The challenge of real rights for disabled students in South Africa

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Abstract
This article argues that part of redressing unequal access to higher education for disabled students is the challenge of transforming formal rights into real rights. Four sections build up to the argument. The first section outlines some of the challenges facing support provision for disabled students in South Africa. The second section describes and analyses the principles of disability rights in South Africa. The third section explains the limits to rights and how they may affects support provision for disabled students. The final section points at some considerations of the nature of rights in thinking about widening access to higher education for disabled students.

OBSTACLES TOWARDS ACCESS
In a publication by the Council on Higher Education, Howell (2005) reports findings of a study on access to higher education for disabled students in South Africa. The report demonstrates the extent of support provision for disabled students in the South African higher education system. It also stresses four challenges that face the process of providing access to higher education for disabled students. The first challenge is the legacy of exclusion of disabled people at all levels of education. The second challenge is the lack of reliable data on disabled students in the South African higher education system. This lack of data is also evident at institutional level. The third challenge is the inbred attitudes and stereotypes that reinforce the marginal position of disabled people. The fourth challenge is management’s failure, oversight or ignorance to formulate and implement policy for disability support services at most higher education institutions. This challenge is exacerbated by lack of funding in trying to implement policies and resistance by faculty to use alternative methods of teaching disabled students. I add a fifth and final challenge which is lack of political commitment from relevant government officials to expedite the process of widening access to higher education for disabled students.
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The above points are challenges because without positive changes in the governmental commitment, institutional transformation, classroom diversity needs, and attitudinal structures regarding disability, access for disabled students is unattainable. They are challenges because they also require practical interventions that call for both human capital and financial support. They indicate the current marginal position of disability services in higher education and also imply the need to redress the situation. That means, on the surface of discussions and at a descriptive level, the challenges indicate obstacles for disabled students to access higher education. However, at a substantive level these challenges indicate the space between formal rights and real rights, that is, the existence of rights as enshrined in legal documents and effective rights as experienced and enjoyed by citizens. A critical discussion of the space between formal rights and real rights is one contribution towards ensuring access to higher education for disabled students in South Africa.

PRINCIPLES OF DISABILITY RIGHTS PROTECTION


With respect to disability rights, the 1997 White Paper on an Integrated National Disability Strategy highlights the situation of disabled people in South Africa and offers some policy guidelines. It has three pillars. The first one is the belief in human rights. It states that disabled South Africans also have the right to enjoy citizenship. The second principle is the belief in the social model of disability. The White Paper expressly states that reconstructing our society necessitates applying the social model of disability to promote disability rights and the inclusion of disabled people in South Africa. It states, ‘The Social Model, therefore, implies that the reconstruction and development of our society involves a recognition of and intention to address the developmental needs of disabled people within a framework of inclusive development. Nation building, where all citizens participate in a single economy, can only take place if people with disabilities are included in the process’ (Office of the Deputy President 1997, 11). The final principle is that of participatory reconstruction. According to the White Paper disabled people should be consulted and involved in reconstructing their lives.

The principles of human rights, the social model of disability and the approach of participatory reconstruction have not been newly introduced by the Constitution and the White Paper on the Integrated National Disability Strategy of 1997. These principles have a longer history than the 1997 White Paper and the Constitution. In 1992, the Disabled People South Africa and the Lawyers for Human Rights launched
the Disability Rights Charter of South Africa. Of relevance is Article 4 which demands, ‘Disabled people shall have the right to mainstream education with personal assistance where necessary, appropriate assistive technology and specialised teaching. Parents of disabled children shall have the right to participate in the planning and provision of their children’s education’ (Disabled People South Africa 1992, 1). In 1993, South Africa endorsed the United Nations Standard Rules on the Equalisation of Opportunities for People with Disabilities. Section 6 of Chapter II of The Employment Equity Act of 1998 outlaws discrimination against disabled people in employment policies and employment opportunities. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 expands Section 9 in the constitutional provisions in prohibiting discrimination and guaranteeing equality before the law. It expressly prohibits discrimination on the grounds of race, gender and disability.

In terms of higher education, three official documents say something about disability. They are the White Paper on Integrated National Disability Strategy, the National Plan for Higher Education and the Education White Paper 6 on Special Education: Building an Inclusive Education and Training System. The White Paper on Integrated National Disability Strategy by the Office of the Deputy President (1997) suggests some policy guidelines regarding all levels of education, including higher education. It advocates equal access, non-discrimination, transformation and redress in the education of disabled South Africans. It does not, however, focus primarily on higher education. It merely states, ‘the implications of the above as they relate to the inclusion of students with disabilities have not been clearly defined or researched. They will receive attention by the NCSNET and NCEESS (formerly TTESS1)’ (Office of the Deputy President 1997, 41).

The National Plan for Higher Education by the Ministry of Education (2001, 41) outlines guidelines on the transformation of higher education in South Africa. Unfortunately the document writes only thirteen lines on equity for disabled students in higher education. It decries the lack of statistics on disability and suggests a development of regional strategies to support disabled students. It then concludes, ‘The Ministry recognises that it may not be possible for every institution to provide the full array of infrastructure needed to service the specific educational needs of disabled students. This provides an opportunity for institutions within each region to develop regional strategies, which would ensure that disabled students are catered for within the region. However, at a minimum, all institutions should have the basic infrastructure to allow access to the campus for disabled parents and members of the community more generally’ (Ministry of Education 2001, 41).

The Education White Paper 6 on Special Education: Building an Inclusive Education and Training System was released by the Department of Education in July 2001. It primarily covers the education of disabled pupils. Where it briefly mentions the education of disabled students in higher education, it repeats and summarises the National Plan for Higher Education. It reads, ‘The National Plan for Higher Education . . . commits our
higher education institutions to increasing the access of learners with special education needs. The Ministry therefore, expects institutions to indicate in their institutional plans the strategies and steps, with the relevant time frames, they intend taking to increase enrolment of these learners’ (Department of Education 2001, 31).

South Africa’s approach to rights for disabled students is what I call the diversity-rights framework. The diversity-rights framework provides for disability support within a general national anti-discrimination legislation and policy (the Constitution & the White Paper on Integrated National Disability Strategy). The national legislation and policy are used to formulate specific policies for disabled students. They also form a legal basis to determine disability discrimination disputes in higher education (the Education White Paper 6 on Special Education: Building an Inclusive Education and Training System). The normative standards underlying this framework are human rights, respect for diversity, equal opportunity and fair advantage for people who qualify for higher education academic programmes. Unlike in the United Kingdom (UK) and the United States (US), such support is not enforceable by a specific disability law (the Special Education Needs and Disability Act of 2001 in the UK and the Rehabilitation Act of 1973 in the US). Rather, institutions of higher education are expected to implement their respective policies for supporting disabled students. If disputes arise, they would be resolved within the framework of human rights instead of that of entitlement.

The diversity-rights framework has a long tradition in Canada and Denmark. However, in the case of South Africa the policies and pace of implementation are faced with criticism. Amongst other criticism, the most appropriate one is the failure of both government and higher education institutions to allocate responsibilities to undertake specific strategies and tasks for transformation. Each document vaguely relegates the responsibilities from one body to the other. In 1997, the White Paper on an Integrated National Disability Strategy listed the features of the special needs framework of the National Commission on Special Needs in Education (NCSNET) and the National Committee for Education Support Services (NCESS), and concluded that the implications thereof will receive the attention of the NCSNET and the NCESS because the issue had not yet been sufficiently researched. After the report of the NCSNE and NCESS had been incorporated in the Education White Paper 6 on Special Education, the duty of the issue of disability and higher education was relegated to the Ministry who ‘expects institutions to indicate in their institutional plans the strategies and steps, with related time frames, they intend taking to increase enrolment of these learners. The Ministry will also make recommendations to higher education institutions regarding minimum levels of provision for learners with special needs. However, all higher education institutions will be required to ensure that there is appropriate physical access for physically disabled learners’ (Department of Education 2001, 31).

With such vague allocation of responsibilities and lack of specific national and institutional policies, Howell and Lazarus (2001) observe, ‘Little attempt has been made in the process of policy implementation to address the barriers in the education system,
which continue to exclude learners with disabilities from higher education institutions and/or from the process of teaching and learning. Similarly, to date, initiatives to accommodate diversity and the building of equity have failed to specify mechanisms towards addressing the full spectrum of learning needs among the learner population’ (Howell and Lazarus 2000, 1).

LIMITS TO RIGHTS

These challenges and observations imply that disabled students have the right to access higher education yet they cannot enjoy the right. However, a cautious approach to rights needs to be taken into account when addressing social exclusion. The limits and problems related to such rights need to be explained and taken into account. Cogently referring to the rhetoric of rights, Benatar (1992) observes, ‘Rights are in vogue. Everybody wants them and everybody wants to say that they respect them. To say otherwise is to be morally and politically impolite, even boorish. Governments and individuals do not wish to have it said of them that they violate rights. It is regarded as a slur of the worst order to be accused of rights violation’ (Benatar 1992, 1). He observes that the preoccupation with the rhetoric of rights is manifested by the substitution of moral arguments for claims to rights and also by the proliferation of rights. He also argues that the consequence of the abuse of rights trivialises and confuses the use of the concept of rights.

Benatar’s observation has serious implications for the right to education for disabled people in the light of Drewett’s (1999) argument that the meaning of rights in disability discourse is underdeveloped. The least that the disability rights movements can say about disability rights is that disabled people have been oppressed and that they morally deserve redress. This argument is echoed by Hyland (1987), when she argues that disability rights have a moral justification and should be understood within the social justice moral framework. She equates the rights of disabled people with the rights of minorities, women, and homosexuals.

The declarations and demands for disability rights across the world argue for a moral justification of rights and demand protection from their respective governments and recognition from other citizens. For example, in the Disability Rights Charter of South Africa, disabled people in the country recognise themselves as the worst victims of apartheid because of negative social attitudes and further discrimination on the basis of gender and class. They therefore demand – among other things – that, ‘Disabled people shall have the right to mainstream education with personal assistance where necessary, appropriate assistive technology and specialised teaching’ (Howell and Masuta 1995, 25).

Another way of seeing how disability rights are understood is by the common contrasts between rights and needs in disability studies. ‘A “human rights” position is fundamentally different from a “needs” position because it challenges power relations, structures and practices in society which are held together by the State. A needs position,
on the other hand, looks to the state as possible mediator and problem solver in situations in which a particular group – or people ascribed to a particular group – are constructed as vulnerable and dependent’ (Armstrong and Barton 1999, 215). Cole (2002) also subscribes to the human rights framework when examining disability discrimination and other struggles for human dignity. Watson (2004, 111) adds that disability rights should not simply be an individual issue. Rather, he argues that disability movements should characterise their activism with ethical rights, expectations and interpersonal relations to positively transform the social relations of disabled people.

The social relations of disabled people within disability rights are captured by Engel and Munger (2003, 241) in their proposal of a recursive theory of rights and identity. Focusing particularly on employment, they argue that the relationship between society and the law is mutually constitutive because, while rights shape identity, identity itself constructs rights to protect that identity. They concluded that disability rights can change the way disabled people look at themselves; the everyday discourse of disability rights can transform or effect change in the treatment of disabled people; proactive institutional transformation through cultural shifts and litigation avoidance can effect change too at the level of agency.

While the concept of rights within a human rights and moral framework is convincing at face value, there are practical problems that raise the need to justify or question rights. The elusive question is, what are rights? Freeden (1991) indicates that there is a difference between rights and human rights, and that some see rights as a subset of human rights whereas others see it the other way round. He argues, however, that human rights are the most basic and encompassing rights and thus defines a human right as a ‘conceptual device, expressed in linguistic form, that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being; that is intended to serve as a protective capsule for those attributes; and that appeals for deliberate action to ensure such protection’ (Freeden 1991, 7).

I would suggest that the disability rights movements have four problems to solve regarding rights. The first problem is the argument about whether human rights are universal or particular. Gloppen and Rakner (1993) refer to the United Nation’s Universal Declaration of Human Rights (1948) and indicate that this is underpinned by European traditions of rights and is often at odds with regional declarations of rights, such as the African Banjul Charter and the Arab Charter of Human Rights, which are context specific. The problem for the disability rights movement, then, is to ascertain whether and to what extent disability struggles are common around the globe, given that disability cuts across national boundaries and cultures, and yet taking into account such specificities. By this I mean that the international disability movement should realise that there are tensions in trying to secure rights for an international movement, such as Disabled People International. Moreover, access to education is also determined by factors other than disability. Meritocracy, class, gender, religion and geographical position are some of the additional factors that affect access to education. Thus, in a country where racism is deeply entrenched, for example, disability rights are bound to collide with civil rights too.
The second problem is that of competing rights. Gloppen and Rakner (1993) list six types of human rights: personal rights; civil rights; political rights; social and economic rights; cultural rights; solidarity rights. McQuoid-Mason, et al. (1991) categorise civil and political rights as first generation rights and include values such as freedom from government interference and participation in political life. Social, cultural and economic rights are second generation rights and include the right to decent standards of living and work. Cultural rights are advocated by communitarians who ‘emphasise the importance of belonging to a distinctive community as an essential component of, as well as a means to, individual well-being, or “flourishing”, as it often termed (with gestural connotations). Communitarians have defended (usually with qualifications) the importance of patriotism and nationalism, which tend to be disparaged from the cosmopolitan viewpoint connoted by the idea of universal human rights, as well as from the individualistic perspective sometimes said to be fostered by the “culture” of rights’ (Edmundson 2004, 177). There are also third-generation rights, which are neither communitarian rights nor individual rights. These are future generations’ rights and belong to humankind (Edmundson 2004).

One problem with types of rights is that some argue that first generation rights are more important than other types of rights, because they create environments that are conducive to democracy. Others argue for the primacy of second generation rights. For example, Kollapen (2003) argues that human rights are insignificant when people live in squalor and lack the basic material resources to live. Albert adds, ‘In fact, access to a wheelchair or a hearing aid is a basic human right for someone who would otherwise be unable to take part in any social activity’ (Albert 2004, 4). Thus in an environment that prioritises rights, disabled people need to articulate the position in which they locate every right that they demand. If all the rights they demand are equally weighted, then they would still need to articulate how they would respond and mobilise against trade-offs, competing demands of other citizens and justifying their rights against criticisms such as those pointed by Low (2001) who warns the disability rights movements against rhetoric.

The third problem that disability rights movements have to take into account is that rights are laden with ideology. Gloppen and Rakner (1993) outline three ideological traditions in respect of rights. The first is the liberal tradition, which espouses personal and civil rights. The second is the democratic tradition, which espouses political rights. The third is the socialist tradition, which advocates social and economic rights based on distributive justice. These traditions are historical in context and reflect the political climate of each context. However, disability is not a context specific category. It is universal and cuts across other social categories as well. Moreover, disability rights movements might be an international feature but there are inter and intra ideological outlooks that underpin their demand for disability rights. How these outlooks affect different social positions of disabled people is a question that also needs to be investigated.
Still on the problem of different ideological traditions, Allen (2002) points out that the contemporary discourse on Human Rights is a synthetic product of the Cold War struggle among Liberal Internationalists, Realists and Marxists. He argues that contemporary Human Rights discourse is more useful for global capitalism and predictability of the markets than morally justified legal claims to basic standards of living. He concludes that it is forces outside the Human Rights discourse that will continue to produce real outcomes for social justice.

The fourth problem is that rights are not only claims and entitlements but that they must be recognised by other citizens (Machan 1989). This process becomes problematic in what Lee (2002, 149) calls ‘simplistic politics’. He asks, ‘Producing evidence of this inaccessible, segregated and exclusionary world is relatively straightforward. Yet how far is the “able-bodied” majority prepared to go in reconstructing “its” social order so that “it can accommodate a far wider spectrum of disability?”’ (Lee 2002, 149). This observation indicates the limitations to claims and justification of rights. For rights to be effective, part of it lies in them being recognised by someone other than the right-bearer.

In terms of the provision of support to disabled students, the above problems with rights are applicable. The right to education is not as straightforward as it sounds. It is restricted by the regulations of higher education institutions across the world. The typical restriction on the right to education at tertiary level is generally three-fold. Firstly, the person with a disability must be qualified to enter an institution of higher education. Secondly, he or she will receive assistance in as far as his or her impairment restricts the academic requirements of a particular academic course of activity. Thirdly, the student’s claim to assistance should be made within reasonable limits taking into account the availability of funding. Finally, disability rights have to be upheld at institutional level and this requires active advocacy on campus and training of faculty.

The above criteria might apply relatively well in developed countries because schooling for children with disabilities has gradually been mainstreamed to prepare disabled pupils for higher education. In contrast, in developing countries like South Africa, most pupils with disabilities are educated to a limited extent in order to qualify for vocational training rather than higher education. The second restriction of assistance is problematic everywhere. If the right-bearer (a disabled student) claims assistance from the right-addressee (higher education institution) and there is disparity of claims and duties, then there is bound to be a conflict. The question of reasonableness is also problematic in most cases. As already noted, institutions of higher education are mindful of resource constraints. The issue of resources is usually translated into what constitutes a reasonable claim in terms of faculty time and institutional resources. It is a fact that developing countries like South Africa cannot afford assistive technology as do developed countries. Moreover, even in developed countries there are limits to what is reasonable. There is always tension between ‘minimalist’ views and ‘extremist’ views of what is reasonable with regard to providing support for disabled students.
CONSIDERATIONS FOR TRANSFORMATION AND ACCESS

In the light of the challenges to support provision for disabled students and the problem of conceptualizing and effecting rights, I suggest three considerations. Firstly, the drive towards transformation should not create a laissez faire impression that disabled students will receive support as they please or see fit. There are material and ideological impediments to what constitutes reasonable support. Reasonability is often the source of conflict between disabled students and disability support providers. Lawsuit cases against universities in developed countries have been lodged by disabled students who alleged discrimination. The 1997 lawsuit against Boston University by some disabled students in the US is a popular and relevant example of this problem. The Boston University President’s response to the lawsuit and its outcome was an argument against the extremist approach to disability support services. He reckoned,

The broader importance of Judge Saris’s decision, however, lies in her rejection of most of the plaintiffs’ attempts to extend the scope of federal disability law. She agreed with the university’s key argument: Those laws do not require universities to compromise essential academic standards. Specifically a university is not required to provide course substitutions that it “rationally concludes would alter an essential part of its academic program”; not required to waive its mathematics requirement; not required to accept outdated diagnoses of learning disabilities; and not required to accept diagnoses from unqualified or disreputable evaluators. These decisions are a crucial victory because universities now have a firm basis for saying no to the extremists’ attempts to turn every intellectual deficit into a disability (Westling 1997, 2).

Secondly, there is distance between formal rights and real rights especially in a country that has more than three centuries of human rights abuse and other competing priorities such as poverty alleviation and international competitiveness. Thus, to think formal rights are an automatic shield misses the need for further struggles to ensure that the rights of disabled students are upheld. One of these struggles is to make disability right to be effective through commitment from faculty. There are several problems with commitment from faculty. ‘First, many faculty may not have prior experience with students diagnosed with learning disabilities. Second, university faculty do not typically receive much formal training in education or legal issues in education. Third, faculty are often not a party to decisions about the provision of extended time for students with learning disabilities. Since faculty are accustomed to a great deal autonomy in determining classroom requirements, any requirement for an accommodation from without may be greeted with some degree of suspicion’ (Milyo and Gran 1999, 3).

Finally, struggles for social transformation are underpinned by assumptions and ideologies. If rights for disabled students are to be taken seriously, then the disability movement in South Africa should begin to articulate, justify and defend these rights taking into account the problematic nature of rights. This will force disability rights discourse to begin the process of operationalisation thus thinking hard about implementation, scope and evaluation of support provision for disabled students in South Africa.
CONCLUSION

There are challenges in the efforts to redress unequal access to higher education for disabled students in South Africa. These challenges include funding, lack of data on disabled students and the slow pace of transformation. One way of trying to understand the challenges is to think in terms of transforming formal rights into real rights. This approach raises the problematic nature of rights as applied to disabled students. Some considerations of these problems may be helpful in trying to practically widen access to higher education for disabled students in South Africa.

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NOTE

1. National Commission on Special Needs in Education (NCSNET); the National Committee for Education Support Services (NCESS) and the Task Team for Education Support Services (TTES).

REFERENCES


