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**PROMOTION AND ENFORCEMENT OF THE RIGHTS OF DISABLED  
PERSONS A SOUTH AFRICAN PERSPECTIVE - SOME IDEAS ON THE  
PROCESS GETTING THE VIOLATIONS**

## **1. Introduction**

*"No one gives us rights. We win them in struggle. They exist in our hearts before they exist on paper. Yet intellectual struggle is one of the most important areas of the battle of rights. It is through concepts that we link our dreams to the acts of daily life."*<sup>1</sup>

I have been asked to provide some ideas and procedures for getting NGO's and governments involved and engaged in the process of collecting and providing information on infringements of human rights. I will attempt to do this within the context of the South African perspective and hope that this will enrich the discussions. I do not profess that the South African system is the best, but it should be seen in the context of a new democracy that is able to experiment with new paradigms especially in the human rights arena.

## **2. Monitoring Bodies under the UN System**

The role of the UN as far as the promotion, protection and enforcement of Human Rights is concerned is set out in Art. 1(3) of the Charter, which states that,

“ The purposes of the United Nations are:

To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and

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<sup>1</sup> Albie Sachs, Protecting Human Rights in a New South Africa vii (1990).

encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...”

To this end two organs of the United Nations are particularly involved in the promotion and enforcement of Human Rights norms.

**2.1 The General Assembly (GA)** of the United Nations is required to initiate studies and make recommendations for the purpose of promoting international co-operation in the economic, social, cultural, educational and health fields and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. To assist in achieving this and in line with its mandate, the GA has passed declarations and treaties that set out the Human Rights norms and through these treaties, the organs that are empowered to monitor and ensure compliance with these treaties. Several of these treaty-bodies have devised monitoring mechanisms that operate to ensure the observance of human rights.

There are no human rights treaties that specifically protect the rights of disabled persons. The treaties will be applicable through the anti-discrimination clauses that are in each treaty. The two important treaties are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These treaties do not contain provisions specifically related to disability. Nevertheless the general human rights guarantees apply to all persons, including disabled persons. Therefore the provisions of the both Conventions may be invoked for the protection on disabled persons.

**With reference to the rights of disabled persons, the following bodies operate as follows: -**

**2.2 The Committee on Economic, Social and Cultural Rights (ICESCR committee).**

Article 2 of the International Covenant on Economic, Social and Cultural Rights sets out the principle of non-discrimination, and requires that the rights set out in the covenant be enforced without discrimination on any of the listed grounds.

In enforcing the rights under the covenant, Article 26 requires States Parties to submit reports to the Economic and Social Council (ECOSOC) of the UN on measures that have been taken and progress made in achieving the rights. Through the ECOSOC, the reports of the States Parties may be transmitted to the Commission on Human Rights for study and general recommendations<sup>2</sup>. The ECOSOC may also co-operate with the specialised agencies of the UN to ensure observance of these rights<sup>3</sup>. Under Article 20 of the Covenant, the ECOSOC is empowered to receive comments from both the States parties and the specialised agencies on the general comments made by the Commission on Human Rights under article 19.

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<sup>2</sup> Article 19

<sup>3</sup> Article 26

The Committee assumed the responsibility of a supervisory task in the disability field in 1994 through a General Comment No. 5. Therefore there is a need for NGO's to be aware of these developments in order to be able to use the system for reporting of violations.

South Africa has not as yet ratified this Covenant and it is therefore not in force as far as South Africa is concerned. Reference is however made to it in line with sec. 39 (1) (b) of the Constitution, which requires that International Law be considered when interpreting the provisions of the Bill of Rights.

It is important that a move be made towards that ratification of the Covenant so as to guarantee commitment to the provisions therein and furthermore to open up new monitoring mechanisms to ensure their implementation. Ratification provides an important tool of collections of violations.

### **2.3 Human Rights Committee. (ICCPR Committee).**

Article 26 of the Covenant guarantees equal protection for all without discrimination. The ICCPR Committee is established under article 28 of the International Covenant on Civil and Political Rights.

As with the ECOSOC, it is empowered to receive Country Reports by the States Parties on measures taken to enforce the rights under the Covenant<sup>4</sup>. Article 41 also permits States Parties to make inter-state complaints. However to make use of this process, a State Party must have made a declaration recognising the competence of the Committee to receive and consider such complaints.

Complaints by individuals are provided for under article 1 of the first optional protocol of the ICCPR. The State Party against which the complaint is made must be party to this optional protocol that recognises the competence of the Committee to receive and consider such complaints.

The ICCPR has been ratified by South Africa and therefore the provisions and the monitoring mechanisms are in force.

### **2.4 Committee on the Rights of the Child (CRC)**

The Convention on the Rights of the Child provides that States parties shall ensure that children are protected from discrimination on among others, the ground of disability. Article 23 of the Convention deals specifically with the rights of the disabled. Under this section, States Parties are required to ensure the dignity of the child and to promote self-reliance and facilitate the child's active participation in the community. In recognition of

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<sup>4</sup> Art.40

the special care that disabled children and their car-givers require, the convention requires that assistance be rendered free of charge<sup>5</sup>.

Article 43 of the Convention, establishes the Committee on the Rights of the Child. The States Parties are required to submit reports to the Committee on the measures that they have taken to realise the rights of the child under the convention. To provide the Committee with a comprehensive understanding of the implementation of the convention in the State Party.

Following its signature and ratification of the Convention in 1995, South Africa submitted its Initial Country Report to the CRC<sup>6</sup>. The report stated that under the Curriculum 2005 additional initiatives were envisaged within the school environment, including programmes to encourage non-discrimination and facilitate inclusion, especially of children with disabilities. The report stressed the challenge of addressing the economic and social disparities that continue to exist. The Committee in its concluding observations recommended that legislation be developed to ensure conformity between the convention and domestic legislation. The Committee was also of the view that the ratification of other international human rights instruments would strengthen the efforts of the State party in meeting obligations under this convention. The NGO's are allowed to submit a supplementary report.<sup>7</sup>

The Committee specifically welcomed the establishment of the Human Rights Commission as an independent monitoring mechanism. It further recommended the establishment of clear child-friendly procedures to register and address complaints from children and that an awareness campaign be carried out to ensure effective use of these procedures by children. The Committee itself does not have an internal mechanism for dealing with complaints by children. The Special Rapporteur in line with the Recommendation 35 of the Commission hopefully will undertake this issue for Social Development.

## **2.4 Special Rapporteur**

As a Charter-based organ of the UN, the **Economic and Social Council (ECOSOC)**, to make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all. To fulfil this mandate and in line with Art.68 of the Charter, ECOSOC has set up commissions for the promotion of human rights. These functional commissions include the Committee on NGO's, the Commission on the status of women and the Commission on Human Rights and most importantly the Commission for Social Development under which the Special Rapporteur is located and

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<sup>5</sup> Articles 22.

<sup>6</sup> CRC/C/51/Add.2) Submitted 4 December, 1997.

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<sup>7</sup> Article 45 of the Convention on the Rights of the Child.

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other various working groups. The ECOSOC has also appointed special rapporteurs to deliberate and report on specific issues.

The appointment of the Special Rapporteur of the commission for social Developments on Disability is an important step in recognizing the rights of disabled persons. The recommendation of the 35<sup>th</sup> session of the UN Commission for Social Development for the renewal of the mandate of the Special Rapporteur is most welcome especially in view of the acceptance by UN agencies that disability has to include in human rights sphere.

### **3. Some Ideas to Ensure Collections of Violations**

#### **3.1 Civil Society**

The existence of a strong NGO sector ensures compliance with human rights standards and norms. The strengthening of robust vigilant civil society as represented by NGO's is a prerequisite for bringing violations to the fore. Such a sector has a role to even abrogate for itself the role of "watching the watchdogs" thereby ensuring that State funded Independent Institutions task with the promotion and protection of human rights violations are meeting their obligations. The effect of this role is that, National Institutions are not only subject to scrutiny from their principals i.e. (Parliament) but also civil society. The likely benefit in this process is that complaints or violations are fed through to National Institutions by this sector and are kept on the spotlight till successful conclusion.

#### **3.2 Collaboration between Government and NGO's**

Collaborative strategies between Governments and NGO's are a creative way of achieving processes of collection of violations. National Action Plans for the promotion and protection of Human Rights as an example, may serve as a tool for facilitating a monitoring strategy. This NAP need not be the prerogative of Governments only, but has to be inclusive and thereby ensuring thorough consultation with the NGO's. This may guarantee legitimacy, but over and above, will engender a sense of ownership that reflects strong civil society sentiments and perspectives. Strong and uncompromising monitoring mechanisms are likely to be included thereby ensuring a clear and firm commitment for monitoring. Government can be held accountable on its undertakings and commitments as provided in the NAP. This relationship may ensure a systematic reporting of violations.

#### **3.3 International Obligations**

International obligations provide a rallying point on which NGO's and Government intersect on violations gathering processes. Although there are tensions as the former are bound to report violations without any compromise whereas the latter tends to report with circumspections ensuring minimum public damage and negative image.

The ability of NGO's to provide a supplementary country report is a useful tool of ensuring a balance and objective assessment of International obligations.eg Convention on the Rights of the Child<sup>8</sup>.

### **3.4 Legal Framework**

Constitutional legal framework generally inculcates a human rights culture to the extent of fostering intolerance to violations as societal norms. It's the underlying power of solid legal standards that promote awareness and ensures that there is a concomitant increase in reporting of violations.

The South African context provides a healthy legal framework that promotes and protects human rights. Such a legal framework is underpinned by the Constitution<sup>9</sup>, which has entrenched a Bill of Rights that is binding to the all organs of the State, to both natural and juristic persons and goes to an extent of including the Socio-economic rights as well. At the employment level, equity legislation<sup>10</sup> has been passed together with legislation that outlaws discrimination.

### **3.5 Policy Framework**

The South African government in collaboration with the DPO's developed an Integrated National Disability Strategy which is underpinned by social model of disability and the principles of equalizations of opportunities of disabled persons.

An office that specifically manages co-ordination within government on policy issues on disability has been set up in the President's office. Offices on status of disabled persons have been set up at Premier's Offices at provincial level. These offices are meant to ensure uniform monitoring on all disability issues including violations and compliance or non-compliance with disability standards. A presence of an institution of disabled person placed at the top level of the executive arm of government, promotes awareness and ensures compliance with disability standards and norms.

To consolidate democracy and to achieve equality a law called Promotion of Equality and Prevention of Unfair Discrimination Act was passed. This law is meant to prevent and prohibit unfair discrimination and harassment: to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech.<sup>11</sup> Interconnectivity between all equity and human rights law engenders a sense of violations intolerances thereby facilitating reporting.

### **3.6 Parliamentary Legislation Processes.**

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<sup>8</sup> Convention on the Rights of the Child.

<sup>9</sup> Constitution of the Republic of South Africa, Act 108 of 1996

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<sup>10</sup> Employment Equity Act 55 of 1998.

<sup>11</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

The South African experience has made the legislation development more transparent than before. They have process which engages and solicit comments, views and positions from the public before they becomes Acts of Parliament has offered an opportunity of shaping laws for NGO's plus civil society at large. Consequently the NGO sector has developed expertise of legislation monitoring and advocacy skills. This process has enriched the gathering of violations. DPO's are lagging behind in this field of legislation monitoring and advocacy. I suspect that it has to do with focus on resources mobilization and development.

### **3.7 Independent National Institutions.**

There are several of these bodies set up in terms of the Constitution. The SAHRC is the one task with the promotion, protection and monitoring of human rights. In line with the Paris Principles on National Institutions the SAHRC is governed by the following principles:

- "It is independent, and subject only to the Constitution and the law, and must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice.
- Other organs of the state must assist such institution to ensure its independence, impartiality, dignity, and effectiveness.
- No person or organ of state may interfere with its function.
- Its accountable to the National Assembly<sup>12</sup>."
- Because the Commission has the complaint driven component, as its enabling legislation obliges it to respond to any complaint received. The promotional work inevitably brings about complaints of violations.

Unfortunately complaints are received mainly the more affluent members of our society.

## **4. Regional Systems**

Under the African Charter of Human and Peoples' Rights, individuals are protected from discrimination<sup>13</sup> and are guaranteed equality before the law and equal protection of the law<sup>14</sup>. The Charter further guarantees the rights of the aged and the disabled to special measures of protection in keeping with their physical or moral needs<sup>15</sup>.

The African Commission is authorised<sup>16</sup> to receive communications on Human Rights violations from States and from individuals including Non-Governmental Organisations (NGO's). Article 62 of the Charter requires that States make reports to the Commission on the measures they have taken in the observance of Human Rights.

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<sup>12</sup> Section 181 of the South African Constitution.

<sup>13</sup> Article 2

<sup>14</sup> Article 3

<sup>15</sup> Article 18 (4)

<sup>16</sup> Under articles 47-59

In examining the complaints, the Commission should be guided by the Charter and international human rights principles<sup>17</sup>. The decisions of the Commission are however not binding on the States parties and are subject to the approval of the Assembly of Heads of State and Government of the OAU (AHSO). As a result they are liable to influence from the political nature of the AHSO.

## **5. Monitoring Systems in South Africa.**

**The Constitution of the Republic of South Africa in sec. 9(3) prohibits discrimination on the grounds of disability. Sec. 27 (1) (c) further require that measures be taken to assist those who are unable to assist themselves. To this end, the Government provides a Disability Grant to assist those who are unable to assist themselves owing to disability.**

Under the Constitution various independent bodies are established to monitor the observance and enforcement of Human Rights. The Human Rights Commission is empowered to investigate and report on the observance of Human Rights. It has performed this function through the preparation and publication of an annual report of Socio-economic rights.

The Commission also handles complaints from individuals and the public in general in line with its constitutional mandate under s.184. The Commission is also authorised to carry out research on human rights issues.

The Human Rights Commission has received recognition for its work from among others, the Committee on the Rights of the Child (CRC), which noted that there is a need for adequate funding to ensure its effective functioning<sup>18</sup>.

It is important also that the recommendations of the Commission be given full consideration when brought to the bodies responsible for the implementation of human rights.

**5.1 The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000,** prohibits discrimination on the grounds of disability<sup>19</sup> The State further has an obligation to promote equality<sup>20</sup>.

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<sup>17</sup> Ankumah, Evelyn.A. – The African Commission on Human and Peoples’ Rights – Practice and Procedures” Martinus Nijhoff Publishers p. 24.

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<sup>18</sup> Concluding Observations of the CRC on the Initial Country Report of South Africa – CRC/C/15/Add.122

<sup>19</sup> S.9

<sup>20</sup> S.24 and S.25.

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The Act, in Chapter 4 constitutes the Magistrates' and High Courts as Equality Courts within their jurisdictions. There is however a need for rules and regulations to guide their operation. Sec. 32 establishes the Equality Review Committees, which are empowered to advise on the operation of the Act and the impact of other legislation on the right to equality.

It is clear therefore that the mechanisms for the monitoring and enforcement of Human Rights are in existence, however several are not applicable to South Africa or are not yet operational. It is imperative that the system be enforced so as to establish a strong system and to strengthen the existing structures that guarantee the rights of the disabled in society.

## **6. Conclusion**

The DPO's have to make a paradigm shift by including human rights monitoring and violations collections as part of their development work. This is not made easier by the poverty and inequality existing in the country that of necessity determines the agenda for the work of the DPO's. Human rights systems especially the enforcements mechanism involves complex legal issues, which are by their nature only accessible to the more affluent members of the community. Clearly the collaboration between Governments and NGO's must be based on clear legal framework over and above goodwill.