

C Ngwena

Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue

Summary

In essence, the article explores the development of disability as a human rights issue with a particular focus on equality in the workplace. It draws from developments that have been taking place at the international plane as well as in other jurisdictions. Throughout, the article seeks to ultimately relate disability to the South African workplace. It is submitted that human rights jurisprudence has been slow in harnessing equality as a normative tool for overcoming prejudice and indifference in the workplace environment. However, in the last two decades or so, there has been a paradigm shift, with disability emerging as a human rights issue at international and domestic levels. The growing recognition of the concept of reasonable accommodation as a mechanism for realising equality for people with disabilities in the workplace, is one of the most promising signs of a new approach to disability.

Gelykheid vir persone met gestremdhede in die werkplek: 'n oorsig van die verskyning van gestremdheid as 'n menseregte-aangeleentheid

In hoofsaak ondersoek die artikel die ontwikkeling van gestremdheid as 'n menseregte-aangeleentheid met 'n besondere beklemtoning van gelykheid in die werkplek. Daar word geput uit ontwikkelings wat plaasgevind het op internasionale terrein sowel as in ander jurisdiksies. Deurgaans word daar gepoog om gestremdheid in verband te bring met die Suid-Afrikaanse werkplek. Dit word aan die hand gedoen dat menseregte-jurisprudentie traag was om gelykheid as 'n normatiewe instrument in te span om vooroordeel en ongeërgdheid in die werksomgewing te oorkom. Gedurende die afgelope ongeveer twee dekades het daar egter 'n paradigmaterskuiwing plaasgevind, met gestremdheid wat as 'n menseregte-tema op internasionale en plaaslike vlak ontwikkel het. Die groeiende erkenning van die begrip redelike akkommodasie as 'n meganisme vir die verwerkliking van gelykheid vir mense met gestremdhede in die werkplek, is een van die mees belowende tekens van 'n nuwe benadering tot gestremdheid.

1. Introduction: a historical experience of inequality

Pre-democratic South Africa had close parallels with a medieval legal order. The apartheid political economy, especially, came to be defined by extreme socio-economic disparities that were underpinned by race. Different racial groups stood in a hierarchical relationship to one another, each occupying a different station in life commensurate with a state-sanctioned notion of racial worth. The system came to reflect the theme in Alexander's hymn 'All things bright and beautiful' (1848):¹

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

Oppression did not only manifest in race, however. Women were also a subjugated class. A combination of the paterfamilial traditions of Roman Dutch law and African customary law ensured that women, especially black women, were in many areas of life, legal appendages to men.² Over and above black people and women, other groups were also marginalised. People with disabilities are one such group.³

Historically, people with disabilities have constituted a minority that has been the object of unfair discrimination and stigmatisation.⁴ Available evidence suggests that people with disabilities suffer indignity, widespread discrimination and lack of economic independence. Disability is a major impediment to the realisation of equal opportunities in South Africa and elsewhere. Doyle has described the global historical plight of people with disabilities as one of a minority sandwiched between two unenviable extremes.⁵ At one extreme, they have been at the receiving end of social neglect and unfair discrimination. At the other extreme, they have been the object of imposed charity, social welfare and undue paternalism that has kept them in a perpetual state of dependence and social inferiority.⁶

1 Quoted in Minnow 1990: 122.

2 Kaganas & Murray 1994: 1-38.

3 In recent years, the term 'people with disabilities' has become preferable to terms such as the 'disabled' or the 'handicapped'. The latter terms carry an historical connotation of social inferiority that places emphasis not so much on the capabilities of the affected individual but on their limitations: Committee on Economic, Social and Cultural Rights, General Comment 5, UN ESCR, 1994, Doc. No. E/1995/22; Shakespeare 1999: 30. Current preference for the term 'people with disabilities' is also a consequence of the shift from a 'medical' model to a 'social model' which is discussed in this article.

4 Doyle 1995:1.

5 Doyle 1995:1.

6 Doyle 1995:1.

In 1994, the United Nations estimated that there were more than 500 million people living with disabilities in the world.⁷ About 80% lived in developing countries and were concentrated in rural areas. A large majority (70%) had limited or no means of access to the services they required. People with disabilities are not a strong political constituency. They are particularly vulnerable to discrimination. Negative societal attitudes, the built environment, the education and the transport systems have all marginalised them. More crucially, employment, which holds out a great potential for redressing historical inequalities, fostering social and economic independence, and securing self-actualisation, has been largely denied to people with disabilities.⁸ Hence the global experience of people with disabilities has been one of under-representation in the formal labour force, and over-representation among the poor and unemployed, with unemployment rates that are much higher than their counterparts without disabilities.⁹ South Africa is no exception.

The South African demographic profile of people with disabilities and their representation in the workplace conforms to a paradigm of a disadvantaged and impoverished minority. In a recent report, the South African Human Rights Commission noted that people with disabilities in South Africa continue to face barriers that prevent them from enjoying their full civil, political, economic, social, cultural and developmental rights.¹⁰ A survey that was conducted in 1999 and published in 2000 showed that people with disabilities, who are estimated to constitute about 6% (about 2.5 million people) of the population, are disproportionately poor, unemployed and excluded from many sectors of social life.¹¹ They experience extreme difficulties in accessing education and vocational training.¹² Equally, they face serious barriers to employment, with an estimated 88% either unemployed or underemployed, but looking for employment.¹³ The employment figures of people with disabilities are less than a third of the employment rate of the general population.¹⁴ The Commission for Employment Equity has also confirmed the under-representation people with disability in the workplace in its annual reports. In its 1999-2001 report, the Commission for Employment Equity reported that people with disability constituted less than 1% of the employees that were reported under the *Employment Equity Act*.¹⁵ In the 2002 and 2002-2003 reports, the proportion

7 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 5*, UN ESCOR, 1994, Doc. No. E/1995/22; Wallace 1997:265; Nuefeldt & Mathieson 1995:175.

8 Kavka 1992:262.

9 Nuefeldt & Mathieson 1995:175; Despouy 1994.

10 South African Human Rights Commission 2002:5.

11 Community Agency for Social Enquiry 2000:4,9; *Mail and Guardian* 4-10 February 2000.

12 Community Agency for Social Enquiry 2000:11, 23-28; *Mail and Guardian* 4-10 February 2000.

13 Community Agency for Social Enquiry 2000:28-29; *Mail and Guardian* 4-10 February 2000; Silver & Koopman 2000:16.

14 Community Agency for Social Enquiry 2000:28.

15 Commission for Employment Equity Report 1999-2001 2001:29.

of employees with disabilities remained more or less the same.¹⁶ Thus, the nexus between disability and exclusion from the workplace is well established.

Against the backdrop of the marginalisation of people with disabilities, this article will, in essence, chart the progress towards the recognition of disability as a human rights issue. The focus will be on the achievement of equality of opportunities in the workplace. The article draws from developments that have been taking place at the international plane as well as in other jurisdictions. Throughout, the article seeks to ultimately relate disability to the South African workplace. It is submitted that human rights jurisprudence has been slow in harnessing equality as a normative tool for overcoming prejudice and indifference in the workplace environment. However, in the last two decades or so, there has been a paradigm shift, with disability emerging as a human rights issue at international and domestic levels. The growing recognition of the concept of reasonable accommodation as a mechanism for realising equality for people with disabilities in the workplace, is one of the most promising signs of a new approach to disability.

2. Equality as a human rights tool for overcoming prejudice and other impediments in the workplace

The treatment of people with disability in the workplace raises difficult questions about how to secure the full enjoyment of human dignity, equality and freedom for a minority that has been the object of entrenched marginalisation. It brings to the fore questions about the efficacy of law as an instrument for securing equality and social justice for people that have historically been assigned to the bottom of the social ladder. In the particular circumstances of the workplace, it raises questions about the kind of reparative or compensatory justice that is necessary to ensure that people with disabilities are able to enter and advance in employment without the serious impediments that they have hitherto faced.

In one sense, people with disabilities share common characteristics with other historically disadvantaged groups. They have been the object of unfair discrimination and stigmatisation in the past. Empirical studies have demonstrated that the under-representation of people with disabilities in the job market and in occupational categories and their under-remuneration cannot be explained solely on the general differential levels of educational and skills attainment between persons with and persons without disabilities.¹⁷ Prejudice by employers is a significant impediment. Employers tend to treat disability as synonymous with incapacity to perform the inherent requirements of the job.¹⁸ People with

16 As at 15 July 2002, people with disabilities constituted 0.9% of employees reported under the *Employment Equity Act*. Commission for Employment Equity 2002: 28. At the end of 2002, they constituted 1%: Commission for Employment Equity 2003:21.

17 Hallock *et al* 1998; Baldwin & Johnson 2000; Productivity Commission 2004: A.14-A.28.

18 Ravaud *et al* 1992:951-958.

disabilities are labelled as not only different, but also abnormal.¹⁹ In another sense, however, people with disabilities are unlike other groups that have historically been marginalised in the workplace in that they tend to exhibit real physical and/or mental limitations which may affect the manner in which they can perform the job. They are faced with barriers that have been erected by employers as well as society in general on the assumption that every person can hear, see, walk run etc. This pervasive implicit assumption of 'able-bodiedness' constitutes a real impediment to entering into, or advancing in, employment. Thus, it is not just prejudice that must be overcome. Real physical or mental differences must also be taken into cognisance if people with disabilities are to enjoy equal opportunities in the workplace.

It is universally accepted that equality is a central principle for addressing the discrimination and disadvantage suffered by people with disabilities in the workplace. At the same time, equality is a contested concept.²⁰ Though the concept of equality has a variety of meanings, the formal equality and substantive equality models have emerged as the main counterpoints, with each model purporting to redress inequality in different ways and proportions.

Formal equality is best associated with Aristotelian equal treatment model, which essentially says that likes must be treated alike.²¹ This 'equal treatment' or 'similarly situated' model of equality does not countenance special measures to redress structural inequalities. It does not, for example, countenance taking special compensatory measures to accommodate a person who is unable to meet stipulated requirements on account of disability. Formal equality is concerned with uniform treatment, and yet it does not necessarily provide a yardstick for determining when two people are similarly situated.²² It requires that all persons be evaluated by neutral rules regardless of any disparate effect on certain individuals or groups. Because of its insistence on uniform treatment, formal equality would be ill suited to recognising the legitimacy of treating people with disabilities unequally, as it were, so as to achieve equality. In the workplace, formal equality would be impervious to the development and implementation of employment policies and practices that recognise the legitimacy of dismantling the unique barriers that people with disabilities face.

Because disability is highly heterogeneous, a more nuanced approach to equality than formal equality is more appropriate. The deeply entrenched systematic marginalisation of people with disabilities requires no less than a legal approach that recognises that disability takes many forms, and that the creation of an environment in which barriers that stand in the way of the rights to human dignity and equality of people with disabilities are dismantled, is a cardinal objective. It is not only the individual's functional capacity that should matter, but also the physical and socio-cultural environment.²³ An indifferent physical environment can be just as disabling as actual bodily or

19 Barnes 1996:43-60.

20 Pojman & Westmoreland 1997:1.

21 Aristotle 1980:113a-113b.

22 Western 1982:537-596; Rioux 1994:12.

23 Michailakas 1999:121.

mental impairment. As a counterpoint, substantive equality has the potential to respond to many of the shortcomings of the formal equality approach.

Day and Brodsky have posited the difference between formal equality and substantive equality in the following way:

The formal model of equality implies that the existing frameworks are acceptable, except that there are occasional incidents of prejudice and perhaps some marginalisation of certain groups. The situation is to conciliate between individuals when there are incidents of prejudice and to ensure that all groups are included in existing institutions by being treated the same as those that are already inside. In other words, this version of equality anticipates little change in the functioning of institutions.

A substantive model of equality, which considers inequality in conditions and imbalances of power among groups, anticipates a deeper level of change. It posits that the functioning of institutions and the structure of relationships among groups must change significantly, and that working towards equality is a process to transformation, not a minor adjustment.²⁴

Though the substantive equality model has many variants, it is at least distinguishable from the formal equality model in that it recognises that people in different positions and starting points cannot compete equally.²⁵ It countenances treating people unequally in order to bestow equal opportunities. Substantive equality goes beyond equal treatment to eliminate not only differential treatment based on prejudice, but also subtle forms of discrimination and the effects of past unequal treatment.²⁶ In its most radical or utopian form, it seeks not only to take into account structural inequalities, but even more significantly, to secure equality of outcome. In its ultimate form, substantive equality is a principle of egalitarian justice which aims to attain equal moral worth and respect for everyone.²⁷

In the particular context of disability, the substantive equality model can be likened to what Minnow has described as the 'social relations approach' for dealing with the dilemma of difference in a society that is committed to inclusion and pluralism rather than exclusion and homogeneity.²⁸ Like Minnow's 'social relations approach', substantive equality questions the assumption that difference is located solely in the person who is different.²⁹ When a source of inequality is located in the individual rather than social arrangements, it tends to confer legitimacy to social inequality.³⁰ Substantive equality does not endorse the status quo of assigning people with disability to their historical position of exclusion from the workplace. Rather, it treats existing institutional arrangements, including workplace arrangements, as possible sources of

24 Day & Brodsky 1996:461.

25 Albertyn & Kentridge 1994; Albertyn & Goldblatt 1998.

26 McCluskey 1988:866.

27 Nielsen 1985; Rioux 1994:127.

28 Minnow 1990:110.

29 Minnow 1990:111.

30 Rioux 1994:131.

the problem of difference, especially where the arrangements confirm the distribution of power in ways that are detrimental to the vulnerable and the disadvantaged.³¹

It is a paradox, however, that for too long, international human rights jurisprudence on disability remained trapped in the formal equality model. Global awakening about substantive equality as a tool for overcoming prejudice and indifference on the part of employers and the workplace environment has been slow to come.³² United Nations human rights instruments have largely not addressed disability as a discrete status, especially in the context of equality and non-discrimination. The United Nations Declaration of Human Rights of 1948³³ and the two subsequent covenants that were designed to give teeth to the Declaration, namely, the International Covenant on Civil and Political Rights of 1966³⁴ and the International Covenant on Economic Social and Cultural Rights of 1966,³⁵ did not expressly mention disability status in their provisions on equality and non-discrimination. This is not to suggest, however, that these provisions did not implicitly include disability status. Rather, it is to emphasise an oversight on the part of international human rights bodies and forums in consciously formulating human rights provisions to include disability. Indeed, in *General Comment 5*, the Committee on Economic, Social and Cultural Rights has taken cognisance of the lack of explicit provisions addressing disability in early human rights instruments.³⁶

It was only in the 70s that the United Nations began to consciously address disability as a human rights concern. In 1971, the United Nations General Assembly adopted the Declaration on the Rights of Mentally Retarded Persons.³⁷ The Declaration on the Rights of Disabled Persons followed in 1975.³⁸ While these declarations expressly proclaimed that people with disabilities were the subject of human rights protection, they were, nonetheless, limited in their orientation of disability. The major flaw seems to have been in the adoption of a medical model of disability where the defining criterion is functional impairment as an outcome of an actual physical or mental impairment, with rehabilitation of the *disabled* person as the focal point.³⁹ Under the medical model, disability is a deviance from the norm.⁴⁰ The medical model locates the problem of difference in the person labelled as different. To compensate

31 Minnow 1990:112.

32 Wallace 1997:265; Hendricks 1995:153; Degener & Quinn 2000:11.

33 United Nations General Assembly Resolution 217A (III) of 10 December 1948.

34 United Nations General Assembly Resolution 2200 (XXI) of 16 December 1966.

35 United Nations General Assembly Resolution 21/2200A.

36 Committee on Economic, Social and Cultural Rights, General Comment 5, UN ESCR, 1994, Doc. No. E/1995/22, par 6.

37 United Nations General Assembly Resolution 2856 of 1971.

38 United Nations General Assembly Resolution 3447 of 1975.

39 The medical model of disability owes much to the definition of disability by the World Health Organisation (WHO). WHO defines disability as the outcome of an impairment and in turn defined impairment as 'any loss or abnormality of psychological, physical, or anatomical structure of function': World Health Organisation 1980.

40 Neufeldt & Mathieson 1995:176; Philpott & McLaren 1997:179-181.

for this deviance, people with disabilities are made the object of social security and welfare, without attempting to address the social and political undertones of a disability label. It is the *disabled* person who has to be rehabilitated so as to be integrated into an existing *normal* environment. The United Nations declarations did not demonstrate any awareness that disability could also be a result of social judgment and labelling in which perceptions of groups or individuals in society play a significant disabling role. There was no realisation that despite possessing impairment, many people with disabilities are able to perform the job once the environment or the job structure is adapted to accommodate their functional limitations. Also, the fact that equality could be employed in a substantive sense as a central principle for restoring the human dignity of people with disabilities was not appreciated.

The 80s and 90s, however, saw the beginnings of significant, and to some extent, concerted efforts to understand disability differently. The focus of attention began to shift from functional impairment and rehabilitation to the disabling environment itself. There was a move towards a social model of disability and a focus on equality as the cardinal principle for securing equity for people with disabilities. The social model has sought to redefine disability so that it is perceived through the range of normal human experience.⁴¹ Unlike the medical model, the social model does not look at the impairment only.⁴² It also considers how society interacts with disability and whether societal structures such as the workplace can be altered so as to facilitate the participation of a person with a disability in mainstream society.

It needs stressing, however, that it would be simplistic to perceive the medical and social models as mutually exclusive concepts that are in a dichotomous relationship. Both models are necessary for addressing disability.⁴³ The medical model is often the starting point. It is useful in identifying individuals that have physical or mental impairments. The social model, on the other hand, serves to illuminate discrimination as a social phenomenon and provides a more nuanced approach for addressing discrimination. The World Health Organisation has endorsed the complimentary relationship between the medical and social model in the following statement:

Disability is a complex phenomena that is both a problem at the level of a person's body, and a complex and primarily social phenomena. Disability is always an interaction between features of the person and features of the overall context in which the person lives, but some aspects of disability are almost entirely internal to the person, while another aspect is almost entirely external. In other words, both the medical and social responses are appropriate to problems associated with disability; we cannot wholly reject either kind of intervention.⁴⁴

41 Neufeldt & Mathieson 1995:176; Goffmann 1961; Wolfensberger 1972; McCluskey 1988:872.

42 Doyle 1995:7-8.

43 Productivity Commission 2004:15.

44 World Health Organisation 2002:9.

A significant development in the global shift towards a social model was the adoption by the General Assembly in 1982 of the World Programme of Action on Disability.⁴⁵ This Programme of Action explicitly recognised the goal of securing equal opportunities as one of its objectives. It sought to equalise opportunities so that the general system of society such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities 'are made accessible to all.' Whilst a variety of other developments followed,⁴⁶ the most significant was the adoption by the General Assembly in 1993 of the United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (Standard Rules).⁴⁷

In respect of equalisation of opportunities, the Standard Rules reinforced the World Programme of Action and recognised that impediments that are erected by society and the environment are as much a limitation as the disability itself. Thus, the Standard Rules subscribe to a social rather than medical model of disability. States are called upon to remove obstacles that prevent people with disabilities from participating fully in the activities of the society in which they live.⁴⁸ Equalisation of opportunities under the Standard Rules means 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'.⁴⁹ The Standard Rules directly appeal to equality as a transformative principle by stating that:

The principle of equal rights means that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity and participation. Persons with disabilities are members of society and have the right to remain within their local communities. They should receive the support they need within the ordinary structures of education, health, employment and social services.⁵⁰

The approach of the Standard Rules to equality clearly signalled a departure from exclusion to inclusion so that people with disabilities participate in political, social and economic activities. Over and above the requirement on the part of the state to raise awareness about persons with disabilities, their rights, needs, potential and contribution to society,⁵¹ the Standard Rules contain sector-related guidelines on obligations that the state must discharge. These

45 General Assembly Resolution 37/52.

46 For example, the years 1982-1993 were declared The United Nations Decade of Disabled Persons and December 3 was proclaimed International Day of Disabled Persons by the General Assembly so as to raise awareness throughout the world about disability and the value of integrating people with disability into every area of social, economic and cultural life: Wallace 1997: 286-7.

47 United Nations General Assembly Resolution 48/96.

48 Wallace 1997:265.

49 Standard Rules, par 24.

50 Standard Rules, pars 24-27.

51 Standard Rules, par 1.

guidelines are set as 'preconditions for equal participation'. In the employment sector,⁵² the Standard Rules cover a whole range of positive obligations, where states are, *inter alia*, required to:

- recognise that people with disabilities must be empowered to exercise their human rights and that they must have equal opportunities for productive and gainful employment;
- ensure that laws must not discriminate against people with disabilities and do not raise obstacles to their employment;
- actively support the integration of people with disabilities into open employment through the adoption of measures such as vocational training, incentive-oriented quota schemes and assistance to enterprises employing people with disabilities;
- encourage employers to make reasonable accommodation for people with disabilities;
- adopt measures to design and adapt workplaces and work premises in such a way that they become accessible to people with disabilities;
- provide support for the use of new technology and the production of facilitatory devices;
- provide appropriate training, placement and support such as personal assistance and interpreter services;
- initiate and support public awareness-raising campaigns designed to overcome negative and prejudices concerning workers with disabilities;
- co-operate to ensure equitable recruitment and promotion, policies, employment conditions, rates of pay; and
- co-operate with organisations of people with disabilities concerning all measures to create training, and employment opportunities, including flexible hours, part-time, job-sharing, self-employment and attendant care for people with disabilities.

State compliance with the Standard Rules is monitored by a Special Rapporteur of the Commission for Social Development on Disability and a panel of experts. However, it must be borne in mind that compliance on the part of the state is merely voluntary. The Standard Rules are a mere resolution of the United Nations and are not part of an international treaty. They are essentially exhortatory. Their efficacy depends on the beneficence of the state.⁵³ This lack of binding force is designed rather than fortuitous. The Standard Rules are really the outcome of a compromise reached by members of the General Assembly after failing to reach consensus on adopting a draft Convention on the Elimination of all Forms of Discrimination against People with Disabilities that had been drawn up by Italy.⁵⁴ The General

52 Standard Rules, Rule 7.

53 Michailakis 1999:119, 122.

54 Michailakis 1999:120; Wallace *op cit* 286; Degener & Quinn 2002:13.

Assembly rejected the draft essentially on the ground that majority of member states would be opposed to ratification of the draft. It was also felt by the majority of members that people with disabilities were adequately protected under existing human rights instruments. In many ways, the rejection of the draft by an international body such as the General Assembly, underscores the marginal place that people with disabilities occupy in contradistinction to other historically marginalised groups such as women,⁵⁵ children⁵⁶ or racial groups⁵⁷ for whom protective international conventions have been adopted.

Despite their non-binding nature, however, the Standard Rules provide a practical framework for removing the real factors that impede the participation of people with disabilities in the workplace and in other spheres, given political willingness on the part of governments. They serve as an important guide for the international community in the formulation of disability-related domestic legislation and codes of good practice. They are an important adjunct to other international normative frameworks such as the standards set by the International Labour Organisation.

The International Labour Organisation (ILO) has contributed to the protection of people with disabilities in the workplace through recommendations made to, or obligations placed on, governments to adopt disability-related employment schemes and policies to enhance the employment prospects of people with disabilities. In 1923, the ILO emphasised the need for countries to recognise that society owes an obligation to “disabled” workers and that such workers have economic value. The ILO recommended compulsory employment schemes for people with disabilities. Subsequently, the ILO adopted the *Vocational Rehabilitation and Employment (Disabled Persons) Convention*⁵⁸ which required governments to formulate policies for vocational rehabilitation and the creation of employment for people with disabilities. Governments were to promote equal opportunities in competitive employment. Positive discrimination in favour of people with disabilities was mandated. In more recent times, the ILO has adopted a *Code of Practice on Managing Disability in the Workplace*.⁵⁹ The ILO Code seeks, *inter alia*, to provide guidance for the adoption of positive measures aimed at effective equality of opportunity for people with disabilities. To facilitate the recruitment and retention of people with disabilities, the ILO Code, *inter alia*, enjoins employers to: improve the accessibility of the workplace to people with different types of disabilities; make adjustments or adaptations that enable a person with a disability to perform the job effectively; and generally, where necessary, review the job description, and where

55 Convention on the Elimination of all Forms of Discrimination Against Women (1979) General Assembly Resolution 34/180, UN Doc A/34/46.

56 United Nations Convention on the Rights of the Child (1989), General Assembly Resolution 44/25.

57 International Convention on the Elimination of all Forms of Racial Discrimination (1966), General Assembly Resolution 2106 A(XX).

58 Convention No 159. See also ILO Vocational Rehabilitation and Employment (Disabled Persons) Recommendation No 99 of 1955; ILO Vocational Rehabilitation and Employment (Disabled Persons) Recommendation No 168 of 1983 and ILO.

59 International Labour Organisation 2001.

appropriate, dispensing with those parts that the person is unable to perform and supplanting them with other tasks. The ILO Code calls for flexibility in work schedules to enable a person with a disability to perform the job effectively.

Another significant international development is that, of late, more and more human rights instruments are beginning to specifically address disability in their provisions.⁶⁰ Furthermore, the Committee on Economic and Cultural Rights has reinforced the elevation of the profile of disability in human rights instruments by issuing a General Comment on persons with disability as part of delineating the parameters of the obligations of governments under the Covenant on Economic Social and Cultural Rights.⁶¹ In this connection, the Committee has endorsed the Standard Rules as of 'major importance' and a valuable guide to governments in identifying more precisely their obligations towards people with disabilities.⁶² Perhaps even more significantly, the Committee has explicitly said that disability-related discrimination includes 'denial of reasonable accommodation.'⁶³ As part of addressing 'prominent and persistent' disability-based discrimination in the workplace, the Committee has called upon governments to develop policies and laws that promote and regulate 'flexible and alternative work arrangements that reasonably accommodate the needs of disabled workers.'⁶⁴

3. Developments in selected jurisdictions other than South Africa

Speaking extrajudicially, a Canadian judge, Madame Justice Beverly McLachlin, said this:⁶⁵

Diverse societies face two choices. They can choose the route of no accommodation where those with power set the agenda and the majority rules prevail. The result is the exclusion of some people from useful

60 See, for example, article 23 of the Convention on the Rights of the Child. This Convention was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. See also article 18(4) of the African Charter on Human and Peoples' Rights that was adopted by the 18th Assembly of the Heads of State and Government of the Organisation of African Unity (now African Union), and entered into force on 21 October 1986; article 13 of the African Charter on the Rights and Welfare of the Child that was adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity (Now African Union) in July 1990 and entered into force on 29 November 1999; and article 18 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights that was adopted on 17 November 1988 at the 18th regular session of the General Assembly of the Organisation of American States, and entered into force on 16 November 1999.

61 Committee on Economic, Social and Cultural Rights, General Comment 5, UN ESCR, 1994, Doc. No. E/1995/22.

62 General Comment 5, par 7(d).

63 General Comment 5, par 15.

64 General Comment 5, par 22.

65 McLachlin 1995. Quoted in Day & Brodsky 1996:434.

endeavours on irrelevant, stereotypical grounds and a denial of human dignity and worth ...

The other route is the route of reasonable accommodation. It starts from the premise of each individual's worth and dignity and entitlement to equal treatment and benefit.

Writing about equality in the context of the Canadian Charter of Rights and Freedoms, Gibson has defined the duty of reasonable accommodation as comprising the adoption of positive measures that ought to be taken by an employer in order to meet the needs of job applicants or employees, who, by reason of disability, pregnancy, religion or some other characteristic that is protected against unfair discrimination, cannot be adequately served by arrangements that are suitable for people who do not have these characteristics.⁶⁶ Reasonable accommodation is not about merely abstaining from erecting barriers against people with disabilities. More importantly, it is about positively adopting measures to modify, adapt or adjust the workplace policies, practices, structures and environment in order to facilitate the entry into, advancement in, employment of people with disabilities.⁶⁷ It is, for example, about designing and adapting workplace and work premises so that they become accessible to people in wheelchairs or using new technology or devices to enable a deaf person to communicate at work.

In a number of jurisdictions, new laws have been enacted, or existing legal principles have been developed to protect and promote equal opportunities for people with disabilities in the workplace. A common approach in progressive laws is not only the proscription of unfair discrimination on the ground of disability. Even more significantly, it is also about recognising that difference created by disability requires accommodation. The United States⁶⁸ and Canada⁶⁹ have taken the lead in developing jurisprudence that seeks to align the medical model of disability with the social model. Countries such as Australia⁷⁰ and the United Kingdom⁷¹ have followed.

3.1 United States

In the United States, reasonable accommodation has its origins in civil rights jurisprudence of the 60s.⁷² Initially, it was developed to accommodate religious diversity in the workplace by allowing workers who could not work normal work schedules on account of religious observance days, to work on alternative days without losing their jobs.⁷³ A shortcoming, however, with the early American jurisprudence on reasonable accommodation is that it was construed narrowly

66 Gibson 1990:133.

67 Gibson 1990:133-137.

68 West 1991.

69 Day & Brodsky 1996.

70 Tucker 1995.

71 Doyle 2000.

72 Pretorius *et al* 2001:7-20; Kanter 1999:235.

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

by the Supreme Court. Reasonable accommodation was limited to circumstances where the employer would not incur more than a 'de minimis' cost in trying to accommodate the employee.⁷⁴ If transposed to people with disabilities, the *de minimis* ceiling would not significantly improve prospects of entry into, or advancement in employment as many disabilities often require significant rather than minimal modifications or adjustments in the manner the job is performed. Another limitation with the early jurisprudence is that reasonable accommodation tended to be limited to accommodating religious diversity only. There was no guidance from the Supreme Court about whether it could also be applied to other contexts such as people with disabilities. The first significant change came with the enactment of *Rehabilitation Act* in 1973.⁷⁵

The *Rehabilitation Act* sought to achieve equal employment opportunities for people with disabilities in the federal sector. Over and above prohibiting invidious discrimination and mandating affirmative action, the *Rehabilitation Act* expressly prohibited discrimination of a 'handicapped' person who was 'otherwise qualified' by any parties receiving federal funds. The Department of Health, Education and Welfare (HEW) which was charged by Congress with securing the objectives of the *Rehabilitation Act*, ascribed a generous interpretation to 'otherwise qualified' in the regulations that it developed.⁷⁶

Effectively, HEW interpreted otherwise qualified to mean a person with a disability who with 'reasonable accommodation' could perform the 'essential requirements' of the job. Also, HEW raised the ceiling of the employer's obligations. It departed from the erstwhile *de minimis* approach under the civil rights jurisprudence of the 60s in favour of 'undue hardship' as the yardstick for determining the ceiling of the employer's obligations when making reasonable accommodation.⁷⁷ Undue hardship would be determined flexibly by taking into account all the relevant factors, including the type of business and the nature and cost of accommodation. Thus employers were required to do more for people with disabilities by making the workplace and workplace facilities accessible, restructuring the job, modifying work schedules, acquiring or modifying workplace equipment and so on.

The *Rehabilitation Act* was supplanted in 1990 by the Americans with Disabilities Act (ADA).⁷⁸ Whilst ADA is wider in scope than the *Rehabilitation Act* in that it covers both federal and private employers, and is applicable outside the employment context, it essentially codifies the regulations that were developed by HEW under the *Rehabilitation Act*.⁷⁹ It employs the concepts of 'reasonable accommodation', 'essential functions of the job' and 'undue hardship' that were developed under the *Rehabilitation Act*, with the exception that this time the concepts are given recognition in primary legislation rather than in mere regulations only. Thus, much of the jurisprudence under the *Rehabilitation Act* and the Americans with Disabilities Act is interchangeable.

74 *Trans World Airlines v Hardison* 1997.

75 Pub L No 93-112, 87 Stat 355.

76 Murphy 1991.

77 Pretorius *et al* 2001:7-21.

78 Pub L No 101-336, 104 Stat 327, 42 USC § 1201-122213 (1990).

79 Pretorius *et al* 2001:7-22.

It is important to stress, however, that the concepts of reasonable accommodation, essential functions of the job and undue hardship are not aimed at dispensing with the inherent requirements of the job. Rather they are aimed at aligning what employers unilaterally stipulate as job requirements with the actual objective, verifiable job-related skills and aptitudes, taking into account the constitutional imperative of accommodating diversity in the workplace as part of the achievement of equality. The concepts ensure that job requirements that are stipulated by the employer are not superfluous and do not needlessly discriminate against people with disabilities. Job requirements must be objective and reasonably necessary for the effective and efficient discharge of the job. A person with a disability need only satisfy those aspects of the job that are objectively regarded as 'essential'. Marginal, or peripheral tasks are merely incidental to the performance of the primary tasks and are not regarded as essential functions. Where a job requirement cannot be met by a person with a disability, the employer has an obligation to explore and implement an alternative way of facilitating the job applicant or employee in meeting the requirement short of incurring a disproportionate burden in terms of costs and disruption or inconvenience in the operation of business. Reasonable accommodation is not required of the employer where its provision would not allow the job applicant or employee to discharge the essential job requirements.

The case of *Norcross v Sneed*, for example, provides an illustration of how reasonable accommodation works in practice.⁸⁰ The plaintiff, who was blind, had been turned down for the position of school librarian essentially on the ground that once a year the librarian would be required to take pupils on the field trip. It was held that to require driving ability for the position was neither reasonable nor necessary. Driving skill was peripheral rather than essential to the primary task as it was only required once a year. Alternative transport could be arranged by the employer without incurring undue hardship.

3.2 Canada

In Canada, reasonable accommodation also had similar beginnings as in the United States. Initially, reasonable accommodation developed as a response to the constitutional imperative of protecting religious freedom by accommodating religious diversity in the workplace.⁸¹ Another limitation with the early development of reasonable accommodation in Canada is that, the balance of judicial opinion clearly suggested that it only obtained in indirect discrimination, but not in cases of direct discrimination.⁸² Moreover, the duty to accommodate

80 755 F2d 113 (8th Cir 1983).

81 *Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd* (1985) 23 DLR (4th) 321; *Central Alberta Dairy Pool v Alberta* (HRC) (1990) 72 DLR (4th) 417; Gibson 1990:134.

82 *Ontario Human Rights Commission and O'Malley v Simpson-Sears Ltd; Bhinder and Canadian Human Rights Commission v Canadian National Railway Co* [1985] 23 DLR (4th) 481, [1985] 2 S.C.R. 561; *Central Alberta Dairy Pool v Alberta* (HRC) at 514-516 per Wilson J; *Large v Stratford (City)*, [1995] 3 S.C.R.

was conceived not so much as a substantive right giving rise to a cause of action, but as an appendage to a defence.⁸³ 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 Canadian judiciary was the endorsement of rigid, if artificial and untenable distinction between direct and indirect discrimination.⁸⁴ The early judicial approach missed the point that the distinction between direct and indirect discrimination is not always a hard and fast one, and could depend on how the complaint is framed, rather than on an immutable characteristic.⁸⁵ It missed the point that reasonable accommodation is a core element of substantive equality. The bifurcated approach to discrimination and reasonable accommodation by the Canadian judiciary became the subject of intense academic criticism.⁸⁶

Canada has since discarded the rigid distinction between direct and indirect discrimination in favour of unified approach to discrimination.⁸⁷ Under the Canadian Charter of Rights and Freedoms and human rights legislation, reasonable accommodation has since been developed into a principle for achieving substantive equality generally as part of taking cognisance of the fact that in a society characterised diversity, reasonable accommodation is a mechanism for meeting special needs.⁸⁸

The case of *British Columbia Government and Service Employees Union v BCGESU*⁸⁹ is instructive on the imperative of reasonable accommodation under the Canadian Charter, albeit in the context of sex rather than disability discrimination. It is a decision of the Supreme Court of Canada. The facts are simple. The British Columbia Government had established minimum physical standards for its forest firefighters. One of the standards was an aerobic standard. The complainant was a female firefighter. In the past she had performed her work satisfactorily but had been dismissed when she failed to meet the aerobic standard. She had failed a running test that was

733 at 751-752 per Sopinka J. Note, however, that the dissent in *Central Alberta Dairy Poll v Alberta* (HRC) at 527-29 per Sopinka J.

83 Leposky 1998:168.

84 Day & Brodsky 1996:447-459; Lepofsky 1998:168.

85 Malloy 1992:37; Day & Brodsky 1996:447-457

86 Malloy 1992; Day & Brodsky 1996.

87 Pretorius *et al* 2001:4-13.

88 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (SCC); Gibson 1990:133-136.

89 (1999) 176 DLR (4th) 1. See also *Eldridge v British Columbia (Attorney General)* (1997) 151 DLR (4TH) 577 (SCC) which illustrates the judicial application of reasonable accommodation, albeit in the context of accessing services. In *Eldridge*, the Supreme Court of Canada held that failure by a state health service provider to provide interpretation services to patients who were deaf was a breach of the right of equality under section 15 of the Canadian Charter of Rights and Freedoms. The health care provider was under an implicit positive duty to provide reasonable accommodation by way of interpretation services so as to ensure that deaf patients are able to benefit equally from government services.

based on the assumption that for firefighters to perform their job effectively and safely, they must have a certain minimum aerobic standard. She had taken 49.4 seconds longer than was required to complete a 2.5 kilometre run. She brought an action alleging unfair discrimination.

The court accepted that aerobic capacity was relevant to assessing suitability to perform the inherent requirements of the job, including performing the job safely. However, it was important for the court to determine whether the minimum standard required by the employer was necessary for the safe and efficient discharge of the job. The court's conclusion was that it was not necessary and that the complainant could still perform the job safely and effectively notwithstanding that she had failed to meet the standard specified by the employer.

In reaching its conclusion, the court accepted evidence that on account of sex-based physiological differences, most women have a lower aerobic capacity than men. Even with training, most women cannot increase their aerobic capacity to the level that was required by the employer, although training can allow most men to meet it. It was also the case that 65-70% male applicants could pass the test on their initial attempt while only 35% of women applicants could have similar success. Furthermore the employment profile of firefighters employed by the government showed that 80-90% were male and only 10-20% were female. It could not be established that the minimum aerobic capacity required by the employer was necessary for the complainant to perform the job safely and effectively. Indeed, in the past, she had performed her work well without risk to herself, her colleagues or the public. The employer could not show that employing the complainant would cause the employer undue hardship. The standard set by the employer was, thus, unfairly discriminatory.

If transposed to disability, *BCGSEU* shows that ostensibly neutral standards that are stipulated by employers are often modelled on a norm that is established by a dominant group in society. Such norms tend to entrench norms or mainstreams into which people with disabilities must integrate, thus, leaving no room at all for accommodation of differences. In *BCGSEU* it was the male standard that was being imposed as the standard requirement for all including women. The case also shows the importance of inquiring beyond merely establishing whether there is a rational connection between the standard imposed by the employer and its purpose. Concerns about economic efficiency and safety, if taken at face value, may serve to entrench discriminatory practices and thus perpetuate systemic inequality. It is significant that the court took cognisance of the fact that the complainant was a woman seeking to keep her position in a male dominated occupation and that the employer had a duty to accommodate a person who was part of a group that was adversely affected by the employers requirements.

The *BCSGEU* case also shows that the crucial inquiry will often be whether the employer can demonstrate that accommodating the complainant and others adversely by a required standard will cause undue hardship to the employer. Undue hardship is a defence. The burden of proving undue hardship is on the employer, once the employer has proved *prima facie*

discrimination. To explain what undue hardship entails in terms of effort on the part of the employer, the court reiterated the words of Sopinka J in *Central Okanagan School District No 23 v Renaud*⁹⁰ who said that: '[t]he use of the term 'undue' infers that some hardship is acceptable, it is only 'undue' hardship that satisfies this test'. The court noted that whilst it may be ideal from the standpoint of the employer to adopt a standard that is uncompromisingly stringent, the court may determine otherwise. A standard must, in the final analysis, be justifiable. It must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship. It is for the employer to demonstrate to the satisfaction of the court, that an alternative that is available cannot be implemented without causing undue hardship to the employer.

'Undue' hardship is unlike 'de minimis' hardship and will, thus, not be an easy gateway for justifying unfair discrimination. In determining undue hardship, it is important, *inter alia*, to consider the financial cost of the accommodation, the relative interchangeability of the workforce and facilities and the prospect of substantial interference with the rights of other workers. Depending on the type of business and nature of the accommodation required, reasonable accommodation may require significant expenditure of the part of the employer.⁹¹ Employers, courts and tribunals are enjoined to be innovative when considering how best reasonable accommodation might be achieved. The possibilities that there may be different ways of performing the job while still accomplishing the employer's legitimate work-related purpose should be diligently considered. The skills, capabilities and potential contributions of the job applicant or employee must be respected as much as possible.

3.3 Australia

Australia and United Kingdom have taken a leaf from the ADA by adopting disability-specific legislation. The Australian *Disability Discrimination Act* of 1992 (Australian DDA) and the British *Disability Discrimination Act* of 1995 (British DDA) outlaw disability-related discrimination and require accommodation of people with disabilities. But whilst the British DDA explicitly refers to a duty that is consonant with making reasonable accommodation,⁹² a peculiar feature of the Australian DDA is that it does not explicitly refer to accommodation.⁹³ Indeed, in a recent case, *Purvis v New South Wales (Department of Education and Training)*,⁹⁴ the High Court of Australia took the view that the Australian DDA does not impose a positive duty to make reasonable accommodation, thus, endorsing a view adopted in earlier cases decided at the Federal Court of Appeal level.⁹⁵ It is, however, doubtful whether this view is correct.

90 [1992] 2 S.C.R 970.

91 *Nelson v Thornburg* 567 F Supp 369 (ED Pa 1983).

92 Section 6(1) of the British DDA which is referred to below.

93 Productivity Commission 2004:186.

94 [2003] HCA 62.

95 *A School v HREOC and Anor* (1998) FCA 1437; *Commonwealth of Australia v Humphries* (1998) 86 FCA 324; Hamilton 2000:217-218.

The view that the Australian DDA does not impose a positive duty to make reasonable accommodation seems to be based on literal rather than purposive interpretation. It is a view that does not sit well with the progressive tenor of the Australian DDA. Notwithstanding that Australia does not have an entrenched bill of rights, the Australian DDA was enacted as innovative legislation to empower people with disabilities and operationalise their human rights.⁹⁶ It was enacted with the specific objective of ensuring that 'as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community' and 'to promote recognition and acceptance within the community of the principle that person with disabilities have the same fundamental rights as the rest of the community'.⁹⁷ It would be difficult to accord people with disabilities the same fundamental rights as the rest of the community if there is no corresponding duty of employers and providers of services to accommodate their special needs. The definition of disability discrimination in section 5 the Australian DDA supports the idea of a duty to provide such accommodation. A person discriminates on the ground of disability when they treat another person with a disability less favourably than a person without a disability in 'circumstances that are the same or are not materially different'.⁹⁸ When determining whether circumstances are the same or not materially different, 'the fact that different accommodation or services may be required by the person with a disability' must be disregarded.⁹⁹

Further support for the argument that the Australian DDA imposes a positive duty to accommodate arises from the fact that the DDA is intended to address not only direct discrimination, but also indirect discrimination.¹⁰⁰ According to section 6, imposing a condition which a substantially higher proportion of person without a disability can comply with, but which is not reasonable for a person with a disability to comply with constitutes indirect discrimination. From this conception of indirect discrimination, it is hard to exclude the possibility that the legislation implicitly envisages reasonable accommodation on the part of the potential perpetrator as a way of avoiding liability for indirect discrimination.

Perhaps an even stronger reason for inferring reasonable accommodation is that, like its counterparts in the United States and Canada, the Australian Disability DDA explicitly provides for 'unjustifiable hardship' as a defence.¹⁰¹ If there is no duty, in the first place, to make reasonable accommodation, it would be pointless to provide unjustifiable hardship as a defence. It is not insignificant that the Human Rights and Equal Opportunity Commission (HREOC), the body that is charged, at first instance, with receiving and conciliating complaints under the Australian DDA, has proceeded on the basis

96 Basser & Jones 2002:258-259; Tyler 1993:210, 228; Productivity Commission 2004:41.

97 Section 3 of the Australian DDA.

98 Section 5(1) of the Australian DDA.

99 Section 5(2) of the DDA.

100 Productivity Commission 2004:186.

101 Sections 15(4)(b), 16(3)(b), 17(2)(b), 18(4)(b) of the Australian DDA; Tucker 1995:25.

that the Australian DDA imposes a duty to make reasonable accommodation.¹⁰² Undue hardship can only be invoked after the party alleged to have perpetrated discrimination has considered taking steps to accommodate the disability.¹⁰³ The matters that are taken into account when determining whether the defence of unjustifiable hardship should prevail under the Australian DDA include the 'financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.'¹⁰⁴ In short, it is submitted that without implying a positive duty to make reasonable accommodation, much of the legal rationale for the Australian DDA would be lost. As part of clarifying the position of reasonable accommodation under the Australian DDA, the Productivity Commission (a body that was appointed by the Australian government to review the Australian DDA) has recommended a statutory amendment to include a general positive duty to make reasonable accommodation.¹⁰⁵

3.4 United Kingdom

As alluded to in the preceding section, the British DDA of 1992 is disability-specific. It represents the closest attempt, thus far, by the United Kingdom to depart from a welfare to a rights-based approach to disability in workplace.¹⁰⁶ Prior to the British DDA, disability in the workplace was essentially regulated by the *Disabled Persons (Employment) Act* of 1944. The 1944 Act was largely ineffective.¹⁰⁷ It operated a quota system for guaranteeing employment opportunities for people with disabilities.¹⁰⁸ A quota system, whereby employers were encouraged or obliged to employ persons with a disability as a set percentage of their workforce, was for a long time the lynchpin of disability employment policy in much of Western Europe.¹⁰⁹ In the UK's case, it required that all employers with twenty or more workers were obliged to employ 'registered disabled persons' up to a point where such persons constituted 3% of the workforce.¹¹⁰ However, the British quota system did not recognise

102 See for example: *Garity v Commonwealth Bank of Australia* [1999] EOC 92-966, where the HREOC found that an employer had discriminated against an employee who was diabetic and had visual impairment and other medical complications by failing to provide the employee with an appropriate system for dealing with diabetes, including rescheduling duties to allow the employee to take breaks and educating those responsible to compiling the work schedule to accommodate the employee's medical need for breaks. Note also that in its advice to the public, the HREOC has also said that there is a positive duty to make reasonable accommodation in all areas covered by the Australian DDA, including employment: See: HREOC 'Frequently asked questions: Employment': http://www.hreoc.gov.au/disability_rights (last visited 20 October 2004).

103 Pretorius *et al* 2001:7-31-7-34.

104 Section 11(c) of the Australian DDA.

105 Productivity Commission 2004: Recommendation 8.1.

106 Hamilton 2000:205; Doyle 1999:209-226.

107 McDonnell & Weale 1984:105-114; Waddington 66-67.

108 McDonnell & Weale 1984:105-114.

109 Waddington 1996:62-64; Waddington & Diller 2002:256.

110 Waddington 1996:66; McDonnell 1984:106.

any rights on the part of people with disabilities. Furthermore, despite its mandatory nature, the efficacy of the quota system depended on the benevolence of employers. Only the state could enforce the quota as people with disabilities had no *locus standi*. Government lacked the political will to enforce the quota system. Consequently, only a tiny minority of employers ever complied with the law.¹¹¹

The British DDA is an improvement on the 1944 Act which it repeals. It has drawn from some of the features of progressive developments in other jurisdictions, not least in its importation of a positive duty of reasonable accommodation into the conceptualisation of disability-related discrimination. Whilst the British DDA does not explicitly use the term 'reasonable accommodation' its notion is unambiguously captured in section 6(1) which says

Where-

- (a) any arrangements made by or on behalf of an employer, or
- (b) any physical feature of the premises occupied by the employer place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all circumstances of the case, for him to have to take in order to prevent the arrangements or the feature from having that effect.

Failure to comply with the duty in section 6(1) constitutes discrimination unless it can be justified.¹¹²

4. South African developments

In 1996, the South African government published its policy on disability in a White Paper — the *Integrated National Disability Strategy*.¹¹³ Government accepts unequivocally that people with disability have been marginalised and disempowered by society. The strategy formulated by the government for dealing with disability is a holistic one. It advocates a social model of disability in which disability is both a developmental and human rights issue. Government seeks to transform society towards a 'Society for All' in which all sectors, including employment, integrate disability in all their policies and practices so as to raise awareness about disability as well as create an enabling environment for people with disabilities. Government's policy must be translated into action. Substantive equality is a crucial instrument for creating a firm and enduring edifice for the realisation of a society that meaningfully acknowledges diversity and the equal worth and dignity of people with disabilities in the South African workplace or elsewhere.

It is trite that the constitutional dispensation that was ushered in 1994 signalled a decisive break with past. In *S v Makwanyane*, Mohamed J had this to say about the new constitutional dispensation:

111 McDonnell & Weale 1984:106-107.

112 Section 5(2) of the British DDA.

113 Office of the President 1997.

The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirational egalitarian ethos...¹¹⁴

The Constitution is built on the values of human dignity, the achievement of equality and the advancement of human rights and fundamental freedoms. Equality is pervasive value under the Constitution and has been described as a core value underlying the post-apartheid society.¹¹⁵ It is extensively accommodated in the provisions of the Bill of Rights, but most poignantly in section 9.¹¹⁶

Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. According to section 9(2) of the Constitution, equality includes the *full* and *equal* enjoyment of all rights and freedoms. The Constitutional Court has interpreted the equality provision under the Constitution to mean more than just securing formal equality.¹¹⁷ Substantive equality is what is envisaged by the equality clause.¹¹⁸ It is not enough to merely treat people in the same way or to proscribe unfair discrimination.¹¹⁹ In *The President of the Republic of South Africa and Another v Hugo* Krieger J said the following:¹²⁰

114 1995 6 BCLR 655 (CC) par 262.

115 Albertyn & Kentridge 1994; Albertyn & Goldblatt 1998.

116 Section 9 of the Constitution provides that:

(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.

117 *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 (1) BCLR 39 (CC); *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC). *Brink v Kitshoff* 1996 (6) BCLR 752 (CC); *Prinsloo v Van Der Linde* 1997 (6) BCLR 759(CC); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708; *Harksen v Lane* 1997 (11) BCLR 1489; *The City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

118 Albertyn & Goldblatt 1998; Albertyn & Kentridge 1994.

119 Section 9(3) of the Constitution.

120 1997 (6) BCLR 708 (CC) par 74.

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.

In pursuit of equality, the Constitution mandates the adoption of legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.¹²¹ Significantly, disability status is among the listed grounds for which unfair discrimination is proscribed.¹²² The goal, then, is to achieve substantive equality for people with disabilities in the same way as with other groups in all sectors, including the workplace.

The *Employment Equity Act* of 1998 (EEA) is the principal parliamentary legislation for protecting and promoting constitutional values in the workplace. Its primary aim is to provide for employment equity. Its objects, as professed in the preamble to the EEA, are designed to overcome the disadvantages that have been endured by historically marginalised groups such as a people with disabilities. More specifically, the EEA seeks to achieve the following:

- promote the constitutional right to equality;
- eliminate unfair discrimination in employment;
- ensure the implementation of employment equity to redress the effects of discrimination; and to
- achieve a diverse workforce broadly representative of the people of South Africa

The EEA implicitly takes cognisance of the status of people with disabilities as a historically marginalized group by treating people with disabilities as a special group — a designated group — along with black people and women.¹²³ As a designated group under the Act, people with disabilities who are employees are entitled to a range of affirmative action measures, including reasonable accommodation. Under the EEA, an employee means not only an existing employee, but also a job applicant.¹²⁴ According to the Act, reasonable accommodation means 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or to participate or advance in employment.'¹²⁵ Designated employers are under an obligation to take positive steps in this regard.¹²⁶

121 Section 9(2) of the Constitution.

122 Section 9(2) of the Constitution.

123 Section 1 of the EEA.

124 Section 1 of the EEA.

125 Section 1 of the EEA.

126 According to section 1 of the EEA, a designated employer means: (a) an employer who employs 50 or more employees; (b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of the EEA; (c) a municipality, as referred to in Chapter 7 of the Constitution; (d) an organ of state

Notwithstanding the clear legislative intention to remove barriers that hitherto operated to limit the employment prospects of people with disabilities, the extent to which the EEA is faithful to the constitutional imperative to achieve substantive equality for previously disadvantaged groups is questionable. The EEA appears to make a rigid distinction between designated and non-designated employers in respect of affirmative action obligations, including, reasonable accommodation. Reasonable accommodation is only explicitly provided for designated employees who apply for jobs to, or work for, employers that are classified as *designated* employers according to Chapter 3 of the EEA. Moreover, reasonable accommodation under the EEA appears to be conceived only as part of affirmative action measures in Chapter 3 of the Act.¹²⁷ The EEA seems to reinforce this distinction when it says in section 4 that Chapter 2, which deals with 'prohibition of unfair discrimination', applies to all employees and employers,¹²⁸ and Chapter 3 'which addresses 'affirmative action' applies only to designated employers and designated groups unless it is provided otherwise.¹²⁹ If section 4 is taken literally, it would mean that a person with a disability can only have a right to reasonable accommodation if he or she is an employee of a designated employer. It is submitted, however, that reasonable accommodation is not so limited.

In two cases, the Labour Court has, to a very limited extent, addressed the issue whether affirmative action measures (and, by implication, reasonable accommodation) apply beyond the strict confines of Chapter 3 of the EEA. In *Harmse v City of Cape Town*, Waglay J adopted a somewhat flexible approach.¹³⁰ The learned judge appeared to be suggesting that to the extent that affirmative action measures coincide with non-discrimination measures, they could also generally obtain in Chapter 2 of the Act. According to the learned judge, an employer who fails to promote the achievement of equality through taking affirmative action measures can be said to have discriminated against the employee.¹³¹ According to the trial judge, affirmative action is one of the ways in which an employer could discharge the duty in section 5 of the EEA (which is part of Chapter 2 of the EEA) take steps to promote equal opportunity in the workplace.¹³² Waglay J put it as follows:

Chapter II of the Act deals with prohibition of unfair discrimination in section 6. Section 6 of the Act provides that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act. Section 5 of the Act (also part of Chapter II) obliges every employer to take steps to promote equal opportunity in the workplace by eliminating

as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and an employer bound by a collective agreement in terms of section 23 or 31 of the *Labour Relations Act*, which appoints it a designated employer in terms of this Act, to the extent provided for in the agreement.

127 Section 15(2)(c) of the EEA.

128 Section 4(1) of the EEA.

129 Section 4(2) of the EEA.

130 (2003) 12 LC 6.15.1.

131 *Harmse*, par 32.

132 *Harmse*, par 32.

unfair discrimination in any employment policy or practice. This section applies to all employers. One of the ways in which an employer can eliminate unfair discrimination is by taking affirmative action measures consistent with the purposes of the Act.¹³³

Indeed, the learned judge fully appreciated that the roots of affirmative action lay in the Constitution and that it was a principle for realising substantive equality for which the EEA had been borne.¹³⁴ In contrast, in *Dudley v City of Cape Town and Another*, the Labour Court adopted the view that there was a rigid demarcation between Chapter 2 and Chapter 3 of the EEA and that affirmative action measures (and by implication reasonable accommodation) could only obtain in the context of Chapter 3 of the EEA.¹³⁵ The trial judge, Tip AJ, was of the clear view that affirmative action could not be imported into the determination whether an employer had unfairly discriminated against an employee under Chapter 2 of the EEA.¹³⁶

It is submitted that the apparent restrictive approach towards affirmative action under the EEA in cases such as *Dudley* might be due to a misunderstanding about the link between affirmative action and unfair discrimination. Certainly, the doctrine of substantive equality that has been developed by the Constitutional Court and comparative jurisprudence such as that emanating from the Canadian Supreme Court, does not support such a restrictive approach towards affirmative action, and by implication reasonable accommodation. Reasonable accommodation should be treated as a mechanism for realising substantive equality. In unfair discrimination cases, it is a tool for combating indirect discrimination especially. Reasonable accommodation, as a constitutional principle, is not limited to disability, but applies more generally to prohibited grounds of unfair discrimination.¹³⁷ It requires the party alleged to have perpetrated discrimination to have taken steps to accommodate the complainant short of incurring undue hardship before it can be established that there was no unfair discrimination.¹³⁸ It is irrelevant whether the employer is classified as designated or otherwise. Thus, reasonable accommodation should not be contingent upon a prior statutory duty to render affirmative action measures. More conclusively, the requirement in section 36(e) of the South African Constitution to take into account the least restrictive means to achieve the purpose, as one of the factors for determining whether a limitation of a fundamental right is justifiable, implicitly requires the employer to have considered reasonable accommodation where unfair discrimination has been established in an employment policy or practice.

133 Harmse, par 32.

134 Harmse, par 45.

135 (2004) 13 LC 1.19.1.

136 *Dudley v City of Cape Town and Another*, pars 73-75.

137 Aggarwal 1994:272.

138 *Re Ontario Human Rights Commission et al v Simpson Sears Ltd* (1985) 23 DLR (4th) 321 (SCC); *Re Bhinder et al v Canadian National Railway Co.* (1985) 23 DLR 482 (SCC); *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 S.C.R 3.

Thus, the distinction between Chapter 2 and Chapter 3 of the EEA should not detract from a holistic interpretation of a statute that is intended to further the constitutional goal of achieving equality in the workplace. Confining reasonable accommodation to Chapter 3 of the EEA is tantamount to a literal interpretation of a statute that is intended to serve the needs of the Constitution. To avoid disembodiment of the EEA from the Constitution, a purposive generous approach is more appropriate. Indeed, section 3 of the EEA requires this when it says that the EEA must be interpreted in compliance with the Constitution so as to give effect to its purpose.¹³⁹

In some respects, a restrictive approach to reasonable accommodation under the EEA, is also reflected in guidelines that have been developed pursuant to the EEA, namely the *Code of Good Practice: Key Aspects on the Employment of People with Disabilities* (the Code)¹⁴⁰ and the *Technical Assistance Guidelines on the Employment of People with Disabilities* (TAG).¹⁴¹ According to the Code and TAG, when effecting reasonable accommodation, employers should adopt the 'most cost-effective' means.¹⁴² While the Code and TAG are correct in identifying cost as a factor to take into account when determining reasonable accommodation, the emphasis on 'cost-effectiveness' risks elevating cost-effectiveness as the sole determinative factor at the expense of other considerations. As United States and Canadian jurisprudence shows, the compass of factors to be taken into account when determining reasonable accommodation is broad and cost, albeit an important factor, is but one of a multiplicity of relevant factors.

The approach to undue hardship, as the limit of the employer's duty to make reasonable accommodation, under both Code and TAG is also rather restrictive.¹⁴³ According to both the Code and TAG, 'unjustifiable hardship' is action that requires 'significant or considerable difficulty of expense'.¹⁴⁴ Again as comparative jurisprudence shows, undue hardship should be conceived not in isolation but as a disproportionate burden relative to the employers business and resources.¹⁴⁵ In some cases it might justify significant expense as demonstrated in an American case, *Nelson v Thornburg* where a court ordered a state department to provide reasonable accommodation to three blind workers, including readers, computers and braille forms, notwithstanding that the cost of accommodation was substantial.¹⁴⁶ This was because the cost of reasonable accommodation was not onerous when the resources at the command of the state department were taken into account. Notwithstanding these shortcomings, however, the Code and TAG have generally emulated the approach to accommodating disability under the ADA.

139 Section 3 of the EEA.

140 Department of Labour 2002.

141 Department of Labour 2003.

142 Pars 6.2 and 6.2 respectively.

143 Ngwena & Pretorius 2003:1834-1835.

144 Pars 6.12 and 6.12 respectively.

145 Ngwena & Pretorius 2003:1835.

146 567 F Supp. 369 (E.D. Pa. 1983).

5. Conclusion

In progressive jurisdictions, the social model of disability has gained ascendancy over the medical model on account of the goal of achieving meaningful equality. The answer to overcoming barriers to entry into, and advancement in, employment is no longer conceived solely in terms of rehabilitating the 'handicapped' or the 'disabled'. Rather, there is a well developed sense of awareness that the source of the barrier might be in workplace policies and practices, and the workplace environment rather than the person with a disability, and that equality is a transformative principle. South Africa has joined progressive jurisdictions. Its doctrine of substantive equality is well placed to translate the social model of disability into an effective model for dismantling barriers against people with disabilities in the workplace. The *Employment Equity Act*, the *Code of Good Practice: Key aspects on the Employment of People with Disabilities* and the *Technical Assistance Guidelines on the Employment of People with Disabilities* all testify to a genuine attempt, however, imperfect, to translate substantive equality into a meaningful goal for people with disabilities in the South African workplace.

Insisting on formal equality, with its requirements of homogeneity and interchangeability, would require people with disabilities in the workplace to overcome natural limitations and become like the norm. In most cases overcoming natural physical and mental limitations may be impossible. The achievement of equality for people with disabilities in the workplace requires acknowledging and accommodating difference. It requires adopting the empathic approach suggested by Spelman when she said:

When you presume, you are not treating me as the person I am; when you do not presume, you are treating me as the person I am in a minimal sense; when you recognise and respond to the person I am, you are treating me as the person I am in a maximal sense.¹⁴⁷

Substantive equality is a viable transformative principle for acknowledging difference so as to achieve equality. It removes the necessity of the disadvantaged group to first prove that it is similarly situated in order to claim equality. Of course, as Minow and others have rightly observed, acknowledging difference and accommodating difference risks perpetuating the stigmatisation of those that are different.¹⁴⁸ This is a dilemma that is hard to escape or resolve.

It would be naïve, however, to confine reasonable accommodation to the workplace. If people with disabilities are to enjoy lasting equal opportunities in the workplace, then it is important to appreciate that barriers external to the workplace and the workplace environment, also create barriers that render it impossible for many people with disabilities to acquire those skills and aptitude that justify the invocation of reasonable accommodation.¹⁴⁹ Reasonable accommodation must also be provided in education and training of people with disabilities if the achievement of substantive equality is to become a reality.

147 Spelman 1978:161.

148 Minow 1995; McCluskey 1988; McKinnon 1993.

149 Rioux 1994:141.

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