

# EQUALITY AND INCLUSION IN EDUCATION FOR PERSONS WITH DISABILITIES: ARTICLE 24 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS IMPLEMENTATION IN HONG KONG

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*This article considers the extent to which a legal right to equality and non-discrimination – as it has been expressed and developed in international law, domestic legislation and constitutional provisions – can support inclusion in education for persons with disabilities. Article 24 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and other relevant human rights standards serve as reference points for this discussion. The article explores the concepts of disability (based on the social model), substantive equality, and inclusion and argues that these notions combine to form a theoretical foundation for a strong legal framework that requires transformative measures. It considers how these concepts are reflected in international human rights law and how they have been applied in Hong Kong domestic law. It concludes that legal reforms are necessary for Hong Kong to fully implement its obligations to ensure inclusive education and substantive equality under the CRPD.*

## **I. Introduction**

This article considers the extent to which a legal right to equality and non-discrimination – as it has been expressed and developed in international law, domestic legislation and constitutional provisions – can achieve or support inclusion in education for persons with disabilities. It explores the concept of equality and argues that when understood

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in its substantive sense – beyond a formal notion of equal treatment – equality has the potential to transform barriers to inclusion and achieve full participation and the equal enjoyment of rights, including the right to education. Substantive equality as a transformative principle requires a contextual analysis to identify disadvantage – an understanding which is particularly important when addressing disability discrimination. Insights into the nature of disability have revealed that disability is not merely defined by an individual’s physical or mental impairments, but is instead a function of social and environmental impediments. Substantive equality is necessary to address discrimination arising from these impediments since they must be identified and then transformed before inclusion is possible. Equal treatment in a formal sense – treating likes alike and thus ignoring characteristics such as disability which should be irrelevant when allocating opportunities – may perpetuate discrimination resulting from structures which cater to a non-disabled norm but exclude, and thus render invisible, persons with disabilities.

The right to equality as it has developed in international human rights law reflects this substantive imperative. Attempts to achieve its realisation at the domestic level, however, have seen mixed results as legislators, policy-makers and courts fluctuate between embracing the change demanded by substantive equality and attempting to limit its impact on the *status quo* by retreating to a formal principle.

The framework and reference point for this examination of equality law and its relationship to inclusive education is the 2006 United Nations Convention on the Rights of Persons with Disabilities (CRPD).<sup>1</sup> The Convention emphasises the principle of equality and non-discrimination in its substantive sense, provides for a right to education, and elaborates the concept of inclusion in education and the relevant state obligations.<sup>2</sup> Although the CRPD sets out the most pertinent and far-reaching set of standards in this context, other key instruments also enumerate a right to equality – in general and in relation to education in particular – and therefore have a bearing on this analysis. These include the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), and the 1989 Convention on the Rights of the Child (CRC).<sup>3</sup> Although the 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the

<sup>1</sup> The CRPD is available on the web site of the Office of the High Commissioner for Human Rights: <http://www2.ohchr.org/english/law/disabilities-convention.htm> (accessed 25 July 2010).

<sup>2</sup> *Ibid.* Art 2 (discrimination) and Art 24 (right to education and inclusive education).

<sup>3</sup> These treaties are available on the web site of the Office of the High Commissioner for Human Rights: <http://www2.ohchr.org/english/law/index.htm#core> (accessed 25 July 2010).

1965 Convention on the Elimination of all Forms of Racial Discrimination (CERD) do not address disability discrimination explicitly, their monitoring bodies have interpreted equality according to a substantive model and contributed to the development of its content in international law more generally.<sup>4</sup>

After a review of relevant international standards, this article then considers domestic equality and anti-discrimination law with a focus on the Hong Kong legal framework including the Disability Discrimination Ordinance (DDO) (which is based on UK and Australian anti-discrimination law)<sup>5</sup> and constitutional equality provisions in the Hong Kong Basic Law<sup>6</sup> – Hong Kong’s regional constitution – and the Bill of Rights which essentially duplicates the ICCPR.<sup>7</sup> Hong Kong arguably has one of the most comprehensive legal regimes for addressing discrimination in the Asian region and has the potential to influence initiatives in China and elsewhere. In addition, since the Bill of Rights copies the provisions of the ICCPR and Hong Kong courts are often willing to cite the interpretive materials produced by the human rights treaty monitoring bodies, developments in international human rights law may have a particular impact in the Hong Kong context. Hong Kong provisions are explored with reference to law from other jurisdictions, especially the Australian Disability Discrimination Act<sup>8</sup> which most closely resembles the Hong Kong legislation, in order to elucidate both the potential and limitations of the Hong Kong model and suggest possible alternative approaches that could strengthen legal support for inclusion in education in Hong Kong.

This review of international and domestic standards suggests that while equality law – when underpinned by a substantive principle – can

<sup>4</sup> These treaties are available at *ibid*. For examples of relevant interpretations by the monitoring bodies, see the United Nations Committee on the Elimination of Discrimination against Women, General Recommendation No 25: Temporary Special Measures, UN Doc A/59/38, 2004 and the United Nations Committee on the Elimination of Racial Discrimination, General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of all Forms of Racial Discrimination, UN Doc CERD/C/GC/32, August 2009.

<sup>5</sup> Cap 487, Laws of Hong Kong. See Carole J. Petersen, “A Progressive Law with Weak Enforcement? An Empirical Study of Hong Kong’s Disability Law”, (2005) 25(4) *Disability Studies Quarterly*.

<sup>6</sup> 1990 Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China.

<sup>7</sup> The Hong Kong Bill of Rights copies most of the provisions in the 1966 International Covenant on Civil and Political Rights (ICCPR) and is included as Part II of the Bill of Rights Ordinance (Cap 383), Laws of Hong Kong.

<sup>8</sup> Australian Disability Discrimination Act 1992 (DDA).

support efforts towards inclusion, it also has limitations.<sup>9</sup> Speakers at a conference on the CRPD and inclusion in education held in Hong Kong in November 2009 expressed scepticism about the potential of equality law – and law generally – to serve as an effective driving force for greater inclusion. Chong Chan-yau pointed out that the disability community in Hong Kong had been hopeful that the DDO would have a positive impact when it was enacted in 1995 since they believed it would require action on the part of the government and others to address discrimination.<sup>10</sup> He remarked, however, that the Ordinance in fact has a “defensive” rather than “promotional” orientation and does not emphasise positive duties on government and other actors to ensure non-discrimination.<sup>11</sup> Carole Petersen argued that relying solely on anti-discrimination legislation was not sufficient and pointed out that some countries, including the United States, had made greater progress since passing specific education legislation elaborating the required measures to achieve inclusion beyond an anti-discrimination framework.<sup>12</sup> Wayne MacKay expressed confidence that wide support for the *policy* of inclusion exists in Canada, but he was less certain that educators and the general public would embrace the *law* as a means of realising more inclusive schools. He observed that, “[l]awyers and judges are more often regarded as sources of fog shrouding the education process, than as beacons of light to guide educators through the complex fog of public education”.<sup>13</sup>

Nevertheless, there was general affirmation that the law has a role to play in reaching solutions. Vernor Muñoz, the United Nations Special Rapporteur on the Right to Education, noted the urgency of

<sup>9</sup> For a discussion of the limits of law in the disability context, see, for example, Melinda Jones and Lee Ann Basser Marks, “Law and the Social Construction of Disability” in Melinda Jones and Lee Ann Basser Marks (eds), *Disability, Divers-ability, and Legal Change* (The Hague: Kluwer Law International, 1999). They note that “[w]hat it is very important to appreciate is that even if there existed a perfect regime of human rights, a system of formal law promoting and empowering people with disabilities, this is only going to be a small part of what is necessary to bring about true equality for people with disabilities” (at 4).

<sup>10</sup> Chong Chan-yau, “Implementing Inclusion: Challenges and Opportunities”, presentation at *Inclusion in Education: Implementation of Article 24 of the United Nations Convention on the Rights of Persons with Disabilities*, The University of Hong Kong, 28 November 2009.

<sup>11</sup> *Ibid.*

<sup>12</sup> Carole J. Petersen, “Inclusive Education and Alternative Dispute Resolution: Rights and Interests”, paper presented at *Inclusion in Education* n 10 above. See also Carole J. Petersen, “Rights and Interests: Alternative Dispute Resolution and Inclusive Education”, (2010) 40 *HKLJ* 481.

<sup>13</sup> A. Wayne MacKay, “An International Call for Action and Canada’s Long and Winding Road to Inclusion: The Canadian Experience”, (2010) 40 *HKLJ* 449 at 466 also presented at *Inclusion in Education*, n 10 above, at 24.

the situation<sup>14</sup> and observed that the widespread denial of the human right to education of persons with disabilities stems from utilitarian visions of education as a privilege or commercial asset, rather than a right provided by law.<sup>15</sup> He therefore underscored the significance of human rights law and urged states to harmonise their national legislation with international standards as part of the process towards greater inclusion.<sup>16</sup>

MacKay also emphasised the significance of equality law. He contended that despite the perception that law contributes to a *lack* of clarity: “the concept of equality, properly understood and applied with adequate resources can be the lighthouse that guides us to more inclusive, effective and even safer public schools”.<sup>17</sup> This metaphor of “light” echoes statements made by the United Nations Secretary-General and the President of the European Disability Forum in relation to the CRPD and the fact that it was adopted on the day of St. Lucy, patron saint of blindness and light.<sup>18</sup> These characterisations of the Convention and other sources of a legal right to equality and education in international and domestic law reveal a sense of optimism in the law’s role as a tool for achieving inclusion. Much of the potential of equality law for furthering the objectives of inclusion, however, depends on how the equality principle is reflected in and promoted through law and policy. When understood in a substantive rather than strictly formal sense, equality can contribute towards achieving the goals of inclusion as expressed in Article 24 of the CRPD.

In the Hong Kong context, although the DDO is an important starting point for protecting students with disabilities from discrimination by educational institutions, its potential is weakened by several factors.

<sup>14</sup> Globally only around 5% of children with disabilities manage to complete primary education and in many developing countries the numbers do not even reach 1%. Vernor Muñoz, Keynote address at *Inclusion in Education*, n 10 above. See also United Nations, Office of the High Commissioner for Human Rights, Inter-Parliamentary Union, “From Exclusion to Equality: Realizing the Rights of Persons with Disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities” (2007), available at: <http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf>.

<sup>15</sup> *Ibid.* (Muñoz).

<sup>16</sup> *Ibid.*

<sup>17</sup> See n 13 above at 466 (HKLJ) and 24–25 (conference paper).

<sup>18</sup> Official Statement of the UN Secretary-General, “Secretary-General Hails the Adoption of Landmark Convention on Rights of Persons with Disabilities”, 13 December 2006, SG.SM/10797, HR/4911, L/T/4400 cited in Rosemary Kayess and Phillip French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities”, (2008) 8 *Human Rights Law Review* 1, at 2–3. The President of the European Disability Forum stated at the Convention’s Signature Opening Ceremony that “[t]his is a Convention to bring those in darkness into light” after quoting Bertold Brecht: “Some there are who live in darkness; While the others live in light; We see those who live in daylight; Those in the darkness out of sight”. UN Press Release, “Record Number of countries Sign UN Treaty on Disabilities on Opening Day”, 30 March 2007. Cited in Kayess and French, at 3.

These include (1) a broad exception in the education provisions; (2) the need to identify a similarly situated comparator in order to prove direct discrimination and the courts' interpretation of this requirement; (3) an overly narrow definition of discrimination; and (4) the lack of an explicit duty to provide accommodation in order to avoid discrimination. Despite policy statements that highlight inclusion as an objective,<sup>19</sup> Hong Kong does not have in place specific legislation on education which stipulates the necessary environment and features for achieving inclusion. The impetus towards inclusion in Hong Kong remains within the realm of education policy rather than law.

This article argues, therefore, that in order to fully implement its responsibilities under the CRPD – especially the right to education in Article 24 – Hong Kong needs to implement legal reforms to address these issues. The CRPD provides a framework which reflects a concept of substantive equality more capable of achieving inclusion and the DDO needs to be analysed, assessed, and potentially amended, taking these standards into account.

Section II of this article discusses the concepts of disability, inclusion and equality and their expression in international human rights instruments, especially the CRPD. Section III examines the Hong Kong legal framework, including the Hong Kong Basic Law, the Bill of Rights and the DDO. It considers the DDO in detail with reference to the concepts of inclusion and equality and the international standards described in section II. It also compares the DDO's approach to disability discrimination statutes and equality guarantees in other jurisdictions. Section IV concludes with several recommendations for legal reform in Hong Kong based on this analysis.

## II. The Concepts of Disability, Inclusion and Equality and Their Development in International Human Rights Law

The concepts of disability, inclusion and substantive equality have found expression in international human rights law, especially the CRPD, and

<sup>19</sup> Eugenie Woo, Senior Specialist (Special Education Support 4, Education Bureau), "Education for Students with Special Educational Needs (SEN) in Ordinary Schools in Hong Kong" presentation at *Inclusion in Education*, n 10 above. See also Education Bureau, Hong Kong SAR, "Catering for Student Differences: Indicators for Inclusion: A Tool for Self-evaluation and School Development", August 2008, available at: [http://www.edb.gov.hk/FileManager/EN/Content\\_7383/indicators-082008\\_e.pdf](http://www.edb.gov.hk/FileManager/EN/Content_7383/indicators-082008_e.pdf). This document acknowledges Tony Booth and Mel Ainscow, Centre for Studies on Inclusive Education (CSIE), "Index for Inclusion: Developing Learning and Participation in Schools" (edited and produced for CSIE by Mark Vaughan, 2000).

form a matrix of overlapping and reinforcing principles which have the potential to strengthen legal mechanisms for inclusion if they are implemented effectively into domestic law. This section considers these concepts, their interaction, and the obligations arising from their articulation as legal norms.

### *Competing Models and Meanings of Disability*

The CRPD represents a “paradigm shift” away from the medical model of disability – an understanding of disability which emphasises the impact of individual impairments – and instead embraces the social model which recognises that disability is created by impediments in society.<sup>20</sup> The Convention, as a core human rights treaty, also places the concerns of persons with disabilities firmly within a human rights framework.<sup>21</sup> The medical model defines disability with reference to impairments – and within this model there has been debate about which impairments should be included. For example, whether mental and intellectual as well as physical conditions constitute disabilities and whether these must be long term in nature.<sup>22</sup>

Advocates for the “social” model observe instead that disability is caused by barriers in the environment – both physical and attitudinal – and is not inherent in any particular impairment.<sup>23</sup> Although the Convention does

<sup>20</sup> See n 18 above (Kayess and French) generally and at 3 citing Ambassador Don MacKay, Permanent Representative of New Zealand in the UN and Chair of the Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, “Commentary at a High-Level Dialogue held in association with the Signature Ceremony of the Convention, from Vision to Action: The Road to Implementation of the Convention on the Rights of Persons with Disabilities”, New York, 30 March 2007 and the UN High Commissioner for Human Rights, “Statement by Louise Arbor UN High Commissioner for Human Rights on the Ad Hoc Committee’s Adoption of the International Convention on the Rights of Persons with Disabilities”, 5 December 2006.

<sup>21</sup> *Ibid.* (Kayess and French), at 3. See also Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford: Oxford University Press, 2005), pp 107–120.

<sup>22</sup> For example in the United Kingdom 1995 Disability Discrimination Act a person has a disability for the purposes of the Act if he/she has a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities. The Hong Kong DDO does not specify that the effect or impairment must be long-term in nature.

<sup>23</sup> See French and Kayess, n 18 above, at 5–7. For discussion and critique of the social model as well as developments in the fields of disability studies and disability theory, see, for example, Colin Barnes and Geoff Mercer, *Exploring Disability* (Polity, 2nd edn, 2010); Michael Oliver, *Understanding Disability: From Theory to Practice* (Basingstoke: Palgrave Macmillan, 2nd edn, 2009); Tom Shakespeare, *Disability Rights and Wrongs* (London: Routledge, 2006); Colin Barnes and Geoff Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (Leeds: Disability Press, 2004); Jones and Marks, n 9 above; Simi Linton, *Claiming Disability: Knowledge and Identity* (New York: New York University Press, 1998); and John Swain, Sally French, Colin Barnes, and Carol Thomas (eds), *Disabling Barriers: Enabling Environments* (London: Sage, 1993).

not define disability in its “definitions” section, it provides some guidance and its approach clearly reflects the social model. For example, the preamble – which forms part of the context for the purpose of interpreting the treaty<sup>24</sup> – states that: “Disability is an evolving concept and ... results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.<sup>25</sup> In other words, disability involves the ways in which social structures and attitudes create disadvantage and limit participation: the focus is on the social and environmental obstacles rather than the impairment.

Martha Nussbaum has observed that this insight about disability forces a re-evaluation of what we assume to be “normal” or “neutral”. She writes that “public space is arranged to cater to the impairments of the ‘normal’ case.<sup>26</sup> What is different about people who are blind and deaf and wheelchair-users is that their abilities are typically not catered for, because they are impaired in an unusual way”.<sup>27</sup> To illustrate this point, she compares the use of wheelchairs by the physically disabled to the use of cars and buses by what she calls “normals”. “Normals” also have limitations: their legs can only go so fast and they use cars and buses as aids to move around. She observes that “public space is arranged to accommodate cars and buses – through the building of roads, parking lots, bus stops, etc. – but that it’s not arranged to cater to prostheses used by the atypically disabled”.<sup>28</sup> In other words, everyone has limitations but society is generally structured only to accommodate “normal” impairments such as having legs. The sources of disadvantage are based in society which is not “neutral” in the way it affects different groups with diverse needs.<sup>29</sup>

### *Concepts of Equality and Inclusion*

There is a close connection between the social model of disability and a right to substantive equality and non-discrimination as it has been

<sup>24</sup> 1969 Vienna Convention on the Law of Treaties, Art 31.

<sup>25</sup> Preamble CRPD (n 1 above). See also the non-exhaustive statement provided in Art 1 of the Convention that “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”. Note that Art 1 sets out the “Purpose” of the Convention and that no definition of “disability” is included under Art 2: “Definitions”.

<sup>26</sup> Nussbaum *Frontiers of Justice* (Cambridge, Mass: The Belknap Press: Harvard University Press, 2006), pp 116–117.

<sup>27</sup> *Ibid.*

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

<sup>29</sup> *Ibid.*



developing in international human rights law and some domestic jurisdictions. Substantive equality is generally contrasted with the more traditional notion of “formal equality” based on a “neutral”, colour-blind principle of equal treatment which demands that likes be treated alike.<sup>30</sup> According to this theory, originally based on Aristotle’s dictum that things that are alike should be treated alike,<sup>31</sup> factors such as gender, race or disability are irrelevant and should not be considered. The problem with this approach is that it does not account for actual power imbalances among groups and communities. So if people are not starting from the same position due to past, systemic discrimination, treating them alike will not redress disadvantage. In fact, it may actually create or perpetuate existing discrimination and social hierarchies.

This may be especially true in the case of disability, where, as discussed above, social and environmental structures clearly create impediments and barriers to accessing opportunities. In contrast, substantive equality mandates a contextual examination that considers the actual circumstances facing a community – and individuals within that community – and an assessment of the group’s degree of marginalisation. Substantive equality may require positive duties, special measures or affirmative action.

Sandra Fredman is one of a number of scholars who have described the problems with formal equality and argued for a conceptual shift towards a substantive model.<sup>32</sup> She has suggested that equality should have four aims: (1) first it should break the cycle of disadvantage for out-groups; (2) next it should promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence based on group membership; (3) third, it should entail positive affirmation and celebration of identity within community; and (4) fourth, it should facilitate full participation in society.<sup>33</sup> Substantive equality pursues these aims and has been described as a transformative project – in much the same

<sup>30</sup> The distinction between formal and substantive equality and the limitations and conceptual difficulties with the equal treatment principle have been extensively discussed in academic literature. For a sampling, see, for example, Sandra Fredman, “The Future of Equality in Britain” Working Paper Series No. 5 (Equal Opportunities Commission: 2002); Peter Westen, “The Empty Idea of Equality”, (1982) 95 *Harvard Law Review* 537; Catherine A. MacKinnon, “Difference and Dominance: On Sex Discrimination” reprinted in Catherine A. MacKinnon, *Feminism Unmodified*, (Harvard University Press, 1988); Christine M. Koggel, *Perspectives on Equality: Constructing a Relational Theory* (Lanham, Md: Rowman & Littlefield Publishers, 1998), pp 75–76; Christopher McCrudden, “The New Concept of Equality”, (2003) 4 *ERA-Forum* 9; Amartya Sen, *Inequality Reexamined* (Oxford: Clarendon Press; New York: Russell Sage Foundation; Cambridge, MA, Harvard University Press, 1992); and Patricia Hughes, “Recognizing Substantive Equality as a Foundational Constitutional Principle”, (1999) 22 *Dalhousie Law Journal* 5.

<sup>31</sup> Aristotle, *Ethica Nicomachea*, V.3 1131a–1131b (trans. into English by W. Ross, 1925).

<sup>32</sup> Fredman (n 30 above).

<sup>33</sup> *Ibid.* and Sandra Fredman, *Human Rights Transformed* (Oxford University Press, 2007), p 10.

way that the disability movement has sought to transform social structures to remove systemic discrimination and make society more inclusive.

Inclusion – in education as well as other areas – is the realisation of substantive equality and ensuring a right to equality demands inclusion.<sup>34</sup> Achieving inclusion/equality necessitates breaking down the social barriers that cause disability (according to the social model) and transforming discriminatory structures through the application of special measures. To some degree, an ideal, full version of equality would eliminate “disability” in the pure social model sense, since the social and environmental barriers would be gone, while still embracing the value of human diversity, one of Fredman’s suggested equality aims. In this way these concepts – inclusion, equality and disability – come together, reinforce each other and express their transformative potential.

### *Substantive Equality in International Human Rights Law*

The core international human rights instruments – seven of which are binding on Hong Kong – articulate a substantive principle of equality in international law which reflects these concepts and objectives and obligates states to respect and ensure fundamental rights without discrimination, including the right to education.<sup>35</sup> They require that states examine context and disadvantage, take necessary measures to redress *de facto* discrimination, and provide an environment for inclusion. As a result, they form a strong international legal basis for implementing inclusive education at the domestic level.

These treaties include general human rights conventions – the ICCPR and the ICESCR – which, along with the Universal Declaration of Human Rights, form the International Bill of Human Rights and provide the foundational principle of equality and non-discrimination which underpins all human rights.<sup>36</sup> A number of specialised treaties provide additional protection from discrimination on specific grounds.

<sup>34</sup> For a discussion of the meaning of “inclusion” and inclusion in education, see, for example, Vernor Muñoz, “The right to education of persons with disabilities”, Report of the Special Rapporteur on the right to education (2007); Booth and Ainscow (n 19 above); and Lee Ann Bassar and Melinda Jones, “Fostering Inclusive Societal Values Through Law”, (2002) 10 *The International Journal of Children’s Rights* 371–402.

<sup>35</sup> For discussion of the right to education in international law in the context of disability, see, for example, Muñoz (*Ibid.*); Bassar and Jones (*Ibid.*), at 376–386; and Lee Ann Bassar, “Justice for All? The Challenge of Realizing the Right to Education for Children with Disabilities”, (2005) *Journal of Gender Race & Justice* 531–559.

<sup>36</sup> Universal Declaration of Human Rights, Arts 1 and 2; ICCPR, Arts 2(1), 3 and 26; ICESCR, Arts 2(2) and 3.

These include the CERD, which prohibits discrimination on the grounds of race, colour, descent, or national or ethnic origin, and CEDAW which prohibits discrimination against women. The CRC is another human rights instrument which is particularly relevant to inclusion in education. Unlike the other treaties, it explicitly adds “disability” to the list of prohibited grounds of discrimination.<sup>37</sup> It also provides for the key principle that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.<sup>38</sup>

Article 2(1) of the ICCPR sets out the principle of equality and non-discrimination in the context of states’ general obligations under the Covenant. States parties must respect and ensure to all individuals within their territories and subject to their jurisdictions the rights recognised in the Covenant, “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Article 26 provides for an autonomous right – not linked exclusively to the rights enumerated in the Covenant itself – to equality before the law and equal protection of the law without discrimination.<sup>39</sup>

“In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.<sup>40</sup>

The United Nations Human Rights Committee (the treaty-monitoring body for the ICCPR) has interpreted these provisions to contain a right to substantive equality noting that States Parties must sometimes “take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”. This “may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant”.<sup>41</sup> In this sense, such “preferential” treatment is

<sup>37</sup> CRC Art 2(1).

<sup>38</sup> CRC Art 3(1).

<sup>39</sup> Human Rights Committee, General Comment 18: Non-discrimination, in UN Doc HRI/GEN/1/Rev.610, November 1989, para 12.

<sup>40</sup> Art 26.

<sup>41</sup> Human Rights Committee (n 39 above) para 10.

part and parcel to ensuring equality and does not constitute an *exception* to the principle of non-discrimination.<sup>42</sup>

Like its counterpart in the ICCPR, Article 2(2) of the ICESCR mandates that states parties guarantee that the rights enunciated in the Covenant – including the right to education in Articles 13 and 14<sup>43</sup> – will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee on Economic, Social and Cultural Rights, which monitors implementation of the ICESCR, has clarified that in order to fulfil these responsibilities states must address both formal and substantive discrimination:

“Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination ...”<sup>44</sup>

In addition, states must, in some cases, “adopt special measures to attenuate or suppress conditions that perpetuate discrimination” in order to “eliminate substantive discrimination”.<sup>45</sup> The Committee notes that such “measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved”.<sup>46</sup>

The Committee has also explained that measures needed to fulfil a right to education under the Covenant will vary according to

<sup>42</sup> See Warwick McKean, *Equality and Non-discrimination under International Law* (Oxford: Clarendon Press, 1983), p 159. McKean makes this point in relation to the special measures provisions in the CERD.

<sup>43</sup> Art 13 provides that states parties recognise the right of everyone to education and agree that education should be directed to the full development of the human personality and the sense of its dignity. With a view to achieving the full realisation of this right, states parties recognise that primary education shall be compulsory and available free to all and secondary and higher education be made available and accessible. It also recognises the freedom of parents to choose schools for their children other than those established by the authorities. Art 14 requires that states parties which had not been able to provide free, compulsory primary education at the time of becoming a party to work out and adopt a detailed plan of action for the progressive implementation within a reasonable number of years of the principle of compulsory primary education free of charge for all.

<sup>44</sup> Committee on Economic, Social and Cultural Rights, General Comment 20: Non-discrimination in Economic, Social and Cultural Rights, UN Doc E/C.12/GC/20, 10 June 2009, para 8(b).

<sup>45</sup> *Ibid.* para 9.

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

the situation, but that every system must have four essential features: (1) “availability” (the existence of functioning institutions); (2) “accessibility” (non-discrimination and physical and economic accessibility); (3) “acceptability” (relevant form and substance, culturally appropriate and of good quality); and (4) “adaptability” (flexible and able to adapt to changing needs).<sup>47</sup>

The Committee on the Elimination of Discrimination against Women has also interpreted the right to equality in CEDAW as a right to “substantive equality” which has transformative capacity. It requires that the lives of women and men “be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns”.<sup>48</sup>

The Committee on the Elimination of Racial Discrimination has similarly interpreted obligations in the CERD according to a theory of substantive equality noting that “[t]he principle of equality underpinned by the Convention combines formal equality before the law with equal protection of the law, with substantive or *de facto* equality in the enjoyment and exercise of human rights as the aim to be achieved by the faithful implementation of its principles”.<sup>49</sup> The Convention prohibits discrimination in effect and the application of the principle of non-discrimination involves taking the characteristics of groups into consideration.<sup>50</sup> The Convention – like the other instruments described above – also necessitates positive measures in certain circumstances and these should not be viewed as “an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality”.<sup>51</sup>

The Committee on the Rights of the Child also recognises that the non-discrimination obligation in Article 2 of the CRC “requires States actively to identify individual children and groups of children the recognition and realisation of whose rights may demand special measures”.<sup>52</sup> It refers to the

<sup>47</sup> Committee on Economic, Social and Cultural Rights, General Comment 13: The Right to Education, UN Doc E/C.12/1999/10, 8 December 1999, para 6. See also Katarina Tomaševski, “Preliminary Report of the Special Rapporteur on the Right to Education”, UN Doc E/CN.4/1999/49, 1999 and Marks and Clapham (n 21 above) pp 133–147.

<sup>48</sup> Committee on the Elimination of Discrimination against Women (n 4 above) para 10.

<sup>49</sup> Committee on the Elimination of Racial Discrimination (n 4 above) para 6.

<sup>50</sup> *Ibid.* para 8.

<sup>51</sup> *Ibid.* para 20.

<sup>52</sup> Committee on the Rights of the Child, General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/5, 27 November 2003 para 12.

Human Rights Committee's General Comment 18, discussed above, noting that "the application of the non-discrimination principle of equal access to rights does not mean identical treatment" and that special measures may be necessary to diminish or eliminate discrimination.<sup>53</sup> This approach reflects the social and human rights models of disability and the Committee has affirmed that while children with disabilities are facing difficulties and barriers to the enjoyment of human rights, these barriers are "not the disability itself but rather a combination of social, cultural, attitudinal and physical obstacles which children with disabilities encounter in their daily lives. The strategy for promoting their rights is therefore to take the necessary action to remove those barriers".<sup>54</sup>

The Committee has highlighted the key role of education and the importance of ensuring non-discrimination in the provision of education and begins to articulate a framework for inclusion: "[d]iscrimination in service provision excludes [children with disabilities] from education and denies them access to quality health and social services. The lack of appropriate education and vocational training discriminates against them by denying them job opportunities in the future".<sup>55</sup> Providing quality education without discrimination involves "modification to school practices and for training of regular teachers to prepare them to teach children with diverse abilities and ensure that they achieve positive educational outcomes".<sup>56</sup>

### ***Equality and Inclusion in the Convention on the Rights of Persons with Disabilities***

These approaches and the connection between the social model of disability and a transformative understanding of substantive equality are further strengthened in the CRPD, the most recent – and arguably the most far-reaching – of the human rights treaties.<sup>57</sup> While the CRPD

<sup>53</sup> *Ibid.* Citing n 39 above.

<sup>54</sup> Committee on the Rights of the Child, General Comment No 9: The Rights of Children with Disabilities, UN Doc CRC/C/GC/9, 27 February 2007, para 5.

<sup>55</sup> *Ibid.* para 8.

<sup>56</sup> *Ibid.* para 62.

<sup>57</sup> For discussion of the Convention, see French and Kayess (n 18 above); Arlene S. Kanter, "The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities", (2007) 34 *Syracuse J. of Int'l L. & Com.* 287–321; Don MacKay, "The United Nations Convention on the Rights of Persons with Disabilities", (2007) 34 *Syracuse J. of Int'l L. & Com.* 323–331; Anna Lawson, "The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?", (2007) 34 *Syracuse J. of Int'l L. & Com.* 563–619; Michael Ashley Stein and Janet E. Lord, "Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities", (2007) 13 *Tex. J. on C.L. & C.R.* 167–185; and Frédéric Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?", (2008) 30 *Human Rights Quarterly* 494–516.

affirms the principle of equality, it goes beyond the non-discrimination focus of CEDAW and CERD since it does not concentrate on discrimination alone but enumerates key civil, political, economic, social and cultural rights and their application in the context of disability. These rights must be guaranteed without discrimination of any kind on the basis of disability.<sup>58</sup>

In the preamble and in many of its provisions, the Convention emphasises the need to transform social structures in order to ensure the rights of persons with disabilities in all areas. It promotes substantive equality requiring positive, proactive measures to address the actual disadvantage and marginalisation encountered by persons with disabilities. The remainder of this section examines two key provisions in particular: (1) the definition of discrimination – which includes indirect discrimination as well as the denial of reasonable accommodation; and (2) Article 24 of the Convention which sets out the framework and obligations for inclusion in education.

#### *The Definition of Discrimination and Reasonable Accommodation*

The definition of discrimination in Article 2 essentially copies the definitions of discrimination found in other human rights instruments and General Comments issued by human rights treaty bodies.<sup>59</sup> It provides that “[d]iscrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the ‘purpose or effect’ of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”. The phrase “purpose or effect” has been interpreted to indicate that human rights instruments prohibit both direct and indirect discrimination.<sup>60</sup>

Direct discrimination means less favourable treatment on the basis of a prohibited ground (such as race, gender or disability). Indirect discrimination, by contrast, occurs when a seemingly neutral practice has a negative, disproportionate effect on a disadvantaged group. For example, an education policy or practice that effectively excludes or marginalises persons with disabilities could amount to *de facto* discrimination (or substantive inequality) even in situations where it appears neutral on its

<sup>58</sup> Art 3(b) (General Principles: Non-discrimination) and Art 4(1) (States General Obligations to “undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”).

<sup>59</sup> See the Convention on the Elimination of all Forms of Racial Discrimination, Art 1; the Convention on the Elimination of all Forms of Discrimination against Women, Art 1; the Committee on Economic, Social and Cultural Rights (n 44 above) para 7, and Human Rights Committee (n 39 above) para 7.

<sup>60</sup> Committee on the Elimination of Racial Discrimination (n 4 above) para 8 and Committee on the Elimination of Discrimination against Women (n 4 above) para 7.

face and where the policy-maker did not intend to discriminate. Since apparently neutral social or environmental structures often have unequal impact on persons with impairments and can create disability, a definition of discrimination that includes *de facto* discrimination is especially important. Tackling indirect disability discrimination – and achieving real equality – often requires positive measures such as installing ramps for wheelchair users or promoting “universal design”<sup>61</sup> products.

The definition in the CRPD goes further than previous instruments, however, and specifies that discrimination on the basis of disability “includes all forms of discrimination, including denial of reasonable accommodation”.<sup>62</sup> The Committee on Economic, Social and Cultural Rights has also interpreted the meaning of discrimination under the ICESCR as it applies to persons with disabilities to include the denial of reasonable accommodation.<sup>63</sup> The CRPD further defines “reasonable accommodation” as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.<sup>64</sup> This could entail alteration of environmental barriers – thus reflecting the social model of disability as well as a concept of substantive equality – but only to the point where accommodation becomes a disproportionate or undue burden. To a certain extent, reasonable accommodation would still be required to fulfil the Convention’s obligation to ensure equality and non-discrimination even if its denial was not explicit in the Convention’s understanding of discrimination. Its inclusion in the definition, however, emphasises the substantive nature of the equality principle and allows for an analysis of discrimination that focuses more directly on the positive measures needed to ameliorate disadvantage.

The meaning of “reasonable accommodation” and “disproportionate or undue burden” must be interpreted in light of the text and context of the Convention including the need to ensure substantive equality. As discussed above, the scope and content of the legal right to equality

<sup>61</sup> Art 2: “‘Universal design’ means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialised design. ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed”.

<sup>62</sup> Art 2.

<sup>63</sup> See n 44 above, para 28. The Committee cites Art 2 of the CRPD and notes that under the ICESCR “the denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability”.

<sup>64</sup> Art 2.



and non-discrimination and the resulting state responsibilities must be understood with reference to the underlying concept of equality. The nature of the concept both reflects and determines the aims which the equality principle is trying to achieve. As such, the objectives of substantive equality suggested by Fredman – which are supported by the Convention’s text – can assist us when delineating the reach of the reasonable accommodation concept and the limits of any undue burden defence. If equality is aimed at breaking cycles of disadvantage, promoting the equal dignity and worth of all, positively affirming and celebrating identity, and facilitating full participation then its antithesis – discrimination including the denial of reasonable accommodation – can be measured and redressed in accordance with these goals.

*Article 24: Equality and Inclusion in Education*

The importance of accommodation to achieving real equality is underscored by the distinction between inclusion and integration. The Convention recognises that while “inclusion” demands a move away from “exclusion” and segregation, it goes beyond a concept of mere integration. Integration reflects a formal requirement that students with disabilities be allowed to attend “mainstream” schools, but the experience in a number of countries has demonstrated that integration without accommodation has largely failed.<sup>65</sup> According to the United Nations Special Rapporteur on the Right to Education:

“Attempts to a simple integration into mainstream schools without accompanying structural changes (for instance, organization, curriculum and teaching and learning strategies) have been shown, and will continue for a variety of reasons, to fail to meet the educational rights of persons with disabilities. Indeed, integration may simply lead to exclusion in the mainstream rather than in the special schools”.<sup>66</sup>

<sup>65</sup> For example, Banks and Kayess observed that efforts to achieve inclusion in education in Australia through integrating students without accommodation led to assimilation rather than full inclusion and the realisation of substantive equality since “the behavioural, social and learning norms that were used to establish rules and expectations by schools had the effect of systematically excluding students with disabilities from access and participation in school activities and learning”. See Robin Banks and Rosemary Kayess, “The Disability Discrimination Act: Working Toward Compliance” (1999), Unpublished Manuscript, cited in Mary Keeffe-Martin and Kate Lindsay, “Issues in Australian Disability Discrimination Case Law and Strategic Approaches for the Lawful Management of Inclusion”, (2002) 7 *Australia and New Zealand Journal of Law and Education* 161–177. For a discussion of “integration” and the limits of accommodation in the Hong Kong context, see Donna Kam Pun Wong, Veronica Pearson and Eva Mei Kuen Lo, “Competing Philosophies in the Classroom: A Challenge to Hong Kong Teachers”, (2004) 8 *International Journal of Inclusive Education* 261.

<sup>66</sup> See Muñoz (n 34 above) para 12.

Achieving inclusion – a concept which has been informed by human rights, the social model of disability and substantive equality – instead calls for accommodation and a holistic, contextual approach.<sup>67</sup>

Article 24 of the CRPD is extensive and in its entirety provides a detailed framework for understanding the meaning of inclusion as it relates to the right to education and equality and non-discrimination in education.<sup>68</sup> It embraces the understanding of discrimination and accommodation discussed above and clearly links the concept of inclusion with a right to education without discrimination. It provides for a right of persons with disabilities to education and “with a view to realising this right without discrimination and on the basis of equal opportunity” states must “ensure an inclusive education system at all levels and lifelong learning”.

The Convention sets out the relevant state obligations and provides that inclusive education should be directed towards achieving a number of aims – which are similar to Fredman’s proposed aims of substantive equality. These include

“the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity; the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; and enabling persons with disabilities to participate effectively in a free society”.<sup>69</sup>

The Convention also requires that persons with disabilities not be excluded from the general education system on the basis of disability; that persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live; that reasonable accommodation of the individual’s needs be provided; that persons with disabilities receive the necessary support within the general education system to facilitate their effective education; and that effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.<sup>70</sup>

Article 24 also lists a number of detailed measures which states must take to “enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and

<sup>67</sup> See n 34 above.

<sup>68</sup> See Vanessa Torres Hernandez, “Making Good on the Promise of International Law: The Convention on the Rights of Persons with Disabilities and Inclusive Education in China and India”, (2008) 17 *Pac. Rim L. & Pol’y J.* 497–527.

<sup>69</sup> Art 24(1)(a)–(c).

<sup>70</sup> Art 24(2).

as members of the community”.<sup>71</sup> These include, for example, facilitating the learning of Braille and sign language and promoting the linguistic identity of the deaf community.<sup>72</sup> States must also take appropriate measures

“to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities”.<sup>73</sup>

### III. The Hong Kong Legal Framework

These international human rights instruments – which affirm the concepts of substantive equality and inclusion generally and in education in particular – provide the basis for an assessment of the extent to which a right to equality and non-discrimination supports inclusion in education for students with disabilities at the domestic level. Indeed, the ability of a substantive equality principle to achieve transformation and the goals of full inclusion and participation depends to a large extent on how it is implemented and reflected in domestic law. This section focuses on the Hong Kong legal framework as a case study of a common law jurisdiction within the Asian region with a reasonably comprehensive regime of anti-discrimination law and a constitutional right to equality. The CRPD has applied to China, including Hong Kong, since August 2008 and therefore Hong Kong has an international obligation to review its laws and policies to ensure compliance with the Convention’s provisions, including Article 24, and should submit its report – which will form part of China’s report – to the Committee on the Rights of Persons with Disabilities, the Convention’s monitoring body, in 2010 according to Articles 35 and 36.<sup>74</sup>

<sup>71</sup> Art 24(3).

<sup>72</sup> Art 24(3)(a) and (b).

<sup>73</sup> Art 24(4).

<sup>74</sup> The Hong Kong Government conducted a six-week public consultation from 17 February to 31 March 2010 on the outline of topics to be included in Hong Kong’s initial report – which will form part of China’s report – to the Committee on the Rights of Persons with Disabilities. In accordance with Art 35, each state party to the CRPD must submit an initial report to the Committee on the measures taken to give effect to its obligations under the Convention within two years after the Convention’s entry into force for the state party concerned. For a discussion of potential concerns in the Hong Kong context, see Carole J. Petersen, “China’s Ratification of the Convention on the Rights of Persons with Disabilities: The Implications for Hong Kong”, (2008) 38 *HKLJ* 611–643.

While Hong Kong law provides extensive protection from disability discrimination in many fields, including education, its capacity to remedy structural and social barriers is limited and legal reforms are needed in order to more fully conform to the equality and inclusion obligations in international human rights law. These limitations and suggestions for change are discussed below.

### *The Basic Law and the Bill of Rights*

Hong Kong's regional constitution, the Basic Law, provides for the right to "equality before the law" in Article 25 and has been interpreted in conjunction with Articles 1 and 22 of the Bill of Rights which essentially duplicate Articles 2 and 26 of the ICCPR. These provisions form the basis of a constitutional right to equality in the Hong Kong context. Although Hong Kong courts have not considered disability cases under these provisions, the courts' approach in cases concerning other forms of discrimination is instructive and points to some potential for a right to equality to provide a stronger basis for greater inclusion in Hong Kong.

First, the courts have accepted that the constitution provides protection from discrimination on the grounds listed in the ICCPR and Bill of Rights.<sup>75</sup> While this list does not specify disability, it is non-exhaustive and contains the general category of "other status" which has been interpreted to cover disability in international human rights instruments.<sup>76</sup> In addition, Hong Kong courts have held that prohibited discrimination includes indirect, as well as direct, discrimination<sup>77</sup> and have adopted a justification test that could require special measures under certain circumstances.<sup>78</sup> The Court of Final Appeal in *Yau Yuk Lung*, a case challenging discriminatory provisions in the Crimes Ordinance, recognised that the guarantee of equality before the law in the Hong Kong constitution "does not invariably require exact equality. Differences in legal treatment may be justified for good reason".<sup>79</sup> To pass the test, the differ-

<sup>75</sup> See, for example, *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903, paras 9–11.

<sup>76</sup> See, for example, Committee on Economic, Social and Cultural Rights, General Comment 5: Persons with Disabilities, UN Doc E/1995/22, 9 December 1994, paras 5–6 in which the Committee confirmed that the requirement that the rights in the Covenant will be exercised without discrimination of any kind on the grounds of "other status" "clearly applies to discrimination on the grounds of disability". As noted above, Art 2(2) of the ICESCR lists the same grounds as Art 2(1) of the ICCPR.

<sup>77</sup> *Leung v Secretary for Justice* [2006] 4 HKLRD 211.

<sup>78</sup> See n 75 above.

<sup>79</sup> *Ibid.*

ence in treatment must pursue a legitimate aim, be rationally connected to that aim, and must be no more than necessary to accomplish it.<sup>80</sup> This opens the door for special measures which could support inclusion if interpreted with reference to the principle and goals of substantive equality.

The Hong Kong courts' reliance on comparative human rights case law and materials produced by human rights treaty bodies, such as the General Comments discussed in section II, creates the potential for a richer understanding of equality in Hong Kong constitutional law that is more capable of supporting inclusion.<sup>81</sup>

### *The Disability Discrimination Ordinance (DDO)*

In addition to constitutional guarantees, Hong Kong has enacted legislation prohibiting direct and indirect discrimination on the basis of disability, victimisation, disability harassment, vilification and serious vilification.<sup>82</sup> This section examines the extent to which the DDO supports non-discrimination in education – in the sense of inclusion – and whether it fully implements Hong Kong's commitments under the CRPD, especially those prescribed by Article 24. An analysis of the DDO illustrates the difficulties encountered by courts when applying disability

<sup>80</sup> *Ibid.*

<sup>81</sup> *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690. In this case, the Court of First Instance relied on CEDAW for assistance in elaborating the nature and limits of special measures in Hong Kong anti-discrimination law and Art 25 of the Basic Law. See also *R v Sin Yau-ming* (1991) 1 HKPLR 88 at 107. The CA held that when interpreting the Bill of Rights, guidance “can be derived from decisions taken in common law jurisdictions which contain a constitutionally entrenched Bill of Rights. We can also be guided by decisions of the European Court of Human Rights ... and the European Human Rights Commission ... Further, we can bear in mind the comments and decisions of the United Nations Human Rights Committee ... I would hold none of these to be binding upon us, although in so far as they reflect the interpretation of articles in the Covenant, and are directly related to Hong Kong legislation, I would consider them as of the greatest assistance and give to them considerable weight”. Art 84 of the Basic Law provides that the courts “may refer to precedents of other common law jurisdictions”. *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 confirmed that “the courts should give a generous interpretation to the provisions in Chapter III [of the Basic Law] that contain constitutional guarantees of freedoms that lie at the heart of Hong Kong's separate system”. For discussion of Hong Kong's reliance on international and comparative law, see, Carole J. Petersen, “Embracing Universal Standards? The Role of International Human Rights Treaties in Constitutional Jurisprudence” in Fu Hualing, Lison Harris and Simon N. M. Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (New York: Palgrave MacMillan, 2007), pp 33–53; Anthony Mason “The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong”, (2007) 37 HKLJ 299–317; Johannes M. M. Chan, “Basic Law and Constitutional Review: The First Decade”, (2007) 37 HKLJ 407–47; and Johannes M. M. Chan, “Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence”, (1998) 47 ICLQ 306–36.

<sup>82</sup> DDO ss 6, 7, 22, 23, 46 and 47.

discrimination law in Hong Kong – and in many other jurisdictions with similar legislation. It argues that the tension between formal and substantive approaches to equality has limited the statute’s ability to achieve inclusion and that reform is necessary.

In particular, the DDO lacks an express requirement to provide reasonable accommodation as part of the obligation not to discriminate. To some extent the DDO implicitly requires reasonable accommodation in education but this is limited and indirect and does not encourage a focus on the measures needed to promote equality when determining whether discrimination has occurred.<sup>83</sup> As discussed in section II, reasonable accommodation is a potentially powerful legal tool which could be used to transform social structures as demanded by substantive equality. Also, in order to establish direct discrimination under the DDO a real or hypothetical comparator must be identified since direct discrimination is defined as “less favourable treatment” than someone without a disability. Therefore, the process of determining discrimination is a relative exercise.<sup>84</sup> This process is fraught with difficulties since disabled and non-disabled persons are often not in comparable situations and thus the comparator analysis is often strained and artificial. The outcome of a claim which hinges on finding a comparator may rely too heavily on a formal equality principle which does not reflect the insights about disability and discrimination that the social model and substantive equality provide. These issues are discussed in more detail below.

#### *DDO Education Provisions: Reasonable Accommodation and Exceptions*

To some degree, the DDO reflects the social model of disability and the concept of substantive equality. First, it prohibits indirect, as well as direct, discrimination. Also, unlike other anti-discrimination laws, such as the Sex Discrimination Ordinance (SDO)<sup>85</sup> and the Race Discrimination Ordinance (RDO),<sup>86</sup> the DDO is in a sense inherently substantive in its approach because of its “asymmetrical” nature. In other words the Ordinance makes discrimination unlawful only on the basis of disability and does not allow claims from individuals for discrimination on the basis of a lack of a disability, thus taking context and group characteristics into account. For example, a student without a learning impairment

<sup>83</sup> See DDO ss 24(4) and 4(a).

<sup>84</sup> Section 6 of the DDO provides that “A person discriminates against another person in any circumstances relevant for the purposes of any provision of this Ordinance if (a) on the ground of that other person’s disability he treats him less favourably than he treats or would treat a person without a disability”.

<sup>85</sup> Cap 480, Laws of Hong Kong.

<sup>86</sup> Cap 602, Laws of Hong Kong.

could not bring a claim that he/she was discriminated against because another student with such a disability was given more time to complete an examination. This contrasts with the SDO which is symmetrical since it applies to discrimination directed against *both* men and women – although all of the anti-discrimination ordinances contain exceptions for special measures.<sup>87</sup> The DDO's asymmetry indicates some recognition of actual disadvantage as demanded by a substantive equality principle. In addition, although the definition of disability largely reflects a medical model since it is essentially a list of impairments, it also includes a disability that presently exists, previously but no longer exists, may exist in the future or is imputed to a person.<sup>88</sup> An understanding of disability that is not necessarily linked to an actual impairment in a medical sense signals a nod towards the social model.

The scope of the Ordinance's application is broad and includes employment, education, and the provision of goods, services and facilities among other fields. Pursuant to s 24, it is unlawful for an educational establishment to discriminate against a person with a disability in the application process by refusing or failing to accept that person's application for admission as a student; or in the terms or conditions on which it is prepared to admit that person as a student.<sup>89</sup> This provision on its own seems to provide for a blanket right to at least integration in education unless admitting someone as a student "would require services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational establishment".<sup>90</sup>

The Ordinance explains that in determining what constitutes "unjustifiable hardship", all relevant circumstances of the particular case are to be taken into account including the reasonableness of any accommodation; the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned.<sup>91</sup> This can include an assessment of available resources. Therefore, the defence of unjustifiable hardship in the DDO to some extent, as a practical matter, incorporates a need to provide "reasonable accommodation". In other words in order to avoid discrimination on the basis of disability, a school must not only admit disabled applicants but must accommodate them unless the services or facilities which constitute the accommodation reach the level of "unjustifiable

<sup>87</sup> SDO s 48, DDO s 50, RDO s 49. The Family Status Discrimination Ordinance, Cap 527, Laws of Hong Kong, also includes an exception for special measures in s 36.

<sup>88</sup> DDO s 2(1).

<sup>89</sup> DDO s 24(1).

<sup>90</sup> DDO s 24(4).

<sup>91</sup> DDO s 4.

hardship”. There is no explicit, direct obligation to ensure reasonable accommodation, however, and unlike the CRPD the denial of reasonable accommodation is not included as part of the definition of discrimination in the DDO.<sup>92</sup>

It is also unlawful for an educational establishment to discriminate against a student with a disability by denying or limiting that student’s access to any benefit, service or facility provided by the educational establishment; by expelling that student; or by subjecting that student to any other detriment.<sup>93</sup> Notably the unjustifiable hardship defence does not apply to this sub-section of the education provisions.

Certain exemptions related to education may limit the law’s capacity to ensure equality and encourage inclusion. Discrimination in the education context is exempted if the person claiming disability discrimination is not reasonably capable of performing the actions or activities reasonably required by the educational establishment in relation to students at that educational establishment; or if the students who participate in or are to participate in those actions or activities are selected by a method which is reasonable on the basis of their skills and abilities relevant to those actions and relative to each other.<sup>94</sup> This seems to be a particularly broad exemption that undermines the aims of inclusion and does little to encourage transformation of school curricula and systems which promote competitive, merit-based criteria for the selection of students. It may also perpetuate assumptions about persons with disabilities based on stereotypes about their abilities and exclude them from activities which are not deemed suitable by a non-disabled society which has built structures designed for “normally” disabled people – in Nussbaum’s sense of this term. This exception allows educational establishments to measure the capabilities of students with disabilities with reference to educational arrangements which may be considered “normal” but which have the effect of limiting inclusion (and undermining substantive equality). In other words, if “reasonable” expectations which accord with the “norm” in the educational environment have the effect of excluding students with disabilities, then these could solidify marginalisation.

Although the DDO’s education provisions are largely copied from the Australian Disability Discrimination Act,<sup>95</sup> this particular exemption is not found in the Australian Act’s education section. It has instead been copied from an exemption elsewhere in both the DDO and the

<sup>92</sup> See Petersen (n 74 above) at 633.

<sup>93</sup> DDO s 24(2).

<sup>94</sup> DDO s 24(5).

<sup>95</sup> See n 8 above.



Australian Act which deals with the specific situation of sports.<sup>96</sup> Applying this exception more broadly to education risks allowing unjustifiable discrimination and limiting the law's ability to provide the basis for inclusion and substantive equality.

Another provision in the Australian Act which arguably supports inclusion has not been duplicated in the Hong Kong statute. The Australian Act makes it "unlawful for an education provider to discriminate against a person on the ground of the person's disability by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment; or by accrediting curricula or training courses having such a content".<sup>97</sup>

*Definition of Discrimination: The Comparator Problem*

An additional problem is that a claimant with a disability who alleges disability discrimination must designate a real or hypothetical non-disabled comparator who is similarly situated to the claimant but treated more favourably. Difficulties identifying a comparator illustrate the problems with a formal understanding of equality when applied to disability discrimination claims.

This was highlighted in the landmark Australian case *Purvis v New South Wales*.<sup>98</sup> The case originated in a claim of direct disability discrimination made on behalf of a boy with an intellectual disability who had been expelled from a "mainstream" high school after exhibiting violent behaviour caused by brain damage. Initially the Australian Human Rights and Equal Opportunities Commission upheld the claim and took an approach that reflected the social disability and substantive equality models. The Commissioner argued that the school had not provided sufficient support and could have done more to accommodate the student (such as provide training to school staff).<sup>99</sup>

The case eventually reached the High Court and the majority took a different view on how to determine the characteristics of an appropriate comparator. Both the DDO and the Australian Act require that a comparison of the cases of persons with or without a disability shall be

<sup>96</sup> DDO s 35 and *ibid.* s 28.

<sup>97</sup> *Ibid.* (DDA) s 22(2A).

<sup>98</sup> *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62; (2003) 202 ALR 133. For a discussion of this case, including the comparator issue, see Elizabeth Dickson, "Disability Discrimination in Education: *Purvis v New South Wales (Department of Education and Training)*, Amendment of the Education Provisions of the *Disability Discrimination Act 1992* (Cth) and the Formulation of Disability Standards for Education", (2005) 24 *UQLJ* 213–222.

<sup>99</sup> Mary Keeffe-Martin and Kate Lindsay (n 65 above) at 7–10.

such that the relevant circumstances in the one case are the same, or not materially different, in the other.<sup>100</sup>

The “irrelevant” circumstance would be the prohibited ground – in this case disability. So it is necessary to choose a non-disabled comparator who is otherwise similarly situated. This analysis is designed to sift out all other factors apart from the prohibited ground in order to establish whether less favourable treatment – direct discrimination – has occurred. The question in *Purvis* was whether the behaviour – the violence – was part of or caused by the disability and therefore irrelevant for purposes of comparison (if so, the non-disabled comparator would not exhibit the behaviour) or whether the violent behaviour should be considered separately from the disability (in which case it should be attributed to the comparator in order to ensure that the relevant circumstances are the same). Of course the outcome would be different, depending on which approach a court resolves to take.

In *Purvis*, the three judge majority took the second approach and held that the school had not discriminated against the student. The two minority judges, however, adopted the social model of disability – and substantive equality – in their reasoning stating that the “purpose of a disability discrimination Act would be defeated if the comparator issue was decided in a way that enabled the characteristics of the disabled person to be attributed to the comparator”.<sup>101</sup> They added that “[i]f the functional limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of the Act in many situations”.<sup>102</sup>

In this case the unjustifiable hardship defence was not available since the boy was already a student at the school and the Australian Act, like the DDO, only provided for an unjustifiable hardship defence at the stage of determining whether to enrol a student at a school and not once the student had been enrolled. If it had been available, the court may have avoided an over emphasis on a strained comparator analysis and could have shifted the focus to the school environment and what the school did – or could have done – to manage the boy’s disability and behaviour.<sup>103</sup> The DDA – but not the Hong Kong Ordinance – has since been amended to include an unjustifiable hardship defence in those

<sup>100</sup> DDO s 8, DDA s 5(1). Although the language of the definition of direct discrimination in the Australian Act is different, it too requires a comparison with a person without the disability in circumstances that are not materially different.

<sup>101</sup> *Purvis* (n 98 above) at para 130.

<sup>102</sup> *Ibid.*

<sup>103</sup> Dickson (n 98 above) at 218–219 and Keeffe-Martin and Lindsay (n 65 above) at 7–10.

circumstances.<sup>104</sup> In an employment discrimination case brought under the DDO in 2008, the Hong Kong Court of Appeal accepted the reasoning of the majority in *Purvis* when identifying a comparator.<sup>105</sup> The Hong Kong court mentioned the minority opinion in the Australian judgment, but rejected it in favour of separating the attributes of the disability from the disability itself as the court ultimately concluded in *Purvis*.

There have been only a handful of disability discrimination cases in Hong Kong which have reached the courts and only one has involved a claim of disability discrimination in education. These cases have also demonstrated the comparator problem in the Hong Kong context.<sup>106</sup> *Ma Bik Yung v Ko Chuen*<sup>107</sup> involved a woman who claimed that a taxi driver discriminated against her on the basis of her disability since he rudely refused to help her with her wheelchair and had subjected her to harassment. The court chose as a comparator an able-bodied passenger who had heavy luggage. Petersen has pointed out that this is rather strained and indeed a disabled person and the person with heavy luggage are not really in similarly situated circumstances since the person with heavy luggage could have more easily placed the luggage in the taxi on her own.<sup>108</sup> A similar observation could be made about the comparator in the *Purvis* case. A boy without the disability and with the violent behaviour caused by the disability would not have been similarly situated since he may have more easily responded to discipline or may have had more control over his behaviour in the first place. The measures needed to accommodate the boy with the disability – and thus the environmental impediments – would also likely be quite different in the two situations.

The comparator problem was also apparent in *Tong Wai Ting v Secretary for Education*,<sup>109</sup> a case decided in August 2009 by the Court of First Instance, which challenged the imposition of an age limit of 18 years for free public education for students with intellectual disabilities attending special schools. The court chose as a comparator a non-disabled secondary school student in a mainstream school who had completed 11 years of free education but who wished to repeat secondary 5 in order to pass the public examinations. It held that the mainstream school students'

<sup>104</sup> DDA s 22(4).

<sup>105</sup> *M v Secretary for Justice* [2009] 2 HKLRD 298.

<sup>106</sup> See Petersen (n 74 above) at 631–633.

<sup>107</sup> [1999] 1 HKC 714 (at first instance) and [2000] 1 HKLRD 514 (Court of Appeal). The case also reached the Court of Final Appeal but the court only considered whether it could order an apology as an appropriate remedy under the anti-discrimination statutes.

<sup>108</sup> See Petersen (n 74 above) at 632 and Carole J. Petersen, "Implementing Equality: An Analysis of Two Recent Decisions under Hong Kong's Anti-Discrimination Laws" 29 HKLJ 178 at 190.

<sup>109</sup> [2009] HKEC 1367.

application to repeat a year would not be automatically approved – and therefore the two students would have been treated in the same way and thus there was no discrimination. The two students, however, were facing different conditions which were not actually comparable. They were not really similarly situated since they were in separate school environments with an entirely different set of expectations so meeting the requirements of the comparator test would be virtually impossible.

#### IV. Conclusions

The reasoning of the Hong Kong courts in these cases – and the courts of other jurisdictions in similar cases – when applying anti-discrimination law demonstrates the law's limitations for furthering the goals of inclusion in education. The legislation and its interpretation have been impeded by a formal approach to equality and non-discrimination and an insufficient understanding of substantive equality. In particular, the DDO lacks a strong reasonable accommodation obligation, contains an overly broad exception in the education provisions, and necessitates the identification of a similarly situated comparator even in situations which are arguably incomparable. Given the new paradigm of the CRPD, the social model of disability, and the substantive equality requirements in international human rights law generally, these limitations hinder Hong Kong's ability to fully implement its international legal commitments in this area.

Nevertheless amendments to the DDO could resolve some of these difficulties. First, the comparator problem could be partly ameliorated by amending the definition of discrimination in the DDO to clearly include the denial of reasonable accommodation, reflecting the language of the CRPD. Again, this could help shift the analysis towards a discussion of necessary accommodation and away from strained arguments about whether a comparison of two similarly situated cases – apart from the disability – show a violation of the equal treatment principle. If such a discussion – including how to delineate the boundaries of “unjustifiable hardship” – is supported by a substantive equality principle which focuses on the aims of equality proposed by Fredman and articulated in the CRPD, then equality law could play a greater role in transforming social barriers and achieving inclusion. Also, exceptions which are overly broad in the education provisions in the DDO should be removed or amended.

In addition, Hong Kong should consider enacting specific education legislation which sets out more explicit requirements that more fully

implement stated policy imperatives and which could better support and elaborate measures to achieve inclusion. Such legislation could supplement and further the aims of a right to equality and non-discrimination as it has in other jurisdictions. Legislation governing inclusion in education for persons with disabilities has been enacted in some locations which also have anti-discrimination legislation and constitutional equality guarantees.<sup>110</sup> While certainly not perfect, these models help avoid the difficulties inherent in the sole use of anti-discrimination law as the impetus towards greater inclusion. Such efforts at legal reform and policy initiatives towards inclusion in education should be guided and supported by international human rights instruments, especially the CRPD.

Disability forces us to confront how we conceptualise the notion of “equality” and raises questions about our objectives. What are we trying to achieve? What legal measures are needed to meet these aims? Probably more than any other prohibited ground of discrimination, disability requires a substantive approach to dismantling discriminatory barriers. To achieve the goals of participation and inclusion, accommodation and even transformation are needed. Disability in particular makes us query in a profound way what we mean by “normal” and challenges us to look at the implications of the ways in which we have constructed our society. A substantive equality principle – supported by effective legal measures – can play an important role in addressing these challenges and promoting inclusion in education and in Hong Kong society more generally.

<sup>110</sup> For example, the US Individuals with Disabilities Education Act (IDEA) and Part IV of the UK Education Act 1996 and the SEN Code of Practice.

