

International Instruments Affecting People with a Disability in South Africa

Viability for Promoting Democratic Governance and Citizen Rights

Sareesha Pillay

Post-Doctoral Fellow, Nelson Mandela University, South Africa

Derek Taylor

Research Associate, Nelson Mandela University, South Africa

Avinash Govindjee

Executive Dean: Faculty of Law, Nelson Mandela University, South Africa

ABSTRACT

While the democratisation of South Africa incorporated political change, a concurrent requirement was placed on the government-of-the-day to develop a transformed normative framework. The necessity for a normative framework continues to be an essential platform for the practice of democratic governance in South Africa. Emphasis remains on the promotion of the democratic rights of persons with disabilities within a global context. In light of the 'new' dispensation, the challenges faced by persons with disabilities have come under the spotlight. International instruments relevant to persons with disabilities have served as a compass for the South African government. The international framework pertinent to persons with disabilities has provided a normative basis for the fair treatment and promotion of equal rights for such persons in the South African context. Questions have been raised regarding the viability of these international instruments in providing an effective normative framework for enhanced democratic governance and positive representation of the rights of persons with disabilities.

Introduction

South Africa is characterised by numerous challenges that had an impact on the governance of the country. The achievement of certain of the ideals relating to democracy has been met with elements of instability in the social and political structures. Persons with disabilities are emphasised with respect to the representation in terms of democratic governance in the South African context. The human rights approach adopted by the international community has been instrumental in steering governance processes worldwide. The previous political dispensation has challenged the ability of the present South African government to meet the democratic demands and representational needs of citizens with disabilities. Hence, international instruments bear significance in guiding South Africa in establishing an effective normative framework that encompasses the rights of persons with disabilities.

This paper will explore the various international instruments applied to persons with disabilities in South Africa. A theoretical basis will thus be provided on the international stipulations prescribed for the representation of persons with disabilities in South Africa. Furthermore, the shortcomings of South Africa's normative framework with respect to the representation of persons with disabilities will be discussed. The analysis of the shortcomings in South Africa's normative framework will form the basis for the determination of the viability of the international instruments affecting persons with disabilities. The paper will conclude with recommendations for a normative framework for South Africa that is inclusive and representative of the rights of persons with disabilities.

International Instruments Affecting Persons with Disabilities in South Africa

International instruments have come to bear significance with reference to the representation of persons with disabilities in the South African context. The international instruments communicate the moral and political commitments that are required from South Africa to promote the democratic rights of persons with disabilities. The respective instruments are fundamental in providing normative guidelines to South Africa in the promotion and steering of legislation and policies that represent and reflect the rights and freedoms of South Africans with disabilities.

Standard Rules on the Equalisation of Opportunities for Persons with Disabilities

The Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (hereinafter, the Standard Rules) were developed in response to the outcomes and experiences of the United Nations Decade of Persons with Disabilities (1983–1992). The above-mentioned rules are based on the principles of responsibility and cooperative action to represent persons with disabilities and incorporate persons with disabilities in the transformation process. The Standard Rules require

a strong commitment by South Africa, as a member state, to comply with the moral and political expectations. A foundation was subsequently created by the Standard Rules to promote a platform for persons with disabilities to exercise the same rights and obligations as others in the South African society.¹

The changing ethos associated with the 1993 international perspective on disability provided insight into the challenges of exclusion in society and access of persons with disabilities to their Constitutional rights and freedoms. Hence, the Standard Rules have been critical in shaping the South African legislative and policy framework. Pressures are subsequently placed on the government to scrutinise the current normative framework for South Africans living with disabilities. There is a need to examine the possible requirement for new legislation. Existing legislation must be scrutinised and adjusted to include the norms and values of persons with disabilities. Ultimately, the normative framework should reflect the norms and values of persons with disabilities and give substance to their rights in the South African Constitution.² The principle of equality of rights, as prescribed by the Standard Rules, has been fundamental in planning South African communities. The employment of equal rights when planning societies is instrumental in promoting the standard values and norms relevant to persons with disabilities. In essence, the normative foundation has been structured to accommodate and capacitate persons living with disabilities.³ The Standard Rules, however, holistically prove to be problematic. The shortcomings of the Standard Rules are associated with the functionality and implementation of the respective provisions. The gap between stipulations and implementation in South Africa adversely affects the full participation in society of persons with disabilities.⁴

The view is held by some that the Standard Rules are nothing more than empty rhetoric. This has been mainly owing to the challenges associated with their implementation in South Africa. Article 4 played a significant role in the motivation of the effective implementation of the Standard Rules. The particular Article has tailored parameters for the monitoring and implementation of the Standard Rules to focus on the rights of persons living with disabilities adequately.⁵ The effectiveness of the Standard Rules in South Africa is dependent on a transformed adaptation and approach to integrating persons with disabilities as contributing partners in society.⁶

International Labour Organisation (ILO) Convention concerning Vocational Rehabilitation and Employment of Disabled Persons (No. 159)

In theory, persons with disabilities participate and contribute to employment at all levels. However, in practice, many persons with disabilities face barriers that prevent them from being employed. This has necessitated a need for more effective disability management practices. In effect, the conviction that employers also benefit from employing a person with a disability has gained greater value in the South African context.⁷ The employment of persons with disabilities is deemed to be mutually beneficial to both employers and employees and should be a contributing factor towards a standardised normative framework.

The convention concerning Vocational Rehabilitation and Employment of Disabled Persons (No. 159), established by the ILO, is a binding international convention. This convention was founded

on the premise of inclusion, equality and transformation (via rehabilitation).⁸ The inclusion of persons with disabilities in South Africa in all services, and the removal of barriers (for example, physical, attitudinal, legal and policy) that prevent their full participation in society, often remain shaped and influenced by societal values and norms.⁹

The focus of the convention is primarily to promote employment opportunities for all categories of persons with disabilities in an open labour market. The focus reinforces the elements of redress in Article 4.¹⁰ The promotion of access to rehabilitation, skills development and employment of persons with disabilities is an on-going aim of the ILO. Attention has thus been directed towards the promotion of a comprehensive and systematic approach to the democratic representation and inclusion of persons with disabilities.¹¹

Achieving the goals and objectives of the ILO and fulfilling its mission require the commitment of member states such as South Africa and the alignment of national goals and objectives with the associated international stipulations and standards prescribed by the ILO. The convention thus seeks a more assimilative plan as well as proactive action at the national level in South Africa, as an ILO member state. Subscription to the stipulations of the ILO by South Africa is required for the development of a more facilitative framework regarding the employment of persons with disabilities.¹²

African Charter of Human and People's Rights

The African Charter of Human and People's Rights (hereinafter referred to as the African Charter) is a human rights instrument applied and practised by South Africa. The African Charter was adopted by the African Union (AU) in 1986 in light of the establishment of a human rights protection system for Africa. A duty is accordingly imposed on member states to protect and promote the human rights and freedoms of citizens.¹³

Similar to the role played by the AU in terms of human rights protection, the African Charter is founded on a notion of unity and integration between African states. As such, the African Charter represents the AU's commitment to aspire to integration, social justice, development and effective governance for all citizens on the African continent.¹⁴ The purpose of this charter has necessitated a focus and emphasis by member states on the constitutional rights of all citizens, inter alia, persons with disabilities. A critique of the AU, however, is found in its limitations as the AU commission that it has no authority and jurisdiction against non-compliance by member states. Hence, member states face no clear repercussions if they violate the Charter. There is only evident authority to publicise violations.¹⁵

An additional shortcoming of the African Charter is a detachment or separation from the legal dimensions associated with human rights.¹⁶ The Charter has been criticised for its inadequate reflection of civil and political rights. This shortcoming has been further criticised owing to the use of claw-back clauses. Claw-back clauses give permission to state parties to restrict their charter obligations. Hence, these clauses undermine the African Charter, as the national laws of member states are given primacy.¹⁷

Millennium Development Goals

The Millennium Development Goals (MDGs) 2000 envisaged a global agreement to impact positively on the reduction of poverty and human rights via collaboration. The comprehensive framework for implementation and support systematically differs from former international instruments regarding human rights and deprivation.¹⁸ As a blueprint for transformation, the MDGs have been centred on more appropriate targets (or non-targets) and more effective policy development and implementation.¹⁹ Global interactions provided a foundation that gave rise to the conception of the MDGs. Global interactions have been central to the ideal of poverty eradication on a global scale and the reframing of social issues, which include persons living with disabilities.²⁰

The MDGs have achieved success by drawing attention to key development areas in high-level political arenas. They have been instrumental in depicting how goals can be useful in shaping development efforts. The MDGs have, however, not been generally effective as planning tools at the national sphere of government. The standardised typology with respect to targets is incongruent with the characteristics and challenges associated with states at differing developmental levels. A generic typology proves more effective in the application of the MDGs. The generic approach serves as a compass to guide countries to align their development goals. Country-specific national targets are guided by policy-making and these, therefore, inform the development of goals.²¹

On the other hand, the MDG framework is inherently defective, as it refrains from directing full attention to marginalised groups indicated in the targets.²² Persons with disabilities constitute 10 per cent of the world population and are associated with approximately 20 per cent of the global population living in poverty. Nevertheless, disability remains invisible in the implementation and monitoring processes of the MDGs. While disability or persons with disabilities are not specifically mentioned in the MDGs, they are also not included in the operational efforts of the MDGs, thus not obligating compliance action by member states.²³

The explicit exclusion of disability and persons with disabilities in the MDGs has consequently extended the stigma, prejudice and barriers experienced by persons with disabilities in South Africa.²⁴ While disability is a global issue, it remains evident that every MDG has relevance to persons with disabilities. However, the relevance of the MDGs does not manifest into the inclusion of persons with disabilities. There is subsequently a need to ensure that all MDG targets will effectively and practically develop, monitor and evaluate policies for persons with disabilities. The sights on the systematic inclusion of persons with disabilities in programmes and policies are intended to foster action associated with the MDGs.²⁵ Thus, in order to mainstream disability in South African policies, recognition of deficiencies in the MDGs is fundamental.²⁶ It is necessary to approach and implement the MDG process as holistically as possible. Calls for the inclusion of persons with disabilities in development efforts have also been met with growing concern. Increased efforts are therefore required by the South African state to ensure that persons with disabilities are included at every level of national and international development.²⁷ The Sustainable Development Goals (SDGs), otherwise known as the Global Goals, are a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity.

United Nations Convention on the Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) came into force on 8 May 2008. The convention is an extension of existing treaties on human rights. It covers a combination of rights, including civil, economic, political, social and cultural rights. The CRPD has clarified the legal duties and obligations of signatory states to respect and ensure equality in human rights for persons with disabilities.²⁸ Although the discrimination experienced by persons with disabilities has been predominantly due to disablism as a social construct, discrimination was formally institutionalised in legislation and policies.²⁹

The purpose of the CRPD in terms of Article 1 is to promote respect for the inherent dignity of persons with disabilities and to protect and promote the full enjoyment of their human rights and fundamental freedoms. The convention is integral in making contributions to the redress and eradication of the social disadvantages experienced by persons with disabilities. However, regardless of the relevant international conventions, treaties and instruments, barriers continue to affect persons with disabilities. Persons with disabilities continue to be prevented from participating on an equal footing in society and continue to have their rights violated globally. The onus is thus placed on signatory parties to adhere to the principles and provisions of the CRPD.³⁰

A requirement is placed on signatory parties to emphasise the prominence of mainstreaming aspects of disability in strategic and sustainable development processes. In addition, it is expected of signatories to the CRPD to promote equal opportunities and enhance the creation of an enabling environment in respect of persons with disabilities. Obligated parties are consequently expected to formulate plans and policies that are reflective of persons with disabilities at all spheres of government. Reinforcement is proposed for the acknowledgement of universal access, the interrelatedness of human rights and fundamental freedoms that simultaneously eliminate discrimination against persons with disabilities.³¹ The raising of awareness of the human rights of persons with disabilities in the CRPD has placed their rights equally with those in association with other human rights treaties. The convention does not create or provide additional or new rights. It highlights established human rights applicable to persons with disabilities, by adding new features that improve accessibility.³²

In mainstreaming disability and removing barriers that affect the access of persons with disabilities, reference is clearly made to the role of the legislative framework in promoting inclusive societies. Article 4 of the convention collectively prescribes the importance of the law in providing measures to protect the rights of persons with disabilities. The legislative framework is conceptualised as fundamental to the formation and promotion of accessible and barrier-free environments. The development and implementation of legislation and policies are furthermore viewed as crucial in appropriately representing the rights of persons with disabilities in relevant decision-making processes.³³

The CRPD epitomises what modern human rights instruments aim to achieve. The convention nonetheless sketches key plans and actions in line with the protection of the rights of persons with disabilities. In outlining these processes, the United Nations (UN) has directed increased attention to prevailing monitoring and reporting models.³⁴ In contrast to former UN human rights treaties, the CRPD establishes a system of monitoring and evaluation of the implementation of the

convention at the national level. Article 33 of the convention provides for a trifocal monitoring system. The system includes a government-level focal point, an independent monitoring framework and the involvement of civil society disability organisations. In addition, Article 33(2) provides for the establishment of a framework that will enable a process of more effective implementation of the convention.³⁵

As a binding convention, the CRPD provides an international benchmark for the formalisation of the greater representation of persons with disabilities. It provides a framework for South Africa for the standardisation of equality in rights for all persons with disabilities as a result of obligatory provisions.

Characteristics of South Africa's Normative Framework

The foundation of South Africa's normative framework is based on the pillars of democracy. Democracy should ideally require adequate intergovernmental and intragovernmental demands for good governance and effective representation of the citizenry. The global focus on the values of human rights and democracy has shaped South African trends and values to model a normative framework that is representative of the value of human rights, democracy and respect for the citizens.³⁶

The South African Constitution of 1996 is regarded as the cornerstone of democracy. It provides explicit rules for the practice of democracy and application of human rights that is consequential to the diverse communities and social structures that comprise the country. The binding nature of the Constitution is particularly important to the citizens of South Africa in that the standard platform is of generic value to every South African citizen within the arena of democratic governance and equal human rights.³⁷ The injustices and repression caused by the former political dispensation promoted the adoption of two approaches during the process of deliberating the final Constitution. The two approaches were constitutionalism and the entrenchment of fundamental rights. The two approaches were pronounced necessary in redressing former injustice and in forging a new culture on the basis of accommodation and mutual respect in South Africa. Emphasis has consequently been placed on the establishment of democracy by entrenching fundamental rights and freedoms for all citizens in a Constitution, which is the supreme law of the country.³⁸

The historic adversities and complexity of elements that characterise South Africa have produced greater demands on the state in terms of the representation of every citizen's rights and freedoms. That is, the strategic culture of the South African normative framework has denoted greater emphasis in its provisions on the practice and application of policy and stipulations that reflect and represent diverse values, beliefs and ideas.³⁹ The influence of the former oppressive government has generated detrimental effects on the goals of democracy. The former apartheid era not only stunted the democratic process, but it simultaneously adversely affected the representational and inclusionary practices that steer transformation in the arena of democratic governance.

Hence, the normative framework within the South African context, is expected to transform the democratic challenges by focusing on the redress process to include all citizens, inter alia, previously disadvantaged groups. The focus has been diverted to an entrenched integration of

democracy being representative, participatory and direct. In particular, South Africa has come to pay increased attention to participatory and direct democracy in fulfilling the values of citizens and fulfilling the goals and principles that define the redress process that had previously left certain citizens excluded. The representation of persons with disabilities in South Africa accordingly extends from the enhancement of participatory and direct democracy.⁴⁰

South Africa's normative framework incorporates advancing the fundamental human rights and freedoms of previously disadvantaged groups and promoting people-centred governance. This process has been advanced by the enrichment of human rights and the ideals of democracy. The framework is steered by the incorporation of political, economic, social and legal elements. Thus, provisions within the framework manifest inequality before the law to protect the human dignity of persons with disabilities and prohibit discrimination as a social construct.⁴¹

The shortcomings projected in the normative framework with regard to the representation of persons with a disability are essentially an area of concern in light of the promotion of democratic governance in South Africa.

Shortcomings in South Africa's Normative Framework in Representing Persons with Disabilities

South Africa's normative framework relevant to the representation of persons with disabilities comprises the policies and legislation that represent their rights and freedoms. The weaknesses in the legislative and policy frameworks that represent the rights and freedoms of persons with disabilities reflect the failure by South Africa to adequately commit to the democratic representation of the citizenry and its normative obligations.

The Bill of Rights applies to the law. Persons with disabilities are more widely represented in the Bill of Rights of the final Constitution. Whereas the Bill of Rights can have dual meanings, the meaning applied must promote the values that afford an open democratic society and state. This application is based on the promotion of human dignity, equality and freedom for all citizens, as conferred by Sections 10 and 20.⁴² The application of the respective Act (Sections 4 [2] [a] and [b]) is thus to take the social differentiation that affects persons with disabilities apart and eradicate the persistence of systematic discrimination. In Section 4 (2) (a) and (b) of the Act, it is stated: '... existence of systemic 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, brought about by colonialism, the apartheid system and patriarchy ...' is to be taken into account; and '... the need to take measures at all levels to eliminate such discrimination and inequalities ...' is to be recognised.⁴³ However, the practice of the provisions often fails to acknowledge the provisions set out in the Act.

Furthermore, provisions contained in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, fail to encapsulate the shortcomings that face persons with disabilities. Regardless of the provisions that clearly prohibit discriminating against persons with disabilities, they continue to face challenges associated with access and freedoms. In education, in particular, there is failure in adapting teaching methods to accommodate students with disabilities. A clear

gap exists between this legislation and the provisions of the Standard Rules and MDGs.⁴⁴ The practical challenges of adaptations in South Africa have been justified by the incurred costs. The lack of progress and accommodation has been consequent to the infrastructural costs. In addition, social attitudes and prejudice regarding the capacity of persons with disabilities impede the positive changes associated with their inclusion.⁴⁵

The National Disability Policy, on the other hand, is driven by South Africa's commitment to the CRPD. Central to the convention is its intention to give light to the full and equal enjoyment of all entitled human rights and fundamental freedoms for all persons with disabilities. The United Nations' convention has thus provided the South African government with the national interpretation of the convention. It assures linkages between the convention, the Constitution and the policy framework that has been developed to promote the rights of persons with disabilities.⁴⁶

The policy is an indication that the barriers that hinder persons with disabilities from accessing fundamental social, political and economic rights and opportunities have been largely influenced by exclusionary practices. The exclusion of persons with disabilities, in the South African context, has been due to collective societal barriers, the stigma of social perceptions and the inequalities infused by the former apartheid legacy.⁴⁷ The focus of the National Disability Policy has been on the facilitation of collaboration between the institutional and legal framework on the national level. The point of focus has been to establish a framework on equal grounding for persons with disabilities that is aligned with the constitutional requirements of the state. The policy has adopted a cross-cutting approach across all departments. This approach has been sought as a benchmark for collaboration between national departments to extend the holistic inclusion of persons with disabilities in South Africa.

However, the challenges in terms of the National Disability Policy pertain to implementation and practice. While the CRPD is the guiding instrument for the South African disability policy, it poses a challenge with the implementation process. The evolved approach of the UN to disability is founded on international trends and the most advanced thinking with regard to disability. South Africa faces challenges in terms of assimilating its disability policy with the international prescriptions for the equalisation of opportunities for persons with disabilities.

In light of the paper, the recommendations that follow are primarily based on an extensive review of relevant literature. In addition, the recommendations are founded on case law in the South African context. The literature reviewed together with the case law consulted created a platform for relevant recommendations within the South African legislative and policy (normative) framework.⁴⁸

Recommendations

The discrepancies between international instruments affecting persons with disabilities and the South African framework highlight the need for corrective action and transformation. In acknowledgement of the shortcomings of South Africa's normative framework, the following recommendations are proposed to improve the representation of persons with disabilities:

- The normative framework is to be indigenous to the socio-political climate of South Africa. The country should encompass the historical conditions and challenges unique to South African. The socio-political climate indigenous to South Africa will provide a clear overview of the conditions and challenges pertinent to the discriminatory treatment of South Africans with disabilities.
- Infrastructural analysis must take place. In order for the standards in the normative framework to be effective and substantial, the infrastructural level should be analysed to ensure that the standards are realistic and that the environment can facilitate and accommodate the provisions proposed by the normative framework.
- International instruments should impose greater repercussions on member states who violate stipulations and obligations. Stricter action must be taken in response to violations to ensure member commitment and the promotion of efficient and effective practices prescribed by international instruments. Furthermore, termination of membership should be implied in view of the violation of obligations, to assure the effective application of international prescriptions.
- Focus should be placed on implementing international stipulations. The gap between international provisions and actual practices must be closed. Regular evaluation of the application of international provisions will highlight the challenges in the implementation of international stipulations within the South African normative framework, giving effect to feasible international demands regarding the representation of persons with disabilities in South Africa.
- A best-practice approach should be adopted that is mutually beneficial to both international and indigenous demands regarding a normative framework that represents persons with disabilities in South Africa. Specified international provisions should be dictated in relation to the feasibility and the infrastructural framework indigenous to South Africa. That is, South Africa's normative framework on the representation of persons with disabilities should be restructured and adapted to the infrastructural factors pertinent to the country.

Conclusion

International instruments that affect persons with disabilities have been found to be an essential element that contributes to democratic governance and the fair treatment of persons with disabilities globally. While international instruments are founded on the concept of human rights and equality, these instruments have attachments of obligatory terms that guide member states. It has been found that international instruments affecting persons with disabilities have extended the challenges experienced by South Africa in effectively representing persons with disabilities.

The international instruments are not viable in South Africa to the extent that historical influences in South Africa have generated deeply entrenched effects that limit the susceptibility of the state to the international framework on disability. Socio-political challenges have had a direct effect on the viability of the international normative ground. The previous exclusion of persons with disabilities has left the South African government with demands to transform the current environment to embrace transformation and to redress persons with disabilities for past injustices. Furthermore, the normative framework that was established has had to meet international

standards, which has proved detrimental in terms of achieving democratic governance and improved representation. The proposed recommendations were, in effect, aimed at improving the South African normative framework. Efforts are being directed at improving the representation of persons with disabilities and democratic governance by promoting the viability of applying the international instruments regarding disability.

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