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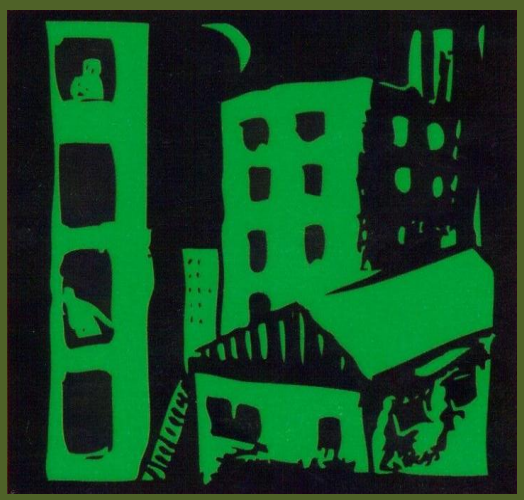

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The social model of disability, rights discourse and the impact of South Africa's Education White Paper 6 on access to the basic education system for persons with severe or profound intellectual impairments

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1 INTRODUCTION

Access to quality education and increased access to higher education are two critical factors that can contribute to breaking the inequality cycle in South Africa.[1] This is so because these factors affect earnings and unemployment, which in turn are key drivers of income inequality.[2] Education

[1] Branson N & Zuze TL "Education, the great equalizer: Improving access to quality education" in Hall K, Woolard I, Lake L & Smith C (eds) *South African child gauge 2012* (2012) at 69.

[2] Branson & Zuze (2012) at 69.

empowers people to claim and realise other rights, allows them to make informed decisions about the lives they wish to lead, and to contribute to their communities.[3]

The data collected in the 2007 Community Survey conducted by Statistics South Africa suggested that while only 1.9% of children were reported as having a disability, children with disabilities accounted for 10% of all children who were not attending school.[4] By 2009, it was estimated that as many as 467 005 children with disabilities of school-going age were not attending school, an increase of 207 005 from the 260 000 estimated in 2001. Furthermore, children with disabilities were indicated as having a much lower school attendance rate than other children.[5]The National Department of Education estimated that by 2011 108 240 learners with disabilities or impairments were accommodated in 442 special schools that were serviced by 9 585 educators.[6] The number of learners with disabilities in non-special schools is not known. While bearing in mind the challenges to compiling reliable statistics on people with disabilities,[7] these figures are consistent with the corresponding figures in developing countries in that only 2% of disabled children in developing countries receive any schooling.[8]

There are various reasons for the exclusion of children with disabilities from mainstream education. In most instances exclusion from education is but one facet of the broader social exclusion of people with disabilities. Many persons with disabilities live in areas where the basic service infrastructure is at its weakest and have no access to piped water, electricity and indoor toilet facilities.[9] Disabled[10] women and children, in particular, may face severe difficulties due to social, cultural and economic

[3] Spreen C & Vally S "Education rights, education policies and inequality in South Africa" (2006) (4) *International Journal of Education and Development* 354.

[4] Fleisch B, Shindler J & Perry H "Children out of school: Evidence from the community survey" in Pendlebury S, Lake L & Smith C (eds) *South African child gauge 2008/2009*" (2009) 43; See, also, Palime B "Characteristics of People with Disabilities in South Africa" Paper presented at the 6th Africa Symposium of Statistical Development 2010. Available at http://www.statssa.gov.za/assd2010/Presentations/6th_ASSD/Characteristics%20of%20People%20with%20Disabilities.%20User%20South%20Africa.pdf (accessed 23 August 2013) (2010) at 17.

[5] Fleish, Shindler & Perry (2008/2009) at 43.

[6] South African Department of Basic Education "Education statistics in South Africa 2011" (2013) 28. Available at http://www.education.gov.za/LinkClick.aspx?fileticket=mpjPX4pwF9s%3D&tabid=93&mid=2399 (accessed 23 August 2013).

[7] Integrated National Disability Strategy White Paper (1997) (INDS) Ch 1; McDermott S & Turk ML "The myth and reality of disability prevalence: Measuring disability for research and service" (2011) *Disability and Health Journal* 1.

[8] Stein "Disability human rights" (2007) 95 *California Law Review* 76.

[9] INDS (1997), Ch 1.

[10] The term "disabled people" or variations thereof will be used interchangeably with the term "people with disabilities". While the writer is aware of the arguments for people-first terminology (see, e.g. Ngwena C "The new Disability Convention: Implications for disability equality norms in the South African workplace" in Dupper, O and Garbers, C *Equality in the Workplace* (2010) 181 at 192 for a brief explanation that such terminology implies "both a relationship with, as well as a separation from, disability" and therefore is an affirmation that disabled persons are part of human diversity), the term "disabled people" also has its advantages in that it offers a direct antonym to "enabled" persons and implies a marginalised, identifiable social category (see Ngwena (2010) at 183-184, who chooses to use "disabled persons" or "disabled people").

disadvantages experienced in addition to their disability.[11] Most impairments that children experience are due to poverty, preventable diseases, alcohol and drug abuse or injuries sustained in social and political conflict.[12]

Historically learners with disabilities were diverted to so-called special schools that were relatively under-resourced and for the most part were recognised to have provided sub-standard education that both reflected and entrenched the marginalised status of their learners.[13] Special schools were also segregated according to race, with black learners in special schools suffering double discrimination based on their disability as well as their race. Today, still, a special school in an African township, such as Khayelitsha, for example, has to deal with the socio-economic deprivation that marks the community it serves, while schools in more affluent areas can seek to improve from a more stable base and with more resources at their disposal.[14]

A democratic South African government has committed itself to changing the historical exclusion of marginalised groups, including learners with disabilities. After 1994 various policies and pieces of legislation were drafted to provide direction on how to transform the unequal education system. One of these policies was Education White Paper 6 on Special-Needs Education (EWP6). EWP6 has a two-fold approach that Soudien and Baxen identify as "mainstreaming" or "integrating" and "inclusion", which they explain as:

> The objective of 'mainstreaming' is to integrate learners into the existing system and supporting them so that they can fit, while inclusion is essentially recognising and respecting the differences among learners and building on their similarities.[15]

The policy envisions a three-tier system of educational support services provided according to the level of support required. Learners who require lower levels of support will get that at mainstream schools; those who require moderate support will receive it at what are termed "full service schools"; and those who require high levels of support will be enrolled in "special schools".[16]

These changes to education for learners with disabilities are said to be underpinned by the international and domestic shift from a medical model of disability to a social model of disability.[17] Whereas the medical model focuses on shortcomings in

[11] Department of Social Development "Policy on disability" (2009) at 13.

[12] Department of Social Development (2009) at 13.

[13] Department of Education "Guidelines to ensure quality education and support in special schools and special resource centres" (2007) at 3. Available at http://www.education.gov.za/LinkClick.aspx?fileticket=6Jp4pUbzHhg%3D&tabid=436&mid=17 (accessed 26 November 2012).

[14] Soudien C & Baxen J "Disability and schooling in South Africa" in Watermeyer B, Swartz L, Lorenzo T, Schneider M & Priestley M (eds) *Disability and social change: A South African agenda* (2006) at 149.

[15] Soudien & Baxen (2006) at 152.

[16] *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and another* 2011 (5) SA 87 (WCC) at para 10.

[17] INDS (1997), ch 1.

the individual and proposes ways to either fix or help the deficient individual,[18] the social model locates disability as a social phenomenon in society. The most extreme version of this social model propounds that disability is wholly and exclusively caused by environmental and social factors.[19] However, even proponents of this extreme version recognise that the social model does not consider the personal restrictions resulting from impairments.[20] Most, if not all, social model theorists therefore use the term "disability" in a specific sense, namely, to refer to disadvantage caused by social and environmental factors.

Central to the social model is the impairment/disability binary. Impairment is "a corporeal condition which leaves a body aesthetically or functionally different and to a great extent inferior to the typical unimpaired body", while disability is regarded as "a social condition in which impaired bodies are met with discrimination and exclusion".[21] The location of the causes of disability in society has meant that the social model gave rise to the utilisation of rights discourse to advance the interests of disabled people. This relationship between the social model and human rights will be explored below. The ultimate objective is to assess the value of both the social model and rights discourse to the provision of education to persons classified as having severe or profound intellectual impairments.

Part two of the article traces the history of the social model of disability. How did it originate and what are its key components? What are some of the critiques of the social model and how valid are such critiques? This short analysis of the social model is followed in part three by a consideration of the similarities and differences between the model and law in the abstract, as well as between the model and rights-based approaches to advance the interests of persons with disabilities. The fourth section of the article explores the validity of the critiques of both the social and rights models through an analysis of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*,[22] in which the South African government was ordered to take reasonable measures to give effect to the rights of children classified as being severely and profoundly intellectually impaired.

2 HISTORY OF THE SOCIAL MODEL OF DISABILITY

[18] The medical model is underpinned by what DePoy E & Gilson S *Studying disability: Multiple theories and responses Thousand Oaks* (2011) at 79-84 who term "interior environment explanations", which explain disability "as a function of interior conditions, or those that are delimited to the organic body." These explanations have been criticised as leading to the devaluation of persons with disabilities as "not normal" in terms of standards they have not set or had any significant influence in setting.

[19] Oliver M *Understanding disability: From theory to practice* (1996) .

[20] Samaha "What good is the social model of disability" (2007) 74 *University of Chicago Law Review* 1251 at 1260.

[21] DePoy & Gilson *Studying disability* (2011).

[22] 2011 (5) SA 87 (WCC).

The social model of disability has gained traction in recent decades at an international level and in many domestic jurisdictions, including South Africa. In Western Europe, the social model has its genesis in the work of British activists who, in 1976, wrote:

> In our view, it is society which disables…. Disability is something imposed on top of our impairments; by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society. [23]

The focus of the social model is therefore on all things that restrict disabled people, ranging from individual prejudice to institutional discrimination, from inaccessible buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on. Further, the consequences of this failure do not simply and randomly fall on individuals but systematically upon disabled people as a group who experience this failure as discrimination institutionalised throughout society.[24]

While the social model recognises that impairment, i.e., a partial or total loss of physical or mental functions, may be important in terms of describing the state of a person's body, it does not recognise impairment as the sole cause of disability.[25] The restrictions imposed on persons with disabilities by impairment are thus not emphasised, and the model rather focuses on the ways in which society erects barriers to the full participation and advancement of people who cannot perform 'normal' social roles.[26]

There are many variations in emphasis in explanations of disability that can plausibly fall under the umbrella of a social model or, alternatively, of non-individual models of disability. In legal discourse the minority group model, which was developed in North America, has been popular. This model views disabled persons as being part of an oppressed group in society that has suffered and is suffering systemic discrimination and social exclusion in similar ways to groups who are marginalised based on their race, gender, sexual orientation or other characteristics.[27] The focus is therefore on identity and power relations in society.

Activists first used the social model as a strategy. Their primary objective was to debunk the overwhelmingly accepted starting point that disability is a personal tragedy and that sufferers either have to be fixed or exist as objects of charity.[28] The social model's primary message was simple and could be conveyed easily - society should look in the mirror when seeking the causes of disability, instead of evaluating individuals against "objective", "medical" standards developed by mainstream society.[29] Less

[23] Quoted in Priestley M "Developing disability studies programmes: The international context" in Watermeyer B, *et al* (eds) *Disability and social change: A South African agenda* (2006) at 22.

[24] Oliver (1996). Also, Marks D *Disability: Controversial debates and psychosocial perspectives* (1999).

[25] Oliver (1996); Oliver M *The politics of disablement* (1990).

[26] DePoy & Gilson (2011).

[27] Kanter A "The law: What's disability studies got to do with it or an introduction to disability legal studies" (2010-2011) 42 *Columbia Human Rights Law Review* 403 at 421-422.

[28] Kanter (2010-2011) at 421-422.

[29] Kanter (2010-2011) at 420.

attention has been paid to the ways in which a social model, together with other models and theories, can impact on the construction of disability.

The social model is part of a theoretical perspective that can be described as social constructivism.[30] This theory views human beings as the creators of reality and the objective of inquiry is not the search for an objective truth, but an explanation of how humans exist within "contexts of meaning".[31] Therefore, when social constructivists posit that the environment disables, there are a myriad ways in which such disablement could occur and be explained. One of the most common ways of doing so, and certainly the most prevalent in locating disability within a human rights framework, is to view disabled persons as belonging to a minority group that has suffered historically and continues to experience discrimination.[32] Such categorisation has been an important anchor from which to leverage social action that seeks to create and maintain equal opportunities for disabled persons.[33]

In South Africa the disability movement was very much influenced by developments at the international level,[34] as well as resistance to apartheid. Kathy Jagoe, an activist involved in the formation of Disabled People South Africa (DPSA), explains that the disability movement in the 1980s was influenced by the Black Consciousness Movement in two respects: first, the importance of self-representation was emphasised – disabled persons had to voice their own experiences and drive their own emancipation; and secondly, the marginalisation and deprivation experienced by people with disabilities were caused by the society in which they lived.[35]

DPSA's initiatives were twofold, namely, a political struggle in which disabled people claimed their rights and a developmental project that sought to generate income through self-help.[36] It was also felt that disabled people's struggles could not be separated from the fight against apartheid, which is why DPSA located itself within the mass anti-apartheid movement and built relationships with many other civil society organisations.[37] As early as 1990, DPSA met with the African National Congress as the government in waiting and encouraged the inclusion of disability issues in that party's position papers and other documents.[38]

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[30] DePoy & Gilson (2011).

[31] DePoy & Gilson (2011).

[32] Kanter (2010-2011) at 422; DePoy & Gilson (2011).

[33] DePoy & Gilson (2011).

[34] Mike Du Toit, who later became the Secretary-General of DPSA, had attended the international conference of Rehabilitation International, at which disability activists walked out after their insistence that 50% of the Board of that organisation should be disabled persons was rejected. This major change saw the formation of Disabled Peoples International, with the emphasis being on self-representation (recounted in Howell C, Chalklen S & Alberts T "A history of the disability rights movement in South Africa" in Watermeyer *et al* (2006) at 49.

[35] Howell *et al* (2006) at 50.

[36] Rowland W *Nothing about us without us: Inside the disability rights movement of South Africa* (2004); Howell *et al* (2006) at 54.

[37] Howell *et al* (2006) at 54.

[38] Howell *et al* (2006) at 56.

One of the milestones for the disability rights movement was the adoption of a Disability Rights Charter in 1992. The Charter was the result of a human rights advocacy campaign driven by Lawyers for Human Rights.[39] This campaign's primary purpose was "to mobilise opinion from disabled people themselves, based on their life experiences, to shape national policy and thinking on disability".[40] The campaign was so successful that it spawned a protest march by disabled people against the marginalisation and discrimination they experienced.[41] The Charter was steeped in a human rights approach with the ultimate objective of building a society in which disabled persons would have their basic needs met and could live independently and free from discrimination, exploitation and abuse.[42]

The human rights and development approach that was adopted by the South African disability movement is, at the macro-level, consistent with the social model of disability, because the central claim of the latter is that disability is caused wholly or substantially by social and environmental barriers that prevent disabled people from living independently and from participating in their communities. However, we would do well to examine the specified scope of the social model in order to assess its utility to policy formulators and legislators.

2.1 Specified scope of the social model

Articulations of the social model vary in the degree to which disability is attributed to social and environmental factors. Oliver's statement that "disability is wholly and exclusively social" [43] is perhaps its most extreme variation. Yet, even he points out that the social model is not meant to deal with the personal restrictions caused by impairments.[44]

Another important conceptual clarification is that the social model is not a social theory. A theory, by definition, "offers a systematic explanation of a body of empirical data" and therefore professes to be more or less true.[45] In contrast, a model can at best be more or less useful, for "models are merely ways to help us to better understand the world, or those bits of it under scrutiny. If we expect models to explain, rather than aid understanding, they are bound to be found wanting".[46]

A further cautionary observation relates to the overall usefulness of models. Ultimately the aim should not be the development of distinct models, but rather the evolution of critical understandings of disability as a social construct manifested in

[39] Howell *et al* (2006) at 57.

[40] Howell *et al* (2006) at 57.

[41] Howell *et al* (2006) at 57.

[42] INDS (1997), ch 2.

[43] Oliver (1996).

[44] Oliver (1996).

[45] Motshedisho K Access to higher education for students with disabilities in South Africa: A tensive intersection of benevolence, rights and the impasse of the social model of disability (2005).

[46] Oliver (1996).

people's lived experiences.[47] These understandings may be informed by various models originating from different disciplines or by gaps left by existing disciplines.[48] Models may overlap and the usefulness of particular models may vary from one instance to another, depending on factors, such as, the purpose of explaining disability and the contexts in which they are explained. Contemporary and emerging explanations of disability may require radical changes to be made to social processes and institutions, some, or all, of which may be established and maintained by law. It is against the backdrop of these general remarks that some critiques of the social model are now considered.

2.2 Critiques of the social model

Various critiques of the social model are discernable. The focus in this article will be on those that may aid our understanding of what the social model offers legislators and policymakers in deciding on the provision of education to disabled persons. The objective is not an exhaustive discussion of the advantages and disadvantages of the social model, but a critical assessment of what the model can and cannot offer us. Five of these critiques are explored below.

2.2.1 *Overbreadth in its conceptualisation of the causes of disability*

It is arguable that the social model is inaccurate in its assertion that disability is always caused by social and environmental factors. At least some instances of disability are caused by individual traits alone, or by individual traits in addition to social and environmental factors.[49] Changes in the environment may ameliorate the negative effects of such traits, but cannot eliminate them.[50] Furthermore, the effect of a personal trait is affected by the state of technology.[51] Poor eyesight, for example, was more disadvantageous before the development of devices, such as, spectacles and contact lenses.

The insistence on locating the cause of disability in society when it lies primarily in individual traits could potentially oppress those who are inhibited by these traits. Crow, for example, laments the absolute use of rhetoric that holds that impairment is "irrelevant, neutral, positive, but never, ever […] the quandary that it really is".[52] She argues that the silence about impairment prevents the difficulties associated with it

[47] Oliver 'The individual and social models of disability' (1990) warns that technical, semantic debates should not obscure the real issues, which relate to oppression, discrimination, inequality and poverty.

[48] Kanter (2010-2011) at 419. On the subject of disability studies, she writes that many scholars view various models of disability as part of an overall model that regards disability as a social construct. While there may be some scholars who reject some of these models as inaccurate, the point remains that the medical, individual model of disability ought not to be the sole model through which to understand disability.

[49] Samaha (2007) at 1262.

[50] Samaha (2007) at 1262.

[51] Samaha (2007) at 1263.

[52] Crow L "Including all of our lives: Renewing the social model of disability" in Morris J (ed) *Encounters with strangers: Feminism and disability* (1996) 55 at 57.

from being addressed and has created a new set of constraints on the self-expression of disabled persons.[53]

Motshedisho argues that the problem of overstatement may not lie in the social model itself, but in how it has been popularised, especially its origins as an alternative to the medical model.[54] The social model can be constructed in a way that does not deny impairment or the role medical professionals have in the lives of people with disability. In essence, the social model posits that the causes of disability are not only individual and that society must examine its own role in creating disability. The role of medical professionals in the lives of disabled people is not denied, but objection is made to the notion that medical science offers the only valid perspective on disability. As Oliver observes: "The problem arises when doctors try to use their knowledge and skills to treat disability rather than illness".[55]

The social model was never meant to apply to those cases in which individual traits are the only causes of disability, but this is not how it is framed in many policies and even in academic commentaries.[56] This more limited scope of the social model does not make it redundant; it simply means that the model does not apply to all instances of disability[57] and that it should not be posited as a one-size-fits-all model that renders other perspectives and experiences incorrect or irrelevant.

2.2.2 *Vagueness in articulation of disadvantage*

Samaha identifies a second set of critiques of the social model and offers an illuminating explanation of the difficulties inherent in any model that operates at a macro level.[58] He argues that proponents of the model do not articulate the kind of disadvantage or disability they have in mind. Does the disadvantage have to be absolute or relational? If it is absolute, it means that some minimum standard has to be developed using independent benchmarks. If a relational standard is adopted, who is the comparator group? Would it be able-bodied people, other disabled people with a different type of disability, or other disabled people with the same type of disability? Also, how severe does the disadvantage have to be before it deserves attention and which dimensions of disadvantage are similarly worthy of attention?

The social model does not answer these questions, which is a limitation, but the vagueness of the disadvantage referred to does not negate the model completely. It is possible for a personal trait coupled with adverse social and environmental factors to give rise to both absolute and relational disadvantages in the same instance. An

[53] Crow (1996) at 57; also, French S "Disability, impairment or something in between?" in Swain J *et al* (eds) *Disabling barriers: Enabling environments* (1993) at 17.

[54] Motshedisho (2005).

[55] See Oliver 'The individual and social models of disability' (1990) at 4.

[56] Shakespeare T & Watson N "Defending the social model" (1997) 12(2) *Disability and Society* at 293 argue that the media has distorted the social model and that the model is poorly understood, even within human sciences.

[57] Samaha (2007) at 1263.

[58] Samaha (2007) at 1264-1265.

example would be someone who is classified as having an intellectual disability and who is denied schooling on that basis. In such cases, normative justifications for choosing a certain conception of disadvantage will have to be provided and some of these justifications in the legal realm will have to be deconstructed and reconstructed within a rights framework.

2.2.3 *Unhelpful binaries that obscure the complexities of the causes of disability*

The third category of criticism hinges on the argument that it is impossible to distinguish a personal trait from the social setting within which it is described or assessed[59]. Put differently, the argument is that the social model relies on binaries, whereas the causes of disability are often complex.[60] Moreover, the identification of impairment implies a prescription of what the body, in its broad sense, should be or look like, a process that is neither value neutral, nor static, over time, location and circumstance.[61]

The insistence on separating individual traits from oppressive social and environmental conditions may also omit understandings of how the latter may cause personal traits that, independently or in conjunction with external factors, cause disability. Ribet notes that the United Nations Convention on the Rights of Persons with Disabilities excludes all analyses of prevention of impairment from its ambit due to the association of preventive measures with the discounted medical, individual model of disability, as well as its inconsistency with the idea that disability is not inherently negative.[62]

She acknowledges that these reasons have some merit, but that strict adherence to them "simultaneously vacated any analysis of disability that acknowledges its social origins or enables recognition that power relations have anything to do with the production of disabilities and not just the treatment of people who are for whatever never-specified reason 'impaired.'"[63] This is an important insight that challenges the assumption that medicine is objective and value neutral in its conception of disability, uncritical acceptance of legal constructions of disability that render the causes of disability relevant in some instances and irrelevant in others, as well as deep-seated notions that disability implies less credibility as well as economic and other worth.[64]

Some of the above critiques have merit and can enrich understandings of and responses to disability, but these perspectives are also not fatal to the central claim of the social model, namely that disability is caused by individual traits and social factors, and not solely individual impairments. Where does that leave the inquiry into what the

[59] Samaha (2007) at 1266.

[60] Motshedisho (2005).

[61] Samaha (2007) at 1266.

[62] Ribet B "Emergent disabilities and the limits of equality" (2011) 14 *Yale Human Rights and Development Law Journal* 155 at 157-158.

[63] Ribet (2011) at 159.

[64] Ribet (2011) at 163.

social model offers legislators and policymakers? The following observations in this regard flow from an analysis of the offered critiques.

2.2.4 *Social model constructed at a macro-level*

The central claim of the social model is that personal traits and social barriers cause disability. This is not an empirically tested statement and it is not known how often social barriers or personal traits are primarily responsible for disability. It is also not known how causation varies with changes in variables, such as, income level, geographical location, geopolitical circumstances, state of development, and culture.

2.2.5 *Social model may have implications for institutional design*

The social model may or may not contribute to the normative choices that influence whether individualised solutions are proposed or whether the social and physical environment has to be changed. Samaha illustrates the differences in expertise that may be required if social, as opposed to individualised, responses have to be implemented in response to deafness:[65]

> While economic cost considerations might call for a similar set of accounting skills, and medical knowledge is surely relevant to nearly any public policy involving physical and mental traits, social and environmental reengineering depend on additional skills if the policy mission is to be successful. If government will subsidize cochlear implants or genetic screening, doctors and medical technicians along with economists will be useful. But if government intends to manufacture social settings in which deafness and other impairments are not socially disadvantageous, the policymakers and executors ought to be a more diverse group if not simply different. Now sociologists, architects, political scientists, social psychologists, anthropologists, historians, and others with unique skill sets become more valuable. Understanding disadvantageous environments, whether built or the product of social interaction, can be a matter of uncommon knowledge. Physicians, however, might be the last people asked for their opinion.

It follows, therefore, that the social cause of a disability may require different policy responses, which in turn will require different expertise to implement.

3 THE SOCIAL MODEL AND HUMAN RIGHTS

There are a few reasons why the social model and human rights would be complementary. First, asserting rights implies the existence of a community, and challenges that community to balance the interests of individuals, groups and the state.[66] Secondly, rights consciousness is not limited to awareness of rights that have been granted in the past, but also provides a discourse within which to persuade others to recognise new rights.[67] Their communitarian starting points mean that the social model and rights paradigms share fundamental similarities.

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[65] Samaha (2007) at 1307.

[66] Minow M "Interpreting rights" (1987) 96 *Yale Law Journal* 1860 at 1867; Nedelsky J "Reconceiving rights and constitutionalism" (2008) 7(2) *Journal of Human Rights* 139 at 139.

[67] Minow (1987) at 1867.

It is therefore unsurprising that rights discourse has been subjected to critiques similar to those directed at the social model. First, rights detractors argue that rights are indeterminate, given the general terms in which these are articulated.[68] This is similar to the above critique of the social model as being framed in the abstract and not really providing much insight into how society has to change. A second argument advanced by scholars within the Critical Legal Studies movement is that rights are internally incoherent because they protect contradictory interests, for example "freedom" and "security".[69] This incoherence leads to mystification and manipulation, which may alienate those who do not have the tools or resources to engage in rhetorical battles.

For all their similarities, the social model is not consistent with all rights paradigms. The social model has been justified with reference to formal equality and corrective justice. Its focus is therefore on first generation civil rights such as those to equality and political participation.

Shakespeare argues that there are tensions between the social model and the minority group model, even though the latter can plausibly be argued to be a variation of the former.[70] According to him, the minority group model may advocate special measures, a comprehensive disability income or a bigger share of social resources, while the social model merely requires that disabled people be treated in the same manner as enabled persons.[71] Put differently, the minority group model's vision of equality is much more substantive than that proposed by the social model.

However, as will be discussed below, some articulations of the model have the drawback of requiring persons to show that they are deserving of equal treatment, which in turn perpetuates the deep-seated starting point that disabled persons must adapt to society rather than the other way around.[72] As Tom Shakespeare puts it, the model may focus "on power politics and identity politics, while not necessarily problematising disability itself."[73]

Stein argues convincingly that a disability human rights framework has to recognise the indivisibility of first generation and second generation rights. Such a framework therefore requires more than treating like alike; it requires positive obligations to provide access to education, housing, food, water and other socio-economic needs.[74] While some variations of the social model may balk at the notion of positive duties and emphasise the removal of barriers within a more narrowly defined

[68] Christie P "The complexity of human rights in global times" (2010) 30 *International Journal of Educational Development* 3 at 3.

[69] Minow (1987) at 1864..

[70] Shakespeare T "Disability, identity and difference" (1996) in Barnes C & Mercer G (eds) *Exploring the divide: Illness and disability* at 97.

[71] Shakespeare (1996).

[72] Kanter (2010-2011) at 426.

[73] Shakespeare (1996) 97.

[74] Stein (2007) at 92-93.

scope, there is no inherent feature in the model that militates against more broad-based positive duties to address systemic disadvantage suffered by persons with disabilities.

Even if a rights paradigm that recognises social, economic and cultural rights as integral to the creation of a more equal society is favoured, all rights paradigms arguably have weaknesses from the perspective of creating a more equal society:[75] First, all rights, particularly those that require positive action, will be subject to resource prioritisation. Secondly, the content of rights may be diluted in various ways, for example, by limiting the content of the right itself only to what can be provided given narrowly defined available resources. Thirdly, implementation of policies and practices that give effect to rights is complex and requires normative justifications that cannot be provided by a rights paradigm or the social model.

4 THE SOCIAL MODEL, EQUALITY AND RIGHTS IN THE CONTEXT OF EDUCATION FOR CHILDREN WITH INTELLECTUAL IMPAIRMENTS

The case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and another*[76] raises some interesting issues regarding the role of the social model in policy formulation and the value of rights in advancing the interests of disabled persons. The salient facts were that government did not accommodate children classified as having severe or profound intellectual impairments at special schools or at any other state school.[77] In the Western Cape, the only educational options for such children were at special care centres that were run by non-governmental organisations (NGOs).[78] The Department of Health subsidised the NGOs providing this education, but the value of the subsidies was less than the financial support provided to learners who were not severely or profoundly impaired.[79] The Forum submitted that because the state provision for the affected children was (a) considerably less than that provided for other children; (b) inadequate to cater for their educational needs; and (c) only made available where a NGO provided the service, the applicable policies and practices infringed on the affected children's rights to equality, human dignity and to be protected from neglect and degradation.[80]

Counsel for the government submitted that EWP6 and the National Strategy on Screening, Identification and Support do indicate plans to deal with the affected children.[81] The crux of their argument was as follows.[82] Due to the scarcity of resources there may be children who do not receive an education, but government had to make difficult policy choices on how resources would be distributed in the face of such

[75] Stein (2007) at 93.

[76] 2011 (5) SA 87 (WCC).

[77] *Western Cape Forum for Intellectual Disability* at para 3.

[78] *Western Cape Forum for Intellectual Disability* at para 3.

[79] *Western Cape Forum for Intellectual Disability* at para 3.

[80] *Western Cape Forum for Intellectual Disability* at para 4.

[81] *Western Cape Forum for Intellectual Disability* at para 17.

[82] *Western Cape Forum for Intellectual Disability* at para 17.

scarcity. The affected children's rights to education should not trump the socio-economic rights of others and an unqualified right to education would have a very big budgetary impact.

The Court held that the failure to provide for the affected children was an infringement of their rights to education, equality, dignity and to be protected from neglect and degradation.[83] The legal intricacies of the judgment will not be explored here.[84] The focus will be on how the social model is implicated and what rights discourse can and cannot contribute.

4.1 Education White Paper 6 and the social model

EWP6's orientation seems to take cognisance of the fact that barriers to learning exist for those who are disabled or have impairments, which is consistent with the social model of disability. It states the following:

> The most significant conceptual change from current policy is that the development of education and training must be premised on the understanding that:
>
> • All children, youth and adults have the potential to learn within all bands of education and they all require support.
>
> • Many learners experience barriers to learning or drop out primarily because of the inability of the system to recognise and accommodate the diverse range of learning needs typically through inaccessible physical plants, curricula, assessment, learning materials and instructional methodologies. The approach advocated in this White Paper is fundamentally different from traditional ones that assume that barriers to learning reside primarily within the learner and accordingly, learner support should take the form of specialist, typically medical interventions.
>
> • Establishing an inclusive education and training system will require changes to mainstream education so that learners experiencing barriers to learning can be identified early and appropriate support provided. It will also require changes to special schools and specialised settings so that learners who experience mild to moderate disabilities can be adequately accommodated within mainstream education through appropriate support from district-based support teams including special schools and specialised settings. This will require that the quality of provision of special schools and specialised settings be upgraded so that they can provide a high-quality service for learners with severe and multiple disabilities.[85]

It is therefore very disconcerting to read that counsel for government in the *Western Cape Forum for Intellectual Disability* case defended government's failure to cater for severely or profoundly intellectually impaired children on the basis that "no amount of education would be beneficial for children failing to qualify for admission to special schools" in terms of the National Strategy on Screening, Identification, Assessment and Support.[86] It is possible to explain this inconsistency in two ways. The first way is to argue that government is simply not acting in accordance with its own policy and that

[83] *Western Cape Forum for Intellectual Disability* at para 52.

[84] For a focused discussion of the case see Ngwena C and Pretorius L "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(1) *South African Journal on Human Rights* 81.

[85] At 24.

[86] *Western Cape Forum for Intellectual Disability* at para 19.

the limitations of the social approach are irrelevant. Government is not willing to put its resources where its policy implementation is.

The second explanation is not in opposition to the first, but would invoke the limitations of the social model as a tool for policy formulation and implementation. The fact that the social model is posited at a macro-level causes it to contribute very little to the minutiae of the policies it is said to underpin because it has not been operationalised. If one were to consider the central tenet of the social model, namely, that society's discriminatory practices disable persons with impairments, it is arguable that EWP6 in some ways run counter to the social model.

First, it is predicated on classifying a range of disabilities according to how much support is required, using IQ scores to determine who will receive education and at which type of institution ("ordinary" school, full service school or special school). Soudien and Baxen argue that this practice fails to problematise the power imbalances that allow "us" to classify "them":

> [I]n Western science, a fixation takes root with classification that inevitably leads to a constant anxiety about who measures up and who does not, who is in and who is out, who is part of us and who is not. Critically important about this, of course, is where the normative power rests; who is doing the classifying and in terms of which norm. It is at this point that the discourse of ideal and deficit bodies finds its translation into a medical scientific framework that measures and classifies. The sum result is the de-emphasis of this question of normative power and a discursive re-emphasis of the abstract calculus of measuring and classifying, a tandem movement that simultaneously allays the anxiety of some (the valued, the powerful, 'us'), by excluding and marginalising those that 'don't measure up'. It also obscures the social consequences and injustices that flow from such dividing practices, by abstracting the violence that is at the base of the discourse's power.[87]

They go on to argue that while EWP6 talks about integrating and including learners with disabilities, it does not critically engage with the terms on which such inclusion is to take place (the unstated assumption is that learners with disabilities or impairments fall short of an unproblematised ideal), nor with the reality that disabled persons' experiences of exclusion are animated by factors other than their disability, for example, their race, class and gender.[88] These features mean that EWP6 is not true to the spirit of the social model's history as a tool for activists who wanted their lived realities to be recognised and reflected.

It is, of course, possible that these inconsistencies or uncritical assumptions in EWP6 are not attributable to the social model, but the model's silence on these issues mean that normative discussions quite apart from the model itself will ultimately determine whether the social causes of disability that the model emphasises are problematised, what social changes will be made and who will bear the costs, if any, of such changes.

4.2 Education White Paper 6 and rights

[87] Soudien & Baxen (2006) at 158.

[88] Soudien & Baxen (2006) at 159-160.

EWP6 also espouses a certain conception of rights and refers to the fundamental rights of every learner, "whether disabled or not". It also refers to the constitutional values of dignity, equality and freedom, which "compel all of us to take up the responsibility and challenge of building a humane and caring society, not for the few, but for all South Africans".

These formulations of what rights require in the context of inclusive education do not critically engage with normative power. Instead, they are underpinned by the unstated ideals of what the body should and should not be.[89] It is not possible to separate rights from the histories and discursive practices in which they are embedded. For this reason, rights can entrench and perpetuate inequality or they can challenge domination. In the words of Anne Brown:

> The language of human rights has at some junctures given expression to and been shaped by otherwise silenced voices – of indigenous and colonised peoples, women, alienated minority peoples, urban and rural workers and the propertyless poor; at some juncture it has acted to deepen the deafness which has systematically excluded the voices of those constituted as inferior or as outcasts.[90]

Government's failure to provide access to education and it defence that such failure is a justifiable limitation of the affected learners' right to equality does not pass muster even in terms of the formal-equality requirement that disabled persons be treated exactly like enabled people. However, if one were to amend the factual matrix slightly to have government investing the same amount in the education of severely or profoundly intellectually impaired learners as it does for other learners, interesting questions arise. As argued above, the social model is vague in its articulation of disadvantage and the requirements of the right to equality are similarly contestable.

In South African jurisprudence and academic commentary the most prevalent distinction is between formal equality and substantive equality.. Albertyn and Goldblatt explain the essence of the distinction between formal and substantive equality thus:

> [Formal equality] perceives inequalities as irrational aberrations in an otherwise just social order. These aberrations can be overcome by extending the same rights and entitlements to all, in accordance with the same 'neutral' standard of measurement…By contrast, a legal understanding of substantive equality proceeds from the recognition that inequality not only emerges from irrational legal distinctions, but is often more deeply rooted in social and economic cleavages between groups in society. Such inequalities are referred to as 'systemic', as they are rooted in the structures and institutions of society. Legal claims (usually of discrimination) that target such inequalities require an understanding of the underlying social and economic conditions that create and reinforce these inequalities, if such claims are to remedy inequality.[91]

The South African Constitutional Court has repeated its adoption of substantive equality on numerous occasions.[92] Hepple[93] notes that substantive equality is premised on the

[89] Soudien & Baxen (2006) at 159.

[90] Quoted in Christie (2010) at 4-5.

[91] Albertyn C & Goldblatt B "Equality in the final constitution" in Woolman S & Chaskalson M (eds) *Constitutional law of South Africa* (2008) Ch 35, at 5-7.

[92] See for example, *Minister of Finance and another v Van Heerden* 2004 (6) SA 121 (CC) paras 26-27.

[93] Hepple B "The aims and limits of equality laws" in Dupper O & Garbers C *Equality in the workplace* (2010) at 9.

unequal outcomes brought about by markets and the requirement that the state intervene to ensure equitable distribution of resources. The extent to which re-distribution can be achieved is a complex matter that more often than not will be decided in the policy domain, rather than in the courts.[94] Furthermore, distribution of resources is regarded as a personal choice. Hepple criticises this reliance on choice because it ignores existing structural inequalities and supports the ideal of 'equality of capabilities' as developed by Sen and others.[95]

It is open to debate what the outcome of the *Western Cape Forum for Intellectual Disability* case would have been had government spent as much money on severely or profoundly intellectually impaired learners as on other learners. The latter need more support, so from the perspective of substantive equality one could argue that they deserve a bigger share of resources. However, it is doubtful whether a court would intervene in that distributional decision in the face of limited resources. What is clear, though, is that an abstract assertion that disabled people have the right to equality is of little use in the complexities of material circumstances.

Another important issue in relation to equality is succinctly captured in Amartya Sen's question: "Equality of what?"[96] Liebenberg states that courts are more amenable to intervene where there is inequality of status, but less so when there are inequalities of resources.[97] This is so even while we acknowledge the poverty experienced by disadvantaged groups, such as, women, children or persons with disabilities, and which bears out the criticism that traditional formulations of rights are silent on the structural inequalities that mar societies.

The recognition that structural deficits severely hamper attempts at building a more equal society holds implications for how we go about claims based on equality. The traditional individual complaints-led model views human rights as a shield against state interference.[98] Rights vest in individuals and remedies are available only upon proof of breach, or "fault".[99] Courts are seen as the primary forums for the enforcement of rights and individuals must approach courts in order to assert their rights.[100]

In contrast, pro-active models do not rely on the individual to approach a court to establish a breach of his or her rights. Policymakers, implementers, service providers or employers must take the initiative.[101] Individual victims are not burdened with the expense and time implications of litigation and change is systematic as opposed to

[94] Fredman S "Providing equality" Substantive equality and the positive duty to provide" (2005) 21 *South African Journal on Human Rights* 163 at 164.
[95] Hepple (2010) at 10.
[96] Sen A "Equality of what?" in McMurrin S (ed) *Tanner Lectures on Human Values* (1980) at 197.
[97] Liebenberg S "Equality rights and children" Moving beyond a one-size-fits-all approach" in Hall K, Woolard I, Lake L & Smith C (eds) *South African child gauge 2012* (2012) at 25.
[98] Fredman S "Changing the norm: positive duties in equal treatment legislation" (2005) at 3. Available at http://scholar.googleusercontent.com/scholar?q=cache:uSwjXfBujjkJ:scholar.google.com/&hl=en&as_sdt=0,5 (accessed 15 October 2012).
[99] Fredman "Changing the norm" (2005) at 4.
[100] Fredman "Changing the norm" (2005) at 5.
[101] Fredman "Changing the norm" (2005) at 3.

random.[102] The duty to bring about change lies with the people and institutions with the power to effect such change.[103] Two types of pro-active models can be distinguished:[104] the first is based on mainstreaming, "a social justice-led approach to policy making in which equal opportunities principles, strategies and practices are integrated into the everyday work of government and other public bodies". The second type of model places a statutory duty on public bodies to promote equality. Examples in the South African context include the Employment Equity Act[105] and the Promotion of Equality and Prevention of Unfair Discrimination Act.[106]

Fredman explains that pro-active strategies frequently confuse means and aims and that more attention will have to be paid to what strategies aim to achieve.[107] She distinguishes equal treatment, equal opportunities and equality of results and argues that equal treatment is not high on the agenda in pro-active models.[108] Furthermore, both equality of opportunities and equality of outcome are open-textured and can be applied expansively or restrictively, so the opportunities-results dichotomy does not prove very helpful.[109] She suggests that equality could have four potential aims:

> First it should break the cycle of disadvantage associated with out-groups. Second, it should promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an out-group. Third, it should entail accommodation and positive affirmation and celebration of identity within community, and, finally, it should facilitate full participation in society.[110]

Policies, such as, EWP6 would probably fall within the category of pro-active strategies. If one accepts Soudien and Baxen's criticism that the policy fails to engage critically with what it means by "integration" and "inclusion", Fredman's observation that strategies often confuse means and ends is borne out. Furthermore, Fredman's potential aims for equality are arguably not fully realised: The policy does not dismantle stereotypes and therefore cannot fully break the cycle of disadvantage experienced by persons with intellectual impairments, even though some attempts are made to do so, it does not celebrate diverse identities and it is arguable that the gaps it leaves may hamper its contribution to ensuring the full participation in society of persons with intellectual impairments.

The intersection of equality and socio-economic rights is important if disabled persons' living conditions and circumstances are to change for the better. This overlap occurs when groups are "excluded unfairly from socio-economic programmes or when services are delivered in ways that reinforce stereotypes and undermine the dignity of

[102] Fredman "Changing the norm" (2005) at 4.
[103] Fredman "Changing the norm" (2005) at 5.
[104] Fredman "Changing the norm" (2005) at 5.
[105] Act 55 of 1998.
[106] Act 4 of 2000.
[107] Fredman "Changing the norm" (2005) at 7.
[108] Fredman "Changing the norm" (2005) at 7.
[109] Fredman "Changing the norm" (2005) at 7.
[110] Fredman "Changing the norm" (2005) at 8.

the recipients".[111] There is also a more fundamental interdependence of rights that are prescient in the education context:

> In this context of rising poverty and inequality and growing protests over school fees and other substantial barriers to educational access by the poor, communities have grasped a fact that sometimes seems to elude education policy analysts: progress (or the lack thereof) in schools cannot be divorced from poverty and its consequences. We cannot expect children to come to school ready to learn if they are hungry; if they have been evicted from their homes or if they lack light by which to read at night. And issues of access to schools are not the only considerations affecting a learner's right to education. The 'quality' and relevance of the education a child receives also has an effect, as does the problem of school violence. Faced with situations of sexual violence, harassment or rape; crime and physical abuse one can hardly question why some learners drop out from school.[112]

Rights activists and lawyers will have to strategise on whether to frame their cases as implicating the right to equality, relevant socio-economic rights or both.[113] A substantive equality approach is of little meaning if it is not coupled with the creation of positive obligations in the socio-economic context.[114] Those obligations are not determined solely by courts, so even if South African courts have been reluctant to impose positive obligations in the face of resource limitations and pressure to defer to the executive branch of government on matters of policy,[115] political communities can still use rights to challenge domination and inequality.

Apart from the conceptualisation of specific rights in concrete circumstances, pro-active strategies also have to reflect attention to the rights of disabled persons in all their planning and implementation processes. Disabled people's organisations all over the globe have fought long and hard for disabled persons to be visible as bearers of human rights.[116] It is in this context that it is particularly disappointing that the National Development Plan,[117] formulated under the auspices of the National Planning Committee, omits disabled persons in important respects, including in its plans to increase the education levels of marginalised groups.[118] It mentions black persons and women, but no mention is made of persons with disabilities. Furthermore, it is silent on the fact that access to education for learners with disabilities is still very problematic, it

[111] Liebenberg (2012) at 28.

[112] Spreen & Vally (2006) at 354.

[113] Liebenberg (2012) at 28.

[114] See Committee on Economic, Social and Cultural Rights "General Comment No. 5, Persons with Disabilities" U.N. Doc E/1995/22 (1995) at 19 where a review of the World Programme of Action concerning Disabled Persons and the UN Decade of Disabled Persons is cited as concluding that "disability is closely linked to economic and social factors" and that "conditions of living in large parts of the world are so desperate that the provision of basic needs for all - food, water, shelter, health protection and education - must form the cornerstone of national programmes."

[115] See, for example, *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC).

[116] Lord J, Suozzi D & Taylor A "Lessons from the experience of UN Convention on the Rights of Persons with Disabilities: Addressing the democratic deficit in global health governance" (2010) *Journal of Law, Medicine and Ethics* 564 at 567.

[117] National Planning Commission "National Development Plan 2030" (2011) AT 319 . Available at http://www.info.gov.za/view/DynamicAction?pageid=623&myID=348761 (accessed 20 December 2012).

[118] Combrinck H & Wakefield L "Pupils with disabilities 'ignored'" (2011). Available at http://mg.co.za/article/2011-12-02-pupils-with-disabilities-ignored (accessed 20 December 2012).

does not consider the identification of disabilities in early childhood development, nor does it acknowledge the difficulties the Department of Education has faced in the implementation of EWP6.[119]

5 CONCLUDING REMARKS

The social model of disability is invoked often as a foundational principle of disability policies and strategies. If one considers the central claims of the most prevalent articulations of the model, which is about the causes of disability, as well as its use by activists opposing the hegemony of the individual, medical model of disability, questions arise as to its value in policy formulation and implementation. While its rhetorical impact cannot be discounted, that impact has to be understood in its objective to subvert the *status quo*. When policies are designed, the emphasis is on problematising, the creation of systems, processes and institutions. The social model is therefore of limited use.

It is also possible for the social model to be used as a rhetorical device while its central principles are not reflected in the minutiae of the relevant policies. It is submitted that this is the case with EPW6, which is ostensibly premised on the social model, but entrenches stereotypes, uncritically endorses the classification of disabled persons' bodies and measures them against an "ideal", and fails to engage with how policies for inclusion may end up creating new sites for exclusion.

EPW6 relies on constitutional rights as normative justifications, but its conception of rights masks inequalities. Just as with the social model, the value of rights, if any, for disabled persons' struggles will depend on whether rights are interpreted to entrench the *status quo* or as discursive tools with which to fight domination and stake social claims. If the latter, it is not just the courts' interpretations of their content that are important, but whether they are utilised by affected persons to appeal to political communities to include and value such persons.

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[119] Combrinck & Wakefield (2011).

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