

WHERE ARE WE WITH DISABILITY?: A REVIEW OF DISABILITY IN TERTIARY INSTITUTIONS

Muhammad Suleman*

Alumni, University of KwaZulu-Natal, Howard College

I INTRODUCTION

Nineteen years after the advent of South African constitutional democracy,¹ and persons with disabilities still face severe challenges as a vulnerable group. Such persons find themselves in disadvantaged positions in all spheres of life. One of the concerns is their treatment, or lack thereof, within the education system – particularly within higher education. These challenges have been acknowledged at the highest levels of government.²

In this regard, the Minister of Higher Education, Blade Nzimande, highlighted that:

‘... a lack of coherence in the higher education sector ... reflects a lack of commitment from some higher education institutions to ensure the right environment for learning and working for students and staff with disabilities.’

My research on students with disabilities at tertiary level suggests that students with disabilities are generally seen as ‘entities’ worthy of pity. Because little consideration is given to their plight, students with disabilities feel it is their duty to fit in with existing norms.³ After finding that an attempt to integrate with other students is more of a challenge than expected, students with disabilities often opt to isolate themselves from so-called ‘able-bodied’ students, and then tend to create their own ‘society’ in which they are accepted. One probable reason for this could be the separate orientation mechanisms for students with disabilities at the beginning of

* Currently Research Fellow at Section 27.

¹South Africa became a constitutional democracy in 1994. The Interim Constitution came into effect on 27 April 1994, and ended the injustices of the past whilst addressing issues such as political and socio-economic rights. The Final Constitution (hereafter ‘the Constitution’) was signed on 10 December 1996 and came into effect on 4 February 1997. Currie & De Waal *Bill of Rights Handbook* 5th ed (2005) 2-7.

²Nzimande, B. Address by Minister of Higher Education and Training, Dr Blade Nzimande, at the Higher Education Disability Services Association (HEDSA) gala dinner, University of the Free State (February 2010).

³ The research involved in-depth discussions and simulations with students with disabilities, staff, persons from QuadPara KwaZulu-Natal, Action Autism and the University of KwaZulu-Natal Disability Unit, at the Visually Impaired Positivism Disability Awareness Day held on 8 August 2012 at the University of KwaZulu-Natal.

their tertiary-level studies.⁴ First-year students are invited to orientation events where they are introduced to the institution and the areas of activity in which they can participate. Students with disabilities are similarly orientated, but this is done separately – to cater for their needs and to introduce activities which they can participate in. It is often from these orientation activities that a student's social group is created. The failure to ensure the full inclusion of disabled students into universities, from as early as the orientation process, however contributes significantly to the creation of an exclusionary environment for them.

In order to address the needs of students with disabilities during their academic years, universities have established Disability Units. These attend to such students and ensure that their academic resources and facilitation of learning materials are catered for.

Although legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter 'the Equality Act') has been implemented, there is a disjuncture between such legislation and its implementation. Furthermore, there are no exclusive pieces of legislation relating to disability that enable such persons to hold institutions accountable. Instead, the rights of persons with disabilities are enforced through rights such as equality and dignity. In order to create the entitlement referred to, there are Bills and White Papers which have been docked in parliament for over a decade, and these help grant persons with disabilities the appropriate accountability mechanisms.⁵

This paper considers the definitions of disability and 'further education'. It also discusses comparatively the social and medical models of disability and reviews national and international legal instruments which attempt to define and address disability. It will argue that students with disabilities who are accepted into tertiary institutions are justified in enforcing their rights to further education by being reasonably accommodated within their respective institutions.

II THE DEFINITION(S) OF DISABILITY

⁴Matshediso, KR 'Experiences of Disabled students in South Africa: Extending the thinking behind Disability Support' (2010) *SAJHE* 24 (5) 730.

⁵*White Paper on an Integrated National Disability Strategy* (November, 1997) and *Education White Paper 6: Special Needs Education Building an Inclusive Education and Training System* (July 2001).

In attempting to define disability within the context of this paper, it is critical that 'further education' be defined. Section 29 (1) (b) of the Constitution states that everyone has a right to 'further' education, which the state, through reasonable measures, must make progressively available and accessible. However, upon interrogating the meaning of 'further', the Further Education and Training Colleges Act⁶ distinguishes between 'general' education, 'further' education and 'higher' education. The terms 'general' or 'basic' education relate to compulsory schooling, while 'further' education is defined as 'everything up to matric', and 'higher' education is everything after matric.⁷ However, Woolman argues that this distinction does not make sense within the context of section 29 (1) of the Constitution. Woolman states that the Constitution only mentions 'basic' and 'further' education, and the sensible interpretation would be that further education denotes 'all education after basic education', and should cover all forms of education that do not fall under 'basic' education.⁸ Section 29 of the Constitution thus encompasses tertiary education.

Reyneke and Oosthuizen rightly point out that there is no definition of disability.⁹ Even though there is legislation dealing with disability in different contexts, the suitability of the term is dependent on the context in which it is used. The Constitution acknowledges discrimination on the basis of disability as a ground for unfair discrimination, but does not provide a definition. The Social Assistance Act,¹⁰ Income Tax Act¹¹ or the Employment Equity Act¹² have defined disability. However, no definition of disability has been established within the context of further¹³ or even basic¹⁴ education.

The United Nations Convention on the Rights of Persons with Disabilities defines persons with disabilities as:

⁶16 of 2006.

⁷Ngwenya, C 'Deconstructing the Definition of Disability under the Employment Equity Act: Social Deconstruction' (2006) *SAJHR* 613 Vol 4 57-38.

⁸*Ibid.*

⁹Reyneke, JM & Oosthuizen, H 'Are the Rights of the Disabled a Reality in South Africa? Part One' (2003) *Journal for Juridical Science* 28 (2) 91,108.

¹⁰Act 13 of 2004: A person owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.

¹¹Act 58 of 1962: A moderate to severe limitation of a person's ability to function or perform daily activities as a result of a physical, sensory, communication, intellectual or mental impairment, if the limitation has lasted or has a prognosis of lasting more than a year, and is diagnosed by a duly registered medical practitioner in accordance with criteria prescribed by the Commissioner.

¹²Act 55 of 1998: 'people who have a long term and recurring physical or mental impairment which substantially limits their prospects of entry into or advancement in employment'.

¹³Further Education and Training Colleges Act 16 of 2006.

¹⁴South African Schools Act 84 of 1996.

‘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.’¹⁵

This paper accepts this definition for the purposes of defining disability in the context of education. Barriers such as physical access, academic resources and an exclusive social environment hinder the progress of students with disabilities. These barriers then prevent these students from fully participating in society.

III A COMPARISON OF THE MEDICAL AND SOCIAL MODELS

There are two models that have shaped the identity of disability. Initially, the medical model considered disability to be a medical condition, while later activists enforced the social model because it shifted the conditioning of disability to its social construct.

(i) *The Medical Model*

The Medical Model views disability as a medical issue caused by a medical condition. It is seen as an object of rehabilitation and cure, and is defined as being ‘physically or mentally incapacitated, economically dependent and the object of charity and paternalism by the family, state and other agencies’.¹⁶ Given the role that the medical profession has played in defining and determining the scope of disability, it has impacted on perception and this has been detrimental to the construct of social integration. In order to allow a person with a disability to be reinstated into the social construct, rehabilitation and cure will have to take place – in terms of the Model.

The Medical Model is discussed aptly by Crossley,¹⁷ who describes it as follows:

‘[t]he defining characteristic ... is its view of disability as a personal trait of the person in whom it inheres. The individual is the locus of the disability and, thus, the individual is properly understood as needing aid and assistance in remedying the disability. Under this view, while the cause of impairments may

¹⁵Article 1.

¹⁶Ngwenya, C (note 7 above) 613.

¹⁷Crossley, M ‘The Disability Kaleidoscope’ (1999) *Notre Dame* 74 *CLR* 621, 627.

vary, the disabled individual is viewed as innately biologically different and inferior. The physical difference of the individual is often apparent, and the nondisabled see the individual's inferiority and resulting social disadvantage as flowing from that physical difference. Thus, according to the medical model of disability, the disabled individual's problem lies in his impairment.'

The Medical Model has been criticised, since, by its nature, it can inherently stigmatise an individual, whose disability becomes the focal point of his/her existence. Reyneke, Oosthuizen¹⁸ and others¹⁹ consider that disability and its stereotypes emanate from deep-rooted prejudicial perceptions - '[t]hey also fuel practices, beliefs, interactions and social attitudes towards people with disabilities which lead to exclusion and the denial of [their] rights and freedoms'. In some South African communities, disability is even seen as an illness or a curse and results in the denial of a person's existence, and their problems, by themselves and their families.²⁰

Ngwenya begins by developing the term 'persons with disabilities' – stating that this is based on a political preference that such persons be identified as such.²¹ According to Ngwenya: 'labels that describe a social group, especially one that has historically endured stigma and a socially subordinate status, stand the best chance of respecting human dignity when they emanate from, or approximate as much as possible, self-descriptions rather than when they are assigned or imposed by a dominant group'.²² He goes on to say that medical terms such as 'the disabled' and 'handicapped' are imposed on certain people, as opposed to self-appropriated terminologies selected by persons with disabilities in an attempt to define themselves. This has resulted in a 'tainted status' for persons with disabilities and has etched in such individuals the perception that they are a group different to the norm.²³

(ii) *The Social Model*

¹⁸Reyneke, JM & Oosthuizen, H (note 9 above) 108.

¹⁹Albertyn *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* 1sted (2001).

²⁰Ngwenya, C (note 7 above) 613.

²¹*Ibid.*

²²*Ibid.*

²³Doyle, BJ 'Disability Discrimination and Equal Opportunities: A Comparative Study of the Employment Rights of Disabled Persons' (1995) 4-6.

While the Medical Model looks at defining disability through the lens of medicine, the Social Model views disability through the lenses of equality and dignity.²⁴ It reconstructs the definition of disability and shifts the attention away from the medical issue – and empowers the person with the disability. In the Social Model, '[t]hey began to reinterpret disability to reflect the aspirations of people with disabilities as a vulnerable and marginalised minority seeking full citizenship in a universe that historically has been indifferent to disability'²⁵ – thus referring to the idea of inclusiveness.²⁶ This Model revolves around the view that one needs to be looked at as an individual and not as part of an alternate or abnormal group.

However, the Social Model does not deny that medical conditions relate to disability. Ngwenya argues that the Medical Model is deeply flawed to the extent that it '[p]urports to address disability as a phenomenon that can be understood medically without regard to the disabling role played by the social and cultural environment'.²⁷ The Social Model has, in fact, been used to deconstruct the stigmatisation associated with disability.

A criticism of the Social Model is that insufficient attention is paid to the person's personal experience of their impairment, and that its existence would create barriers that are difficult to regard as social produce.²⁸ Thus, the Social Model accepts that disability is seen from a medical perspective but emphasises that the medical perspective should not be the basis from which disabilities are seen. It views disability as a social phenomenon that should be analysed, as previously stated, though the lens of equality and dignity.

South Africa has attempted to produce legislation to protect the rights of persons with disabilities in a manner that would promote the inclusion of such persons into our society, that is founded on the right to equality for people living with disabilities.

²⁴Ngwenya, C 'Deconstructing the Definition of Disability under the Employment Equity Act: Social Deconstruction' (2006) *SAJHR* 613, read with Scotch, R 'Disability as the Basis for Social Movement: Advocacy and the Politics of Definition (1988) 44 (1) *J of Social Issues* 159; Driedger, D (1989) *The Last Civil Rights Movement: Disabled People's International* England; Charlton, J (2000) *Nothing About Us Without Us: Disability Oppression and Empowerment* California.

²⁵Ngwenya, C (note 7 above) 613.

²⁶*Ibid.*

²⁷*Ibid.*

²⁸Howell, C 'Higher Education Monitor 3: South African Higher Education. Responses to Disabilities: Equity of Access and Opportunity?' (2005) Council for Higher Education 14.

South Africa has further ratified international instruments to strengthen the protection of these rights.

IV SOUTH AFRICAN JURISPRUDENCE

South Africa has uncodified instruments that enforce the rights of persons with disabilities, unlike the United Kingdom and the United States of America.²⁹ Therefore, within the context of higher education, this largely places the onus on tertiary institutions to develop and implement policies to reasonably accommodate students with disabilities.³⁰ The problem with this scenario, according to Matshediso, would be that '[i]f disputes arise[s], they would be resolved within the framework of human rights instead of that of entitlement'.³¹ Thus, as mentioned above, persons with disability find redress in the Constitution and under anti-discrimination clauses in the Equality Act.³²

(i) *Constitution of the Republic of South Africa, 1996*³³

The Constitution was adopted as the supreme law of the land and in order to improve the quality of life of all citizens and free the potential of each person.³⁴ In order to free the potential of each person, the Constitution must allow equal opportunity to persons with disabilities, and furthermore, reasonably accommodate them on the basis of equality and human dignity.

The founding values embedded in the Constitution are human dignity, the achievement of equality, and the advancement of human rights.³⁵ It enshrines the rights of *all* people,³⁶ and therefore the key element would be that persons with disabilities be included in the word 'all'. The Constitution therefore promotes the achievement and fulfilment of the rights of persons with disabilities. Thus, as

²⁹Matshediso, KR 'Experiences of Disabled students in South Africa: Extending the thinking behind Disability Support' (2010) *SAJHE* 24 (5) 730. The UK and the USA have promulgated legislation about the enforcement of disability rights, such as the Disability Discrimination Act of 1992 (UK) and the Americans with Disabilities Act of 1990 (USA).

³⁰*Ibid.*

³¹*Ibid.*

³²Ngwenya, C (note 7 above) 613.

³³Constitution of the Republic of South Africa 1996.

³⁴Preamble.

³⁵S 1(a).

³⁶S 7 (1).

Woolman & Others state, 'its achievement is thus a Constitutional imperative of the first order'.³⁷

In the case of *President v Hugo*, the court stated³⁸ that 'equality means nothing if it does not represent a commitment to recognise each person's equal worth as a human being, regardless of *individual differences*' (emphasis by the author).³⁹ Furthermore, 'all' persons, whether with a disability or not, have the value of human dignity. Dignity conveys a sense of 'equal moral worth'.⁴⁰ Therefore, the right to equality is hinged on the value of dignity.

Section 9 of the Constitution⁴¹ promotes equality amongst all persons.^{42,43} Section 9(1) promotes the right to equal protection and benefit of the law. Persons with disabilities should benefit preferentially from the same form of equality that everyone else benefits from. According to section 9(3), 'the State may not, directly or indirectly, unfairly discriminate against any one on the basis of any of the listed grounds'. This list includes the grounds of disability.⁴⁴ Section 9(5) goes on to say that any discrimination on the above-mentioned grounds will be deemed unfair, unless proven otherwise.

In addition to the right to equality, all persons have the right to inherent dignity and the right for it to be respected and protected.⁴⁵ Section 10 of the Constitution refers to the right to dignity. In *S v Makwanyane*, the court assessed this clause and stated that '[r]ecognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in the Bill of Rights'.⁴⁶

³⁷Currie & De Waal (note 1 above) 35-1.

³⁸1997 (4) SA 1 (CC) at para 41, quoting *Egan v Canada* [1995] 2 CR 513.

³⁹Currie & De Waal (note 1 above).

⁴⁰*Ibid.*

⁴¹Known as the equality clause

⁴²S 9 (1).

⁴³*President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). The form of equality proposed is a substantive one. Unlike formal equality where every person is seen equally, or specific rights which are awarded equally, substantive equality is based on reaffirming the past disadvantages faced and awarding them according to gender, race and disability. Therefore, based on the concept of affirmative action, disabled persons like black persons and women, have an advantage in the equality spectrum due to their previously disadvantaged backgrounds.

⁴⁴S 9 (3) sets out a list of grounds of unfair discrimination and has given effect to certain legislation, such as the Employment Equity Act 55 of 1998, Labour Relations Act 66 of 1995, and the Prevention of Unfair Discrimination Act 4 of 2000.

⁴⁵S 10 of the Constitution.

⁴⁶*S v Makwanyane* 1995(3) SA 391 CC; 1995(6) BCLR 665 CC.

Persons with disabilities should be granted access to higher education, which opens the gateway to equal opportunity, and includes the use of adequate facilities at the institution concerned. There can be no unjustifiable interference in accessing such education. Upon realising this right of access, it is then up to the institution accepting the said student to grant adequate facilities and a reasonable opportunity to progress. In this regard, however, the current stance is circumstance-based.

Section 39 of the Constitution requires that the courts, when interpreting law, must consider international law⁴⁷ and promote the underlying values of the Constitution.⁴⁸ In interpreting the rights, the courts must also consider international instruments. In this case, the courts have an obligation to look at the United Nations Convention on the Rights of Persons with Disabilities – before addressing an issue they are faced with. This is discussed further below.

(ii) *United Nations Convention on the Rights of Persons With Disabilities*

On the international plane, the United Nations Convention on the Rights of Persons ('the UNCRPD') with Disabilities was signed by South Africa on 30 March 2007,⁴⁹ and was ratified on 30 November 2007.⁵⁰ As the focus of the paper is on the education of persons with disabilities, article 24 is of particular relevance. It requires state parties to ensure that persons with disabilities, regardless of age, be guaranteed the right to inclusive education at *all* (author's own emphasis) levels, without discrimination on the basis of equal opportunity.⁵¹

In terms of the UN Convention, state parties must ensure that persons with disabilities are allowed to participate and develop to their full potential, freely and effectively in society, regardless of mental, physical or personality disabilities.⁵² Therefore, states that are signatories to the UN Convention have a duty or obligation to ensure that, for example, relevant programmes or measures are put in place to ensure the participation and personal development of persons with disabilities. In respecting human rights, promoting a sense of dignity, self-worth and fundamental

⁴⁷(1) (b).

⁴⁸Section 39 (1) (a), (b), (c).

⁴⁹Woolman, S et al *Constitutional Law of South Africa* 2ed Vol 3 35-70.

⁵⁰*Western Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC) 23.

⁵¹Article 24 of the UN Convention on the Rights of Persons with Disabilities.

⁵²*Ibid.*

freedom, adults with disabilities should have access to general and adult education, vocational training and life-long learning. Necessary support and reasonable accommodation should be received by persons with disabilities within the general education system, to facilitate their effective education – including individualised support measures required to maximise academic and social development.⁵³

State parties also need to take appropriate measures to endorse the learning of braille, alternative script, communication, orientation and mobility skills, the facilitation of peer support and mentoring, and also support learning of sign language and a promote the linguistic identity of the hearing-impaired community.⁵⁴

(iii) *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*

This Act⁵⁵ (the Equality Act) states in section 9 that no person with disabilities may be unfairly discriminated against. This includes denying or removing a person with a disability the facility or support to enable them to progress in society.

Unfair discrimination is also the failure to eliminate obstacles and obstructions preventing persons with disabilities from enjoying equal opportunity, or failing to take steps to reasonably accommodate persons with disabilities. The Equality Act, therefore, promotes an inclusive model for a progressive society, as it gives persons with a disability equal opportunity by reasonably accommodating such persons in order to allow progression for this minority. Reyneke and Oosthuizen describe the Act as ‘the idea of equality as embracing the full and equal *inclusion* (author’s own emphasis) of all disabled people within society through the removal of barriers and the development of positive measures’.⁵⁶

Section 9(a) of the Act deals with facilitating persons with disabilities and this is not only directed at persons accessing buildings, but also directed at facilitating them within a social and psychological context.⁵⁷ Albertyn and others clearly state that

⁵³Article 24(1)-(2).

⁵⁴Article 24 (4)

⁵⁵4 of 2000.

⁵⁶Reyneke, JM & Oosthuizen, H (note 9 above) 108.

⁵⁷Ngwenya, C (note 7 above) 613.

lacking reasonable accommodation would amount to unfair discrimination against persons with disabilities.⁵⁸

V ENFORCEMENT OF RIGHTS

The issue in question is not whether there should be equal access to tertiary education. Where a tertiary institution accepts a student, the right to further education would be borne and there is then a duty on that institution to accommodate the student on the grounds of equality. More so, being a student with disabilities and part of a vulnerable group, one would expect a higher level of facilitation based on the factors discussed below.

While the wording of the Constitution requires the state to make further education accessible and available, the Constitution also requires the state to progressively realise this right through reasonable measures. However, where a student with a disability is accepted into an institution, the rights of a person with disabilities should be promoted and fulfilled.⁵⁹ This means that a person's right to being facilitated in an institution is realised upon being accepted into a tertiary institution.

Any institution accepting a student into their system would be accepting that there are adequate facilities for the student to access and use in order to academically achieve his/her goals or merely participate in academic activities. Similarly, when an institution accepts a student with a disability, there has to be a form of reasonable accommodation on the part of the institution in accepting the particular student. On this same principle, institutions must grant access to physical and academic facilities, and the use of the resources, in order for the student with a disability to academically achieve his or her goals.

Universities are obliged to grant students reasonable facilities such as reading material in the language or medium that is best understood by students. The Constitution promotes the development and use of official languages, indigenous languages and sign language – as media of communication.⁶⁰ However, in instances where material is handed to students, the UNCRPD suggests the use of braille for

⁵⁸Albertyn (note 19 above).

⁵⁹S 7 (2) of the Constitution.

⁶⁰S 6 (4) (a) (iii).

persons with visual impairments.⁶¹ In addition, notice boards, lecture material and reading material need to be made available in audio for persons with complete visual disabilities, and the enlargement of texts and fonts is required in order to facilitate persons with partial visual impairment. Furthermore, in terms of structural assessment, students have the right to access all general and public areas of a building with ease, and should not be dependent on others to do so.

There are no remedies available in terms of a direct breach of any specific law or legislation relating to persons with a disability. Rather, only within the context of rights such as equality, human dignity and access to education, can actions be instituted. Therefore, if an issue arises, one would be able to address it through the Equality Act⁶² on the basis of equality and not upon any rights that a person with a disability is entitled to through a codified piece of legislation. If there are violations of the rights to education of a person, these are only enforceable through instruments such as the Equality Act, on the basis of equality.

VI CONCLUSION

There are no codified pieces of legislation that protect the interests of students with disabilities in South African law – especially within the Further Education sector. Students are expected to rely on their rights to equality and dignity to seek redress for any violations that may occur during their experiences at tertiary level. The Equality Act does promote the rights of persons with disabilities, but rather does so broadly and through the lens of equality.

The state has a duty to promote and fulfil the right to further education, but should do so progressively and reasonably within the available resources. Thus the right to further education cannot be enforced like the right to basic education; however, upon acceptance into a tertiary institution, students then have the opportunity to enforce their rights to further education.

Until South Africa promulgates legislation that specifically deals with persons having disabilities, legislation such as the Equality Act can be used to deal with institutions where students are not being reasonably accommodated – to a point

⁶¹ Article 24.
⁶² 4 of 2000.

where their full potential is realised. This would result in them being given the opportunity to contribute positively to society as is envisaged by the Constitution.