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Analyzing the Legislative Prescriptions Representing Persons with Disabilities in South Africa

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Abstract. The legislative prescriptions promoting and protecting the rights of disabled people in South Africa are some of the most comprehensive globally. These prescriptions are applied across all the spheres of government to eliminate the discrimination faced by persons with disabilities. This study analyzed selected legislation and public policies representing persons with disabilities in the country with reference to the City of Cape Town. The study sought to identify features of the government's efforts to improve the lives and participation of disabled people in order to better implement inclusive legislation and policies. Through a desktop analysis, the study found that legislation and governmental policies that protect and promote the rights of persons with disabilities provide a framework from which disabled people can exercise their economic, political, and social rights as equal members of the citizenry. However, the state of disability in relation to policy and legislation does pose challenges to the effectiveness of these prescriptions to eliminate discrimination and promote equality. The study recommends the strengthening of legislation and policies through strategies that involve partnerships between government and civil society. There is also a need to review the existing legislative framework to identify and eliminate barriers that limit the equality of disabled people.

Keywords. Disability inclusion, South African disability policy, inclusive society

1. Introduction

The Constitution of South Africa protects the rights of all South Africans against discrimination. Section 9 of the Constitution states that no person should be discriminated against on any grounds, including disability. The section imposes the responsibility on the state to protect its citizens by taking the necessary steps to "... protect and advance persons, or categories of persons [who are] disadvantaged by unfair discrimination" (Republic of South Africa (RSA), 1996). These steps include enacting legislation as well as monitoring the development of vulnerable groups through structural government interventions and public policies.

The historical context of South Africa provides a general sense of the direction taken in the legislative and policy framework as it highlights that legislation and policy are arranged to integrate previously marginalized social groups into the social, economic, political, and developmental environments of the country (Pillay, 2017:8). Legislative prescriptions such as the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 are indicative

of this policy flow. Beyond this intended integration, this policy direction also aims to eradicate the continued stigmatization of these social groups. However, since the focus has been on correcting the injustices in the order of gender and race, persons with disabilities are often found at the bottom of the priority list of policies globally (United Nations, 2006).

The Employment Equity Act states that the disability framework related to persons with disabilities in South Africa aims to "... promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination". Despite these clear legislative objectives, Maart (2015:1) contends that persons with disabilities are still amongst the most excluded and stigmatized social groups in South Africa's economic, social, and political landscapes. This suggests that the existing legislative prescriptions do not necessarily translate into observable changes in the injustices experienced by persons with disabilities (Mahlangu, 2009:2). This also highlights that people with disabilities are at the mercy of socioeconomic challenges whose effects are exacerbated by the country's existing socioeconomic conditions (Mahlangu, 2009:2). The main issue with this concerns the inability to secure the full employment of equality, freedom, and human dignity of this social group that has been the object of ingrained marginalization (Ngwenya, 2004:168). This raises the question of whether the current legislative framework can be effective in representing persons with disabilities.

The South African government has made several attempts to address issues concerning the rights of persons with disabilities. One of the most notable is the implementation of the social security strategy that aims to alleviate the plights faced by persons with disabilities in the country through state institutions such as the South African Social Security Agency (SASSA) (Kelly, 2016:11), which allocated R190 billion in 2021 (Business Day, 2021). Despite the considerable financial investment by the state towards this initiative, it is questionable whether the grants that are afforded to persons with disabilities are sufficient in meeting their developmental and social needs. A study by Simkins (2005) even suggested that the attempts by the government to meet the needs of persons with disabilities have been ineffective in reducing the challenges experienced by this social group.

Notably, there is currently no comprehensive framework to monitor and evaluate the challenges experienced by persons with disabilities which further highlights the uncertainties of the legislative and government policies in representing persons with disabilities. The lack of legislation and appropriate policy evaluation framework specific to persons with disabilities has consequently led to the emergence of civil society unions comprising of disabled people. These civil unions developed documents such as the Disability Rights Charter of South Africa that assert the rights of persons with disabilities in South Africa. Inspired by the work of the civil society in championing legislative and policy reform, the researchers of this paper sought to analyze the existing prescriptions on disabilities in a bid to recommend how they can be improved. The view of contemporary models of disability and indeed the Social Exclusion theory which forms the theoretical framework of this paper argue that the social integration of persons with disabilities should be prioritized to move the country forward. However, this can only be achieved through legislative and policy reforms that integrate persons with disabilities into every segment of society. The relevance of this paper is linked to the need for policy reform at least at a municipal level where the effects of policy implementation are most felt and where the needs of people are provided for through service delivery. The study, therefore, sought to analyze legislative prescriptions representing persons with disabilities in South Africa with reference to the City of Cape Town.

2. Defining disability from a South African perspective

The concept of disability is historically complex owing to the variations in the types and the degrees of disability. Such variations make it challenging to develop a definition that encompasses the lived experiences and social exclusion of persons with disabilities (Pillay, 2017:30; Department of Social Development, 2015:10). Predictably, there are many definitions and descriptions of disabilities that attempt to encapsulate the concept for all its forms and variations. It is the view of the researchers of this paper that the definition of disability should be viewed from the broader constructs of social practices. From this viewpoint, disability is considered a social construct, which leads to the concept being defined subjectively. According to Tate and Pledger (2004:290), a sociological view enables the definition to incorporate many perceptions. This highlights that disability is, in fact, multifactorial. It is subjected to interactions between persons with impairments, attitudinal, and environmental barriers that restrict the full participation of persons with disabilities in society on an equal basis as their able-bodied counterparts (Department of Social Development, 2015:11). Consequently, the South African Cabinet approved the following definition of disability in 2005 for social security: "... the loss or elimination of opportunities to take part in the life of the community equitably with others, that is encountered by persons having physical, sensory, psychological, developmental, learning, neurological or other impairments which may be permanent, temporary or episodic in nature and thereby cause activity limitations and participation restriction with the mainstream society" (RSA, 2010:17). These barriers may be due to "... economic, physical, social, attitudinal and/or cultural factors" (RSA, 2010:17). This definition reiterates that disability goes beyond the physical impairment of the individual affected and the physical impediments that hinder their full participation in society. Rather, a disability is determined and shaped by an individual's performance concerning facets of several environments that shape "...elements of customs, values, beliefs, behavioral patterns and traditions" (Swain, French & Cameron in Pillay, 2017:32).

The broad spectrum of the types and the degree of disability still pose difficulties in developing a definition that is fully encompassing of the concept. These challenges are linked to the absence of a classification system and the lack of a comprehensive and clear conceptual framework that marries the varieties of disabilities into one common thread (Florian & McLaughlin, 2008:211). Such definitional challenges have prompted the formulation of models that are commonly used to study disability. Models of disability not only grant the intellectual width to accommodate the diverse nature of disability but also describe their evolving nature to reflect the context and society that persons with disabilities live in (Department of Social Development, 2015:11). Models are influenced by the epistemological assumptions held by both the disabled and abled communities. These assumptions to a great extent provide the basis for the creation of the legislative prescriptions and the services relating to persons living with disabilities. This highlights that the understanding of disability is intrinsic to how society influences the experiences of people with impairments.

3. Methodology

This study utilized a qualitative method because this method enabled the researcher to analyze the perceptions and commentary of disability. This method was chosen to provide meaning to the content analysis that was employed in the study. The methodological perspective employed in this research study was the interpretive approach. The interpretive approach is different from the normative, constructivist, and positivist approach in that it applies to social sciences, where the positive tradition is employed mainly in the natural science and business

studies respectively (Christensen, Johnson & Turner, 2011:81). Therefore, the interpretive approach was more applicable to this research study because of the insight that was gained into the policies governing disability in the City of Cape Town.

Data collection for the study was secondary data that was collected from various secondary sources. Secondary data is a practical and extensive method for collecting data because it grants researchers access to large amounts of information. The data were analyzed through a content analysis because of its flexibility and extensiveness in research studies. The desktop analysis involved the analysis of data that already exist in the literature such as journal articles, laws, and regulations. Primarily, this analysis involves scanning through and evaluating the data.

4. Results and Discussion

Since the political dispensation in 1994, South Africa has undergone significant changes in its history. These changes have brought some form of transformation at the policy and legislative level as well as in the implementation of service delivery and government accountability in the disability sector. In discussing this policy and legislative transformation in disability rights, it is important to acknowledge the establishment and involvement of the Office on the Status of People with Disabilities (OSDP), parliament, and the improvements in the relationship between government and civil society in addition to how a combination of these has opened platforms for disability issues to be raised and addressed in key sectors of the country.

The period between 1994-2020 has seen many leaps being made toward the representation of disabled people in policies and legislation. The adoption of the White Paper on an Integrated National Disability Strategy (INDS) in November 1997 represented a paradigm shift in how disability is viewed in South Africa. Moreover, it provided society and the government guidelines to "... promote non-discriminatory development planning, program implementation, and service delivery" (RSA, 1997). While the INDS is not legislation, it does compel government departments to formulate disability policies and approaches that are aligned with its provisions and with the unique mandate of the respective government department.

Along with the INDS, this research study analyzed policies and legislation that aim to enforce the rights of persons with disabilities. It must be noted that legislation and policies concerning the needs of persons with disabilities either cater specifically to the needs of disabled people, for example, in areas of education and training, employment, and social security, or these prescriptions are mainstream laws that are also utilized by disabled people.

4.1. Legislation representing persons with disabilities

4.1.1. The Constitution of the Republic of South Africa

The Constitution of the Republic of South Africa came into operation in 1997 to replace the interim constitution adopted in 1994. The central position of both the interim and the new Constitution of South Africa emphasized the value of equality. The supreme status of the Constitution meant that this position filtrated into the fabric of South African law. Much of this has to do with how the Constitution of 1996 retained equality as a fundamental constitutional value from its interim predecessor. The Constitution also kept the design of the interim Constitution which was set to advance and protect disadvantaged people from unfair discrimination.

The role of the Constitution is based on bridging the country's unjust past with a just future for all South Africans (RSA, 1996). Traces of this role are indicated in the preamble of

both the interim and the permanent Constitution. The interim Constitution referred to "... a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races..." (RSA, 1993). The Constitution, 1996 continued this role by asserting the aim to "... establish a society based on democratic values, social justice, and fundamental human rights... and every citizen is equally protected by law..." (RSA, 1996). As an extension of the value of equality, the Constitution of 1996 also reaffirms the embodiment of dignity, equality, and freedom as the foundations of the democratic vision encapsulated in the Constitution.

The representation of persons with disabilities within the scope of the Constitution and in the interest of this research paper is in the remedial and corrective measures that it sets for promoting equal treatment of all citizens. Section 7 of the Constitution for instance sets the following concerning the Bill of Rights (RSA, 1996):

7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom.

(2) The state must respect, protect, promote, and fulfill the rights in the Bill of Rights.

(3)” Section 9 of the Constitution, 1996 defines the concept of “equality” by determining that- “9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

4.1.2. The Employment Equity Act, 1998

The formulation of the Employment Equity Act (EEA) was set on enabling disabled people and other marginalized population segments to participate in the economy through the promotion of two main purposes. Firstly, the implementation of progressive measures to abolish discrimination in employment practices, and secondly, in providing companies with guidelines that promote occupational equity, and the equitable representation of race, gender, and disabled people in the workforce (SAICA, 2020). As far as the employment of disabled people is concerned, the EEA protects against unfair discrimination on the grounds of disability. Also, the Act entitles disabled people to affirmative action measures that give them a priority for employment opportunities. The Act does not only protect disabled people against discrimination in employment practices, but it also sets grounds for people who are associated with them. This further entrenches the EEA’s links with Chapter 2 of the Constitution (Bill of Rights), particularly those reference to affirmative action.

The convolution of employment means that employment equity depends heavily on the education and training system to support the skills development of individuals. A critical look into this facet in the employment of disabled people in the country indicates that the education and training afforded to disabled people have inadequately responded to the economic demands. Furthermore, this education and training also consistently failed to link theory and practice (Commission for Employment Equity, 2003). Employment equity should be in line with the constitutional requirement of non-discrimination (RSA, 1998). Moreover, employers should be encouraged through incentives and legislation to accelerate the training of historically disadvantaged social groups and discard barriers to employment that prevent the organizational transformation from taking place.

Several concerns are noted in the literature around the issue of transformation in the workplace concerning disabled people. Dube (2015) suggests that strategies centered on the training of management and staff members on attitude change and diversity management may

be an effective tool to promote human diversity in the workplace. Furthermore, the embracement of a transformation agenda in combination with the Skills Development, Broad-Based Black Economic Empowerment Act, and diversity management strategies can significantly accelerate employment equity (RSA, 2014). However, the quality of employment for disabled people challenges the effectiveness of this piece of legislation in fulfilling this purpose. It is estimated that 99% of employed disabled people in South Africa are not meaningfully employed (Dube, 2015). Clearly, from this vantage point, the EEA has had minimal effect in increasing the employment of disabled people. However, due to the lack of empirical studies on the employment of disabled people in the City of Cape Town, it is difficult to determine whether this legislation is effective in effecting a significant impact on the employability of persons with disability. Therefore, further empirical studies need to be undertaken in this research area to get the true extent of the effectiveness of its purpose.

4.1.3. Promotion of Equality and Prevention of Unfair Discrimination Act, 2000

The Promotion of Equality and Prevention of Discrimination Act (PEPD) can be argued to be one of the most important pieces of legislation concerning disabled people in South Africa. The importance of this Act is in its recognition of the discrimination that brews in society, and more importantly, the Act's necessitation for creating solid structures that can mediate discrimination and advance equality. The Act states that:

"... recognises the existence of systematic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, as well as the need to take measures at all levels to eliminate such discrimination and inequalities."

The purpose of the Act is to enable the prevention, prohibition, and elimination "... of unfair discrimination, hate speech and harassment..." (RSA, 2000), and restricts the state and/or any other persons from discriminating against the grounds of disability. These include:

- removing enabling and supporting facilities from any disabled person that facilitates their functioning in society.
- a failure to remove barriers that impede people with disabilities from gaining equal opportunities.
- violating the regulations that govern environmental accessibility which is set by the South African Bureau of Standards.

The Act sets obligations on constitutional institutions such as the South Africa Human Rights Commission (SAHRC) to request information from the state or any person on measures to promote equality, such as codes of practice, and compliance with legislative and executive action. These provisions are set to restrict any form of discrimination against disabled people by any entity or component which falls within the jurisdiction of the state. Actions such as these should be by the Constitution of South Africa or any law. According to the RSA (2000), the powers and functions associated with these constitutional structures include:

- Assist complainants in instituting proceedings in an equality court – particularly complainants who are disadvantaged
- Conduct investigations into cases and make recommendations as directed by the court regarding persistent contraventions of this Act or cases of unfair discrimination, hate speech or harassment referred to them by an equality court
- Request from the Department, in the prescribed manner, regular reports regarding the number of cases and nature and outcome thereof.

The PEPUD provides for additional measures to promote equality for among others, disabled people. According to the Act, offenses proven to be unfair discrimination on the grounds of disability, gender, and race must be viewed with aggravating circumstances to direct the purposes of sentencing (RSA, 2000). Also, the SAHRC must issue a report on its findings of any unfair discrimination on the grounds of disability, gender, and race. This report is in terms of section 15 of the Human Rights Commission Act of 1994 and should include i) the extent of the unfair discrimination and ii) effects of the unfair discrimination and iii) offer remedies on how to address the problems (RSA, 1994). Furthermore, the state, public institutions, and all citizens are responsible to discard discrimination on any ground and should promote equality among all who live in the country.

4.1.3. Social Assistance Act, 1992

According to the RSA (1992), the Social Assistance Act provides the framework for the rendering of social assistance to individuals, national councils, and welfare organizations. After the political dispensation in 1994 and subsequently the rollout of financial awards to a certain category of people and bodies, the Act was amended to regulate these transfer payments. In 1997, the Social Assistance Act 1992 was amended into the Welfare Laws Amendment Act of 1997 to implement the social grant strategy adopted by the new democratic South African government. The purpose of the Act was to (RSA, 1992):

- provide for uniformity of, equal access to, and effective regulation of, assistance throughout South Africa;
- introduce the child support grant;
- do away with capitation grants;
- abolish maintenance grants subject to the phasing out of existing maintenance grants over a period not exceeding three years;
- provide for the delegation of certain powers; and
- extend the application of the provisions of the Act to all areas in the Republic.

The implementation of this Act has rapidly increased the number of disabled people who have benefitted from its rollout. In April 2000, an estimated 2.9 million were recipients of social grants. This number rocketed to 7.9 million in just five years. Experts believe that the number will increase by more than 20% per annum (Dube, 2015). The costly social grant payments cost the City of Cape Town R37.1 million with the number said to have increased to R54.4 million by 2007 (Dube, 2015).

The government has committed large spending on disability grants that have seen considerable increases since the adoption of the social security strategy. According to the National Treasury, spending on disability grant increased from R4.0 billion in 2000/01 to an estimated R10.3 billion in 2003/04 (Johannsmeier, 2007). The main concern of this exponential growth in grant spending by the government is around the sustainability of the rollout which is further strained by the inflation-related adjustment to social grants provided in the Medium-Term Expenditure Framework (MTEF). Following the Budget Speech of 2005 by former finance Trevor Manuel, the increase of disability and care dependency grants will be from R40 – consistent with the rise of the inflation rate. In the 2021 budget speech, Minister Tito Mboweni announced that social grants would increase by only R30 – an indication of the unsustainable growth of the rollout (Business Tech, 2021).

Considering the socioeconomic status of many South Africans and their subsequent reliance on social grants, it is important to study disability grants as a component of the

government's policy initiative. Based on this, the Social Assistance Act is perhaps one of the most important and controversial pieces of legislation in South Africa. It falls under the custodianship of the Department of Social Development and sets the legislative framework that governs the administering of disability grants and dependency grants amongst others. Disability grants are awarded to persons over the age of 18 years who are likely to find difficulties in finding employment because of their disability. While the care dependency grant is meant for disabled minors. The Department of Social Development also awards the grant-in-aid and the social relief distress – both of which are awarded to disabled adults.

The challenge of administering social grants in the country concerns the definitional challenges that are based on the varying types of disability. In a study by Sangweni (2002), it was found that those people who have what is referred to as 'invisible' disabilities such as hearing disability and learning difficulty were less likely to apply and receive a grant than other disabilities likely because of the invisible nature of the disabilities. In contrast, people with physical disabilities were all likely to apply and successfully receive a grant owing to the visible nature of their disabilities. Gender seemingly affects the acceptance of applications for social grants. Males were more likely to receive grants than their female counterparts.

5. Recommendations

Based on the findings of this paper, the following recommendations are made.

- Focus on the reinforcement and development of accessibility legislation and systems across all sectors to adjust these with the obligations set in disability policies.
- Improving disability systems that track and report inequalities and contravention of the rights of persons with disabilities.
- Reviewing legislation and policies that represent persons with disabilities to improve prevention measures of discrimination.
- Strengthening the relations between public-sector institutions and service organizations and aligning their respective objectives so that services at the community level are seamless and realize the right to adequate support services to disabled persons.
- Strengthen the capacities of disability organizations to enable them to advocate for the rights of persons with disabilities at the policy level, and effectively monitor incidents that infringe the rights of disabled people.

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