

# Inclusion of learners with severe intellectual disabilities in basic education under a transformative constitution: a critical analysis

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## *Abstract*

The 1996 South African Constitution is transformative. It was adopted to address the injustices of the past by establishing an egalitarian society characterised by non-discrimination, respect for human rights, dignity and equality for all. This paper critically explores the extent to which the Constitution had been transformative for learners with severe intellectual disabilities. Answering this question will entail addressing the extent to which legal and education policies and practices are in line with article 24 of the Convention on the Rights of Persons with Disabilities (CRPD) which compels state parties to provide the right to inclusive education for persons with disabilities (PWDs). This paper will distinguish between a segregated education system and an inclusive education system. These models will provide the context of the paper's analysis. Based on the social constructionism theory, a segregated education system gathers all learners with disabilities in one school (for special needs learners) away from 'able bodied' learners. This approach is also informed by an essentialist theory which regards disability as pathology. It is the medical model of disability. On the other hand an inclusive education system recognises that children have different abilities and are all gathered in the same classroom where there is a universal learning design (ULD) to ensure the success of all. This model is characterised by support to all learners, teachers and the system as a whole, to cater for various learning needs in the classroom. Informed by neurological science, the ULD method seeks to understand how people learn through memory, language, perception, problem solving and thinking. Nevertheless, the concept of inclusive education (anchored in the ULD) is evolving with numerous schools of thought advocating for the implementation of various approaches including the rule of 'separate but

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equal' as an appropriate exception. This entails the placement of learners with severe disabilities in special schools for their own interest. Given the evolving nature of inclusive education, the paper also examines how inclusive education is responsive to a human rights model of disability especially in the case of learners with severe intellectual disabilities. As part of assessing the inclusion of learners with severe intellectual disabilities in the South African basic education, the paper critically examines legal and policy documents as well as state practice. Among the criteria used when determining whether education is inclusive is whether it is discriminatory and whether it provides learners who have severe intellectual disabilities with adequate resources for learning as their counterparts with mild or with no disabilities. The paper relies on local and foreign jurisprudence on equality and inclusive education to inform the discussion. Ultimately, it argues that the South African basic education system is yet to be inclusive of learners with severe intellectual disabilities.

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## INTRODUCTION

Education is the primary step towards ensuring human development.<sup>1</sup> It is an 'enabling right'<sup>2</sup> or a right without which other rights cannot be realised because it empowers the beneficiary to understand and enjoy other rights. In short, it is 'a gateway for a better future'.<sup>3</sup> As a result, the UN endeavours to ensure that everyone enjoys the right to education, and that the same quality and standards of education is provided to all through the adoption of

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<sup>1</sup> Committee on ESCR, General Comment No 13, 'the right to education' (art 13 of the ICESCR), 21<sup>st</sup> Session, 1999, UN Doc E/C 12/1999/10, reprinted in compilation of General Comments and General Recommendations adopted by human rights treaty bodies, UN Doc. HRI/GEN/1/Rev.6 at 70 (2003), par 1; Kanga 'Realising the right to primary education in Cameroon' (2011) 11 *AHRLJ* 171; Akinbola 'The right to inclusive education: meeting the needs of and challenges of children with disability' (2010) 10 *AHRLJ* 47; Veriava & Coomans 'The right to education' in Brand & Heyns (eds) *Socio-Economic rights in South Africa* (2005) 57.

<sup>2</sup> Salomon 'Legal cosmopolitanism and the normative contribution of the right to development' in Marks (ed) *Implementing the right to development: the role of international law* (2008) 17, 17.

<sup>3</sup> Chataika, Mckenzie, Swart & Lyner-Cleophas 'Access to education in Africa: responding to the United Nations Convention on the Rights of Persons with Disabilities' (2012) 27/3 *Disability & society* 385, 386 available at <http://www.tandfonline.com/loi/cdso20> (last accessed 24 March 2016).

non-binding<sup>4</sup> as well as binding instruments<sup>5</sup> which cater for inclusive education.

South Africa subscribes to inclusive education and has ratified the CRPD<sup>6</sup> which explicitly provides for the right to inclusive education in its article 24. This article is the global yardstick to measure inclusive education. It obliges state parties to provide education to Persons With Disabilities (PWDs) in an 'inclusive education system' at all levels to ensure the development of their 'potential and sense of dignity and self-worth'.<sup>7</sup> It also prohibits discrimination at school on the ground of disabilities. This entails that states must ensure that no one is kept away from the 'general system of education' because of a disability.<sup>8</sup> This necessitates the provision of reasonable accommodation<sup>9</sup> such as assistive devices, sign language and other means to ensure that learners with disabilities have equal access to education. This also means ensuring that reasonable accommodation is commensurate with the learner's disability as to ensure an effective access to education. Article 24 is clear in requesting that all PWDs are fully and effectively included in the regular or mainstream education system. It is from this contextual

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<sup>4</sup> The *Salamanca Statement on Principles, Policy and Practice in Special Needs Education*, The World Conference on Special Needs Education: Access and Quality *The Salamanca Statement and Framework for Action* Salamanca, Spain (7–10 June 1994)., The UN Educational, Scientific and Cultural Organization *World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs* (1990); Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, GA res 48/96 December 1996, Rule 6; World Education Forum *The Dakar Framework for Action Education for All: Meeting our Collective Commitments* Dakar, Senegal (26–28 April 2000); *Guidelines for Inclusion: Ensuring Access for All* (2005); UN Educational, Scientific and Cultural Organization *Policy Guidelines on Inclusion in Education* (2009); Committee on the Rights of the Child *General Comment 1: The Aims of Education* (2001); Committee on the Rights of the Child *General Comment 9: The Rights of Children with Disabilities* (2009), especially pars 66–7.

<sup>5</sup> Articles 28 & 29 of the Convention on the Rights of the Child, adopted and opened for signature, ratification, and accession by the General Assembly (GA) res 44/25 of 20 November 1989, and entered into force on 2 September 1990; Article 2 of the Convention on the Rights of Persons with Disabilities GA res 61/611. Adopted on 13 December 2006, and entered into force on 3 May 2008. At an African regional level, inclusive education finds implicit expression in Articles 11 & 13 of the African Charter on the Rights and Welfare of the Child. Adopted on 11 July 1990, and entered into force on 29 November 1999.

<sup>6</sup> South Africa ratified the Convention on the Rights of Persons with Disabilities (CRPD) and its optional Protocol on 30 November 2007, see article 24.

<sup>7</sup> Article 24(1) of the CRPD.

<sup>8</sup> Article 24 (2)(a) of the CRPD.

<sup>9</sup> Article 24(2)(c), (d) & (e) of the CRPD.

background that the inclusion of children with severe intellectual disabilities under South African basic education will be examined.

Previously referred to by the stigmatising terms of mental retardation, or developmentally challenged,<sup>10</sup> intellectual disability is associated with impairment to the brain which causes learning difficulties and hinders everyday functioning.<sup>11</sup> Wehmeyer and Obrebski define intellectual disability as a ‘disability characterized by limitations in intellectual functioning and resulting in the need for extraordinary supports for the person to participate in activities involved with typical human functioning’.<sup>12</sup> The level of intellectual disability is generally diagnosed through intelligence tests. Based on these tests, the level of intellectual disability varies from mild, to moderate, to severe. A person with an intelligence quotient (IQ) from 55 to 70 has a mild intellectual disability, from 36 to 52 is moderate, from 21 to 35 corresponds to severe, and below 25 corresponds to profound disability.<sup>13</sup> Before the development of the discourse on inclusive education, educators had harmonised IQ scores with potential learning capabilities: those with mild intellectual disability (IQ from 55 to 75) were educable, those with moderate (IQ from 25 to 50) were trainable; and those with severe and profound intellectual disabilities (IQ 0 to 25) were ‘custodial,’<sup>14</sup> or uneducable and untrainable and were therefore simply cared for in so-called ‘residential care facilities’.<sup>15</sup> This was the application of the medical model of disability. In this context, uneducable and un-trainable learners were considered ill and had no place in schools, but in houses or residential care facilities.

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<sup>10</sup> American Association on Intellectual and Developmental Disabilities (AAIDD).

<sup>11</sup> ‘Intellectual disabilities’ at <http://children.webmd.com/intellectual-disability-mental-retardation> (last accessed 24 March 2016).

<sup>12</sup> Wehmeyer & Obrebski ‘Intellectual Disabilities’ in Stone & Blouin (eds) *International encyclopedia of rehabilitation*. (2013). Available at: <http://cirrie.buffalo.edu/encyclopedia/en/article/15/> (last accessed 24 March 2016).

<sup>13</sup> ‘Intellectual disability’ in *International encyclopedia of rehabilitation British Britannica* at: <http://www.britannica.com/topic/375400/contributors> (last accessed 24 March 2016); also ‘Intellectual disability (mild, moderate, severe, profound) available at: <http://peppinc.org/wp-content/uploads/2012/07/intellec-disab.pdf> (accessed when?); also Wehmeyer & Obrebski n 12 above.

<sup>14</sup> ‘Intellectual disability’ in *International Encyclopedia of Rehabilitation British Britannica* at: <http://www.britannica.com/topic/375400/contributors> (*ibid*) (last accessed 24 March 2016).

<sup>15</sup> *Ibid*.

In the South African context, the concept of severe and profound intellectual disability is in line with the global understanding which is related to limitation of functioning. In South Africa this concept is not new, as it was discussed in the apartheid era. Back in 1967, the Apartheid Government set up a Committee of Inquiry into the Care of Mentally Deficient Persons headed by Van Wyk.<sup>16</sup> The Van Wyk Report was the confirmation of the medical model in the education of children with intellectual disabilities. It called for the separation between children with intellectual disabilities and other children. According to the report, children with an IQ below 50 were entitled to state-supported training if they were able to benefit from it. Though initially this recommendation applied to white children only, it was later extended to other racial groups.<sup>17</sup> Subsequent to the publication of the report, intellectually disabled children were often categorised as “educable”, “trainable” and “ineducable/untrainable”.<sup>18</sup> This characterisation led to the exclusion of the so-called ‘untrainable’ from the Department of Education funding. As a result, the ‘untrainable’ resorted to special care centres that subsisted on minimal subsidy from the Department of Health.<sup>19</sup>

In 1996 the South African Government adopted the post-apartheid Constitution.<sup>20</sup> According to its preamble, the Constitution was adopted ‘to heal the divisions of the past, and to establish a society based on democratic values, social justice and fundamental human rights’. It was adopted to ‘improve the quality of life of all citizens and free the potential of each person’. In this vein, it was informed by the need to ensure equality and dignity for all. Hence, its characterisation as a ‘transformative constitution’.<sup>21</sup> Though some scholars have reservations about the transformative attribute of the Constitution because of the neo-liberal

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<sup>16</sup> Van Wyk Report (1967) Report of the Committee of Inquiry into the Care of Mentally Deficient Persons. Republic of South Africa. RP 66/68. Pretoria. As quoted in Henning, Bruwer & Hillard ‘Policy on the care of the mentally retarded’ Department of Health, Welfare and Pension – a report back on the A.J. Van Wyk Committee Report (1980) available at: <http://www.curationis.org.za/index.php/curationis/article/viewFile/265/207> (last accessed 24 March 2016)

<sup>17</sup> Molteno ‘Education and intellectual disability in South Africa’ (2006) 18(2) *Journal of Child & Adolescent Mental Health* iii available at: <http://dx.doi.org/10.2989/17280580609486620> (last accessed 24 March 2016.)

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Act 108 of 1996.

<sup>21</sup> Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* 146, 153.

theories entrenched in it,<sup>22</sup> various decisions of the Constitutional Court uphold the right to equality and human dignity and in doing so highlight the transformative features of the Constitution described by some as one of the best in the world.<sup>23</sup>

On the education terrain, this means that immediately after apartheid, the new democratic government dedicated itself to the transformation of education, and important policy documents and legislation were adopted to implement the right to education as a basic human right as provided for in the Constitution.<sup>24</sup> As a philosophy, the concept of inclusive education in the South African context embraces the democratic values of equality and human rights and the recognition of diversity.<sup>25</sup> This means education for all including those with severe intellectual disabilities. In this regard, the Constitution states in section 29 (1) that everyone has the right to a basic education.

This paper critically explores the extent to which the Constitution has been transformative for learners with severe intellectual disabilities. Answering this question will entail addressing the extent to which legal and education policies and practices are in line with article 24 of the Convention on the Rights of Persons with Disabilities (CRPD) which compels state parties to provide the right to inclusive education for persons with disabilities (PWDs). This paper will distinguish between a segregated education system and an inclusive system. These models will provide the context for my analysis.

On the one hand, a segregated education system which gathers all learners with disabilities in one school away from their peers without disabilities is based on the social constructionism theory.<sup>26</sup> From a social constructionist

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<sup>22</sup> Sibanda 'Not purpose-made! Transformative constitutionalism, post independence constitutionalism and the struggle to eradicate poverty' (2011) 22/3 *Stellenbosch Law Review* 482. Sibanda is of the view that neoliberal tenets included in the constitution are serious impediments to its ability to transform the society into an equalitarian one. See also Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 (1) *SA Public Law* 155 156.

<sup>23</sup> Mubangizi *The protection of human rights in South Africa: a legal and practical guide* (2004) 71.

<sup>24</sup> Engelbrecht 'The implementation of inclusive education in South Africa after ten years of democracy' 2006 (XXI) 3 *European Journal of Psychology of Education* 253.

<sup>25</sup> *Ibid.*

<sup>26</sup> Thomas & Loxley *Deconstructing special education and constructing inclusion* (2001); Van Rooyen & Le Grange 'Interpretive discourses in South Africa's education White Paper No 6: Special Needs Education' (2003) 23 (2) *SAJE* 152.

standpoint, this division of learners is a social construct informed by the ‘beliefs and understandings taken to be factual’ which in reality are the results of societal interactions in a specific context.<sup>27</sup> To use the words of Danfoth and Rhodes, ‘social constructionism assumes that the various forms of "disability" are not physical absolutes but social designations that are made by people in interaction and relationship’.<sup>28</sup> In light of this, the deaf and deaf/blind children for example are considered to be ‘children with disabilities’ who have ‘special education needs’<sup>29</sup> and should be isolated from the mainstream education. This implies that disability becomes an ‘oppressive and normative construct deployed against minorities enforcing social marginalisation’.<sup>30</sup> This approach is also informed by an essentialist theory which sees disability as pathology.<sup>31</sup>

On the other hand, the inclusive education system recognises that children have different abilities and are all gathered in the same classroom where there is a universal learning design (ULD) to ensure the success of all.<sup>32</sup> Given that the ULD represents the more recent model for the implementation of inclusive education, it deserves some elaboration.

According to the Center of Universal Design at North Carolina State University, implementing ULD entails designing products and environments as to enable their use by all people without the need of modification, ‘adaptation or specialized design’.<sup>33</sup> The ULD revolves around three principles based on neuroscience research. They are: multiple means of presentation, expression and engagement.<sup>34</sup> Firstly, in an ULD environment,

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<sup>27</sup> Danfoth & Rhodes ‘Deconstructing disability – a philosophy for inclusion’ (1997) 18 (6) *Remedial and Special Education* 357 359.

<sup>28</sup> *Ibid.*

<sup>29</sup> Stubbs ‘Inclusive education where there are few resources’ *Booklet for the Atlas Alliance* (2002) 23.

<sup>30</sup> Slee ‘Imported or important theory?’ (1997) 18 *British Journal of Sociology of Education* 407, 409.

<sup>31</sup> Thomas & Loxley n 26 above.

<sup>32</sup> For more on this model see, Dalton, McKenzie & Kahonde ‘The implementation of inclusive education in South Africa: reflections arising from a workshop for teachers and therapists to introduce Universal Design for Learning’ (2012) 1(1) *African Journal of Disability* 1 <http://dx.doi.org/10.4102/ajod.v1i1.13> (last accessed 24 March 2016).

<sup>33</sup> Eagleton ‘Universal design for learning’ (2008) 2. Available at: <http://www.ebscohost.com/uploads/imported/thisTopic-dbTopic-1073.pdf> (last accessed 24 March 2016 ).

<sup>34</sup> Center for Applied Special Technology CAST (2011). *Universal Design for Learning Guidelines Version 2.0*. available at [udcenter.org](http://udcenter.org) (last accessed 24 March 2016 ); also Dalton *et al* n 32 above.

a multiple means of presentation is used to explain the topic, ‘the what of learning’. It offers learners various ways of acquiring information and knowledge. It caters for various needs in the classroom simultaneously. Secondly, the provision of multiple means of action and expression is necessary to assist learners with various abilities to express what they know, or the ‘how of learning’. In this context, students are offered various alternatives to demonstrate what they know. Thirdly, multiple means of engagement offers the opportunity to engage students and motivate them to learn. It addresses ‘the why of learning’. It provides an opportunity to ‘tap into students’ interests, challenge them appropriately, and motivate them to learn’.<sup>35</sup>

These principles clearly show that the ULD model is characterised by support to all learners, teachers and the system as a whole to cater for various learning needs in the classroom. The ULD method seeks to understand how people learn through memory, language, perception, problem solving and thinking.<sup>36</sup> The understanding of these learning methods informs the development of the curriculum and the training of teachers for the benefit of all learners in the classroom. Eagleton observes:

[ULD] principles guide educators in finding innovative ways to make the curriculum accessible and appropriate for individuals with different backgrounds, learning styles, abilities, and disabilities in various learning situations and contexts. This paradigm for teaching, learning, assessment, and curriculum development focuses on adapting the curriculum to suit the learner rather than the other way around. ULD guides teachers and curriculum developers toward creating flexible materials and methods before they are put in students’ hands, rather than waiting until students arrive and trying to retrofit inflexible materials to each learner. In considering [ULD] as a new paradigm for addressing the instructional needs of students with disabilities and those at risk for learning challenges, “disability” is viewed as a normal phenomenon of human diversity rather than as an aberration.<sup>37</sup>

The ULD illustrates the shift from the medical model to the human rights model of disability. Nevertheless, the concept of inclusive education (anchored in the ULD) is evolving with numerous schools of thought

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<sup>35</sup> <http://accessproject.colostate.edu/> (last accessed 24 March 2016).

<sup>36</sup> Dalton *et al* n 32 above.

<sup>37</sup> Eagleton n 33 above 1 & 2.



advocating for the implementation of various approaches including the rule of ‘separate but equal’<sup>38</sup> as an appropriate exception. This entails the placement of learners with severe disabilities in special schools for their own interest. Given the evolving nature of inclusive education, the paper also examines how inclusive education is responsive to a human rights model of disability especially in the case of learners with severe intellectual disabilities.

As part of assessing the inclusion of learners with severe intellectual disabilities in the South African basic education, the paper critically examines legal and policy documents as well as state’s practice. Among the criteria used to determine whether education is inclusive or not, is whether it is discriminatory and whether it provides learners with severe intellectual disabilities with adequate resources for learning as their counterparts with mild or with no disabilities. The paper relies on local and foreign jurisprudence on equality and inclusive education to inform the discussion. Ultimately, it argues that the South African basic education system is yet to be inclusive of learners with severe intellectual disabilities.

In terms of structure, the paper is divided into 5 parts including this introduction. The second part presents an overview of post-apartheid legal and policy framework for inclusive education. The third part discusses the philosophy underpinning inclusive education in South Africa. The fourth part examines the specific situation of learners with severe intellectual disabilities and the final part provides concluding remarks.

### **POST-APARTHEID LEGAL AND POLICY FRAMEWORK FOR INCLUSIVE EDUCATION: AN OVERVIEW**

Apartheid was characterised by the entrenchment of discrimination in all domains of society and education was not an exception.<sup>39</sup> The education system was discriminatory in the sense that it was biased towards the empowerment of white learners only. There were schools for whites and schools for blacks.<sup>40</sup> White learners were afforded more opportunities in

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<sup>38</sup> The expression ‘separate but equal’ was used for the first time by the majority of the United States Supreme Court in *Plessy v Ferguson*, 163 U.S. 537 (18 96). It acquired a bad reputation after it was utilised to justify racial discrimination in the USA (For more see Pothier ‘*Eaton v Brant County Board of Education*’ (2006) 18/1 *CJWLJ/RFD* (2006) 121). Nevertheless, in this case, it has a rather positive connotation as it seeks ways to ensure substantial equality in addressing the marginalisation of PWDs disability rights.

<sup>39</sup> Engelbrecht n 24 above.

<sup>40</sup> Chataika, Mckenzie, Swart & Lyner-Cleophas n 3 above at 388.

terms of funding and quality of education. Firstly, as far as funding was concerned, research shows that in 1994, prior to the first democratic elections, government *per capita* funding for black colleges and school children was 1 600 Rands per year, whereas white learned founding was 4 772 Rands per year.<sup>41</sup> Therefore, black schools were ill-equipped and dilapidated. According to Sparks, thirty per cent of black schools had no electricity, twenty-five per cent had no water and fifty per cent had no sanitation.<sup>42</sup> The poor quality infrastructure found in some black schools was simply not conducive to quality education.

Secondly, the curriculum and academic programmes for black learners were tailored to ensure their employability as domestic workers, labourers and make sure that they remained unskilled for white-collar jobs.<sup>43</sup> This approach was sustained by the allocation of unqualified teachers to black schools.<sup>44</sup> In contrast, white learners were exposed to the curriculum and programmes which prepared them for white-collar jobs.<sup>45</sup> To ensure their success, white learners were allocated the services of the best teachers who received good salaries.<sup>46</sup> Woolman and Fleish summarise the system under apartheid as follows. It was characterised by a

[R]adical unequal system of education that long preserve seats in schools, places in the economy and jobs in government for a white elite, while it denied the vast majority of black South Africans the training to be anything more than hewers of woods and drawers of water.<sup>47</sup>

On the disability terrain, only white learners with disability had access to education. Those with mild or moderate disabilities were accepted in mainstream well-funded white schools equipped with support devices to ensure the successful education of the learners.<sup>48</sup> White learners with more serious disabilities were generally placed in special schools equipped with

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<sup>41</sup> Maher *Inclusive education a decade after democratisation: the educational needs of children with disabilities in KwaZulu-Natal* (unpublished Phd thesis (2007)) 73.

<sup>42</sup> Sparks *Beyond the miracle: inside the new South Africa* (2003) 220.

<sup>43</sup> Woolman & Fleisch *The Constitution in the classroom – law and education in South Africa 1994–2008* (2009).

<sup>44</sup> Sparks n 42 above 220.

<sup>45</sup> Cross, Mungadi & Rouhani 'From policy to practice: curriculum reform in South African education' (2002) 38 (2) *Comparative Education* 171–187.

<sup>46</sup> *Ibid.*

<sup>47</sup> Woolman & Fleisch n 43 above at 109.

<sup>48</sup> Woolman & Fleisch n 43 above.

qualified experts to ensure their education.<sup>49</sup> Indeed, all measures were put in place to fragment the education system along racial lines and ensure inaccessibility of school for black learners.<sup>50</sup>

However, the collapse of apartheid in 1994 and the adoption of the new Constitution in 1996 were transformative events. Given the legacy of apartheid, the advent of democracy in the country would have been incomplete without a constitutional commitment to also ensure education for all. Hence, the Constitution of the Republic of South Africa includes a Bill of Rights that guarantees the rights of all South Africans. Put differently, the Bill of Rights is unequivocal in providing for the right to equality,<sup>51</sup> in prohibiting discrimination<sup>52</sup> and the right to education for all. As far as the right to education is concerned, section 29 of the Constitution provides:

- (1) Everyone has the right
  - (a) to a basic education, including adult basic education; and
  - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account
  - (a) equity;
  - (b) practicability; and
  - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that
  - (a) do not discriminate on the basis of race;
  - (b) are registered with the state; and
  - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

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<sup>49</sup> *Ibid.*

<sup>50</sup> Engelbrecht n 24 above 253.

<sup>51</sup> Section 9.

<sup>52</sup> Section 9 (4) & (5).

To give effect to these provisions and specifically to section 29 (1) on the right to education for all, including learners with disabilities, important education policy documents and legislation including the White Paper on Education and Training,<sup>53</sup> the White Paper on an Integrated National Disability Strategy,<sup>54</sup> the South African Schools Act<sup>55</sup> and the White Paper 6: Special Needs Education, Building an Inclusive Education and Training System<sup>56</sup> were published. These policy arrangements clearly underline the significance of equality of treatment and opportunities in a democracy where everyone has a right to education. Indeed, these policies are in line with the CRPD and other treaties<sup>57</sup> that compel state parties to ensure the right to education to learners with disability at all levels.

## **PHILOSOPHY UNDERPINNING INCLUSIVE EDUCATION IN SOUTH AFRICA: A RECONCILIATORY APPROACH BETWEEN INCLUSION IN MAINSTREAM SCHOOLS AND THE USE OF SPECIAL SCHOOLS**

### **Inclusiveness in mainstream education**

The concept of inclusive education is grounded on the need to have all students in the same school. Inclusive education has been defined as ‘all students being educated where they would be educated if they did not have a disability (*ie*, in age-appropriate general education classes in their neighbourhood school) with necessary support provided to students, educators, and families so that all can be successful’.<sup>58</sup> This entails a wide range of approaches, activities and processes that seek to ensure that all learners from various backgrounds are given the same opportunity without consideration of their differences. As mentioned earlier, unlike segregated education crafted in the social constructivism theory which gathers learners with disabilities in a different set up from those without disabilities,

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<sup>53</sup> Department of Education 1995 available at: <http://www.education.gov.za/LinkClick.aspx?fileticket=855ft9w3A2U%3D&tabid=191&mid=484> (last accessed 24 March 2016).

<sup>54</sup> Office of the Deputy President 1997 available at: [http://www.gov.za/sites/www.gov.za/files/disability\\_2.pdf](http://www.gov.za/sites/www.gov.za/files/disability_2.pdf) (last accessed 24 March 2016).

<sup>55</sup> South African Schools Act, No 84 of 1996.

<sup>56</sup> Department of Education 2001 available at: <http://www.education.gov.za/LinkClick.aspx?fileticket=gVFccZLi/tf=:> (last accessed 24 March 2016).

<sup>57</sup> See n 5 above.

<sup>58</sup> Dukes & Lamar-Dukes ‘Special education: An integral part of small schools in high schools’ (2006) 89(3) *The High School Journal* 1,4.

inclusive education system recognises that children have different abilities and are all gathered in the same classroom where there is a ULD to ensure the success of all.

In South Africa, White Paper 6 is the vital piece of policy that provides guidance on the inclusiveness of education. Departing from past discriminatory policies, White Paper 6 caters for the right to equality of all learners at school. It acknowledges the diversity of children's learning needs and recognises that all learners should be given the necessary support to succeed.<sup>59</sup> White Paper 6 is unequivocal in describing its stand for 'building an inclusive education and training system'. Ngwena and Pretorius correctly observe that White Paper 6

[A]ccepts that different learning needs may arise not just from physical, mental, and developmental impairments or differences in intellectual ability and socio-economic deprivation. Equally significant, different learning needs can also arise from the education system itself from factors such as negative stereotyping of learners, inappropriate curriculum, inappropriate communication, inadequate support services, and an inaccessible architectural environment. The ultimate goal of inclusive education is the provision of an enabling education system and environment with a view to maximising the capacities of *all* children and enabling the participation of *all* learners.<sup>60</sup>

In fact, prior to the adoption of White Paper 6, obligations under section 29 (1)(a) of the Constitution were already clarified by the Constitutional Court in *Ex parte Gauteng Provincial Legislature* as follows:<sup>61</sup>

Section 32 (a) [ of the 1993 interim Constitution, now section 29 (1) of the 1996 Constitution] creates a positive right that basic education be provided for *every person* and not merely negative right that such a person should not be obstructed in pursuing his or her basic education.<sup>62</sup>

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<sup>59</sup> Department of Education *Education White Paper 6: Special Needs Education. Building an Inclusive Education and Training System* (2001) 16–7 available at: <http://www.education.gov.za/LinkClick.aspx?fileticket=gVFccZLi/tl=:> (last accessed 24 March 2016).

<sup>60</sup> Ngwena & Pretorius 'Substantive equality for disabled learners in state provision of basic education: a commentary on *Western Cape Forum For Intellectual Disability v Government of the Republic of South Africa*' (2012) 28 *SAJHR* 81 90.

<sup>61</sup> *Gauteng Provincial Legislature in re: Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) 9.

<sup>62</sup> *Id* at par 9. My emphasis.

This means that the state is obliged to provide basic education for all, including learners with severe or profound disability and any limitation of this right can only be justified under section 36 of the Constitution which clearly provides that ‘the rights in the Bill of Rights can 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 ...’. This implies that, not only should the state not interfere with the right to education, it is also compelled to fulfill the right for all including those with disabilities.<sup>63</sup> This is further clarified by Boezaart in these terms:

In the context of disability, section 29(1) obliges the government to provide basic education (including adult basic education) to *everyone*. The unqualified and absolute nature of the right requires that the state implement measures and make budgetary allocations to give effect to the right as a matter of priority.<sup>64</sup>

Therefore, in order to provide primary education for *everyone*, White Paper 6 establishes ‘full-service schools’ or ‘mainstream’ that welcome learners with various needs inside a school district.<sup>65</sup> In these schools learners with ‘mild to moderate’ disabilities who need ‘low intensive support’ would be educated along with learners without such disabilities. In such an inclusive environment, adequate support will be provided to surmount learning hurdles.<sup>66</sup> This approach is informed by the ULD in a sense that gives direction to educational staff and teachers on planning, designing curricula and teaching and assessing students to meet various needs in the classroom. In this context, the diversity of needs in the classroom are equally attended to and celebrated.<sup>67</sup> Sharing this view, the UN Special Rapporteur on Disability Rights urged states parties to the CRPD to:

[E]nsure an inclusive education system at all levels and life-long learning. Learners with disabilities therefore have a right not to be excluded from the

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<sup>63</sup> For more on the negative and positive dimension of the right to education under section 29 of the Constitution, see Woolman & Fleisch n 43 above, 119–126.

<sup>64</sup> Boezaart ‘A constitutional perspective on the rights of children with disabilities in an educational context’ (2012) 27 *SAPL* 455 458.

<sup>65</sup> White Paper 6 n 59 above, 8.

<sup>66</sup> *Id* at 10.

<sup>67</sup> State Government Victoria Department of Education ‘Inclusive schools are effective schools: developing inclusive environment for students with additional learning needs’ 6 available at: <http://www.education.vic.gov.au/Documents/about/research/inclusiveschool.pdf> (last accessed 24 March 2016).

general education system on the basis of disability and to reasonable accommodation for the individual learner's needs. This not only means that learners have a right to attend mainstream schools and not be relegated to segregated schools, it also means that the special education needs of persons with disabilities must be taken into account in the general education system. This goes beyond grouping all learners together in one classroom to ensuring the provision of effective individualized support that maximizes academic and social development.<sup>68</sup>

Inclusion is clearly not synonymous with placing the disabled learners in an unfriendly or non-accommodative environment. In the *Sofia* case,<sup>69</sup> the European Court of Human Rights held that the equal right to education of children with disabilities (CWDs) is only effective if the school has a conducive environment for their education and the failure to create such an environment amounts in itself to unequal treatment of CWDs in that they do not then have the same opportunities as other children.<sup>70</sup> Similarly, while addressing discrimination on the ground of mental disabilities, the European Committee of Social Rights in the Bulgarian case of *Mental Disability Advocacy Center v Bulgaria*<sup>71</sup> ruled that Bulgaria violated the human rights of children with intellectual disabilities under the European Social Charter by keeping them away from mainstream education systems.

Inclusiveness in a mainstream classroom is not without challenges. For instance, there is a strong need to capacitate teachers to work in an inclusive classroom.<sup>72</sup> Indeed, it is a complex task to ensure the 'design of goals, methods, materials, and assessments to make them accessible for *all* students, including those with [severe intellectual] disabilities in a classroom'.<sup>73</sup> Furthermore, service delivery in an inclusive classroom may entail co-teaching in which at least two teachers are involved in providing lessons to all learners at the same time.<sup>74</sup> In this model, both teachers co-

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<sup>68</sup> Report of the United Nations High Commissioner for Human Rights on progress in the implementation of the recommendations contained in the study on the human rights of persons with disabilities (2007) [A/HRC/4/75], par 36.

<sup>69</sup> Case No 13789/06, decision of 18 May 2007.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Mental Disability Advocacy Center v Bulgaria* (Complaint No 41/2007, decision rendered on 3 June 2008).

<sup>72</sup> Chataika *et al* n 3 above 391.

<sup>73</sup> Dalton *et al* n 32 above at 3.

<sup>74</sup> Boston-Kemple 'A conceptual analysis of key concepts in inclusive education' Dissertation, University of Iowa (2012) 29–30. <http://ir.uiowa.edu/etd/2828> (last accessed 24 March 2016).

teach and share responsibility for the class; one may teach while the other observes or provides support.<sup>75</sup> Although co-teaching lowers student/teacher ratio, enables co-teachers to cover various needs in the classroom, and enables *all* students to engage with each other, its effectiveness could be reduced by the clash of personality of co-teachers.<sup>76</sup> More importantly, co-teaching could be very distractive for some learners.<sup>77</sup>

These challenges show that inclusion in mainstream classroom could be detrimental for some learners with disabilities and even for their peers without disabilities. Danforth and Rhodes write:

[W]here the inclusion movement has erred is not so much in developing techniques for integration or in championing a moral direction for educators, but in articulating a logical and consistent philosophy that supports the non-exclusionary education of all students. Continued support of the commonly accepted concept that physiological or psychological disabilities exist in specific individual students no longer supports the philosophical and practical purposes of inclusion advocacy.<sup>78</sup>

Put differently, it is imperative to note that sometimes inclusion may not serve the best interests of disabled learners, hence the need to consider and adopt the principle of ‘different but equal’ which advocates for the schooling of some learners with disability in specific settings or ‘special needs schools’. Ngwena and Pretorius argue that

[L]earning and other support for learners who are disabled may militate against teaching learners under the same roof. At the end of the day, substantive equality demands a recognition of, and responsiveness to, difference rather than mechanical standardisation. The particular needs and circumstances of the individual learner rather than integrated learning, per se, should remain the primary focus.<sup>79</sup>

Therefore, while commending drafters of White Paper 6 for their inclination towards inclusiveness which may promote and preserve harmony, social

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<sup>75</sup> *Ibid.*

<sup>76</sup> *Id* at 34.

<sup>77</sup> *Id* at 34–35.

<sup>78</sup> Danforth & Rhodes ‘Deconstructing disability’ (1997) 18(6) *Remedial and Special Education* 357, 357.

<sup>79</sup> Ngwena & Pretorius n 60 above 106.



justice and togetherness<sup>80</sup> between learners with disabilities and those without disabilities, it is always important to note that inclusion has its challenges.<sup>81</sup>

### **The use of special schools**

Although inclusive education in a mainstream school/classroom as advocated by the CRPD is becoming a more contemporary approach in the education sector around the world, it is still evolving and faces various challenges such as those mentioned earlier. Therefore, mindful of challenges of full inclusion, White Paper 6 also calls for the separation between learners with special needs from their peers without disabilities. In this regard, besides establishing ‘full-service schools’, White Paper 6 also sets up ‘special schools’ at the basic education level. Though these schools existed during apartheid, they were divided along racial lines to the benefit of white disabled learners only.<sup>82</sup>

The approach used by White Paper 6 aims to improve existing ‘special schools’ from the apartheid era to becoming ‘special schools/resource centres’ capacitated to provide ‘intense levels of support’ for the benefit of all learners with severe disabilities in a school district.<sup>83</sup> In this perspective, these schools will also provide specific ‘expertise and support, especially professional support in curriculum, assessment and instruction’ to neighbourhood schools, especially ‘full-service’ schools. In this context, special schools in a district would assist in providing appropriate reasonable accommodation to disabled learners admitted in mainstream or ‘full service schools’.<sup>84</sup> In doing so, White Paper 6 eradicates discrimination by giving the opportunity to learners with severe disability to be taught like their counterparts without disability and this would be in line with the right to equality and the right to education for all as provided for by the Constitution. The vital element in this context is to ensure that a learner with disability(ies) receives education ‘in the most appropriate languages and modes and means of communication [commensurate with his/her disability],

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<sup>80</sup> Mastropieri & Scruggs *The inclusive classroom: strategies for effective instruction* (2ed 2004).

<sup>81</sup> For more on these challenges see Du Plessis ‘Legislation and policies: progress towards the right to inclusive education’ (2013) 1/46 *De Jure* 76 87.

<sup>82</sup> White Paper 6 n 59 above 4.

<sup>83</sup> *Id* at 21.

<sup>84</sup> *Id* at 21 & 29.

and in environments which maximize academic and social development'.<sup>85</sup> White Paper 6 also included an operational plan with a time frame<sup>86</sup> to ensure that learners without disabilities and those with disabilities are attended to equally in terms of support and resources allocation.

In order to ensure that no child is left behind, the government in 2005, adopted the Screening, Identification, Assessment and Support (SIAS) Strategy to identify which child needs specific assistance and how this could be provided. To use the words of Ngwena and Pretorius, the SIAS strategy was 'a tool for determining the nature and level of support for learners with 'special' education needs [and] to determine which learners could be admitted to special schools and which learners could not'.<sup>87</sup> Nevertheless, as will be demonstrated later, this policy did not yield the expected result as it became a tool for the identification and exclusion of learners with severe disabilities. However, in a bid to give effect to this policy, the National Department of Education in November 2007, published guidelines to make sure that all special schools become completely functional and contain the preliminary phases for the development of special schools into special school resource centres.

These initiatives take into account the best interest of the child. They illustrate the application of the principle of 'different but equal' which ensures that children with disabilities receive the same quality education as their counterparts without disabilities in different spaces. In this context, segregating children with disabilities provides them with the opportunity to learn without being abused or ill-treated by their non-disabled counterparts.<sup>88</sup> Some foreign jurisprudences supports this approach and the decision of the Supreme Court of Canada in the case of *Eaton v Brant Country Board of Education*<sup>89</sup> is enlightening in this regard. In this matter, the court was called upon to decide whether the placement (without the consent of her parents) of a child with cerebral palsy who is unable to communicate through speech, sign language or an alternative communication system, has some visual and

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<sup>85</sup> CRPD art 24 (3) (C).

<sup>86</sup> White Paper 6 advanced a 20-year plan as a 'realistic' timeframe for realising progressively inclusive education. The plan is made of short-term (2001–2003), medium-term (2004–2008), and long-term (2009–2021) goals.

<sup>87</sup> Ngwena & Pretorius n 60 above 88.

<sup>88</sup> Hegarty 'Education of children with disabilities' in Mittler; Brouillette & Harris (eds) *World Yearbook of Education - Special needs education* (1993) 21; also Aefsky *Inclusion confusion: a guide to educating students with exceptional needs* (1995) 6.

<sup>89</sup> *Eaton v Brant Country Board of Education* [1997] 1 SCR 241.

mobile impairment and mainly uses a wheelchair in a special needs education centre, was a violation of the right to equality of the child provided for in section 15 of the Canadian Charter of Rights and Freedoms. The court held that the placement of the child in a special setting served the best interest of the child and could not be regarded as discrimination, but was rather a good way to accommodate the child in the mainstream society. According to Justice Sopinka, forcing a child with disability in a mainstream school without considering his or her specific condition may amount to a discrimination which ‘forces the individual to sink or swim within the mainstream environment’.<sup>90</sup> In other, words, putting a child with special educational needs in an appropriate education setting could ensure his or her equality with non-disabled children.

Similar to the *Eaton* case, the *O’Donoghue* case<sup>91</sup> heard in the Irish High Court is informative. In this case, while acknowledging the obligation of the state to provide free basic elementary education for all children,<sup>92</sup> the position of the court was unambiguous in stating that,

In the case of the child who is deaf, dumb (sic), blind, or otherwise physically or mentally handicapped (sic), a completely different programme of education has to be adopted and a completely different rate of progress has to be taken for granted, than would be regarded as appropriate for a child suffering from no such handicap (sic).<sup>93</sup>

Susan Senator who is the Director of Autism Services and Outreach at the US-based Community College Consortium on Autism and Intellectual Disabilities supports the position of the court in the *O’Donoghue* case. Based on her personal experience of raising her severely autistic and intellectually disabled child, she is of the view that ‘severe autistic children are different and ‘require a different curriculum altogether’.<sup>94</sup> This means

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<sup>90</sup> *Id* at pars 66–67. For more analysis of this case, see Ngwena *Disabled people and the search for equality in the workplace: An appraisal of equality models from a comparative perspective* (LLD thesis, University of the Free State (2010)) 478–480.

<sup>91</sup> *O’Donoghue v The Minister for Health, The Minister for Education, Ireland and the Attorney General* [1993] IEHC 2; [1996] 2 IR 20 (27th May, 1993). This judgment was approved by the Irish Supreme Court in *Sinnott v Minister for Education* 2001] IESC 63; [2001] 2 IR 505 (12 July 2001).

<sup>92</sup> Art 42.4 of the Irish Constitution.

<sup>93</sup> *O’Donoghue* n 91 above par 25.

<sup>94</sup> Senator ‘Is inclusive education for people with severe intellectual disabilities good policy?’ 11 July, 2013. Available at: <http://cognoscenti.wbur.org/2013/07/11/intellectual-disabilities-higher-ed-susan-senator>

that inclusion of children with severe autism and intellectual disability in a mainstream school will be counterproductive. Senator explains as follows:

For some at the most challenged end of intellectual ability, inclusion may be about *seeing* them for their own particular needs and abilities, and providing space, funding, and programs they can really benefit from. We can't all be in the center of the bullring, and some of us don't even need to be.<sup>95</sup>

This is an unambiguous call for the use of special education for children with special needs. However, the choice to send a disabled learner to a special need setting should be preceded by various considerations including making sure that the special need centre is equipped to meet the needs of the learner. Furthermore, ensuring that the learner is not simply dumped and forgotten in such a centre should be paramount. The special need centre should not be used 'to relegate a person or group of people to the status of inferior other'.<sup>96</sup> The Centre should not be used to keep learners with disabilities at the 'margins where most of the able-bodied population did not have to notice their existence'.<sup>97</sup>

American jurisprudence has played an important role to avoid the dumping of learners with severe disabilities in inappropriate centres. In this regard, the American case of *Daniel RR v State Board of Education*<sup>98</sup> is informative. In this case, the United States Court of Appeals, 5<sup>th</sup> Circuit held that a school district could rightfully refuse to admit a learner with disability in a classroom with his non-disabled counterparts. Nevertheless, it also highlighted that learners with disabilities should be educated in the less restrictive environment or in a regular education classroom to the 'maximum extent appropriate',<sup>99</sup> and that the removal of such learners from such environment should be submitted to the following test:<sup>100</sup>

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(last accessed 24 March 2016).

<sup>95</sup> *Ibid.*

<sup>96</sup> Pothier n 38 above 121.

<sup>97</sup> *Id* at 131.

<sup>98</sup> *RR v State Board of Education et al* 874 F 2d 1036; 53 Ed Law Rep 824 (5<sup>th</sup> Cir 1989) for more discussion of this case see Boston-Kemple (n 74 ) 17–18; also McDonough 'The mainstreaming requirement of the individuals with disabilities Education Act in the context of autistic spectrum disorders' (2007) 35/5 *Fordham Urban Law Journal* 1226, 1240.

<sup>99</sup> *RR State Board of Education et al* n 98 above.

<sup>100</sup> *Ibid.*

- (1) Can education in the regular classroom, with the use of supplementary aids and services, be achieved satisfactorily for a particular student?
  - (a) Has the school taken sufficient steps to accommodate the student in the regular classroom with the use of supplementary aids and services and modifications?
  - (b) Will the student receive educational benefit from the regular education?
  - (c) What will be the effect of the student's presence in the regular education classroom on the education of the other students?
- (2) If the student is to be removed from a regular education classroom and placed in a more restrictive setting, has the student been mainstreamed to the maximum extent appropriate?<sup>101</sup>

These questions clearly prohibit the dumping of learners with disabilities into so-called 'special schools' on the ground that they have 'special needs' without taking all necessary measures to accommodate them into mainstream schools. This was reiterated through the *Oberti* case in which<sup>102</sup> the judge held that placing a learner with severe disability in a special centre cannot be done without considering a 'whole range of supplemental aids and services' in a mainstream classroom.<sup>103</sup> Importantly, the court also held that the need for adjustment 'is not a legitimate basis upon which to justify excluding a child from the regular classroom unless the education of other students is basis upon'.<sup>104</sup>

At first sight, it could be argued that the arrangement of inclusive education by post-apartheid South Africa captures the concept of inclusiveness thoroughly by accommodating 'full service schools' and 'special schools' in the same policy. It turns former special schools into support centres in mainstream schools. As indicated above, the SIAS strategy had been adopted to identify who needs help and how it can be provided for mentally disabled learners. However, as will be demonstrated below, learners with severe or profound intellectual disability are discriminated against or simply kept away from schools. Therefore, in a context of inclusive education, labelling or categorising some learners as 'special needs' to be taught in 'special education' settings perpetuates exclusion. In fact, categorising is exactly what should not be done if inclusion it is to become a reality. Waterhouse

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<sup>101</sup> *Id* at 874 F.2d 1048–49.

<sup>102</sup> *Oberti v Board of Education* 995 F 2d 1204 (3<sup>rd</sup> Cir 1993).

<sup>103</sup> *Id* at 1204.

<sup>104</sup> *Id* at 1207.

and Virgona argue that labels ‘may promote prejudicial judgments serving to relegate people into pigeon holes in life by defining them in terms of their disability’.<sup>105</sup> In a similar perspective, Ngwena and Pretorius correctly observe: ‘Categorisation frequently has the effect of legitimising status subordination even if that was not the intended outcome’.<sup>106</sup> It could, therefore, be argued that categorising or labeling some learners as ‘those with severe disability’ can only hinder their inclusion in schools.

Waterhouse and Virgona however, caution against discarding labels which have ‘the potential to liberate and to empower’ because the identification and acknowledgement of a disability enable policy makers to adopt appropriate strategies, allocate sufficient resources to provide much needed support.<sup>107</sup> Unfortunately, as will be demonstrated below, labelling some learners with ‘severe intellectual disability’ simply keep them at the margins of basic education in post-apartheid South Africa.

### **THE EXCLUSION OF LEARNERS WITH SEVERE INTELLECTUAL DISABILITY FROM SCHOOL IN POST APARTHEID SOUTH AFRICA**

As indicated at the introduction of this article, in the South African context, the concept of severe and profound intellectual disability is in line with the global understanding, which is related to limitation of functioning. In this regard, the South African Mental Health Care Act defines severe and profound intellectual disability to be:

[A] range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self-care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care’.<sup>108</sup>

This section examines the extent to which the transformative constitution departs from the principles established in 1967 by the Van Wyk report. Put differently, this section focuses on whether subsequent to the adoption of the 1996 Constitution, learners with severe intellectual disabilities have been

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<sup>105</sup> Waterhouse & Virgona *Contradicting the stereotype: case studies of success despite literacy difficulties* (2005) 5.

<sup>106</sup> Ngwena & Pretorius n 60 above 112.

<sup>107</sup> Waterhouse & Virgona n 105 above.

<sup>108</sup> The Mental Health Care Act 17 of 2002 s 1 (xxxvi).

included in the basic education system. Unfortunately, the discriminatory arrangements which excluded learners with severe intellectual disabilities from the basic education system, which were contained in the Van Wyk report, were not parts of the transformation brought about by the 1996 Constitution and its policies of implementation. This view was clearly exposed by the facts and decision of the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Government of the Province of the Western Cape*.<sup>109</sup>

In this case, the Western Cape Forum for Intellectual Disability, a body comprising non-governmental organisations (NGOs) that care for 1 000 children in the Western Cape where around 1,500 are severely or profoundly intellectually disabled,<sup>110</sup> brought an application to court to enforce the constitutional rights of these children. As a matter of fact, children with severe (IQ levels of 20 to 30) or profound (IQ levels of less than 20) intellectual disabilities were not admitted to special schools or to any other government schools.<sup>111</sup> Both the national and provincial governments (the respondents) failed to provide schools for such children in the Western Cape. As a result, the approximately 1 500 severely or profoundly disabled children in the Western Cape became the responsibility of Special Care Centres, ran by NGOs such as that of the Western Cape Forum (the applicant).

Interestingly, the government's only contribution to the education of these children was a subsidy paid to the organisations involved through the Department of Health. The financial support provided for children with severe and profound disability was less than that offered to children with no disability and low level of disability. To be precise, in the Western Cape, the Department of Health paid an annual subsidy of R5 092 per child per annum for children with severe or profound intellectual disabilities who attended Special Care Centres; R6 632 per child per annum for children who attended mainstream schools, and R26 767 per child per annum for children with mild to moderate intellectual disabilities who attended special schools.<sup>112</sup> The applicant argued that these discriminatory practices revolving around the lowest funding for children with severe and profound intellectual disabilities

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<sup>109</sup> *Western Cape Forum* 2011 5 SA 87 (WCC).

<sup>110</sup> *Id* at par 48.

<sup>111</sup> *Western Cape Forum* n 110 above at par 3 at 3.1–3.3.

<sup>112</sup> *Id* at par 3 at 3.8–3.8.3.

and the placement under the care of NGOs violated the rights to education, equality,<sup>113</sup> human dignity,<sup>114</sup> and protection from neglect and degradation<sup>115</sup> of these children.

The respondents claimed that their policy was logically justifiable because it was linked to the legitimate government purpose to ensure access to education to children with intellectual disabilities in a period of financial difficulties. They also claimed that the SIAS Strategy and Policy explained the approach used by the government to include children with disabilities in the education system. In addition, without explaining why the burden of financial challenges shall be exclusively on children with severe and profound disabilities, the respondents portrayed financial constraints as the cause of low financing of children with intense mental disability.<sup>116</sup>

Given that White Paper 6 does not provide for the specific accommodation of children with severe or profound disabilities in special schools, the respondents argued that some of these children will have access if they are able to ‘acquire sufficient skills’ or if they ‘achieve the minimum outcome and standards linked to the grade of education’. Admission to a special school will be on the basis of an assessment of a child’s level of educational need. Children who fall within levels 4 and 5 of the SIAS Strategy will be admitted to special schools.<sup>117</sup> Those whose level of need is higher than that ‘will receive education through Partial Care Centres’ such as those run by the applicant’s members.

It could, therefore, be argued that the SIAS strategy was diverted from its original aim to identify neediest learners and provide appropriate assistance, into a tool to categorise and exclude learners with severe and profound intellectual disabilities from school.<sup>118</sup> Indeed, this sounds like the implementation of the 1967 Van Wyk report which excluded severe or profound mentally disabled learners, so-called ‘untrainable’ from government special schools. In addition similar to the Van Wyk Report recommendation, children with severe or profound mental disabilities are excluded from the Department of Education funding and have to seek

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<sup>113</sup> Section 9.

<sup>114</sup> Section 10.

<sup>115</sup> Section 28(1)(d).

<sup>116</sup> *Western Cape Forum* n 109 above at par 29.

<sup>117</sup> *Id* at par 19.

<sup>118</sup> *Ibid.*



education in special care centres that rely on minimal subsidy from the Department of Health. This led Palesa Tyobeka, former Deputy Director General of Education in South Africa to argue that

Special needs education is a sector where the ravages of apartheid remain most evident. Learners with disability experienced great difficulty in gaining access to education. Very few special schools existed and they were limited to admitting learners according to rigidly applied categories. Learners who experienced learning difficulties because of severe poverty did not qualify for educational support.<sup>119</sup>

In the same vein, the exclusion of children with severe and profound intellectual disabilities is illustrated by the fact that these children are not in government schools but in private settings subsidised by the Department of Health and not of Education. This seems to suggest that children in these settings are simply ill, hence the Department of Health's intervention. This is the medical model of disability which carries stigma as it ignores environmental challenges faced by PWDs. It contrasts with the social and human rights models of disability which consider environmental constraints faced by PWDs and advocated the CRPD respectively.

The other discriminatory element against children with severe and profound disabilities is underlined by the fact that NGOs caring for the neediest received mere subsidies which are not compulsory. Ngwena and Pretorius correctly observe that the word subsidy is 'an essentially *benevolent* form of state augmentation of private means to assist the recipient in achieving its goals.'<sup>120</sup> Though the government is allowed to outsource or rely on NGOs to provide services to its citizens<sup>121</sup> and specifically mentally disabled children, it cannot be relieved from its constitutional role of duty bearers of human rights.<sup>122</sup> Therefore, children with severe or profound mental disabilities are simply denied the right to education. Cleaver J clarifies:

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<sup>119</sup> Department of Education 'Special needs education. Building an inclusive education and training system' (2001) 6 *Education White Paper* 9 available at: <http://www.education.gov.za/LinkClick.aspx?fileticket=gVFccZLi/tl=:> (last accessed 25 March 2016).

<sup>120</sup> Ngwena & Pretorius n 60 above 99 (my emphasis).

<sup>121</sup> For more on state funding of privately rendered social services see *National Association of Welfare Organisations and Non-Governmental Organisations v Member of the Executive Council for Social Development, Free State*, Case no 1719/10 FS, judgment 5 August 2010, reported in [2010] *JOL* 26056 (FB).

<sup>122</sup> *Western Cape Forum* n 109 above at par 24

[T]he fact is that at present children with severe or profound intellectual disabilities are excluded from special schools. More importantly, *White Paper 6* or the current implementation of government policy makes no provision for such children to be catered for by special schools at present. The respondents only say that their objective is to ensure, at an unspecified time in the future, that such children are catered for by special schools.<sup>123</sup>

This view was echoed by the court in the *Western Cape Forum* case. The court found for the applicant. It held that state education policy and practice constituted unfair discrimination under section 9(3) of the Constitution, infringed the right to basic education under section 29(1)<sup>124</sup> and violated children's right to dignity and the right to be protected from neglect and degradation.<sup>125</sup> In clarifying the unfair discrimination, the court relied on the *Harksen v Lane*<sup>126</sup> which emphasises the need to move from mere formal equality to substantive equality. On this point, the respondents failed to demonstrate why the lack of financial resource affected only the rights of learners with severe and profound disabilities. The respondents also failed to show their available resources and what would have been the surplus in catering for the educational needs of children with severe or profound intellectual disabilities.<sup>127</sup>

The court was also of the view that the policy failed the reasonable test established by the *Grootboom* court.<sup>128</sup> Accordingly, a programme that excludes an important segment of society (such as the approximately 1 500 severely or profoundly disabled children in the Western Cape) is unreasonable.<sup>129</sup> Furthermore, the failure to ensure the right to learners with severe and profound disabilities was not justified under the limitation clause of the Constitution<sup>130</sup> because the education policy and practice subject of the dispute was not a law of general application.<sup>131</sup>

As far as the violation of the right to basic education is concerned, informed by the case of *Ex Parte Gauteng Provincial Legislature*, the Court found that

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<sup>123</sup> *Id* at par 18.

<sup>124</sup> *Id* at par 26.

<sup>125</sup> *Id* at par 47.

<sup>126</sup> 1998 1 SA 300 (CC); 1997 (11) BCLR 1489 (CC) par 53

<sup>127</sup> *Id* at par 29–30.

<sup>128</sup> *Grootboom v Government of the Republic of South Africa* 20011 SA 46 (CC).

<sup>129</sup> *Id* at par 43.

<sup>130</sup> Section 36 of the Constitution

<sup>131</sup> *Western Cape Forum* n 109 above at par 39.

section 29(1) was violated because not only did the respondents fail in their positive duties to ensure the availability of schools for basic education of children with severe or profound mental disability, they also violated their negative duties not to interfere with the admission of these children into special schools.<sup>132</sup> The court concluded in these terms

[T]he applicant has established that the respondents are infringing the rights of the affected children, both in respect of the positive dimension of the right, by failing to provide the children with a basic education and also in respect of the negative dimension of the right, by not admitting the children concerned to special or other schools. As I have attempted to show, there is in my view no valid justification for the infringement of the rights of the affected children to a basic education and to equality.<sup>133</sup>

In reaching this decision, the court was empowered by the Constitution which enables the court ‘to consider international and foreign law’,<sup>134</sup> and the court was also informed by the *O’Donoghue* decision<sup>135</sup> which compels the state to adopt ‘a completely different programme of education’ to meet the educational need of learners with disabilities.<sup>136</sup>

Indeed, the facts and decision of the *Western Cape Forum* case clearly show that learners with severe disabilities in post-apartheid South Africa are still treated like they were during apartheid where they were considered ‘uneducable’. Consequently, it is contended that the Constitution has not been transformative for them. However, the seed of hope lies in the fact the government in compliance with the court order to remedy the situation has been taking actions. For instance measures taken include the adoption of the 2011 Guidelines for Responding to Learner Diversity in the Classroom through Curriculum and Assessment Policy Statements.<sup>137</sup>

In addition, with specific reference to children with severe and profound mental disabilities, there is a 2012 report on ‘[a]ctions taken by the

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<sup>132</sup> *Western Cape Forum* n 109 paras 6, 45; *Ex Parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) par 9.

<sup>133</sup> *Western Cape Forum* n 109 above par 45 at 108.

<sup>134</sup> Section 39 (1) (b)&(c).

<sup>135</sup> *O’Donoghue* n 91 above

<sup>136</sup> *Ibid.*

<sup>137</sup> Department of Basic Education 2011 available at: <file:///C:/Users/dkamgsa/Downloads/Responding%20to%20Diversity%20Final%202011.pdf> (last accessed 24 March 2016).

Department of Basic Education to develop a framework for the provision of services to children with severe and profound intellectual disabilities'.<sup>138</sup> Among others, after expressly acknowledging that learners with severe intellectual disabilities are currently excluded from basic education system, the government commits to ensure that the basic education becomes an entitlement for learners with severe disability.<sup>139</sup> For this to happen, the curriculum framework will be inclusive of the needs of learners with severe intellectual disabilities,<sup>140</sup> the training of teachers will be responsive to the needs of these children and a multidisciplinary team comprising special-needs teachers, psychologists, therapists and social workers could be tasked to design programmes and training, to mentor and monitor care centres staffs in charge of learners with severe intellectual disabilities.<sup>141</sup>

Furthermore, the use of IQ for assessing the severity of disability and as a test for admission has been replaced by the International Classification of Functioning, Disability and Health. This approach suggests that disability is an 'expression of difficulties that arise as a result of a combination of personal, health-related, functional and environmental factors'.<sup>142</sup> This approach provides a bridge to look at disability rights and more importantly severe intellectual disability from a social model and human rights perspective which are enabling for PWDs. This set of actions by the government seem to be the solutions for the inclusion of learners with severe intellectual disabilities in the education system. Nevertheless, it is important to wait and see how these measures will play out in the implementation phase.

## **CONCLUDING REMARKS**

The aim of the paper was to interrogate the extent to which the South African Constitution had been transformative for children with severe or profound intellectual disabilities in terms of ensuring their access to basic education. To attain this objective, the paper looked at three main issues. First, it focused on post-apartheid legal and policy frameworks that depart

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<sup>138</sup> Report on Action Taken by the Department of Basic Education to Develop a Framework for the Provision of Services to Children With Severe and Profound Disability (31 July 2012). Available at: [http://www.saaled.org.za/R2ECWD/docs/Report\\_on\\_Services\\_to\\_Children\\_With\\_SP\\_ID\\_DBE\\_31\\_July\\_2012\\_\(2\).pdf](http://www.saaled.org.za/R2ECWD/docs/Report_on_Services_to_Children_With_SP_ID_DBE_31_July_2012_(2).pdf) (last accessed 24 March 2016).

<sup>139</sup> *Id* at par 16.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Id* at par 21.2.

<sup>142</sup> *Id* at par 24.

from apartheid ideology of discrimination to a society informed by human dignity and equality resulting in inclusion in the education sector. Second, it examined the philosophy underpinning inclusive education in South Africa. In this section where the concept of inclusive education is unpacked through an examination of foreign jurisprudence among others, it is argued that the country adopt an approach which allows the use of inclusion in mainstream school and the use of special schools. Third and finally, the paper examined the inclusiveness of children with severe intellectual disabilities in the country.

The paper found that in a constitutional democracy such as South Africa, the government must adopt rights-based legislations and social policies that pursue a distributional pattern centered on all the neediest in general and in the education sector specifically. In addition, the government should ensure the availability of financial and human resources for the implementation of such policies to the benefit of *all*. However, though this had happened on the inclusiveness of education in South Africa, (through White Paper 6), these developments forsake children with severe and profound mental disabilities. These children are simply not admitted to any government schools, are abandoned to ill subsidised NGOs or are simply not factored in legal and policies framework for inclusive education.

Subsequent to the decision of the court in the *Western Cape Forum* case, the government adopted enabling measures to ensure the inclusion of learners with severe intellectual disability in the education system. Nonetheless, it is too early to examine the effectiveness of these measures which are not yet fully implemented. However, it is hoped that the decision of the court in the *Western Cape Forum* case will not only compel the government to effectively include children with severe or profound disability in schools, but will also inspire other African countries on how to go about giving effect to article 24 of the CRPD.