allows feminism not to duplicate the errors of patriarchy in its quest for a liberated self.

Whether it is in the workplace or elsewhere, the moral for disability is that it would be a mistake to stake the claim for equality as wholly centred around autonomy as that would deny the reality of interdependence as part of the constitutiveness of social relations for disabled people. It will be recalled that Anita Silvers has warned about the dangers of an incomplete or even oppressive disability theory that valorizes traits that are traditionally associated with

¹⁰⁵ *Ibid* 9.

¹⁰⁶ *Ibid* 8; Nussbaum *Sex and Social Justice* (note 44 above) 56-58.

¹⁰⁷ Nedelsky 'Reconceiving Autonomy' (note 99 above) 8-9.

enabled people.¹⁰⁸ Writing from a feminist perspective, Silvers has argued that such a theory cannot hold an emancipatory prospect for disabled women who do not and, indeed, cannot have bodily traits that approximate enabled women.¹⁰⁹ Likewise, Barbara Hillyer has argued for a more integrated feminist theory of disability that factors in the reality of dependence and does not construct equality on the premise of woman as independent and productive beings as that would ineluctably disenfranchise many disabled women.¹¹⁰

The individualistic nature of formal equality with its premium on autonomy is a product of a patriarchal value system. It is a value system that militates against the legitimacy of recognising the material needs of disabled people to the extent that it promotes separation from, and not connection with, a sense of community and precludes reading into equality dependence, vulnerability and care as components of equality.¹¹¹ If it can be accepted as Rosemarie Garland-Thomson argues, that the body is not a static or stable anchor of identity that is congruent both in space and in the milieu of corporeal and cultural expectations, but is, instead, unstable, and constantly interacting with history and the environment,¹¹² then it ought to be possible for our equality universe to prize care and assistance as a philosophical and juridical duty in the same way as it does autonomy and choice depending on the particularities and needs of the body. A body whose variations or transformations are contradicted or erased by the socio-economic environment both in a physical sense as well as in an attitudinal sense is a body that is lacking in justice. The disabled body ought to be entitled to stake its

¹⁰⁸ A Silvers 'Reprising Women's Disability: Feminist Identity Strategy and Disability Rights' (1998) 13 *Berkeley Women's Law Journal* 81 at 86; Chapter 3 § 5 of this study.

¹⁰⁹ Silvers *ibid* 84-85.

¹¹⁰ B Hillyer *Feminism and Disability* (1993) 9-19; Chapter 3 § 5 of this study.

¹¹¹ Fineman 'Equality: Still Elusive After All These Years' (note 30 above) 14; Garland-Thomson (note 48 above) 16-17; Kittay (note 30 above) 4; Hillyer (note 110 above); A Silvers 'Reconciling Equality to Difference: Caring (f)or Justice for People with Disabilities' (1995) 10 *Hypatia* 30; West 'Jurisprudence and Gender' (note 97 above) 1; Nedelsky 'Reconceiving Autonomy' (note 99 above) 12.

¹¹² Garland-Thomson (note 48 above) 20.

equality claim not on an assimilated body, but on *realignment* of the physical and attitudinal environments so that they are at equilibrium with body's self. To refuse to concede this claim is to refuse recognition not only in a cultural or political sense, but also in an economic sense.¹¹³ Ultimately, denial of political and economic recognition is a ringing refutation of the heterogeneous public sphere. Such denial leaves us with the status quo of an oligopolic somatic sphere that is highly partial and deeply lacking in empathy and solidarity.

While disability demands recognition of human interdependence, solidarity and the imperatives of the 'ethics of care' that have been propounded by cultural feminists,¹¹⁴ formal equality maintains studied masculine isolation as it is built around an individualistic approach that is animated by the primacy of protecting the myth of autonomy and choice of individuals.¹¹⁵ Formal equality's individualistic and patriarchal orientation inherently veers us towards accepting the legitimacy of an equality universe in which the burden of responding to the dependency and vulnerability of those that do not resemble the norm, is not transacted through the language of entitlement but non-justiciable charitable benevolence. Not surprisingly, the philosophy of socio-economic rights and the idea that such rights have something to do with respect for equality and human dignity, are alien to formal equality. In a bid to treat a person based only on individual characteristics or merits and not on the basis of stereotypes attributed to the person's social group, formal equality leaves, according to Martha Fineman, no theoretical room for the recognition of dependency and vulnerability.¹¹⁶ When autonomy is conceived as self-government above all else, it valorises self-sufficiency and independence and frowns upon dependence

¹¹³ N Fraser *Justice Interruptus* (1997) 13-16.

¹¹⁴ Garland-Thomson (note 48 above) 16-17, 21. In Chapter 3, I elaborated on the 'ethics of care', especially ethics of care expounded and popularised by Carol Gilligan and others.

¹¹⁵ West (*Jurisprudence and Gender*) (note 97 above).

¹¹⁶ Fineman 'Equality: Still Elusive After All These Years' (note 30 above) 14.

and vulnerability. Such normative self-sufficiency or even normative ethical egoism,¹¹⁷ requires the state to refrain from interfering with self-rule rather than come to the aid of those that are marginalised or excluded by day-to-day socio-economic arrangements that serve the imperatives of free enterprise.

Fineman has argued that positing autonomy in purely masculine individualistic terms promotes 'crude autonomy'.¹¹⁸ It is an autonomy that mythologises merit and refuses to see that existing socio-economic arrangements benefit others and yet burden some, and that coming to the aid of those that are burdened is a concomitant part of the duty of substantively realising autonomy in a democracy. Equally significant, it is an autonomy that sees the world only in homogenous terms and refuses to acknowledge that human frailty is part of the human condition and that normative ethics requires us to factor in dependence and vulnerability when we construct our equality universe so that we become alive rather than oblivious to the illusion of treating free market notions of merit as ahistorical and context free.¹¹⁹

In the final analysis, therefore, for disabled people, formal equality's neutral standard is anything but neutral. While it is capable of remedying individual instances of discrimination, it is woefully inadequate to respond to structural inequality. In a Foucauldian sense, is an equality that stigmatises and disciplines the disabled body by reaffirming the superiority of the enabled body and objectifying the disabled body.¹²⁰ It is apt to create an illusion of equality to the extent that it is preoccupied with merit consideration. In this way, formal

¹¹⁷ I use the terms 'normative self-sufficiency' and 'normative ethical egoism' to denote a universe in which it is ethical to satisfy ones desires independently of the desires of others: Nussbaum *Sex and Social Justice* (note 44 above) 59-61.

¹¹⁸ Fineman 'Equality: Still Elusive After All These Years' (note 30 above) 14.

¹¹⁹ *Ibid* 16.

¹²⁰ P Berg 'Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law' (2000) 18 *Yale Law & Policy Review* 1, 5.

equality can serve to depoliticise the disabled body whilst in practice denying it equality.¹²¹ By not recognising claims to socio-economic resources as part of distributive justice, formal equality marginalises and disadvantages the disabled body. It resolves the challenge of treating all human beings equally by denying diversity and heterogeneity, seeing, instead, only dichotomous bodily forms and selecting only 'normal' traits and making them matter for the purposes of constructing sameness.¹²² What formal equality does not do is explain how certain traits have come to matter and be privileged.¹²³ Merely claiming that a certain standard is the norm, and thus, the comparator, hides more than it explains why the standard ought to be the norm in the first place. The establishment of a hegemony that is made to appear natural and inevitable is formal equality's *modus operandi* as well as its destination.

Martha Minow invites us to question and ultimately reject the neutrality of formal equality when she argues that difference is relational and not intrinsic and that there is no single, superior vantage point from which to judge *ex-cathedra* questions of difference.¹²⁴ The moral of Minow's propositions is that a more inclusive and dialogic type of equality is needed as formal equality cannot be neutral to the extent that it is steeped in historical patterns that are embedded in the status quo.¹²⁵ And furthermore, Minow is saying that formal equality is inherently conformist and oligopolic, and that it cannot rest on the assumption that everyone has democratic purchase in the claimed 'norm'.¹²⁶

If the right to equality is intended to be the outcome of democratic dialogue rather than a culturally imperialistic expression of the dominant societal

¹²¹ *Ibid* 43-45.

¹²² M Minow *Making All the Difference: Inclusion, Exclusion, and American Law* (1990) 50-51.

¹²³ *Ibid*.

¹²⁴ *Ibid* 52-53; Chapter 2 § 3.4 of this study.

¹²⁵ *Minow ibid* 53.

¹²⁶ *Ibid*.

interests, then its content and reach ought to be responsive to the broadest range of equality interests, including the interests of those that are different from the norm. Formal equality uses difference to contract rather than expand the domain of citizenship for disabled people and is necessarily undemocratic. Indeed, it was argued in Chapter 2 that an important lesson to take from the crucible of apartheid is that, like racial differentiation that is pegged around the distribution of socio-economic resources, we should also be able to see, and condemn the construction of difference that is pegged around ablebodiedness and is used to give dominance and legitimacy to a master position, including priority over access to resources.

4.3 Formal Equality as the Antithesis of Dialogic Equality: Insights from Iris Young's Critique of the Ideal of Impartiality and the Civic Public

In this section, as part of advancing the normative cogency of disability method as legal method for achieving substantive equality that is transformative, and as part of critiquing existing equality jurisprudence, I appropriate a heterogeneous form of democracy as a paradigm for normative substantive equality. I develop my ideas essentially from Iris Young's critique of the 'Ideal of Impartiality and the Civic Public'.¹²⁷

A constituent element of disability method is that in order to pass constitutional and moral muster, the impugned norm must be dialogic in the sense of admitting a plurality of interactive voices each with its own unique but equal claim.¹²⁸ The point of departure is that rights are dialogical; they are based on a right to give voice and be listened to within a context where others have

¹²⁷ Young (note 1 above) 96-121.

¹²⁸ Chapter 3 § 2.1 of this study.

precisely the same right. Rights cannot be held independently of the rights of others as that would give unbridled vent to normative self-sufficiency as apartheid did for the whites. To manage conflict, rights are, therefore mediated in a manner that respects the human dignity and worth of all individuals and groups and does not privilege any group. Thus, there is no dominant or subordinate voice in the imagined equality universe as the ultimate objective is to dissolve rather than cement power relations (but not subjective identities) so as to enable every citizen and not just some citizens. By requiring dialogism, disability method rejects false universalism and necessarily dissolves a hierarchical 'norm' of human experience, supplanting it with variety of egalitarian human experiences as are voiced by the participants. The import for disabled people is that they can no longer be measured in relation to an abstracted somatic ideal, but by their unique lived experience and the fact that they have an equal claim to equality and *enablement*. Formal equality, which is replete with false universalism, is, of course, a negation of dialogism in a democratic sphere.

In linking equality with democracy, and seeing equality as a constituent element of the dogmatics of democratic ethics and a democratic universe, I do not claim to be making a novel contribution not least because the link between equality and democracy, though not always made in jurisprudential discourses, is part of the staple of critical moral philosophical discourse. In any event, critical legal discourses have begun to explore the intersections between equality as a right and democracy, including discourses in the South African context. One example is Henk Botha's essay on 'Equality, Plurality and Structural Power.'¹²⁹ In this essay, Botha draws, inter alia, from Hanna Arendt's¹³⁰ idea of a plural democracy

¹²⁹ H Botha 'Equality, Plurality and Structural Power' (2009) 25 *South African Journal on Human Rights* 1.

¹³⁰ H Arendt *The Human Condition* (1958); Botha 'Equality, Plurality and Structural Power' (note 127 above) 10-11. Botha also draws from Claude Lefort's discourses on democracy and political

in order to build a case for a type of equality that is responsive to the uniqueness of every citizen and is respectful of human dignity in equal measure.¹³¹ In Arendt's universe of equality there is plurality which can only be achieved among equal citizens who each have a capacity to make new beginnings. The recognition of 'public autonomy'¹³² in this universe provides space for marginalised groups, including disabled people, to make new and unexpected beginnings.

My basic proposition is that formal equality expresses in a juridical form the ideal of impartiality as the hallmark of moral reasoning in a civic republic that Iris Young criticised as wanting in universal justice in *Justice and the Politics of Difference*.¹³³ Formal equality is precisely what disability method seeks to repudiate and transform. Formal equality's studied insistence on a universal standard that serves as the norm denies recognition of difference, including bodily difference, in a heterogeneous republic by suggesting that all moral situations should be treated the same. Iris Young has argued that such an ideal serves two principal ideological ills.¹³⁴ Firstly, it feeds on cultural imperialism by representing the particular experience and particular perspective of a privileged social group to become the norm.¹³⁵ The insistence on impartiality masks the partiality of situated assumptions that emanate from particular histories, experiences and affiliations but are cast as objective assumptions.¹³⁶ Construing as the norm and as neutral the standpoint of a dominant and privileged group in

theory: C Lefort *Democracy and Political Theory* (1988); C Lefort *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (1986). The equality idea that Botha draws from Lefort is that of an equality universe in which no particular group is dominant or subordinate. This is an outcome of a democracy which has no organic centre or single authoritative standpoint such that equality is dialogic. There is no structural power and by implication, no structural inequality: Botha 'Equality, Plurality and Structural Power' (note 129 above) 11.

¹³¹ Botha 'Equality, Plurality and Structural Power' (note 129 above) 10-16.

¹³² *Ibid* 12.

¹³³ Young (note 1 above) 96-121.

¹³⁴ *Ibid* 97

¹³⁵ *Ibid* 97.

¹³⁶ *Ibid* 115.

a stratified society is inherently oppressive. It facilitates legitimisation of decision-making by dominant social groups that wield power, thus, legitimising an undemocratic hierarchy.¹³⁷

Young's thesis is that insistence upon the ideal of impartiality is not merely a case of creating a universe in which citizenship is dispensed on identical terms, but it is also a case of hiding exclusionary citizenship behind a veil of impartiality.¹³⁸ It is a case of denying relational difference and creating, in its stead a master dichotomy; a dichotomy between the *universal* which must be included and the particular which is *oppositional* and must be excluded.¹³⁹ Ultimately, the ideal of impartiality is, according to Young, an idealist fiction that is inherently undemocratic despite its claim to neutrality because it adopts a situated rather than unsituated moral viewpoint and cannot claim to speak for all viewpoints.¹⁴⁰ What the ideal of impartiality lacks, foremost, is the legitimacy of dialogic reason that comes out of participatory democracy. It lacks public fairness and heterogeneity by not ensuring giving equal audience to a voice and an equal vote to all particular groups that are impacted upon by a given norm.¹⁴¹

Young's counterpoint to the ideal of impartiality is participatory democracy as a necessary condition for the realisation of social justice.¹⁴² The answer is not a unified civic public but a heterogeneous public sphere that does not exclude or silence some groups.¹⁴³ It is a domain in which the imperatives of effective recognition and representation of distinct voices and perspectives of the public constituent groups, not least the oppressed and disadvantaged groups, are

¹³⁷ *Ibid* 97.

¹³⁸ *Ibid* 120.

¹³⁹ *Ibid* 97, 99.

¹⁴⁰ *Ibid* 104.

¹⁴¹ *Ibid* 112, 116.

¹⁴² *Ibid* 60.

¹⁴³ *Ibid* 183.

normative values and organising principles. Furthermore, representation must be both procedural and substantive such that democratic deliberation is facilitated in a practical sense.¹⁴⁴ Lest the heterogeneous republic becomes a haven for normative anarchy and unresolvable group conflict, Young is careful to draw a distinction between ‘interest-group pluralism’ in which each interest group promotes its own agenda at the exclusion of the interests of other groups and without the need to justify its decision, and a heterogeneous public where participants deliberate and come to a decision based on principles of justice and can be called upon to justify their claim.¹⁴⁵ It is the latter and not the former that is consistent with an inclusive, considerate and caring democracy.

In arguing for a heterogeneous civic republic, Young must be understood, and, indeed, would like to be understood as parting with Rawls’ theory of justice¹⁴⁶ for the reason that ultimately, Rawls’ theory universalises an arbitrary rational agent as the person who is omniscient and chooses for all.¹⁴⁷ Though Rawls’ *original position*¹⁴⁸ and its adjunct, *the veil of ignorance*,¹⁴⁹ hold some attraction for

¹⁴⁴ *Ibid* 184.

¹⁴⁵ *Ibid* 190.

¹⁴⁶ Rawls (note 16 above).

¹⁴⁷ Young (note 1 above) 101-102; S Darwall *Impartial Reason* (1983) 231.

¹⁴⁸ Rawls (note 16 above) 17-22, 118-122, 142-150. Rawls constructs the original position as a procedural requirement and a starting point for ensuring that the principles of justice that are chosen are just. Parties in the original position have equal rights for choosing just principles. Furthermore, they command equal knowledge. Rawls constructs the ‘veil of ignorance’ to equalise their knowledge. The rationale for equalising procedural rights and knowledge is to create conditions that ‘represent equality between human beings as moral persons and as creatures having a conception of their good and capable of a sense of justice’: Rawls *ibid* 19. Rawls’ ultimate point is that people in the original position will choose two principles – the liberty principle (comprises basic civil liberties) and the difference principle (centres on equality as the cardinal goal) – as their foundational principles for a just political order that is consonant with maximal promotion of conceptions of own good: Rawls *ibid* 60-65, 75-83.

¹⁴⁹ *Ibid* 136-142. The ‘veil of ignorance’ is a critical component of Rawls’ methodology and is a distinct counterpoint to Young’s requirement that dialogical engagement entails engagement in which subjectivity is not erased. The parties behind the veil of ignorance must leave their particularities behind so that they can be placed in a position – the original position – where they must decide rationally about their own welfare without knowing their own position (such as social class, material wealth and natural endowments) but knowing enough about the general facts of society. The rationale for the veil according to Rawls ‘is to nullify the specific

Young to the extent that it accommodates to some degree a plurality of selves, in the end, she sees it as monological in character. This is because in the quest to render the original position impartial, any differences among individuals in the original position are erased. In this connection, Young says:

The veil of ignorance removes any differentiating characteristics among individuals, and thus ensures that all will reason from identical assumptions and the same universal point of view. The requirement that participants in the original position be mutually disinterested precludes any of the participants from listening to others' expression of their desires and interests and being influenced by them.¹⁵⁰

The lack of recognition of a plurality of subjects who engage in dialogue renders Rawls' original position a position of impossible impartiality or even false impartiality. Young's rejection of Rawls' 'original position' contrasts with her receptiveness, albeit qualified, to Jürgen Habermas' 'communicative ethics' in moral reasoning.¹⁵¹ The attraction of Habermas' communicative ethics is that it is

contingencies which put men at odds and tempt them to exploit social and natural circumstances to their advantage': Rawls *ibid* 136. The supposition in Rawls' theoretical calculation for arriving at just principles of justice is that the original position and the veil of ignorance compel rational parties to design a society in which every individual is treated with dignity and is offered equal opportunity precisely because the chances of each party finding themselves in a position of relative privilege or relative disadvantage are equal.

¹⁵⁰ Young *ibid* 101. See also Mari Matsuda who has argued from a feminist standpoint that the abstractness in Rawls' methodology constructs a vision of socio-economic life without reference to the concrete realities of life and alternative conceptions of the nature of humankind. Matsuda is fundamentally opposed to abstraction because it has the capacity to exclude the experiences of marginalised groups. Matsuda contends that the methodology used by Rawls is 'the first step down the road of androcentric ignorance': MJ Matsuda 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16 *New Mexico Law Review* 613 at 617-619.

¹⁵¹ Young *ibid* 101; J Habermas *The Theory of Communicative Competence Volume 1: Reason and Rationalization of Society* (1983); J Habermas *The Theory of Communicative Competence Volume 2: Lifeworld and System* (1987). I say qualified because, in the end, Young argues that Habermas relies on a counterfactual that is built into an 'impartial starting point' so as to get to the end point – the universal position. This detracts from the notion of starting with a clean slate and allowing the subjects to reconstruct normative reason without a conceptual priori. According to Young, this is tantamount to appeal to a homogeneous public or at least it vacillates between a homogenous public (which is tantamount to unacceptable universalism as it may ignore the

dialogic and is predicated upon a plurality rather than homogeneity of subjects.¹⁵² Dominance and hegemony are averted by interactions under conditions of equal power. The essence of Habermas' communicative ethics as ethics of justice is that it is aimed at maximal citizenship through discursive interaction as an indispensable part of democratic political practice. Its vision is that of citizens that are citizens because they deliberate their interests openly and free of domination and oppression and with reciprocity and mutual tolerance of difference.¹⁵³ Such deliberation should necessarily involve the participation of all those that are affected by the decision so as to ensure just outcomes. In this way, Habermas' communicative ethics is a conceptual resource for imagining a universe where substantive pluralism gives rise to participatory parity and where social inequality and domination and exclusionary practices are not given expression.

The import of Young's thesis is that when thinking about the rationale for equality and antidiscrimination law, important as it is to combat invidious discrimination, there is need to search for a more democratic ethic of equality. There is need to vest equality with a more substantive content and more substantive goals that serve functions beyond merely achieving identical treatment so as to destabilise, in a fundamental way, ideologies and systems that sustain group subordination for those that are different from what dominant discourses invest with normalcy. An exclusive focus on combating animus or stereotyping means formal equality falls short of constructing inclusive equality because it is apt to simultaneously serve to maintain a status quo as it conceives

needs of a particular group) and a heterogeneous public which Young has argued for: Young (note 1 above) 7, 106-107. For Young, therefore, it is not enough that persons in the original position and under the veil of ignorance 'know about the general facts about human society', understand political affairs and principles of economic theory', and 'know the basis of social organization and the laws of human psychology': Rawls (note 16 above) 137. It is the tendency to universalize that is inherent in Rawls' theory that Young is, ultimately, opposed to.

¹⁵² Young (note 1 above) 106.

¹⁵³ Young *ibid* 33-34; A Heller *Beyond Justice* (1987) 240-241.

discrimination as the outcome of a few irrational individuals rather than a systematic phenomenon that is deeply entrenched in the socio-economic system. By maintaining the status quo, formal equality serves to reinforce and indeed legitimise underpinning socio-economic arrangements that impede the achievement of equality and secure the dominance of one group over another.

If the project of antidiscrimination is to bear meaningful fruit for social groups such as disabled people that are largely excluded by existing socio-economic arrangements and not necessarily by raw animus or stereotyping, the legitimating function of antidiscrimination law itself must be examined and critiqued for its inclusiveness. Ultimately, equality must be grounded in a participatory democratic ethic that has not so much an organic centre but dialogic essence. The next question to consider is whether substantive equality as formulated and applied by the Constitutional Court of South Africa has such a dialogic and heterogenising essence.

5 SUBSTANTIVE EQUALITY: APPROACHES OF SOUTH AFRICA, CANADA AND THE UNITED STATES

Part of the challenge with espousing substantive equality as the ideal equality is that even when there is consensus about reforming formal equality, there is no homogenous concept of substantive equality. Rather, there are types of substantive equalities. As a counterpoint to formal equality, substantive equality can be understood as a more complex type of equality that can take a number of forms that are different in substance but, nonetheless, converge on the imperative of departing from formal equality with a view to expanding the universe of equality to render it more egalitarian. Like the concept of equality itself, substantive equality defies easy definitions and is an equal conundrum to philosophers, let alone lawyers. Richard Hare perhaps summed up neatly the

challenge of conceptualising substantive equality when he said that whilst formal and 'substantial' equality may be distinguishable, there is no agreed method for moving from the former to the latter.¹⁵⁴ Subjective notions and even intuitive guesses about egalitarianism are what inform ideas and notions of substantive equality as with any other notion of equality. Kai Nielsen states the obvious when he says that equality and egalitarianism are unclear concepts.¹⁵⁵ Even among advocates of egalitarianism, it is easy to discern nuances and disagreements over the legitimate moral claims of the beneficiaries and the reach of equality. Some conceptions of substantive equality take a fairly conservative approach and follow what can be loosely described as libertarian egalitarianism as expounded by Rawls and his adherents.¹⁵⁶ Others, such as Nielson, expound a concept of substantive equality that is even more radical and more egalitarian than Rawls' conception of justice as to require equality in outcomes over and above equality of opportunities.¹⁵⁷

In this study, I concede that to try and prescribe substantive equality is a tall order. As submitted in Chapter 1, the study does not set out to come up with a dogmatic blueprint of equality.¹⁵⁸ Rather, the study is, in the final analysis, a search for a transformative interpretive methodology for establishing an inclusive universe of equality, that is, a universe that accommodates enabled people and disabled people in equal measure. To this end, without wishing to oversimplify the complex nature of substantive equality, for discursive purposes,

¹⁵⁴ RM Hare 'Justice and Equality' in LP Pojman & R Westmoreland (eds) *Equality: Selected Readings* (1997) 218-228 at 222.

¹⁵⁵ Nielsen *Equality and Liberty* (note 30 above) 5.

¹⁵⁶ Rawls (note 16 above).

¹⁵⁷ K Nielsen 'Radical Egalitarian Justice: Justice as Equality' (1979) (5) *Social Theory and Practice* 209; HA Bedau 'Radical Egalitarianism' in HA Bedau (ed) *Justice and Equality* (1971) 171-174; K Nielson 'Radical Welfare Egalitarianism' in LP Pojman & R Westmoreland (eds) *Equality: Selected Readings* (1997) 204-217; See generally Nielsen *Equality and Liberty* (note 30 above).

¹⁵⁸ Chapter 1 § 7.3 of this study.

I do not proceed, as other commentators have done,¹⁵⁹ on the analytical footing that the search for a more substantive type of equality depends, inter alia, on exploring, comparing and contrasting the reaches of the equality of opportunities approach¹⁶⁰ and the achievement of equal outcomes or results¹⁶¹ as the

¹⁵⁹ Fredman *Discrimination Law* (note 37 above) 11-15; Veatch (note 12 above) 123-129.

¹⁶⁰ Clearly, the equality of opportunity approach would be an incomplete type of equality for a heterogeneous public sphere, especially if it fails to dislodge structural inequality. Equality of opportunity is animated by a liberal notion of equality. In its simple or even simplistic form, equality of opportunity envisages levelling the playing field where the field has been rendered uneven by 'extraneous' factors. The metaphor of levelling the playing field in a race so that competitors start at the same point and can be judged on 'merit', alone is often used to explain the goal of equality of opportunity. However, the perennial and deeper conceptual challenge with the equal opportunity approach is that it is never clear as to what constitutes an equal starting point. It is never clear as to what constitutes an 'extraneous' factor that ought to be eliminated. The idea of merit is a myth if a competitor has never been given the opportunity to acquire the merit in the first place. Thus, reorganising the workplace so that a job applicant who uses a wheelchair can perform the job requirements in the same way as her or his counterparts tell us little or nothing at all about whether the job applicant has an equal opportunity to acquire the skills required for the job. The more important question is determining where equality of opportunity draws the line when levelling the playing field. As Veatch points out, the equality of opportunity approach does not clearly address the question whether need and ability are relevant factors when determining access to resources or whether there ought to be treated as extraneous factors: Veatch (note 12 above) 123-125. Another problematic with a simplistic equality of opportunity is that it assumes that a neat line can be drawn between levelling the playing field procedurally, which is the job of the equal opportunity approach and levelling the playing field substantively which is not the job of the equal opportunity approach. To focus only on procedural equality is to miss the point about structural inequality. Ultimately, as Veatch argues, equality of opportunity hides two radically different and competing conceptions of equality – on the one hand, a more restrained libertarian conception of equality focuses on procedural equal opportunity, and on the other hand, a more radical conception of equality which focuses on redistributive justice and allocation of resources and necessarily gestures towards equality of outcome: Veatch *ibid* 123-125; Fredman *Discrimination Law* (note 37 above) 14-15.

¹⁶¹ Equality of outcome or equality of results is the more radical type of equality. Conceptually, I would argue, it is relatively more unambiguous when juxtaposed with equality of opportunity. Its accent is on 'just outcomes'. The means to just outcomes require a focus on meeting needs and ensuring that equal opportunity do not mean procedural fairness but rather substantively fair equality of opportunity. Substantively fair equality of opportunity entails a type of equality that has the capacity to redress the 'bias of contingencies' such as social class, wealth, poverty, natural endowments, disablement and so on. Redistributive justice and allocation of resources at the expense of the state are unambiguously integrated in the equality of outcome approach: Veatch (note 12 above) 126. At the same time, equality of outcome has its fair share of problematics. In this connection, Sandra Fredman argues that the main problem is whether to look at outcomes for the individual and provide an individual remedy where there is no just outcome or to focus on the structural inequality experiences of the social group to which the individual belongs: Fredman *Discrimination Law* (note 37 above) 11-14. Fredman is highlighting that equality of outcome can be understood in different senses and each sense will entail a specific response to

alternatives to the formal equality approach and ultimately settling on a particular type so that it becomes a blueprint. Rather, I proceed on the footing that substantive equality is a type of equality that is envisaged by the disability method, complete with its heterogeneous public sphere in which historically disadvantaged groups are entitled as of right to 'open access, participatory parity and socio-economic equality'.¹⁶² The trajectory of inclusive equality is that it must, on a concerted basis, engage with systemic inequality in order to erase patterns of dominance and subordination, and in this instance, patterns of dominance and subordination that are linked to enablement and disablement respectively. Certainly, heterogeneous public is not a sphere where a liberal model of the bourgeois public that has the capacity to justify inequalities on utilitarian grounds can find a comfortable home, precisely because the elimination of systemic socio-economic inequalities is one of the fundamental goals.¹⁶³ The remaining questions, then, are: 1) whether South African equality jurisprudence delivers equality consonant with the disability method; and 2) whether the comparative equality jurisprudence of Canada and the United States yields any positive or negative lessons that South Africa can appropriate when seen through the disability method.

equalise the outcome. Veatch has raised the problem of whether need in equality of outcomes is to be determined according to 'objective need' or 'subjective need'. Each approach entails value judgments: Veatch (note 12 above) 138.

¹⁶² Fraser *Justice Interruptus* (note 113 above) 77-93.

¹⁶³ *Ibid* 79-80.

6 SOUTH AFRICA AND THE HETEROGENEOUS PUBLIC SPHERE: HOPES AND IMPEDIMENTS

6.1 South African Equality and Non-discrimination Schema as Summarised in *Harksen v Lane*

In Chapter 3, I alluded to the practical test that the Constitutional Court has developed for determining discrimination and achieving the goal of substantive equality. Though the test was developed in a number of cases, it received its most tabulated expression in *Harksen v Lane NO and Others*.¹⁶⁴ The *Harksen v Lane* test essentially entails asking a number of questions that are designed to elicit: (a) whether there is a rational and legitimate reason for the policy, law or practice that differentiates between people or groups of people; (b), whether the differentiation amounts to unfair discrimination; and if the discrimination amounts to unfair discrimination, whether it can be justified under section 36 of the Constitution - the limitation clause of the Constitution. In *Harksen v Lane*, the Court put the questions and the sequential steps as follows:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

¹⁶⁴ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC). The other cases in which the Constitutional Court has developed its test for determining unfair discrimination include: *Brink v Kitshoff* NO 1996 (6) BCLR 752 (CC); *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa and Another v Hugo* (note 9 above); *Larbi-Odam and Others v MEC for Education (North-West Province) and Another* 1997 (12) BCLR 1655 (CC); *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC).

- (i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes or characteristics that have the potential to impair the fundamental dignity of a person as a human being or to affect them adversely in comparably serious manner.
- (ii) If the discrimination amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

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

- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).¹⁶⁵

As will be apparent from the second stage of the *Harksen v Lane* test, the test for eliciting unfairness focuses primarily on the ‘impact’ of the discrimination on the complainant. In determining the adverse impact of the discrimination on the complainant, the following factors are primarily taken into account: (a) the position of the complainant in society and whether the complainant belongs to a group that has suffered from patterns of disadvantage in the past; (b) the nature of the provision or power and the purpose it seeks to achieve, including considering whether the provision or power is intended to achieve a worthy and

¹⁶⁵ Note that the references to section 8 and section 33 of the Constitution were under the interim Constitution and should now be understood as exact equivalents of section 9 and section 36 of the Constitution respectively.

important social goal; and (c) the extent to which the provision or power had affected the rights or interests of the complainant and whether it has caused an impairment of the fundamental human dignity of the complainant in a comparably serious manner.¹⁶⁶

If the discrimination is found to be unfair, then the last stage of the discrimination analysis is to apply a proportionality test by inquiring into whether the respondent can justify the discrimination based on the criteria laid down in section 36 of the Constitution. Section 36 of the Constitution provides that: The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. In essence, as the Constitutional Court has explained in *S v Makwanyane*,¹⁶⁷ section 36 imports a proportionality test where, as in this instance, the equality claim is balanced against other rights and compelling public interests.

The purpose of restating the *Harksen v Lane* test in this section is not with a view to exploring or applying sequentially all its stages in respect of disability. Rather, the purpose is much more limited. It is to measure the compass of the *Harksen v Lane* test in terms of its responsiveness to disability method. The discussion assumes that disability is a protected and listed ground for which unfairness is presumed. Furthermore, the discussion also assumes that a rationality review is otherwise unnecessary as there is a rational connection between a legitimate

¹⁶⁶ Pretorius 'Constitutional Framework for Equality in Employment' (note 63 above) 2.6.2.

¹⁶⁷ *S v Makwanyane* 1995 (6) BCLR 665 para 104; See also: *S v Bhulwana* 1996 (1) SA 388 (CC); *S v Manamela* 2000 (3) SA 1 (CC); Currie & De Waal (note 27 above) 176-185.

purpose and means. The focus in this section is on the scope of the fairness review and in particular on the 'impact' dimension of the *Harksen v Lane* test. For the purposes of my discussion, I have assumed that according to *Harksen v Lane*, the impact enquiry manifests not only under section 9(3) and section 9(4) as a focal point of the test for unfair discrimination, but also under section 36 – the limitation clause – and that the two analyses reinforce each other.¹⁶⁸

Focusing on 'impact' allows us to measure the extent to which the *Harksen v Lane* test has the capacity to depart from the universalism of formal equality and to embrace a type of substantive equality that is responsive to structural inequality that so much explains the existence and perpetuation of disablement. We can think of focus on impact as faithfulness to three sub-goals. First, a diligent focus on impact must necessarily entail judicial understanding of the social and historical context within which the alleged inequality and discrimination manifest. Second, taking impact into cognisance necessarily requires courts to be alive to social group difference that is tied to social hierarchies that empower or disempower, include or exclude, and advantage or disadvantage the complainant or members of the social group to which the complainant belongs. Third, a focus on impact entails judicial commitment to remedying systemic subordination and disadvantage.¹⁶⁹ If impact is understood in this way, it can

¹⁶⁸ Loot Pretorius has observed that the analysis under sections 9(3) and 9(4) (the unfairness inquiry) overlaps substantially with the analysis under section 36 (the proportionality inquiry). Furthermore, Pretorius has observed that notwithstanding the overlap, there can be good reasons for keeping the two analyses apart so that the unfairness inquiry is limited to determining discrimination that is unfair and can never be justified, whilst section 36 is reserved for instances where the focus is on balancing the right to equality with other rights as well as public policy: Pretorius 'Constitutional Framework for Equality in Employment' (note 61 above) § 2.6.4. As will be noted below in § 6.2, in *President of the Republic of South Africa v Hugo* (note 9 above) Justice Kriegler, in his dissenting judgment, was of the view that the two analyses should be kept apart.

¹⁶⁹ In positing these three facets of impact, I have been persuaded in part by the suggestion made by Cathi Albertyn about the features of substantive equality under the South African Constitution. Albertyn has argued that notwithstanding lack of consistency in the application of substantive equality by the South African Constitutional Court, the approach that has been endorsed by the Court can be described as having four main features, namely: emphasis on understanding inequality within its socio-historical context; primary concern with impact of the

concomitantly do the job of disability method. When adjudicating over a norm, standard or practice that is alleged to be the cause of disablement, a juridical inquiry that draws inspiration from transformative equality should seek to sufficiently and substantively render an equality and non-discrimination normative framework in which: the norm, standard or practice in question is rendered conscious to disability as social oppression, including being conscious to the experience and equality aspirations of disabled people as a diverse but distinct social group that has been historically excluded or marginalised; and the test for unfair discrimination admits a plurality of interactive voices that command equal power rather than reinforce dominance and subordination so as to create space for an egalitarian playing field.¹⁷⁰ Ultimately, an egalitarian playing field, I would argue, is a field where systemic inequality has been eradicated as the outcome of radical transformation that aspires towards Young's heterogeneous public sphere.

alleged inequality on the complainant; recognition of difference as a positive feature of society; and attention to the purpose of the right in a manner that shows concern with remedying systemic subordination or disadvantage: Albertyn 'Substantive Equality and Transformative Equality in South Africa' (note 8 above) 258. The difference between Albertyn's analysis and my own is perhaps one of form rather than substance. Whereas I see the features of substantive equality that are suggested by Albertyn as sides of the same coin that can be subsumed under 'impact', and as useful questions to ask when determining 'impact' Albertyn gives them individual character, but only to a point as in her discussion, she treats them as intimately related. Indeed, the ultimate point Albertyn makes is that part of the problem with the approach of the Constitutional Court is that there are cases where the Court has failed to apply the four features as part of an integrated package.

¹⁷⁰ I have paraphrased these questions from the elements of disability method that I formulated in Chapter 3 § 2.2. However, I have deliberately omitted including at this stage asking the question in the last segment of disability method, namely: 'if the norm, standard, or practice is monologic and exclusionary, how rather than whether it can be reformed to provide accommodation, that is, to provide an alternative to existing social structures in a manner, and is costless to the person accommodated as part of constructing an inclusive egalitarian society'. This is because asking this question is the specific focus of Chapter 6 of this study. This separation is for heuristic purposes only and is not intended to convey the impression that the last element is a free standing question that is disembodied from the other elements of disability method. As submitted in Chapter 3 § 2.2, the elements of disability method closely intertwine.

In the next section, I use two cases - *President of the Republic of South Africa v Hugo*,¹⁷¹ and *National Coalition for Gay and Lesbian Equality v Minister of Justice*,¹⁷² to test not so much the formulation but the application of the *Harksen v Lane* test and its capacity to be faithful to 'impact' and to yielding a heterogeneous public sphere.

6.2 *President of the Republic of South Africa v Hugo*: Ambivalence in Celebrating a Heterogeneous Public Sphere

In *President of the Republic of South Africa v Hugo* (*Hugo* case), Hugo, an incarcerated prisoner, widower and single parent of a nine-year old child, challenged a Presidential Act¹⁷³ on the grounds that it constituted unfair discrimination on the bases of sex and gender under sections 8(1) and (2) of the interim Constitution.¹⁷⁴ The Presidential Act had granted remission of sentences to certain categories of female prisoners,¹⁷⁵ that is, 'all mothers in prison on 10 May 1994, with minor children under the age of 12 years'. But for the fact that Hugo was a father and not a mother of a child under the age of 12, he would have qualified for remission. The Presidential Act was motivated by concern for the welfare of children who are deprived of parental nurturing when the parent is incarcerated. Furthermore, the decision to release mothers and not fathers was motivated by the fact that in general, it is mothers and not fathers who bear primary responsibility for the care of children. The Constitutional Court held by

¹⁷¹ Note 9 above.

¹⁷² Note 10 above.

¹⁷³ Presidential Act No 17 of 1994.

¹⁷⁴ Sections 8(1) and (2) of the interim Constitution are the same as sections 9(1) and (3) of the final Constitution. Nothing turns on the fact that the Constitutional Court was considering the interim rather than the final Constitution.

¹⁷⁵ The Presidential Act excluded from this category prisoners serving sentences in connection with the following offences: murder, culpable homicide, robbery with aggravating circumstances, assault with intent to do grievous bodily harm, child abuse, rape, any other crimes of a sexual nature; and trading in or cultivating dependence producing substances.

a majority (Justice Johann Kriegler dissenting) that although Hugo had been discriminated against on the basis of sex and gender, the discrimination was not unfair.

Justice Richard Goldstone delivered the main judgment on behalf of the majority of the Court. Although *Hugo* is not the Constitutional Court's first equality case, it represents one of the earliest cases in which the Constitutional Court laid down two significant markers of its own interpretive understanding of the meaning and reach of equality under the Constitution's equality clause. One of the markers is that the Court cast the objects of the equality clause not only in terms of eradicating unfair discrimination, but also realising *human dignity*. In this connection, the Court said:

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purposes of our new constitutional and democratic order is the establishment in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy but that that is the goal of the Constitution should not be forgotten or overlooked.¹⁷⁶

The Court has reiterated the centrality of human dignity in equality adjudication in several other equality cases.¹⁷⁷ In the context of equality adjudication, human dignity has a distinct orientation and role. Though in other contexts, human dignity can serve multifarious purposes, including the Kantian injunction of

¹⁷⁶ *President of the Republic of South Africa v Hugo* (note 9 above) para 41.

¹⁷⁷ See for example: *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) paras 31-33; *Harksen v Lane* (note 164 above) para 50; *City Council of Pretoria v Walker* (note 162 above) para 81; *National Coalition for Gay & Lesbian Equality v Minister of Justice* (note 10 above) paras 120-129; *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) para 116.

treating a person as a person and not as a means to an end,¹⁷⁸ in the South African equality context it has come to play a central and integrated role in the determination of unfair discrimination. Respect for human dignity serves equality by protecting social groups and individuals belonging to protected social groups from being treated as members of a lower caste and thus putting an end to notions of hierarchical citizenship or premiere citizenship for some groups that were assiduously and zealously cultivated under colonialism and apartheid.¹⁷⁹ At its core, human dignity serves the idea of the equal worth of every human being by virtue only of being a human being. In turn, human dignity is connected to the idea of liberty.¹⁸⁰ It means that the liberty of a person cannot be abridged merely because of a group characteristic that a dominant political order has discredited and rendered subservient. It means that in a democracy, individuals and social groups ought to be given autonomy as well as capacity to shape their lives in accordance with their view of a good life. Human dignity is non-hierarchical, serving not only to dissolve racial ranking, but also other types of ranking including gender and ablebodiedness. It serves the purposes of placing the equality clause of the South African Constitution at the heart of rescuing people from a caste-like status and putting an end to their treatment as lesser beings merely because they belong to a particular group.¹⁸¹

Thus, while differentiation, per se does not offend equality, differentiation which has the capacity to impair human dignity in a serious manner does. In *Minister of Finance v Van Heerden*,¹⁸² the Constitutional Court amplified the place of human

¹⁷⁸ LWH Ackermann 'Equality and the South African Constitution' (2000) 63 *Heidelberg Journal of International Law* 537 at 540-542; 'Botha 'Equality, Plurality and Structural Power' (note 129 above) 3.

¹⁷⁹ A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *South African Journal on Human Rights* 193 at 199; Chapter 2 of this study.

¹⁸⁰ Nussbaum *Sex and Social Justice* (note 44 above) 56-57.

¹⁸¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* (note 10 above) 129.

¹⁸² *Minister of Finance v Van Heerden* (note 177 above).

dignity in equality adjudication and its rationale as an instrument for dissolving the hierarchisation of social groups when it said:

Human dignity is harmed by unfair treatment... premised on the assumption that the disfavoured group is not worthy of dignity. At times, as our history amply demonstrates, such discrimination proceeds on the assumption that the disfavoured group is inferior to other groups. And this is an assault on the human dignity of the disfavoured group. Equality as enshrined in our Constitution does not tolerate distinctions that treat other people as "second class citizens, that demean them, that treat them as less capable for no good reason or that otherwise offend human dignity".¹⁸³

There is complementarity between human dignity and the heterogeneous public sphere. The heterogeneous public sphere is incompatible with hierarchical social ranking for the purposes of facilitating the universalisation of a dominant group's experience that is exclusionary. Under apartheid the pervasive form of hierarchical status for social groups took a somatic form. By defining dark bodies as inferior bodies to be loathed, feared, avoided, and at the same time subjected to burdens and economic exploitation, apartheid constructed the operative norm for its ideal 'impartial' public sphere. Its monological character rendered it an impossible ideal as dark bodies could not lose their particularity to become white or pass as white and thus be entitled to partake of public affairs in the civic republic. The moral significance of human dignity for equality is that it serves to reject a 'logic of identity'¹⁸⁴ that equates equality with reducing differences to unity and in the process not only denies but more significantly represses difference for the reason that it is predicated on generating stable categories.¹⁸⁵ In a Cartesian sense, colonial and apartheid racial discourses pined for stable

¹⁸³ *Ibid* para 116 citing with approval a decision of the Supreme Court of Canada, *Egan v Canada* (1995) 29 CRR (2nd) 79. Footnote omitted.
footnotes omitted.

¹⁸⁴ Young (note 1 above) 97-98.

¹⁸⁵ *Ibid* 98.

diametrically opposed categories. The discourses were inherently inimical to the notion of heterogeneous embodiment that is not constructed around dominance and subordination.¹⁸⁶ Such a polarity was essential for legitimating the economic exploitation of dark bodies. The orthodox contours of apartheid discourse, in particular, presupposed that unless a social group could be classified as physically the same, then multiplicity of social groups meant lifelong immutable binary opposition and mutually exclusive categories. Seen from this perspective, the advent of human dignity as an integral part of interpreting the right to equality signals in South Africa's political and legal economy transformative, egalitarian equality that subscribes to heterogeneity in which non-hierarchical diversity is celebrated. It signals, or at least, ought to signal not the end of differences but master dichotomies of the body.

Initially, some commentators were quite critical of the Constitutional Court's integration of human dignity into an equality analysis.¹⁸⁷ Using arguments drawn from a feminist discourse, Cathi Albertyn and Beth Goldblatt, for instance, maintained that the Constitutional Court's focus on human dignity had the effect of overly focusing equality analysis on individual particularities rather than on social groups to the detriment of putting a spotlight on structural inequality and its effect on perpetuating the marginalisation and disadvantage of social groups.¹⁸⁸ In this connection, as a counterpoint to the Court's repeated stress on the centrality of human dignity in equality analysis, Albertyn and Goldblatt argued:

¹⁸⁶ *Ibid* 99.

¹⁸⁷ C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' 14 *South African Journal on Human Rights* 248. Henk Botha has observed correctly that these criticisms have since receded: Botha 'Equality, Plurality and Structural Power' (note 129 above) 3.

¹⁸⁸ Albertyn & Goldblatt (note 187 above) 258

Conceptually, the replacement of disadvantage with dignity returns us to a liberal and individualised conception of the right [the right to equality]. The centrality of disadvantage, vulnerability and harm, and their connotation of groups-based prejudice – the essence of the right – is lost. The right to equality is defined by the value of dignity rather than the value of equality. The enquiry tends towards a concern with the individual personality issues rather than an understanding of more systemic issues and social relationships.¹⁸⁹

Put differently, Alertyn and Goldblatt's argument was that the Constitutional Court's approach has the effect of reinforcing formal equality and marginalising substantive equality by not making group disadvantage and difference the core of the equality enquiry.¹⁹⁰ The arguments or criticisms, seems however, to have missed the nuance within human dignity and the multiple purposes it can serve in the vindication of equality, and in particular its versatility in meeting not only the needs of normative self-sufficiency (which is obviously inimical to substantive equality), but also communitarian values that seek to eradicate systemic inequality and group disadvantage.¹⁹¹ Like equality itself, much depends on the standpoint of the interpreter and context. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,¹⁹² the Constitutional Court, in part to respond to the criticisms of its dignity analysis, put a gloss on its human dignity analysis. Justice Albie Sachs said that equality and human dignity should be seen as complimentary rather than rival principles.¹⁹³ In the context of interrogating equality under the South African Constitution, human dignity is precisely intended to be responsive to differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of a particular social group, not least on account of South Africa's

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid* 256.

¹⁹¹ Botha 'Equality, Plurality and Structural Power' (note 129 above) 3-4.

¹⁹² *National Coalition for Gay & Lesbian Equality v Minister of Justice* (note 10 above).

¹⁹³ *Ibid* para 125

own apartheid history.¹⁹⁴ According to Justice Sachs, a violation of human dignity is more likely to be established where the social context implicates inequality of power and status.¹⁹⁵

The other equally important marker that the Constitutional Court in the *Hugo* case laid down was its understanding of the equality clause under the South African Constitution as importing something much more than formal equality. In this connection, the Court said:

We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human dignity equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which further the constitutional goal of equality or not. A classification which is unfair in one context may not be necessarily unfair in a different context.¹⁹⁶

This pronouncement, which commits itself to responsive equality and which has been reiterated by the Constitutional Court in other cases, marks out *substantive equality* as the favoured judicial interpretation of equality under the South African Constitution. The message from *Hugo* is that the determination of unfair discrimination is not an abstract consideration, but a concrete consideration of the lived experience of the individual and the protected group to which the individual belongs. A blind commitment to sameness of persons, as would be required by formal equality, would serve to hide rather than reveal structures of

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *President of the Republic of South Africa v Hugo* (note 9 above) para 41.

privilege and oppression and their relationship with specific social groups.¹⁹⁷ Social groups do not come to the substantive equality table amorphous, behind a veil of ignorance and stripped of the particularities of their social identities and histories of oppression and marginalisation. Instead they come with their standpoint epistemologies and their historical disadvantages and vulnerabilities. The Constitutional Court ultimately directs its focus on the 'impact' of the alleged discriminatory measure in order to determine whether it constitutes unfair discrimination. Where the measure in question perpetuates rather than ameliorates the marginalisation and exclusion of a historical disadvantaged group, its determination points towards a finding of unfair discrimination.

But as alluded to in the introduction, a commitment to substantive equality by the Constitutional Court and outcomes in individual cases have not always been consonant. The outcome in the *Hugo* case is an illustration. By a majority, the Court concluded that Hugo had not been unfairly discriminated against. This was so regardless of the fact that Hugo was the only parent with primary caring responsibilities for his son. The Court had correctly taken judicial notice that mothers bear more responsibilities for children than fathers in the present day South African society and that such responsibilities deprived women of benefits or advantages or imposed on them disadvantages in a number of socio-economic spheres, including in the sphere of employment.¹⁹⁸ At the same time, the Court had observed, equally correctly, that this was only a generalisation and that there will be cases where this is not the case and fathers bear more responsibilities¹⁹⁹ and that, indeed, in this instance, Hugo was the only remaining parent. The fact that he belonged to a class - men- that had not been historically disadvantaged in a gender sense did not follow that extending a benefit or advantage to women only would not be found to be unfair not least because the Constitution seeks

¹⁹⁷ Young (note 1 above) 164.

¹⁹⁸ *President of the Republic of South Africa v Hugo* (note 9 above) paras 38-40.

¹⁹⁹ *Ibid* para 37.

much more than merely ending discrimination for historically disadvantaged groups. The Constitution seeks to extend to all human beings equal dignity regardless of membership of particular groups.²⁰⁰ And yet, contrary to the logic of its own methodology for interrogating impact, the Court was of the opinion that it was not unfair to deny fathers the same benefit as has been extended to mothers by the Presidential Act.

The main reasons given by the Court for deciding against Hugo were that: notwithstanding that it is a generalisation that mothers have served as primary care givers for children and that it is the goal of the Constitution to facilitate equal responsibility in child rearing rather than entrench the status quo, nonetheless, the impact of discrimination in child rearing has thus far been disproportionately borne by women;²⁰¹ male prisoners outnumbered women almost fiftyfold and it would have been impracticable to release all male prisoners without alarming the public about rampant crime in the South African society;²⁰² fathers were not totally denied the opportunity for early release as they could still apply to the President directly for remission of sentence and be considered on their own individual merits.²⁰³ The Court concluded that the 'impact' of the Presidential Act on incarcerated fathers could not be said to be unfair as to impair their right of dignity or sense of equal worth.²⁰⁴

It is submitted that the outcome of *Hugo* illustrates ambivalence not so much in the formulation but rather in the application of substantive equality. While purporting to recognise a wrongful sex-role stereotype in its conception of substantive equality, in more ways than one, the Court ironically ended up

²⁰⁰ *Ibid* para 41.

²⁰¹ *Ibid* para 113.

²⁰² *Ibid* para 46, 106.

²⁰³ *Ibid* paras 47, 106, 114.

²⁰⁴ *Ibid* para 47.

perpetuating such a stereotype.²⁰⁵ Justice Johann Kriegler's incisive dissent captures the error in juridical application that the Court made on its own terms. In parting with the majority, Justice Kriegler said:

What I cannot endorse, is the majority's conclusion that although the discrimination inherent in the Act [the Presidential Act] was based on that very stereotyping, it is nevertheless vindicated. In my view the notion relied upon by the President, namely that women are to be regarded as the primary care givers of young children, is a root cause of women's inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet onerous role. It is a relic and a feature of patriarchy which the Constitution vehemently condemns... One of the ways in which one accords equal dignity and respect to persons, is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities.²⁰⁶

Underpinning Justice Kriegler's incisive dissent is the argument that it is not so much that in theory the Court could not have ultimately upheld the Presidential Act on the basis of a section 33 (now section 36) justification analysis, especially when considering the implications of releasing large numbers of male prisoners.²⁰⁷ But to say that there was in the first place no impairment of the

²⁰⁵ Cook & Cusack (note 8 above) 53-54, 121-122.

²⁰⁶ *Ibid* 80. Footnotes omitted.

²⁰⁷ Justice Kriegler implies this in paras 77-78. It is significant that although Justice Yvonne Mokgoro found the Presidential Act to be unfairly discriminatory under section 8 (now section 9), she, nonetheless, upheld the Act under section 33 (now section 36): paras 103-106. The point that both judges are making is that some of the factors that were relied upon by the majority to establish that there was no unfairness – namely public reactions to the early release of many convicted persons and the administrative challenges of implementing such a release – are factors that should properly be invoked when justifying unfair discrimination rather than rebutting unfairness. It is true, as alluded to earlier, that there is an overlap between section 9 and section 36 in terms of factors that the Court takes into consideration when determining unfairness and justification respectively: Note 170 above. However, the *Hugo* case is an illustration of a case where it is important to maintain a distinction between rebutting unfairness and justifying unfairness for the purposes of preserving juridical integrity in the application of substantive equality.

dignity of those male parents who like Hugo bore primary parental care, and thus no unfair discrimination under section 8 (now section 9) as the Constitutional Court did, became itself a palpable source of denial of the dignity and autonomy of male parents. How else can the Constitutional Court succeed in 'developing a concept of unfair discrimination which recognises that although a society which affords each human dignity and equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved, unless it does not treat Hugo according to a stereotype?'²⁰⁸ Treating Hugo according to a stereotype was hardly a demonstration of 'a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned.'²⁰⁹ A nuanced application of substantive equality should carry with it a capacity to recognise that different forms of discrimination may require different forms of application and that the spotlight on disadvantage and vulnerability need not be shone only on the most visible historically disadvantaged groups. Though disadvantage and vulnerability depend to a large extent on past patterns of disadvantage and vulnerability, nonetheless, they can also be experienced by individuals belonging to groups that have not been historically disadvantaged.²¹⁰ In short, while history ought to be an invaluable guide when thinking about remedial substantive equality, it should at the same time not become a blunderbuss that is inherently incapable of netting new

²⁰⁸ *President of the Republic of South Africa v Hugo* (note 9 above) para 41.

²⁰⁹ *President of the Republic of South Africa v Hugo* (note 9 above) para 41.

²¹⁰ In *City Council of Pretoria v Walker* (note 164 above), Justice Pius Langa gestured towards a nuanced and impact sensitive application of substantive equality that allows for whites to be treated as both historically advantaged, but at the same time, a political minority that is vulnerable in post-apartheid South Africa. In respect of a white complainant who was challenging the differential level of municipal electricity and water charges as racially discriminatory and contrary to section 8(2) of the interim Constitution (now section 9(3) of Constitution), Justice Langa said: 'The respondent does however belong to a racial minority which could, in a political sense, be regarded as vulnerable. It is precisely individuals who are members of such minorities who are vulnerable to discriminatory treatment and who, in a very special sense, must look to the Bill of Rights for protection': *City Council of Pretoria v Walker* *ibid* para 48.

categories of disadvantage and vulnerability for the reason that it is tied to the logic of prior recognition.

When analysed from the perspective of a heterogeneous public sphere, the approach of the majority illustrates the problem of gender essentialism.²¹¹ It supports the thesis of a yearning for reductionism,²¹² conceptual tidiness²¹³ and pragmatic outcomes.²¹⁴ It is a yearning that is at odds with substantive equality and coheres more comfortably with formal equality's desire to normalise difference and in the process misrecognise individuals and groups that do not conform to a dominant norm. The category of men, however different, was reduced to an abstraction. Rebecca Cook and Simone Cusack point out that the Court missed recognising the composite social group status of Hugo.²¹⁵ The Court was manifestly unable to see Hugo as both part of an advantaged group of fathers and as distinct from that group.²¹⁶ The condition of a sub-group of men (to which Hugo belonged) was conflated with the condition of another group of men (the dominant group of men that in general does not partake equally of child-rearing). Men, like Hugo, who bear primary childrearing responsibilities were ultimately treated as a transient phenomenon - an aberration - whose differentiation is incapable of injuring human dignity in a manner that is comparable to women who are treated differently. The crucial differences between men (albeit a minority) who shoulder childrearing responsibilities and

²¹¹ K van Marle 'Equality: An Ethical Perspective' (2000) 63 *THRHR* 595 at 599-600; Botha 'Equality, Plurality and Structural Power' (note 129 above) 17-18; Albertyn 'Substantive Equality and Transformation in South Africa' (note 8 above) 261-263.

²¹² Van Marle (note 210 above) 599-600; Botha 'Equality, Plurality and Structural Power' (note 129 above) 18.

²¹³ Spelman (note 32 above) 1.

²¹⁴ N Bohler-Muller *Developing A New Jurisprudence of Gender Equality in South Africa* Unpublished thesis submitted in partial fulfilment of the requirements for the degree of Doctor Legum in the Faculty of Law, University of Pretoria (2005) 116.

²¹⁵ Cook & Cusack (note 8 above) 121.

²¹⁶ *Ibid.*

men (a majority) who do not bear such responsibilities were ultimately erased in favour of purveying and reinforcing a wrongful stereotype.

Leaving aside the approach of Justice Kriegler and Justice Mokgoro to gender discrimination, the Court's application of substantive equality in *Hugo* was simply unable to negotiate the difference and plurality in childrearing unless the multiplicity of childrearingers was reduced to one category – mothers. Elizabeth Spelman would describe the essentialising approach of the majority in *Hugo* as an instance of 'plethoraphobia' – a fear of 'manyness' and particularity.²¹⁷ Notwithstanding its commendable observation that some men were also primary childrearingers, nonetheless, a theocratic view about men became for the Court the ultimate marker for juridical intelligibility about the human essence of men.²¹⁸ A heterogeneous public sphere requires a type of substantive equality that is sensitive to standpoint epistemology, including, in this instance, being sensitive and receptive to the concrete realities of a single father. The Court refused to accept Hugo's own understanding and experience as a single father. Instead, it chose to speak for Hugo's feelings and to use or even misuse judicial fiat to silence Hugo and paternalistically downplay the injury and indignity he suffered when not treated equally with women counterparts.²¹⁹ Ultimately the Court refused to give political recognition to the concrete realities of single fathers. In this sense, *Hugo* does not sit comfortably with disability method that shuns universalism in favour of hearing different voices equally and admits substantive plurality as a remedy. *Hugo* enabled mothers and yet disabled single fathers

²¹⁷ Spelman (note 32 above) 2. In Chapter 1 of *Inessential Women*, Spelman opens her thesis on feminism and antiessentialism by describing the essentialising character of Uncle Theo in Iris Murdoch's novel – *The Nice and the Good* (1969) 158-159. Uncle Theo is a man who is 'preoccupied with perceptual and conceptual tidiness'. When sitting on the seashore, he is unable to comprehend the multiplicity in the shapes and sizes of pebbles because he has a distinct fear and dislike for things that are different. He is easily disturbed by the multiplicity of things. To establish equilibrium with his constitution, he just sees 'pebblehood' as if all pebbles are of the same colour, shape and size even when he touches and feels the pebbles: Spelman *ibid* 1-4.

²¹⁸ Spelman *ibid* 2.

²¹⁹ Beatty (note 21 above) 97-99.

under a constitution that the Constitutional Court paradoxically has unambiguously interpreted as prescribing inclusive equality.

Ultimately, a heterogeneous public sphere requires a type of equality whose ontological stability is not threatened by multiplicity and does not rush to have recourse to essentialism and a single universalised or assimilationist standpoint as the main juridical tools for managing plurality. In the end, the outcome in *Hugo* managed to reinforce rather than challenge and subvert the dominant and oppressive gender roles. As Cook and Cusack have argued, the wrongful stereotype perpetuated and, indeed, prescribed by *Hugo* is not just that women are and ought to be primary caregivers with a special role in childrearing while men are primary breadwinners, but also that women are and ought to be homemakers who are and ought to be located in the home at the centre of family life tending not only to childrearing but also care and domestic responsibilities in general.²²⁰ Thus the *Hugo* decision manifestly failed to transform traditional patriarchal norms in not just child-rearing but also in other wrongful gender stereotypes in general.

Hugo tells us something about the shortcomings of a formalised or essentialised type of substantive equality that bestows its protective ambit in a manner that is selective and inconsistent. Whilst I have selected *Hugo* as, inter alia, the main casestudy for illustrating the failure of the Constitutional Court to vindicate substantive equality even on its own terms, *Hugo* is by no means a singular instance of such failure as there are others.²²¹

²²⁰ Cook & Cusack (note 8 above) 53-54, 121-122.

²²¹ See note 11 above where I submit that there are other cases that could also serve to make the same point about shortcomings in the Constitutional Court's jurisprudence on substantive equality. I cited *S v Jordan* (note 11 above) and *Volks NO v Robinson* (note 11 above) as good illustrations in this regard.

In *Jordan v the State*, for example, the majority of the Court (Justice Albie Sachs and Justice Kate O'Regan dissenting) incomprehensibly refused to see a statute that criminalises sex work but focusing only on the merchants who happen to be disproportionately female sex workers as an instance of indirect discrimination.²²² Section 9(3) expressly prohibits both 'direct' and 'indirect' discrimination. In *City Council of Pretoria v Walker*,²²³ without purporting to enunciate exhaustively the elements of indirect discrimination, the Court, nonetheless, proceeded on the conceptual premise that a municipal administrative measure for charging and collecting electricity and water services levies which was neutral on 'race' but differentiated between ratepayers in two main geographical areas, one of which was predominantly populated by whites and the other by blacks, was an instance of indirect discrimination on the ground of race as contemplated by section 9(3) of the Constitution. Such an understanding is in line with how indirect discrimination has been developed and applied in Canada²²⁴ as well as in the United States.²²⁵

²²² Justice Sandile Ngcobo who delivered the leading judgment said: 'Penalising the recipient of the reward only does not constitute unfair discrimination on the grounds of gender. The section penalizes "any person" who engages in sex for reward. The section is therefore gender neutral...Nor does it amount to indirect discrimination. The section makes a distinction between the prostitute and the customer. There is a qualitative difference between the prostitute who conducts the business of prostitution and is therefore likely to be a repeat offender, on the one hand, and the customer who seeks the service of a prostitute only on occasion and thus may or may not be a repeat offender': *S v Jordan* (note 11 above) paras 9-10.

²²³ The majority of the Court said: 'It is sufficient for the purposes of this judgment to say that this conduct which differentiated between the treatment of residents of townships which were historically blacks areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and are still overwhelmingly white constituted unfair discrimination on the grounds of race': *City Council of Pretoria v Walker* (note 164 above) para 32. See also *Democratic Party v Minister of Home Affairs* (1999) 6 BCLR 607 (CC) where the Constitutional Court rejected a claim that a statute that required voters to identify themselves using a bar-coded identity document was an instance of indirect discrimination on the grounds, inter alia, of race and age. The Court's decision on indirect discrimination was based on its findings that there was no evidence of a disproportionate disparate effect, and that there was no evidence of clear nexus between voting outcomes and the statute in question as other factors were also at play. In this way, the Court, as in *City Council of Pretoria v Walker*, correctly applied an internationally shared juridical understanding of indirect discrimination, albeit to deny a claim; JL Pretorius 'Indirect Employment Discrimination' in Pretorius *et al* (note 63 above) § 4.1; Currie & De Waal (note 27 above) 260-262.

²²⁴ See § 8 below.

Rather than find indirect discrimination, the majority of the Court, instead, saw sex workers as free agents who invite their own misery and stigmatised status.²²⁶ In the process, the majority of the Court completely missed the gender structural inequality dimension to sex work and perpetuated a harmful gender stereotype of female sex workers.²²⁷ Furthermore, the studied refusal by the entire Court to envision the legalisation of sex work was animated by a moralising and normalising judicial discourse that flies in the face of equality as a dialogic discourse which allows agents to make their own identities. Instead, sex work was transacted by an equality discourse that primarily sought to discipline female sex workers especially through hegemonic and patriarchal norms rather than acknowledge and accept them as persons with human dignity.²²⁸ The rhetoric of morally uncensored and unconditional human dignity which suffuses

²²⁵ See § 8 below.

²²⁶ Justice Ngcobo said: 'If the public sees the recipient of reward as being "more to blame" than the "client", and a conviction carries a greater stigma on the "prostitute" for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attached to them not by virtue of their gender, but by virtue of the conduct they engage in... by engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community, thus undermining their status and becoming vulnerable': *S v Jordan* (note 11 above) para 16. In contrast, in their dissent on the question of unfair discrimination, Justice O'Regan and Justice Sachs see criminalising primarily the sex worker as reinforcing and perpetuating sexual stereotypes. *S v Jordan ibid* para 72.

²²⁷ Cook & Cusack (note 8 above) 116-117, 125-126; J Simpson 'Stereotyping Sex Workers: *S v Jordan and Others*'. Paper submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women's Human Rights, University of Toronto, Faculty of Law, March 6, 2009. Available at < <http://www.law-lib.utoronto.ca/diana/symposium2009.html> > (last accessed on 16 April 2009); G Carpenter 'Of Prostitutes, Pimps and Patrons: Some Still More Equal than Others' (2004) 19 *South African Public Law* 231; S Jagwanth 'Expanding Equality' (note 8 above) 135-136. In their dissent, Justice Sachs and Justice O'Regan have no trouble in appreciating that indirect discrimination is implicated when preponderantly female sex workers are penalised: *S v Jordan* (note 11 above) para 60.

²²⁸ U Jivan & D Perumal, 'Let's Talk About Sex, Baby' – But Not in the Constitutional Court: Some Comments on the Gendered Nature of Legal Reasoning in the Jordan Case' (2004) 17 *South African Journal of Criminal Justice* 368; E Bonthuys & C Monteiro 'Sex For Sale: The Prostitute As Businesswoman' (2004) 121 *South African Law Journal* 659; W le Roux 'Sex Work, the Rights to Occupational Freedom and the Constitutional Politics of Recognition' (2003) 120 *South African Law Journal* 452; R Kruger 'Sex Work from a Feminist Perspective: A Visit to the Jordan Case' (2004) 20 *South African Journal on Human Rights* 138; N Fritz 'Crossing Jordan: Constitutional Space for (Un)Civil Sex' (2004) 20 *South African Journal on Human Rights* 230; Meyerson (note 8 above); Robson (note 8 above).

many equality cases that have come before the Court, including *National Coalition for Gay and Lesbian Equality v Minister of Justice* which is discussed below,²²⁹ and has been used by the Court to invest equality claimants with the logic of irreducible humanity is conspicuously absent in *Jordan*. Instead, sex workers are treated as agents who have freely chosen to forsake their human dignity for a life of indignity and cannot now turn round to reclaim it.²³⁰

In a Dworkinian sense, as Denise Meyerson points out, *Jordan* represents the elevation of 'external preferences' into law where the personal preferences of sex workers lost out to the preferences of those who do not indulge in sex work and concomitantly prescribe that no one else must do so either.²³¹ Once the Court was convinced about the moral wrongness of sex work, the limitation clause – section 36 – became irrelevant. The right of sex workers were treated more like interests than rights as trumps.²³² There was no attempt at all even at a token level by the entire court to try and determine whether the rational and legitimate interest of the state in combating the adverse social consequences of sex work could be attained by other means other than the proscriptive means chosen by the legislature. Sex workers lost out not because their personal preferences did not command sufficient weight when balanced against the preferences of others against the backdrop of scarce resources.²³³ They lost out only because their conception of a desirable job is a form of life that is despised by others.²³⁴ Conveniently, the court was ecumenical in leaving any such consideration to the legislature as part of a respectful observance of separation of powers. The 'hands off' approach of the Court in this regard was far from neutral. Instead it was a

²²⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 10 above); Robson (note 8 above) 422.

²³⁰ *S v Jordan* (note 11 above) paras 28.

²³¹ R Dworkin *Taking Rights Seriously* (1977) 276; Meyerson (note 8 above) 149.

²³² Dworkin (note 231 above) xi; Meyerson (note 8 above) 145.

²³³ Dworkin (note 231 above) 276.

²³⁴ *Ibid.*

thinly disguised form of unprincipled judicial pragmatism that is strikingly at odds with the assertive position the Court adopted in other cases of which *S v Makwanyane* is a towering example.²³⁵

Another example of misapplied substantive equality is *Volks NO v Robinson* where a normalizing and patriarchal judicial discourse of equality clearly was at play. By a majority, the Court refused to see the exclusion of female life partners from the benefits conferred by the Maintenance of Surviving Spouses Act²³⁶ as an instance of unfair discrimination on the bases of marital status and gender. Instead, the Court saw unmarried life partners as persons exercising choice by remaining unmarried unencumbered by a gendered environment.²³⁷ This was so notwithstanding that the Court was conscious, for example, of women's dependency of men and the hardships they suffer on the death of male partners.²³⁸ Over and above failing to remedy the stigmatizing effect of Maintenance of Surviving Spouses Act on unmarried female life partners especially, the Court's judgment effectively used the conventional marriage as a foundational and virtuous social institution for disciplining rather than

²³⁵ *S v Makwanyane* (note 166 above). In this case, the Constitutional Court unanimously held that a provision of the Criminal Procedure Act No 51 of 1977 which prescribed a death penalty as a competent sentence for murder was unconstitutional under the interim Constitution. An important part of the judgment was the Court's view that the limitation of the constitutionally guaranteed right to life could not be saved by the limitation clause (then section 33 of the interim Constitution). In interrogating the application of the limitation clause, Justice Arthur Chaskalson, who delivered the leading judgment, made it crystal clear that the question was not whether the death penalty was not without any justification. The crucial question was not whether capital punishment was not rationally connected to a legitimate government purpose, but whether such punishment was 'reasonable and necessary as to be consistent with the requirements of the limitation clause': *S v Makwanyane ibid* para 102.

²³⁶ Act No 27 of 1990.

²³⁷ *Volks NO v Robinson* (note 11 above) paras 92-94.

²³⁸ The Court said: 'Structural dependency of women in marriage and in relationships of heterosexual unmarried couples is a reality in our country and in other countries. Many women become economically dependent on men and are left destitute and suffer hardships on the death of their male partners... They [women] often wish to be married, but the nature of the power relations within the relationship makes a translation of that wish into reality difficult. This is because the more powerful participants in the relationship would not agree to be bound by marriage: *Volks NO v Robinson* (note 11 above) paras 63-64. Footnote omitted.

transforming family forms that are not compliant and thereby delivered exclusionary rather than inclusive equality.²³⁹ At the same time, the dissenting judgments in *Volks NO v Robinson* are instructive in their acute sensitivity to 'impact and gendered structural inequality as a potent immobilising force in women's choice to marry and boldly part company with the assumptions about choice that are made by the majority.²⁴⁰

Unless substantive equality is applied with nuance rather than an essentialised sense of what constitutes a disadvantaged and marginalised group, and unless it is applied with a readiness to interrogate 'impact' by engaging in a genuinely inclusive dialogue with the claimants so as to hear the lived experiences of those at the receiving end of discrimination and their subjective realities rather than judicially second-guessing those experiences, then substantive equality can easily descend into a yet another form of reductionism and formalism that is comfortable for the courts but manifestly incapable of delivering inclusive equality on a consistent basis. In the process, substantive equality can, paradoxically, come to assume more and more features which are not unlike formal equality where protected categories are not dialogically constructed but are rigidly defined by carefully worked out prior recognition and 'impact' is what the court says it is. Once highly formalised and essentialised, substantive equality becomes eminently vulnerable to plethoraphobia and to the incipient seepage of hegemonic norms that owe their existence to preempting the

²³⁹ Botha 'Equality, Plurality and Structural Power' (note 129 above) 19-20; Jagwanth 'Expanding Equality' (note 8 above) 136; C Lind 'Domestic Partnerships and Marital Status Discrimination' in Murray & O'Sullivan (eds) (note 8 above) 108-130; C Albertyn 'Substantive Equality and Transformation in South Africa' (note 8 above) 265-268.

²⁴⁰ Justices Mokgoro, O'Regan and Sachs dissented but for not quite the same reasons. Applying a *Harksen v Lane* schema for determining unfair discrimination, Justices Mokgoro and O'Regan found that cohabiting partners were a vulnerable group and their exclusion from protection under Maintenance of Surviving Spouses Act has a serious adverse impact, especially financial, as to constitute unfair discrimination that was not justifiable. Justice Sachs on the other hand based his dissent on respecting diversity of family forms and the reality of gender inequality. Justice Sachs approach to diversity of family forms is informed by the ethic of equality in difference that is unencumbered by moral prejudice.

recognition of new protected categories, new accommodations and new acceptances that are perceived as a threat to the status quo and a hegemonic centre.

6.3 *National Coalition for Gay and Lesbian Equality v Minister of Justice: Celebration of a Heterogeneous Public Sphere*

If in *Hugo* we have ambivalence towards vindicating the spirit of substantive equality as well as highly questionable allegiance to the ethics of Iris Young's heterogeneous public sphere, I would argue that in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,²⁴¹ we have the promise of a more faithful progeny but with one main caveat. If we apply Nancy Fraser's analytical framework for status recognition as a surrogate for disability method,²⁴² and as a way of interrogating substantive equality, and ultimately, the heterogeneous public sphere, we could argue that *National Coalition for Gay and Lesbian Equality v Minister of Justice* meets the standard of equality that is transformative in that it is more than a 'surface reallocation of respect for existing sexual identities'²⁴³ and instead gestures towards a 'deep restructuring of relations of group recognition

²⁴¹ Note 10 above.

²⁴² In Chapter 3 § 1 of this study, I alluded to the work of Nancy Fraser on status recognition and its relevance for interrogating equality under the South African Constitution: Fraser *Justice Interruptus* (note 113 above) 11-39; Fraser 'Rethinking Recognition' (2000) 3 *New Left Review* 107. Furthermore, in Chapter 3 § 2.2 of this study, I argued that there is resonance between disability method and Fraser's analytical framework for attending to two types of justices - cultural or political recognition and economic recognition. In this connection, I argued that disabled people were a 'bivalent' category and that their equality aspirations can only be met by attending political and more crucially economic recognition. In this section, I assume rather than seek to argue further for the validity of the arguments I made in Chapter 3 about the relevance of Fraser's analytical framework. In this section, I also proceed on the assumption, as does Fraser, that the distinction between political and economic recognition is primarily for analytical purposes in order to highlight the type of claims and equality needs that are at stake and that in practice the two recognitions do not exist in isolation from one another but instead tend to intertwine with one another: Fraser *Justice Interruptus* (note 113 above) 17.

²⁴³ Fraser *Justice Interruptus* (note 113 above) 27.

and group differentiation'.²⁴⁴ At the same time, beyond the inclusive rhetoric of the Constitutional Court, we are unable to tell how in concrete terms *National Coalition for Gay and Lesbian Equality v Minister of Justice* would have responded to the redistributive component of Fraser's analytical framework had the Court been faced with a bivalent category that aspires towards not just political recognition but also economic recognition. *National Coalition for Gay and Lesbian Equality v Minister of Justice* is an instance of a monovalent category whose equality claim was primarily satisfied by political recognition.

The main issue in *National Coalition for Gay and Lesbian Equality v Minister of Justice* was whether the common law crime of sodomy²⁴⁵ and provisions of section 20A of the Sexual Offences Act of 1957²⁴⁶ which criminalised anal sex between men constituted unfair discrimination, and, was therefore, inconsistent with section 9(3) of the Constitution. At first instance, the High Court²⁴⁷ answered the question in the affirmative and issued an order to that effect. The order was referred to the Constitutional Court. Section 172(2)(a) of the Constitution requires that an order made by a lower court that a statutory provision is invalid for inconsistency with the Constitution must be ultimately confirmed by the Constitutional Court for it to be a valid order.

The Constitutional Court regarded the issues raised as necessarily implicating not just the right to equality and non-discrimination,²⁴⁸ but also the rights to human dignity²⁴⁹ and privacy.²⁵⁰ In a leading judgment delivered by Justice

²⁴⁴ *Ibid.*

²⁴⁵ Under common law, sodomy is defined as 'unlawful and intentional sexual intercourse *per anum* between males': *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* (note 10 above) para 14

²⁴⁶ Act No 23.

²⁴⁷ *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* 1998 (6) BCLR 726 (W).

²⁴⁸ Section 9(3) of the Constitution.

²⁴⁹ Section 10 of the Constitution.

Laurie Ackermann, and a supporting judgment delivered by Justice Albie Sachs, the Court unanimously held that the common law crime of sodomy was inconsistent with the Constitution and by implication all statutory offences that were built around the premise of sodomy as a common law crime were necessarily inconsistent with the Constitution, and, thus, invalid, including section 20A of the Sexual Offences Act. The Court found that the crime of sodomy constituted a violation of the rights to equality, human dignity and privacy.

The case was primarily resolved by the interpretation and application of the right to equality. In finding a violation of the right to equality, the Court essentially applied the *Harksen v Lane* test for determining unfair discrimination.²⁵¹ It will be recalled that the focus of the *Harksen v Lane* test is on determining the *impact* of the discriminatory policy, law or practice on the individual and the group to which the individual belongs. In determining the impact on the crime of sodomy over gay people, the Court said that such a crime served to reinforce already existing societal prejudices against people of sexual orientation that was different from heterosexual orientation.²⁵² The crime stigmatizes gay men and encourages discrimination in many sectors of socio-economic life reducing them to the status of 'unapprehended felons'.²⁵³ The adverse consequences of criminalizing consensual sex between men are rendered more serious because gays and lesbians are a political minority and cannot easily marshal political power to secure favourable legislation for themselves.²⁵⁴ In the result, gay men live

²⁵⁰ Section 14 of the Constitution.

²⁵¹ *Harksen v Lane* (note 164 above); *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* (note 10 above) paras 17-19.

²⁵² *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* (note 10 above) para 23.

²⁵³ *Ibid* paras 23-24, citing E Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights (1993) 110 *South African Law Journal* 450 at 455.

²⁵⁴ *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* (note 10 above) para 25.

insecure and vulnerable lives because of their sexuality as the legal system treats them as criminals. Other than societal prejudice, and an argument for the enforcement of the private moral views of the community, there was no justification for criminalizing consensual sex between men. Prejudice cannot qualify as a legitimate purpose. Equally, the religious view that holds that sexual relationships are for the purpose of procreation could not be a legitimate purpose for the purposes of justifying limitation of a freedom, not least because there are also religious views that do not share this view.²⁵⁵ In short, the crime of sodomy constituted a 'severe limitation' of a gay man's right to equality in sexual orientation.²⁵⁶ There was 'nothing' in the proportionality inquiry under section 36 of the Constitution to weigh against such a limitation of freedom and equality.²⁵⁷

The Court also said that the right to equality was not the only right implicated and violated although it was the eminent right. The right to equality intertwines with the right to human dignity.²⁵⁸ Human dignity requires acknowledging every person is of equal value and equal worth.²⁵⁹ According to the Court, the crime of sodomy punishes gay men for conduct that is part of their experience as human beings and does not harm a third party. Punishing people for what they are is profoundly disrespectful of the human personality and is a violation of human dignity. Such punishment degrades and devalues gay men in society. It is a palpable invasion of their dignity and a breach of section 10 of the Constitution. Rescuing people from caste-like status and ending their treatment as lesser

²⁵⁵ *Ibid* para 38. On this point the Court drew from *S v H* 1995 (1) SA 120 (C); *S v K* 1997 (9) BCLR 1283 (C). These are cases where at High Court level, it was held that after the coming into operation of the Interim Constitution of the Republic of South Africa, the common law crime of sodomy constituted a breach of the constitutional right to equality.

²⁵⁶ *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* (note 10 above) para 36.

²⁵⁷ *Ibid* para 36.

²⁵⁸ *Ibid* paras 120-129.

²⁵⁹ *Ibid* para 120.

human beings simply because they belonged to a particular group lay at the heart of the right to equality and non-discrimination.²⁶⁰

Equally, the Court said that the crime of sodomy was a violation of the right to privacy contrary to section 14 of the Constitution. Sodomy constitutes an egregious invasion of a constitutional right that is intended to protect the inner sanctum of a person. Respecting the right to privacy enjoins us to recognise that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.²⁶¹ The expression of sexuality is a core part of the sphere of private intimacy.²⁶² A crime that punishes the expression of sexuality that is consensual and does not harm another person constitutes a breach of privacy.

In reaching its conclusion, the court also considered international law and foreign decisions. It drew support, inter alia, from the decisions of the European Court of Human Rights²⁶³, the United Nations Human Rights Committee,²⁶⁴ and foreign benches of Western countries, including the Supreme Court of Canada²⁶⁵

²⁶⁰ *Ibid* para 129.

²⁶¹ *Ibid* para 32.

²⁶² *Ibid*.

²⁶³ *Dudgeon v United Kingdom* (1982) 4 EHHR 149; *Norris v Republic of Ireland* (1991) 13 EHRR 186. In these cases, the European Court on Human Rights held that the sodomy laws of Northern Ireland and the Republic of Ireland, respectively, constituted a breach of article 8 of the European Convention on Human Rights guaranteeing the right to privacy.

²⁶⁴ *Toonen v Australia* Communication Number 488/1992 (31 March 1994) UN Human Rights Committee Document No CCPR/C/50/D/488/1992. In this case, the Human Rights Committee held that a Tasmanian law criminalizing sex between men was a violation of the right to privacy under article 17 of the International Covenant on Civil and Political Rights which Australia had ratified.

²⁶⁵ *Egan v Canada* (1995) 29 CRR (2d) 79. In this case, the Supreme Court of Canada held that though not listed, sexual orientation was an analogous ground under section 15 of the Canadian Charter of Rights and Fundamental Freedoms, and thus discrimination on the basis of sexual orientation constituted unfair discrimination, unless it could be justified under section 1 of the Charter; *Vriend v Alberta* [1998] 1 SCR 493, where the Supreme Court of Canada held that sexual orientation was a protected analogous ground under the Individual Rights Protection Act of Alberta and that its exclusion created differential treatment which has the effect of denying equal protection on the ground of sexual orientation.

on the adverse impact of the crime of sodomy on the respect, protection and fulfilment of individual fundamental rights and the definite trend towards decriminalisation. At the same time, the Court observed that other liberal democracies, not least the United States, pointed in a different direction as was evident in *Bowers v Hardwick* where the majority of the Supreme Court refused to invalidate sodomy laws of 25 states.²⁶⁶ The Court distinguished *Bowers* noting, inter alia, that the South African Constitution differs so substantially from that of the United States in respect of its equality, human dignity and privacy guarantees and accompanying jurisprudence, including in respect of the express guarantee on sexual orientation in the South African Constitution.²⁶⁷ As part of underscoring the dissimilarities in the constitutional jurisprudence of the two countries, Justice Ackermann said that '*Bowers* can really offer us no assistance in the construction and application of our own Constitution'.²⁶⁸

National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others is the first case in which the Constitutional Court, as the highest appellate court in constitutional matters, authoritatively determined that the common law crime of sodomy was inconsistent with the constitutional right to equality. It is significant that the Court determined the case on the basis that the right to equality was the fundamental right that was pre-eminently implicated with the right to human dignity as an attendant right. According to the Court, the answer to the issue of unfair discrimination raised was not to achieve parity in discrimination by also outlawing sex between women as well, but to acknowledge that erotic expression was part of being human whether it be in relation to heterosexual expression or homosexual expression or some other sexual expression that does not harm others. In this way, the Court, without

²⁶⁶ *Bowers v Hardwick* 478 US 186 (1986); *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* (note 10 above) 54-55.

²⁶⁷ *Bowers v Hardwick* (note 266 above) 55.

²⁶⁸ *Ibid.*

marginalizing the relevance of the right to privacy, highlighted the importance of relying on equality, and more specifically, substantive equality, as a more enduring and more encompassing fundamental right for promoting the right to sexual self-determination of a group that has historically been stigmatized and marginalized. Simply basing the decision on the right to privacy might have the inadvertent effect of treating sexualities that are different from heterosexuality as sexualities that are acknowledged but should be hidden from the public sphere.

The case is important for acknowledging candidly and unapologetically that at an erotic level, same-sex feelings and same-sex conduct are part of the human variation in the domain of sexuality and sexual expression. Homoeroticism is about group difference, passion and play.²⁶⁹ It is about the body rather than reason, abandon rather than control. Acknowledging the humanity of sexual passion, especially unsubordinated gay passion, requires law to sever itself from the shackles of the sexually repressive rationality of Enlightenment and middleclass respectability so as to admit the body to the universe of equality or at least admit the body to holistic equality struggles with the real possibility of officially eroding or even dismantling a hegemonic sexuality centre.²⁷⁰ Judicial acknowledgment of homoeroticism is iconoclastic to the extent that it has the capacity to shatter the idea of respectability in sexuality as ultimately pegged on a code of masculinity and femininity as mutually exclusive and yet complementary opposites but with feminine sexuality essentially there to serve masculine sexuality. Receiving homoeroticism in mainstream jurisprudence humanises the law forcing it be more open, radical and self-critical so as to embrace humanity in its full dimensions, including its antidimorphic erotic dimensions, as part of respecting human dignity and plurality.²⁷¹

²⁶⁹ Young (note 1 above).

²⁷⁰ C West *The Cornel West Reader* (1999) 412-413; Young (note 1 above) 138-139.

²⁷¹ West (note 270 above) 412-413; Young (note 1 above) 139.

National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others goes far beyond complementarity between the Court's decision and international human rights jurisprudence. Not only did the Court draw from progressive decisions of human rights courts and tribunals, but even more significant, it went beyond the terrain reached by such courts and tribunals by placing the right to equality at the centre. By categorically vindicating the right of an individual to self-determination regarding their sexuality primarily on the basis of equality and human dignity rather than the right to privacy, the case established a human right standard that is higher than that established by the European Court on Human Rights²⁷² and the United Nations Human Rights Committee.²⁷³ At the same time, it is important to highlight that the manner in which the Constitutional Court approached the constitutional right to privacy was also significant in that the Court explicitly recognized that respecting the right to privacy of gay men means not just being absent from public view but more crucially recognizing that sex between men is an integral part of the nurturing of relationships between gay men.²⁷⁴

²⁷² In the following cases, for example, the European Court on Human Rights based its determination that domestic laws which criminalized consensual sex between men constituted human rights violations solely on the basis of article 8 of the European Convention which guarantees the right to privacy: *Dudgeon v United Kingdom* (note 263 above); *Norris v Republic of Ireland* (note 263 above); *Modinos v Cyprus* (1993) ECHR 19.

²⁷³ In *Toonen v Australia* (note 264 above) the United Nations Human Rights Committee based its finding that a provision of a Tasmanian Penal Code that criminalized consensual sex between men primarily on the basis of the right to privacy in article 17 of the International Covenant on Civil and Political Rights. At the same time, however, it is important to note that the Committee attempted to base its decision on wider grounds. At least, the Committee was amenable to framing the issue in terms of violation of the right to 'sexual orientation' and thus render the issue as also an equality one. The Committee said that for the purposes of determining a violation under article 26 of the Covenant, the phrase 'other status', is to be taken as including 'sexual orientation'. The Committee also said that the reference to 'sex' in article 2(1) of the Covenant is to be taken to include 'sexual orientation': I Saiz 'Bracketing Sexuality: Human Rights and Sexual Orientation - A Decade of Development and Denial at the UN' (2004) 7 *Health and Human Rights* 48.

²⁷⁴ Le Roux (note 228 above) 462.

The Court's decision has paved the way for reforms that have been instituted in a diverse range of socio-economic spheres in South Africa with a view to ending legally sanctified heterosexual hegemony. The decision has been applied in subsequent cases to outlaw discrimination against gay and lesbian people in the spheres that impact on sexual health albeit indirectly, including the spheres of immigration,²⁷⁵ third party employment-related benefits,²⁷⁶ third party insurance liability,²⁷⁷ adoption,²⁷⁸ assisted reproduction and birth certification,²⁷⁹ recognition of civil unions and marriages,²⁸⁰ succession,²⁸¹ and age for legal consent to sexual intercourse.²⁸²

In many ways, *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* comes close to a judicial vision of transformative sexual citizenship in a heterogeneous public sphere in which the focus is not so much

²⁷⁵ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2002 (2) SA 772 (CC).

²⁷⁶ *Langemaat v Minister of Safety and Security and Others* 1998 (3) SA 312 (T). In this case, an employment-related medical scheme which extended benefits to 'dependants' but excluded from the definition of dependants a person in a same-sex relationship with the employee was, successfully challenged before the High Court on the ground that it constituted a violation of the right to equality and constituted unfair discrimination on the basis of sexual orientation under section 9 of the Constitution; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC).

²⁷⁷ *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (C). This case, which was decided at a High Court level stands for the proposition that, where an insurance policy excludes liability to a member of the policy holder's family normally resident with him', it necessarily includes within its exclusionary ambit a same sex partner of the policy holder who has shared a home with the policy holder in a manner resembling that of husband and wife, and that such an interpretation accords with section 9 of the Constitution; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA). In this case, the Supreme Court of Appeal of South Africa held that a same-sex partner in a permanent relationship was in a similar position to a spouse in a marriage where a partner dies having undertaken a contractual duty to support the surviving partner. Where the partner is wrongfully killed, the surviving same-sex partner is entitled to claim from the perpetrator of the wrongful act, damages for loss of that support.

²⁷⁸ *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC).

²⁷⁹ *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC).

²⁸⁰ *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (3) BCLR 355 (CC); Civil Unions Act No 17 of 2006.

²⁸¹ *Gory v Kolover NO and Others (Starke and Others Intervening)* 2007 (4) SA 89 (CC).

²⁸² *Geldenhuys v The State* (2008) ZACC 21 (SCA).

on giving political recognition to gay men as a social group. The focus is, instead, on treating sexuality as an open domain without an organic centre or single standpoint but a multiplicity of voices some of which are stable and others defy definition. In support of the transformative dimension to the Court's decision in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*, Pierre De Vos has said that it:

..came very close to a queer understanding of the legal and social reality that have helped to construct and continues to perpetuate, a heteronormative view of society, a view that (still) permeates every aspect of our world and takes for granted the inherent normality of certain kinds of regulated different-sex emotional and sexual desire, while accepting or endorsing only certain kinds of same-sex emotional and sexual desire.²⁸³

The point De Vos is making is a crucial one when asking whether the decision achieved or at least laid the foundations of a heterogeneous public sphere. It is that, historically, heteronormativity has been institutionalised and protected from insurgency. Heteronormativity is complemented by elaborate supporting social structures including laws that give it a hierarchy. Heteronormativity has a disciplining effect on those who deviate from it such that even when different sexual orientation is given recognition, it is on terms and conditions scripted by heteronormativity, that inter alia, require deviations from heteronormativity to accept a subordinate position and to comport to sexual conduct that meets the expectation of heteronormativity about what homoerotic desire should be.²⁸⁴ Some of the manifestation of the terms and conditions of homoerotic desire are unwritten rules of self-policing and self-regulation which become part of a legal and social order of conditional acceptance and ultimately translate into assimilationist strategies so that the foundations of heteronormativity are not

²⁸³ P De Vos 'From Heteronormativity to Full Sexual Citizenship? Equality and Sexual Citizenship in Laurie Ackermann's Constitutional Jurisprudence' (2008) *Acta Juridica* 254 at 255.

²⁸⁴ *Ibid* 257-260.

threatened and that it remains the privileged model for sexuality.²⁸⁵ In this way, decriminalisation of same-sex, becomes just that – an end to criminal prosecution but without disturbing, in any fundamental way, the premises and the institutions underpinning the normalcy of heteronormativity.

Against a backdrop of heterosexuality as the privileged sexuality norm and jurisprudence from other jurisdictions and human rights treaty bodies that extended to same-sex conditional acceptance *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* is a bold attempt at sexuality equality as a dialogic ethic. It is evident for example, that when Justice Ackerman defined sexual orientation by reference to erotic attraction, he judiciously refrained from giving it a normalising centre preferring to recognise differentness and giving it a human and affective centre rather than a scripted rational and biological sex centre as is scripted by heteronormativity.²⁸⁶

Perhaps much more than Justice Ackermann, it is Justice Sachs who strikes resonant and symphonic notes on the drum of a heterogeneous public sphere. For this reason, Justice Sachs' judgment provides an entry point, however rudimentary, for a South African disability reading of substantive equality. His opening statement that this was less a case about who may penetrate whom and

²⁸⁵ *Ibid* 258.

²⁸⁶ Justice Ackermann essentially adopted a definition of sexual orientation advanced by Edwin Cameron which is that: '...sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay person can therefore be anyone who is erotically attracted to members of his or her own sex': Cameron (note 253 above) 452. But more than just adopt this definition, Justice Ackerman also put his own inclusive imprint on the definition when he said that: The concept of 'sexual orientation in s 9(3) of the 1996 Constitution must be given a generous interpretation of which it is linguistically and textually capable of bearing. It applies equally to the orientation of persons who are bi-sexual, or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex'. *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* (note 10 above) para 21. In this way, the Court avoided the trap of scripting rigid sexual identities in favour of recognising plurality in an open sexual domain and new possibilities as they are manifested and discursively created by persons and social groups.

where, and more about the status, moral citizenship and sense of self-worth of a particular social group in a pluralistic society set the parameters for implicating the wrongness of hegemonic equality and the moral imperative of recognising difference as relational and not hierarchical.²⁸⁷ For Justice Sachs, equality is not about transacting abstract categories but about focusing on concrete human lives as lived and injuries as experienced by different persons and different social groups.²⁸⁸ The guarantor of substantive equality is when equality puts human dignity at the centre and when certain groups are not denied full citizenship though difference that is translated by hegemonic laws and social institutions into subordinated difference.²⁸⁹ Whether it be sexuality or otherwise, the success of the post-apartheid constitutional project depends, in large part, on whether the country can successfully reconcile sameness and difference and not by eliminating and suppressing difference using a hegemonic norm, but on the contrary according sameness and difference equal respect.²⁹⁰

Justice Sachs makes it abundantly clear that equality is not about normalising difference in an assimilationist sense. Equality does not imply homogenisation but instead the *acknowledgement* and *acceptance* of difference.²⁹¹ Difference should not be the basis for exclusion, marginalisation, stigma and punishment but can on the contrary be the cause for celebrating the vitality that difference brings to society.²⁹² In the following pronouncement, Justice Sachs gave ringing support to a heterogeneous public sphere in which there is no domination or subordination and equality has no hegemonic centre:

²⁸⁷ *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* (note 10 above) para 107.

²⁸⁸ *Ibid* para 126.

²⁸⁹ *Ibid* paras 126, 129.

²⁹⁰ *Ibid* para 132.

²⁹¹ *Ibid*.

²⁹² *Ibid* para 132.

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.²⁹³

The egalitarian sweep of Justice Sachs' vision of equality is unmistakable. The same sweep is evident in *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*,²⁹⁴ where the Constitutional Court unanimously held that the common law definition of marriage was unconstitutional in that by implicitly excluding same-sex marriages it constituted unfair discrimination. Justice Sachs, who delivered the main judgment, spared little effort in fulsomely enunciating inclusive equality and situating equality in a domain in which respect and accommodation of differences are integral parts of equality. Reiterating and, at times, elaborating on the architecture of inclusive equality he first articulated in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*, Justice Sachs speaks of the society that is envisioned by the Constitution that is not merely democratic, but is also caring, universalistic, and aspirationally egalitarian.²⁹⁵ Equality means affirming in a positive sense differences so that they do not become the source of exclusion, marginalisation and stigmatisation of certain

²⁹³ *Ibid* para 134.

²⁹⁴ *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (note 280 above).

²⁹⁵ *Ibid* para 60.

groups.²⁹⁶ Acknowledging difference means affirming human beings in all their manifestations, including their socio-cultural and biological manifestations.²⁹⁷ South Africans, he said, 'come in all shapes and sizes'.²⁹⁸ As he did in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*, Justice Sachs aligns substantive equality with participatory citizenship that is something much more than formal citizenship.²⁹⁹

In Chapter 2, I argued that part of the moral flaw in colonial and apartheid discourses of race lay in treating difference as categorical rather than relational.³⁰⁰ The flaw was in the deliberate construction of a master dichotomy that *enabled* one group but *disabled* the other. In the end, racial differences became the physical barriers they were intended to be by the colonial and apartheid architects of race complete with complimentary jurisprudence that was steeped in a Cartesian container with no co-ordinating points save those that register racial interaction in relationships of dominance and subordination, and enablement and disablement. Justice Sachs' embrace of difference as relational is a ringing rejection of jurisprudence in the era of the container.³⁰¹ His implicit judicial endorsement of Minow's thesis on difference as normatively relational rather than categorical is particularly significant.³⁰² It does what Aletta Norval has argued for in a post-apartheid socio-political order where deeper levels of

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

³⁰⁰ Chapter 2 § 4.4.

³⁰¹ H Botha 'Metaphoric Reasoning and Transformative Constitutionalism' (Part 1) (2002) 4 TSAR 612 at 623-627; Chapter 2 § 4.4 of this study.

³⁰² *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* (note 278 above) para 60, footnote 71 where in predicating active common citizenship on normative acceptance of differences, Justice Sachs, citing Martha Minow, also implies that categorical (and not relational) differences that marginalise and disadvantage are socially constructed using unstated and unacceptable assumptions; Minow *Making All the Difference* (note 122 above) 53-74; Chapter 2 § 4.4 of this study.

social change require not only breaking with master dichotomies of race under apartheid, but also transforming the logic that informed, at a broader level, modes of social division and hierarchy.³⁰³

If transposed to disablement, Justice Sachs' expansive vision of equality compels us to find comfortable purchase in the epistemology of disablement as social oppression. Even more significantly, it compels us to acknowledge, accommodate and accept the largest spread of somatic difference in a manner that compliments the construction of disablement under the social model of disability and under radical feminism. To conceive equality in the manner that Justice Sachs does, means looking at disabled bodies as relational difference and not subordinated difference. Certainly, it requires us not to treat disabled bodies as deviant bodies that can only be discursively constituted as polar opposites of abled bodies. The question we are left to answer, however, is that: In a concrete juridical sense, what would acknowledging, accommodating and accepting the largest spread of somatic difference mean in terms of somatic difference? What would it mean in terms of redistributive justice to accommodate disabled people so that sufficient resources are allocated to disabled people in order to facilitate an active rather than a purely formal sense of citizenship, including participation in employment? Although I propose to answer this question more pointedly in Chapter 6 of this study, I can at this stage stake out the broad implications and broad possibilities as well as limits of Justice Sachs' equality semantics.

Using Fraser's analytical framework, acknowledging, accommodating and accepting disabled bodies must mean the imperative of both cultural or political recognition and economic recognition. In terms of equality, it must mean, *inter alia*, an equality jurisprudence that treats 'disability' in section 9 of the Constitution as protecting disabled people from subordination and

³⁰³ A Norval *Deconstructing Apartheid Discourse* (1996) 299; Chapter 2 § 4.4 of this study.

stigmatization not just from attitudes but also from socio-economic arrangements. It means recasting the 'normal' body so that it becomes only a 'statistical norm' and not a legal norm that has a disciplining effect on deviating bodies as our Sachsian starting point is that the body is variable.³⁰⁴ If we extend Justice Sachs' reasoning of deviance in homosexuality as existing in stigmatising attitudes rather than people that do not regard heterosexuality as the only possibility, it means treating socio-economic arrangements that treat disabled people as subordinate as the repositories of deviance rather than the disabled body.³⁰⁵

Ultimately, acknowledgement, accommodation and acceptance of disabled bodies means: being conscious to disablism as social oppression; hearing the different voices of enabled and disabled people; creating an equal playing field between the enabled and the disabled privileging none and disadvantaging none; and providing, by way of full accommodation and full acceptance, an alternative to existing exclusionary socio-economic arrangements in a manner that is costless to disabled people. Justice Sachs' endorsement of Christine Littleton's feminist thesis on substantive equality as equality that is 'costless' to those that have been categorised as different by mainstream juridical norms can be understood as gesturing towards judicial acceptance of accommodation of disablement that is not economically burdensome to disabled people.³⁰⁶

³⁰⁴ *Ibid* para138. Here I have coined the adjective 'Sachsian' from Sachs to convey a jurisprudential approach associated with Justice Sachs.

³⁰⁵ *Ibid* para 129

³⁰⁶ *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* (note 10 above) para 132, footnote 44, citing C Littleton 'Reconstructing Sexual Equality' (1987) 75 *California Law Review* 1279; As submitted in Chapter 3 § 4.4 of this study, Littleton's ultimate equality argument is that 'The differences between human beings, whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived equality of those persons': Littleton *ibid* 1284-1285.

In short, it could be argued that there is enough in Justice Sachs' equality semantics to allow us to argue that substantive equality under the South African Constitution ought to do the job of disability method. The problem, however, as alluded to earlier, is that whilst Justice Sachs provided the rhetoric, the case before the Court does not give us a concrete roadmap on how the redistributive dimension of accommodation and acceptance would be implemented. *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* essentially addressed political recognition. The case does not say anything concrete about economic accommodation. The case does not tell us anything tangible about claimants who may need material resources in order to vindicate their equality. Rather it is about claimants who are otherwise ready and able to realise their sexuality without the fear of prosecution once the burden of cultural marginalisation and stigmatisation that is legally ordained is lifted. The case is about facilitating agency in subjects who otherwise are already possessed of the capability to realise their sexuality but are disabled by a legal proscription. The claimants in *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* were not asking for the state to intervene positively through the discharge of positive duties and the allocation of material resources in order to render them capable to realising their equality on parity with counterparts that are endowed with such resources. Rather, they were seeking equality as a civil and political right. In this sense, *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* can be understood as a case exemplar of equality as a 'duty of restraint'.³⁰⁷ The same point can be made in respect of *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*.³⁰⁸ The case does not tell us

³⁰⁷ S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 176.

³⁰⁸ Note 280 above. The point is not that implementing a legal infrastructure for recognizing same-sex marriages does not require expending the resources at all, but that at most it requires miniscule resources only.

anything concrete about equality as a multilayered concept that entails not only parity in participation at a political level, but also parity at an economic level.³⁰⁹

Though Justice Sachs' rhetoric of accommodation and acceptance is not qualified and, therefore, hints at the proposition that nothing less than full accommodation and acceptance is required whether one is dealing with a political recognition claim or economic recognition claim, the evidence, as I shall argue in Chapter 6 of this study shows that courts are apt to adopt a different mindset when faced with an economic recognition claim. When vindicating equality and non-discrimination that entails economic redistribution, courts tend to retreat into the comfort offered by the parlance of 'reasonable accommodation' which, as alluded to in Chapter 1 of this study, is apt to guarantee a much more circumscribed equality universe.³¹⁰ 'Reasonable accommodation' opens substantive equality to the incipient and constraining influence of formal equality such that a disabled worker, who otherwise needs the job or workplace environment to be realigned with a disabled body, is treated in the same way as an enabled worker unless the resources of the employer permit differentiation that does not threaten profit margin expectations.

7 COMPARATIVE LAW AND EQUALITY PARADIGMS

In assessing the value of Canada and the United States as comparators, the focus of this section is on highlighting the respective affinities of these jurisdictions with formal equality and substantive equality. The point of departure is that a heterogeneous public sphere coheres with substantive equality rather than formal equality and that South African jurisprudence, at least at a rhetorical level, has unambiguously embraced substantive equality, notwithstanding the

³⁰⁹ Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (note 307 above) 180.

³¹⁰ Chapter 1 § 3.2.

inconsistency in application as well as the gap in respect of economic recognition. The discussion does not include affirmative action (which is an instance of substantive equality) for reasons that were explained in Chapter 1.³¹¹ Moreover, the discussion focuses only on the jurisprudence emanating from the interpretation of constitutional equality clauses by the respective highest courts.³¹²

7.1 Canada: Substantive Equality Lessons from *Andrews v Law Society of British Columbia*

The Charter of Rights and Fundamental Freedoms of 1982 (the Charter) is Canada's supreme law. Section 15 of the Charter is Canada's equality clause at the highest level. It provides that:

- (1) Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.³¹³

In 1989 the Supreme Court of Canada delivered its first judgment on equality under the Charter in *Andrews v Law Society of British Columbia*.³¹⁴ At issue was

³¹¹ Chapter 1§ 7.2.

³¹² Both Canada and the United States are federal jurisdictions with provincial and federal equality jurisprudence respectively running side by side with the jurisprudence of the supreme courts albeit at subordinate levels.

³¹³ I have omitted quoting section 15(2) of the Charter which mandates affirmative action and is analogous to section 9(2) of the South African Constitution.

³¹⁴ *Andrews v Law Society of British Columbia* (note 29 above), also available on <[http:file:///E:\Supreme%20Court%%20of%20Canada%20-%20Decisions%20-%20An...](http://file:///E:\Supreme%20Court%%20of%20Canada%20-%20Decisions%20-%20An...)> (last accessed on 12 October 2010). The Charter, which was promulgated in 1982, provided for a staggered implementation of some of its provisions, including section 15. The operation of section 15 only commenced five years later in order to allow governments at the federal as well as provincial levels sufficient opportunity to amend their respective laws in accordance with the Charter.

whether a Canadian citizenship requirement for admission to the British Columbia Bar infringed section 15 by barring non-Canadian citizens permanently resident in Canada from admission to legal practice. In the course of answering the question in the affirmative, the Canadian Supreme Court laid down the main interpretive edifice of the Charter's equality clause. As many commentators have observed, *Andrews* marked a turning point in the Canadian Supreme Court's equality jurisprudence.³¹⁵ The most striking equality development in *Andrews* is that the Court resolutely turned away from an unduly deferential, parsimonious, and highly formalised approach that had characterised equality adjudication under the Canadian Bill of Rights of 1960,³¹⁶

³¹⁵ Hogg *Canadian Constitutional Law* (note 76 above) § 55.2; D Lepofsky 'The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster' (1992) *Law and Contemporary Problems* 167 at 170; Fudge 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (note 53 above) 238.

³¹⁶ For example, in connection with the interpretation and application of the equality clause of the Canadian Bill of Rights, Peter Hogg says that *R v Drybones* (1970) SCR 282 is the only case in which the Supreme Court of Canada nullified a parliamentary legislation as inconsistent with the equality clause. In *Drybones*, the Court struck down, as inconsistent with the Bill of Rights' guarantee of equality on the ground of race, federal legislation which made it an offence for an 'Indian' person to be in possession of intoxicants while not on a 'reserve'. The Court's reasoning was that it would be perverse to understand equality on the ground of race as meaning discriminating against members belonging to the same race in the same way at a time that members belonging to a different race are not being subjected to the same restriction. As exemplifications of undue juridical deference by the Supreme Court of Canada through failure to adequately subject to judicial scrutiny federal objectives behind discriminatory legislation Hogg cites cases such as: *Attorney General of Canada v Lavell* (1974) SCR 1349, where the Court upheld, as not constituting infringement of the right to equality on the ground of sex, a federal statute depriving 'Indian' women of their Indian status if they married non-Indians notwithstanding that the statute did not impose the same restriction on Indian men; *R v Burnshine* (1975) 1 SCR 693, where the Court held that a statute which authorised courts to impose an indeterminate sentence of up to two years on offenders under the age of twenty-two who committed offences carrying penalties of more than three months imprisonment, but did not impose the same burden on a person above the age of twenty-two did not constitute discrimination on the ground of age; and *Bliss v Attorney General of Canada* (1979) 1 SCR 183 where the Court held that a statute that offered benefits to women who were not pregnant but withheld the benefits from pregnant women under a federal unemployment insurance scheme, did not constitute discrimination on the ground of sex. The reasoning was that the statute did not discriminate as between pregnant women and that any discrimination as between pregnant and non-pregnant women was 'not created by legislation but by nature': Hogg *Canadian Constitutional Law* (note 76 above) § 55.2. It is important, however, to understand the impoverished legacy of the Canadian Supreme Court on the protection of equality under the Canadian Charter of Rights as not solely a matter of judicial choice but also the outcome of an equality clause that, in relative terms, was not couched in expansive terms and was ensconced in a Bill of Rights that was not quite a Bill of Rights in the

and made a clear choice in favour of adopting an assertive, generous and substantive equality approach.

Though the equality architecture that the Canadian Supreme Court constructed in *Andrews* has been subject to revision as well as embellishment by the Canadian Supreme Court in an ever-growing bank of equality cases, nonetheless, it remains, at least from the Court's own standpoint, the essential roadmap.³¹⁷ In *R v Kapp*, nearly twenty years after *Andrews*, the Supreme Court, in part to ward off criticisms that its equality jurisprudence was inconsistent rather than unified, professed its loyalty to *Andrews* by unanimously saying that '*Andrews* set the template for this Court's commitment to substantive equality – a template which subsequent decisions have enriched but never abandoned'.³¹⁸ But what does substantive equality mean for the Canadian Supreme Court? Even more pertinently, we need to ask the question: Ultimately, what lessons or insights can Canadian jurisprudence yield for the equality paradigm under the South African Constitution as it applies to disability in terms of an expansive equality paradigm? Five main points can be made in this regard, namely that Canadian equality jurisprudence has: (1) rejected formal equality in favour of substantive equality; (2) integrated human dignity in the equality analysis; (3) placed the primary focus of the framework for determining unfair discrimination on

conventional sense of constituting supreme law. The Canadian Bill of Rights was in essence federal law. It was adopted in order to protect individual liberties against encroachment by federal government. Though it was accorded relative supremacy, it was open to federal statutes to exempt themselves from its ambit. Section 15 of the Charter not only supersedes the equality clause of the Canadian Bill of Rights as part of fundamental law that enjoys supremacy. Also, at a textual level and in a substantive sense, section 15 is intended to remedy the restrictive ambit of equality protection of fundamental rights guaranteed by the Canadian Bill of Rights under section 1(b) which guaranteed 'equality before the law without discrimination by reason of race, national origin, colour, religion or sex': Lepofsky 'The Canadian Judicial Approach to Equality Rights (note 315 above) 170. See also note 326 below.

³¹⁷ The decision of the Supreme Court of Canada in *R v Turpin* (1989) 1 SCR 1296, which was decided shortly after *Andrews*, should be regarded as a twin to *Andrews* in terms of echoing and reinforcing the Court's marker on substantive equality as its preferred interpretation of section 15 of the Charter at the advent of the Canadian Supreme Court's jurisprudence on equality.

³¹⁸ *R v Kapp* (2008) 2 SCR 483, para 14.

eliciting 'impact' using a contextual approach; (4) conceived the duty to accommodate disablement as a non-discrimination duty when determining unfair discrimination; and (5) has applied the duty to provide 'reasonable accommodation' in a manner that cannot always assure the vindication of economic recognition.³¹⁹ I treat the first four points as interpretive virtues and as positive or complimentary lessons not just for the South African jurisprudence on substantive equality but also for giving expression to a heterogeneous public sphere. The fifth point I treat as pointing towards a circumscribed substantive equality paradigm. I address this last point in Chapter 6 of this study where the focus is on accommodating disablement.

All four interpretive virtues can be found, albeit with varying content and emphasis, in *Andrews* in the judgment delivered by Justice McIntyre.³²⁰ *Andrews* is shot through with a repeated emphasis on first establishing the larger context as the gateway to determining unfair discrimination. The Canadian Supreme Court emphatically set its interpretive approach against an approach that conceives 'similarly situatedness' in a manner that is rigid, mechanical and is manifestly devoid of social context. *Andrews* firmly turned its back on an equality that always requires sameness for the reason that 'identical treatment may frequently produce serious inequality'.³²¹ The Court treated a simplistic conception and application of the Aristotelian principle of formal equality as 'seriously deficient' and one that can readily justify the legitimacy of an apartheid vision of equality. To highlight this deficiency, the Court expressly observed that a formalistic conception of formal equality would be consistent

³¹⁹ I do not imply that the five points are all what can be said about the features of the contours of Canadian Supreme Court's jurisprudence on substantive equality but that the points are immediately apposite to my discourse.

³²⁰ Note that the Supreme Court was unanimous on the point that the legislative measure in question constituted unfair discrimination under section 15(1). However, Justice McIntyre, who delivered the main judgment, dissented on the justification point. He was of the opinion that the measure was saved by section 1 of the Charter, the justification clause.

³²¹ *Andrews v Law Society of British Columbia* (note 29 above) per Justice McIntyre.

with justifying the treatment of Jews under the Nuremburg laws and the doctrine of separate but equal under *Plessy v Ferguson*.³²² Embracing a contextual approach as the new judicial approach to adjudicating equality, the Court said that when determining whether a measure is discriminatory, consideration must be given to its 'content of the law, to its purpose, and its impact upon those it applies and also upon those it excludes from application'.³²³ In *R v Turpin* (which was decided shortly after *Andrews*), the Court put a gloss on its contextual approach and its focus on impact when it said:

In determining whether there is discrimination on the grounds relating to personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...Accordingly, it is only by examining the larger social context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.³²⁴

It is instructive that the Supreme Court in *Andrews* approached equality conscious of its epistemology as a protean concept for which there is no closed meaning but, instead, competing theories of what constitutes treating people equally in an envisioned good society.³²⁵ Emboldened by the historical rationale for section 15 and its language,³²⁶ the Court made a clear choice in favour of a

³²² *Andrews v Law Society of British Columbia* *ibid*; *Plessy v Ferguson* 163 US 637 (1896). By a majority (Justice Harlan dissenting), the Supreme Court of the United States held that a state of Louisiana law mandating racially segregated railway carriages did not constitute a violation of the Equal Protection Clause of the Constitution of the United States. See § 7.2 below.

³²³ *Andrews v Law Society of British Columbia* (note 29 above) per Justice McIntyre. I have used the law report that is available on internet and I am, therefore, unable to indicate the original pages where the pagination of the judicial assertions that I am referring to can be found. The judgment does not number the paragraphs as later judgments of the Canadian Supreme Court do.

³²⁴ *R v Turpin* (note 317 above) 1331-1332.

³²⁵ *Ibid* per Justice McIntyre.

³²⁶ As part of the 'linguistic, philosophic and historical context' for interpreting section 15, the Court in *Andrews* said that the language used to draft section 15 was 'deliberately chosen in order

type of equality that is not content with looking at the surface of things, but requires examining the larger social context to see whether there is, in fact, a level playing field and whether in a substantive and not merely a formal sense the law in question, as the case may be, confers benefits or imposes burdens to all equally. In this regard, Justice McIntyre said:

In simple terms then, it may be said that law which treats all identically and which provides equality of treatment between "A" and "B" may well cause inequality for "C", depending on the differences in personal characteristics and situations. To approach the ideal of full equality before the law and under the law - and in human affairs an approach is all that can be expected - *the main consideration will be the impact of the law on the individual or the group concerned.* Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another.³²⁷

Rendering the impact of the law the main consideration when determining whether a law extends equal benefits or imposes equal burdens means examining the larger social, political and legal context within which unfair discrimination is alleged and juxtaposing them with the characteristics and circumstances of the claimant and the protected social group to whom they belong. It means a judicial capacity and willingness to implicate law not as an inherently neutral and virtuous social instrument, but as instrument that can

to remedy some of the perceived defects under the Canadian Bill of Rights': *ibid* per Justice McIntyre. According to Justice McIntyre, it is significant that while the Canadian Bill of Rights spoke only of 'equality before the law' in contrast, section 15 is much more expansive and has four basic component rights, namely: (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) the right to equal benefit of the law to reflect not only an attempt to remedy the shortcomings of the protective ambit under the Canadian Bill of Rights but also an expanded concept of discrimination as developed under Canadian Human Rights Codes: *Ibid*.

³²⁷ *Ibid*. Emphasis added.

serve to reinforce oppression and perpetuate systemic inequality and disadvantage in a society that is socially stratified along a variety of axes including, race, gender and ablebodiedness. Indeed, Justice McIntyre said that 'the worst oppression will result from discriminatory measures having the force of law and it is against this evil that section 15 provides a guarantee'.³²⁸

Examining the larger social context will require asking pertinent sub-questions, including: Is there a pre-existing pattern of disadvantage, vulnerability, stereotyping or prejudice for the individual claimant or the group to which they belong?; What is the relationship between the ground upon which the unfair discrimination is alleged and the nature of the discriminatory treatment?; Is the measure ameliorative in purpose or effects upon a more disadvantaged individual or group to which they belong, and; What is the nature and scope of the interest affected by the impugned measure?³²⁹ As Justice Iacobucci emphasised in *Law v Canada*, these sub-questions need not be asked as if they are legislative edits that must always be asked or as a closed list representing all that must be asked.³³⁰ They are best understood as judicial praxis that provides the Court with important but flexible pointers towards the application of an equality framework that first elicits context in order to vindicate substantive equality.

As part of extending or complimenting the judicial thesis on the centrality of impact as a marker for vindicating substantive equality, the Court described the accommodation of differences as the 'essence of true equality'.³³¹ The Court also integrated human dignity into the determination of equality. It said that the

³²⁸ *Andrews v Law Society of British Columbia* (note 29 above) per Justice McIntyre.

³²⁹ Although these sub-questions have been formulated and reiterated by the Canadian Supreme Court in numerous equality cases, it is in *Law v Canada* that they were first given a more structured and elaborate form in the judgment delivered by Justice Iacobucci: *Law v Canada* (1999) 1 SCR 497 paras 62-75.

³³⁰ *Law v Canada* *ibid* paras 62, 88.

³³¹ *Ibid.*

purpose of section 15 of the Charter was to promote a society in which all are secure in the knowledge that they are recognised as human beings equally deserving of concern, respect and consideration' and that the section has a 'large remedial component'.³³²

Though in subsequent cases members of the Supreme Court of Canada have not always adopted the same methodological framework for adjudicating section 15 or put the same gloss on the contours of substantive equality,³³³ it is fair to say that they have not differed on the indispensability of a generous, contextual approach, and a spotlight on impact as cardinal pointers towards vindicating substantive equality. In *R v Kapp* the Supreme Court of Canada was at pains to emphasise that the substantive equality is the motif of section 15 and that, principally, vindicating substantive equality means focusing on eradicating the perpetuation of disadvantage and stereotyping in a social context and that although the Court may have expressed its equality framework with different

³³² *Ibid.*

³³³ Much has been written about dissensus among members of the Supreme Court of Canada in the formulation as well as application of the substantive equality framework after *Andrews*. The major academic concern has been about the judicial clawing back of the expansiveness of *Andrews* in subsequent cases. In this connection, for example, the decisions of the Court in *Egan v Canada* (1995) 2 SCR 513, *Miron v Trudel* (1995) 2 SCR 418 and *Thibaudeau v Canada* (1995) 2 SCR 627, *Law v Canada* (1999) 1 SCR 497, have been the subject of wide academic commentary to the extent that they demonstrate different rather than unified judicial accents on substantive equality, including the place and application of human dignity with some judges using the requirement of impairment of human dignity to restrict rather than vindicate substantive equality: M Irvine Winner 1999 Cassels Brock & Blackwell Paper Prize: A New Trend in Equality Jurisprudence (1999) Appeal Publishing Society. Available at <http://web.lexis-nexis.com/professional/document?_m=b045daeb8269de083ca778980...> (last accessed on 30 November 2004; B Baines 'Law v Canada: Formatting Equality' (2000) 11 *Constitutional Forum* 65; Fudge 'Substantive Equality, the Supreme Court of Canada, and the Limits to Distribution' (note 53 above) 238; W Black & L Smith 'The Equality Rights' (2005) 27 *Supreme Court Review* (2d) 315; PW Hogg 'What is Equality? The Winding Course of Judicial Interpretation' (2005) 29 *Supreme Court Review* (2d) 39; Hogg *Constitutional Law of Canada* (note 76 above) 55.9. For my immediate comparative purposes, it is not necessary to go beyond noting: that while Canadian jurisprudence is committed to substantive equality, there are ongoing judicial complexities in the formulation and actual application of substantive equality; and that the application of substantive equality in Canada has gone through testing judicial times and that in *R v Kapp* (note 318 above), the Canadian Supreme Court attempted to restore coherence and fidelity to the substantive equality spirit of *Andrews*: See note 318 above.

accents, ultimately, the motif remains extant.³³⁴ Equally, the Court has consistently maintained that the duty to accommodate difference is an integral part of discharging the duty to respect substantive equality.³³⁵

It would be difficult to miss the parallels between Canadian and South African equality jurisprudence. The similarities in the framework for determining unfair discrimination are substantial.³³⁶ And this is not a matter of mere coincidence but a case of the South African Constitutional Court emulating, in many concrete respects, the approach of its Canadian counterpart as part of developing its own framework for interpreting and applying section 9 of the Constitution. Though there are some methodological differences in the framework for determining unfair discrimination,³³⁷ ultimately, they are minor technical differences which pale into insignificance when juxtaposed with the broader common approach to the rejection of formal equality and the embrace of substantive equality that is contextualised and alive to the importance of eradicating systemic inequality and historical disadvantage. The South African Constitutional Court's framework for eliciting context is complemented by the Canadian approach. The factors for determining 'impact' of a discriminatory measure on the individual or the group to which they belong that have been articulated by the Constitutional Court,³³⁸ are, in substance, the same factors that the Canadian Supreme Court has impressed upon. Given the striking similarities between the equality jurisprudence of these two courts, and the value of Canadian jurisprudence as a comparator that complements the juridical credibility of the nature and trajectory of South African equality jurisprudence, a remaining question to ask is whether there are areas where gaps subsist and where Canadian equality jurisprudence

³³⁴ *R v Kapp* (note 318 above) para 24.

³³⁵ See the discussion in Chapter 6 of this study.

³³⁶ Pretorius '*R v Kapp*' (note 6 above) 398-399.

³³⁷ *Ibid* pp

³³⁸ See the discussion in § 6.1 above.

can be persuasive to South African jurisprudence. This is an important question to ask, especially given the dearth of jurisprudence on disability in South Africa and its relative visibility in Canada.

I would submit that in essence there are two positive lessons to draw from Canadian jurisprudence at the intersection between equality and disability. One of the lessons is an expansive definitional categorisation of disability for the purposes of determining whether the complainant falls within the protected group. I deal with this aspect in Chapter 5 of this study. The other positive lesson to draw is how Canadian substantive equality jurisprudence has conceived unfair discrimination in cases relating to disablement so as to found a duty to act positively on the part of the party alleged to have perpetrated the discrimination. Although I address this aspect more fully in Chapter 6 of this study, on account of its direct relevance to underlining the approach of the Supreme Court of Canada to the determination of the question whether differential treatment constitutes unfair discrimination, it serves well, at this stage, to outline the broad approach of the Canadian Supreme Court when imposing a positive duty.

Whilst there is a body of cases in which the Supreme Court's equality has intersected with disability, its decision in *Eldridge v British Columbia*³³⁹ is, in many ways, standard setting and serves well as an illustration. *Eldridge* concerns three applicants who all suffered from deafness and used Sign language as their regular mode of communication. One applicant suffered from diabetes and had been unable to communicate with his doctor, finding communication stressful and confusing. The other two were a couple who had gone through the experience of giving birth to premature twins, but without understanding what the doctors and nurses were saying to them. During labour, nurses communicated through gestures to communicate that the heart rate of one of the

³³⁹ *Eldridge v British Columbia (Attorney General)* (1997) 3 SCR 624.

babies had gone down. When the twins were born they were immediately taken away for intensive therapy care. But except for a note saying the twins were 'fine' there was no effective communication about their condition. The healthcareers did not know how to communicate in Sign language. Lack of effective communication about the health welfare of the twins had left the couple distressed and frightened. The applicants brought an action alleging that the provincial health services had discriminated against them by failing to provide interpretive services. They argued that effective communication was an essential part of the provision of health services. Neither the legislation governing provision of health services, nor the hospitals providing health services made provision for sign language interpretation services. The applicants based their claim on section 15 of the Charter.

The Court held unanimously that the state had violated section 15. The state had provided deaf people with health care services that were strictly identical to those received by people whose hearing was not impaired. Effective communication was an essential part of the provision of health services. Consequently, health providers were under a positive duty to ensure that deaf patients effectively communicated with health providers. In this case, health providers had failed to provide 'equal benefit of the law' to people with disabilities. In this connection the Court said:

Section 15(1) expressly states, after all, that every individual is 'equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination... The provision makes no distinction between laws that impose unequal burdens and those that deny equal benefits. If we accept the concept of adverse effect discrimination, it seems inevitable, at least at s. 15(1) stage of analysis, that the

government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.³⁴⁰

According to the Court, government had not provided 'reasonable accommodation' for the appellants' disabilities.³⁴¹ In reaching its decision, the court took into account that disabled people have historically endured exclusion and marginalisation, and have frequently been excluded from jobs, denied access to opportunities for social interaction.³⁴² Section 15 of the Charter is committed to recognising the equal worth and dignity of all persons and rectifying and preventing legacies of social, political and legal disadvantage. Failure to communicate with the health providers impaired the dignity and worth of the applicants according to the court. It deprived them of the opportunity to meaningfully access services they were entitled to. As part of the realisation of equality, provincial health providers were constitutionally required to take *positive* steps to ensure that persons with disabilities and other groups in a comparable position are in substance and not merely in form treated equally. The court rendered its analysis of equality under section 15 in terms of substantive equality template pioneered by *Andrews* and *Turpin*.

The court in *Eldridge* explicitly acknowledged the social, political and historical context underpinning the disadvantages suffered by disabled people, noting that disabled people have 'too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping, and relegated to institutions.'³⁴³ When thinking about substantive equality, the significance of the *Eldridge* lies in the proposition that discrimination can sometimes be perpetrated by failure to adopt positive

³⁴⁰ *Ibid* para 76.

³⁴¹ *Ibid* para 94.

³⁴² *Ibid* paras 56-57.

³⁴³ *Ibid* para 56

measures that will allow certain disadvantaged groups to achieve a level playing field, as it were, with people that are not so disadvantaged. Reasonable accommodation is not affirmative action in the sense of preferential treatment to achieve a certain level of representativeness for a particular historical marginalised and disadvantaged social group, but a tool for removing barriers that stand in the way of realising meaningful equality. It is a concrete recognition that, in a society characterised by diversity, certain individuals and groups may need to be treated differently and be conferred with a positive benefit in order to enjoy equality. Strictly equal or even-handed application of rules or policies without regard to their impact on certain individuals or groups may cause discrimination rather than provide equality of opportunity. In this way, accommodating difference is a manifestation of substantive equality and the rejection of formal equality.

In impressing upon the relevance of accommodation duties, in *Eldridge*, the Canadian Supreme Court demonstrated an awareness that though eliminating invidious discrimination against disabled people is an important objective of the right to equality and non-discrimination, the greater sting of disablism lies in socio-economic arrangements that are not so much constructed to intentionally exclude disabled people, but ineluctably have that 'impact'. In this connection, the Court said that 'the government will rarely single out disabled persons for discriminatory treatment', and that 'more common are laws of general application that have a disparate impact on the disabled'.³⁴⁴ As part of enunciating the rationale for accommodation and its inextricability from the determination of unfair discrimination under section 15 of the Charter when dealing with disablement, the Court, inter alia, drew with approval from Justice Sopinka's statement in *Eaton v Brant County Board of Education* where he said:

³⁴⁴ *Ibid* para 64.

The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is the recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation of disability.³⁴⁵

If projected on disability method and the heterogeneous public sphere, the rationale and outcome in *Eldridge* can be said to meet the criterion of equality as a dialogic norm that requires hearing excluded and marginalised voices, eradicating master dichotomies, and accommodating difference in manner that is costless to those that are deemed different by mainstream society. *Eldridge* implicates spoken language as a socially privileged form of communication. It is a universalised and homogenised master dichotomy that is used in an oppressive

³⁴⁵ *Ibid* para 65; *Eaton v Brant County Board of Education* (1997) 1 SCR 241 at paras 66-67.

way to marginalise Sign language and is at odds with the egalitarian ethics of a heterogeneous public sphere where all languages whether spoken or Sign have equal dignity. The substantive equality objective is not to eradicate spoken language but to relativise it so that it acknowledges other communication genres in a non-hierarchical way. That way, the impact of the master dichotomy on people who are deaf is ameliorated if not eradicated. Prior to the decision in *Eldridge*, consistent with the philosophy of disablement as individual impairment, the applicants had relied on their own resources to pay for interpretive services when attempting to access the provision of public services. The Court shifted this burden from the applicants to the state consistent with a social model of disablement where equality means more than just equal treatment. It also means acceptance and in a practical sense accommodating disablement in a manner that is costless to disabled persons. It is particularly significant that *Eldridge* approaches disablement attuned to its phenomenon as socially constructed oppression when it says:

This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the “equal concern, respect and consideration” that s. 15(1) of the Charter demands. Instead they have been subjected to paternalistic attitudes of pity and charity, and their entrance to the social mainstream has been conditional upon their emulation of able-bodied norms.³⁴⁶

Rather than follow the individual impairment model and locate disability intrinsically in the body of persons who are deaf, *Eldridge* appeals to the social model of disability and implicates, instead, the larger social, political and economic environment. It implicates social attitudes and social arrangements as

³⁴⁶ *Ibid* para 56.

the primary locus for disablement.³⁴⁷ Thus, in *Eldridge*, disabled people, are not so much people whose hearing is impaired, but people whose Sign language has been disabled primarily because of the overwhelming social and legal privileges accorded to spoken language and the relative non-recognition of Sign language. In this way, *Eldridge* manages to raise consciousness about disability. It manages to both destigmatise deafness as well as politicise the category of disabled people as people as an identifiable class that shares a common history and experiences systemic inequality.

Eldridge comports with feminist thought. From the perspective of radical feminism,³⁴⁸ the outcome in *Eldridge* stands for anti-reductionism and recognition of difference. The outcome stands for the proposition that what is equal to spoken language need not be spoken language precisely because spoken language is not, or at least, ought not be regarded as the universal reference point for communication and neither should written language. People that are deaf need not be compelled to learn to speak and read in order to qualify to claim equality in communication. Spoken language is not pre-social but a social construct. Its dominance is not natural. Where it is a source of systemic inequality and disadvantage, it should give way to the recognition of other forms of communication. *Eldridge* acknowledges the body as an unstable anchor of identity that is constantly shifting and not necessarily in congruence with cultural expectations.³⁴⁹ The inability of the applicants to hear or read with ease was a somatic variation that was contradicted by the environment. And yet, quite rightly *Eldridge* saw the remedy as aligning the environment with the body and not the other way round. In short, *Eldridge* is eminently receptive to disability method.

³⁴⁷ *Ibid* paras 56-57.

³⁴⁸ See Chapter 3 § 4.4 of this study.

³⁴⁹ Garland-Thomson (note 48 above) 20; § 4.2 above.

Viewed from a standpoint of equality in a neoliberal environment, the applicants' deafness was an unfortunate predicament for which the state had no duty to ameliorate except in those instances where negligent conduct can be established. The applicants' equality claim, at most, imposed a duty of restraint. Equality lay in the right to be allowed to exercise the liberty to pay for interpretive services. *Eldridge* implicitly rejects this neoliberal premise of a society where everyone commands merit, and autonomy means valourised self-sufficiency and independence in an environment where socio-economic arrangements are assumed to be neutral.³⁵⁰ Instead, it is animated by relational autonomy that acknowledges communitarianism, dependence and vulnerability as part of the human condition. In short, *Eldridge* rejects the paradigm of a monologic discourse when framing and vindicating equality.³⁵¹

7.2 United States: The Equal Protection Clause and Sameness

In this section, my essential argument is that once we are thinking about substantive equality and not merely formal equality, we find that the hermeneutics of constitutional equality of the Supreme Court of the United States and the Constitutional Court of South Africa are divergent rather than convergent. The overriding equality sensibilities of American constitutional jurisprudence are that of a commitment to a 'melting pot' formalistic conception of equality that manifests in a philosophical accent on sameness and an adherence to a mechanical formulation and application of the 'similarly situated test'. Furthermore, equality is conceived as liberty and a 'duty of restraint'³⁵² on the part of the state. Precisely because it is a duty of restraint, there is skepticism, if not an historical antagonism, towards notions of substantive equality that

³⁵⁰ See the discussion in § 4.2 above.

³⁵¹ *Ibid.*

³⁵² Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (note 305 above) 176. See the discussion in § 6.3 above.

import imposition of positive state socio-economic duties unless such a duty can be understood within the paradigm of sameness and not accommodation of difference.³⁵³

Another divergence subsists in the notion of judicially entrenching different levels of scrutiny, or at least an attempt thereof by the Supreme Court of the United States³⁵⁴ - namely, heightened scrutiny, intermediate scrutiny and a

³⁵³ The point to make here is that formal equality can be understood as importing positive duties under a paradigm of achieving sameness where in order to achieve mechanical uniformity between protected social groups, a court orders the state to provide a facility such as the provision of an educational facility to a racial group that has hitherto been denied the same facility in contrast to its counterpart(s). The implementation of the end of the separate but equal doctrine of the Supreme Court, equality under the Equal Protection Clause after *Brown v Board of Education* 347 US 483 (1954) (also known as *Brown I*), for example, anticipated that states would adopt positive measures to implement equality. When the Supreme Court declared the separate but equal provision of state educational facilities as unconstitutional, it deferred deciding on the remedy. In *Brown v Board of Education II* 349 US 294 (1955), by way of issuing a remedy it had deferred in *Brown I*, the Court remanded the issue of devising the remedy to District Courts on the understanding that they were closer to the local conditions where the discrimination was being perpetrated, and that they would be guided by principles of equity in fashioning remedies that entail not only revision of local laws and regulations, but equally important, the actual implementation of educational facilities on a non-racial basis, including implementation of a desegregated physical infrastructure of the school, transport systems, personnel and so on.

³⁵⁴ In making this argument, it must be conceded that though the differential levels of scrutiny approach should not be understood as cast in a judicial straitjacket as to give the jurisprudence of the Supreme Court an essential character that is the product of an unbroken line of judicial reasoning and unanimity. Different periods of the Supreme Court have placed different accents on the essentiality of tiers of scrutiny. In this connection, Jerome Barron and Thomas Dienes observe that the era of the Warren Court developed a two-tiered approach - a 'suspect class' or 'strict scrutiny test' (the heightened scrutiny test) for inquiring into state discriminatory measures that the Court saw as inherently arbitrary and significantly burdening the exercise of a fundamental right and a lower 'rational basis' test for inquiring into the residual category not governed by strict scrutiny. A third test - an intermediate test - was developed during the era of the Burger Court in order to accommodate discrimination cases perceived to be falling somewhere between the strict scrutiny test and the rationality test such as gender and illegitimacy cases: J Barron & C T Dienes *Constitutional Law* (1995) 219. However, even on the terms of a formalistic conception of equality, the differential levels of scrutiny lack the cogency and coherence of equality jurisprudence that is able to treat groups equally. It is difficult, for example, to see the rationale for drawing a distinction between race and gender if the historical experience of exclusion from equal participation in the socio-political sphere is the impulse behind rendering a measure 'suspect' and, thus, subject to strict scrutiny. Indeed, as Lee Epstein and Thomas Walker point out, members of the Supreme Court themselves have not agreed on the soundness of tiered tests with some advocating for a unified test: L Epstein & TG Walker *Constitutional Law for Changing America* (2004) 654. In this regard, Epstein and Walker cite Justice Thurgood Marshall's statement in *Dunn v Blumstein* 405 US 330 (1972) that the scrutiny tests do

rational test scrutiny - depending on the type of protected social group into which the complainant falls as a methodology for interrogating alleged unfair discrimination. To the extent that such a methodology is not just a matter of a neutral procedure but can be read as a modality for tethering method to the conferment of substantively different equality statuses,³⁵⁵ it is apt to create master dichotomies and hierarchically configured equality statuses that are at odds with the egalitarian thrust of South African substantive equality jurisprudence. It would, for example, be tantamount to juridically prizing determinations of racial and gender discrimination and relegating disability to a lower level of scrutiny than 'strict scrutiny' - the premiere scrutiny.³⁵⁶

But the idea is not to dismiss the comparative value of American constitutional jurisprudence but rather to use it as jurisprudence that, because of its contrasting nature, enhances our understanding about what is different and unique about South African equality jurisprudence and tells us something about the dangers of simplistic comparativism. The equality jurisprudence of the United States is a useful comparator not because it yields analogous lessons, but precisely because it is different. It alerts us to equality paradigms that South Africa should avoid for the reason that they are not analogous and are apt to restrict rather than enhance equality. In making these claims I am basing my arguments essentially

not have the precision of mathematical formulas and Justice Paul Stevens opinion in *City of Cleburne v Cleburne Living Centre* 473 US 432 (1985) that the Court should adopt a single scrutiny test: Epstein & Walker *ibid* 654.

³⁵⁵ To pass constitutional muster in respect of 'strict scrutiny', the measure in question must be the least restrictive means for achieving a *compelling* state interest. The 'strict scrutiny' test is the most exacting standard. The 'intermediate' test requires that the measure be *substantially* related to achieving an *important* state objective. The rationality test is the lowest or minimal level scrutiny and is manifestly deferential. It merely requires that the measure must be reasonable to achieve a legitimate government purpose: Epstein & Walker (note 354 above) 654; E Chemerinsky *Constitutional Law* (2002) 651-652, 668-669, 723-727.

³⁵⁶ See the discussion below in respect of the approach of the Supreme Court in *City of Cleburne v Cleburne Living Centre* (note 354 above) where the Court applied a 'rationality test' in determining whether the requirement of a special permit for a home for 'the mentally retarded' violated the Equal Protection Clause.

on a substantive equality reading of the development of equality jurisprudence under Equality Protection Clause in the 14th Amendment of the American Constitution³⁵⁷ and the interpretation thereof by the Supreme Court of the United States. I am, for present purposes, excluding the significantly important equality jurisprudence ushered in by congressional legislation, especially the Americans with Disabilities Act of 1990 which I discuss in Chapter 5 and Chapter 6 and which, I argue, appeals to something much more than formal equality and at the very least to a 'thin' conception of substantive equality.

The formalistic conception of American equality jurisprudence is historically anchored. Its genesis is indelibly tied to a change of heart in American polity on the rightness of a legally ordained white supremacy and a desire to remedy the legacy of the political misrecognition of black Americans as part of forging national reconciliation and reconstruction in the aftermath of the American Civil War.³⁵⁸ The institution of slavery in American polity and law had naturalized apartheid and denied the humanity of Americans of African descent. The original Constitution had no equality clause. The end of the Civil War became an historical moment for, inter alia, breaking with the legacy of constitutionally ordained apartheid, for the Republicans at least.³⁵⁹ Against this backdrop, three guarantees were added to the American Constitution, namely: the 13th Amendment which sought to unequivocally end slavery³⁶⁰; the 14th Amendment which, inter alia, guaranteed a common American citizenship³⁶¹; and the 15th

³⁵⁷ Constitution of the United States of 1787. In this section, I have proceeded on the premise that the 14th Amendment is the primary source of the right to equality under the American Constitution notwithstanding that the Supreme Court of the United States, has also said that the due process clause of the 5th Amendment contains equality rights: *Bolling v Sharpe* 347 US 497 (1954); GR Stone *et al Constitutional Law* (2005) 447.

³⁵⁸ Epstein & Walker (note 354 above) 651-652; Karst 'Why Equality Matters' (note 51 above) 256.

³⁵⁹ Epstein & Walker (note 354 above) 651-652.

³⁶⁰ The 13th Amendment was ratified in 1865.

³⁶¹ The 14th Amendment was ratified in 1868.

Amendment which removed race as a bar to voting.³⁶² The Equal Protection Clause is enshrined in the 14th Amendment. The relevant part says:

[N]or shall any State...deny to any person within its jurisdiction the equal protection of the laws.³⁶³

As several commentators have observed, the promise of the Equal Protection Clause went unrealized for close to a century.³⁶⁴ Successive benches of the Supreme Court of the United States seemed woefully incapable of transcending embedded notions of hierarchical racial essences and vindicating even the thinnest conception of equality, namely a mechanical application of formal equality. In this regard, the decision of the Supreme Court in *Plessy v Ferguson* stands as a monument on the adamant refusal by the Court to relent on racialised notions of justice in favour 'container jurisprudence'³⁶⁵ even after Reconstruction.

In *Plessy*, the majority of the Court (Justice Harlan dissenting) held that a law passed by Louisiana which required the separation of races on all railroads did not violate the Equal Protection Clause. Justice Brown, who delivered the majority judgment, said that the ultimate question was whether the impugned law was 'reasonable' taking into account that the state was entitled to use its own discretion and was at liberty to take into account 'established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and preservation of the public peace and good order'. Furthermore, the majority were of the view that to argue that segregation 'stamps the colored race with a badge of inferiority' was a 'fallacy'. As long as the facilities were more or less the same, there was not inequality. In short, save for Justice Harlan's dissent,

³⁶² The 15th Amendment was ratified in 1870.

³⁶³ The 14th Amendment has five sections and the Equal Protection Clause comes at the end of section 1.

³⁶⁴ Chemerinsky (note 355 above) 642.

³⁶⁵ See note 91 above.

members of the Supreme Court were simply unable to fathom equality as something to do with avoiding injury to human dignity, stigmatization, and the creation and sustenance of hierarchically ordered racial castes that are accompaniments to legally ordained segregation.³⁶⁶ Instead, barely departing from a Verwoerdian rationale for apartheid,³⁶⁷ the justices found purchase in the utilitarian justification for segregating races, including the 'preservation of public peace and good order'. In this way, the Supreme Court functioned less like a custodian of justice and more like part of the political process for forging reconciliation between the Northern and Southern States through appeasing Southern segregationists but at the expense of constitutional equality of black Americans.³⁶⁸ In the aftermath of *Plessy*, many states, especially Southern States became emboldened and went about erecting, on a large scale, legalized segregation. As with apartheid, segregation erected to govern the lives of black and white Americans from the cradle to the grave. Segregation manifested in separate transportation, hospitals, parks, restrooms, water fountains, libraries, hotels, recreational facilities, cemeteries and so on.³⁶⁹

Against the backdrop of the history of American slavery, struggle for racial equality, the racist and racialising premises of *Plessy* together with the judicial licence *Plessy* gave to full-scale development and proliferation of segregation in Southern states especially, the decision of the Supreme Court in *Brown v Board of*

³⁶⁶ Karst 'Why Equality Matters' (note 51 above) 248-249.

³⁶⁷ See the discussion in Chapter 2 of this study.

³⁶⁸ Karst 'Why Equality Matters' (note 49 above) 271; KL Karst 'Equal Citizenship under the Fourteenth Amendment' (1977) *Harvard Law Review* 1 at 17-22.

³⁶⁹ Epstein & Walker (note 354 above) 665. *Plessy* was reaffirmed by the Supreme Court in a number of cases including the following: *Berea College v Kentucky* 211 US 45 (1908) where the Court affirmed the conviction of a state college that had violated state law that required separate provision of educational services; *McCabe v Atchinson, T. & S.F. Ry. Co* 235 US 151(1914) where the Court upheld Oklahoma state law separation of races on railroad services; *Gong Lum v Rice* 275 US 78 (1927) where the Court upheld Mississippi law that excluded a pupil of Chinese ancestry from a white school. The Court said that the law on racial segregation was settled and that it applied in the same way where the issue is 'as between white pupils and the pupils of the yellow races': Chemerinsky (note 355 above) 676-677.

*Education*³⁷⁰ in 1954 to overrule *Plessy* and to hold that in the field of public education the doctrine of 'separate but equal' has no place' and that separate educational facilities are inherently unequal',³⁷¹ was an historical moment, a real milestone in the American political almanac. At the same time, the point should not be lost that though *Brown* served the important point of admitting human dignity into the Supreme Court's jurisprudence on racial equality, it was, nonetheless, a formalistic conception of equality. Certainly, it does not remotely extend to the conception of substantive equality that has been developed by the South African Constitutional Court or Canadian Supreme Court. Furthermore, there is little to suggest that since *Brown*, the jurisprudence of the Supreme Court of the United States under the Equal Protection Clause has fundamentally moved beyond a formalistic conception of equality other than to begin to incrementally extend *Brown* to other protected groups, and even then, on a highly selective basis.

By way of substantiating the thesis that the Supreme Court's Equal Protection Clause jurisprudence has remained trapped in a formalistic conception of equality, it can be argued that the Court's achievements on admitting gender to the Equal Protection Clause are less to do with taking into account the larger social, political and economic context in which gender differentiation takes place, determining the impact thereof on a particular gender, and ameliorating the impact by accepting and accommodating differences. Rather, the achievements are more to do with treating men and women the same - as similarly situated - using men as the universal standard. The Supreme Court's main gender project under the Equal Protection Clause has been about dismantling patriarchal barriers that have historically prevented women from being treated the same as

³⁷⁰ *Brown v Board of Education (Brown I)* (note 353 above)

³⁷¹ *Ibid.*

men in the public sphere. The Supreme Court's jurisprudence on dismantling barriers against entry into occupations closed to men serves this point.

Prior to its decision in 1971 in *Reed v Reed*,³⁷² the Supreme Court had regularly upheld states' measures that imposed differential gender classifications, and, thereby, hardly departing from the manifestly gender stereotyping and infantilising premises it had laid down in 1873 in *Bradwell v Illinois*.³⁷³ In that case, upholding Illinois State's refusal to grant a licence to women to practice law, Justice Bradley, in a concurring opinion said:

The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The Constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which belongs to the domain and functions of womanhood. The harmony, not to say identity of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband...The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be

³⁷² *Reed v Reed* 404 US 71 (1971); Cook & Cusack (note 8 above) 127, 163.

³⁷³ *Bradwell v Illinois* 83 US (16 Wall) 130 (1873). Cases preceding after *Bradwell* and preceding *Reed* in which the Supreme Court had refused to concede formal equality to women include: *Minor v Happersett* 88 US (21 Wall) 162 (1875) where the Court upheld a Missouri law denying women the vote. The Court held that the right to vote was not a privilege of equal citizenship under the Constitution. It took the 19th Amendment which was ratified in 1920 to overturn *Minor*; *Goesaert v Cleary* 335 US 464 (1948) where the Court upheld a Michigan law that barred a woman from becoming a bartender unless she was a member of the bar owner's family; *Hoyt v Florida* 368 US 57 (1961) where the Court upheld state law that automatically exempted women (but not men) from jury service unless they asked to serve on the ground that women were 'still regarded as the center of the home and family life' notwithstanding progress in lifting restriction on women in spheres hitherto reserved to men.

adapted to the general constitution of things, and cannot be based upon exceptional cases.³⁷⁴

Reed v Reed marked a turning point in the Supreme Court's gender jurisprudence when, for the first time, the Court invalidated a state law on probate which employed gender classification as a violation of the Equal Protection Clause. The law in question gave preference to males over females in the appointment of the administrator of an estate where a person dies intestate, qualifying individuals have the same priority relationship with the deceased, and there are competing petitions. The Court was of the clear view that the male preference prescribed by the state law was the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause and that the preference could not be justified solely on the basis on sex.

But while *Reed* is an important and historic victory, it concomitantly serves to underline, as alluded to earlier, the formalistic conception of equality under the Equal Protection Clause as tethered to different levels of protection even for protected groups. In *Reed*, the Court used the minimal threshold 'rational test' and not the high threshold 'strict scrutiny' to impugn the state justification for the gender classification. However, subsequent cases have seen the Court departing from the rationalist test in the case of gender.

In *Frontiero v Richardson*³⁷⁵, the Court divided with some justices preferring the rationalist test³⁷⁶ but others the strict scrutiny test.³⁷⁷ Justices who preferred the rational test scrutiny based their argument on the original intent, namely that the

³⁷⁴ *Bradwell v Illinois* note 373 above.

³⁷⁵ *Frontiero v Richardson* 411 US 677 (1973).

³⁷⁶ Justices Blackmun, Burger and Powell expressly disagreed with the strict scrutiny approach in separate concurring judgments.

³⁷⁷ Justice Brennan who delivered the judgment of the Court was supported on the strict scrutiny by Justices Douglas, White and Marshall. Justice Stewart did not clearly state his preference. Justice Rehnquist dissented from the Court's judgment.

Equal Protection Clause was essentially intended to suppress the mischief of racial segregation and advance racial equality and that it was proper for the Court to leave the task of bringing parity between race and gender to a constitutional amendment.³⁷⁸ The justices who preferred strict scrutiny did so because gender is, in terms of the historical experience of disadvantage, marginalization and exclusion, analogous to grounds such as race.³⁷⁹

Against the backdrop of a Supreme Court seemingly undecided over the level of scrutiny for gender classification, the decision of the Court in 1976 in *Craig v Boren*³⁸⁰ seemed to clarify the Court's position on gender when it settled for a new classification – intermediate scrutiny – as the more appropriate scrutiny for gender. In determining the constitutionality of a gender classification, the Court said that 'to withstand constitutional challenge, previous cases establish that classifications by gender must serve *important* governmental objectives and must be *substantially* related to achievements of those objectives'.³⁸¹ At the same time, as Erwin Chemerinsky has observed, even after *Craig*, the Court has not always

³⁷⁸ The Equal Rights Amendment was in the end not ratified as it did not muster support from the minimum number of states prescribed by the Constitution. The supposition on the part of the justices disagreeing with the strict scrutiny approach is that the proposed Amendment would have settled the matter either way. BA Brown *et al* 'The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women' (1971) 80 *Yale Law Journal* 871.

³⁷⁹ Justice Brennan (with the concurrence of Justices Douglas, White and Marsall on the point of strict scrutiny) observed that: There can be no doubt that our Nation has a long and unfortunate history of sex discrimination. '... Our statute books gradually became laden with gross, stereotyped distinctions between sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes'. Further, Justice Brennan said that: '... we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny'.

³⁸⁰ *Craig v Boren* 429 US 190 (1976). Cases after *Frontiero v Richardson* and before *Craig v Boren* did not establish a clear position. For example, in *Kahn v Shevin* 416 US 351 (1974), the Court decided a case involving a distinction between widows and widowers without articulating the relevant scrutiny test. In *Taylor v Louisiana* 419 US 522 (1975), the Court opined that a gender classification in that case 'cannot be overcome merely on rational grounds': *Taylor v Louisiana ibid* at 534.

³⁸¹ *Craig v Boren* (note 380 above) 197. Emphasis added.

stuck to intermediate scrutiny nor necessarily declared the scrutiny that it is using.³⁸²

If gender, which has close parallels with race in terms of visibility of disadvantage, exclusion and marginalization, cannot muster the Court's approval for strict scrutiny, it comes as no surprise that disability, which has a much diminished level of visibility and, has, in any event, been historically treated as a charity rather than equality issue, is reviewed using the rationality test. In *City of Cleburne v Cleburne Living Center*,³⁸³ the Court was asked to determine whether a city ordinance which required a special licence for the running of a home for mentally 'retarded' people was a violation of the Equal Protection Clause. In determining this question, the Court said that 'to withstand equal protection review, legislation which distinguishes between the mentally retarded and others must be rationally related to a legitimate government purpose.³⁸⁴ Justifying why a higher level of scrutiny was not appropriate, the Court said that to accord heightened scrutiny to disabled people would open floodgates for other groups such as the aged, the disabled and the infirm.³⁸⁵

Although the actual outcome was favourable to the protection of equality in that the Court found that there was no rational connection or legitimate purpose for the ordinance other than prejudice against mentally disabled people, nonetheless, the Court's refusal to apply strict or intermediate scrutiny is quite revealing of the peculiarity and parochial nature of the Supreme Court's equality jurisprudence. It confirms a universe of formalistic equality that is comfortable with hierarchical equalities and is the outcome of a juridical fixity on the original

³⁸² Chemerinsky (note 355 above) 727.

³⁸³ *City of Cleburne v Cleburne Living Center* (note 354 above).

³⁸⁴ *Ibid* 446. In subsequent cases, the Supreme Court has affirmed the rationalist test as the test for reviewing discrimination on the ground of disability. See, for example: *Heller v Doe* 509 US 312 (1993); *Garret v University of Alabama* 531 US 356 (2001); Chemerinsky (note 355 above) 755-756.

³⁸⁵ *City of Cleburne v Cleburne Living Center* (note 354 above) 445-446.

intention of the Equal Protection Clause. It is a fixity that assures that the larger social, political and economic context in which discrimination is experienced across a whole range of spheres and among a whole range of social groups is never captured by the Supreme Court as an urgent equality issue. The impact of the discrimination on lives actually lived and injuries actually suffered, comes second to hierarchical scrutiny classification. In *Cleburne*, instead of applying the most rigorous test for the very reason that mentally disabled people are, relatively speaking, more powerless and more vulnerable to discrimination than their mentally enabled counterparts, the Court paradoxically did the very opposite. It applied a rationality test that ordinarily imposes the least burden of proof on the state.³⁸⁶ It applied a standard of review that is reserved for cases where the Court does not readily see a suspect classification or an infringement of a fundamental right.

Under South African equality jurisprudence equalities are not hierarchically conferred as impairment of human dignity is not unique to racial groups, for example, but can be experienced by all social groups.³⁸⁷ Under the *Harksen v Lane test*, asking whether a law that differentiates bears a rationally connection to a legitimate government purpose is merely the beginning of the inquiry to determine unfair discrimination.³⁸⁸ The larger question is whether the

³⁸⁶ Chemerinsky has argued that the outcome in *Cleburne* where the Supreme Court found a violation of the Equal Protection Clause can be explained by saying that despite the articulation of a rational test as the applicable test, in substance, the Court applied a much more rigorous test. This is because under the rationality test, which tolerates underinclusiveness, the state would be able to make a case for drawing a distinction between regulating homes for mentally disabled people and homes for other social groups: Chemerinsky (note 355 above) 755. Martha Minow has also described the outcome in *Cleburne* as unexpected on account of the least burdensome nature of the rational test: Minow *Making All the Difference* (note 122 above) 104.

³⁸⁷ Here, I am, of course, not including affirmative action which in any event I have excluded from the purview of this discussion. Also, although it can be argued that the listing of protected groups into a 'listed' category and an 'analogous' category is a prioritization of the listed category and a subordination of the analogous categories, the distinction is a procedural one only in terms of reversing a burden of proof rather than according listed groups a superior claim to equality.

³⁸⁸ See the discussion in §6.1 above

differentiation amounts to unfair discrimination. Ultimately, it is discrimination that matters not the genus of the social group. The focus on impact as the crucial indicator for determining whether discrimination amounts to unfair discrimination under South African jurisprudence does not accord, or at least, ought not to accord preferential scrutiny to any protected group.³⁸⁹ It is something much more than a technical or methodological difference as it affects substantive outcomes and reflects contrasting rather than analogous philosophies of constitutional equality.

8 CONCLUSION

In this chapter, I have argued that equality is quintessentially a protean concept. I have also argued that different approaches to equality are, in essence, surrogates for different approaches to the meaning and application of democracy. In the end, equality is about competing visions of democracy, and it behoves us to choose a vision of equality that comports with our own democratic aspirations and suppositions. Consequently comparativism is only useful to the extent that we first clarify what we are seeking to include as well as exclude from the protective ambit of equality. If our concern is with inclusive equality for the disabled body, then our refuge ought to be substantive equality rather than formal equality for the reason that the former is receptive to dialogical reason and ultimately disability method. Substantive equality has the capacity to treat the disabled body as complete even if dependant.

I also argued that though South African equality jurisprudence represents a great leap forward not just from the apartheid past but also from the vantage point of

³⁸⁹ This is not to imply that in the application of the framework for determining unfair discrimination under a substantive equality paradigm, *misapplication* does not occur. Indeed, as I argued in § 6.3 above, such misapplication manifestly occurred in cases such as *S v Jordan* (note 11 above).

traditional liberal thinking about equality, the country's equality jurisprudence is still a long walk to freedom, partly because, on its own terms, the jurisprudence has suffered from inconsistencies and incompleteness. Though the Constitutional Court has asserted substantive equality as the conveyance to envisioned freedom, it has not always provided the fuel. While the decision of the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* supports the thesis of dogmatics of equality that are grounded in dialogical reason and ultimately a participatory democracy ethic that has not so much an organic centre but dialogic essence, its decisions in cases as *President of the Republic of South Africa v Hugo* or even more worryingly in *Jordan v the State* detract from dialogism and gesture towards equality with a homogenising centre.

Hugo was correct to problematise men when applying substantive equality to childrearing, but the answer should have been a more discerning type of substantive equality that resists the lure of comfortable abstract universalism where fathers are indistinguishable and fungible and are consequently deprived of individuality and diversity. Comfortable universalism renders itself vulnerable to the incipient seepage of the essentialism and reductionism of formal equality. In *Jordan*, the Constitutional Court simply stopped acting as the custodian of impartial justice. Instead it acted more like the *polis* that robustly defends public morals even if those morals reinforce an oligopolic status quo whose sustenance by the Court requires distorting the theoretical tenets of indirect discrimination and the adoption of a convenient and unduly deferential approach towards the executive.

Regarding incompleteness, my argument was that equality jurisprudence has yet to provide us with a roadmap for plotting the architecture of economic recognition which is so crucial to the realisation of active citizenship for disabled

people. While *National Coalition for Gay and Lesbian Equality v Minister of Justice* provides an adequate roadmap for plotting political recognition in a manner that is inclusive, it provides no concrete markers for economic recognition. As will be highlighted in Chapter 6, because economic recognition implicates resources, it is highly susceptible to circumscription by both courts and legislatures, and more so in the workplace where economic recognition must be balanced with the capitalist ethos of business profitability.

The chapter explored and summarised the equality approaches of Canada and the United States with a view to eliciting comparative law values. I argued, in the end, that whilst Canadian equality jurisprudence is a useful and important comparative source for South Africa, the jurisprudence of the United States, is useful only as a contrast. The quintessentially formal equality approach of the Supreme Court of the United States when interpreting the Equal Protection Clause, is clearly removed from the substantive equality approach that the South African Constitutional Court is committed to. Certainly, it is a detraction from the heterogeneous public sphere. Canada, on the other hand, has complimentary substantive equality jurisprudence and is replete with analogous lessons. More than this, Canadian jurisprudence, as exemplified by the *Eldridge* case, provides South Africa with a lead on how to elicit the larger social, political and economic context in which disablism is experienced. It provides South Africa with analogous lead on how to integrate, in a concrete sense, a heterogeneous public sphere into the *Harsken v Lane* test through a juridical commitment to substantive equality that is consciously responsive to the 'impact' of disablism as social oppression.

Eldridge stands for the proposition that law, including antidiscrimination law to combat disablism, need not be fatally dismissed as a rhetorical tool that only manages to create a mystique of equality by masking inequality and legitimising

the very oppression it is intended to eradicate through the reinforcement of existing social arrangements.³⁹⁰ Instead, given an enabling constitutional jurisprudence, it can function as a social tool that is capable of being receptive to the aspirations of disabled people and effecting meaningful change not just for the individual before the court but also for an historically disadvantaged and marginalised social group.

³⁹⁰ KW Crenshaw 'Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 *Harvard Law Review* 1331 at 1351-1352; Berg (note 120 above) 35-36; DA Freeman 'Legitimising Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine' (1978) 62 *Minnesota Law Review* 1049 at 1349-1369; M Tushnet 'An Essay on Rights' (1984) *Texas Law Review* 1363-1364. See the discussion in Chapter 3 § 4.2.

CHAPTER 5

COMBATING DISABLISM THROUGH ANTIDISCRIMINATION LAW: WHO FALLS WITHIN THE PROTECTED CATEGORY?

The definition of disability in antidiscrimination law is part of a larger cultural discourse that establishes and upholds dominant notions of health, illness and disability while imposing a particular set of expectations upon individuals deemed to occupy each class. Specifically, the restrictive category of disability reflects and reinforces the notion that disability is an objective biomedical phenomenon that constitutes an essential part of an individual. In keeping with this assumption, a principal function of the category of disability is not to inquire into the existence of prejudice or an exclusionary environment, but rather to establish the exact nature and severity of the impairment, because it is the impairment – not the environment – that is seen as the root cause of the social and economic problems faced by the disabled individual.¹

1 INTRODUCTION²

In Chapter 1 of this study, I introduced the idea of disability as an unstable definitional category that is porous and amenable to changing as well as different, if not, oppositional formulations, each with its own normative implications.³ In Chapter 3, I elaborated on this theme but in the context of developing disability method as legal method. My argument was that social constructions of disability have a bearing on the

¹ P Berg 'Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law' (2000) 18 *Yale Law & Policy Review* 1 at 4-5. Footnote omitted.

² While this chapter is an original contribution in the sense that it is my own work, nonetheless, it draws heavily from an article published as: CG Ngwena 'Deconstructing the Definition of 'Disability' under the Employment Equity Act: Legal Deconstruction (2007) 23 *South African Journal on Human Rights* 116. To a lesser extent, this chapter also draws from another article published as: CG Ngwena 'Deconstructing the Definition of 'Disability' under the Employment Equity Act: Social Deconstruction (2006) 22 *South African Journal on Human Rights* 622 as well as a chapter published in a book as: CG Ngwena 'The New Disability Convention: Implications for Disability Equality Norms in the South African Workplace' in O Dupper & C Garbers (eds) *Equality in the Workplace* (2009) 181-203.

³ Chapter 1 § 2 of this study.

juridical hermeneutics of disability.⁴ Competing social epistemologies of disability do much more than merely help us to understand what the law means when it regulates with disability. More crucially, the epistemologies have normative juridical consequences in that they are instrumental in shaping the legal construction of the definitional categories of disability as well as normative responses to disablism, including the construction of vertical as well as horizontal non-discrimination duties. In this connection, my ultimate argument was that the ‘individual impairment model’,⁵ with its primary gaze on intrinsic individual pathology, is a limited paradigm for combating disablism. Disability is more than just the presence of intrinsic pathology that can be linked to mental and physical limitations. On the other hand, the ‘social model’ of disability⁶ as well as feminism,⁷ with their political insights about extrinsic disabling factors, offer more holistic epistemologies of disability. They provide rationales for the formulation of expansive normative responses that would otherwise be lost to the individual impairment model operating on its own and are conducive to the achievement of substantive equality.

In this chapter, I do not so much seek to advance fresh arguments about epistemologies of the definitional categories of disability. Instead, my aim is on application. It is to apply the epistemologies that were discussed in Chapter 3 of this study to the definitional categories of disability in antidiscrimination law. The focus of the discussion is on demonstrating how juridical praxis of the definitional category of disability is tethered to social epistemologies of disability when determining who falls within the protected category. More specifically, I seek to demonstrate, how some legislatures and some courts have over-appropriated the individual impairment model to the definitional category of disability in antidiscrimination law with a consequent distortion of the protective and remedial purposes of antidiscrimination law. The

⁴ Chapter 1 § 2 and Chapter 3 § 3 of this study.

⁵ Chapter 3 § 3.3 of this study.

⁶ *Ibid.*

⁷ *Ibid.* See also Chapter 3 § 4 of this study.

outcome, I argue, has been an under-inclusive legal definition of disability and/or interpretation thereof.

The chapter uses the definition of disability under section 6(1) of the Employment Equity Act (EEA)⁸ and its interpretation by the South African Labour Court in *IMATU and Another v City of Cape Town*⁹ as the main case-study for illustrating under-inclusiveness that emanates not so much from a prescribed constitutional or legislative approach, but from a judicial approach that is overly aligned with an individual impairment model. Section 6(1) of the EEA lists disability as a ground protected against unfair discrimination under the EEA. I argue that in *IMATU* the court adopted an erroneous approach in its construction of disability as a protected ground precisely because it relied on a definitional category that was ultimately informed by disability as individual impairment. More specifically, the court made two mistakes. Firstly, it erroneously imported into the meaning of 'disability' in Chapter II of the EEA, a definitional construction of disability that is intended only for 'people with disabilities' in Chapter III of the Act. Consequently, the court failed to draw a distinction between the interpretation of disability as an *antidiscrimination* issue and that of disability as an *affirmative action* issue. Secondly, the court relied uncritically on a foreign decision – *Sutton v United States Airlines*,¹⁰ which was decided by the Supreme Court of the United States under Americans with Disabilities Act of 1990¹¹ (ADA) – without establishing whether the definition of disability under the ADA was, in the first place, analogous. In this sense, *IMATU* also underscores the dangers of shallow comparativism.¹²

I do not contend that the social model alone is sufficient for explicating a definitional category of disability that has the capacity to adequately respond to antidiscrimination purposes. Rather, my argument is that a legal definition of disability should be concomitantly alive to the relevance of the social model and not be animated solely or

⁸ Act No 55 of 1998.

⁹ *IMATU and Another v City of Cape Town* (2005) 14 LC 6.12.2; [2005] JOL 15052 (LC).

¹⁰ *Sutton v United States Airlines Inc* 527 US 471 (1999); *IMATU* (note 9 above) para 91.

¹¹ Pub L No 101-336, § 104 Stat. 327, codified at 42 USC §§ 12101-12213 (1990).

¹² Chapter 1 § 5.3 of this study.

overly by the individual impairment model. To be inclusive, the definitional category must integrate both models as the two models intertwine to create the social phenomenon of disability.¹³ I concede that, as a discrete ground protected against discrimination under the Constitution¹⁴ and section 6(1) of the EEA, disability would be incomprehensible without appeal to a real or ascribed physical or mental impairment that is intrinsic to the individual. At the same time, if the goal is to eliminate discrimination, a construction of disability that fails to transcend the individual impairment model, or only pays lip service to the social model, risks not only frustrating, but also distorting the rationale for antidiscrimination law as a social tool for combating systematic disadvantage and marginalization arising from stigma, prejudice, stereotypes and an exclusionary socio-economic environment.

In short, I argue that when formulating the definitional category of disability in antidiscrimination law, on its own, the individual impairment model would fail the test of transformative disability juridical praxis as encapsulated in disability method. To avoid anomalies in discrimination law, disability should be interpreted in a manner that is inclusive and qualitatively enjoys parity with other protected categories such as race, sex and gender. As alluded to in Chapter 1¹⁵ and as will be elaborated upon in this chapter, the Convention on the Rights of Persons with Disability (the Convention) points the way towards an inclusive definition of disability.¹⁶

The chapter begins by underlining the importance of an inclusive definition of disability.

¹³ S Wendell *The Rejected Body: Feminist Philosophical Reflections on Disability* (1996) 35.

¹⁴ Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter the Constitution).

¹⁵ Chapter 1§ 3.2.

¹⁶ Article 1 of the Convention. See the discussion in § 4 below.

2 WHY AN INCLUSIVE DEFINITION IS IMPORTANT FOR ANTIDISCRIMINATION

An inclusive definition of disability for antidiscrimination purposes is important for ensuring inclusiveness against the backdrop of disability as a definitional category that does not, and, indeed, need not carry a ready archive of social identity.¹⁷ Disability does not always carry a conspicuous badge of social identity in the same way as race or gender, for example. As highlighted in Chapter 3, defining the protected class in a disability context is fraught with challenges, not least because disability itself is a contested concept.¹⁸ There is no agreed norm or standard for determining who falls within the protected class, even for the purposes of antidiscrimination. Writing about identity in disability, Simi Linton puts the lack of a universal criterion for determining who is a disabled person in this way:

The question of who qualifies as disabled is as unanswerable or as confounding as questions about any identity status. One simple response might be that you are disabled if you say you are...¹⁹

When adjudicating claims of racial, sex or gender discrimination, courts have generally not become mired in classificatory difficulties that are related to the challenge of determining whether the complainant falls within the protected class. In antidiscrimination adjudication, the biological markers or socio-political ascriptions of race, sex or gender are generally considered as relatively unproblematic, or at least, have not become the focal point of juridical inquiry.²⁰ On the other hand, disability is

¹⁷ In Chapter 3 § 3.8 of this study, I argued that disabled people are a heterogeneous group and that what renders them a distinct social group is not so much sameness in terms of physical characteristics or an aspired social identity but, instead, a common experience of disadvantage and marginalisation.

¹⁸ Chapter 3 § 3.

¹⁹ S Linton *Claiming Disability: Knowledge and Identity* (1998) 12-13.

²⁰ This does not imply, of course, that racial or sex categorisations are without challenges, inconsistencies or contradictions. The history, especially, of South Africa and the United States with racial classification, shows that race can be a highly problematic category, not only in terms of inherently contestable formulations of racial categories, but also in their application. Indeed, Chapter 2 § 3 of this study sought, in part, to highlight the challenges that apartheid, on its own terms, experienced with racial classification. For the United States see: A Silvers 'Protection of Privilege? Reasonable Accommodation, and Fair Costs

different, or at least, has tended to be treated differently by legislatures and the courts. This may be the result of an intuitive perception that, because impairments are so varied in nature and manifestation, disabled people do not belong to a readily identifiable social group in the same way as, say, women or racial groups do and that unless a narrow category of disability is constructed, then the law cannot otherwise easily transact disability.²¹ Furthermore, the fact that, chronologically, the entry of disability into antidiscrimination law has followed rather than preceded entry of disability into social security law means that unless we are vigilant, it is not inconceivable that legislatures and courts, acting out of reductionist tendencies rather than conceptual need, might be inclined to tether the definitional category of disability for antidiscrimination purposes to its social security law counterpart.

More specifically, the argument is that the characterization of disability as both incapacity and dependence for the purposes of determining eligibility for social assistance and disability grants, has left enough room for an insidious juridical seepage of social security concepts into antidiscrimination jurisprudence leading to restrictive rather than expansive definitional categories of disability. Incapacity and dependence as physical co-indicators of disability were first received into law through the route of legislation that was intended to provide compensation for workplace injuries or social welfare grants, with the medical profession playing a diagnostic, if not determinative, role. The criteria for satisfying eligibility in such legislation have conceived disability as signifying both medical as well as economic disability to the extent that they have primarily focused on physical and mental limitations that are linked to *incapacity* for

of Repairing Recognition of Disabled People in the Workplace' (2005) 8 *Journal of Gender, Race and Justice* 561 at 573-575; R Colker 'Bi: Race, Sexual Orientation, Gender and Disability' (1995) 56 *Ohio State Law Journal*. The decision of the Supreme Court of the United States in *Plessy v Ferguson* 163 US 537 (1896), where it affirmed the right of states to adopt their own conventions in setting the biological criteria for racial classification, effectively meant that a person could be white or black depending on which state he or she was located. Equally, as the discourse on transgenderism shows, sex identity, that has historically been treated as naturally flowing from the anatomical or genital constitution that is apparent at birth as distinguishing females from males and is recorded on birth certificates and other types of certifications, can become problematic when that constitution is strongly rejected by its owner in favour of another: Silvers *ibid* 568-569.

²¹ Silvers *ibid* 573-574.

work.²² Under the Compensation for Occupational Injuries and Diseases Act (COIDA),²³ for example, the rationale for compensation is that the injury that is sustained or disease that is acquired in the course of employment has the effect of physically rendering the employee temporarily or permanently unable to work. The COIDA employs calibrated levels of physical and mental incapacity to denote levels of disablement.²⁴

The notion of incapacity for work and dependence as co-indicators of disability has been extended to social welfare systems for disbursing disability grants. Drawing up criteria to determine eligibility for disability grants raises acute political questions about who deserves assistance from the state and what constitutes a dependent citizen.²⁵ The Social Assistance Act²⁶ is forthright in invoking and evoking incapacity as well as dependence as the eligibility criteria. Under the Social Assistance Act, a disability grant is payable to a person who, among other requirements, is, 'owing to a mental and physical disability, *unfit* to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance'.²⁷ The conception of disability under the Social Assistance Act is, thus, ultimately pegged to *clinical* impairment and *functional limitations* that, in turn, are linked to prior normative notions about who can be excused from work, and who is morally deserving of

²² N De Villiers 'Social Grants and the Promotion of Administrative Justice Act' (2002) 18 *South African Journal on Human Rights* 320 at 324; M Crossley 'The Disability Kaleidoscope' (1999) 74 *Notre Dame Law Review* 621 at 628-630; JE Bickenbach *Physical Disability and Social Policy* (1993) 16, 93-134.

²³ Act 130 of 1993 as amended.

²⁴ The COIDA provides compensation for 'temporary, total or partial disablement' and 'permanent disablement': See sections 47-51 of the COIDA and the accompanying Schedules to the COIDA; L Truter 'People with Disabilities' in MP Olivier *et al* (eds) *Social Security Law: General Principles* (1999) 193-211, 200-201.

²⁵ D Stone *The Disabled State* (1985) 27-28; CJ Kudlick 'Disability History: 'Why We Need Another 'Other'' (2003) 108 *American Historical Review* 763. Also available at <http://historycooperative.org/cgi-bin/printpage.cgi> (last accessed 21 February 2008).

²⁶ Act No 13 of 2004 (supplanting the Social Assistance Act No 59 of 1992); De Villiers (note 22 above) 324-331; E Klink 'People with Disabilities' in MP Olivier *et al* (eds) *Social Security* (2003) 311-342 at 326-329; J Andrews *et al* 'Issues in Disability Assessment' in B Watermeyer *et al* *Disability and Social Change: A South African Agenda* (2007) 245-259 at 249. The constitutional basis for the provision of social security benefits derives from section 27 of the Constitution which provides, *inter alia*, that: 'Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'.

²⁷ Section 9(b) of the Social Assistance Act.

entitlement to financial support from the state on account of inability to participate in remunerated labour.²⁸ When determining criteria for eligibility for social welfare benefits on account of disability, therefore, the need for restrictive criteria seems self-evident. However, it would be unwarranted to elide the definitional category of disability for disability grants with that for antidiscrimination protection as the two serve different protective purposes.

There is reason to think that seepage of social welfare definitional categories into antidiscrimination law is what may explain, in part, why jurisdictions such as the United States²⁹ and the United Kingdom³⁰ have sought to render disability uniformly identifiable by constructing a restrictive category of what constitutes disability. In this regard, the preferred approach has been prescribing, in addition to the presence of a physical or mental impairment, the requirement of 'substantial limitation' or its equivalent as calibrated threshold of functional impairment that must be reached before it can be said a disabled person falls within the protected class.³¹ The outcome has been legal definitions that approximate criteria for eligibility for disability grants and, consequently, serve as gatekeepers to restrict the numbers of disabled people that can fit into the protected class even for antidiscrimination purposes.

As I shall argue in this chapter, the experience of the United States with litigation under the ADA is particularly instructive of an unduly restrictive approach. Many disability claims under the ADA have not proceeded to a point where courts determine whether the discrimination was fair or the appropriate remedies, for the reason that

²⁸ SR Bagenstos 'Subordination, Stigma and 'Disability'' (2000) 86 *Virginia Law Review* 397 at 413; M Diller 'Entitlement and Exclusion: The Role of Disability in the Social Welfare System' (1997) 44 *University of California Los Angeles Law Review* 361 at 386.

²⁹ ADA (note 11 above).

³⁰ Disability Discrimination Act of 1995; M Connolly *Discrimination Law* (2006) 297-351.

³¹ Under the ADA of 1990, 'disability' means 'with respect to an individual - (a) a physical or mental impairment that *substantially limits* one or more life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment. Emphasis added. See the discussion in § 3.1 below. Section 1 of the British Disability Discrimination Act of 1995 says 'a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a *substantial* and long term adverse effect on his ability to carry out day-to-day activities'. Emphasis added.

complainants have been unable, as a preliminary matter, to persuade the courts that they meet all the elements of the legal definition of the protected class, especially, the 'substantial limitation' element.³² Not surprisingly, restrictive criteria such as those conceived under the ADA have engendered robust criticism,³³ with some of the criticism being ultimately heeded by Congress as evidenced by the passage of the Americans with Disabilities Amendments Act of 2008 to mitigate the rigours of overly restrictive judicial interpretation.³⁴

An important consideration in facilitating protection against discrimination is that, as a protected class, the alleged victims of disability discrimination must be readily identifiable. If the analogy of race, sex or gender discrimination is used, ideally, the

³² The following decisions of the Supreme Court exemplify this hurdle: *Murphy v United Parcel Service, Inc* 527 US 516 (1999); *Albertsons, Inc v Kirkingham* 527 US 555 (1999); *Sutton v United Airlines* (note 10 above); *Toyota Motor Manufacturing, Kentucky, Inc v Williams* 534 US 184 (2002). See the discussion in § 3.1 below.

³³ The ADA has generated a veritable stock of scholarly appraisal. The following journal articles are but a sample of the extensive criticisms of the ADA; RL Burgdorf "'Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstruction of the Definition of Disability' (1997) 42 *Villanova Law Review* 409; WE Parmet 'Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability' (2000) 21 *Berkeley Journal of Employment and Labour Law* 53; CR Feldblum 'Definition of Disability under the Federal Anti-discrimination Law: What Happened? Why? And What Can We Do About it?' (2000) 29 *Berkeley Journal of Employment and Labor Law* 91; M Diller 'Judicial Backlash, the ADA, and the Civil Rights Model' (2000) 21 *Berkeley Journal of Employment and Labor Law* 19; S Stefan 'Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act' (2000) 52 *Alabama Law Review* 271; BP Tucker 'The Supreme Court's Definition of Disability under the ADA: A Return to the Dark Ages' (2000) 52 *Alabama Law Review* 321; MM Joyce 'Has the Americans with Disabilities Act Fallen on Deaf Ears: A Post-Sutton Analysis of the Mitigating Measures in the Seventh Circuit' (2002) 77 *Chicago-Kent Law Review* 1389; S Hoffman 'Corrective Justice and Title I of the ADA' (2003) 52 *American University Law Review* 1213; C Centre and AJ Imparato 'Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers' (2003) 12 *Stanford Law & Policy Review* 321; R Turner 'The Americans with Disabilities Act and the Workplace: A Study of the Supreme Courts Disabling Choices and Decisions' (2004) 60 *New York University Annual Survey of American Law* 379; MA Rothstein *et al* 'Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act' (2002) 80 *Washington University Law Quarterly* 243; AK Naef 'Toyota Motor Manufacturing v Williams: A Case of Carpal Tunnel Syndrome Weakens the Grip of the Americans with Disabilities Act' (2004) *Pepperdine Law Review* 575; E Kaiser 'The Americans with Disabilities Act: An Unfulfilled Promise for Employment Discrimination Plaintiffs' (2004) 6 *University of Pennsylvania Journal of Labor & Employment Law* 735; A Long 'State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act' (2004) 65 *University of Pittsburgh Law Review* 597. Ngwena 'Deconstructing the Definition of 'Disability' under the Employment Equity Act: Legal Deconstruction' (note 2 above) 128-138.

³⁴ The amendments were implemented through the enactment of the Americans with Disabilities Act Amendments Act of 2008. See the discussion in § 3.1 below.

definition of disability should be simple enough to render a person with a disability easily identifiable so that the focus of the judicial enquiry is on the alleged conduct of the respondent and causation rather than proving membership of the protected group based on the extent of the disability as has occurred under the ADA.³⁵

In the South African context, it might be argued that it is not too crucial to determine who falls within disability in order to derive protection against discrimination as there are other protected grounds to fall back on. It might be argued that determining who falls within disability is crucial only for jurisdictions such as the United States where antidiscrimination legislation recognises a very limited number of protected grounds, but not for South Africa where there is generous provision for recognising protected grounds. To an extent, this is true. In this regard, Ockert Dupper and Christoph Garbers observe that a complainant alleging unfair discrimination in South Africa should find it relatively easy to subsume herself or himself under one of the protected grounds without having to explore in detail the content of the ground upon which they base their claim.³⁶ Over and above the seventeen grounds of discrimination that are listed under sections 9(3) and (4)³⁷ of the Constitution, and twenty that are listed under section 6(1) of the EEA,³⁸ there is the analogous grounds category which expands the ambit of protected grounds and, in practice, serves as a residual category that substantially widens the safety net in terms of the availability of grounds to fall back on. Indeed, the decision of Constitutional Court in *Hoffmann v South African Airways*³⁹

³⁵ JE Bickenbach 'Disability and Equality' (2003) 2 *Journal of Law & Equality* 7 at 8-9; LA Basser & M Jones 'The Disability Discrimination Act 1992 (Cth): A Three-dimensional Approach to Operationalising Human Rights' (2002) 26(2) *Melbourne University Law Review* 254, 261-263; E Hastings 'FoundDDAtions: Reflections of the First Five Years of the Disability Discrimination Act in Australia' (1997) <http://.hrec.gov.au/disability_rights/hr_disab/found.html>. Productivity Commission Inquiry Report *Review of the Disability Discrimination Act 1992*, Vol 1 (2004) 47, 297-298.

³⁶ O Dupper & C Garbers 'The Prohibition of Unfair Discrimination' in E Strydom (ed) *Essential Employment Discrimination Law* (2004) 31-65 at 59.

³⁷ The listed grounds under sections 9(3) and (4) are: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

³⁸ Section 6(1) of the EEA reproduces the grounds listed under the Constitution, but adds 'family responsibility', 'HIV status', and 'political opinion'.

³⁹ *Hoffmann v South African Airways* (2000) 11 BCLR 1211 (CC).

illustrates the generous nature of protected grounds under the South African Constitution and, perforce, the EEA.

The main issue in *Hoffmann* was whether the complainant who was HIV-positive had been unfairly discriminated against by the respondent when he was refused a job on account of his HIV status. *Hoffmann* was decided under the Constitution rather than the EEA which lists HIV status as a protected ground. The Constitutional Court found it unnecessary to determine whether HIV status was a disability under section 9(3), and preferred, instead, to treat it as an analogous ground.⁴⁰ Equally in *IMATU*,⁴¹ although the Labour Court rejected the argument that a complainant who suffered from diabetes that was optimally controlled by medical management had a disability, the court, nonetheless, treated diabetes as condition protected under the analogous ground of 'health' status.⁴² Thus, save for a reversal of the burden of proof in that the court will presume neither discrimination nor unfairness when a complainant relies on an unlisted ground,⁴³ it can be argued that no injustice is caused when a court fails to recognise a complainant as having a disability in those cases where there is another ground to fall back on.

Clearly, under sections 9(3) and (4) of the Constitution and section 6(1) of the EEA, as a listed protected ground, disability has characteristics that are interchangeable with other grounds. Disability that is linked with a congenital and inherited condition, for example, can arguably be subsumed under 'birth' as a listed ground. Indeed, the court in *IMATU* expressed this view *in obiter*.⁴⁴ In any event whether it is congenital or acquired after birth, disability is, on account of its link with a physical or mental impairment, interchangeable with health status as an analogous ground. But notwithstanding the fungible nature of disability as a protected ground, it would be presumptuous to think that the ultimate consideration for complainants that experience

⁴⁰ *Ibid* para 40.

⁴¹ Note 9 above.

⁴² *Ibid* para 91.

⁴³ *Harksen v Lane NO and Others* 1997 (11) 1489 (CC), para 53. See Chapter 4 § 6.1 of this study.

⁴⁴ Note 9 above, para 91.

disability-related discrimination is whether they can institute an unfair discrimination, on any of the available grounds, and that it matters little whether their claim comes clothed under 'disability' or under an analogous or some other fungible ground. Whether one is specifically recognised under a constitution and or an antidiscrimination statute as having a 'disability' is also linked to questions about social and political identity and emancipatory strategies. Susan Wendell makes the point that recognition that a person has a disability is important not only for receiving benefits such as social assistance, but also for receiving acknowledgment and confirmation that one belongs to a vulnerable and marginalised group.⁴⁵ Recognition of disability status is important for political organisation and solidarity.⁴⁶ It allows people sharing similar experiences of discrimination and exclusion to organise politically and campaign for fuller rights not only in the courts but also outside of the courts, including in those areas where they experience the discrimination such as in workplaces, schools, transport and housing.

Of course, social identity in disability is not necessarily contingent upon legal recognition. However, a constitutional or legislative clause, or interpretation thereof, that refutes rather than affirms identity borne out of real life experiences and substitutes it with another identity that does not necessarily capture the peculiar dynamics of disability as a vulnerable and marginalised status of the complainant's choice, would constitute a hindrance rather than an aid to political and legal emancipation. It would serve to depoliticise rather than politicise disability as a distinct form of social oppression that has been historically neglected and merits urgent attention.⁴⁷ Naming disability provides an opportunity for developing a vocabulary as well as normative frames of reference for advocating for political as well as economic recognition of disabled people.⁴⁸ To simply substitute 'health status' as an analogous ground for

⁴⁵ Wendell (note 13 above) 12.

⁴⁶ *Ibid*; M Putnam 'Developing a Framework for Political Disability Identity' (2005) 16 *Journal of Disability Policy Studies* 118.

⁴⁷ Berg (note 1 above) 44-45.

⁴⁸ Diller 'Judicial Backlash, the ADA, and the Civil Rights Model' (note 33 above) 34-36; See also Chapter 3 § 9 of this study.

disability status, for example, is not enough as it would serve to conceal rather than reveal the peculiar nuances of the epistemology of disability and the urgency of emancipatory solutions for a historically marginalized group. It is inimical to integrating consciousness-raising and standpoint epistemology in our quest for a more responsive equality paradigm.⁴⁹ Once antidiscrimination law is stripped of the lived experience of the disadvantaged social group, as Kimberlé Crenshaw has argued, it can serve the purposes of creating a façade of equal citizenship through the rhetoric of equality and yet in practice function to legitimize the very type of oppression it is intended to combat by confirming existing attitudes as well as socio-economic arrangements as facts of life that we should all accept.⁵⁰ In this connection, Crenshaw has said this in respect of antidiscrimination law:

..what at first appears an unambiguous commitment to antidiscrimination conceals within it many conflicting and contradictory interests. In antidiscrimination law, the conflicting interests actually reinforce existing social arrangements, moderated to the extent necessary to balance the civil rights challenge with the many interests still privileged over it.⁵¹

Paula Berg has argued that American disability antidiscrimination law under the ADA has done precisely what Crenshaw is cautioning us against. It has embodied contradictions that on the one hand advance equality, and on the other hand, counteract it.⁵² Denying recognition of disability status in discrimination litigation on the grounds of legal formalism and reductionism has the effect of depriving the courts, and by implication, the public of the opportunity to think about disability, to raise awareness about disability and to forge normative responses to the experience of disability discrimination. Welcoming the passage of the Australian Disability Discrimination Act of 1992, Margaret Thornton said that the availability of domestic legislation that

⁴⁹ In Chapter 1 § 2, I alluded to the place of consciousness-raising and standpoint epistemology in the scheme of developing an emancipatory equality paradigm.

⁵⁰ KW Crenshaw 'Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 *Harvard Law Review* 1331 at 1348.

⁵¹ *Ibid* 1348.

⁵² Berg (note 1 above) 36.

specifically recognises disability offers an opportunity for a contest which, even if unsuccessful, allows the opportunity for public debate that has the capacity to prick the public conscience about the iniquity of disability-related discrimination.⁵³ Thus, a definitional category that is in tune with the social experience of disability discrimination would be one way of ensuring that such an opportunity is fully realised.

Ultimately, disability method, as argued in Chapter 3, enjoins us to choose a definitional category that comports with an epistemology of disability not as the possession of common physical markers, or common degrees of physical limitation, but rather the experience of disablism.⁵⁴ The experience of disablism is the experience of aversive disablism, dominative disablism and metadisablism.⁵⁵ It is the experience of being at the receiving end of negative, disadvantaging, and stigmatizing attitudes, and wrongful stereotypes, of being asked to comply with ableist standards as the normative reference, and, ultimately, of being excluded from socio-economic domains that are constructed around culturally imagined bodily normalcy.

The remainder of this chapter considers juridical construction of the definitional category of disability in three jurisdictions – United States, Canada and South Africa. I first consider the United States and Canada prior to considering South Africa.

⁵³ M Thornton 'Domesticating Disability Discrimination' (1997) 2 *International Journal of Discrimination Law* 183 at 194.

⁵⁴ For a fuller discussion on the concept of disablism that is tethered to disability method, see chapter Chapter 3 § 3.8.

⁵⁵ Here, I am adapting the terms aversive disablism, dominative disablism and metadisablism from their racial equivalents in Joel Kovel's discourse on racism: J Kovel *White Racism: A Psycho History* (1984) 31-33. See Chapter 2 § 2.2 of this study.

3 INDIVIDUAL IMPAIRMENT AND SOCIAL MODELLING IN DEFINITIONAL CATEGORIES OF THE UNITED STATES AND CANADA

An increasing number of jurisdictions now concede that domestic legal protection against disability-related discrimination is warranted.⁵⁶ Several factors, but mainly disability activism at domestic and international levels, global initiatives to posit disability as a human rights issue, especially the initiatives taken by the United Nations⁵⁷ and the popularisation of human rights generally, have been instrumental in spurring the enactment of domestic laws for regulating disability discrimination. Whilst the common denominator is combating disability-related discrimination, the approach to protection differs from jurisdiction to jurisdiction. Some jurisdictions follow a constitutional route, others a legislative one and yet others a combination of the two, depending on the legal-historical traditions.⁵⁸ Where protection against discrimination is provided in a constitution, as is the case, for example, under the constitutions of South Africa⁵⁹ and Canada,⁶⁰ the more conventional approach is to list, without more, *disability* or *mental* or *physical disability* as a protected ground that is part of wider range of protected grounds under an equality clause. Implicitly, it is left to the courts to construct and apply a definition of disability when the need arises, taking into account the overall meaning of equality as a fundamental right. Where legislation is used, as a supplement to a constitution or on its own, the majority of jurisdictions, and United States, Canada and South Africa fall into this category, rely on a civil rights or human

⁵⁶ T Degener 'Disability Discrimination Law: A Global Comparative Approach' in A Lawson & C Gooding (eds) *Disability Rights in Europe: From Theory to Practice* (2005) 87-106 at 92; AS Kanter 'The Globalization of Disability Rights Law' (2003) 30 *Syracuse Journal of International Law and Commerce* 241 at 249; SR Herr 'Reforming Disability Nondiscrimination Laws: A Comparative Perspective' (2002) 35 *University of Michigan Journal of Law Reform* 305 at 355.

⁵⁷ On the role played by the United Nations in raising the profile of disability as an equality and human rights issue, see the discussion in Chapter 1 § 3.1 of this study.

⁵⁸ Degener 'Disability Discrimination Law' (note 56 above) 92; Kanter (note 56 above) 249-252; Herr (note 56 above) 355-357.

⁵⁹ Sections 9(3) and (4) of the Constitution.

⁶⁰ Section 15(1) of the Canadian Charter of Rights and Fundamental Freedoms.

rights model to outlaw *direct* and *indirect* discrimination. Criminal law is rarely used to combat disability discrimination.⁶¹ Where antidiscrimination legislation is disability-specific, as is the position with the United States, an attempt is invariably made to define disability.

Both the individual impairment model and the social model of disability have been instrumental in shaping antidiscrimination legislation. However, when deciphering approaches to disability in modern antidiscrimination or constitutional clauses, it would be too simplistic to categorise definitions of disability in terms of a linear divide between an individual impairment model and a social model. Rather, the tendency is for legal formulations of disability or the interpretations thereof, to reflect both models but in varying proportions. As will be highlighted in this section, the discrimination laws of the United States and Canada treat the individual impairment model as a base or starting point, and at the same time attempt to incorporate the social model. The more important question is determining to what extent each jurisdiction strikes a balance between recognising the fact or perception of the existence of a physical or mental impairment, and reflecting the social experience of disability in the definitional construction of disability. In answering this question, it is possible to argue that whilst both the United States and Canada incorporate the social model, ultimately it is Canada that has succeeded in adopting a judicial interpretation of disability that resonates more fully with a social model.

3.1 United States: Americans with Disabilities Act of 1990 as amended

The ADA⁶² is probably the best known statute in the annals of disability discrimination law, not least on account of its pioneering status. It is the first piece of national legislation to attempt to situate the definition of disability within a social model of disability. The ADA is a culmination of developments in which Congress incrementally

⁶¹ Examples are: France: Article 225 of the Penal Code, Loi 90-602 de 12 juillet 1990); Finland: Penal Code 1995, Chapter 11(9) and Chapter 47(3); Spain: Article 314 of Criminal Code (Organic Law 10/1995). Degener 'Disability Discrimination Law' (note 56 above) 91-92; Kanter (note 56 above) 249, 251.

⁶² Note 11 above.

conceded the need to enact more socially responsive disability discrimination legislation.⁶³ It superseded the Rehabilitation Act of 1973 as amended.⁶⁴ The Rehabilitation Act was initially passed not so much to regulate disability discrimination, but access to rehabilitation programmes for disabled people.⁶⁵ However, in the year of its enactment, the scope of the Rehabilitation Act was extended to cover prohibiting discrimination against an 'otherwise qualified handicapped individual' on the basis of a 'handicap' in respect of any programme or activity receiving federal financial assistance.⁶⁶ Under the Rehabilitation Act, a handicapped person was someone whose disability diminished his or her prospects of employment, but was, at the same time, expected to benefit from access to a rehabilitation programme.⁶⁷

The Rehabilitation Act had been conceived within a paradigm of disability as individual impairment. The main focus was on determining who had functional impairment, repairing a perceived intrinsic impairment, and, ultimately, integrating that person with the impairment into existing working arrangements.⁶⁸ Jonathan Drimmer has noted that at first, Congress could not see a connection between exclusion from employment of disabled people and discrimination.⁶⁹ The underlying assumption by Congress was that people were rendered unemployable by intrinsic limitations. The attitude of employers

⁶³ RK Scotch 'Models of Disability and the Americans with Disabilities Act' (2000) 21 *Berkeley Journal of Employment and Labor Law* 213.

⁶⁴ 29 USC § 794 (1994); On the transition from the Rehabilitation Act to the Americans with Disabilities Act see: TM Cook 'The Americans with Disabilities Act: The Move to Integration' (1991) 64 *Temple Law Review* 393; NL Jones 'Overview and Essential Requirements of the Americans with Disabilities Act (1991)' 64 *Temple Law Review* 471; TH Barnard 'The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?' (1990) 64 *St John's Law Review* 229; RL Burgdorf 'The Americans with Disabilities Act: Analysis and Implications of a Second-generation Civil Rights Statute' (1991) 26 *Harvard Civil Rights-Civil Liberties Law Review* 413.

⁶⁵ Parmet (note 33 above) 57.

⁶⁶ Section 504 of the Rehabilitation Act of 1973.

⁶⁷ In more precise terms, the Rehabilitation Act defined a handicapped person as 'any individual who is under a physical or mental disability which for individual constitutes or results in a substantial handicap to employment, and can reasonably be expected to benefit in terms of employability from vocational rehabilitation service': Pub L No 93-112, § 7(6), 87 Stat 355 (1973); Feldblum 'Definition of Disability under the Federal Anti-discrimination Law' (note 33 above) 100.

⁶⁸ JC Drimmer 'Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities' (1993) 40 *University of California Los Angeles* 1341, 1364-1371; Feldblum (note 33 above) 98.

⁶⁹ Drimmer (note 68 above) 1365, 1368.

and the barriers posed by the environment were, thus, implicitly exonerated. The expectation was that, with rehabilitation, disabled people could overcome limitations arising from impairments, and be integrated into existing working arrangements.⁷⁰ In common with its predecessors, the Rehabilitation Act had been driven by an economic rather than moral imperative.⁷¹ The fiscal rationale was that by spending money to cure the 'problem' residing in the disabled person, there would be less dependence on public welfare and that disabled people would become tax producers rather than tax consumers.⁷² From a definitional perspective, the outcome was a concept of disability that was explained solely in terms of an intrinsic physical or mental impairment and capacity to benefit from rehabilitation.

However, the limitations of the Rehabilitation Act soon became apparent to Congress.⁷³ Limiting protection against discrimination only to those who are likely to be employed as a result of benefiting from vocational rehabilitation services meant that the legislation had a very narrow compass and was incapable of responding to broader attitudinal and physical barriers. The Rehabilitation Act also excluded people experiencing discrimination because of impairments that, in a functional sense, fell short of constituting a substantial barrier to employment. In 1974, further amendments followed in part to render the definition of disability more responsive to the phenomenon of disability discrimination. In this regard, the most significant amendment was section 504 which clarified the meaning of disability. Section 504 prohibited discrimination against an 'individual with a disability' who was defined as: Any individual who:

- (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

⁷⁰ Parmet (note 33 above) 53, 57.

⁷¹ The Rehabilitation Act of 1973 is a successor to the Rehabilitation Acts of 1920, 1943, 1954 and 1972. A common objective behind these antecedents is rehabilitating people with disabilities to render them fit for employment and, in the process, save public money that would otherwise be spent on social welfare payments: Drimmer (note 68 above) 1364-1369.

⁷² Drimmer *ibid* 1368, 1380-1381.

⁷³ Feldblum 'Definition of Disability under the Federal Anti-discrimination Law' (note 33 above) 100.

- (ii) has a record of such impairment; or
- (iii) is regarded as having such an impairment.⁷⁴

Section 504 broke new ground to the extent that it severed the connection with capacity to benefit from rehabilitation services and thus broadened the ambit of the definition. The definition constituted the first occasion where Congress clearly evinced an intention to depart from an essentially individual impairment model of disability so as to embrace a social model. Section 504 spawned a three-pronged definition of disability that was bequeathed to the ADA in 1990. The imprint of the social model is clearly visible in the second and third prongs of the definition where a person who has ‘a record of a physical or mental impairment’ or ‘is regarded by others as having such an impairment’, is also within the protective ambit.⁷⁵ In this way, Congress implicitly recognised that disability could be a result of past experience of disability or social labelling by others. In *School Board of Nassau County v Arline*,⁷⁶ the Supreme Court gave judicial expression to the social model of disability in the second and third prongs of the definition.

In *Arline*, the Court acknowledged that a school teacher who in the past had been treated successfully for tuberculosis but had lost her job because of fear by school authorities that she might spread tuberculosis, fell within the protective ambit of the Americans with Disabilities Act. The Court said that ‘society’s accumulated myths and fears about disability and disease are as handicapping as the physical limitations that flow from actual impairment’⁷⁷ and that the statutory definition of disability was broad

⁷⁴ Pub L No 93-516, 88 Stat 1617, 1619 (1974).

⁷⁵ 42 USC s 12102(2); CR Feldblum ‘The Americans with Disabilities Act: Definition of Disability’ (1991) 7 *The Labour Lawyer* 11; Kanter ‘Toward Equality: The ADA Accommodation of Differences’ (1999) in Jones & Bassar Marks (eds) M Jones & L Bassar Marks (eds) *Disability, Diversity and Legal Change* (1999) 227-250.

⁷⁶ 480 US 273 (1987); Feldblum ‘The Americans with Disabilities Act: Definition of Disability’ (note 75 above) 16-17; Parmet (note 33 above) 60; H Hahn ‘Accommodations and the ADA: Unreasonable Bias or Biased Reasoning’ (2000) 21 *Berkeley Journal of Employment & Labour Law* 166-192, 171; Feldblum (note 33 above) 92; Turner (note 33 above) 443-444; Centre & Imparato (note 33 above) 325.

⁷⁷ 480 US 273 (1987) 284.

and not limited to 'traditional handicaps'.⁷⁸ The Court said that the third prong served to protect from discrimination people who had impairments that did not in fact substantially limit their physical or mental capacity to carry out major life activities, but are perceived by others as so impaired.⁷⁹

But even with the amendment of the Rehabilitation Act in 1974, it became apparent to Congress that the scope of the Act was, nonetheless, too limited as a legislative response to disability discrimination. The Rehabilitation Act had left untouched other socio-economic sectors that were not receiving federal funds, but where disability-related discrimination was, nonetheless, extant.⁸⁰ This shortcoming prepared the way for the ADA. The transition from the Rehabilitation Act to the ADA was largely galvanised by domestic demand. With the hindsight of success achieved with enacting civil rights legislation to vindicate the rights of blacks and women, domestic disability activists and disability organisations that subscribed to a social model of disability began calling for comprehensive legislation to combat disability discrimination.⁸¹ They campaigned for legislation that would not only cover the gaps in the Rehabilitation Act, but would also reflect a paradigm shift from treating disability merely as a welfare issue to treating it a rights issue.⁸² The focus became a right to equal citizenship rather than a right to be cured or rehabilitated.⁸³

The ADA broadened the scope of protection to include employment, public entities, public accommodation and telecommunication in the public as well as private sectors. It

⁷⁸ *Ibid* 286.

⁷⁹ *Ibid* 283.

⁸⁰ Feldblum (note 75 above) 11, 12; Jones (note 64 above) 475-476; Parmet (note 33 above) 58.

⁸¹ Burgdorf (note 64 above) 428; Drimmer (note 68 above) 1375-1376; Parmet (note 33 above) 56-57; Feldblum (note 33 above) 97.

⁸² Degener 'Disability Discrimination Law' (note 56 above) 90. For an account on disability advocacy and campaigns in the United Kingdom's case see, especially: C Barnes *Disabled People in Britain and Discrimination* (1991); C Barnes 'Institutional Discrimination against Disabled People and the Campaign for Anti-discrimination Legislation' (1992) 12 *Critical Social Policy* 5; C Gooding *Disabling Laws and Enabling Acts* (1995) 159-174. For a United States account, see: LP Weicker 'Historical Background of the Americans with Disabilities Act' (1991) 64 *Temple Law Review* 387; Drimmer (note 68 above).

⁸³ Drimmer *ibid* 1376.

sought to provide a 'clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities'.⁸⁴ The preamble to the ADA acknowledged that people with disabilities 'continually encounter various forms of discrimination' and 'are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a position of political powerlessness'.⁸⁵ Whilst the ADA had its detractors,⁸⁶ it was passed by an overwhelming vote of 91-6 vote in the Senate,⁸⁷ was received by Americans with much optimism. Some hailed it as 'the most significant civil rights and social policy to become law in more than a decade'.⁸⁸

However, there is a widely shared view that the ADA has not lived up to the hopes and aspirations that accompanied its promulgation.⁸⁹ Empirical evidence demonstrating, for example, that in employment cases, plaintiffs are disproportionately unable to overcome the initial hurdle of establishing that they fall within the definition category has given much credence to dissatisfaction with the ADA.⁹⁰ One of the implications of the disproportionate failure by plaintiffs to succumb the definitional hurdle is that courts rarely ever get to the stage of determining whether the employer's policy or practice is discriminatory and whether it ought to have provided reasonable accommodation. Though many factors influence prospects of success, including the quality of legal representation, nonetheless, the restrictive nature of juridical

⁸⁴ 42 USC § 12101(b)(1)-(2).

⁸⁵ 42 USC § 12101(a)(5), (7).

⁸⁶ Much of the opposition is based on free market thinking, including the beliefs that people with disabilities are perfectly capable to selling their labour to employers and that antidiscrimination legislation is a hindrance rather than a help in that it is apt to deprive individual choice, and result in high unit cost and employer aversion towards people with disabilities. See, for example: R Epstein *Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992) 484.

⁸⁷ 136 *Congressional Record* 17 296 (1990).

⁸⁸ DS Broder 'The Press's Fumble on the Hill' *Washington Post* December 5, 1990.

⁸⁹ See note 33 above.

⁹⁰ American Bar Association *Study Finds Employers Win Most ADA Title I Judicial Administrative Complaints* (1998) 22 *Mental & Physical Disability Law Reporter* 403. R Colker 'The Americans with Disabilities Act: A Windfall for Defendants' (1999) 34 *Harvard Civil Rights-Civil Liberties Law Review* 99, 160; R Colker 'Winning and Losing Under the Americans with Disabilities Act' (2001) 62 *Ohio State Law Journal* 239; AL Allbright '2001 Employment Decisions Under the ADA Title 1-Survey Update' (2002) 26 *Mental & Physical Disability Law Reporter* 394; JW Parry 'Employment Decisions under ADA Title I B Survey Update' (1999) 23 *Mental and Physical Disability Law Reporter* 290.

construction of disability under the ADA has been a major limiting factor. This restrictive nature manifests at two levels – at a legislative or textual level, and at a judicial construction level.

As alluded to earlier, the ADA adopts the three-pronged definition of disability of its predecessor, the Rehabilitation Act.⁹¹ The ADA does not protect an individual against discrimination on the mere basis of disability, but rather on the basis of a disability which in turn is statutorily defined as an individual who has ‘a physical or mental impairment which *substantially* limits one or more of such person’s major life activities’, or ‘has a record of such impairment’ or ‘is regarded as having such an impairment’.⁹² Thus, whilst the ADA subscribes to the social model, the medical model is present in each of the three prongs as the base or starting point for the definition of disability. The ADA itself does not elaborate on the meaning of impairment, but the regulations pursuant thereof make it abundantly clear that impairment is conceived in terms of organic pathology or disorder.⁹³

More to the point, at a textual level, the formulation of disability under the ADA shows beyond peradventure a statutory formulation that conceives disability in terms of a prescribed degree of functional limitation. Anything short of the prescribed threshold of functional limitation will not do. Thus, it is not just the existence or perception of physical or mental impairment that satisfies the statutory requirements, but also the presence of a certain degree of impairment or limitation in terms of competence to physically or mentally perform certain tasks or enter into or advance in, certain spheres,

⁹¹ 42 USC § 12102(2). In *Sutton* (note 10 above) 497, Justice Stevens said of the ADA’s definition of disability: ‘The Act’s definition of disability is “almost verbatim” drawn from the Rehabilitation Act of 1993...’ The only difference is that ‘disability’ was substituted for ‘handicapped’.

⁹² Pub L No 93-516, 88 Stat 1617, 1619 (1974).

⁹³ According to the regulations, ‘physical or mental impairment’ includes ‘(a) any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more systems of the body, including the following: (i) the neurological system; (ii) the musculoskeletal system; (iii) the special sense organs; (iv) the cardiovascular system; (v) the reproductive system; (vi) the digestive and genitourinary systems; (vii) the hemic and lymphatic systems; (viii) the skin; (ix) the endocrine system; or (b) any mental or psychological disorder, such as mental retardation, organic syndrome, emotional or mental illness, and specific learning disabilities’: 45 CFR § 84.3(j)(2)(2001).

including the workplace. Impairment is clearly linked to 'substantial' functional limitation to carry out certain tasks which are described as 'major life activities' in all three prongs of the definition.

At a judicial construction level, the limitations of the ADA can be illustrated by the decision of the Supreme Court in *Sutton v United States Airlines*.⁹⁴ The main issue in *Sutton* was whether the appellants - two twin sisters who suffered from severe myopia and had been denied positions as global airline pilots - had been unfairly discriminated under the ADA. With corrective lenses, the appellants' myopic vision was unimpaired. However, the appellants had failed to meet the minimum standard of uncorrected visual acuity that had been stipulated by the employer and accepted by all parties as an inherent requirement of the job.⁹⁵ By a majority,⁹⁶ the Supreme Court answered the question in the negative.

Justice O'Connor, who delivered the majority judgment said that the phrase 'substantially limits' in the definition of disability under the ADA appears in the 'present indicative tense', and implies that the complainant must be 'presently and not 'potentially or hypothetically' substantially limited.⁹⁷ Determining whether the complainant was so substantially limited requires an 'individualised inquiry' that focuses not on the 'name or diagnosis' of the disability but on functional limitation.⁹⁸ Justice O'Connor noted that the ADA had not defined 'substantially limits' but that the gap could be filled by recourse to dictionaries and the interpretive guidance of the Equal Employment Opportunity Commission (EEOC).⁹⁹ Drawing from dictionaries, she said that 'substantially', inter alia, suggests something that is 'considerable, or 'specified

⁹⁴ Note 10 above.

⁹⁵ With corrective lenses, the appellants had visual acuity of 20/20 or better. Without corrective lenses, they had visual acuity of 20/200 or worse in the right eye and 20/400 in the left eye. The employer had set a requirement of uncorrected visual acuity of 20/100 or better.

⁹⁶ Justices Stevens and Breyer dissenting.

⁹⁷ *Sutton v United States Airlines* (note 10 above) 482.

⁹⁸ *Ibid* 483.

⁹⁹ The EEOC has a statutory mandate to issue interpretive guidance under the ADA.

to a large degree' or 'ample' or 'considerable amount, quantity or dimensions'.¹⁰⁰ Justice O'Connor also noted that the EEOC had explained 'substantially limited' to mean the following:

Significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.¹⁰¹

She concluded that both appellants were not 'substantially limited' and therefore outside the ambit of 'individuals with disabilities' under the ADA. This was because whilst the appellants were precluded from performing a single particular job – that of global airline pilot – they were not precluded from a broad range of jobs.¹⁰² The appellants could still be employed as regional pilots or pilot instructors.¹⁰³ Justice O'Connor also said that in determining whether one is substantially limited corrective measures such as medical intervention, aids (corrective lenses in this case), and prosthesis must be taken into account.¹⁰⁴ Where the corrective measure enables the person to perform the major life activity of working, as this case, it could not be said that the person was substantially limited irrespective of the fact that the person could not perform a particular job.

To require disability to be limiting in terms of a broad range of jobs is untenable in a discrimination context. It is to treat a discrimination claim as analogous to a social welfare benefit claim where incapacity to perform remunerative work is the major criterion for eligibility. The ADA and the judicial interpretation thereof, adopt what can be described as a 'functional' approach to disability where the accent is on the severity

¹⁰⁰ *Sutton v United States Airlines* (note 10 above) 491.

¹⁰¹ *Ibid*; CFR §1630.2(j)(3)(i) (1998).

¹⁰² *Sutton v United States Airlines* (note 10 above) 491.

¹⁰³ *Ibid* 493.

¹⁰⁴ *Ibid* 482.

of the functional limitation resulting from the physical or mental impairment.¹⁰⁵ Such an approach detracts from the social model of disability, and assumes that discrimination only happens to those that have severe disabilities. Whilst it is legitimate to take into account corrective measures when determining whether a person has a disability, it should not be overlooked that regardless of the fact a disability may be substantially ameliorated, as would be the case with someone with a prosthetic leg, others may still perceive that person as having a disability.¹⁰⁶ The more useful question to ask is not whether the disability has been substantially corrected in a functional sense, but whether, regardless of the correction, the person is still the object of discrimination that is related to disability. In any event, *Sutton* effectively renders the third prong of definition of an individual with disability under the ADA – namely, ‘is regarded as having an impairment’ – meaningless.

The approach to disability in *Sutton* has been followed in a number of cases.¹⁰⁷ It is an approach that is wedded to a literal rather than a purposive approach to statutory interpretation. Not surprisingly, *Sutton* has attracted robust criticisms from commentators.¹⁰⁸ The *Sutton* approach has been castigated as a parsimonious reading of the ADA and a triumph of the text of a statute over its purpose.¹⁰⁹ *Sutton*, it is charged, has resulted in the diminution of the number of people covered by the ADA as it has become increasingly harder for complainants to bring themselves within the statutory definition of disability.¹¹⁰ Robert Burgdorf, a leading commentator on the ADA, has bemoaned the manner in which disability was conceived under the ADA describing it

¹⁰⁵ According to Justice O’Connor ‘nonfunctional’ approaches to defining disability, would produce a significantly larger number of people falling within the ADA’s definition of disability than were ever intended by Congress: *Sutton v United States Airlines* *ibid* 487.

¹⁰⁶ Justice Stevens made this observation in his dissenting judgment: *Sutton v United States Airlines* *ibid* at 497.

¹⁰⁷ *Murphy v United Parcel Service, Inc* (note 32 above); *Albertsons, Inc. v Kirkingburg* (note 32 above); *Toyota Motor Manufacturing, Kentucky, Inc. v Williams* (note 32 above). In *Toyota Motor*, for example, the Supreme Court said that “substantially limited in a major life activity’ must be interpreted strictly to create a demanding standard for qualifying as disabled...’: *Toyota Motor Manufacturing* *ibid* at 197; *Turner* (note 33 above) 426-428.

¹⁰⁸ Note 33 above.

¹⁰⁹ *Ibid.*

¹¹⁰ Note 90 above.

as having given rise to ‘unnecessary technicalities, harsh technicalities and niggardly standards’.¹¹¹

Certainly, the *Sutton* approach does not sit well with the generous and expansive approach to statutory interpretation that befits legislation that is intended to secure a social remedial purpose. Indeed, in his dissent, Justice Stevens, in contrast to Justice O’Connor’s adherence to the text when interpreting the ADA, said that ‘...in order to be faithful to the remedial purpose of the Act, we should give it a generous, rather than miserly, construction’.¹¹² The majority ruling in *Sutton* represents a construction of disability that is not sufficiently contextualised. It is a construction that does not reflect the totality of the social experience of disability, including the attitudes of employers and society in general towards disability, or perceptions thereof.

A fundamental limitation of the ADA is a statutory formulation of disability as something very different from, say, race, sex and gender. A compounding limitation has been the restrictive manner in which the Supreme Court interpreted the concept of disability. The outcome has been a definition of disability that is more suited to the criteria for eligibility for social security disability grants than antidiscrimination legislation. At a broader philosophical level, as Mathew Diller has argued, the restrictive interpretation of the ADA by the Supreme Court can be understood as not so much a case of the Court inadvertently misconstruing the ADA but, instead, an instance of conscious judicial antipathy towards a statute that envisages an expansive form of equality.¹¹³ The resort to textualism by the Court is deliberate rather than inadvertent constraining praxis in order to give expression to judicial skepticism, if not strong opposition, towards a vision of equality that departs from the ‘sameness’ approach that the Court has traditionally protected under the Equal Protection Clause.¹¹⁴ The exclusionary approach of the Supreme Court reinforces disability as individual

¹¹¹ Burgdorf ‘“Substantially Limited” Protection from Disability Discrimination’ (note 33 above) 414.

¹¹² *Sutton v United States Airlines* (note 10 above) 495.

¹¹³ Diller ‘Judicial backlash’ (note 33 above) 39-40.

¹¹⁴ See the discussion in Chapter 4 § 7.2.

impairment and as something that the individual should overcome in order to fit into existing socio-economic arrangements that treat everyone on the basis of sameness.¹¹⁵

A remaining question to consider is whether Americans with Disabilities Act Amendments Act of 2008 (ADA Amendments Act) makes a substantive difference in terms of removing the restrictive tenor of the ADA or the interpretation thereof so as to render the ADA more inclusive. The ADA Amendments Act was passed by Congress as a response to widespread criticisms that the ADA, and more specifically, the judicial interpretation thereof was serving to exclude rather than include disabled people within the protected category. In essence, the ADA Amendments Act seeks to expand the definitional interpretation of disability by primarily reversing the restrictive interpretation of disability by the Supreme Court of the United States as exemplified in cases such as *Sutton*¹¹⁶ and *Toyota Motor Manufacturing, Kentucky v Williams*.¹¹⁷

In more specific terms, the ADA Amendments Act reverses the reasoning in *Sutton* that the question whether impairment is substantially limiting is to be determined with reference to ameliorative or mitigating measures.¹¹⁸ The Amendments Act rejects the standard set by the Supreme Court in *Toyota Motor Manufacturing* that the terms ‘substantially’ and ‘major’ in the ADA’s definition of disability, ‘need to be interpreted strictly to create a demanding standard for qualifying as disabled’.¹¹⁹ The Amendments Act also expands the definition of what constitutes ‘major life activities’, inter alia, by including activities such as reading, bending and communicating that the Equal Employment Opportunity Commission (a federal agency which is inter alia, charged

¹¹⁵ Berg (note 1 above) 23.

¹¹⁶ Note 10 above. In this connection, the Amendments Act says that ‘the holdings of the Supreme Court in *Sutton v. United Air Lines Inc*, 527 US 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect’: section 2(a)(4) of the ADA Amendments Act.

¹¹⁷ Note 32 above. In this connection, the ADA Amendments Act says that ‘the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc v. Williams* further narrowed the broad scope of protection intended to be afforded by the ADA’: section 2(a)(5) of the ADA Amendments Act.

¹¹⁸ Section 2(b)(2) of the ADA Amendments Act.

¹¹⁹ *Ibid* section 2(b)(3).

with the responsibility for making regulations for the implementation and enforcement of the ADA) had hitherto not recognised.¹²⁰

It is submitted, however, that while the ADA Amendments Act seeks to broaden the class of persons falling into the protected group, and more specifically, seeks to reverse the import of the restrictive decisions of the Supreme Court on the definitional construction of disability, in the final analysis, the point should not be lost that the new Act retains the definition of disability under the ADA of 1990. The requirement of 'substantial limitation' under the ADA of 1990 Act has been retained by the new Act. In this sense, I would argue that the amendment does not absolve the ADA from the inappropriateness of insisting on a threshold of 'substantial' limitation as a condition for legally recognising disability for non-discrimination purposes.

3.2 Canada: Section 15(1) of the Canadian Charter of Rights and Fundamental Freedoms

David Lepofsky has observed that the original text of the Canadian Charter of Rights and Fundamental Freedoms (the Canadian Charter) provided protection only for grounds that were listed and disability was not among the list.¹²¹ When disability advocates pressed for the inclusion of disability, federal government initially resisted. Federal government advanced a variety of reasons, including the following: that constitutional protection was unnecessary as disability discrimination was better protected under human rights codes; that the interpretation of disability would pose complex problems for the judiciary; that the cost of providing equality to people with disability would be too high; and that the notion disability rights was, in any event, not sufficiently imprinted in the mind of the public to justify inclusion in the Canadian

¹²⁰ *Ibid* section 3(3).

¹²¹ The listed grounds were 'race, national or ethnic origin, colour, religion, age or sex': MD Lepofsky 'The Charter's Guarantee of Equality to People with Disabilities - How Well is it Working?' (1998) 16 *Windsor Yearbook of Access to Justice* 155, 162.

Charter.¹²² Disability advocates, however, were unrelenting. In the end, they were successful in convincing government of the significance and desirability of including specific protection against disability discrimination.

Section 15(1) of the Canadian Charter lists 'mental or physical disability' as one of the protected attributes, but without further elaboration.¹²³ The Supreme Court of Canada recognises the social model in its approach to the definitional aspects of disability as an enumerated ground under s 15(1) of the Canadian Charter. In *Granovsky Canada (Minister of Employment and Immigration)*, the Court clearly treated the social model of disability as an integral aspect when Justice Binnie, delivering judgment where disability was at issue, made the following observations against the backdrop of the relevance to law of the tri-partite definition of disability (namely, 'impairment', 'disability' and 'impairment') in the World Health Organisation's *International Classification of Impairments, Disabilities and Handicaps (ICIDH)*:

It is therefore useful to keep distinct the component of disability that may be said to be located in an individual, namely the aspects of physical or mental impairment, and functional limitation, and on the other hand the other component, namely, the socially constructed handicap that is not located in the individual at all but in the society in which the individual is obliged to go about his or her everyday tasks... (While the WHO, in the *medical* context uses the word "disability" to refer to functional limitation (the second aspect), I prefer to use the expression "functional limitation" to emphasize that in *legal* terms it is all three aspects considered together that constitute disability.)¹²⁴

As part of recognising the social model of disability the Court in *Granovsky* noted, as an example, that a person with serious facial disfigurement or a person who is diagnosed with leprosy may not have and may never have any functional limitations, but may, nevertheless, suffer discrimination on account of the condition.¹²⁵ According to the

¹²² *Ibid* 162-163.

¹²³ G Penney 'A Constitution for the Disabled or a Disabled Constitution? Toward a New Approach to Disability for the Purposes of Section 15(1)' (2002) *Journal of Law & Equality* 83.

¹²⁴ *Granovsky* *ibid* para 34. Emphasis original; Penney (note 123 above) 99-101. The *ICIDH* was discussed in Chapter 3 § 3.2 of this study.

¹²⁵ *Granovsky* *ibid* para 38.

Canadian Supreme Court, section 15(1) is ultimately concerned with human rights and discriminatory treatment and not with *biomedical conditions*.¹²⁶ In this regard, the court said;

The true focus of s. 15(1) disability analysis is not on the impairment as such, nor even on any associated functional limitation, but is on the problematic response of the state to either or both these circumstances. It is the state action that stigmatizes the impairment, or attributes false or exaggerated importance to the functional limitations (if any) or which fails to take into account the 'larger remedial component'...or 'ameliorative' purpose of s. 15(1)...that creates the legally relevant human rights dimension to what might otherwise be a straightforward biomedical condition.¹²⁷

Further on in its deliberations, the court said:

In summary, while the notions of impairment and functional limitation (real or perceived) are important considerations in the disability analysis, the primary focus is on the inappropriate legislative or administrative response (or lack thereof) of the state. Section 15(1) is ultimately concerned with the human rights and discriminatory treatment, not with biomedical conditions¹²⁸

The Canadian Charter is not the only instrument that regulates disability discrimination. Disability discrimination is also regulated at a federal and provincial level by Human Rights Code and other legislation. Whilst organic impairment forms the base of the definitional construction of disability, the approach of Canadian instruments compliments a social rather than medical model of disability.¹²⁹

¹²⁶ *Ibid* para 39.

¹²⁷ *Ibid* para 26.

¹²⁸ *Ibid* para 39.

¹²⁹ This is evident, for example in the Human Rights Code RSO 1990, Chapter H.19 which inter alia, protects every person against discrimination in employment on the ground of 'disability'. According to section 10 of the Human Rights Code, 'disability' means (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and without the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device, (b) a condition of mental impairment or a developmental disability, (c) a learning disability, or a dysfunction in one or more of the processes

3.3 South Africa: Section 6(1) of the Employment Equity Act and *IMATU and Another v City of Cape Town*

The construction of disability in *IMATU and Another v City of Cape Town*¹³⁰ was decided under section 6(1) of the EEA.¹³¹ The EEA is not disability-specific legislation. Unlike the United States, Australia or the United Kingdom, South Africa has not followed the route of disability-specific antidiscrimination legislation. Although there have been domestic disability movements and activism in South Africa,¹³² they have never acquired a political presence comparable to their counterparts in the United States or the United Kingdom, for example, in terms of galvanising political support for disability-specific legislation or even presenting government with a blueprint for such legislation. In any event, government has never been pressed in any concerted way to consider legislating solely to regulate disability discrimination. As part of the political process leading to a democratic South Africa, the disability movement lobbied for the specific inclusion of disability as a protected ground in an equality clause of a constitution rather than disability specific legislation.¹³³ The Constitution came with a Bill of Rights where equality is a foundational value and an organising principle,¹³⁴ and

involved in understanding or using symbols or spoken language, (d) mental disorder, or (e) an injury or disability for which benefits were claimed under the insurance plan established under the Workplace Safety and Insurance Act 1997. See also the definitions of disability under: section 3 of the Employment Equity Act of 1995 which seeks to achieve equity in the workplace, inter alia, for 'persons with disabilities'; section 25 of the Canada Human Rights Act 1976-77 which, inter alia, seeks to guarantee equality; and provisions of provincial human rights codes.

¹³⁰ Note 9 above.

¹³¹ Note 8 above.

¹³² W Rowland *Nothing about Us Without Us* (2004); K Jagoe 'The Disability Rights Movement: Its Development in South Africa' http://www.independentliving.org/toolsfor_powe/tools6.html (last accessed on 26 January 2005); V Finkelstein 'Reflections on the Social Model of Disability: The South African Connection' (2005) <<http://www.leeds.ac.uk/disability-studies/archiveuk/titles.html>> (last accessed on 10 December 2005).

¹³³ Roland (note 132 above) 17; J Nkeli 'How to Overcome Double Discrimination of Disabled People in South Africa' <<http://www.independentliving.org/docs1/hr5.html>> (last accessed on 28 July 2005).

¹³⁴ Section 1(a) of the Constitution: 'The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable states may underscore their principles and rights. But in the light of our own particular history, and our vision for the future, a Constitution was written with equality as its centre. Equality is our Constitution's focus' per Justice Johann Kriegler in

disability status, as alluded to earlier, is protected as part of a wider family of protected grounds. Moreover, the Constitution also came with an injunction to enact antidiscrimination legislation generally.¹³⁵ Indeed, the EEA¹³⁶ and the Promotion of Equality and Prevention of Unfair Discrimination Act¹³⁷ are products of this injunction. If there was a case for special disability legislation before 1994, such case was seemingly rendered otiose by the inauguration of a Constitution with an inclusive Bill of Rights and an injunction to enact antidiscrimination legislation.

IMATU concerns a complainant who claimed that he had been unfairly discriminated in the workplace contrary to section 6(1). The complainant suffered from a type of diabetes that was controlled by insulin. He was an incumbent law enforcement officer, but was seeking a position as a fire fighter within his workplace. He was turned down by the respondent on the ground that he could not discharge the inherent requirements of the job. According to the respondent, because the complainant suffered from insulin-dependent diabetes, there was always a risk that he might suffer a debilitating hypoglycaemic attack and in consequence pose a danger to the public, fellow fire fighters and to himself. The employer operated a blanket ban policy that precluded all those who suffered from insulin-dependent diabetes mellitus from taking up positions as fire fighters.

The complainant claimed that he had been unfairly discriminated, *inter alia*, on the ground of *disability*. He argued that diabetes constituted a disability. On this point, Acting Justice Murphy held that the complainant did not have a disability. According to the court, this was because the complainant was physically fit and that his diabetes was satisfactorily controlled through insulin and other medical management such that its adverse effects in the workplace were largely prevented or removed.¹³⁸ Instead, the

President of the Republic of South Africa and Another v Hugo 1997 (6) BCLR 708 (CC) para 74. See also the discussion in Chapter 3 § 6 of this study.

¹³⁵ Section 9(2) of the Constitution.

¹³⁶ Preamble to the EEA.

¹³⁷ Act No 4 of 2000.

¹³⁸ *IMATU* (note 9 above) para 91.

court held that diabetes was an analogous ground under section 6(1)¹³⁹ and proceeded to find in favour of the complainant on that basis.

IMATU is the first ever reported case where a South African court has adjudicated on a matter directly bearing on the construction of disability as a listed ground.¹⁴⁰ Hitherto, the nearest that a South African court had got to interpreting disability in an equality context was in *Hoffmann v South African Airways*.¹⁴¹ In that case, the appellant, who had been declined employment as an air steward, contended, as part of his claim of unfair discrimination against the respondent, that HIV status constituted disability under s 9(3) of the Constitution. However, the Constitutional Court declined to address the disability issue, preferring, instead, to resolve the case by treating HIV status as an analogous ground.¹⁴² In *IMATU*, on the other hand, the Labour Court did not shy away from attempting to interpret disability. On this point, Acting Justice Murphy, drawing support mainly from the *The Code of Good Practice: Key Aspects on the Employment of People with Disabilities (Code of Good Practice)*,¹⁴³ and the decision of the Supreme Court of the United States in *Sutton*¹⁴⁴ that was taken under the ADA,¹⁴⁵ held that the complainant did not have a disability. According to the court, this was because the complainant was physically fit and that his diabetes was satisfactorily controlled through insulin and other medical management such that its adverse effects in the workplace were largely prevented or removed.¹⁴⁶

¹³⁹ *Ibid* para 92.

¹⁴⁰ See also *Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration* [2008] 4 BLLR 356 (LC), para 65 which followed the same approach to definitional disability in section 6(1) of the EEA.

¹⁴¹ Note 39 above.

¹⁴² *Ibid* para 40.

¹⁴³ *IMATU* (note 9 above) paras 89-90; Department of Labour *The Code of Good Practice: Key Aspects on the Employment of People with Disabilities* (2002). The *Code of Good Practice* was issued by the Minister of Labour pursuant to section 54 of the EEA. The *Code of Good Practice* is, in turn, supplemented by technical guidelines: Department of Labour *Technical Assistance Guidelines on the Employment of People with Disabilities (Technical Assistance Guidelines* (2003)).

¹⁴⁴ Note 10 above; *IMATU* (note 9 above) para 91.

¹⁴⁵ Note 11 above.

¹⁴⁶ *IMATU* (note 9 above) para 91.

It is submitted that *IMATU* was correct in finding that diabetes was an analogous ground. As alluded to earlier, in *Hoffmann*, the Constitutional Court found that HIV status was an analogous ground on the ground that people that are living with HIV are a vulnerable social group that is stigmatised and marginalised not least in the workplace where they have been excluded from on account of health status only and without regard to ability to perform the inherent requirements of the job. Though diabetes is not as stigmatised as conditions such as HIV or epilepsy, nonetheless, insulin-dependent diabetes is an attribute or characteristic that has historically been the object of aversive and stigmatising attitudes to the extent of impairing the dignity of sufferers in a manner comparable to discrimination on a listed ground.¹⁴⁷ Indeed, the court in *IMATU* noted that insulin-dependent diabetics are a vulnerable group, and that they are denied employment and prevented from realising career choices on account of misapprehension about their medical condition.¹⁴⁸

Equally, it is submitted that the court was correct in finding that the employer's blanket ban on appointing diabetes sufferers that are dependent on insulin constituted unfair discrimination. Risk assessment for the purposes of health and safety requires a case-by-case assessment and not reliance on generalised assumptions and stereotypes. It requires the employer to consider not only the magnitude of the risk but also its actual probability. Though the blanket ban was rationally connected to the performance of the duties of fire fighter and health and safety were legitimate concerns on account of the possibility of a hypoglycaemic attack, nonetheless, the ban was disproportionate to the risk posed by the complainant. The medical evidence that was adduced for the complainant, which was accepted by the court, showed that the complainant was physically fit and that his diabetes was optimally controlled. The prospect of suffering a hypoglycaemic attack was minimal rather than significant. Moreover, the complainant

¹⁴⁷ On what constitutes an analogous ground, see: *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) paras 28-33; *Harksen v Lane* (note 43 above) paras 46-49; *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) BCLR 1655 (CC) para 16; *Hoffmann v South African Airways* (note 39 above) paras 28, 40.

¹⁴⁸ *IMATU* (note 9 above) para 98.

could anticipate a hypoglycaemic attack and take immediate remedial action. The ban was borne out of a policy that treated all insulin-dependent diabetics as displaying risk of uncontrolled hypoglycaemic attacks.¹⁴⁹ It was a risk based on generalised assumptions about insulin-dependent diabetics as class and thus constituted unfair discrimination. From the standpoint of determining capacity to discharge the inherent requirements of the job where health and safety are implicated, *IMATU* is consistent with the approach adopted by the Constitutional Court in the *Hoffmann* case.¹⁵⁰

However, on the construction of disability, it is submitted that *IMATU* adopted the wrong approach. As part of interpreting the word 'disability' in section 6(1), the court noted, correctly, that 'disability' is not defined in the EEA. Having identified this gap, the court went on to observe that item 5 of the *Code of Good Practice* defines 'people with disabilities' as 'people who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment'. The court then proceeded to ascribe the meaning of 'people with disabilities' as explained in the *Code of Good Practice* to 'disability' in section 6(1). In this connection, the court said there was no doubt that diabetes was a long-term physical impairment but it was not sufficient for a complainant to merely establish he had such an impairment.¹⁵¹ Rather, the complainant must satisfy all the criteria of the definition.¹⁵² In the complainant's case, in addition to establishing a long-term physical impairment, namely diabetes, it was necessary to show that in terms of its nature, duration or effects, the diabetes substantially limited the ability to perform the essential functions of the position of fire-fighter.¹⁵³ However, as the complainant's diabetes was optimally managed to the extent that its adverse effects in the workplace were largely prevented or removed, it could not be said that the complainant was substantially

¹⁴⁹ *Ibid* para 113.

¹⁵⁰ Note 39 above; C Ngwenya and S Matela '*Hoffmann v South African Airways and HIV/AIDS in the Workplace: Subjecting Corporate Ideology to the Majesty of the Constitution*' (2003) 18 *SA Public Law* 306.

¹⁵¹ *IMATU* (note 9 above) para 90.

¹⁵² *Ibid*.

¹⁵³ *Ibid*.

limited.¹⁵⁴ According to the court, it could, therefore, not be said that he fell into the definition in the *Code of Good Practice* and by extension the meaning of disability in section 6(1). As part of fortifying its conclusion, the court purported to follow the decision of the Supreme Court of the United States in *Sutton*.¹⁵⁵

The main shortcoming with the approach in *IMATU* to the interpretation of 'disability' is that the court wrongly ascribed the meaning of 'people with disabilities' to 'disability'. The court inappropriately imported into section 6(1) that regulates discrimination and provides for 'disability' as one of the protected grounds, a statutory interpretation of 'people with disabilities' that is implicitly intended for Chapter III which regulates affirmative action. Whilst, as the court noted, the term 'disability' is not defined under the EEA, concomitantly, the court does not appear to have been cognisant of the fact that the term 'people with disabilities' is in fact defined in s 1 of the Act. What item 5 of the *Code of Good Practice* does is not so much explain a concept for the first time, but reiterate and expand upon section 1, which defines 'people with disabilities' as 'people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment'. Thus, s 1 of the EEA rather than item 5 of the *Code of Good Practice* should be the primary source of the definition of 'people with disabilities'. The term 'people with disabilities' is a legal term of art that is, by implication, intended to denote one of the groups that is a beneficiary of affirmative action measures in Chapter III of the EEA. The very fact that section 1 does not define 'disability', a term which is also used in section 9 of the Constitution, suggests that it is unwarranted to conflate 'people with disabilities' with 'disability'. In defining 'people with disabilities' as one of the groups that is a beneficiary of affirmative action duties that are imposed on designated employers, it is implicit that the legislature has formulated a definition that is intended to circumscribe the type of disabilities that meet the statutory criteria for affirmative action purposes. Thus, for affirmative action purposes, the EEA employs a much

¹⁵⁴ *Ibid* 91.

¹⁵⁵ Note 10 above.

narrower concept of disability. It is not everyone who has a disability that is a potential beneficiary of affirmative action measures. Over and above having a disability in the sense of a 'long-term or recurring physical or mental impairment', the disability must be one that 'substantially limits' employment prospects. Such circumscription seems reasonable given the preferential rather than rights-based nature of affirmative action measures.

To adopt without modification, the concept of 'people with disabilities' as defined by the EEA and explained in the *Code of Good Practice*, as the equivalent of 'disability' in section 6(1) would unduly restrict the protected class. Section 6(1) is intended to protect groups against unfair discrimination, as part of respecting the right to equality. Section 6(1) is not intended to confer protection on the basis of the degree of limitation that the disability poses in terms of prospects of entry into, or advancement in, employment. Rather it is intended to confer protection against unfair treatment on the basis or ground of disability. It is intended to eliminate aversive, stereotypic and indifferent attitudes towards disability in the workplace that have the effect of imposing a disadvantage on the person with a disability. Thus, even if the disability in question does not substantially limit employment prospects, what is crucial, as is the position with other protected grounds such as race, sex and gender, is a causal relationship between disability and conduct of the employer that is discriminatory and disadvantageous.

It is further submitted that it was equally inappropriate for the court in *IMATU* to treat *Sutton* as a persuasive authority. Reliance on a foreign precedent without concomitantly exploring it to see whether it is appropriate for South African jurisprudence risks the 'dangers of shallow comparativism' that the Constitutional Court has cautioned against.¹⁵⁶ As was established in the previous section, *Sutton* deals

¹⁵⁶ *NK v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 35 per Justice Kate O'Regan; See also *Bernstein & Others v Bester & Others* NO 1996 (2) SA 751 (CC) para 133; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 26.

with a concept of disability under a statute – the ADA – which, unlike section 6(1) of the EEA, explicitly employs a restrictive definition of disability for antidiscrimination purposes. Under the ADA, the effects of disability must be ‘substantially limiting’ in terms of performing major life activities before it can be said that an individual has a disability. While the interpretation of disability under the ADA would be instructive for understanding the meaning of ‘people with disabilities’ under Chapter III of the EEA to the extent that it applies a ‘substantially limiting’ approach, unless modified, it is not an appropriate analogy for understanding the meaning of ‘disability’ in section 6(1). Requiring a disability to be ‘substantially limiting’ is unduly restrictive of the disability in a discrimination context.

The rationale for antidiscrimination law is to deter as well as provide remedies for unfair treatment that is rooted in stereotypes, stigma and indifference. To confine disability only to persons who have severe disabilities or are substantially limited in their competence to perform given activities would be to miss the point.¹⁵⁷ Disability discrimination is not invoked by a certain degree of impairment or limitation in level of physical or mental competence. Rather, it is the result of unfair treatment, negative attitudes and indifferent social structures. The degree of impairment or level of limitation in competence may be quite irrelevant to the perpetrator. For example, a typist who is denied a typing job because one of her fingers is missing even though she can type competently without any assistance is not discriminated against because she has a severe impairment or is substantially limited in her competence to type.¹⁵⁸ Discrimination may be based on past, future or even assumed disabilities. The mischief that disability discrimination law seeks to suppress is social reaction to disability irrespective of the degree of disability or perceptions thereof.¹⁵⁹ To suppress the

¹⁵⁷ Bagenstos (note 28 above); Burgdorf ‘“Substantially Limited” Protection from Disability Discrimination’ (note 33 above); Feldblum (note 33 above) 161; T Degener ‘Definition of Disability’ (2004) <europa.eu.int/comm./employment_socia/fundamental_rights/aneval/disabdef.pdf> (last accessed on 1 December 2008).

¹⁵⁸ This example is taken from Degener ‘Definition of Disability’ *ibid.*

¹⁵⁹ Parmet (note 33 above) 62-63; Degener (note 157 above).

mischief of disability discrimination, the focus should be on the conduct of the perpetrator rather than the degree of impairment or level of limitation in physical or mental competence.

However, this is not to say the definition of people with disabilities in section 1 of the EEA and its amplification in the *Code of Good Practice* are not relevant to the construction of disability under section 6(1). The notion of the presence of a 'long-term or recurring physical or mental impairment' is a reasonable construction to put to the formulation of disability as a protected group under section 6(1). The notion of an impairment of a physical or mental nature that has a certain degree of presence is indispensable to the legal construction of disability in antidiscrimination clauses. It serves the important juridical function of identifying the protected category with exclusivity or determinacy. By insisting on physical or mental impairment, it is possible to exclude persons whose competence to perform the inherent requirements of the job for example, is limited on account of, say, poor education, lack of training, general poverty or some other socio-economic disadvantage. Jerome Bickenbach *et al* robustly put this point across when they say:

The nature of the link between impairment and disablement is an important issue for any social theory of disablement, since without some researchable connection it would not be possible to distinguish the socially-created disadvantages of disablement from those of race, class or economic status. Each of these identifiers is associated with social disadvantages, but they are not the same as disablement. Disablement is essentially, conceptually, linked to health status (or the perception of health status). A social theory of disablement risks incoherence if it cannot make the link (let alone explain the link) between impairments and the socially created disadvantages of disablement.¹⁶⁰

¹⁶⁰ JE Bickenbach *et al* 'Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps' (1999) 48 *Social Science & Medicine* 1173 at 1176; Bickenbach *Physical Disability and Social Policy* (note 23 above) 173.

4 DEFINITIONAL CONSTRUCTION OF DISABILITY UNDER THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Against the backdrop of a trend towards restrictive definitional constructions of disability at the domestic level, the Convention points the way forward in terms of an inclusive definition that connects with both biomedical as well as more socially grounded conceptions of disability. Given the inclination among some domestic jurisdictions to construe disability restrictively, and perforce, constrain equality, the Convention makes an important contribution to the extent that it proffers an inclusive definition of disability. The Convention uses the term ‘persons with disabilities’ to describe and define the protected class. It says:

...persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder their full participation in society on an equal basis with others’.¹⁶¹

Leaving aside the term ‘persons with disabilities’,¹⁶² the Convention’s definition is welcome. The Convention’s definition attempts to also resolve with what can be described as unfinished business in disability studies, namely, reaching consensus on the definitional construction of disability in terms of whether to implicate impairment only, or the socio-economic environment only, or both. Against the backdrop of disability as contested conceptual terrain and contrasting approaches to its definitional construction, the Convention steers not so much a middle course, but a nuanced one, taking from both the individual impairment model and the social model. The Convention constructs an inclusive definition of disability. The definition recognizes that whilst there might be myriad interpretations of disability, a juridical definition of disability for equality and non-discrimination purposes must at least implicate

¹⁶¹ Article 1 of the Convention.

¹⁶² I discuss the appropriateness of the terminology of ‘people with disabilities’ or its equivalents in Chapter 3 § 9 of this study.

impairment as a starting point. At the same time, the definition must be responsive to socio-economic barriers as constituent elements of disability. The Convention's definition accepts that impairments and the environment interact to produce the experience of disability when people with impairments cannot participate in society on an equal basis with others. In this way, the definition acknowledges that disability cannot be understood at the exclusion of the environment. In terms of normative implications, the definition implicitly envisages transcending formal equality in order to achieve substantive equality. It envisages dismantling barriers or restructuring the socio-economic environment to enable disabled people to participate equally.

The Convention's definition is deliberately not exhaustive. Indeed, in the preamble, the Convention accepts that the concept of disability is an 'evolving one'.¹⁶³ The definition deliberately leaves room for domestic jurisdictions to add to, rather than detract from, the protection engendered by the definition. It would be open, for example, for a jurisdiction, such as South Africa, not to require impairments to be long-term so as to also include short-term impairments in the protected ambit. Underpinning the Convention's inclusive approach was the realization by the drafters that the definition of disability is not only a contested concept, but it is also a fluid one such that it would be futile to construct a rigid definition.¹⁶⁴ Indeed, as Anna Lawson observes, much time was devoted by the drafters of the Convention in trying to secure agreement on the wording of the definition.¹⁶⁵ An inclusive definition that is responsive to both invidious discrimination and indirect discrimination became the way forward.

5 CONCLUSION

Legal proscriptions against disability discrimination serve to affirm persons with disabilities as persons of equal worth and human dignity, and repositories of enforceable rights. The definitional formulation of what constitutes a disability is an

¹⁶³ Preamble to the Convention, para e.

¹⁶⁴ A Lawson 'The United Nations Conventions on the Rights of Persons with Disabilities: New Era or False Dawn' (2007) 34 *Syracuse Journal of International Law & Commerce* 563 at 593-595.

¹⁶⁵ *Ibid* 593-594.

important constituent element of the legal proscription against disability-related discrimination. As the South African Human Rights Commission has noted, if the definition of disability is inadequate or inappropriate, it will not only result in a limited understanding of disability, but can also contribute to inequality and discrimination.¹⁶⁶ Unbridled formalism in the construction of disability, as would flow from the medical model, fails to grasp, at an elementary level, the purposes of antidiscrimination law. If formulations of disability that are predicated on an individual impairment model of disability are adopted wholesale by antidiscrimination legislation, they will probably lead to regimes than encourage legalism. Complainants will be obliged to devote a disproportionate amount of time amassing medical evidence to persuade the courts that they, indeed, fall within the protected class. The outcome is a distortion of discrimination law in that the extent of disability rather than the causative link between disability and aversive attitudes becomes the focus of inquiry.

The construction of disability under the ADA demonstrates overt as well as subliminal tendencies on the part of both the legislature as well as the judiciary to conceive disability as something quite different from other protected grounds such as race, sex or gender. Under the ADA, juridical notions of disability that are overly complex, restrictive and inconsistent with the underlying purposes of discrimination law have been inscribed into the law. The tendency has been to construct eligibility criteria that serve to restrict the definitional category of disability to those that are 'truly', 'really', 'substantially' or 'severely' disabled.¹⁶⁷ Regrettably, the result has been a legal construction of disability that subordinates the social model to the individual impairment model, and in so doing, serves to exclude rather than include people that have a social experience of disability discrimination.

¹⁶⁶ South African Human Rights Commission 'Disability' Policy paper from the South African Human Rights Commission (1997) <<http://www.independentliving.org/docs6/sahr1977.html>> (last accessed on 1 December 2008).

¹⁶⁷ Burgdorf "'Substantially Limited'" Protection from Disability Discrimination: (note 33 above) 536-539; Bagenstos (note 28 above) 466-473; Parmet (note 33 above) 54; Degener (note 157 above).

Certainly, the complexity, heterogeneity, and fluidity of disability render it more susceptible to raising far more questions about identifying the protected class than its counterparts such as race, sex or gender. The boundary between ability and disability can be highly contested. For these reasons, the efficacy of legislation that is intended to regulate disability depends in part on line-drawing to identify with reasonable certainty members of the protected group. But line-drawing must be contextual. Whilst legislatures and the courts have a legitimate role to play as gatekeepers, an *enabling* juridical approach to the construction of disability in discrimination law should shy away from the underinclusive approach of the United States where disability is something that warrants not only special, but also onerous rules in terms of the complainant proving, in the first place, that he or she falls within the protected class. In these jurisdictions, disability discrimination law has been *disabling* in that the legislative or judicial line-drawing has been overdone, so to say. The ADA has intuitively drawn from notions of disability that were developed primarily to regulate entitlement to workplace compensation for disability or social welfare benefits. Such notions have been inspired by the medical model and are intended to serve an exclusionary purpose so as to ensure that the smallest number of people is entitled to certain insurance or social welfare benefits. Such notions are inappropriate yardsticks for defining disability in an antidiscrimination context.

The argument is not that the individual impairment model should be the exclusive or dominant model for the legal construction of disability. Rather it is that the individual impairment model should be juxtaposed with the social model so as to respond adequately to the mischief of disability related discrimination. In this regard, the inclusive interpretation of disability under section 15(1) of the Canadian Charter offers appropriate lessons to the interpretation of section 6(1) of the EEA than the lessons emanating from the ADA. An important lesson to draw from the appraisal of the approach of the Labour Court in *IMATU* is that South African courts should be circumspect when treating foreign decisions as persuasive precedents because

jurisdictions can differ significantly in their juridical notions of what constitutes disability.

Doubtlessly, the court in *IMATU* failed to sufficiently contextualise or indigenise equality. The court failed to appreciate the expansive nature of equality under the South African Constitution. The Constitutional Court has enunciated beyond peradventure that the imperative is towards achieving substantive equality.¹⁶⁸ The 'full and equal enjoyment of all rights and freedoms' that is envisaged by section 9(2) of the Constitution and, perforce, its progeny - section 6(1) of the EEA - cannot be realised by the restrictive interpretation that was ascribed to the meaning of disability in *IMATU*.

The moral is that definitional categories are for us to choose. We can choose to contract or expand the category of the protected class depending on our equality vision. If the purpose of the law at issue is to eliminate disability-related discrimination, then, surely, how we define disability must commensurately reflect the social experience of disabled people. The definition and/or interpretation thereof should seek to facilitate the inclusion rather than exclusion of people that experience disability-related discrimination. In one sense, the juridical conceptualization of disability-related discrimination must seek to combat stigma and prejudice as operative social tools for consigning people with disabilities to a socially subordinate class. In another sense, the conceptualization of disability-related discrimination must seek to also implicate the lack of accommodation as an instance of discrimination. By capturing both attitudinal discrimination and 'impact' or 'disparate effect' discrimination, antidiscrimination law is able to capture the full play of direct and indirect discrimination as envisaged by sections 9(3) and (4) of the Constitution as well as section 6(1) of the EEA. Antidiscrimination law must complement the goal of ensuring that disabled people are guaranteed rights to enjoy full citizenship, are treated with respect and dignity, and are not be subjected to unfair treatment on account of a disability whether real or

¹⁶⁸ See the discussion in Chapter 4 § 6.

perceived.¹⁶⁹ It should not be the extent of functional limitation arising from the physical impairment that matters, but rather, the presence of an aversive attitude that is causally linked to disability.¹⁷⁰

¹⁶⁹ Bickenbach 'Disability and Equality' (note 35 above) 8-9.

¹⁷⁰ Bagenstos (note 28 above) 418.

CHAPTER 6

ACCOMMODATING DISABLED PEOPLE IN THE WORKPLACE: THE SCOPE AND LIMITS OF 'REASONABLE ACCOMMODATION'

Can accommodation be an idea of equality? Or is it, by definition, accommodationist, not transformative, not egalitarian in vision? We believe that accommodation could be an idea of equality if it recognized that we are all "different," and that structures that reinforce power imbalances among groups are the real impediment to equality. Accommodation could be an idea if it came to mean: making space for the equal participation of diverse groups in work and in social life through the negotiation of rules that redress power imbalances among groups.¹

1 INTRODUCTION²

In Chapter 3 of this study, I lent support to the argument by Karl Klare and several other commentators that a generous reading of the South African Constitution provides sufficient room for the recognition of transformative constitutionalism as a concept that captures a constitutional imperative towards changing society in a *major* rather than a minor way.³ I argued that the interpretation and application of the right to equality and non-discrimination for disabled people need to take place against this expansive and transformative backdrop if they are to succeed in repairing an injured past and, more importantly, eradicating systemic disadvantage based on somatic difference.⁴ I further developed the transformative thesis by advancing disability method as transformative

¹ S Day & G Brodsky 'The Duty to Accommodate: Who Will Benefit?' (1996) 75 *Canadian Bar Review* 433.

² While this chapter is an original contribution in the sense that it is my own work, nonetheless, it draws heavily from my contribution to a joint chapter in a book: CG Ngwena & E Klink 'Reasonable Accommodation' in JL Pretorius *et al Employment Equity Law* (2001) § 7.

³ Chapter 3 § 1 of this study; K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146. See also the other sources in footnote 3 of Chapter 3 § 1 of this study.

⁴ *Ibid.*

praxis. It will be recalled that one of the cardinal imperatives of disability method is that if the norm, standard, or practice in question is monologic and/or exclusionary, then it ought to be reformed in order to accommodate excluded groups and persons.⁵ Within a transformative paradigm, accommodation means providing an alternative to existing social structures and arrangements in a manner that is *costless* to the groups or persons excluded as part of constructing an inclusive egalitarian society.⁶

In Chapter 4, I argued that if judicial utterances of the Constitutional Court about the appropriateness of substantive equality as the Constitution's equality paradigm are taken at face value, they are apt to steer us towards an expansive vision of equality against a backdrop that compels us to establish rapport with an epistemology of disablism as social oppression.⁷ The equality rhetoric of the Constitutional Court compels us to acknowledge, accommodate and accept the largest spread of somatic difference in a manner that complements the reconstruction of disablement under the social model of disability and radical feminism.⁸ To conceive equality in the manner that Justice Albie Sachs does, especially, compels us to look at disabled bodies as relational difference and not subordinated difference so that, in Nancy Fraser's parlance, we can be assured of achieving not only political recognition but also economic recognition for disabled people.⁹ I suggested that Justice Sachs' endorsement of Christine Littleton's feminist thesis on substantive equality as equality that ought to be achieved in a manner that is 'costless' to those that have been categorised as different by mainstream juridical norms, can be understood as judicial acceptance of accommodation of disablement that is not economically burdensome to disabled

⁵ Chapter 3 § 2.1 of this study.

⁶ *Ibid.*

⁷ Chapter 4 § 6.3 of this study.

⁸ *Ibid.*

⁹ Chapter 4 § 6.3; N Fraser *Justice Interruptus* (1997) 11-39; N Fraser 'Rethinking Recognition' (2000) 3 *New Left Review* 107.

people.¹⁰ At the same time, I sounded caution about accepting uncritically the rhetoric of the Constitutional Court's substantive equality doctrine, not least because the rhetoric emanating from cases such as *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*¹¹ and *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*¹² essentially speaks to political recognition. The rhetoric does not tell us anything concrete or precise about how equality and non-discrimination can be used to achieve parity in economic participation.

This aim of this chapter is to explore the scope and limits of the duty to provide reasonable accommodation under the equality clause of the Constitution with particular focus on determining the extent to which the duty comports with the expectations of accommodation as it is conceived by disability method. In the main, I argue that the manner in which the duty to provide reasonable accommodation has been developed by legislatures and the courts over time, provides both significant possibilities as well as significant limitations in terms of realizing disability method. Put differently, the juridical concept of reasonable accommodation is both enabling as well as disabling. On the enabling side, the recognition of the duty to accommodate in constitutional equality jurisprudence represents a progressive development. Recognising lack of accommodation as an instance of unfair discrimination constitutes a significant departure from the disabling effects of a purely formal equality approach. At the same time, I argue that prevailing juridical notions of reasonable accommodation are not sufficiently transformative in that, for disabled people who are in terms of physical capacities far removed from the merits of the enabled comparator, especially, reasonable accommodation is apt to merely create an illusion of substantive equality.

¹⁰ Chapter 4 § 6.3 of this study; *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others* (note 10 above) para 132, footnote 44, citing C Littleton 'Reconstructing Sexual Equality' (1987) 75 *California Law Review* 1279.

¹¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

¹² *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (3) BCLR 355 (CC).

The manner in which the duty to provide reasonable accommodation has been juridically formulated, not least through the adoption of 'undue hardship' or 'disproportionate burden' as thresholds for the duty to provide accommodation, implicitly appeals to formal equality as the ultimate determinant, and, in the end, only manages to yield a marginally expanded universe of equality.

More specifically, my argument is that when faced with an economic recognition equality claim in a disability context, even courts that are wedded to substantive equality, such as the South African Constitutional Court and the Canadian Supreme Court, are apt to adopt a different equality mindset. When vindicating an equality and non-discrimination claim that entails economic redistribution, courts tend to retreat into the comfort offered by the parlance of 'reasonable accommodation' which is apt to guarantee a much more circumscribed equality universe.¹³ 'Reasonable accommodation' opens substantive equality to the incipient and constraining influence of formal equality such that a disabled worker, who otherwise needs the job or workplace environment to be realigned with a disabled body, is treated in the same way as an enabled worker unless the resources of the employer permit differentiation that does not threaten profit margin expectations. Predicating reasonable accommodation on the resources of the employers inevitably compromises equality. It means that disabled people cannot be treated equally by employers. Much will depend on the employer in question, and, in particular, on resources at the command of the employer, rather than on the equality needs of the disabled person.

I begin by outlining the constitutional foundations of the duty of reasonable accommodation.

¹³ Chapter 1 § 3.2 of this study.

2 CONSTITUTIONAL FOUNDATIONS OF THE DUTY TO PROVIDE REASONABLE ACCOMMODATION

In its constitutional form, reasonable accommodation is primarily a non-discrimination principle and a juridical tool for achieving substantive equality. Reasonable accommodation is an integral principle in the determination of the justification for direct and indirect discrimination in that it gives effect to inclusive equality by recognising that in order to treat people equally, it may be necessary to treat them differently. Broadly stated, the duty of reasonable accommodation comprises of *positive* measures that ought to be taken to meet the special, or more accurately, *different* needs of those who, by reason of a protected characteristic such as disability, religious affiliation, sex or gender etc., cannot be adequately served by arrangements that are suitable for people who do not share such a characteristic.¹⁴

In the workplace, reasonable accommodation essentially requires the employer to adapt the job or working environment so as to enable a job applicant or an existing employee, who has a protected characteristic that is adversely served by the existing job requirements or work environment, to discharge the inherent requirement of the job. Failure to adapt the job requirements or work environment constitutes unfair discrimination unless it can be justified. As a non-discrimination principle, the duty to accommodate under the Constitution obtains, or at least ought to obtain, for all protected grounds.

In positing reasonable accommodation as a non-discrimination principle in the determination of direct and indirect discrimination it is important to highlight that it is a novel principle in South African law in the sense that it emanates from post-apartheid constitutional jurisprudence that is still undergoing development. Though the test for determining unfair discrimination that was developed by the Constitutional Court in

¹⁴D Gibson *The Law of The Charter: Equality Rights* (1990) 133; AP Aggarwal *Sex Discrimination: Employment Law and Policy* (1994) 271-272.

*Harksen v Lane*¹⁵ and other cases does not articulate the duty of reasonable accommodation in any explicit way, subsequent legislative as well as judicial developments on the meaning and application of equality have acknowledged, and even applied reasonable accommodation. Another fact to highlight is that the Employment Equity Act (EEA)¹⁶ does not expressly situate reasonable accommodation in a non-discrimination context. The EEA only explicitly refers to reasonable accommodation in the context of affirmative action duties in Chapter III. Section 15 of the EEA requires a designated employer to implement affirmative action measures ‘to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer’. Affirmative action measures under the EEA include ‘reasonable accommodation’.¹⁷ Section 1 of the EEA defines reasonable accommodation as ‘any modification or adjustment to a job or to a working environment that will enable a person from a designated group to have access to or participate or advance in employment’. The EEA does not expressly refer to reasonable accommodation in section 6 – the non-discrimination provision. The framing of reasonable accommodation under the EEA may thus be wrongly understood as an affirmative action duty only when in fact it is, foremost, a non-discrimination principle that cannot be confined to affirmative action duties in Chapter III of the EEA.

The practical consequence of reasonable accommodation as a non-discrimination principle rather than an affirmative duty only under EEA is that it imposes a duty that can be enforced by any person belonging to a protected group. Reasonable accommodation as a non-discrimination principle as opposed to an affirmative action

¹⁵ *Harksen v Lane* 1997 11 BCLR 1489 (CC). On the *Harksen v Lane* test for determining unfair discrimination, see the discussion in Chapter 4 § 6.1 of this study.

¹⁶ Act No 55 of 1998.

¹⁷ Section 15(2)(c) of the EEA.

measure gives rise to an enforceable right where unfair discrimination is alleged.¹⁸ It is more than a statutory duty whose beneficiaries are members of designated groups only.

Though reasonable accommodation as a non-discrimination principle and an affirmative action measure under the Employment Equity Act share some similarities, they are ultimately not the same as they are aimed at achieving different purposes.¹⁹ The similarities are that both concepts constitute a departure from the neutrality of the formal equality model and that they both appeal to substantive equality as their justification. They serve to dismantle patterns of systemic discrimination and require positive action. However, beyond this overlap, the similarities between reasonable accommodation as a non-discrimination principle and reasonable accommodation as an affirmative action principle cease. As a non-discrimination principle, reasonable accommodation does not import the preferment of a certain group. It is not primarily aimed at achieving a particular rate of participation in the workplace of persons belonging to a certain group. It is not meant to confer an advantage, but rather to overcome a barrier that constitutes unfair discrimination. For this reason, reasonable accommodation ultimately requires an individualised assessment of disadvantage and need in order to establish eligibility and the type of accommodation that would be warranted. In *British Columbia (Superintendent of Motor Vehicles) v British Columbia Council of Human Rights*, the Supreme Court of Canada underscored the individualised remedial nature of reasonable accommodation when it said:

¹⁸ The issue whether an affirmative action duty in Chapter III of the Employment Equity Act can give rise to an enforceable unfair discrimination claim by an individual complainant has been considered in two cases by the Labour Court. In *Harmse v City of Cape Town* [2003] 6 BLLR, Justice Waglay said that a failure to implement affirmative action could constitute unfair discrimination. In *Dudley v City of Cape Town & Another* (2004) 13 LC 1.19.1, on the other hand, the Labour Court took a different view. Acting Justice Tip said an unfair discrimination claim could not be imported into the affirmative action framework in Chapter III of the Employment Equity Act. It is submitted that the *Dudley* case represents the better view. Affirmative action duties are enforced primarily through monitoring and administrative compliance procedures: C Garbers 'Is There a Right to Affirmative Action Appointment' (2004) 13 *Contemporary Law* 61. See generally the discussion in Pretorius et al (note 2 above) § 11.

¹⁹ CA Ball 'Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act' (2004) 55 *Alabama Law Review* 951.

Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his personal abilities, instead of being judged against presumed group characteristics.²⁰

In contradistinction, reasonable accommodation as an affirmative action measure in Chapter III seeks to remedy the history of disadvantage and marginalisation through the route of group preferment. Once an individual belongs to a designated group, he or she becomes eligible for preference by a designated employer. Ultimately, affirmative action seeks to achieve representivity. Under the EEA, affirmative action generally connotes a plan to change the composition of the workforce by means of goals that serve to achieve a desired rate of participation by members of designated groups.²¹

The distinction between reasonable accommodation as a non-discrimination principle and affirmative action in the particular context of disability was captured by the United States Commission on Civil Rights when, against the backdrop of the provision of reasonable accommodation in the Americans with Disabilities Act, it said:

[A] key component of non discrimination toward people with disabilities is the requirement of reasonable accommodation. The non-discrimination mandate and its reasonable accommodation component address acts, policies, and barriers that currently operate to exclude, segregate, or impede people with disabilities.

Affirmative action, on the other hand, in the context of disability discrimination, refers to some effort beyond non-discrimination to increase the participation of people with disabilities. It does not focus on systematically eliminating existing discrimination, but rather on facilitating entry of representatives of an erstwhile excluded group into a given sector. The premise underlying such an affirmative action requirement is that, as a social group, disabled people have been so seriously underrepresented in the past,

²⁰ (1999) 3 SCR 868 at para 19. Emphasis provided.

²¹ Pretorius *et al* (note 2 above) § 9.

whether by the particular individual or agency involved or on a broader societal basis, such that a special or exceptional dispensation is required to achieve an equitable level of participation. Typically this takes the form of outreach and recruiting efforts designed to increase the number of participants that are disabled.²²

In the South African context, reasonable accommodation should be seen as a logical outcome of the imperative towards substantive equality and the rejection of formal equality under the South African Constitution that was discussed in Chapter 4 of this study. Substantive equality accepts that insisting on similar treatment between two persons where one is already burdened with a disadvantage merely serves to reinforce a particular norm that has the effect or potential to perpetuate a disadvantage. Insisting on a mechanical application of the principle of equal treatment in all cases can serve to produce or perpetuate inequality.²³ Substantive equality leads to a focus on impact, and requires unequal treatment, if necessary, in order to achieve equal impact.²⁴ Reasonable accommodation is an operative principle for recognizing individual as well as group differences so as to promote substantive equality in the determination of unfair discrimination. It is a principle that is aimed at promoting a model of equality that recognises diversity, disadvantage, and the legitimacy of distributive justice.

The interpretive logic is that, if section 9(3) or (4) of the Constitution has been breached, it becomes necessary to determine whether the measure in question can be justified in terms of section 36 – the limitation clause. This entails considering the proportionality between the infringement and the purpose, effect and importance of the infringing provision. One of the factors to take into account when making an assessment based on proportionality under section 36 of the Constitution is whether less restrictive means could have been used to achieve the purpose of the limitation. Thus, under the Constitution, the duty to make reasonable accommodation is linked to the principle of

²² United States Commission on Civil Rights *Accommodating the Spectrum Of Individual Abilities* (1983) at 154-156.

²³ See, for example, *President of the RSA v Hugo* 1997 (6) BCLR 708, para 41.

²⁴ *Ibid.*

proportionality. It should be regarded as an implied duty in section 6 of EEA which is designed to give practical expression to the achievement of equality under the Constitution in the context of the workplace.

In *MEC for Education and Others v Pillay and Others*,²⁵ the Constitutional Court gave reasonable accommodation its most explicit recognition as an equality and non-discrimination principle, albeit in a context unrelated to the workplace. 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 section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act).²⁶ The school had declined permission on the ground that wearing a nose stud constituted a breach of the school's code of conduct which was designed to maintain uniformity and discipline. 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 said that the school had a duty to provide reasonable accommodation as part of recognizing cultural diversity.

Unlike the EEA, the Equality Act contains elaborate provisions on the meaning of discrimination and its interpretation. Indeed, in many respects, the Equality Act codifies much of the equality jurisprudence that was developed by the Constitutional Court in the early years of the Constitution.²⁷ The Equality Act is quite explicit about the substantive nature of equality under the Constitution.²⁸ Even more pertinently, it explicitly integrates reasonable accommodation in its formulation of the different forms that discrimination might assume in practice. The sections that specifically address

²⁵ *MEC for Education and Others v Pillay and Others* 2008 (2) BCLR 99 (CC).

²⁶ Act No 4 of 2000.

²⁷ C Albertyn *et al* (eds) *Introduction to Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 65-67.

²⁸ Section 1 of the Equality Act says, *inter alia*, that: "equality" includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes'.

unfair discrimination against persons on the grounds of race, gender and disability provide that 'failing to take steps to reasonably accommodate the needs of such persons is a manifestation of unfair discrimination'.²⁹ Reasonable accommodation is also acknowledged among the factors to be taken into account when determining the fairness of discrimination. Section 14 of the Equality Act provides that when determining whether the respondent has proved that the discrimination is fair, one of the factors that must be considered is whether, and to what extent, the respondent has taken 'such steps as being reasonable in the circumstances to accommodate diversity'.³⁰ In this way, the Equality Act makes it abundantly clear that reasonable accommodation is not a principle of preferment but, instead, a general non-discrimination duty that applies to all prohibited grounds and not merely race, gender and disability.

Chief Justice Pius Langa, who delivered the main judgment in *Pillay*, clearly treated reasonable accommodation as a principle and duty not unique to the Equality Act but as something required by Constitution which subscribes to substantive equality, including accommodating diversity. He said that at the core of the principle of reasonable accommodation is the 'notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy their rights equally'.³¹ Reasonable accommodation is a principle that ensures that people are not marginalized on account of failure to conform to certain societal norms.³² The rights and values of equality, human dignity and freedom under the South African Constitution require the adoption of positive measures to accommodate diversity.³³

²⁹ Sections 6, 8 and 9 of the Equality Act respectively.

³⁰ Sections 14(i) and (ii) of the Equality Act.

³¹ *MEC for Education and Others v Pillay and Others* (note 25 above) para 73.

³² *Ibid* 73.

³³ *Ibid* 75.

In *Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration*,³⁴ the Labour Court had occasion to apply reasonable accommodation in the workplace. It held that the conduct of a bank in dismissing an employee on the ground of incapacity constituted a failure to provide reasonable accommodation to an employee who had a disability. The employee had developed severe back pain following a road traffic accident. As a result, the employee could no longer discharge her usual duties as a home-loan consultant. A panel of doctors had recommended modifications to the employee's work station as well as posture training so as to enable the employee to perform her duties. The bank failed to act on the recommendations citing cost as the main reason. It refused to bear the cost of an occupational therapy assessment as well as to provide the employee with a headset as she had requested. The bank also refused to consider appointing the employee to a flexible working schedule such as a half-day position as an alternative to dismissal. The Labour Court found that the cost of accommodating the employee's needs at work would have been 'infinitesimal',³⁵ and that the conduct of the bank constituted a breach of the right to equality and non-discrimination contrary to section 6(1) of the EEA through failure to provide reasonable accommodation.

It certainly bodes well for disability method that the notion of accommodation has clearly been integrated into South African equality jurisprudence as a right not merely a privilege. The other important question, though, in evaluating the equality jurisprudence of the Constitutional Court against disability method is: What are the limits of reasonable accommodation and do the limits comport with disability method? When attempting to answer this question, given the novelty of reasonable accommodation in South African law, it is useful to turn to other jurisdictions, notably the United States and Canada, where reasonable accommodation has an earlier history and a more visible presence. Setting a low threshold for determining the limits of

³⁴ *Standard Bank of South Africa v The Commission for Conciliation, Mediation and Arbitration* (2008) 4 BCLR 356 (LC).

³⁵ *Ibid* para 137.

reasonable accommodation would militate against aligning South African equality jurisprudence with disability method. Disability method envisages full rather than partial accommodation.

3 COMPARATIVE OVERVIEW

3.1 United States

Reasonable accommodation was first developed in equality jurisprudence by American and Canadian courts.³⁶ The origins of reasonable accommodation in the United States are located in case law interpreting Title VII of the Civil Rights Act of 1964,³⁷ rather than the Equal Protection Clause of the American Constitution.³⁸ Initially, reasonable accommodation was developed to acknowledge religious diversity in the workplace. It allowed workers who could not work on conventional working days on account of religious observations to work on alternative days without incurring dismissal. In determining the scope of reasonable accommodation, the Supreme Court of the United States narrowly construed the weight of the duty imposed on the employer. Reasonable accommodation only obtained where the employer would not incur more than *de minimis* or negligible costs. In *Trans World Airlines Inc. v Hardison*,³⁹ putting a limit of the duty to accommodate, the Supreme Court said that it is unreasonable to expect an employer to accommodate an employee who cannot work on regular days on account of religious observance if it means paying another employee overtime rates to fill in. Reasonable accommodation has since been extended beyond protection against religious discrimination to include disability. Also, the extent of the duty has since moved away from *de minimis* threshold that was laid down in *Hardison*.

³⁶ Aggarwal (note 14 above) 271-312; L Waddington and A Hendricks 'The Expanding Concept of Employment Discrimination in Europe: From Direct to Indirect Discrimination to Reasonable Accommodation' (2002) 18 *The International Journal of Comparative Labour Law and Industrial Relations* 403-427 at 413-414.

³⁷ Aggarwal (note 14 above) 272.

³⁸ On the Equal Protection Clause, see the discussion in Chapter 4 § 7.2 of this study.

³⁹ *Trans World Airlines Inc. v Hardison* 432 US 63 (1977); Aggarwal (note 14 above) 296; AS Kanter 'Towards Equality: The ADA's Accommodation of Differences' in M Jones and LA Basser Marks (eds) *Disability, Divers-Ability and Legal Change* (1999) 227-249 at 235.

The Americans with Disabilities Act of 1990⁴⁰ (ADA) is the main legislative instrument that prescribes reasonable accommodation as a non-discrimination principle in the United States. The ADA, which, *inter alia*, applies to employment, seeks to assure 'equality of opportunity, full participation, independent living and economic self-sufficiency' of people with disabilities. As part of the achievement of this objective, the ADA requires reasonable accommodation to enable a person with a disability to perform the essential functions of the job.⁴¹ Failure to provide reasonable accommodation constitutes discrimination. Section 12112(b) provides a definition of discrimination under the ADA for the purposes of employment. The section provides that the term 'discrimination' includes: (a) not making 'reasonable accommodations to the known physical or mental limitations of a qualified person who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose undue hardship on the operation of the business of the covered entity'; or (b) 'denying employment opportunities to a job applicant or employee who is a qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant'. Making reasonable accommodation includes: '(a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training manuals or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities'.⁴²

Apart from integrating reasonable accommodation in the formulation of disability-related discrimination, the ADA (and its antecedent – the Rehabilitation Act of 1973) also raised the threshold of the duty of reasonable accommodation above the *de minimis*

⁴⁰ Pub L No 101-336, § 104 Stat. 327, codified at 42 USC §§ 12101-12213 (1990).

⁴¹ 42 USC § 12112(b)(5)(A).

⁴² § 12111(9)(A)-(B) of the ADA.

ceiling that had been laid down by the Supreme Court in context of religious accommodation in *Hardison*.⁴³ Reasonable accommodation is required unless the employer can demonstrate that it would impose ‘undue hardship’ on the operation of the business.⁴⁴ Undue hardship is defined as consisting of ‘an action requiring significant difficulty or expense, when considered in light of factors’.⁴⁵ This standard is clearly more onerous than the *de minimis* threshold which is triggered by accommodation that entails more than a *negligible* increase in costs or inconvenience.

But despite broadening the scope of reasonable accommodation beyond religious accommodation, and despite moving away from *de minimis* threshold, the ADA’s approach to reasonable accommodation, nonetheless, falls far short of what is envisaged under disability method. There are two main shortcomings with the ADA’s approach. One of the shortcomings is that the ADA is an instance of a selective approach to reasonable accommodation that is dependent of the goodwill of the legislature. Though the United States is credited with taking the global lead in developing reasonable accommodation, it has, nonetheless, concomitantly restricted the scope of reasonable accommodation to the accommodation of a closed category of groups, including religious groups and disabled people. Reasonable accommodation in the United States has not been conceived as general non-discrimination principle applicable to all protected characteristics or groups under the Equal Protection Clause. To this extent, the American model of reasonable accommodation offers a limited rather than coherent picture of inclusive equality.

As will be elaborated in § 6, below, the more significant shortcoming is that the threshold for reasonable accommodation is tethered not only to the resources available to the employer but also to the ethos of business operation. The effect of such an approach is to privatise equality in many respects.

⁴³ *Trans World Airlines, Inc. v Hardison* (note 39 above).

⁴⁴ § 12112(b)(5)(A) of the ADA.

⁴⁵ §12111(10)(A) of the ADA.

3.2 Canada

As a constitutional equality principle, reasonable accommodation is visibly present in Canadian jurisprudence perhaps more than in any other comparable jurisdiction. Reasonable accommodation is recognised in federal legislation as well as in provincial human rights codes.⁴⁶ The Canadian Human Rights Act of 1985 is aimed at proscribing discrimination. Section 2 of the Act which explains the purpose of the Act provides, inter alia, that all individuals should have an opportunity equal with other individuals to make for themselves the lives they are able and wish to have, and 'to have their needs accommodated' without being hindered by discriminatory practices based on race, national or ethnic origin, etc. Section 15 of the Human Rights Act addresses discrimination in employment. The section says that for any employment to be a bona fide occupational requirement, 'it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost'.

The Canadian Employment Equity Act of 1995 is a federal piece of legislation that is aimed at achieving equality in the workplace for women, aboriginal peoples, persons with disabilities and members of visible minorities. It requires employers to provide reasonable accommodation for persons belonging to these groups.⁴⁷ The Human Rights Code of Ontario of 1990 is an illustration of the recognition of the duty of reasonable accommodation at a provincial level. The Human Rights Code of Ontario, inter alia, prohibits direct and indirect discrimination. In respect of disability-related discrimination in the workplace, section 17(2) of the Human Rights Code provides that

⁴⁶ Gibson (note 14 above) 133-136; Aggarwal (note 14 above) 272-274 ; C Kimber 'Disability discrimination law in Canada' (1993) in Quinn *et al Disability discrimination law in the United States, Australia and Canada* (1993) 105-220; B McKenna 'Legal Rights for Persons With Disabilities in Canada: Can The Impasse Be Resolved?' (1997) 28 *Ottawa Law Review* 153. MH Rioux & CL Frazee 'The Canadian Framework for Disability Equality Rights' (1999) in Jones & Bassar Marks (note 39 above) 171-187.

⁴⁷ Section 5(b) of the Canadian Employment Equity Act.

a person is not incapable of performing the essential requirements of the job unless the person cannot be accommodated without undue hardship on the employer.

More importantly, it is in the interpretation of section 15(1) – the equality clause - of the Canadian Charter of Rights and Fundamental Freedoms by the Supreme Court that reasonable accommodation has been accorded its highest status as a non-discrimination principle under fundamental law. The advent of the recognition of the duty to provide reasonable accommodation under the jurisprudence of the Canadian Supreme Court was influenced to an extent by the United States. It was first recognized by the Supreme Court of Canada in *Re Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd*⁴⁸ as an implied duty in the equality provisions of human rights legislation. In that case, the complainant, an adherent of the Seventh Day Adventists, had been dismissed from work for refusing to work on Saturdays as dictated by the tenets of her faith. She claimed that she had been unfairly discriminated under the Ontario Human Rights Code. The employer's defence was that the complainant had not been singled out for discrimination as all employees were required to work on Saturdays. The Supreme Court held that by refusing to make a reasonable adjustment to its normal work schedules, the employer had discriminated against the complainant. The employee's right to be free from discrimination in the workplace required the employer to take 'reasonable steps to accommodate' the employee's individual needs.⁴⁹

Apart from being confined to the accommodation of religious diversity, as was also the case at the beginning in the United States, another limitation with the early development of reasonable accommodation in Canada is that it was located in a bifurcated notion of discrimination in that it was tethered to the distinction between direct and indirect discrimination. The balance of judicial opinion in the Supreme Court of Canada was that reasonable accommodation only obtained in indirect discrimination,

⁴⁸ (1985) 7 CHHR D/3102, 23 DLR (4th) 321. See also *Central Alberta Dairy Pool v Alberta* (HRC) (1990) 72 DLR (4th) 417.

⁴⁹ *Re Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd* (1985) 23 DLR (4th) 321 at 335.

but not in cases of direct discrimination.⁵⁰ Moreover, the duty of reasonable accommodation was not so much conceived as a correlative duty to a substantive right, but as an appendage to a defence. Reasonable accommodation was first developed as a means of limiting the liability of an employer who was found to have discriminated against an employee by a bona fide work policy, rule or practice but without any intention to discriminate.⁵¹ Where a claimant established a prima facie case of indirect discrimination by showing the disparate effects, it was for the defendant to show that they could not accommodate the needs of the claimant short of incurring undue hardship.

The effect of the early approach of the Supreme Court of Canada towards reasonable accommodation was the judicial endorsement of a rigid, if artificial and untenable, distinction between direct and indirect discrimination. The early judicial approach to reasonable accommodation missed the point that the distinction between direct and indirect discrimination is not always a hard and fast one, and may depend on how the complaint is framed, rather than on an immutable characteristic.⁵² Above all, the early approach of the Canadian Supreme Court missed the point that reasonable accommodation is an integral principle for the achievement of substantive equality. As Justice McLachlin put it in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, form triumphed over substance under the bifurcated approach, and the broad purpose of providing protection against discrimination was left unfulfilled.⁵³ Not

⁵⁰ *Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd* *ibid*; *Central Alberta Dairy Pool v Alberta (HRC)* (1990) 72 DLR (4th) 417; *Bhinder and Canadian Human Rights Commission v Canadian National Railway Co* [1985] 23 DLR (4th) 481; *Central Alberta Dairy Pool v Alberta (HRC)* at 514-516 per Justice Wilson; *Large v Stratford (City)* [1995] 3 S.C.R. 733 at 751-752 per Justice Sopinka; Gibson (note 14 above) at 134.

⁵¹ *Central Okanagan School District No. 23 v Renaud* [1992] 2 SCR 970 at para 30 per Justice Sopinka.

⁵² A Malloy 'Disability And The Duty To Accommodate' (1992) 1 *Canadian Labour Law Journal* 23 at 36-37; D Lepofsky 'The Duty to Accommodate: A Purposive Approach' (1993) 1 *Canadian Labour Law Journal* 1 at 8-9. Day & Brodsky (note 1 above) 447-457.

⁵³ *British Columbia (Public Service Relations Commission) v BCGSEU* (1999) 176 DLR (4th) 1, at par 28.

surprisingly, the bifurcated approach was to become the subject of intense academic criticism.⁵⁴

The Canadian Supreme Court has since discarded the rigid distinction between direct and indirect discrimination in favour of a unified approach to discrimination when applying reasonable accommodation. In *British Columbia (Public Service Relations Commission) v BCGSEU*, the Supreme Court held that the bifurcated approach should be replaced by a unified approach.⁵⁵ The corollary of this unified approach is that reasonable accommodation applies to both direct and indirect discrimination. Under the equality clause of the Canadian Charter – section 15 – reasonable accommodation is not mentioned but is implied by the courts in the determination of unfair discrimination. According to the Supreme Court of Canada, incorporating reasonable accommodation into the standard for determining unfair discrimination ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics that frequently are not reasonably necessary but are an outcome of bias or historical prejudice.⁵⁶ Thus, reasonable accommodation has now been developed into a principle for accommodating the needs of persons with a protected characteristic that cannot be served by a stipulated norm. It applies to all groups protected against discrimination under section 15(1) of the Charter.

It is in cases on disability discrimination that the Canadian Supreme Court has articulated most clearly the link between reasonable accommodation and equality. *Eaton v Brant County Board of Education* is one such illustration.⁵⁷ The main issue was whether placing a child with cerebral palsy into a special education rather than a mainstream class contrary to the wishes of the parents was a discriminatory act

⁵⁴ Malloy (note 52 above); Day & Brodsky (note 1 above); Lepofsky (note 52 above).

⁵⁵ *British Columbia (Public Service Relations Commission) v BCGSEU* (note 53 above).

⁵⁶ *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (note 20 above) para 19.

⁵⁷ [1997] 1 SCR 24; See also *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (note 56 above).

contrary to section 15(1) of the Charter of Rights and Freedoms. Section 15(1) of the Charter provides that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court said that when faced with a child who had a disability, the decision-making body had to determine the type of accommodation that was in the child's best interest. The decision-making body had to determine whether an integrated setting could be reasonably changed to meet the child's needs.⁵⁸ Where aspects of the integrated setting could not be reasonably changed to meet the child's needs, the principle of accommodation required a special education placement outside of this setting.⁵⁹ On account of the nature of the disabilities of the child in question, the Supreme Court ruled that section 15(1) had not been violated as equality could not be achieved within the integrated setting. As part of the deliberations, Justice Sopinka, who delivered a unanimous judgment on behalf of the Court, squarely located reasonable accommodation within the non-discrimination framework of the Charter. He said:

Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. ... It is recognition of the actual

⁵⁸ *Eaton v Brant County Board of Education* *ibid* para 77.

⁵⁹ *Ibid*.

characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.⁶⁰

Clearly, under the Charter, reasonable accommodation is a mechanism for achieving equality for persons belonging to protected groups who have attributes that are not accommodated by norms that are derived from mainstream society. Instead of requiring, for example, disabled people to conform to existing norms, it is society that must adapt and accommodate. Reasonable accommodation is part and parcel of the nature of substantive equality under the Charter. As highlighted in Chapter 4 of this study, when determining unfair discrimination under the Charter, the larger social, historical and political context must be considered⁶¹ Like the South African Constitution, the Charter is concerned not only with preventing the attribution of stereotypical characteristics to individuals, but also ameliorating the position of groups that have suffered from patterns of exclusion from mainstream society. Substantive equality requires the actual personal characteristics of a person who cannot meet a mainstream standard to be taken into account as part of recognising and accommodating diversity. In *Andrews v Law Society*, Justice McIntyre said that ‘the accommodation of differences ... is the essence of true equality’.⁶² Ultimately, reasonable accommodation is about recognising equality in human worth and dignity.

In terms of delineating the limits of reasonable accommodation, from the outset, the Canadian Supreme Court set itself against adopting the *de minimis* test that had been articulated by the Supreme Court of the United States in *Hardison*.⁶³ In *O’Malley*, Justice McIntyre said that the employer had a duty to take such steps as may be reasonable but short of requiring the employer to incur ‘undue hardship’ in the form of ‘undue interference in the operation of business’ and ‘undue expense’.⁶⁴ In *Central Okanagan School District*, a case where religious accommodation was also at issue, the Supreme

⁶⁰ *Ibid* para 67.

⁶¹ *R v Turpin* (1989) 1 SCR 1296 at 1331-1332.

⁶² [1989] 1 SCR 143 at 169.

⁶³ *Trans World Airlines, Inc v Hardison* (note 39 above).

⁶⁴ (1985) SCR 536 para 23.

Court reiterated its rejection of the *de minimis* test in *Hardison*.⁶⁵ The Court also affirmed the approach adopted by Justice Wilson in *Central Alberta Dairy Pool* in determining the limits of reasonable accommodation.⁶⁶ Justice Sopinka, who delivered a unanimous judgment on behalf of the Court, said that ‘more than mere negligible effort’ is required to satisfy the duty to accommodate as a tool for providing equal access to employment of people who otherwise encounter ‘serious barriers’ to entry.⁶⁷ Minor interference or inconvenience was the price to be paid for religious freedom in a multicultural society.⁶⁸ According to Justice Sopinka, the *de minimis* test in *Hardison* had the effect of virtually nullifying the duty to accommodate.⁶⁹ The term ‘undue hardship’ infers that some hardship is acceptable. The employer must show ‘more than minor inconvenience’ before the right to accommodation can be defeated.⁷⁰ Where the accommodation sought impacts upon a collective agreement, for example, the employer must establish that actual interference with the rights of other employees which is not ‘trivial’ but ‘substantial’ will result from the adoption of the accommodating measures.⁷¹ The factors to take into account when determining undue hardship will depend on each case. It is, thus, not possible to start with an exhaustive list. The relevant factors include the following:

- financial cost;
- disruption of a collective agreement;
- morale of other employees;
- interchangeability of the workforce;
- interchangeability of facilities;
- size of the employers operation; and

⁶⁵ *Central Okanagan School District No. 23 v Renaud* (note 51 above) paras 20-22.

⁶⁶ *Ibid* para 22; *Central Alberta Dairy Pool v Alberta (Human Rights Commission)* (1990) 72 DLR (4th) 417.

⁶⁷ *Central Okanagan School District No. 23 v Renaud* (note 51 above) paras 20-22.

⁶⁸ *Ibid* para 22.

⁶⁹ *Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd* (note 49 above); *Central Okanagan School District No. 23 v Renaud* (note 51 above) para 21.

⁷⁰ *Central Okanagan School District No. 23 v Renaud* *ibid* para 23.

⁷¹ *Ibid*.

- safety.⁷²

The impact of reasonable accommodation on other employees is an important consideration. Reasonable accommodation should not be applied in such a way as to compel perpetrating unfair discrimination against other employees.⁷³ What constitutes undue hardship is a question of fact to be determined on a case-by-case basis.⁷⁴ In their conceptualisation of the limits of reasonable accommodation, Canadian courts do not treat ‘reasonable’ and ‘undue hardship’ as independent criteria but as alternate ways of expressing the same concept.⁷⁵

In its enunciation of the duty of reasonable accommodation, the Canadian Supreme Court has also laid down important procedural principles.⁷⁶ In *Renaud* the Court said that the duty to accommodate anticipates an interactive process involving the employer and the employee.⁷⁷ Whilst the primary duty to accommodate resides in the employer, the complainant has a duty to assist the employer in searching for appropriate accommodation.⁷⁸ However, this does not mean that the complainant has a duty to take the initiative. The complainant can make suggestions, but the employer is in a better position to determine how reasonable accommodation can be implemented without undue interference to the operation of business.⁷⁹ The conduct of the complainant is a relevant factor when determining the success or failure of reasonable accommodation. Where an employer makes a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the

⁷² *Ibid* paras 22-23; In *Renaud*, the Supreme Court was reaffirming the inclusive factors that it had enumerated in *Central Alberta Dairy Pool v Alberta (Human Rights Commission)* (1990) 72 DLR (4th) 417.

⁷³ *Central Okanagan School District No 23 v Renaud* (note 51 above) para 35.

⁷⁴ *Ibid* para 40.

⁷⁵ *Ibid*.

⁷⁶ Aggarwal (note 14 above) 309-312.

⁷⁷ *Central Okanagan School District No. 23 v Renaud* (note 51 above) paras 39-41.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*.

implementation of the proposal.⁸⁰ Moreover, the complainant has a duty to accept reasonable accommodation.⁸¹

4 INTERFACE BETWEEN REASONABLE ACCOMMODATION AND INTERNATIONAL HUMAN RIGHTS

In Chapter 1 of this study, it was highlighted that disability-related discrimination has received the attention of the United Nations. The UN's paradigm shift from treating disability as a welfare issue to a human rights one has also yielded the recognition of reasonable accommodation as a general non-discrimination duty. The Standard Rules on the Equalisation of Opportunities for Persons with Disabilities,⁸² that have generally been regarded as a weak instrument on account of their non-binding nature, have, nonetheless, served as valuable guidelines on the positive obligations upon states to dismantle barriers that prevent disabled people from fully participating in society.⁸³ In *General Comment 5*, the Committee on Social, Economic and Cultural Rights observed that through neglect and prejudice, disabled people have often been prevented from exercising their economic, social and cultural rights.⁸⁴ The Committee also noted that the effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services.⁸⁵ By way of a remedial response, the Committee unambiguously aligned

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² United Nations General Assembly Resolution 37/52; D Michailakis 'The Standard Rules: A Weak Instruments and a Strong Commitment' in M Jones & LA Bassar Marks (eds) *Disability, Divers-Ability and Legal Change* (1999) 119-130 at 117-130.

⁸³ Michailakis *ibid* 122.

⁸⁴ United Nations, Committee on Economic, Social and Cultural Rights, *Persons with disabilities, General Comment 5*, Doc. No. E/1995/22.

⁸⁵ *Ibid* para 15.

itself with a substantive notion of equality and said that denial of reasonable accommodation was a manifestation of disability-related discrimination.⁸⁶

Even more significantly, the Convention on the Rights of Persons with Disabilities (Convention) recognises the duty to provide reasonable accommodation as a non-discrimination duty.⁸⁷ Under the Convention, the duty to provide reasonable accommodation is pervasive. It obtains in respect of all sectors that are addressed by the Convention. Reasonable accommodation is recognised as general human rights principle as well as a specific equality and non-discrimination duty. The duty to provide reasonable accommodation is implicit in the general principles that are articulated in article 3 of the Convention. As part of its foundational principles, the Convention requires: full and effective participation and inclusion in society;⁸⁸ respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;⁸⁹ and accessibility.⁹⁰ There is little doubt that these principles, which revolve around inclusivity, ultimately draw sustenance from the goal of achieving substantive equality and provide an edifice for the imposition of the duty to provide reasonable accommodation to disabled people who are otherwise not served by existing socio-economic arrangements. Article 5 of the Convention, which specifically addresses equality and non-discrimination duties, provides that 'in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'.⁹¹ Article 27 of the Convention addresses the workplace. It obliges States Parties to render the workplace 'open, inclusive and

⁸⁶ *Ibid.*

⁸⁷ GA Res. 61/611. Adopted on 13 December 2006, and entered into force on 3 May 2008. See also the discussion in Chapter 1 § 3.1.

⁸⁸ *Ibid* para (c).

⁸⁹ *Ibid* para (d).

⁹⁰ *Ibid* para (f).

⁹¹ *Ibid* article 5(3).

accessible' to disabled persons,⁹² by inter alia, ensuring that 'reasonable accommodation is provided to persons with disabilities'.⁹³

The International Labour Organisation (ILO) has also addressed disability discrimination and developed valuable international instruments and guidance.⁹⁴ In 1983, the ILO adopted the *Vocational Rehabilitation and Employment (Disabled Persons) Convention*.⁹⁵ This ILO Convention obliges government to promote equal employment opportunities for people with disabilities in competitive employment through vocational rehabilitation. It mandates affirmative action as an instrument for promoting equality. In 2002, the ILO published a code of practice on promoting equality of opportunities in the workplace for disabled people.⁹⁶ As part of facilitating the entry into, and advancement in employment of disabled people, the code requires employers to, inter alia, make reasonable accommodation. Employers are enjoined to make adjustments that enable persons with disabilities to perform the job effectively.⁹⁷ Where appropriate, employers must discard those tasks that a disabled person cannot perform. The ILO Code calls for flexibility in the range of possible accommodation.⁹⁸

5 APPLYING REASONABLE ACCOMMODATION UNDER THE EEA

The following discussion builds on comparative law and extends the comparative law model to the South African EEA.

⁹² *Ibid* article 27(1).

⁹³ *Ibid* article 27(i).

⁹⁴ CG Ngwena 'Equality for People with Disabilities in the Workplace: An Overview of the Emergence of Disability as a Human Rights Issue' (2004) 29 *Journal for Juridical Science* 167 at 177-178.

⁹⁵ ILO Convention No 159. See also International Labour Organisation *Vocational Rehabilitation and Employment (Disabled Persons) Recommendation No 99* of 1955; International Labour Organisation *Vocational Rehabilitation and Employment (Disabled Persons) Recommendation No 168* of 1983.

⁹⁶ International Labour Organisation *Code of Practice on Managing Disability in the workplace* (2002).

⁹⁷ *Ibid* See, for example, paras 2.1.3, 4.1.7 and 7 of the ILO Code. See also Chapter 1 § 5.4 of this study.

⁹⁸ *Ibid* para 6.1.2 of the Code of the Code of Good Practice.

5.1 Whether the Job Applicant or Employee is Suitably Qualified

For disabled job applicants or employees to benefit from reasonable accommodation under the Employment Equity Act, they must, in the first place, be a 'suitably qualified person' as contemplated in section 20(3) and (4) of the Act. The Department of Labour's Code Good of Practice: Key Aspects on the Employment of People with Disabilities (Code of Good Practice) follows the same approach.⁹⁹ Sections 20(3) and (4) of the EEA provide that for the purposes of the Employment Equity Act, a person may be suitably qualified for the job as a result of any of the following factors taken singly or in combination: formal qualifications, prior learning, relevant experience, or capacity to acquire, within a reasonable time, the ability to do the job. It is incumbent upon the employer to begin by taking all these factors into account in order to determine whether a person with a disability has the ability to do the job.¹⁰⁰ If, after taking these factors into account, the employer reaches a determination that the disabled person does not have the ability, it must consider whether the person can do the job with reasonable accommodation. The presumption under the EEA is that to be eligible for reasonable accommodation, the disabled person must ultimately be capable of performing the inherent requirements of the job with or without reasonable accommodation. Such a person must implicitly have the personal and professional attributes, including education, skills, experience, physical, mental, medical, safety and other job-related requirements that are necessary for performing the inherent requirements of the job. Indeed, it is not insignificant that according to section 6(b) of the Act, it is not unfair discrimination for an employer to distinguish, exclude or prefer any person on the basis of an inherent requirement of the job. Equally, under section 187(1)(f) of the Labour Relations Act, a dismissal is not regarded as automatically unfair where an employer can prove that discrimination was on account of an inherent job requirement. There is no obligation, therefore, upon the employer to make reasonable accommodation in

⁹⁹ Department of Labour *Code Good of Practice: Key Aspects on the Employment of People with Disabilities* Government Gazette 23702 of 19 August 2002, para 7.2.1.

¹⁰⁰ Section 20(4) of the EEA.

respect of a disabled person who is unable to perform the inherent requirements of the job in spite of reasonable accommodation.

One possible approach would be to determine whether a disabled is a suitably qualified person under the Employment Equity Act by adopting a two-stage approach similar to the approach mandated by regulations promulgated by the United States Equal Employment Opportunity Commission pursuant to the ADA.¹⁰¹ The regulations pursuant to the ADA provide that in determining whether an applicant or employee is a qualified individual with a disability, the first stage is to determine whether he or she satisfies the prerequisites for the job in terms of education, experience, training and other job-related qualifications. The second stage is to determine whether the applicant or employee can perform the job with or without reasonable accommodation. It is important, however, that these two stages are not seen as mutually exclusive but as a logical progression to determining the ultimate question, namely whether the job applicant or employee can discharge the inherent requirements of the job with or without reasonable accommodation.

An alternative approach would be simply to ask whether the job applicant or employee can discharge the inherent requirements of the job, taking into account job-related qualifications, skills and reasonable accommodation. The Code of Good Practice pursuant to the EEA provides that employers may adopt a two-stage approach.¹⁰² The first stage is the determination of whether the applicant is suitably qualified.¹⁰³ The second stage is the determination of whether a suitably qualified applicant needs any accommodation in order to perform the essential functions of the job.¹⁰⁴ Whatever approach is adopted, a crucial consideration is determining the content of the inherent requirements of the job. The term 'inherent requirements of the job' is not defined in the

¹⁰¹ 56 Fed Reg 8578, 8594 (1991).

¹⁰² Para 7.2.2 of the Code of Good Practice (note 99 above).

¹⁰³ Para 7.2.2(i) *ibid.*

¹⁰⁴ Para 7.2.2(ii) *ibid.*

EEA or the Labour Relations Act and much depends on judicial construction taking into account comparative jurisprudence.

When formulating and implementing criteria for assessing the competence of a disabled person, it is incumbent upon the employer not to rely on stereotypic assumptions about the incompetence of such a person. Instead, the employer must carry out a specific or individualised assessment taking into account the job at hand, the specific disability and any consequent functional limitation of the applicant or employee. In *Mantolite v Bolger*,¹⁰⁵ which was decided under the Rehabilitation Act, an employer had justified a refusal to hire on a generalised assumption rather than an individual assessment. A job applicant with epilepsy had applied for a job at the post office. The job involved the use of a letter sorting machine. He had been refused employment on the ground of medical evidence stating that he should not be allowed to use machines with moving parts. On appeal, it was held that the employer had not discharged the onus of proof to justify dismissal of the employee. The medical evidence that the employer had relied upon had not been based on an 'individualised' assessment about the applicant's epileptic condition, but instead had been based on conclusions about epilepsy in general. The applicant had in fact worked significantly with machinery in the past without incident. In the preceding five years he had not suffered any daytime seizures. The few seizures that had occurred in the past did not result in danger to others. It was held that the applicant was qualified for the job.

When determining the content of the inherent requirements of the job, one should begin by looking at the contract of employment. The terms and conditions in the contract of employment and written job descriptions prepared for advertising or interviewing the job applicant or employee for the job provide good evidence of the employer's expectations. In *Guinn v Bolger*,¹⁰⁶ an employee with permanent arthritis had been dismissed for the reason that he could not stand for long periods at work. The employee had been working as a multi-position letter sorting operator. At the time of dismissal,

¹⁰⁵ 767 F 2d 1416 (9th Cir 1985).

¹⁰⁶ 598 F Supp 196 (D DC 1984).

the employee had been able to perform all functions stated in the job description. The employer argued before the court that the job description was incomplete and that the employee's position required long periods of standing. It was held that the employee was entitled to rely on the standard job description.

However, what constitutes the inherent requirements of the job cannot be answered solely by reference to the written terms and conditions of employment. Not all terms and conditions will be written. The employer's verbal opinion and judgment are also relevant factors. In any event, it will be necessary to refer also to the *actual* functions which the job applicant is legitimately expected to perform as some of the functions that are stated in a job description may only be tangentially related to the inherent requirements of the job. In *Prewitt v United Postal Service*,¹⁰⁷ for example, the question was whether an employee with a disability which limited mobility in one arm was qualified for the job which entailed lifting and carrying mail. According to the job description, an employee had to use both arms to lift and carry mail. The employee could not use both arms, but could, however, perform the job with one arm. It was held that in this particular case, the focus of the job requirements should be on the result rather than the means of accomplishing the job. According to the court, the employee was able to perform the essential functions of the job and was thus qualified for the job. In short, a court or administrative agency must carry out an independent inquiry. It is not open to the employer to exclusively determine the content of the inherent requirements of the job.

Ultimately, inherent requirements of the job must be determined according to objective and verifiable job-related skills and aptitudes. *Stutts v Freeman*,¹⁰⁸ which was decided under the Rehabilitation Act, illustrates a situation where a criterion for job selection set by an employer could not be said to be objectively job-related. A dyslexic job applicant applied for a job as a heavy equipment operator and was required to complete a written test. The employer refused to provide the applicant with an oral examination. It was

¹⁰⁷ 662 F 2d 292 (5th Cir 1981).

¹⁰⁸ 694 F 2d 666 (11th Cir 1983).

held that the job the applicant was seeking had nothing to do with reading or writing. The employer had not only failed to make reasonable accommodation, but also the selection criteria adopted by the employer did not validly test job-related skills and aptitude. To underscore the importance of using appropriate selection and screening criteria, the ADA provides that use of qualification standards, tests and eligibility and selection criteria which would screen out or tend to screen out individuals with a disability on account of their disabilities may only be used if they are shown to be job-related and consistent with business necessity.¹⁰⁹

In an attempt to enhance employment opportunities of, and avoid disparate outcomes for, job applicants and employees who are disabled, the ADA employs a strict test for determining the equivalent of inherent requirements of the job. It distinguishes between essential and non-essential functions of the job. A job applicant or employee with a disability need not satisfy all the requirements of the job, but only those requirements that are regarded as 'essential'.¹¹⁰ In adopting the concept of essential functions of the job, the Code of Good Practice pursuant to the EEA seems to have followed implicitly the approach of the ADA. The Code of Good Practice provides that 'the inherent requirements of the job are those requirements the employer stipulates as necessary for a person to be appointed to the job, and are necessary in order to enable an employee to perform the essential functions of the job'.¹¹¹ However, it does not elaborate on what constitutes the 'essential functions' of the job, other than providing that employers may not include criteria which are not necessary to the performance of the essential functions of the job, because selection based on non-essential functions may unfairly exclude people with disabilities.¹¹²

According to regulations made under the ADA, essential functions are those 'primary duties that are intrinsic to the employment position'. They exclude 'marginal' or

¹⁰⁹ 42 USC §§ 12112(b)(6), 12113(a) of the ADA.

¹¹⁰ 42 USC §§ 12112(b)(6), 12113(a) of the ADA.

¹¹¹ Para 7.1.2 of the Code of Good Practice (note 99 above).

¹¹² Para 7.1.6 *ibid.*

peripheral functions that are 'incidental' to performance of primary functions.¹¹³ The regulations further provide for factors to be taken into account when determining whether a particular function of the job is essential. These are: (a) whether the employer actually requires employees in the position to perform the function that is said to be essential and whether removing the function would fundamentally alter the job; (b) whether the position in question exists to specifically perform that function; (c) the number of employees available to perform that function or among whom the performance of the function can be distributed; (d) the degree of expertise or skill required to perform that function; (e) the amount of time spent performing the function; (f) terms of any collective bargaining agreement; (g) the work experience of those who previously held the position; and (h) the current work experience of individuals holding similar jobs.¹¹⁴

A number of cases have applied the concept of essential functions of the job under the Rehabilitation Act. In *Treadwell v Alexander*,¹¹⁵ for example, a park technician who had a heart condition which prevented him from walking over a mile per day was dismissed. A court upheld the dismissal on the ground that he was otherwise not qualified to perform the essential functions of the position of a park technician. There were only two to four park technicians at any given time to patrol a 150 000 acre park. The plaintiff's workload could not be distributed to fellow workers without doubling their workloads. It was, thus, necessary for the plaintiff to be able to do substantial walking in the park. In *Simon v St Louis County*,¹¹⁶ the court upheld the dismissal of a police officer who became paraplegic on the ground that he was no longer able to meet the physical requirements essential to the job. According to the court, an active police officer had, *inter alia*, to be able to make forcible arrests and to transfer prisoners. In *Norcross v Sneed*,¹¹⁷ on the other hand, the court was not persuaded that having a driver's licence

¹¹³ 56 Fed Reg 8578, 8588.

¹¹⁴ *Ibid.*

¹¹⁵ 707 F2d 473 (11th Cir 1983).

¹¹⁶ 735 F2d 1082 (8th Cir 1984).

¹¹⁷ 755 F2d 113 (8th Cir 1983).

was an essential requirement of the job. Norcross, who had been legally blind since childhood, sought a position as a school librarian. She was refused employment mainly on the ground that she did not have a driver's licence, a requirement which had been stipulated by the employer. However, driving was only required when the school had its annual field trip. Moreover, in the past, full-time librarians had never been required to possess a driver's licence. Indeed, Norcross' predecessor had arranged alternative transportation for the field trip when she was the incumbent school librarian, and had thus not been required to drive the school bus. For these reasons the court ruled that the stated requirement of driving ability was not a reasonable, necessary or legitimate requirement.

It is submitted, that should South African courts refer to the American approach of distinguishing between essential and non-essential job functions when interpreting the meaning of inherent job requirements under the Employment Equity Act, a too rigid understanding of 'essential' job functions should be avoided. A job requirement might not be essential in the sense of being an indispensable or intrinsic qualification for the job, but might nevertheless be reasonably incidental to the manner in which the job is performed. It would be unduly restrictive to regard a reasonably incidental requirement as falling outside the ambit of inherent requirements of the job. Mainly on account of such considerations, Australian courts have rejected a rigid distinction between essential and non-essential requirements of the job as a reliable test for determining the inherent job requirements.¹¹⁸

An implicit component of inherent requirements of the job is health and safety. The job applicant or employee must be able to perform the job safely. This consideration has particular significance for disabled people. The job applicant or employee might have the requisite education, training and skills required for the job, but might be unable to perform the job without posing a risk of danger to himself or herself or others. Employers must comply with common law as well as statutory requirements of the

¹¹⁸ *Jamal v Secretary, Department of Health* (1988) 14 NSWLR 252. See also *X v The Commonwealth* (1999) HCA 63; Pretorius *et al* (note 2 above) § 5.4.3.1.

preservation of health and safety in the workplace. The mere presence of a risk to health and safety does not *per se* disqualify a job applicant or employee. It is essential to rely on objective and reasonable medical evidence and not generalised assumptions. Moreover, it is necessary to observe the constitutional principle of proportionality, and take into account the duty of reasonable accommodation. Not every risk to health and safety will disqualify a job applicant or employee. The probability of the risk and its magnitude are integral considerations. It is also incumbent upon the employer to consider whether the risk cannot be eliminated or substantially ameliorated by making reasonable accommodation.

The ADA provides a useful model for determining whether a disabled job applicant or employee poses a risk to health or safety in the workplace. It provides the employer with a specific defence to a charge of unfair discrimination where the job applicant or employee with a disability poses a 'direct threat to the health or safety of other individuals in the workplace'.¹¹⁹ 'Direct threat' means posing a 'significant risk to the health or safety of others which cannot be eliminated by reasonable accommodation'.¹²⁰ The American Supreme Court in *School Board of Nassau County Florida v Arline*¹²¹ emphasised the necessity of basing a disqualification on grounds of health and safety on verifiable facts rather than generalised assumptions. The employer must conduct an individualised inquiry and consider all the relevant factors, including: (a) the duration of the risk; (b) the nature and severity of the potential harm; (c) the likelihood that harm will occur; and (d) the imminence of the potential harm.¹²²

5.2 Choosing Reasonable Accommodation

As stated earlier, the Employment Equity Act defines reasonable accommodation as 'any modification or adjustment to the working environment that will enable a person

¹¹⁹ 42 USC § 12113(b) of the ADA.

¹²⁰ 42 USC § 12111(3) of the ADA.

¹²¹ 480 US 273, 107 SCt 307, 94 LEd 2d 307 (1987).

¹²² See also *Mantoliete v Bolger* 767 F2d 1416 (9th Cir 1985).

from a designated group to have access to or participate in employment'.¹²³ The Code of Good Practice pursuant to the EEA provides guidance as to the types of modifications and adjustments that are expected of the employer. These include but are not limited to:¹²⁴

- adapting existing facilities to make them accessible;
- adapting existing equipment or acquiring new equipment, including computer hardware and software;
- re-organising workstations;
- changing training and assessment materials and systems;
- restructuring jobs so that non-essential functions are re-assigned;
- adjusting working time and leave; and
- providing specialised supervision, training and support in the workplace.

Given the diversity of disabilities and workplace environments, the Code of Good Practice cannot produce a closed list of modifications and adjustments. What is more useful and more feasible is to give indications of the common types of modifications and adjustments.¹²⁵ Once a job applicant or employee has discharged the initial evidential burden that she/he is a suitably qualified person and that there is a case for reasonable accommodation in order to allow him or her to discharge the inherent requirements of the job, the employer bears the burden of proving that no reasonable

¹²³ Section 1 of the EEA.

¹²⁴ Para 6.9 of the Code of the Code of Good Practice (note 99 above).

¹²⁵ 42 USC § 12111(9); 56 F Ed Reg 8578, 8588 (1991). *The Code of Good Practice on Key Aspects of Disability* para 6.9.

accommodation could have enabled the job applicant or employee to discharge the inherent requirements of the job.¹²⁶

A common characteristic of the types of reasonable accommodation required by the EEA is job-relatedness. The Code of Good Practice reinforces this point by providing that the aim of reasonable accommodation is to reduce the impact of the impairment on the person's capacity to fulfil the 'essential functions' of a job.¹²⁷ Reasonable accommodation is designed to take into account the peculiar disability of the job applicant or employee and specifically assist him/her in the work environment. Reasonable accommodation is not intended to assist the job applicant or employee in respect of functions that are strictly of a personal nature and unrelated to the workplace. Primarily, reasonable accommodation must assist the job applicant or employee performing inherent functions of the job. It is important, however, not to construe the work environment too narrowly as to exclude facilities such as recreation rooms, cafeterias or health clubs that are provided by the employer. Such services, as is recognised under the regulations pursuant to the ADA, are work-related.¹²⁸

Modifying or adjusting the work environment as required by the EEA does not require eliminating an inherent requirement of the job. The case of *South Eastern Community College v Davis*,¹²⁹ which was decided by the Supreme Court of the United States, illustrates this point albeit in the context of access to an educational facility. The case was decided under the Rehabilitation Act of 1973. Davis was seeking admission to train as a registered nurse. The college denied her admission on the ground that her inability to understand speech without reliance on lip-reading meant that she did not have the

¹²⁶ *Treadwell v Alexander* 707 F2d 473 (11th Cir 1983) LA Lavelle 'The duty to accommodate: Will Title 1 of the Americans with Disabilities Act Emancipate Individuals with Disabilities only to Disable Small Businesses?' (1991) 66 *Notre Dame Law Review* 1172.

¹²⁷ Para 6.1 of the Code of Good Practice (note 99 above).

¹²⁸ 56 Fed Reg 8599 (1991).

¹²⁹ 442 US 397 (1979). BL Egan 'Civil Rights: Handicapped Individuals. Rehabilitation Act Of 1973 Does not Require Affirmative Action: *Southeastern Community College v Davis*' (1979-1980) 13 *Creighton Law Review* 607; DJ Olenick 'Accommodating the Handicapped: Rethinking Section 504 After *Southeastern*' (1980) 80 *Columbia Law Review* 171; GT Holtzman *et al* 'Reasonable Accommodation for the Disabled Worker - A Job For The Man or A Man For The Job' (1986) 44 *Baylor Law Review* 279.

requisite qualifications for the training programme. Unless she was able to hear without lip-reading, she could not participate safely in the training programme or practice safely as a nurse. Davis challenged the decision of the college, but was unsuccessful before the District Court, Court of Appeals and the Supreme Court. Her main argument was that she could be qualified if reasonable accommodation had been made in the form of close personal supervision by a nursing instructor during her clinical portion of the training. The Supreme Court unanimously held that Davis was not qualified. The court's view was that the individual supervision that Davis was seeking would have the effect of preventing her from acquiring personal skills necessary to practice nursing without such supervision. A personal aid such as Davis was seeking was distinguishable from a blind person's use of a reader as the reader would only perform a mechanical function, whereas a personal supervisor would perform some of the tasks that Davis was expected to master. In short, the accommodation that Davis was seeking would not enable her to perform the essential requirements of the training programme.

5.3 Limits of Reasonable Accommodation

Comparative law supports the proposition that making *reasonable* accommodation should not impose a disproportionate burden on the employer. Equally, the Convention's formulation of the limits of reasonable accommodation has followed the same approach. Article 2 of the Convention defines reasonable accommodation as meaning 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden'.

The aim in this subsection is to examine more closely the approach that courts must adopt in determining whether reasonable accommodation imposes a disproportionate burden. Determining whether reasonable accommodation will not impose a disproportionate burden on the employer provides an opportunity for an individualised assessment of the nature and costs of accommodation in the light of the employer's financial resources, workplace structures, and environment and business operations.

The criteria set out under the ADA provide useful guidance to the determination of whether reasonable accommodation will impose a disproportionate burden on the employee. Under the ADA, undue hardship means 'an act requiring significant difficulty or expense'.¹³⁰ It is to be determined on a case-by-case basis in the light of the following factors:

- the nature and cost of accommodation needed;
- the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility,
- the overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of employees, the number, type and location of its facilities, and
- the type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, geographical separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.¹³¹

Equally Canadian jurisprudence that was discussed earlier provides guidance on the limits of reasonable accommodation.¹³²

It is apparent that the Code of Good Practice has followed comparable jurisdictions in attempting to prescribe explicitly the limits of reasonable accommodation. It provides that the employer need not accommodate an applicant or employee with a disability if doing so would impose an 'unjustifiable hardship' on the business of the employer.¹³³ The Code of Good Practice also explains 'unjustifiable hardship' as any action that

¹³⁰ 42 USC § 12111(10)(A) of the ADA.

¹³¹ 42 USC § 12111(10)(B).

¹³² Aggarwal (note 14 above) 309-312. See § 3.2 above.

¹³³ Para 6.11 of the Code of Good Practice (note 99 above).

requires 'significant or considerable difficulty or expense'.¹³⁴ The Code is cognisant of the relative nature of the concept of unjustifiable hardship and provides that 'an accommodation that imposes unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time'.

The indication from the Constitutional Court is that it would adopt more or less the same approach as its counterpart in Canada when determining the limits of reasonable accommodation. In *Pillay*, the Court made some obiter remarks on the duty to provide reasonable accommodation.¹³⁵ Chief Justice Langa said that the difficult question is not whether positive steps should be taken in order to provide accommodation, but how far the community is required to go in accommodating those that are outside the 'mainstream'.¹³⁶ He said that South Africa would align itself with the approach of the Supreme Court of Canada when determining the limits of reasonable accommodation. Citing the *Renaud's* case, he said that reasonable accommodation is required unless it would impose 'undue hardship'.¹³⁷ But whilst aligning the Constitutional Court with the approach of the Supreme Court of Canada, Chief Justice Langa emphasised that what is ultimately determinative is not whether reasonable accommodation is compatible with a 'judicially created slogan' but whether it is consistent with the values and principles under the South African Constitution.¹³⁸ Ultimately, the limits of reasonable accommodation are determined by the principle of proportionality.¹³⁹

Determining whether making reasonable accommodation does not impose a disproportionate burden, thus, opens a wide inquiry into the totality of the workplace environment. It is not possible to produce a blueprint of precise situations where reasonable accommodation will impose a disproportionate burden. Though cost is a crucial factor, the inquiry must take into account the administrative structures and

¹³⁴ Para 6.12 *ibid*.

¹³⁵ *MEC for Education and Others v Pillay and Others* (note 25 above).

¹³⁶ *Ibid* para 76.

¹³⁷ *Ibid*; *Central Okanagan School District No 23 v Renaud* (note 51 above).

¹³⁸ *MEC for Education and Others v Pillay and Others* (note 25 above) para 76.

¹³⁹ *Ibid* 76.

mode of business operations. Ultimately, reasonable accommodation must not be unduly financially burdensome, pose a significant risk to health and safety or significantly disrupt business operations. The determination is to be made flexibly, on a case-by-case basis, with precedent being of little value.

The burden of establishing that providing reasonable accommodation would impose a disproportionate burden necessarily rests on the employer since it is a presumptive statutory duty. Making reasonable accommodation certainly means incurring more than a *de minimis* burden in terms of costs and inconveniences and is a departure from the approach adopted by the United States Supreme Court in *Hardison*.¹⁴⁰ In general, the larger the enterprise and the greater the resources at its disposal, the more costs and inconveniences the employer will be expected to bear in terms of making reasonable accommodation. In appropriate cases, reasonable accommodation may entail substantial expenditure.¹⁴¹

6 CONCLUSION

In those cases where, relative to the needs of the employee, the employer has significant resources at its disposal, there is much to say about the enabling nature of reasonable accommodation and its rapport with disability method. The duty of reasonable accommodation is clearly an attempt to embrace inclusive equality. It is aimed at achieving parity in participation in the workplace. To a large extent, it recognises that it is not the impairment itself that is disabling, but barriers emanating from socio-economic arrangements, including the manner in which the job is structured. Reasonable accommodation seeks to achieve an on-going and flexible adjustment to the criteria for job selection as well as job performance. The fact that the costs of providing reasonable accommodation fall on the employer supports the proposition in disability method that accommodation should be *costless* to the disabled person. On the face of it, therefore, reasonable accommodation seems to reject the premise of abstract

¹⁴⁰ *Trans World Airlines, Inc. v Hardison* (note 39 above).

¹⁴¹ *Nelson v Thornburg* 567 F Supp 369 (ED Pa 1983).

universalism in formal equality that requires employees to be homogeneous in terms of physical capacities and fungibility.

As I argued in Chapter 4 of this study, formal equality has a propensity to treat the disabled body as dependent and incomplete when juxtaposed with an enabled body.¹⁴² In contrast, reasonable accommodation departs from the uniformity of formal equality by promoting the idea of recognising a diverse humanity with different physical capacities and different needs in the workplace. In this way, reasonable accommodation gestures towards a semblance of a heterogeneous public sphere where there is at least interaction between the employer needs and those of the employee and an attempt to level the playing field.

However, on closer examination, reasonable accommodation is not as enabling as it first appears. Especially when conceived in private relationships where the relationship is between two individual parties - the employee and the employer - rather than a relationship between the employee and society, reasonable accommodation has significant limitations. Foremost, reasonable accommodation privatises equality in the sense that the prospects of accommodating the employee are dependent of the fortunes of the individual employer. Where the employer is well endowed with resources relative to the needs of the employee, such as where the employer is a large conglomerate or is the state, reasonable accommodation has its greatest prospects of achieving rapport with disability method. The availability of resources on the part of the employer is crucial for determining whether the costs of accommodation will be borne by the employer or the employee. For as long as the employer is expected on its own to accommodate disability, there is no strong incentive for the employer to incur costs in the provision of reasonable accommodation in those cases where the costs of accommodation are significant relative to the employer's resources. In this way, reasonable accommodation is inherently discriminatory against disabled employees whose accommodation costs occasion significant expenditure relative to the employer's

¹⁴² Chapter 4 § 4.2 of this study.

resources. The implication is that for those employers that do not command significant resources relative to the needs of the disabled worker, reasonable accommodation will only serve disabled workers whose physical capacities are as close as possible to those of enabled workers and, thus, do not have accommodation needs that require the employer to incur significant expenses.

An equally formidable obstacle to the realisation of full accommodation is the fact that within a capitalist economy, business is ultimately run for profit.¹⁴³ In the end, the disabled worker must be able to discharge the inherent requirements of the job. Though reasonable accommodation is a principle that is amenable to admitting a margin of incapacity on the part of the disabled worker, it simultaneously retains at its core, a notion of functional competence and efficiency.¹⁴⁴ The emphasis on costs as the more defining criterion for the limits of the duty to provide accommodation implicitly appeals to corporate and marketplace values where making profit is the central objective of business operations. It means therefore that equality and human dignity values that underpin reasonable accommodation are ultimately subjected to the discipline of the market and cannot trump the employer's objective to make profit. For as long as employment is seen as a commodity, the social values of substantive equality will always take second place to economic considerations. Reordering work structures and operations in order to accommodate a disabled worker will only be required to the extent that they do not compromise profit making.

My argument, however, is not that the employer should come under a duty to provide full accommodation even at the expense of making profit. Rather, the argument is that within a capitalist market economy, full accommodation for disabled people cannot be realised within the context of a privatised relationship between the employer and

¹⁴³ Here, I draw my arguments in part from earlier published work: CG Ngwena Equality for People with Disabilities: The Limits of the Employment Equity Act of 1998 in S Jagwanth & E Kalula (eds) *Equality Law* (2001) 186-193 at 192-193. See also Anon 'Employment Discrimination against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness' (1984) *Harvard Law Review* 1011-1015.

¹⁴⁴ *Ibid.*

employer only. Ultimately, the costs of providing accommodation should be borne by society, which includes but is not confined to employers. Unless, the state is able and willing to offset the costs of accommodation that impose a disproportionate burden on the employer, then it must be conceded that reasonable accommodation is not so much a principle of full equality, but instead a principle of highly relativised equality that is tethered to the peculiar economic or financial standing of the individual employer. In this way, reasonable accommodation will rarely assure economic recognition and parity in participation for severely disabled persons.

At the beginning of this chapter, Shelagh Day and Gwen Brodsky rhetorically asked whether accommodation could be an idea of equality.¹⁴⁵ The authors also supplied an apt answer when they said that accommodation could be an idea of equality but only if it recognized that we are all different and that structures that reinforce power imbalances among groups are the real impediment to equality. The shortcoming with the doctrine of reasonable accommodation as it has been judicially developed thus far is that while it purports to fully recognise difference, it is woefully inadequate when it comes to capacity to alter the status quo of power imbalances such as those that obtain in the employer and employee relationship in a free market economy.

¹⁴⁵ Note 1 above.

CHAPTER 7

CONCLUDING REMARKS

One view about how to write a philosophy book holds that an author should think through all of the details of the view he presents, and its problems, polishing and refining his view to present to the world a finished, complete, and elegant whole. This is not my view. At any rate, I believe there is also a place and a function in our ongoing intellectual life for a less complete work, containing unfinished presentations, conjectures, open questions and problems, leads, side connections, as well as the main line of argument. There is room for words on subjects other than the last words.¹

1 INTRODUCTION

I end my study with two main statements - firstly, a summary of what I believe the study has achieved, and secondly, a further gloss on the limitations of the study

2 SUMMARY

Against the backdrop of disabled people as a historically disadvantaged and marginalized group that experiences discrimination in the workplace, among other socio-economic sectors, my primary focus has been on searching for an inclusive type of equality that *ought* to inform the interpretation and application of the equality clause in the South African Constitution given its transformative trajectory. My aim has neither been to arrive at a mathematically constructed abstract type of equality, nor to produce a blueprint of equality that puts finality on the debate on equality. Rather, my aim has been to engage with equality discursively with a view to contributing towards an ongoing development of a juridical as well as philosophical path for constructing the normative architecture of a type of equality that is more responsive to the equality needs of disabled people. The spotlight has been on developing a type of equality that is normatively inclusive and transformative as to be capable of sufficiently meeting the quest for political, and more crucially, economic recognition of disabled people.

¹ R Nozick *Anarchy, State, Utopia* (1974) xii.

I have used a repertoire of analytical techniques to explore and appraise the inclusiveness and responsiveness of contemporary approaches to equality. At a more general level, I have employed comparative analysis. However, whilst comparative analysis in this thesis has encompassed comparing and contrasting the equality jurisprudence of different jurisdictions and, in this instance, comparing and contrasting South Africa with Canada and the United States, nonetheless, comparative law has been a relatively small part of my comparative discourse. The greater part of my discourse has employed a comparative approach to mean comparing and contrasting the underpinning moral compasses of formal equality and substantive equality with a view to revealing the capacities of each type of equality to be responsive, in an inclusive manner, to the equality aspirations of disabled people.

Over and above comparative analysis, I have used, in the main, the historicity of apartheid, the social model of disability, and feminist theory and practices as analytical techniques for interrogating the responsiveness of notions of formal equality and substantive equality. From insights drawn mainly from the social model of disability and feminism, I have constructed *disability method* as a syncretic and legal method for interrogating the normative sufficiency of equality laws and praxis. Disability method has been the study's principal interpretive method for ensuring that the appraisal of pertinent laws, policies or practices is always conscious of the status of disabled people as a disadvantaged and vulnerable historical community, and the imperative of transforming erstwhile culturally, and even more crucially, economically oppressive norms.

My contention throughout the study has been that law does not carry inherently neutral values that, as a matter of course, allow for searching for alternative paradigms of equality. Ultimately, it is the social construction of disability that holds the key to interrogating equality norms in a serious manner and not merely restating what the legislature and the judiciary proclaim about disability and equality. In this sense, by way of clarifying the methodological and philosophical orientation of this study, it

bears stressing that the analytical approach that I have adopted differs markedly from conventional legal discourses that *only* use an ‘internal critique’, as it were, to critically evaluate legal norms by using norms derived from law in order to determine whether the law is living up to the standards which it professes to hold and whether the justice promised by those standards is being dispensed evenly across all social groups.² Though ‘internal critique’ is part of how some of the arguments in this study have been framed, it is only a small part. The greater part of my equality discourse derived from external critique. It derived from appraising the law using ethical or social values that are external to the law, but which I argued ought to shape the law.³

Using disability method, and drawing from the thesis on a heterogeneous civic public sphere, I sought to situate the normative ethical framework for substantive equality within a type of participatory democracy in which equality is constructed dialogically and not unilaterally or hegemonically. I treated equality as a component of democratic ethics that result not from a given centre, but from an egalitarian dialogue between *disabled* people and *enabled* people. I argued for inclusive heterogeneous equality as the operative equality template for eradicating *disablism* in an imagined participatory democracy in which respect for pluralism and the eradication of dominance and subordination among social groups are core foundational ethics.

In short, the study constitutes a statement on rethinking equality.

3 FURTHER GLOSS ON LIMINATIONS OF STUDY

In Chapter 1 of this study, I alluded to the main limitations of my study. My aim in this subsection is to put a final gloss on those limitations. In this connection, my concluding remarks are framed around the epigraph that I began this chapter with and is taken from Robert Nozick’s work.⁴

² See the discussion in Chapter 1 § 5.6 of this study.

³ *Ibid.*

⁴ Note 1 above.

Although I would be clearly out of sympathy with Robert Nozick's minimal state and the parsimonious equality paradigm that it yields to those who do not possess the bodily merits of the 'universal man', I am, at the same time, completely empathic about Nozick's approach to philosophical discourse, as conveyed in the epigraph. Like Nozick, I subscribe to the view that a philosophical discourse need not seek to develop, or claim to have developed the final solutions and to have reached absolute truths in order to make an intellectual contribution.⁵ The discourse need not be a complete work, containing finished presentations and dogmatics, closed questions and complete solutions to problems regarding normative standards for realising the constitutional right to equality and non-discrimination for disabled people in the workplace. Something less can suffice.

Likewise, my discourse does not purport to offer a complete statement of the problems of, and solutions to, normative standards. It is not a finished presentation in the sense that it does not raise all the questions about equality and non-discrimination in respect of disabled people, nor provide complete solutions to pertinent questions. As I highlighted at the beginning of this study,⁶ the value of my discourse should be understood as no more than an attempt at a principled search for a more inclusive equality paradigm that draws its inspiration from transformative constitutionalism and an expansive universe of equality. Its main contribution lies in articulating the philosophical premises that ought to underpin the development of standards for realising equality for disabled people in the workplace. Those premises find their ultimate theoretical expression in the notion of substantive equality that is responsive to disability method. It is through the construction and application of disability method that is largely appropriated from feminism and the social model of disability that my study has sought to illuminate the limitations of a formal equality approach, and the possibilities of substantive equality that is animated by a heterogeneous public sphere.

⁵ *Ibid.*

⁶ Chapter 1 § 7.3.

Though my study has staked out the main line of argument as the search for inclusive equality that erases bodily hierarchy, this line of argument also comes with its own conjectures for which I do not so much apologise for but candidly own up to. I have assumed that substantive equality rather than formal equality is better for society even though substantive equality comes with the challenge of defining its precise parameters and content, and, above all, the challenge of being at odds with an economic system that is, on the whole, predicated on free market principles. I have assumed that a society committed to inclusive equality would be amenable to developing equality and non-discrimination standards that cohere with disability method. In my arguments, I have deliberately tried not to put a seal on what those standards ought to be in order not to produce a too rigid grip of equality. I have not tried to render a comprehensive statement on the content of substantive equality. Instead, I have eschewed what Mark Tushnet described as the trap of 'blueprintism' that conceives equality as a mathematical formula that is highly detailed and can be policed by a 'coercive bureaucracy'.⁷ My emphasis has been on the inclusive philosophy that ought to underpin equality and non-discrimination rather than on mechanical details.

The spectacular collapse of apartheid under the unsustainable weight of racially calibrated essences is a lesson enough for avoiding the nightmare of Stalinist programme of equality.⁸ I have focused more on articulating the imperative of erasing bodily dominance and subordination in a heterogeneous public sphere in which equality is dialogic. In the end, I accept that, like any philosophical and jurisprudential discourse, my own discourse also leaves many open questions, and indeed raises its own problems,⁹ including the questions of what are the appropriate parameters of distributive justice, and how can a society that is committed to a competitive free enterprise economy reconcile with the ideals of creating a heterogeneous public sphere in the workplace without first losing the commitment towards a capitalist mode of

⁷ Mark Tushnet 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363-1403 at 1398-1400.

⁸ *Ibid.*

⁹ Nozick (note 1 above) xii.

production. Capitalism and a heterogeneous public sphere would be strange bedfellows. They are impossible to push and shove into a fixed box even with the best 'coaxing and cajoling'.¹⁰ To the extent that I have not suggested an alternative to capitalism, I cannot claim, therefore, to have advanced other than a tentative and incomplete discourse.

My discourse is incomplete in that it is saying something but not everything about the search for inclusive equality. I have focused more on what juridical praxis can do rather than on eliciting whether society has the resources that are needed to implement disability method, not least because I have assumed that in a heterogeneous public sphere, the question of constraints of resources is not a formidable obstacle as all the parties have equal claim to resources and it not a question of enabled people showing goodwill to disabled people. As I emphasized in Chapter 4 of this study, in a heterogeneous public sphere equality has no organic centre and does not privilege any particular group(s).

My discourse is also incomplete because my views about equality, however, substantiated, are ultimately subjective and are not subject to scientific validity. As I sought to argue in Chapter 4, the more important moral duty is not so much to profess a given equality paradigm, but to justify it morally and democratically. The discussion from Chapters 1 to Chapter 6 was all about attempting to morally and democratically justify my chosen vision of equality which ultimately draws sustenance from a heterogeneous public sphere.

As part of refraining from pronouncing on the categorical parameters and categorical content of substantive equality, I have, therefore, deliberately allowed my discourse to focus more on the process of achieving equality. Disability method has been my motif. It is the instrument that I have constructed as interpretive and analytical method for guiding the process of achieving substantive equality. The search for an equality

¹⁰ *Ibid* xiii.

paradigm that is responsive to the subordination of disabled people is in essence a search for an insurgency¹¹ for giving recognition to a heterogeneous civic public. It is to resist an incorporationist or assimilationist type of equality in favour of equality that is not only democratized in that it reflects plural decision-making and political participation, but is also transformative as to be able to dislodge, in a sustained manner, the architecture of formal equality as the universal paradigm of equality.

Disability method subscribes to substantive equality that aspires towards full accommodation in manner that is costless to disabled people.¹² When trying to achieve the goal of substantive equality for disabled under the South Africa Constitution, it is not only useful, but even more importantly, necessary to think of disabled people as a protected group that in Nancy Fraser's parlance constitutes a bivalent collectivity.¹³ It is a category that clamours for both political recognition and economic recognition. Economic recognition cannot be met unless adequate resources are made available. Making resources available for accommodation must necessarily implicate the economic organization of a given jurisdiction at a deep structural level.

In the final analysis, the discourse should be understood as no more than an existential search for equality in a world in which there is somatic hierarchy and the socio-economic environment enables some and yet disables others. My assumption has been that somatic hierarchy causes unnecessary suffering and misery for those who are at the receiving end of a master somatic dichotomy and that the task of humanity is to challenge the dogmatics that preserve and perpetuate this hierarchy.

¹¹ I am borrowing usage of the term 'insurgency' from moral philosophy where it is used to capture a sense of repoliticisation of public life by social movements that are resistant to domination and colonization by state bureaucracies, and are seeking self determination: IM Young *Justice and the Politics of Difference* (1990) 81. Insurgency in this instance means forsaking the distant objective omniscient observer as the norm in favour of a proximate subjectivity.

¹² See the discussion in Chapter 3 and Chapter 6 of this study generally.

¹³ N Fraser *Justice Interruptus* (1997) 11-39. See also the discussion in Chapter 3 § 2.2.

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