

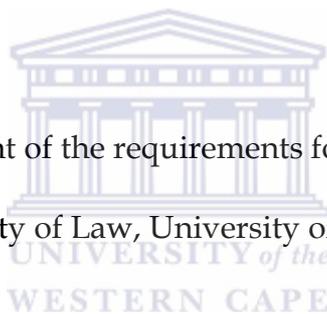
**The significance of article 24(2) of the UN Convention on the Rights of Persons with
Disabilities for the right to primary education of children with disabilities: a
comparative study of Kenya and South Africa**

By

LUCYLINE NKATHA MURUNGI

Student No: 2974027

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Laws
(LLD) in the Faculty of Law, University of the Western Cape



Supervisor:

Prof. Julia Sloth-Nielsen

Co-supervisor

Dr. Benyam D. Mezmur

May 2013

Declaration

I
hereby declare that **'The significance of article 24(2) of the Convention on the Rights of Persons with Disabilities for the right to primary education of children with disabilities: a comparative study of Kenya and South Africa'** is my original work, and that it has not been submitted to any other forum for assessment. Where another person's work has been used, it has been duly acknowledged.



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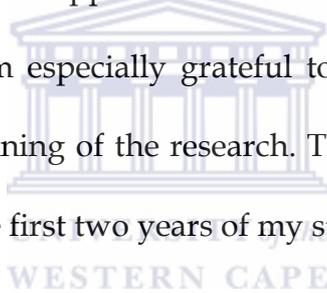
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Acknowledgments

This thesis would not have been possible without the support of a number of people. First, I am indebted to my supervisor Prof. Julia Sloth-Nielsen for her insights, guidance and patience throughout the period of the research and writing. I also thank my co-supervisor Dr. Benyam D. Mezmur for his guidance on the research.

I am grateful to the Community Law Centre (CLC) particularly the Children's Rights Project for the opportunity to undertake this research, and the financial support that made it possible. I am grateful to the staff and fellow students at the CLC both present and past for great company and support that made an otherwise tedious process of study a lot more bearable. I am especially grateful to Ms. Claasen for her help with obtaining materials at the beginning of the research. Thanks too to Ms. Fortuin for her incredible hospitality during the first two years of my studies.



My greatest appreciation to Prof. Katharina Boele-Woelki of the Utrecht Centre for European Research into Family Law (UCERF), at the Molengraaf Institute for Private Law, Utrecht University for enabling me to undertake part of my research in the Netherlands. Thank you Prof. for your time and effort towards making the research visit happen and for your insightful comments on my work while there. I highly appreciate the wonderful hospitality, resources and great company I had with the staff and fellow students at UCERF. I am also grateful to Prof. Jenny Goldschmit of the

Utrecht Centre for Human Rights (SIM) for sharing her very insightful thoughts on my research, and for introducing me to incredibly resourceful members of SIM during my stay in Utrecht.

My research benefited immensely from information and resources in various organisations in Kenya. I would like to thank in this regard the staff of the Special Needs Education department of the Ministry of Education, the Kenya Institute of Education, the Kenya Institute for Special Education, the Kenya National Archives, and the Kenya National Commission for Human Rights. I am grateful for all their help.

To those wonderful friends that shared this journey with me at different times and in different ways, thank you all very much. Finally, I am eternally grateful to my family for the enduring support, prayers and understanding throughout the period of my studies. I especially thank my parents for being a pillar of strength for me, and my greatest encouragers. Above all I thank God for holding it all together for me.

Dedication

To my parents Rev. Samuel Murungi and Mrs. Priscilla A. Murungi

For your unconditional love, care, and support to me.

May God always bless you.



Key Words

Children with disabilities

Children's rights

Disability

Inclusive education

Primary education

Reasonable accommodation

Right to education

Socio-economic rights

Special education

Support measures



Table of Contents

Declaration.....	ii
Acknowledgments.....	iii
Dedication.....	v
Key Words.....	vi
Table of Contents.....	vii
Abbreviations.....	xxii
Abstract.....	xxix
CHAPTER 1.....	1
Introduction.....	1
1.1 Research Background.....	1
1.1.1 Adoption of the CRPD.....	3
1.1.2 The right to education under the CRPD.....	5
1.2 Statement of the problem.....	10
1.3 Research Questions.....	15
1.4 Comparative study.....	16
1.5 Scope and limitations of the study.....	17
1.6 Methodology.....	19
1.7 Conceptual clarifications.....	19
1.7.1 Disability.....	19

1.7.2	Education	21
1.7.3	Primary education	23
1.7.3.1	‘Primary’ versus ‘basic’ education in Kenya and South Africa	24
1.7.4	‘Free’ primary education	28
1.7.5	Compulsory education	31
1.8	Chapter Breakdown	32
CHAPTER 2		35
International and Regional Legal Framework on the Right to Primary Education:		35
2.1	Introduction	35
2.1.1	Brief background to the right to primary education in international law	36
2.2	Primary education and disability rights: treaties, declarations and agreements	39
2.2.1	The Universal Declaration of Human Rights, 1948	39
2.2.2	Declaration on the Rights of the Child, 1959	42
2.2.3	UNESCO Convention on Discrimination in Education, 1960	43
2.2.4	The International Covenant on Economic, Social and Cultural Rights, 1966 .	45
2.2.5	Declarations on the Rights of Mentally Retarded Persons (1971), and on the Rights of Disabled Persons (1975)	48
2.2.6	International Year of Disabled Persons and the World Programme of Action Concerning Disabled People, 1981	50

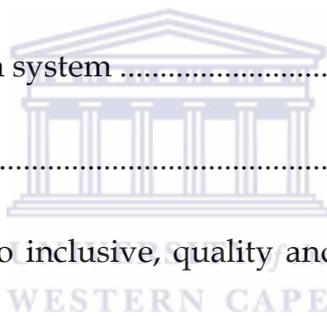
2.2.7	The Convention on the Rights of the Child, 1989	52
2.3	The Education for All Frameworks.....	57
2.3.1	The Jomtien Conference.....	58
2.3.2	Dakar Declaration and Framework for Action	60
2.3.3	Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993.....	61
2.3.4	The Salamanca Statement and Plan of Action on Special Needs Education, 1994	65
2.3.5	The World Fit for Children Framework.....	67
2.4	Relevant General Comments	68
2.4.1	General Comments of the CESCR.....	69
2.4.1.1	General Comments 5: The rights of persons with disabilities, 1994	69
2.4.1.2	General Comment No. 11: Plans for action on primary education, 1999	71
2.4.1.3	General Comment No. 13: The Right to Education, 1999.....	72
2.4.2	General Comments of the Committee on the Rights of the Child.....	73
2.4.2.1	General Comment No. 1: The aims of education, 2001.....	74
2.4.2.2	General Comment No. 9: The rights of children with disabilities, 2006 .	74
2.5	The UN Convention on the Rights of Persons with Disabilities.....	76

2.5.1	The drafting history.....	76
2.5.2	Significance of the CRPD.....	80
2.5.3	New rights versus adaptation of existing rights.....	81
2.5.3	General obligations for implementation of the CRPD.....	88
2.6	African (regional) framework on the right to primary education and the education of children with disabilities.....	90
2.6.1	UNESCO Education Conferences.....	91
2.6.2	Charter of the Organisation of Africa Unity / African Union, 1963.....	93
2.6.3	The African Charter on Human and Peoples' Rights, 1981.....	94
2.6.4	The African Charter on the Rights and Welfare of the Child, 1990.....	95
2.6.5	The African Decade for Persons with Disabilities.....	97
2.7	Remarks on the regional framework.....	99
2.8	Conclusion.....	100
2.9	Prologue to chapter 3.....	107
CHAPTER 3.....		109
Conceptual Framework.....		109
3.1	Introduction.....	109
3.1.1	Basis and approach to conceptual relationships.....	110
3.1.2	The concepts.....	112

3.2	Socio-economic rights and the right to primary education.....	113
3.2.1	The nature of obligations for the right to education.....	116
3.2.1.1	Duty to take reasonable steps.....	120
3.2.1.2	Progressive realization	120
3.2.1.3	The duty to ensure the minimum core.....	125
3.2.1.4	Application of the minimum core to primary education	128
3.3	The right to education in the African human rights system	130
3.4	Application of socioeconomic rights standards to the right to primary education	132
3.4.1	Availability	133
3.4.2	Accessibility	135
3.4.3	Acceptability.....	137
3.4.4	Adaptability.....	139
3.5	Principles of children’s rights	140
3.5.1	The principle of non-discrimination.....	142
3.5.2	The principle of the best interests of the child.....	144
3.5.3	The principle of survival and development	147
3.5.4	The principle of child participation	149



3.5.5	Application of the principles of children’s rights to the right to education..	151
3.6	Disability rights principles	153
3.7	Conclusion	157
CHAPTER 4		162
Interpretation of Article 24(2) of the CRPD.....		162
4.1	Introduction.....	162
4.1.1	Introduction to article 24 of the CRPD	163
4.2	The duty to ensure non exclusion from the general education system: article 24(2) (a).....	166
4.2.1	The general education system	168
4.2.2	Non-exclusion	174
4.3	Duty to ensure access to inclusive, quality and free primary education: article 24(2) (b).....	176
4.3.1	The duty to ensure access.....	177
4.3.2	Inclusive education.....	178
4.3.3	Quality and free primary education	184
4.3.4	‘On an equal basis with others in the communities in which they live’	185
4.3.4.1	‘Equal’	185
4.3.4.2	The ‘other’ standard.....	188



4.4	The duty to ensure reasonable accommodation of a learner’s needs: article 24(2)	
	(c).....	192
4.4.1	General remarks on reasonable accommodation.....	194
4.4.2	Reasonable accommodation in domestic legislation.....	197
4.4.3	Reasonable accommodation in international law	200
4.4.4	The building blocks of reasonable accommodation: ‘reasonable’ and ‘undue burden’	203
4.4.5	Reasonable accommodation in education.....	207
4.5	Duty to provide support measures: article 24(2) (d) and (e).....	212
4.5.1	The context of support: choice between systems.....	215
4.5.2	Meaning of choice.....	218
4.5.3	The meaning of support.....	224
4.5.3	Purpose of Support.....	225
4.5.4	The meaning of support measures.....	227
4.6	Conclusion	230
4.7	Prologue to chapters 5 and 6.....	235
	CHAPTER 5	236
	Primary Education of Children with Disabilities in Kenya.....	236
	Part I	236

5.1	Introduction.....	236
5.2	Structure of the chapter.....	238
5.3	Organisation of education in Kenya	239
5.4	Institutional responsibility for primary education in Kenya	240
5.5	Brief History of primary education in Kenya	241
5.6	Background to special (needs) education in Kenya.....	245
Part II: Legal and policy framework on primary education in Kenya.....		253
5.7	The legal framework on education in Kenya.....	253
5.7.1	International obligations.....	253
5.7.2	The Constitution of Kenya, 2010	255
5.7.3	The Children Act.....	258
5.7.4	The Persons with Disabilities Act.....	259
5.7.5	The Basic Education Act	261
5.8	Policy Framework on primary education in Kenya	262
5.8.1	Policy on Education, Training and Research.....	262
5.8.2	Kenya Education Sector Support Programme.....	263
5.8.3	Special Needs Education Policy	264
5.8.4	Free primary education programme.....	265
5.8.4.1	The application of FPE to children with disabilities	270

Part III: Evaluation of compliance	273
5.9 Evaluation of the domestication of the principles under article 24(2)	273
5.9.1 Non-exclusion from free and compulsory primary education.....	273
5.9.2 Access to an inclusive, quality and free primary education on an equal basis with other children	279
5.9.3 Duty to provide reasonable accommodation	285
5.9.4 Provision of support.....	288
5.9.5 Education in environments that maximise academic and social development	292
5.10 Conclusion	295
5.10.1 General Remarks.....	295
5.10.2 Remarks on compliance with Article 24(2).....	303
CHAPTER 6	306
Primary Education of Children with Disabilities in South Africa:	306
Part I	306
6.1 Introduction.....	306
6.2 Purpose and structure of the chapter.....	308
6.3 Organization of education in South Africa	309
6.4 Preliminary clarifications.....	310



6.4.1	Definition of a child for the purpose of education.....	310
6.4.2	Free basic education	312
6.3	Historic backdrop to education in South Africa	319
Part II	323
6.6	The Legal Framework on Primary Education in South Africa	323
6.6.1	The Constitution	324
6.6.1.1	The role of dignity interpreting the right to education under the Constitution	328
6.6.2	The Children’s Act, 38 of 2005	333
6.6.3	The South African Schools Act	334
6.7	Education Policy Framework.....	337
6.7.1.	White Paper on Education and Training Policy framework.....	337
6.7.2.	Education White Paper 2: the organisation, governance and funding of schools	338
6.7.3.	Education White Paper 6: special needs education	341
6.7.3.1	Conceptual and Operational Guidelines on Special Schools as Resource Centres.....	344
6.7.3.2	Guidelines on Quality Education and Support in Special Schools and Special School Resource Centres.....	345

6.7.3.3	Guidelines on Full Service Schools (FSS).....	347
6.7.3.4	Strategy on Identification, Assessment and Support.....	348
6.7.4	Draft Minimum Uniform Norms and Standards for Public Schools Infrastructure, 2013.....	349
Part III:	Evaluation of compliance.....	350
6.8	Legal and policy response to Article 24(2): analysis of compliance.....	350
6.8.1	General remarks.....	350
6.8.2	Non-exclusion of children from the general education system, and from free and compulsory primary education.....	357
6.8.3	Access to quality inclusive education on an equal basis with other children	360
6.8.4	Provision of reasonable accommodation.....	363
6.8.4	Provision of support within the general education system.....	365
6.8.5	Provision of support in special schools.....	368
6.9	Conclusion.....	375
CHAPTER 7	380
	Synopsis of Findings and Conclusion.....	380
7.1	Introduction.....	380
7.2	Synopsis of findings.....	380

7.2.1	Background to the development of a right to primary education for children with disabilities	381
7.2.2	Conceptual framework for the interpretation of primary education of children with disabilities	382
7.2.3	Interpretation of the principles under article 24(2).....	384
7.2.3.1	Non-exclusion from the general education system.....	386
7.2.3.2	Access to free and compulsory primary education on an equal basis ..	387
7.2.3.3	Duty to provide reasonable accommodation of individual needs.....	387
7.2.3.4	Duty to provide support measures.....	389
7.2.4	Does article 24(2) create any new rights?	390
7.2.5	Synthesis of findings from the comparative studies – horizontal comparison ..	391
	
7.2.5.1	Similarities in approaches to education of children with disabilities.....	391
7.2.5.2	Responses specific to article 24(2)	392
7.2.5.3	The role of contextual factors in education policy choices.....	396
7.2.5.4	The effects of adequate planning on inclusive education	396
7.3	Implications of the comparative study findings	399



7.4	Conclusion	402
BIBLIOGRAPHY		403
8.1	Books.....	403
8.2	Chapters in books	410
8.3	Journal articles.....	420
8.4	Dissertations and papers	429
8.5	Reports.....	430
8.5.1	International.....	430
8.5.2	Kenya	432
8.5.3	South Africa	433
8.5.4	Other reports.....	434
8.6	International legal instruments.....	434
8.6.1	Treaties	434
8.6.2	Other international agreements	435
8.7	General Comments	436
8.7.1	CRC Committee	436
8.7.2	Committee on ESCR	437



8.7.3	Human Rights Committee.....	438
8.8	Concluding observations.....	438
8.8.1	CRC Committee.....	438
8.8.2	Committee on ESCR.....	439
8.8.3	CRPD Committee.....	439
8.9	Resolutions.....	439
8.10	National Legislation.....	440
8.10.1	Kenya.....	440
8.10.2	South Africa.....	440
8.10.3	Other (foreign) statutes.....	440
8.11	Policy documents.....	441
8.11.1	Kenya.....	441
8.11.2	South Africa.....	441
8.12	Case Law.....	442
8.12.1	International cases.....	442
8.12.2	National cases.....	443



8.13	Internet sources.....	445
8.14	Other sources	448



Abbreviations

4As of Education	:	Availability, Accessibility, Acceptability, and Adaptability
ACERWC	:	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	:	African Charter on Human and Peoples' Rights
ACmHPR	:	African Commission on Human and Peoples' Rights
ACPF	:	Africa Child Policy Forum
ACRWC	:	African Charter on the Rights and Welfare of Children
ADA	:	Americans with disabilities Act
AFUB	:	African Union for the Blind
AHC	:	Ad Hoc Committee
ASAL	:	Arid and Semi-Arid Land
AU	:	African Union
Bomas Draft	:	The Draft Constitution of Kenya, 2004
CDF	:	Constituency Development Fund
CDG	:	Care Dependency Grant

CEDAW	:	Convention on the Elimination of All Forms of Discrimination against Women
CERD	:	Convention on the Elimination of Racial Discrimination
CESCR	:	Committee on Economic, Social and Cultural Rights
CKRC	:	Constitution of Kenya Review Commission
Committee on ESCR:		UN Committee on Economic, Social and Cultural Rights
CRC Committee	:	UN Committee on the Rights of the Child
CRC	:	Convention on the Rights of the Child
CRPD Committee	:	Committee on the Rights of Persons with Disabilities
CRPD	:	Convention on the Rights of Persons with Disabilities
CWD	:	Children with Disabilities
DAC	:	Day of the African Child
DBE	:	Department of Basic Education
DBST	:	District Based Support Team
DOE	:	Department of Education
DPO	:	Disabled Persons Organisations
DRPI	:	Disability Rights Promotional International

EAC	:	Education Assessment Centre
ECDE	:	Early Childhood Development and Education
EFA	:	Education for All
ESS	:	Education Support Services
FPE	:	Free Primary Education
FSS	:	Full Service School
Gachathi Committee:		National Committee on Education Objectives and Policies
GC	:	General Comment
GDP	:	Gross Domestic Product
GER	:	General Enrolment Rates
GET	:	General Education and Training
IBST	:	Institution Based Support Team
ICCPR	:	International Covenant on Civil and Political Rights
ICESCR	:	International Covenant on Economic, Social and Cultural Rights
ICJ	:	International Commission of Jurists
IDC	:	International Disability Caucus

IEA	:	Institute for Economic Affairs
IYDP	:	International Year of Disabled Persons
Kamunge Commission:		Report of the Presidential Working Party on Education and Manpower Training for the next Decade and Beyond
KANU	:	Kenya African National Unity
KESSP	:	Kenya Education Sector Support Programme
KNCHR	:	Kenya National Commission on Human Rights
Koech Commission:		Commission of Inquiry into the Education System in Kenya: Totally Integrated Quality Education and Training
McKay Commission:		Presidential Working Party on the Second University in Kenya
MDG	:	Millennium Development Goals
MOE	:	Ministry of Education, Kenya
MOEST	:	Ministry of Education, Science and Education - Kenya
NARC	:	National Rainbow Coalition
NCESS	:	National Commission on Special Needs in Education and Training

NCPWD	:	National Council for Persons with Disabilities
NCSNET	:	National Committee on Education Support Services
NEPA	:	National Education Policy Act
NEPAD	:	New Partnership for Africa's Development
NER	:	National Enrolment Rate
OAU	:	Organisation of African Unity
Odhiambo Task Force:		Task Force on the Re-alignment of the education sector with the Constitution of Kenya 2010
OECD	:	Organisation for Economic Co-operation and Development
Ominde Commission:		Kenya Education Commission, 1964
PDA	:	Persons with Disabilities Act
PTA	:	Parent-Teacher Association
PWD	:	Persons with Disabilities
SA	:	South Africa
Salamanca Statement:		Salamanca Statement and Programme for Action on Special Needs Education
SASA	:	South African Schools Act

SER	:	Socioeconomic Rights
SNE	:	Special Needs Education
SS	:	Special School
Standard Rules	:	Standard Rules on the Equalization of Opportunities for Persons with Disabilities
UCT	:	University of Cape Town
UDHR	:	Universal Declaration of Human Rights
UN Charter	:	Charter of the United Nations
UNESCO Convention:	:	UNESCO Convention against Discrimination in Education
UNESCO	:	United Nations Education, Science and Cultural Organisation
Universal Declaration:	:	Universal Declaration of Human Rights
UNOHCHR	:	United Nations Office of the High Commissioner for Human Rights
WG	:	Working Group
WHO	:	World Health Organisation
WP6	:	White Paper 6 on Special Needs Education

WPA : World Programme of Action



Abstract

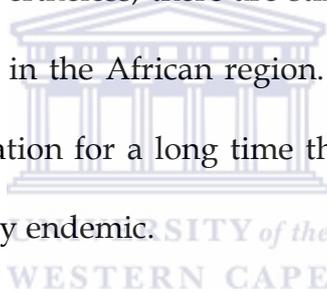
The UN Convention on the Rights of Persons with Disabilities (CRPD) is the latest human rights treaty at the UN level. The process leading to the adoption called attention to the plight of persons with disabilities, and redefined approaches to issues of disability. Fundamentally, the CRPD embodies a paradigm shift in thinking about disability. It embraces the social model of disability, in terms of which disability is a function of the interaction between a person with impairment and his or her environment as opposed to an inherent limitation of functioning. The social model is, in turn, anchored in a human rights approach to disability. No doubt, the adoption of the CRPD triggered immense optimism for the realization of the rights of persons with disabilities.



One of the rights recognised under the CRPD is the right to education. Article 24(1) of the CRPD recognises the right of persons with disabilities to education and sets out the aims of such education. Article 24(2) sets out a number of principles to guide the implementation of the right. These include: non-exclusion from the general education system including non-exclusion of children with disabilities from free and compulsory primary education; access to inclusive quality and free primary education on an equal basis with other children in the communities in which children with disabilities live; reasonable accommodation of a student's needs; provision of support necessary to facilitate effective education; and provision of individualised support measures in

environments that maximise academic and social development of the students with disabilities.

It is generally accepted that the right to education is one of the most essential rights, particularly in light of its empowerment function that helps to facilitate the exercise of other rights. The primary level of education has particularly attained global recognition and priority in resource allocation and implementation. Primary education contributes significantly to the maximum development of the full human potential of children. There are therefore differentiated obligations for the right to primary education in international human rights. Nevertheless, there are still significant barriers to access to primary education, particularly in the African region. While children with disabilities have been excluded from education for a long time the world over, their exclusion in the African context is particularly endemic.



The core purpose of this thesis is to determine how article 24(2) of the CRPD affects or is likely to affect primary education of children with disabilities, particularly in the context of developing countries. The focus of the enquiry is mainly the law and policy in this regard. The subject spans three main spheres of rights: children's rights, socioeconomic rights (particularly the right to education), and finally disability rights. Children's rights, especially since the adoption of the Convention on the Rights of the Child (CRC), are generally accepted. The right to education also has a long standing

history, and whereas debate regarding the appropriate approaches to its implementation still abides, there is apparent normative and jurisprudential consensus on some aspects thereof, particularly at the primary education level. It is essential to determine the relational framework of these spheres with the disability rights established under the CRPD.

The thesis finds that the CRPD does in fact redefine the parameters of the right to education as previously understood in international human rights instruments. Particularly, the expanded aims of education under article 24 call for education systems that recognise non-academic learning, such as the development of the talents or creativity of the learner. This provision is particularly significant to the child with disabilities. Also, while not establishing an entirely new right, the principles under article 24(2) establish actionable sub-entitlements that enhance the justiciability right to education for children with disabilities.

However, it is apparent from the comparative studies that it is the implementation of these provisions that presents the greatest challenge for the realisation of primary education for children with disabilities. This suggests that whereas norm creation as under the CRPD may have the value of triggering and sustaining discourse on appropriate responses in the context of the education of children with disabilities, it is

the translation of these norms into practical action points that is the determining factor for realization of the right.

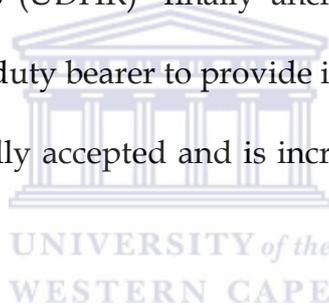


CHAPTER 1

Introduction

1.1 Research Background

Education is as old as the human society. The responsibility for providing it, its content, and the mode of presentation has however evolved over time and varied from one society to another. Formal education as a public function is a relatively more recent phenomenon dating back to the late 19th and early 20th centuries.¹ International acceptance of a right to education gained more impetus after the adoption of the Declaration of the Rights of the Child in 1924.² The Universal Declaration of Human Rights (UDHR)³ finally anchored education as a right for everyone, and the state as the duty bearer to provide it. In subsequent years, the right to education became universally accepted and is increasingly domesticated through national constitutions.⁴



¹D Hodgson *The human right to education* (1998) 9; KD Beiter *The protection of the right to education by international law* (2006) 21.

²While this Declaration did not expressly establish right to education, it set down principles on the entitlements of children which have been interpreted as implying a right to education. These Principles lay the foundation for the 1959 Declaration of the Rights of the Child. Beiter (n 1 above) 25. The contribution of the Declaration to the development of the right to education is discussed in Chapter 2 of this work.

³10 December 1948.

⁴JH Steiner et al *International human rights in context; law politics, morals* (2007) Oxford 358. Y Rabin 'The many faces of the right to education' in D Barak-Erez & AM Gross (eds) *Exploring social rights* (2007) 266 argues that the right to education is the most commonly acknowledged social right in the world. Hodgson (n 1 above) 62 argues that the wide ratification and adoption of human rights conventions and declarations at the international and regional levels, as well as national constitutions and legislation, support the conclusion that certain aspects of the right to education, especially free public primary education, have attained the status of customary international law.

Throughout the history of formal education, certain groups of children have been excluded, either by default as a consequence of the organisation of education, or by design based on ideological, religious, or cultural beliefs prevailing in the respective communities. Children with disabilities are one such group.⁵ The adoption of the UN Convention on the Rights of the Child (CRC)⁶ which recognised the rights of children with disabilities to benefit from all rights on an equal basis with other children was a formidable affront to this trend of exclusion.⁷ But this international legal development notwithstanding, a significant number of children with disabilities have continued to be excluded from education.⁸

With the much more recent adoption of the UN Convention on the Rights of Persons with Disabilities (CRPD)⁹ there is renewed hope that the standards established therein, particularly those in article 24(2), will help to fast-track the realization of the right to education for these children. It is therefore imperative to interrogate the potential of the CRPD in this regard. Such an enquiry (as is intended in this thesis)

⁵World Health Organization (WHO) 'World report on disability' (2011) 206. The historic exclusion of children with disabilities in education is more evident in history of the right to education discussed in Chapter 2 of this work.

⁶Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 44/25 of 20 November, 1989.

⁷CRC Article 2 prohibits discrimination of any kind on the basis of the prohibited grounds in ensuring the rights under the Convention. The CRC was also the only international treaty with a specific provision on disability. See P Arjarvi 'UN CRPD and the Human Rights of Persons with Disabilities' in J Kumpuvuori & M Scheinin (eds) *United Nations Convention on the Rights of Persons with Disabilities: Multi-disciplinary perspectives* (2009) 43.

⁸UNESCO 'Strong foundations; early childhood care and education' Global EFA Monitoring Report (2007) 74; H Combrinck 'The hidden ones: children with disabilities in Africa and education' in J Sloth-Nielsen (ed) *Children's Rights in Africa: A legal perspective* (2008) 299; UN Committee on the Rights of the Child *General Comment No 1: article 29(1) - The aims of education* CRC/GC/2001/1 Para 10.

⁹Adopted in 2006, entered into force in 2008.

touches on at least three topical spheres of human rights; children's rights, the rights of persons with disabilities, and socio-economic rights.

A brief backdrop to the research is set out below.

1.1.1 Adoption of the CRPD

The CRPD is the first international treaty to deal exclusively with the rights of persons with disabilities.¹⁰ It embodies a paradigm shift in the understanding of the rights of persons with disabilities and anchors the human rights approach to the subject.¹¹ The CRPD represents a growing consensus at the global level that the rights of persons with disability should be recognized, respected and fulfilled.¹² As a specialised instrument on rights in the context of disability, the CRPD ought to guide the interpretation of all other rights in the context of disability.¹³ The adoption of the Convention triggered great expectations for the realization of the rights of persons with disabilities across the globe.¹⁴

¹⁰Arajarvi (n 7 above) 36.

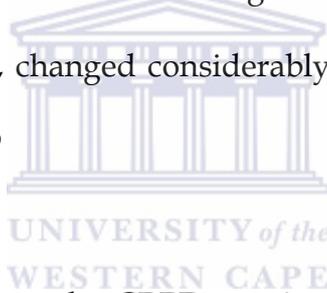
¹¹Arajarvi (n 7 above) 34.

¹²AS Kanter 'The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2007) Vol. 34 *Syracuse Journal of International Law and Commerce* 291; A Lawson 'The United Nations Convention on the Rights of Persons with Disabilities: new era or false dawn?' (2007) 34 *Syracuse Journal of International Law and Commerce* 618.

¹³Lawson (n 12 above) 584; G Quinn & T Degener 'Expanding the system: the debate about a disability specific convention' in G Quinn & T Degener (eds) *Human rights and disability: the current use and future potential of United Nations human rights instruments in the context of disability* (2002) 295 - 296.

¹⁴F Mégret 'The disabilities convention: human rights of persons with disabilities or disabilities rights' (2008) Vol 30 No 2 *Human Rights Quarterly* 495; R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 4.

During the drafting process, it was often said that the CRPD was not meant to introduce new rights.¹⁵ Rather, it was argued, the Convention would restate rights existing in various international human rights instruments with a view to making them relevant to persons with disabilities.¹⁶ It is however argued that the CRPD did indeed introduce some new rights, and that some of the rights established therein have not been stipulated in any other international human rights instrument before,¹⁷ such as the right to live independently and to be included in the community, the duty of the state to ensure habilitation and rehabilitation to persons with disabilities, the right to personal mobility and the right to accessibility.¹⁸ From the text of the Convention, it is also apparent that the framing of some of the pre-existing rights, such as the right to education, changed considerably in the CRPD to accommodate disability specific guarantees.¹⁹



Regarding the rights of children, the CRPD requires states to ensure that children with disabilities enjoy all human rights and fundamental freedoms on an equal basis

¹⁵OM Arnardottir 'A future of multi-dimensional disadvantage equality?' in OM Arnardottir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 44.

¹⁶Kayess & French (n14 above) 20.

¹⁷Mégret (n 14 above) 498; Kayess & French (n 14 above) 32.

¹⁸CRPD, articles 19, 26, 9 & 20 respectively. It is acknowledged that, save for article 19, these other provisions do not expressly purport to create a right. Nevertheless, a right is an affirmative claim. To the extent that the articles create a duty on the state with a corresponding and enforceable benefit to persons with disabilities, they may be said to constitute rights failure to expressly state so notwithstanding.

¹⁹A more detailed analysis of the rights created under the CRPD is undertaken in Chapter 2 of this work.

with other children.²⁰ It reiterates the principle of the best interests of the child to the effect that in every action concerning children with disabilities, their best interest shall be a primary consideration, and it calls upon states to ensure the rights of children with disabilities to express their views in all matters affecting them.²¹ This article acts as a reference point in the interpretation of the rights of children in the context of disabilities.²²

1.1.2 The right to education under the CRPD

The right to education is covered in article 24 of the CRPD. This article sets out the aims of education, reiterates the duty to ensure its realisation, highlights some essential safeguards relative to education in general so as to ensure inclusion of persons with disabilities, and points to programmatic interventions necessary for the realisation of the right.²³ In sub-article 24(2), the CRPD sets out principles to guide state obligations with respect to the right to education. These include non-exclusion of persons with disabilities from the general education system, and specifically non-exclusion of children with disabilities from free and compulsory primary education.

The article obliges states to ensure inclusive, quality and free primary and secondary education for persons with disabilities on an equal basis with others in the communities in which they live. State parties are further under duty to ensure

²⁰ CRPD Article 7(1).

²¹ CRPD article 7(2)

²²T Boezaart 'The Children's Act: a valuable tool in realizing the rights of children with disabilities' (2011) 74 *Journal of Contemporary Roman-Dutch Law* 268.

²³In article 24(3), the CRPD addresses the teaching of life skills especially for persons with sensory disabilities, while article 24(2) (4) provides for the training and employment of persons with disabilities in the education sector. Finally article 24(5) provides for access to post-secondary education.

provision of reasonable accommodation for the individual requirements of learners and to ensure that persons with disabilities receive the support required to facilitate their effective education within the general education system. In addition, article 24(2) (e) requires state parties to ensure that individualised support measures are provided to learners with disabilities in environments that maximise academic and social development in pursuit of the goal of inclusion.

Formal education is organised on the basis of learning levels with primary education falling within the first tier of formal education.²⁴ Children often fall within the pre-primary, primary and secondary school levels of education.²⁵ When factors such as poverty, late enrolment and 'wastage'²⁶ in the education system, diminished transition rates between primary and secondary schools, and the precarious status of pre-primary education in most developing countries are taken into account, children in these countries are more likely to benefit from primary school level than any other level of education.²⁷ It is therefore rightfully argued that 'primary education is [perhaps]..... the only kind of education to which most [children in Africa] can ever

²⁴F Coomans 'In search of the core content of the right to education' in A Chapman & S Russel (eds) *Core Obligations: Building a Framework For Economic, Social and Cultural* (2002) 226.

²⁵The definition of a child as an individual below the age of 18 years is taken from article 1 of the CRC which is a universally accepted standard in this regard.

²⁶The term 'wastage' as applied in education theory refers to dropping out of school or repetition of classes. See K Halvorsen 'Notes on the realization of the human right to education' 12 (1990) *Human Rights Quarterly* 343; O Abagi & G Odipo 'Efficiency of primary education in Kenya: situational analysis and implications for education reform' *Discussion Paper No. DP 004/97* (1997) 1 & 24.

²⁷K Tomasevski, 'Report of the Special Rapporteur on the Right to Education mission to Uganda 26 June to 2 July 1999' E/CN.4/2000/6/Add.1 9 August 1999, para 52.

have access: secondary and university education are beyond the reach of the majority.²⁸

It is also generally acknowledged that universal primary education is a prerequisite for economic development, and a tool of empowerment towards the realization of other rights.²⁹ Primary education is, for these reasons, a prominent agenda on the international arena, featuring in main international legal and political commitments such as the Millennium Development Goals (MDGs) and the Education for All (EFA) frameworks.³⁰ It is a core component of the right to education in general, and a minimum core obligation of all states.³¹

Before the CRPD, international human rights instruments provided for the right to education without discrimination.³² These instruments did not however suggest an appropriate approach to the implementation of this right in order to ensure equality in the context of disability. As a result, approaches to the education of children with

²⁸Tomasevski (n 27 above) para 52.

²⁹M Mustaniemi – Laakso, “The right to education: Instrumental right par excellence” in ME Salomon et al (eds) *Casting the net wide: human development and new duty bearers* (2007) 333; Beiter (n 1 above) 28; Committee on ESCR *General Comment No 13 – the right to education* 21st session 1999 UN Doc E/C.12/1999/10 para 1.

³⁰The World Conference on Education held in Jomtien Thailand (1990) during which the ‘World Declaration on Education for All: Meeting basic learning needs’ was adopted marked the beginning of an international commitment to achieving education for all. Subsequently, the Salamanca Statement on Special Needs Education (1994), and the Dakar Framework of Action on EFA (2000) were adopted. These international commitments, along with the MDGs have been essential in benchmarking global progress towards the full realization of the right to education.

³¹In General Comment No 11, the Committee on ESCR noted that provision of free and compulsory primary education is a minimum core responsibility of all states irrespective of their financial circumstances. See Committee on ESCR *General Comment No 11: plans of action for primary education* E/C.12/1999/4 10 May 1999, para 57.

³²For instance article 26 of the Universal Declaration, articles 13 and 14 of the ICESCR, articles 28 and 29 of the CRC, and article 11 of the ACRWC all recognise a right to education for everyone.

disabilities were influenced by various schools of thought and models of thinking about disability. The medical model of disabilities³³ dominated the discourse on disability for a long time and resulted in the establishment of parallel education systems for persons with disabilities.³⁴ To date, there is ample evidence of co-existing systems of education in a number of countries. As will be shown in Chapter 2 of this work, responses to disability at the international and national levels have evolved over time.³⁵ In the recent past, the undesirable effects of separate or special education systems have been widely acknowledged.³⁶ The shift towards a social model of disability which applies human rights as a tool to foster equality of persons with disabilities and to entrench positive social accommodation of difference has contributed to the changing perspectives. As a result, a philosophy of inclusive

³³According to this model, disability is a pathological problem inherent in the person, which requires medical intervention directed at the person to enable them fit in or participate in the general society. See AS Kanter 'The globalization of disability rights law' (2003) 30 *Syracuse Journal of International Law and Commerce* 245; The medical model evokes charitable responses to disability which depicts persons with disabilities as objects of pity, the responsibility for the care of whom is a moral or religious as opposed a legal duty. J Petman 'The special reaching for the universal: why a special convention for persons with disabilities?' in J Kumpuvuori & M Scheinin (eds) (n 7 above) 26 argues that the pathological understanding was also the main factor behind disability terminology. With the change in the underlying philosophy, it was necessary to change the terminology as well.

³⁴World report on disability (n 5 above) 205; Combrinck (n 8 above) 301; KC Heyer 'The ADA on the road; disability rights in Germany' (2006) 27 4 *Law and Social Inquiry* 726.

³⁵Quinn & Degener (n 13 above); G Quinn 'A short guide to the United Nations Convention on the Rights of Persons with Disabilities' in G Quinn & L Waddington (eds) *European year book of disability law* (2009) 89 - 90, & 93 - 99.

³⁶SJ Peters 'Inequalities in education for people with disabilities' in DB Holsinger & WJ Jacob (eds) *Inequality in education; comparative and international perspectives* (2008) 153 - 154; Salamanca Statement and Framework For Action on Special Needs Education (1994); R Hodgkin & P Newell *Implementation handbook on the UN Convention on the Rights of the Child* (2007) 337; Centre for Educational Research and Innovation, *Inclusive education at work: students with disabilities in mainstream schools* (1999) 18. The latter is of the view that the most powerful argument against the application of the medical model in the context of the education of children with disabilities is the fact that the diagnostic terms characteristic of this model such as blind, partially sighted etc are inadequate in defining educational provision in schools.

education has emerged and developed rapidly. Inclusive education is fronted as a solution to the exclusion of children with disabilities from the mainstream of education. It is a facet of the general concept of inclusion, a broad process that entails the elimination of barriers to effective participation of certain social groups in the society.³⁷

The CRPD embraces the philosophy of inclusive education.³⁸ However, despite the prominence of inclusive education as a general concept in the education of persons with disabilities, there are still disparities in the interpretation and implementation thereof, the most common misperception being that inclusive education is synonymous with integration of learners with disabilities into the regular classroom.³⁹ Evidently, lack of universal and authoritative interpretative guidance on the meaning of the concept has largely diminished its potential to ensure equality in the education of children with disabilities.⁴⁰ Article 24(2) of the CRPD responds to the lacuna on 'how' to ensure the right to education for children with disabilities through inclusive education.

³⁷UN CRC *General Comment No 9 – the rights of children with disabilities* (2006) CRC/C/GC/9 27 February (2007) para 66; UNESCO *Guidelines for inclusion: ensuring access to education for all* (2005).

³⁸Article 24(1) of the CRPD establishes the duty of all states to ensure an inclusive education system at all levels and lifelong learning.

³⁹The meaning and prevailing perspectives on inclusive education are discussed in Chapter 4 part 4.3 of this thesis.

⁴⁰UNESCO *Guidelines* (n 36 above) define inclusive education. These guidelines however have limited legal authority to facilitate a universal meaning.

1.2 Statement of the problem

The following paragraph succinctly summarises the problems affecting the education of children with disabilities in general;

'The right to education is both the most important right for children with disabilities and the right most frequently denied. Moreover, the scale of violation is compounded by a number of factors. First, severely disabled children may be considered [uneducable] and denied any education, specialist or otherwise, on that ground. Second, only 2 per cent of disabled children in developing countries have access to an education system. Third, while many disabled children receive no education, many more children fail to receive an effective education or one from which they can draw any benefit. Fourth, children with disabilities continue to endure an approach that favours their segregation and marginalization from the mainstream education system on the ground that they are receiving "special education". But students in so called "special schools" frequently fail to enjoy the same range of academic and leisure activities as children in mainstream schools, and the needs of individual pupils are not met in a comprehensive or dedicated manner.'⁴¹

In the same year that the CRPD was adopted, the UN Committee on the Rights of the Child (CRC Committee) adopted a General Comment on the rights of children with disabilities.⁴² The Comment addressed, inter alia, the right to education for children

⁴¹U Kilkelly 'Disability and children: the Convention on the Rights of the Child' in Quinn & Degener (n 13 above) 198.

⁴²CRC General Comment No 9 (n 37 above).

with disabilities and how it could be realised, while paying particular attention to articles 2, 23, 28 and 29 of the CRC. At the time of drafting the General Comment, the process of drafting the CRPD was in its penultimate stages.⁴³ The General Comment therefore incorporates some of the aspects of the CRPD and the benefit of the Committee's experience in considering state party reports.⁴⁴

The Committee's guidance on the rights of children with disabilities in the General Comment is however limited to the extent that it is an interpretation of the CRC, not the CRPD. For this reason, the contextual value and ambit of the general principles of the CRPD were not considered in detail. On education of children with disabilities, the CRC Committee endorsed the definition of inclusion proposed by UNESCO⁴⁵ and concurred with the goal of inclusive education proposed by the CRPD.⁴⁶ The Committee called upon states to work towards implementing inclusive education in their jurisdictions, and also cautioned against the narrow interpretation of inclusion as mere integration at the expense of harnessing the full benefit of inclusion.⁴⁷ The Committee did not however delve into the meaning or practical implications of the principles established under article 24(2) of the CRPD.

⁴³The CRC Committee noted with appreciation the work of the Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, and that the Ad-Hoc Committee had as at then adopted a draft Convention which was pending presentation to the UN General Assembly.

⁴⁴CRC General Comment No 9 (n 37 above) para 3.

⁴⁵ UNESCO Guidelines (n 37 above).

⁴⁶The CRC Committee stated that 'inclusive education should be the goal of educating children with disabilities'. CRC General Comment No 9 (n 37 above) para 66.

⁴⁷ As above para 67.

The UN Committee on the Rights of Persons with Disabilities (CRPD Committee), the body mandated to monitor the implementation of the CRPD, has yet to engage in the interpretation of the bulk of the CRPD's provisions.⁴⁸ Similarly, the CRPD has in view of its relative novelty, not benefited much from judicial or quasi-judicial interpretation, including in national and regional courts. The principles and concepts set out in article 24(2) of the CRPD have also not been widely tested in practice especially in the African region. In addition, the relationship of the CRPD provision on education with the pre-existing treaty obligations on the right to education such as the ICESCR, CRC and the ACRWC also need to be interrogated.⁴⁹

The CRPD generally delves into quite some detail on the duties of states for its implementation in a manner that is unusual in other international human rights instruments.⁵⁰ Arguably, the tendency of international legal instruments to shy away from prescriptive provisions guards against suggesting or endorsing national political and ideological choices in order to achieve the rights. It also affords a state's a reasonable margin of appreciation which in turn enables contextual adaptations of

⁴⁸The only attempts at the interpretation of the CRPD by the CRPD Committee have been the concluding observations on initial state reports of a few countries that have so far been considered. The concluding observations of the CRPD Committee are available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Sessions.aspx> (last accessed 22 February 2012).

⁴⁹The UN Special Rapporteur on the Right to Education in his 2007 annual report, the focus of which was on the right to education for children with disabilities, did not pay much attention to the meaning of 'availability' or of the duty to 'avail' education to children with disabilities, despite the fact that the UN CRPD had been adopted the year before the report. The report however served to highlight some of the existing disparities in the understanding of states obligations to avail education for children with disabilities. See V Munoz 'The right to education of persons with disabilities' Report of the Special Rapporteur on the Right to Education (2007) A/HRC/4/29, 19 February 2007. This counts as a missed opportunity to expound on the rights and the measures necessary to achieve it.

⁵⁰F Mégret 'The disabilities convention: human rights of persons with disabilities or disability rights' (2008) 30 2 *Human Rights Quarterly* 504. In fact, article 24 is one of the longest and detailed articles of the Convention.

rights. The CRPD's bold intrusion into the discretion of states therefore has potentially significant effects on the extent and nature of rights created under the Convention.⁵¹ More specifically, over prescription can induce rigidity which has the potential to compromise optimum protection of the rights.⁵²

Primarily, by prescribing the exact steps to be taken in implementation, the CRPD delimits choice, and forecloses on other implementation options that could have the potential to achieve the same or a better outcome. The pathway to the full recognition of the rights of persons with disabilities, which is set out in chapter 2 of this work, clearly indicates the potential for such changes over time. With the recognition of the fact that disability is an evolving concept, it is possible that as the Convention is tested in practice and as society evolves, new approaches to the protection of the rights of persons with disabilities could emerge.

Indeed, the social model upon which the CRPD is anchored is the subject of growing and ardent criticism, especially for its perceived discounting of impairment and the resultant experiences of persons with disabilities.⁵³ Also, some existing approaches to education of persons with disabilities are likely to fall outside the prescribed measures under the Convention despite their usefulness in delivering education in defined contexts. A salient motive in the interpretation of state obligations under the

⁵¹As above.

⁵²Arajarvi (n 7 above) 38 argues that the detail of the Convention can be restrictive.

⁵³See for instance T Shakespeare *Disability Rights and Wrongs* (2006); T Shakespeare & N Watson 'The social model of disability; an outdated ideology?' (2008) 9 - 28 *Research in Social Sciences and Disabilities*; A Downing 'Power and disability in the global south: a case study of Ghana's disability rights movement' (2011) Unpublished Masters Thesis, Lund University.

Convention in this study, particularly article 24(2), would therefore be to interrogate the potential of the prescribed measures *vis a vis* other approaches to deliver optimum education for children with disabilities in Kenya and South Africa.

There is a dearth of jurisprudence on the rights of children with disabilities in Africa as stipulated in African regional instruments. It is also acknowledged that majority of persons with disabilities live in the developing world, including Africa,⁵⁴ a factor that underscores the need to determine the appropriate measures to ensure their rights.⁵⁵ Some contextual factors have an impact on the interpretation of the Convention in the African region. Key among these is the insidious poverty that impacts on resources for implementation of socio-economic rights.⁵⁶

Other factors include harmful cultural practices and embedded social stigma towards disability. Also, most of the African education systems are inherited from the colonial era, and whilst the systems have considerably changed in the former colonising states, little has been done in African states to adapt education systems to the unique needs of their societies. Remnants of the colonial educational organisation philosophy such as parallel special education systems, as well as a predominant role

⁵⁴There are different statistics on the distribution of persons with disabilities around the globe. It is often suggested that 80% of persons with disabilities are found in developing countries, yet most developing countries use the rough estimate of 10% of their population. See A Downing (n 51 above) 20.

⁵⁵See A Elwin, *Poverty and disability: a survey of the literature* World Bank, Social Protection Discussion Paper No. 9932, Washington on the connection between disability and poverty.

⁵⁶Whereas it is generally observed that there is a connection between the likelihood or prevalence of disability and poverty, it is also argued that the existing data is not enough to adequately establish the causal link between poverty and disability. See World report on disability (n 5 above) 39. In the Dakar Framework for Action (n 29 above) para 14 it was recognised that the challenge of universal education is greatest in Sub-Saharan Africa and South East Asia.

of religious and charitable organisations in the establishment and financing of special education are still evident.⁵⁷

In brief, the gaps that this research will address relate to: the determination of an appropriate relational framework between the principles of the CRPD and those of other international human instruments relative to primary education for children; interpretation of the principles under article 24(2) of the CRPD; how the prescribed measures under article 24(2) are incorporated into national law and policy on education of children with disabilities in Kenya and South Africa; and the interaction between these principles and pre-existing state obligations on the right to primary education of children.

1.3 Research Questions

The central research question in this research is how article 24(2) of the CRPD impacts upon state obligations for the realisation of the right to primary education for children with disabilities. To answer this question, the following sub-questions will guide the research:

- a) How should the principles set out in article 24(2) be interpreted with respect to primary education of children with disabilities?
- b) Does article 24(2) of the CRPD introduce new obligations with respect to the education of children with disabilities?

⁵⁷H Combrinck (n 8 above) 317.

- c) What value does article 24(2) add to the existing legal framework on the education of children with disabilities?
- d) Are the approaches adopted in Kenya and South Africa's law and policy on primary education compliant with the purpose of the CRPD?
- e) How far do the unique circumstances of these countries define the choice of implementation measures?

1.4 Comparative study

The thesis includes a comparative study on the domestication of the principles under article 24(2) of the CRPD in two African countries; Kenya and South Africa. Through the study, the policies and laws relevant to primary education of children with disabilities in these countries will be evaluated against the standards established in article 24(2) of the Convention. The purpose of the comparative study is to show the practical application of the rights discussed in the research.

The choice of the two countries was influenced by a range of factors. Both countries are party to the CRPD and the CRC. Kenya has ratified while South Africa has signed the ICESCR. These are the key international human rights treaties that will be applied in the research. Both countries have structures in place for the education of children with disabilities, and constitutionally recognise the right to non-discrimination on the ground of disability in the implementation of the rights established in the respective Constitutions. In both countries, children's right to basic education is considered an immediate obligation of the state. However, while Kenya

implements a free primary education policy for all, South Africa has a graduated fee-paying system.⁵⁸ It is nevertheless acknowledged that the material circumstances, including the history and economic development of these countries, are significantly different.

1.5 Scope and limitations of the study

The scope of the current study is limited in a number of ways. First, the aims, principles and obligations stipulated in respect of the right to education in the CRPD cover the entire spectrum of lifelong learning, ranging from early childhood education to tertiary and vocational training. Such a full spectrum of issues is beyond the ambit of this work. While children with disabilities may be found at more than one of these levels of education, the current study focuses on the primary level of education as understood in international human rights law, and more particularly, on the application of the provisions of article 24(2) of the CRPD to primary education. Secondly, the right to education as set out in article 24 of the CRPD covers 'all persons' including children. The thesis however focuses on the right to education for children with disabilities within the mainstream society only. It excludes children in exceptional circumstances such as those deprived of liberty, incarcerated with their parents, homeschooling, or children affected by conflict.

The research would benefit considerably from empirical and field research to inform a proper evaluation of state practice. Such extensive research is however not feasible in the confines of the study, particularly due to time and resource constraints. Rather,

⁵⁸ See a discussion of the education systems in Chapters 5 and 6 respectively.

references to practical implementation measures are limited to those reported in secondary materials. Consequently, a practice gap may be evident in the interpretation and ultimately in the conclusions made. In addition, it is barely five years since the CRPD came into force. Hence, it is still too early to assess its impact on the rights of persons with disabilities. The study is therefore not an impact assessment or evaluation of implementation of the Convention. It is rather an evaluation of the legal and policy approaches to the domestication of the article 24(2) of the Convention.

With regards to the comparative study, it has to be taken into account that Kenya adopted a new Constitution in 2010. The Constitution introduces a new devolved system of government with significant changes to public administrative structures.⁵⁹ These changes in government structures began in earnest in April 2013 following the general election, but it is still too soon to determine how government functions, including those relative to education, will be distributed. Nevertheless, the core functions for the right to education, particularly policy and planning, are likely to remain within the national competence in the Ministry of Education.

Finally, while the concepts discussed in this work are drawn from a range of international and regional legal instruments, this research focuses on those international instruments that are more reflective of international normative consensus on the right to education, particularly the ICESCR, CRC and CRPD. The reasons for this choice are discussed further in Chapter 2.

⁵⁹Constitution of Kenya 2010, Fourth Schedule.

1.6 Methodology

The research entails a desktop analysis of secondary materials, particularly text books, journal articles, legislation, case law, policy documents, and online academic resources. The study also relies on primary information from reports of the relevant ministries or departments of education in Kenya and South Africa.

Research on the education of children with disabilities has the potential for a multidisciplinary study. Indeed, the subject of education of children with disabilities is relatively much more developed in education studies than in law. Similarly, there is a significant wealth of knowledge on various aspects of the lives of children with disabilities, including education, within the medical field. While not discounting to any extent the value of these alternative perspectives on the education of children with disabilities, this work approaches the issue from a human rights perspective. As will be seen in Chapter 2, the shift from the medical to social models of thinking on disability, the hallmark of which is the CRPD, is anchored in the human rights philosophy. Arguably, a human rights approach is hence forth apposite in all matters affecting persons with disability.

1.7 Conceptual clarifications

Below is a brief definition of the key terms applied in this work.

1.7.1 Disability

The term 'disability' is neither defined in the CRPD nor the other main international human rights instruments discussed in this work. There are various reasons for not having a definition of disability, the primary of which is that disability, especially in

terms of the social model, is an evolving concept.⁶⁰ It is therefore difficult to adopt a definition that sufficiently covers all the aspects of disability. In addition, defining disability would tend to focus on the impairments of the people affected, and most likely therefore lead to stigmatization.

In terms of the CRPD,

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁶¹

This description is read along with the preamble of the Convention which states that,

“.....disability is an evolving concept anddisability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”⁶²

A similar approach is accepted in both Kenya and South Africa which are discussed in this work. In terms of the Constitution of Kenya, disability

“includes any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the

⁶⁰ This is acknowledged in para (e) of the Preamble to the CRPD.

⁶¹ CRPD article 1.

⁶² CRPD Preamble, para (e).

community to have, a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities"⁶³

In South Africa, there is no universal definition of disability. Rather, various definitions exist in different statutes. But, following the ratification of the CRPD, there is a general acceptance of the need to adopt a definition that is in line with the Convention.⁶⁴ The approach of the CRPD to the 'definition' of disability is therefore adopted in this work.

1.7.2 Education

'Education' is the lifelong process of learning which occurs in both formal and informal settings.⁶⁵ As applied in international human rights instruments however, two views on its scope prevail. The first is that the right to education as depicted in international human rights instruments refers to education in its narrow sense, often focusing on formal instruction.⁶⁶ This inference can be drawn from the expected outcomes, the benchmarks on implementation of the right (such as the 4A scheme which is suited to or derived from formal classroom settings), the recognised levels of education and the corresponding state duties.⁶⁷ The CRC for instance requires promotion of regular school attendance and reduction of drop-out rates as part of

⁶³Constitution of Kenya, section 260.

⁶⁴See for instance the draft SA First Country Report to the United Nations on the Implementation of the United Nations Convention on the Rights of Persons with Disabilities, November 2012 3.

⁶⁵Hodgkin & Newell (n 36 above) 410.

⁶⁶J Sloth-Nielsen & BD Mezmur 'Free education is a right for me' A report on free and compulsory primary education (2007) 9; Beiter (n 1 above) 19.

⁶⁷LN Murungi 'The right to education' in G Musila & JK Biegon (eds) *Judicial enforcement of socio-economic rights under the new Constitution: challenges and opportunities for Kenya* (2011) 219. See more generally, UNESCO Institute for Statistics, *International Standard Classification of Education ISCED 2011*, (2012) Montreal, Canada.

ensuring the right to education, as well as calling for protection of children from performing any work that is likely to be hazardous or to interfere with their education.⁶⁸ These provisions point to a narrow understanding of education.

The alternative view regards the right to education in its broad sense. This view is supported by various commentators and provisions. The CRC Committee interprets 'education' under article 28 of the CRC as embracing the broad range of life experiences and learning processes which enable children, individually and collectively, to live a full and satisfying life within the society.⁶⁹ Verheyde also argues that based on the CRC Committee's practice and jurisprudence, the right to education under article 28 of the CRC refers to both formal and non-formal education.⁷⁰ The aims of education as stipulated in international instruments also point to an intention that goes beyond academic achievement.⁷¹ The broad interpretation of 'education' was also adopted in the UNESCO Convention against Discrimination in Education (1960) which defined education as "all types and levels of education"⁷²

⁶⁸Article 28(1) (e) and 32(1) of the CRC respectively.

⁶⁹CRC Committee *General Comment No. 1: the aims of education* (2001) CRC/GC/2001/1 para 2.

⁷⁰M Verheyde *Article 28(the right to education): a commentary on the United Nations Convention on the Rights of the Child'* (2006) 12 - 13; See also The CRC Committee 'General guidelines regarding the form and content of the periodic reports' (UN Doc. CRC/C/58, 1996), para 106.

⁷¹For instance, article 29 of the CRC foresees the role of education in fostering the development of the personality of the child, respect for cultural identity, language and values, as well as respect for the natural environment. While some of these can be achieved within a tailored school curriculum, certain other aspects are learned as part of broader efforts beyond the school environment.

⁷² UNESCO Convention against Discrimination in Education, article 1(2).

In this thesis, the term 'education' coincides with the narrow definition of education highlighted above. It is limited to formal instruction and learning within the school environment.

1.7.3 Primary education

Primary education is not universally defined. It is however often understood as the first layer of formal schooling.⁷³ Formal education on the other hand refers to structured, chronologically graded instruction given in an educational institution.⁷⁴ In practice, primary education focuses on imparting basic learning skills, including literacy and numeracy.⁷⁵ It is also important to mention that 'primary education' is sometimes used interchangeably with 'basic education'. However, while there are areas where the two overlap in meaning, the terms are not synonyms. Basic education de-emphasizes the completion of specific formal programs or certification requirements, focusing more on the content of education.⁷⁶ Primary education is the main conduit of basic education.⁷⁷ This thesis focuses exclusively on primary education, and to a limited extent on the acquisition of basic skills only in as far as they are acquired within the formal primary school system.

⁷³Coomans (n 24 above) 226; Sloth-Nielsen & Mezmur (n 66 above) 10. This interpretation is also adopted by UNESCO 'Revision of the international standard classification of education (ISCED) general conference' (2011); UNESCO Institute for Statistics (n 64 above) 31.

⁷⁴Verheyde (n 70 above) 12.

⁷⁵M Ssenyonjo *Economic, social and cultural rights in international law* (2009) 377.

⁷⁶The definition of basic education in the World Declaration on Education for All (1990) is the most elaborate statement of its meaning, purpose and scope. See World Declaration on Education for All, article II; R Malherbe 'Education rights' in T Boezaart *Child law in south Africa* 407; Coomans (n 24 above) 226.

⁷⁷Coomans (n 24 above) 227.

For the purposes of the discussion in the comparative study, below is a clarification of the terms ‘basic’ and ‘primary’ education as used in education law and policy in Kenya and South Africa.

1.7.3.1 ‘Primary’ versus ‘basic’ education in Kenya and South Africa

In Kenya, both the Children Act and the Constitution refer to the right to ‘basic’ education as opposed to ‘primary’ education.⁷⁸ The national policy on education and training and its supporting investment programme also indicates that basic education shall constitute fourteen years of learning up to the end of high school.⁷⁹ A Task Force charged with the alignment of the education system to the Constitution interpreted basic education as education provided from pre-primary to the end of senior secondary school.⁸⁰ This interpretation by the Task Force was translated into the Basic Education Act of 2013, in terms of which primary education is but one of the components of basic education.⁸¹

The foregoing notwithstanding, there are a number of reasons that imply that basic education as contemplated under the Constitution of Kenya coincides with the primary education phase. For example, the term ‘basic’ education as applied in the Constitution is only applied in relation to children.⁸² Also, ‘basic’ education as applied by education commissions/committees in Kenya implies that the term was

⁷⁸Constitution section 53(1) (b); Children Act, section 7.

⁷⁹Republic of Kenya, *Sessional Paper No 1 of 2005 on Education, Training and Research*, para 1.2, & 3.15; MOEST, *Kenya Education Sector Support Programme, 2005 – 2010*, 202. The long-term phase of the KESSP is 2010 – 2015.

⁸⁰Republic of Kenya *Task Force on the re-alignment of the education sector with the Constitution of Kenya 2010* (2012) 35.

⁸¹The Basic Education Act, No 14 of 2013, section 2 & 28.

⁸² Constitution section 53(1) (b).

consistently understood as a synonym for primary education.⁸³ It is also apparent that the terms 'basic' and 'primary' were used interchangeably during the constitutional review process,⁸⁴ meaning that the term 'basic' as used in the final text of the provision could mean primary education. Furthermore, the term was first used in the Children Act, which by virtue of its reference to the CRC, implies that it is used as a synonym for primary education.⁸⁵ 'Basic' education as applied in the current management of education also indicates that it refers to primary education.⁸⁶ It is therefore not clear where the broad interpretation of basic education by the aforementioned Task Force is drawn from.

An alternative view would be that article 53(1) (b) of the Kenya Constitution is a deliberate departure from the formal limits of primary education as stipulated in the CRC, without affecting existing obligations for this level of education. In this sense, basic education under the Constitution includes primary education as understood in international law. If so understood, providing free and compulsory primary education would discharge the state's international obligation under the CRC, but would not exhaust constitutional responsibility to provide other forms of basic education including informal and vocational education that is not within the ambit of formal primary education.

⁸³See Chapter 5 part 5.4 & 5.5 for a discussion of the education commissions and committees that shaped education in Kenya.

⁸⁴See for instance Recommendation 184 in the Constitution of Kenya Review Commission Report (2005) 335.

⁸⁵CRC article 28 which is referenced by the Children Act refers to primary education as opposed to basic education as do several other universal instruments.

⁸⁶The directorate of basic education is responsible for the delivery of ECDE and the delivery of primary education. See www.education.go.ke (last accessed 18 April 2013).

The term 'basic education' as used in South African legislation and education policy has been ascribed two meanings.⁸⁷ In the first sense, it is applied to indicate a level of education computed on the basis of time or progression. In the alternative, 'basic education' refers to a certain content of education.⁸⁸ Following the latter definition, Woolman & Fleisch define basic education in South Africa as the 'minimum levels of literacy, numeracy and essential life skills necessary to do more than menial work in a complex society.'⁸⁹ They argue that basic education should be about the adequacy as opposed to level of education.⁹⁰ This argument, to an extent, accords with the definition in the World Declaration of Education for All. But the World Declaration goes further to recognise that primary education is the main delivery channel for basic education.⁹¹

The White Paper on Education and Training (WP 1) adopted at the dawn of a democratic government in South Africa endorsed the definition of 'basic education' in the World Declaration on Education for All, arguing that basic education 'must be defined in terms of learning needs appropriate to the age and experience of the

⁸⁷S Woolman & M Bishop 'Education' in Woolman et al *Constitutional law of South Africa* (2010) 57-15.

⁸⁸M Seleokane 'The right to basic education' in E Coetzee & J Streak (eds) *Monitoring socioeconomic rights in South Africa: achievements and challenges* (2004) 228 argues that from requirement under the South African Schools Act that education be compulsory for children between 7 and 15 years, it may be inferred that basic education is equivalent to primary education.

⁸⁹S Woolman & B Fleisch *The Constitution in the classroom: law and education in South Africa 1994 - 2008* (2009) 113.

⁹⁰Woolman & Fleisch (n 89 above) 130. Similar arguments are reiterated in C McConnachie & C McConnachie 'Concretising the right to a basic education' (2012) 129 *South Africa Law Journal*; and C Simbo 'Defining the term basic education in the South African Constitution: an international law approach' (2012) 16 *Law, Democracy and Development*.

⁹¹World Declaration on Education for All: meeting basic learning needs (1990), Article V available at <http://www.unesco.org/education/wef/en-conf/jomtien%20declaration%20eng.shtm> (accessed 29 March 2013).

learner'.⁹² However, the Paper subsequently stipulated that the design of education programmes to the level of the General Education and Training (GET) would adequately define basic education for the purpose of the constitutional requirement.⁹³ WP 1 therefore seems to take a middle ground that accommodates both perspectives.

Subsequently, the South African Schools Act (SASA) took further WP 1's view of basic education as a level of education that covers a period of 10 years up to grade 9 or the age of 15 years whichever comes first.⁹⁴ This period coincides with the GET phase of education.⁹⁵ The GET level is, on the other hand, prioritised in the allocation of state education resources, a trend that at the international level is associated with the primary education phase.⁹⁶ This suggests that basic education in South Africa, as far as it applies to children, refers to the primary education phase as understood in international law.

The two perspectives on the meaning of basic education in South African law and policy are not mutually exclusive but complimentary. Indeed, it is not rational to interpret basic education solely in terms of levels because an organisational structure and the sufficiency of education are complementary aspects of an education system. Education is also a function of time, and therefore it would not be sufficient to define 'basic education' exclusively on the basis of content.

⁹²White Paper on Education and Training 196 of 1995 (WP1) Chapter 7, para 12.

⁹³WP1 (n 92 above) Chapter 7, para 15.

⁹⁴ SASA, Section 3(1).

⁹⁵WP1 (n 92 above) chapter 7; Malherbe (n 76 above) 404.

⁹⁶Woolman & Fleisch (n 89 above) 128, footnote 213; Seleokane (n 88 above) 228.

As used in Chapters 5 and 6 of this thesis, the term 'primary' education refers to Standard 1 - 8 in the Kenyan context, and the GET phase of education as a conduit for delivery of basic education in South Africa.

1.7.4 'Free' primary education

Primary education was already free and compulsory in most western states before it was actually recognized as a human right.⁹⁷ Its subsequent recognition in the Universal Declaration was therefore not met with ideological opposition as did other socioeconomic rights and the general concept of the unity of rights.⁹⁸ Subsequently, a right to 'free and compulsory' primary education was codified in the ICESCR,⁹⁹ the CRC,¹⁰⁰ and regional treaties such as the ACRWC.¹⁰¹

The use of 'free' in reference to education can be misleading because there is really no such thing as a free education. Instead, 'free' in this context refers to the incidence of the cost of education, that is, whether on the public (state) or on individual households. Whether education is free or not therefore depends on the scope of costs borne by the state relative to those borne by learners' households. Thus while there is general consensus that primary education ought to be free, it is the scope of 'free' that is contentious.

⁹⁷Beiter (n 1 above) 23.

⁹⁸M Nowak 'The Right to education' in A Eide et al (eds) *The universal declaration of human rights* (2001) 253.

⁹⁹Article 13(2) (a) of the ICESCR provides that primary education shall be compulsory and available free to all. Article 14 requires state parties to ensure free primary education in their jurisdiction within 2 years of ratifying the ICESCR.

¹⁰⁰ Article 28(1) (a).

¹⁰¹ Article 11(3) (a).

'Free' has been interpreted to mean free of charge (in the sense of tuition fees), and in a broader sense, that school supplies are provided for free.¹⁰² The Committee on ESCR has stated that cost-free education means that government should abstain from imposing registration fees, and that direct and indirect costs such as compulsory levies on parents or the requirement to wear relatively expensive school uniforms is eliminated.¹⁰³ Some commentators have added to this list 'expenses for text books and supplies, cost of extra lessons, expenses for meals and school canteens, school transport, and medical expenses.'¹⁰⁴ The practice of the CRC Committee also seems to have accorded a generous interpretation to the duty to provide free education, including an obligation to provide assistance for the purchase of uniforms and school books, at least for children from poor families.¹⁰⁵

The Committee on ESCR also recognizes that fees and other direct charges, whether imposed by the government, local authorities or school administration, are a disincentive to the enjoyment of the right to primary education and can jeopardize its realization.¹⁰⁶ On the one hand, the CESCR envisages some acceptable costs, but only upon examining them on a case-by-case basis.¹⁰⁷ Such costs have not yet been defined, but it is argued that they may especially arise in view of the state's level of

¹⁰²P Arajarvi 'Article 26' in G Alfredsson & A Eide (eds) *The universal declaration of human rights: A common standard of achievement* (1999) 554; Verheyde (n 70 above) 20.

¹⁰³Committee ESCR *General Comment No 11: Plans of action for primary education* (UN Doc. E/C.12/1999/4, 1999) para 7.

¹⁰⁴Coomans (n 24 above) 228.

¹⁰⁵CRC Committee 'Concluding observations for Senegal' (UN DOC.CRC/C/46, 1995) paras 128 and 142.

¹⁰⁶General Comment No 11 (n 103 above) para 7. See also Steiner (n 4 above) 297.

¹⁰⁷As above, para 7.

development.¹⁰⁸ On the other hand, the Committee is of the view that the ‘free available to all’ standard for the right to primary education applies in all situations,¹⁰⁹ including where local communities are unable to afford any costs associated with attendance at school.¹¹⁰

It is contended that the requirement for ‘free education’ should be unconditional, meaning that introducing study fees for certain categories of children, the financial capacity of their parents notwithstanding, or the establishment of bursaries does not constitute a satisfactory measure for the realisation of ‘free’ education.¹¹¹ It is also argued that it would be imprudent to ignore voluntary parental and community contributions,¹¹² particularly in circumstances of extremely limited resources. But such contribution should neither absolve the state of the responsibility to provide the education free, nor be compulsory.

Clearly, there is no universal consensus on the outer limits of a state’s responsibility to ensure that primary education is free. In deciding the scope of free as applied in this study, a purposive approach is adopted. Therefore, ‘free’ is used to refer a situation where the cost of education borne by a child’s household, whether directly or indirectly, does not constitute a barrier to access to education for the child.

¹⁰⁸Beiter (n 1 above) 513.

¹⁰⁹CESCR General Comment No 11(n 103 above) para 7.

¹¹⁰See Committee on ESCR ‘Concluding observations: Kenya’ UN Doc E/C.12/1993/6 (3 June 1993) para 18.

¹¹¹Beiter (n 1 above) 512.

¹¹²Sloth-Nielsen & Mezmur (n 66 above) 17.

1.7.5 Compulsory education

The words 'free and compulsory' are common adjuncts of one another and distinctive features of the right to primary education.¹¹³ Indeed, making education compulsory is contingent upon making it cost-free.¹¹⁴ The content of the duty to make primary education compulsory is however not as well developed.¹¹⁵ It is argued that compulsion has two dimensions; school attendance for the purpose of receiving an education, and secondly, the demand for adherence to a set curriculum determined by the state and other requirements introduced within the education framework such as the requirement to wear uniforms.¹¹⁶

Neither the CRC nor the ACRWC provide for the duration of compulsory education of children. The CRC Committee has however shown an inclination to the view that the end of compulsory education ought to coincide with the minimum age for employment.¹¹⁷ The CRC Committee has also set other benchmarks such as a recommended age limit of 14 or 16 or merely recommended that the state party clearly set an age for admission to and completion of compulsory education.¹¹⁸

¹¹³Committee on ESCR *General Comment No 13 – the right to education (article 13 of the Convention)* EC./12/1999/10, para 10.

¹¹⁴Sloth-Nielsen & Mezmur (n 66 above) 18.

¹¹⁵As above.

¹¹⁶Rabin (n 4 above) 279.

¹¹⁷See for instance CRC Committee 'Concluding observations for Nicaragua' (UN Doc.CRC/C/43, 1995) para 65, Senegal (UN Doc. CRC/C/46, 1995) para 125 and 139.

¹¹⁸For instance, in the concluding observations to the initial report of Burundi, the CRC Committee recommended that the school leaving age be raised to 16 (UN Doc. CRC/C/100, 2000) para 110; and the concluding observations to the initial report of Mauritania in which the Committee recommended that compulsory education should last from the age of 6 to 14 (UN Doc. CRC/C/111, 2001), para 73.

Compulsion serves a protective purpose by ensuring that children are not barred from accessing education by the state, parents or guardians.¹¹⁹ It also serves a social function of facilitating development.¹²⁰ Compulsory education restricts the rights of the parents to freely decide on their children's education but does not entitle the state to a monopoly on education.¹²¹ As applied in this work, compulsion reinforces the right of children with disabilities to attend school, which cannot be hindered by another party.

1.8 Chapter Breakdown

This thesis is divided into seven chapters. In this chapter, a general introduction to the background of the research, as well as the research questions sought to be addressed have been set out. This Chapter also briefly introduces the comparative study undertaken in latter part of the thesis and the delimitations of scope of the research.

In Chapter 2, a discussion of the international and regional legal framework on primary education is undertaken. The legal instruments discussed in the Chapter include international and regional treaties, soft laws and relevant international political agreements. The discussion is set out in a chronological format, clearly mapping out the key milestones towards the recognition of the right of children with disabilities to primary education. The Chapter identifies the standards and concepts

¹¹⁹General Comment No 11 (n 103 above) para 6; Verheyde (n 70 above) 23.

¹²⁰Arajarvi (n 102 above) 554.

¹²¹Beiter (n 1 above) 512.

relevant to the interpretation and implementation of the right to education, children's rights and disability rights.

Chapter 3 discusses the concepts and standards identified in Chapter 2 with a view to establish a relational framework that can be applied to the interpretation of article 24(2) of the CRPD. To this end, the chapter engages with the interpretation of these concepts in international law and the implications thereof for the right to education of children with disabilities.

Chapter 4 focuses on the interpretation of article 24(2) of the CRPD and its implications for primary education of children with disabilities in practice. The chapter undertakes a textual analysis of the article, noting the implications of each of the components for the duty to ensure primary education of children with disabilities. The chapter points out the practical responses necessary in law and education policy to facilitate the realization of the right.

In Chapters 5 and 6, the legal and policy framework on the right to education of children with disabilities in Kenya and South Africa is evaluated against the standards established in Chapter 4. The aim of these chapters is to determine how or whether the principles established under article 24(2) of the CRPD have been interpreted and/or incorporated into national law and policy.

Chapter 7 concludes the thesis by setting out in brief a synopsis of the findings of the study, and highlighting the fundamental differences and similarities in the

approaches to education of children with disabilities that emerge from the case study. The Chapter ends with the general conclusions of the research.



CHAPTER 2

International and Regional Legal Framework on the Right to Primary Education:

A chronological account of the regulation and interpretation of primary education in general, and the education of children with disabilities in particular in international legal instruments

2.1 Introduction

In order to establish the significance of the standard introduced by article 24(2) of the Convention on the Rights of Persons with Disabilities (CRPD) to the right to education for children with disabilities, it is necessary to highlight the pre-existing legal and normative standards on the subject. It has already been indicated in Chapter 1 that this study straddles three contemporary human rights spheres: socioeconomic rights, children's rights, and disability rights. This broad scope poses a formidable challenge to the methodological choice in discussing the relevant instruments. The standards applicable can be presented thematically and the relevant developments mapped on that basis. However, there are overlaps in the three themes, meaning that a thematic approach would be unnecessarily repetitive. In addition, as will be seen in this chapter, a historical perspective is necessary to contextualise the provisions of the various instruments discussed. For these reasons, a chronological approach to the international legal and normative framework is preferred.

This chapter sets out the linear history of the right to primary education, identifying the key milestones that are significant to the current interpretation of state

obligations for primary education in general, and the education of children with disabilities in particular. As indicated in Chapter 1, the primary approach to the rights of persons with disabilities, especially as advanced under the CRPD, is the pursuit of equality. Equality on the other hand is a relational concept, meaning that it requires a comparison of one thing to another.¹ For this reason, the present study must of necessity establish the general standard applicable to all children in the context of the right to primary education, and subsequently or concurrently establish the standard applicable to children with disabilities.

The chapter begins by setting out the key instruments and provisions of international treaties and non-binding instruments on the right to primary education. In view of the regional delimitation of the thesis in general, the legal instruments as well as the political pronouncements of the African Union in relation to education or disability are considered in the subsequent part. A summary of the key findings in the chapter is set out in the conclusion.

2.1.1 Brief background to the right to primary education in international law

Though the concept of education as an organised social function far predates modern history,² education as a right was first recognised in international law after the end of World War I through the treaties adopted for the protection of certain minorities in

¹K Tomasevski, *Human rights obligations in education: the 4A scheme* (2006) 110.

²See generally HIA Marrou *A history of education in antiquity* (1956) The University of Wisconsin Press.

Europe in the aftermath of the war.³ Soon thereafter, a Declaration on the Rights of the Child was adopted.⁴ The Declaration stressed social and economic needs over the traditional civil and political rights of the child. Through its adoption, children's rights became a concept in public international law, albeit as soft law.⁵ Though this Declaration did not expressly refer to a child's right to education, one of its Principles required that the child 'be put in a position to earn a livelihood.'⁶ Arguably, educating a child is implicit in enabling them to earn a livelihood. It was however not until the end of World War II that the right to education, alongside other human rights, was fully proclaimed internationally.⁷

International events following the end of World War II, especially the formation of the United Nations, had profound effects on the global understanding of human rights. The UN Charter became the first international treaty to call for general respect for human rights by reaffirming faith in fundamental human rights, and in the dignity and worth of the human person.⁸ In addition, state parties to the Charter of

³Treaty between the Principal Allied and Associated Powers and Poland, 28 June 1919, article 8; KD Beiter *The protection of the right to education in international law* (2006) 25; D Hodgson *The human right to education* (1998) 25.

⁴The Geneva Declaration of the Rights of the Child, 1924.

⁵E Verhellen *Convention on the Rights of the Child* (1994) 58.

⁶Geneva Declaration of the Rights of the Child, 26 September 1924 League of Nations. The Declaration was an aspirational document and the basis for the Declaration of the Rights of the Child of 1959. The Declaration is also significant because it marks the beginning of a specific focus on the child as a bearer of rights.

⁷Hodgson (n 3 above) 7; M Ssenyonjo *Economic, social and cultural rights in international law* (2009) 6; Y Rabin, 'The many faces of the right to education' in D Barak-Erez & AM Gross (eds) *Exploring social rights* (2007) 270 argues that while it is now internationally agreed that any person is eligible to receive an education, it is in fact children who have the right to an education.

⁸ UN Charter, Preamble.

the UN agreed to promote, amongst other things, international educational co-operation.⁹ In the same year as the adoption of the UN Charter, UNESCO was formed. Member states to UNESCO affirmed the role of education in shaping human thinking and hence in fostering peace amongst the nations. Hence, the UNESCO Constitution expresses the belief of the State Parties thereto that full and equal opportunities for education for all would facilitate mutual exchange of knowledge and understanding and thus avert war.¹⁰ UNESCO was poised to give a fresh impetus to popular education by, amongst other things, giving equal opportunities for education without any distinctions on the basis of sex, race, economic or social grounds.¹¹

Both the UN Charter and the UNESCO Constitution are significant milestones for the right to education because they established a common international agenda for education, and particularly the education of children. Secondly, these two created the first basis for international cooperation to facilitate access to education materials.¹² There was however neither a specific reference to the rights of children with disabilities to education, nor recognition of the need for any specialised measures aimed at facilitating their education in either instrument.

⁹ UN Charter, article 55(b).

¹⁰Preamble of the Constitution of the United Nations Education, Scientific, and Cultural Organization (hereinafter UNESCO Constitution), Adopted in London 16 November (1945).

¹¹UNESCO Constitution, article 1b.

¹²As above, article 1(c).

2.2 Primary education and disability rights: treaties, declarations and agreements

As already mentioned, the period following the formation of the UN was the most vibrant in the negotiation of new international instruments on human rights. These instruments and their relevance to primary education and/or the education of children with disabilities are discussed below.

2.2.1 The Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights (UDHR) gives content to the 'human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' contemplated under the UN Charter.¹³ The provisions of the UDHR are not binding on states, but they formed the foundation of the subsequent binding treaties, particularly the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, (ICESCR).¹⁴

¹³UN Charter article 55(c); Beiter (n 3 above) 89; Coomans, F *et al*, (eds) *Human rights from exclusion to inclusion; principles and practice – an anthology from the work of Theo Van Boven*, (2000) 5 regards the Universal Declaration as an extensive complement to the UN Charter.

¹⁴The Universal Declaration stated that the provisions thereof were a common standard of achievement for all peoples and all nations, as opposed to a binding Convention binding upon the state parties. See A Eide 'Economic, social and cultural rights as human rights' in A Eide *et al*, (eds) *Economic, social and cultural rights* (2001) 17; Beiter (n 3 above) 94 on article 26 of the UDHR as the basis for articles 13 and 14 of the ICESCR. BD Mezmur, & J Sloth-Nielsen 'Education for Africa: Exploring the interpretation of "free" and "compulsory" primary education in international law' (Unpublished article on file with the author) 5 argue that the right to education under the UDHR was an aspiration upon which subsequent instruments have expanded, explained, and developed. Ssenyonjo (n 7 above) 359 – 360 argues that although the right to education was not expressly defined in the UN Charter, it was implied by the reference to 'international problems of an economic, social, and cultural..... character' contemplated under article 1(3) of the UN Charter, and further that the Universal Declaration set out in detail the human rights content of the UN Charter obligations under articles 55 and 56 of the Charter.

Significant to the present discussion, article 26 of the UDHR established the right of everyone to education, including free elementary and fundamental education, and compulsory elementary education.¹⁵ The meaning of the terms ‘elementary’ and ‘fundamental’ is widely speculated in view of the fact that these terms are not consistently or universally applied in subsequent instruments on education.¹⁶ In this context, Hodgson argues that ‘elementary’ education as referred in this article could refer to literacy, numeracy and tuition in basic knowledge and skills essential to function in society.¹⁷ Beiter argues that ‘elementary’ in the article refers to formal schooling for children of primary school age, while ‘fundamental’ education refers to primary education offered outside of the regular school to children, youth and adults that did not have the opportunity to attend or complete primary school during the usual years of schooling.¹⁸ Also, ‘elementary education’ was understood in most countries to refer to primary schooling at the time of drafting.¹⁹ In addition, subsequent use of the standard proposed in this provision for ‘elementary’ education (that is, that elementary education ought to be free and compulsory) is a clear

¹⁵ Universal Declaration, article 26(1).

¹⁶The term ‘elementary’ education is used in the 1959 Declaration of the Rights of the Child, Principle 7.

¹⁷Hodgson (n 3 above) 40.

¹⁸Beiter (n 3 above) 90 & 96.

¹⁹UNESCO ‘World education report: the right to education: towards education for all throughout life’ (2000) 41. In fact, a review of the drafting history of the article indicates that these terms were used to refer to the minimum level of education (a basic content) with the distinction being mainly on whether the reference was to children or adults. Elementary education was thus understood to refer to the basic education of children while fundamental education referred to the basic education of adults that had missed the education during their childhood. See UNESCO World Report (above) 97 – 99.

indication that the provision was the predecessor of 'free and compulsory primary education'.²⁰

The UDHR did not recognize disability as a basis for discrimination.²¹ Arguably however, this omission was more reflective of the prevailing ignorance and attitude towards disability at the time which gave legitimacy to differential treatment.²² It is significant to note that while article 26 did not subject the right to education to progressive realization and make this dependent upon the availability of resources, article 22 (which makes a general introduction to state obligations in respect of the socioeconomic rights under the Universal Declaration) subjects the realization thereof to 'effort', 'co-operation' and the organization and resources of each state.²³

The foregoing provision means that socioeconomic rights under the UDHR are indeed subject to progressive realization. The notion of an 'immediate' duty to implement any aspect of the obligations on the right to education had therefore not arisen as at this point. There is however an indication that priority has to be accorded to 'elementary' education.²⁴ Thus, while elementary education may be progressively

²⁰UNESCO Report (n 19 above) 38. The report argues that elementary education' was, at the time of the adoption of the Universal Declaration, understood to refer to the first stage or level of formal education.

²¹The only reference to disability in the Universal Declaration is in the context of social security where it provided that everybody has a right to security in the event of, amongst other things, disability, at article 25.

²²At the time, the treatment of persons with disabilities in Nazi Germany was still a vivid and recent past. Though widely morally condemned, there was not a concurrent understanding of disability as a human rights issue. See S Herr, 'Rights of disabled persons' (1980) 2 12 *Columbia Human Rights Law Review*.

²³ Universal Declaration article 22.

²⁴ Beiter (n 3 above) 92.

realized, the onus is on the state to prove scarcity of resources as a reason for its non-implementation.

2.2.2 Declaration on the Rights of the Child, 1959

This Declaration provided in respect of the right to education that children are entitled to free and compulsory elementary education. It further stated that education should promote the child's culture and help the child to become a useful member of society.²⁵ The Declaration set out the best interests of the child as the guiding principle for those responsible for his or her education, and in this way further entrenched a child-oriented approach on matters affecting the child.²⁶ It followed the lead of the UDHR in prioritizing elementary education.

The Declaration provided that a child who 'is physically, mentally or socially handicapped shall be given the special treatment, education, and care required by his particular condition.'²⁷ In this way, it seems to imply that a child with disability would indeed require 'special' education. It is argued that the Declaration, and particularly Principle 7 on the right to education depicted the child as a passive recipient of rights as opposed to a bearer of rights as used in subsequent instruments.²⁸ Nevertheless, the significance of the 1959 Declaration to the

²⁵ Declaration on the Rights of the Child, 1959 Principle 7.

²⁶ Declaration on the Rights of the Child, Principle 2; P Alston 'The best interests principle: towards a reconciliation of culture and human rights' in M Freeman (ed) *Children's rights* (2004) 184. The 'interests of the child' approach had previously been discussed as a criterion in the convention on the guardianship of minors in the 1902 Hague Conference on Private International Law. See Verhellen (n 5 above) 58.

²⁷ Declaration on the Rights of the Child 1959, Principle 5.

²⁸ Beiter (n 3 above) 114; Verhellen (n 5 above) 61 argues that the Declaration regards the child as a legal subject, but without competence to exercise his or her rights independently. Hence, it dwelt more

subsequent developments of the rights of the child is clear. It is argued that in view of the exceptional unanimity at its adoption – more unanimous than the UDHR – the 1959 Declaration had more moral authority than other soft laws.²⁹

Around the time of the Declaration, organizations of persons with disabilities in some countries started formulating a philosophy of disability along the connection between the limitation experienced by the individual and the design or structure of their environment, or the attitude of the general population.³⁰ Yet such an emerging discourse notwithstanding, the UNESCO Convention against Discrimination in Education (UNESCO Convention) adopted the following year steered clear of dealing with the de facto disability-based exclusion in education.³¹

2.2.3 UNESCO Convention on Discrimination in Education, 1960

The UNESCO Convention was the first international treaty to recognize a binding right to education.³² It prohibited discrimination in education on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth. The prohibition was effective if the discrimination had the purpose or effect of nullifying or impairing equality of treatment in education, and particularly if such discrimination had the effect of excluding certain groups of

on protective rights, 'the leitmotif being the best interests of the child; the child as a separate entity in other words.'

²⁹ Verhellen (n 5 above) 60.

³⁰ See Standard Rules of Equalization of Opportunities for Persons with Disabilities, A/RES/48/96 85th Plenary Meeting 20 December 1993, Introduction.

³¹ The UNESCO Convention against Discrimination in Education (UNESCO Convention), adopted by the General Conference at its 11th Session in Paris, 14 December 1960. Membership of UNESCO is concurrent with membership of the United Nations, and is therefore near universal.

³² As above.

persons from any kind of education, or of establishing separate education systems for groups of persons with the effect that the education offered in those separate schools was of an inferior quality.³³ The grounds listed in the Convention were drawn from the UDHR with the exclusion of the 'other status' clause, which clearly indicates that the provision was intended to be exhaustive.³⁴ The exclusion of the 'other status' clause or an express reference to 'disability' as one of the grounds of discrimination was very unfortunate in view of the fact that the aforementioned practices were affecting the education of children with disabilities in similar ways to that experienced by children of other minorities at the time.³⁵

As the first international binding treaty on education, state parties to the UNESCO Convention undertook to make primary education free and compulsory, to ensure compliance by all with the obligation to attend school as prescribed by law, and to establish equal standards of education in all public education institutions.³⁶ Ideally, this would have been a basis for the equal education of children with disabilities. However, the continued discontent with the protection of the rights of people with disabilities as shown in the adoption of the 1971 and 1979 Declarations discussed below is a clear indication that the protection offered by the 1960 Convention did not extend to persons with disabilities.

³³UNESCO Convention, article 1.

³⁴ Beiter (n 3 above) 247.

³⁵At the time of the adoption of this Convention, the prevailing concerns were about the treatment of linguistic, religious and racial minorities in the Europe. The plight of persons with disabilities was still largely invisible as was that of people in occupied or colonised countries.

³⁶UNESCO Convention, article 4(a) & (b).

2.2.4 The International Covenant on Economic, Social and Cultural Rights, 1966

The International Covenant on Economic, Social and Cultural Rights (ICESCR) codified the socioeconomic rights set out in the UDHR.³⁷ It set out both the general obligations of states with respect to socioeconomic rights, and the content of specific rights.³⁸ The Covenant also set out the content of the right to education in more detail than any of the preceding instruments, including differentiating the obligations corresponding to each of the levels of education.³⁹

Articles 13 and 14 thereof are not only essential in building on the preceding provisions on education, they became a crucial reference point in the formulation of state obligations for education in subsequent instruments and jurisprudence.⁴⁰ In addition, as the principal international instrument on socio-economic rights, the ICESCR lays down the fundamental approach to the obligations of states in respect of socioeconomic rights. It is therefore imperative for this study to establish the standards set out in this regard, as well as the provisions on primary education, and the application of these standards to children with disabilities.

³⁷UNESCO Report (n 19 above) 21. The Covenant is widely signed and ratified, with 160 state parties to date. Significant to this work, Kenya has ratified the Covenant, while South Africa has not.

³⁸ICESCR articles 13 & 14.

³⁹Ssenyonjo (n 7 above) 366 argues that article 13 is the most comprehensive article on the right to education in international law.

⁴⁰Ssenyonjo (n 7 above) 366 & 370. Article 13 added to the UDHR the need to ensure that education is directed to the development of the human personality and the sense of its dignity, so as to enable full and equal participation of all persons in society and to promote understanding amongst all nations. Subsequently, the ICESCR Committee recognized that the article had been expounded even further through other international instruments such as the CRC and non-binding instruments of the UN. See Committee on ESCR *General Comment No 13: the right to education (article 13 of the Covenant)* (1999) E/C.12/1999/10 para 5.

Regarding the nature of obligations for socio-economic rights in general, the ICESCR provides that state parties shall,

'take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the (sic) Covenant by all appropriate means, including particularly the adoption of legislative measures.'⁴¹

In General Comment No. 3, the Committee on ESCR elaborated this provision and stated that it embodies both obligations of conduct and of result. The Committee noted that whereas socioeconomic rights would generally be subject to progressive realization, some aspects thereof, particularly the right to non-discrimination in the implementation of rights were an immediate responsibility.⁴² The Committee further defined the meaning of 'progression' as not being a license for states to take no action whatsoever, but rather an obligation to take deliberate, concrete and targeted steps towards the realization of the goal.⁴³

The CESCR Committee was inclined to regard primary education as a self-executing and immediately enforceable right in member states, with the beneficiaries entitled to

⁴¹ICESCR Article 2(1)

⁴²Committee on ESCR, *General Comment No 3: The nature of State Parties obligations (article 2(1) – para (1)*, 14/12/1990 para 1.

⁴³ As above para 2.

an effective remedy.⁴⁴ In addition, article 13 of the ICESCR applies imperative language, i.e. primary *shall be* compulsory and free, thereby implying immediate rather than progressive obligations. However, article 14 allows progressive realization of a period stipulated within two years of the ratification of the Covenant. It is argued that the net effect of the two provisions is to make the duty to avail free and compulsory primary education subject to progressive realization in a limited sense, but more strongly than other legal obligations under article 13(2).⁴⁵ The debate on the progressive or immediate realization of free and compulsory education has often overly dwelt on the ‘free’ component, to the exclusion of the compulsory or other aspects of primary education such as quality. The parameters of ‘free’ education have been highlighted and are discussed a little further in chapter 3 of this work, it is apposite to indicate at this point that the position of the Committee on ESCR on the extent of the duty to immediately ensure free primary education is inconsistent.⁴⁶

⁴⁴Committee on Human Rights General Comment No 3 (n 42 above) para 5. This statement merely implied (as opposed to expressly stating) that the state needed to fulfil the right to free and compulsory primary education immediately. Arguably though, it created the foundation for the CESCR’s subsequent interpretation of the obligation to ‘provide’ primary education as an immediate duty of all State Parties in Committee on ESCR *General Comment No 13* (n 40 above) para 51 .

⁴⁵Beiter (n 1 above) 98. Though the Committee on ESCR in General Comment No. 13 (as above) para 51 refers to an immediate duty, it concurrently regards article 13(2) as a reinforced priority. This view is more consistent with the purpose of article 14, and the CESCR’s own pronouncements in General Comment No. 11: Plans of Action for Primary Education E/C.12/1999/4 10 May 1999, para 10. However, it is also argued that article 14 underscores the immediate nature of article 13(2)(a) by requiring those states that are not yet implementing the right to do so by taking precise measures to that end. See F Coomans, ‘In search of the core content of the right to education’ in A Chapman & S Russell (eds) *Core obligations: building a framework for economic, social and cultural rights* (2002) 236.

⁴⁶For instance, in General Comment No 11 (n 45 above) para 7 (discussed in part 2.4 below), the CESCR considered indirect costs that are permissible in the context of primary education. Yet, in General Comment No. 13 (n 40 above) the same Committee was of the view that the primary education is irrevocably free.

Regarding the application of the rights under the ICESCR to children with disabilities, the ICESCR does not expressly prohibit discrimination on the ground of disability. However, article 2(2) thereof has subsequently been interpreted to include disability as a ground of non-discrimination.⁴⁷ Effectively therefore, the rights to education as set out in article 13 and 14 of the ICESCR apply to all people on a basis of equality. In addition, as highlighted above, the duty to not discriminate on any ground in the implementation of the rights under the Convention is of an immediate nature.⁴⁸

2.2.5 Declarations on the Rights of Mentally Retarded Persons (1971), and on the Rights of Disabled Persons (1975)

The 1971 Declaration was adopted in the context of a growing consensus amongst non-governmental organisations that specific declarations defining the rights of persons with disabilities were necessary to complement the general human rights contained in the universal instruments.⁴⁹ The Declaration targeted a specific group of people with disabilities, but it became the basis for the subsequent one which extended the entitlements to all persons with disabilities.⁵⁰

It stated that

⁴⁷ICESCR, *General Comment No 5: Persons with disabilities*, 12/09/1994 para 5.

⁴⁸ICESCR *General Comment No 3: The nature of state parties obligations* (article 2 para 1 of the Covenant) para 1.

⁴⁹Hodgson (n 3 above) 156.

⁵⁰Declaration on the Rights of Disabled Persons (1975) Preamble paragraph 3.

'The mentally retarded person has a right to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.'⁵¹

Subsequently, the 1975 Declaration called for measures to enable persons with disabilities to be as self-reliant as possible, and specifically recognised their right to

'....education, vocational training and rehabilitationthat will enable them to develop their capabilities and skills to the maximum extent and hasten their social integration and reintegration.'⁵²

These Declarations did not have binding force. However, they constituted moral and political persuasion to secure national policy changes in the 70s and 80s.⁵³ They also greatly enhanced the visibility of persons with disabilities and their exclusion from mainstream human rights protection. Hence, soon after the 1975 Declaration, the United Nations General Assembly designated 1981 as the International Year of Disabled Persons.⁵⁴

Other than recognising the right of persons with disabilities to be availed education opportunities, these Declarations did not propose any appropriate approaches to such education, such as whether children with disabilities should be educated within the general education system or not. The definition of a person with disability under the 1975 Declaration was clearly indicative of the medical model of disability which

⁵¹ Declaration on the Rights of the Mentally Retarded (1971) para 2.

⁵² Declaration on the Rights of Disabled Persons 1975 para 6.

⁵³ Hodgson (n 3 above) 156.

⁵⁴This Proclamation was made in 1976 through UN General Assembly Resolution 31/123 of 16 December 1976.

was in use at the time in defining and responding to the challenges of disability.⁵⁵ The 1975 Declaration recognised that resource limitation was likely to interfere with the amount of effort that was devoted to initiatives geared at persons with disabilities. It appears that the main aim of the Declarations was to stress the unequivocal entitlements of persons with disabilities to human rights. As such, they did not dwell on the specificities of the rights in question.

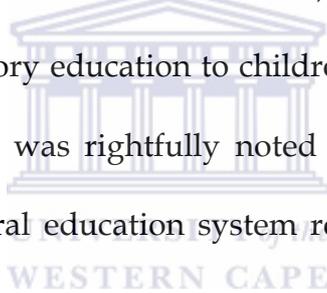
2.2.6 International Year of Disabled Persons and the World Programme of Action Concerning Disabled People, 1981

As above indicated, the International Year of Disabled Persons (IYDP) was proclaimed on the heels of the 1975 Declaration. The theme of the IYDP was full participation and equality for persons with disabilities. The advisory committee on the IYDP came up with recommendations on elimination of discriminatory practices in various spheres of the lives of people with disabilities. The year culminated in the adoption of the World Programme of Action Concerning Disabled Persons (WPA), and the proclamation of years 1983 - 1992 as the UN Decade of Persons with Disabilities as a long-term plan to implement the World Programme of Action Concerning Disabled Persons.⁵⁶

⁵⁵Declaration of the Rights of Disabled Persons (n 50 above) para 1 stated that a disabled person means 'any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical and mental capabilities.' This view which focused on an individual's impairment was the foundation of special education.

⁵⁶UN General Assembly Resolutions 37/52 and 37/53 of 3 December 1982 respectively.

The IYDP and the WPA had a significant contribution in highlighting the plight of people with disabilities and triggering national and international responses.⁵⁷ The WPA and IYDP also pioneered the nexus between the definition of ‘handicap’ as a function of the relationship between people with disability and their environment.⁵⁸ The WPA in particular noted the disparities in the education of persons with disabilities from country to country, and the general limitation of knowledge on, and facilities for such education.⁵⁹ It proposed that education of persons with disabilities should as far as possible take place within the general education system, and that responsibility for the education of children with disabilities should be placed within the mandate of the education authorities. In addition, the WPA called for application of the regulations on compulsory education to children with disabilities on an equal basis with other children.⁶⁰ It was rightfully noted therein that the integration of disabled children in the general education system requires planning by all parties concerned.⁶¹



⁵⁷World Programme of Action Concerning Disabled Persons A/Res/37/52, Preamble paragraph 4; Standard Rules (n 30 above) Introduction. The Decade had its failings, which became part of the reason for the proclamation of similar initiatives in the regions to facilitate the achievement of the goals that had not been sufficiently achieved at the time.

⁵⁸United Nations Decade for Persons with Disabilities (A Res/39/26), World Programme of Action (n 57 above) para 21; Standard Rules (n 30 above) Introduction para 6.

⁵⁹World Programme of Action (n 57 above) para 64 - 68.

⁶⁰ As above, para 120.

⁶¹As above, para 123.

2.2.7 The Convention on the Rights of the Child, 1989

The Convention on the Rights of the Child (CRC) is the principal international treaty on the rights of the child.⁶² Three key aspects of the Convention are important to the present study. These are the fact that the Convention establishes fundamental principles for the protection of children's rights, that it establishes standards for the right to education, and finally that it makes provision for special measures for the protection of the rights of children with disabilities.

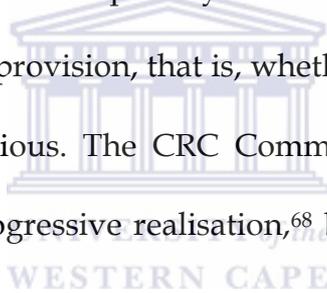
Regarding the fundamental principles, the CRC Committee established non-discrimination (article 2), best interests of the child (article 3(1)), the right to life, survival and development (article 6), and the right to participate (article 12) of the CRC as general principles of the Convention.⁶³ Through subsequent jurisprudence of the CRC Committee, other judicial and quasi judicial forums, and scholarly interpretation, these general principles have attained significant normative value in the interpretation of all the rights under the Convention. The principles, particularly the best interests of the child, are therefore widely accepted and domesticated in a

⁶²Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990. The CRC is ratified by all states except Somalia, South Sudan and the United States of America. J Doek 'The CRC 20 years: an overview of some of the major achievements and remaining challenges' (2009) 33 *Child Abuse and Neglect* 777 - 778 argues that the CRC has been critical as a trigger to push global recognition of children's rights.

⁶³CRC Committee *General Comment No 5 - general measures for the implementation of the Convention on the Rights of the Child* (2003) (articles 4, 42, and 44, para 6), CRC/GC/2003/5, para 12. These principles were not novel as approaches to children's rights, but rather served to concretize existing uses. Some of the principles, particularly the best interests of the child, had been in regular use in matters affecting the child especially in the context of family law. See Alston (n 26 above) 183 - 198 on the background to the principle of the best interests of the child.

number of national laws. By virtue of their designation as general or fundamental rights, the principles must be taken into account on any matters affecting the rights of children.⁶⁴ Their role in the interpretation of state responsibilities for the right to education for children with disabilities is discussed further in the Chapter 3 of this work.

On the right to education, the CRC built upon the provisions of the ICESCR on education.⁶⁵ Article 28 recognises the right of the child to education, with a view to achieving that right progressively.⁶⁶ The article further recognises the duty of the state to 'make primary education compulsory and available free all'.⁶⁷ The nature of obligations created under this provision, that is, whether they create an immediate or a progressive duty is contentious. The CRC Committee has argued that primary education is not subject to progressive realisation,⁶⁸ but the argument has not been



⁶⁴CRC General Comment No 5 (n 63 above) para 12.

⁶⁵Coomans (n 45 above) 224; M Verheyde *Article 28: the right to education – a commentary on the United Nations Convention on the Rights of the Child* (2006) 9 is of the view that in effect, the CRC contextualized pre-existing international education rights law from a child's perspective. S Detrick *The United Nations Convention on the Rights of the Child; a guide to the travaux preparatoires* (2006) 382 – 395 documents the submissions of various states on the draft article on the right to education. The majority of the discussions referred to article 13 as the standard on education, often warning against a provision that would weaken the standard already established under the ICESCR. Several commentators including Ssenyonjo (n 7 above) 371; Beiter (n 3 above) 116 – 117; Verheyde (above) 10; and M Verheyde 'The Convention on the Rights of the Child as a tool for the promotion of education rights,' in PV Auweraert et al, (eds) *Social, economic and cultural rights; an appraisal of current European and international developments* (2002) 78, agree that article 28 is framed in weaker terms than article 13 of the ICESCR, particularly to the extent that it reintroduces a general progressive approach to the realization of the right. It is further argued that the weakening of the provision was based on a consensus amongst states of the financial burden of immediate free primary education.

⁶⁶ CRC article 28(1).

⁶⁷ As above.

⁶⁸CRC Committee *General Comment No 9 (2006): The right of children with disabilities* CRC/C/GC/9 27 February 2007, para 62.

consistent⁶⁹ and does not therefore adequately support an alternative interpretation of the express provision under the Convention.

On the rights of children with disabilities, the Convention was the first internationally binding instrument to have a disability specific provision (article 23), in addition to an express prohibition of discrimination on the ground of disability.⁷⁰ In this way, the CRC is one of the most comprehensive binding international instruments to address the issue of disability.⁷¹ The essence of the express prohibition of discrimination on the basis of disabilities in respect of all the rights under the Convention is that the rights apply to all children on a basis of equality.⁷² The Convention provides that a child with disability should enjoy a full and decent life in

⁶⁹In the initial Guidelines for State Reports, the CRC Committee required states to indicate in their periodic reports the measures taken 'to achieve this right progressively on the basis of equal opportunities.' The same Guidelines however require the report to indicate the measures adopted to 'make primary education compulsory and available free for all, particularly children.....' See CRC General Guidelines for Periodic Reports (1996) 11/20/1996 CRC/C/58 2 para 105 and 107 respectively. In subsequent versions of the reporting guidelines however, the reference to progressive realization was removed. See CRC Committee Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States Parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child (2010) CRC/C/58/Rev.2 para 38.

⁷⁰ CRC article 23 and 2 respectively.

⁷¹U Kil Kelly 'Disability and children: the UN Convention on the Rights of the Child (CRC)' in G Quinn & T Degener, *Human rights and disability: the current use and future potential of United Nations instruments in the context of disability* (2002) 192 acknowledges this contribution but criticizes the internal limitations on the provision. Notably, the CRC was negotiated and adopted during the UN Decade of Persons with Disabilities (1983 - 1992). It is not surprising therefore that it accorded a relatively significant amount of attention to the rights of children with disabilities. But the approach of the CRC to the rights of children with disabilities has also been criticized for (inadvertently) advancing a theory of disempowerment children with disabilities. See B Byrne, 'Minding the gap? Children with disabilities and the United Nations Convention on the Rights of Persons with Disabilities' M Freeman *Law and childhood studies* (2012) in this regard.

⁷²In article 23(1) the CRC refers to children with physical and mental disability. However, in General Comment No 9, the CRC Committee adopted the definition of disability in the CRPD, thereby extending the protection under article 23 to all children with disabilities.

conditions that ensure dignity, promote self-reliance and facilitate their active participation in the community.⁷³ It calls for extension of special assistance to parents or guardians of children with disabilities subject to resource availability and an application procedure, to facilitate access to among other things, education.⁷⁴ But, article 23 does not give an absolute right to assistance.⁷⁵ The article stops short of specifying how the right is to be secured.⁷⁶ The article further calls for international cooperation including information concerning methods of education, particularly for developing countries.⁷⁷

The net effect of article 23(2) and 23(3) is to make the education of children with disabilities subject to availability of resources and progressive realisation, hence contradicting the free and compulsory right as read together with the non-discrimination provisions.⁷⁸ The CRC is also not conclusive on whether the education of children with disabilities is best provided in the mainstream school or in special schools.⁷⁹ But, the CRC reporting guidelines on article 23 require state parties to report on the consideration given to the inclusion of children with disabilities together with children without disabilities in institutions, services and facilities,

⁷³CRC Article 23(2) ; The language of the provision, particularly the terms 'child should enjoy' has been criticized for failing to recognize or seek to guarantee the child with disabilities the conditions necessary for a full decent life as a matter of right. See Kilkelly (n 71 above) 192.

⁷⁴CRC Article 23(2) (3).

⁷⁵Kilkelly (n above 71) 192.

⁷⁶Kilkelly (n 71 above) 192.

⁷⁷ CRC article 23(4).

⁷⁸Beiter (n 3 above) 133.

⁷⁹G Van Bueren *The international law on the rights of the child* (1995) 359 argues that the question of what would serve the best interests of the child with disabilities between education in the mainstream and education in special schools was raised but not considered in detail during the drafting of article 23.

including within the education system.⁸⁰ This implies a preference for integration of learners with disabilities into the mainstream education system. The position of the CRC Committee however seems to have subsequently changed in favour of a flexibility of choice in the approaches to inclusion as seen in General Comment No 9 discussed further below.

Though generally acclaimed as a progressive provision on the rights of children with disabilities, article 23 is also criticised for various reasons, one of which is the apparent discrimination against children with disabilities in education highlighted in the preceding paragraph. The other criticisms include its failure to specify the kind of 'special care' envisaged under the article, and its failure to recognise a duty bearer in respect of the rights of children with disabilities to enjoy a full and decent life.⁸¹ A more profound criticism however is made in relation to the language of article 23. It is argued that both the article's and the General Comment No 9's⁸² elaboration thereon is

'heavily grounded in welfare and medicalized approach to disability with emphasis on 'special care', 'treatment', and 'rehabilitation', suggesting that there remains a tendency to regard all children with disabilities as necessitating predominantly protective measures rather than as active holders of rights more generally.'⁸³

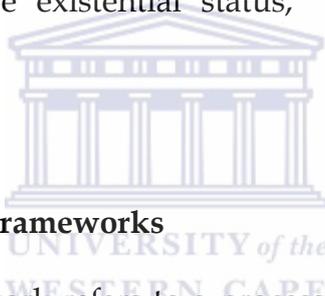
⁸⁰CRC Committee (n 69 above) para 92.

⁸¹Kilkelly (n 71 above) 192.

⁸² CRC *General Comment No 9: the rights of children with disabilities* (2006) CRC/C/GC/9.

⁸³Byrne (n 71 above) 424.

This view on article 23 is apt. Indeed the language of the article is highly reflective of the level of knowledge regarding disability at the time of its drafting. The General Comment however is for the most part aligned to the CRPD.⁸⁴ It would be expected therefore that the philosophical underpinnings thereof (and by extension, the interpretation of article 23) would be grounded in the social model of disability. However, the remnants of the medical model in the language of the General Comment such as references to the ‘stress and difficulties’ that families of children with disabilities have to bear,⁸⁵ inevitably invoke the perception of disability as a burden and hence a negative existential status, which gives credence to the foregoing criticism.⁸⁶



2.3 The Education for All Frameworks

The Education for All Framework refers to a process which began with the Jomtien Conference on Education for All (the conference is discussed below). That conference pioneered a series of events including a mid-decade Meeting of the International Consultative Forum on Education for All (EFA) held in Amman, Jordan in 1996,⁸⁷ and ultimately the World Education Forum held in Dakar-Senegal in 2000 during which a revised plan of action titled the ‘Education for All: Meeting our Collective

⁸⁴ General Comment No 9 (n 82 above) para 7.

⁸⁵As above para 27.

⁸⁶Byrne (n 71 above) 425.

⁸⁷This meeting adopted a Communiqué titled “Education for All: Achieving the Goal: The Amman Affirmation”.

Commitments: The Dakar Framework for Action⁸⁸ was adopted. In addition to the Declarations emanating from these meetings, the EFA framework provided a crucial forum for the assessment of the global status of basic education through the reports that were required from states.⁸⁹ Effectively, the EFA frameworks marked a shift in global attention on the right to education particularly basic education, a reflection on progress made in terms of the existing treaty obligations, and evaluation of the way forward. As evident in the subsequent part, the 90s decade witnessed the most vibrant global activity in relation to the right to education, most of which was tied to the EFA framework.

2.3.1 The Jomtien Conference

In 1990, a World Conference was held in Jomtien, Thailand against the backdrop of continuing exclusion of a significant proportion of both child and adult populations from education, the UDHR's proclamation of a right to education for everyone

⁸⁸The Dakar Framework had one collective Declaration, and separate regional Frameworks for Action. The EFA process is criticized for having detracted from the human rights language and hence human rights approach to education that clearly establishes the duty bearers for education, and hence creates a basis for an argument of any violation. The EFA failed to irrevocably provide that primary education ought to be free of charge. The use of 'basic' education in particular as opposed to 'primary' education is said to have confused statistical and conceptual categories. See K Tomasevski *Removing obstacles in the way of the right to education* (2001) 10; Beiter (n 3 above) 328. The foregoing authors further attribute the failure of the achievement of the EFAs to the non-human rights nomenclature thereof.

⁸⁹ Beiter (n 3 above) 326.

notwithstanding.⁹⁰ The conference adopted a Declaration on Education for All and a Framework for Action to Meet Basic Learning Needs. This Declaration reiterated the right of every person to 'benefit from educational opportunities designed to meet their basic learning needs'.⁹¹ The Declaration identified the need to review the meaning and scope of basic education to embrace an expanded vision that entails, amongst other things, broader resource levels and institutional structures.⁹² The expanded vision would also encompass the universalisation of access and promotion of equity which would entail expansion of measures and equal opportunity for all children to achieve and maintain an acceptable level of learning⁹³

In view of the existing educational disparities, the Declaration noted the need for special attention to be paid to the needs of students with disabilities. It called for action to be taken to provide equal access to education to every category of 'disabled persons as an integral part of the education system.'⁹⁴ It further called for

⁹⁰World Declaration and Framework for Action, preamble, para 1; Beiter (n 3 above) 323. The conference was co-sponsored by UNDP, UNICEF, UNESCO and UNFPA which are key role players in the field of education globally. The majority of those who are excluded from education were women and girls, a fact that explains with the Declarations emphasis on the application of the standards and efforts proclaimed therein to this group. BD Mezmur & J Sloth-Nielsen 'Education for Africa: exploring the interpretation of "free" and "compulsory" primary education in international law' (Unpublished paper on file with the author) 3 indicate that the commitments under the EFA framework were endorsed by more than 180 countries.

⁹¹World Declaration (n 90 above) article I (1). It is argued that the broad application of education in this Declaration, particularly the reference to access to a range of educational opportunities as opposed to the keen focus on primary education in the UDHR was in recognition of the changing nature of education and the development of more opportunities to learn and gain skills outside schools or institutions. See OS Jovic, 'The right of a child to education in universal and regional documents in Serbian legislation' (2008) *International Survey of Family Law* 340.

⁹² World Declaration (n 90 above) article II.

⁹³ As above Article II (2) & article 3.

⁹⁴ As above, article 3(4) & (5).

international cooperation to finance priority education areas in developing countries. These priorities included programmes designed to meet the basic learning needs of disadvantaged groups, such as persons with disabilities.⁹⁵

2.3.2 Dakar Declaration and Framework for Action

The Dakar Declaration and Framework for Action made a collective commitment to ensure that the Education for All goals are reached and sustained. One of the goals of the collective commitment was the expansion of access to and completion of free and compulsory quality primary schooling for all children by 2015.⁹⁶ The Framework also provided for the need to ensure that no child was denied an opportunity to complete a good quality education because such education was unaffordable.⁹⁷

The African regional framework prioritised improving access, particularly mobilising resources to strengthen basic education and to pay special attention to the rights of vulnerable groups of children such as those with disabilities.⁹⁸ The Framework called on African governments to commit such an amount of resources as would have the potential to make a significant impact on quantity and quality of education.⁹⁹ The Dakar Framework did not devote much attention to the education of children with disabilities as a specific category save for the general call on states to pay attention to

⁹⁵ Framework for Action (n 90 above) para 18(d).

⁹⁶ Dakar Declaration and Framework for Action (2000), para 7.

⁹⁷ As above, para 32.

⁹⁸ As above, para 3.1.

⁹⁹ Dakar Framework for Sub-Saharan Africa, para 6.1.

the needs of vulnerable groups including children with disabilities. The Framework rather focused on basic education in general and the targets in that regard.

The three documents discussed in subsequent part, that is, the Standard Rules, the Salamanca Statement and Framework for Action, and the World Fit for Children, are not directly linked to the EFA framework. They however form part of the broader education for all agenda that sought the expansion of access to education to all, including persons with disabilities and children.

2.3.3 Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 1993

Towards the end of the UN decade on persons with disabilities discussed above (1981 - 1992), the idea of an international specialised treaty on the rights of persons with disabilities was mooted, but failed to gather sufficient support in the General Assembly. States were rather more supportive of an international instrument of a different kind. An ad hoc working group funded by voluntary contributions was thus established to elaborate standards on the equalization of opportunities for children, youth and adults with disabilities.¹⁰⁰ The resulting document was the Standard Rules on Equalization of Opportunities for Persons with Disabilities which summarised the message of the WPA.¹⁰¹ These Rules, though not binding, implied a

¹⁰⁰The formation of the Ad Hoc Working Group was authorized through Resolution 1990/26 of 24 May 1990 of the Economic and Social Council.

¹⁰¹A/RES/48/96 85 Plenary meeting 20 December 1993.

strong moral and political commitment of states to take action for the equalization of opportunities for persons with disabilities.¹⁰²

The Standard Rules identified education as one of the target areas for equal participation. It provided in this regard that states should recognise the principle of equal primary educational opportunities for children with disabilities.¹⁰³ The Rules called for the education of persons with disabilities to be an integral part of the education system and for persons with disabilities to be educated in integrated settings.¹⁰⁴ To facilitate the education in the mainstream settings, it was presupposed that interpretation, accessibility and other appropriate support services designed to meet the needs of people with disabilities would be provided. The Rules further proposed that in order to accommodate the needs of learners with disabilities in the mainstream classroom, states would need to have clear and accepted policies in that regard, allow for curriculum flexibility, addition and adaptation, and provide quality materials, as well as ongoing teacher training and support.¹⁰⁵

Through these provisions, the Rules became the entry point of the call for education in integrated settings at the international level. In general, the Rules main point of focus in the education of children with disabilities was their integration into the

¹⁰²Standard Rules (n 30 above) para 15; Beiter (n 3 above) 134.

¹⁰³Standard Rules (n 30 above) Rule 6.

¹⁰⁴ As above Rule 6; Hodgson (n 3 above) 160.

¹⁰⁵ Standard Rules (n 30 above) Rule 6(6).

mainstream education system as the norm.¹⁰⁶ It was however recognised that there were situations in which the education of children with disabilities was better off in special schools, such as where the mainstream schools were not adequately meeting the needs of these students.¹⁰⁷ Even in such cases however, the Rules considered the role of education in special schools as preparatory for the mainstream education system.¹⁰⁸ The Rules further required that the quality of the education provided in special schools should reflect the same standard and ambition as the general education system, and be allocated at least a similar amount of resources.¹⁰⁹

The Standard Rules established some key issues that have had significant ramifications on the understanding of the right to education for children with disabilities in subsequent years. First is the call for integration of learners with disabilities into the mainstream education system, and by implication, into the mainstream classroom.¹¹⁰ This was a bold affront to the pre-existing established system of education in special schools. Egalitarian and economic arguments relative to the untapped productive potential of persons with disabilities and the financial and opportunity costs of maintaining separate systems were cited in support of

¹⁰⁶ Beiter (n 3 above) 134.

¹⁰⁷ Standard Rules (n 30 above) Rule 6(9).

¹⁰⁸ Beiter (n 3 above) 136.

¹⁰⁹ Standard Rules (n 30 above), Rule 6(7).

¹¹⁰By implication because whereas the Rules did not expressly require that the learners with disabilities be educated in the same classroom as their peers, the proposed support services necessary to facilitate the integration into the mainstream class suggest that the education is not just a merger of the education (management) systems, but actual tuition in the same classroom.

integration.¹¹¹ Secondly, the Rules called for a common authority to manage the education both for the mainstream and education of children with disabilities. This effectively brought the education of children with disabilities into the purview of the right to education as opposed to being consigned to the peripheries of social welfare.

Thirdly, the Rules correctly conceded that whereas integration was the ideal position, there were circumstances in which education in special schools was still a better option in the interest of a good quality of education for the children.¹¹² In addition, the Rules noted that there were certain groups of persons with disabilities, particularly those with sensory disabilities whose needs necessitated their education in special schools, special classes and units in mainstream schools. The latter view was particularly important in view of the development of communication and life skills amongst deaf and blind learners. But it also suggests that the integration contemplated in Rule 6 was targeted at learners with physical and intellectual impairments to the exclusion of those with sensory impairments. As will be seen in Chapter 4 of this work, these issues were central to the subsequent discussion regarding the place of special education in the current article 24 of the CRPD.

The Standard Rules also introduced the use of the term ‘persons with disabilities’ as opposed to disabled persons. This shift was justified on the basis that the use of ‘disabled persons’ had the potential to imply that ‘the ability of the individual to

¹¹¹ Beiter (n 3 above) 135.

¹¹² As above 136.

function as a person had been disabled.’¹¹³ This change of terms was carried over into the Committee on ESCR’s General Comment on the rights of persons with disabilities discussed further below, and subsequently into the CRPD.

2.3.4 The Salamanca Statement and Plan of Action on Special Needs Education, 1994

The Statement was adopted at the World Conference on Special Needs Education in 1994.¹¹⁴ The Statement reiterated the fundamental right of everyone to education, and recognised the diversity of characteristics, interests, abilities and learning needs amongst children and hence the need for education systems to be designed and educational programmes implemented to take into account these diversities.¹¹⁵ The Statement emphasised that children with special needs must have access to regular schools which accommodate them within a child-centred pedagogy capable of meeting their needs. Essentially, the Statement endorsed the integration of learners into the mainstream classroom in similar terms as the Standard Rules, as a channel for the delivery of education for all.¹¹⁶ It further endorsed the education of children with special needs in regular schools as a way of addressing discriminatory attitudes,

¹¹³CESCR General Comment No 5 (n 47 above) para 4.

¹¹⁴The Conference, held in Salamanca Spain from 7 – 10 June 1994, was attended by 92 governments and a number of international organizations. Consequently, the statement is a highly influential document and has shaped world action on special needs education in subsequent years. Coming on the heels of the Standard Rules, it built upon the standards established therein, with a more specific emphasis on the education of persons with disabilities. See Salamanca Statement and Framework for Action (1994) para 15.

¹¹⁵The Salamanca Statement (n 114 above) para 2. Whereas the term ‘Special Needs’ is broader than disability, its use in the Salamanca Statement refers to disability. See Salamanca Statement (n 114 above) para 3.

¹¹⁶Salamanca Statement (n 114 above) para 19.

achieving universal education due to expansion of access, and improving the cost-effectiveness of the entire education system.¹¹⁷

Though the Salamanca Statement referred to the adoption of policy and laws on inclusive education, this was interpreted to mean 'enrolling all children in regular schools, unless there are compelling reasons for doing otherwise.'¹¹⁸ In the accompanying Framework for Action, the Statement reiterated its guiding principle to be that 'schools should accommodate all children regardless of their physical, intellectual, social, emotional, linguistic or other conditions.'¹¹⁹ The Framework therefore placed a burden on the schools to adapt to the needs of all learners.

The Framework for Action continued the emphasis on the integration of learners into the mainstream schools.¹²⁰ It stated that 'the fundamental principle of the inclusive school is that all children should learn together, whenever possible, regardless of any difficulties or differences they may have.'¹²¹ This apparent equating of the integration of learners with disabilities into the mainstream classroom as inclusive education has contributed to the present day confusion around integration and inclusion. In addition, the Framework provided that education policies at all levels should

¹¹⁷Salamanca statement (n 114 above) para 2. It is argued that the Statement regarded the existence of a special education mechanism as symptomatic of the failures of the general education system. See Centre for Educational Research and Innovation, *Inclusive education at work: students with disabilities in mainstream schools* OECD (1999) 19.

¹¹⁸ Salamanca Statement (n 114 above) para 3.

¹¹⁹ As above.

¹²⁰ As above, para 16.

¹²¹ As above para 7.

stipulate that a child with a disability should attend the neighbourhood school that they would have attended if they did not have a disability.¹²² Inherent in this latter provision is the issue of choice. A child without disability is often in a position to make choices between which schools to attend in the neighbourhood. Similar choices may not be available to the child with disability if the neighbouring schools are not adapted to the education of all learners.

According to the Salamanca Framework for Action, children with disabilities should receive whatever support they need to ensure their effective education within the general education system. The exceptional cases when this is not possible would include cases where the regular classroom is incapable of meeting a child's educational or social needs necessary for their welfare or where the welfare of other children in the classroom is affected.¹²³ The Framework however envisaged (as an exception) the application of the case-by-case criteria in determination of appropriate placements for children with sensory disabilities.¹²⁴

2.3.5 The World Fit for Children Framework

In 2002, the UN General Assembly adopted a resolution on 'A World Fit for Children' as a follow up to the initiatives started at the World Summit for Children in 1990.¹²⁵ One of the principles and objectives of the document was to educate every child, and particularly to ensure that all children have access to and complete

¹²² Salamanca Statement (n 114 above) para 18.

¹²³ As above, para 8.

¹²⁴ As above, para 18 & 21.

¹²⁵ UN General Assembly, *A world fit for children*, Resolution S-27/2, 10 May 2002.

primary education that is free and compulsory and of good quality as a cornerstone for an inclusive basic education. The Framework recognised the need for elimination of disparities including those resulting from discrimination on the ground of disability.¹²⁶ While not directly targeting the education of children with disabilities, the Plan of Action for a World Fit for Children called for the promotion of innovative strategies to identify, and help children with disabilities to enrol and attend school.¹²⁷ It also called for accessible basic education programmes that are responsive to the needs of children with disabilities.¹²⁸

2.4 Relevant General Comments

General Comments are not binding on states. They do however have persuasive jurisprudential value. In addition they consolidate the vast experiences drawn from a range of state practices as represented in the various state reports and research works gathered within the mandate of the issuing body.¹²⁹ The General Comments of the CRC and ESCR Committees are particularly important in capturing the prevailing views on the rights under the CRC and the ICESCR. A number of General Comments relative to state obligations for socioeconomic rights (the right to education in particular) and the rights of children with disabilities have thus far been adopted, and are considered below.

¹²⁶ UN General Assembly (n 125 above) para 25.

¹²⁷ As above para 40(2).

¹²⁸ As above para 40(4).

¹²⁹HJ Steiner & P Alston *International human rights in context: law politics and morals* (2000) 732; E Reidel 'Economic, social and cultural rights' in C Krause & M Scheinin (eds) *International protection of human rights: a textbook* (2009) 144.

2.4.1 General Comments of the CESC

General Comments of the ICESCR are instructive for interpretation of state obligations for socioeconomic rights. The CESC has issued several General Comments, some of which directly address the themes of this research; children, disability or education.¹³⁰ Other General Comments however, while not addressing any of these subjects directly, make some significant mention on the themes. For instance, special attention on children with disabilities is sanctioned in General Comment No 15 of the ICESCR.¹³¹ In this section, the main General Comments of the ICESCR relative to disability and education are discussed.

2.4.1.1 General Comments 5: The rights of persons with disabilities, 1994

General Comment No. 5¹³² was a response to a request by the General Assembly and the Commission on Human Rights to monitor the compliance of State Parties with their obligations to ensure the full enjoyment of socio-economic rights by persons with disabilities.¹³³ It was part of the multiple efforts underway at the international level at the time to address issues of disability. It drew from and built upon the standards established in the Standard Rules and treaties adopted in the period before its adoption.¹³⁴ Its main purpose was to expand the protection and the rights under the ICESCR to persons with disabilities. Hence it was recognised therein that

¹³⁰The General Comments of the CESC are available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed 19 December 2012).

¹³¹CESCR *General Comment No 15: the right to water (articles 11 and 12 of the Covenant)* E/C.12/2002/11, (2002), para 16.

¹³²CESCR General Comment No 5 (n 47 above).

¹³³World Program of Action (n 57 above) para 165; UN Commission on Human Rights Resolution 1992/48, para.4 and 1993/29 para 7.

¹³⁴CESCR General Comment No 5 (n 47 above) para 8.

whereas the ICESCR did not expressly mention 'disability' as a ground of discrimination, the 'other status' phrase in article 2 of the Covenant would be taken as including disability.¹³⁵

General Comment No 5 endorsed the progressive realization approach in line with the general approach to the rights under the ICESCR. It however stipulated in addition to this that passive non-discrimination would not suffice to reduce structural disadvantages. Hence in addition to positive action to address structural exclusion, affirmative action was also necessary to facilitate full participation and equality within the society.¹³⁶

General Comment No 5 defined discrimination for the first time to include the denial of reasonable accommodation which has the effect of impairing or nullifying the enjoyment of the rights under the Convention.¹³⁷ The General Comment particularly recognised education as one of the areas in which persons with disabilities had most often been excluded.¹³⁸ While endorsing the integration of learners with disabilities into the general education system, the Committee reiterated the belief that the

¹³⁵As above, para 5.

¹³⁶As above, para 9.

¹³⁷ICESCR General Comment No 5 (n 47 above) para 15. This redefinition of discrimination was important because it added a positive dimension to a negative duty, and thereby established nexus between the obligation to protect from discrimination and the positive action necessary to guarantee that right. The recognition of the denial of reasonable accommodation as a form of discrimination paved the way for its inclusion in a binding instrument in the CRPD.

¹³⁸ICESCR General Comment No 5 (n 47 above) para 15.

education of children with disabilities is best done in the regular schools with the necessary support services and equipment being provided.¹³⁹

The General Comment was evidently focused on the re-affirmation of the applicability of the rights under the Convention to persons with disabilities, to provide guidance on appropriate approaches to these rights in the context of macroeconomic challenges, and to a lesser extent, to point out the necessary adaptations in the context of selected rights under the Convention.

2.4.1.2 General Comment No. 11: Plans for action on primary education, 1999

This General Comment¹⁴⁰ mainly served to remind state parties, particularly those in whom free and compulsory education had not yet been achieved, of the responsibility in terms of article 14 of the ICESCR to develop and submit plans of action for primary education in their countries. The CESCR acknowledged the multi-classification of the right to education into both civil-political and socioeconomic category of rights, and further noted that whereas aspects of the right itself were subject to progressive realization in view of the demands on resources, the duty to provide an action plan was an immediate one that needed to be adhered to.¹⁴¹

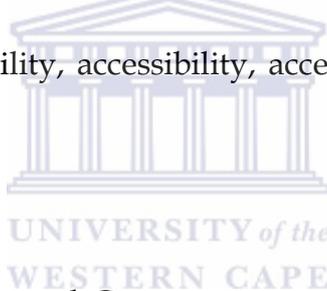
¹³⁹ As above para 35.

¹⁴⁰ CESCR General Comment No 11 (n 45 above).

¹⁴¹ As above para 8. See Chapter 3 of this work for a discussion on the classification of the right to education and the ramifications of such classification.

2.4.1.3 General Comment No. 13: The Right to Education, 1999

Soon after General Comment No. 11¹⁴², a general comment on the normative content of the right to education was adopted.¹⁴³ As an elaboration of the content of article 13 of the ICESCR, General Comment 13 addressed a number of issues that are fundamental to subsequent interpretation of the rights and duties under the right to education. For instance, the General Comment suggested a hierarchy in the aims of education by stating that the fundamental aim of education is ‘the full development of the human personality’ despite the existence of other aims of education under article 13 of the ICESCR.¹⁴⁴ Secondly, the General Comment adopted the essential-features-approach to the evaluation of measures taken towards the realization of the right to education, i.e. availability, accessibility, acceptability, and adaptability (the 4As) of education.¹⁴⁵



On primary education, the General Comment restated the applicability of the 4As thereto, stating that the state has a duty to respect, protect and fulfil each of the ‘essential features’ of education.¹⁴⁶ The General Comment endorsed UNESCO’s stipulation that primary education is the most important component of basic education.¹⁴⁷ The General Comment also reiterated the prohibition of discrimination

¹⁴²In the same year as CESCR General Comment No 11 (n 45 above).

¹⁴³ESCR Committee General Comment No 13 (n 40 above).

¹⁴⁴ As above para 4.

¹⁴⁵ As above para 6. The 4A Scheme is discussed in more detail in Chapter 3 of this thesis.

¹⁴⁶ As above para 50.

¹⁴⁷ As above, para 10.

enshrined in article 2(2) of the Covenant and emphasised the non-applicability of progressive realisation to this aspect of the right to education provision.¹⁴⁸

The CESCR recognised the differentiated obligations in respect of the different levels of education.¹⁴⁹ It argued that primary education should be prioritised in line with article 14, and that the duty to provide primary education is an immediate one for all state parties.¹⁵⁰ This interpretation was the first indication of the non-applicability of progressive realization to the primary level of education. Significantly also, the General Comment established primary education as part of the minimum core duty of states regarding the right to basic education.¹⁵¹ It established the failure of a state party to provide primary education compulsorily and available free to all as a matter of priority to be a violation of article 13 of the Covenant.¹⁵²

2.4.2 General Comments of the Committee on the Rights of the Child

As of August 2013, the CRC Committee has adopted 17 General Comments on various aspects of children's rights.¹⁵³ Some of these General Comments have a bearing on children's education. Two of the Committee's General Comments are particularly relevant to the education of children with disabilities. These are General Comments on the aims of education, and on the rights of children with disabilities.

¹⁴⁸ As above, para 31.

¹⁴⁹ As above paras 48 & 51.

¹⁵⁰ As above, para 51.

¹⁵¹ As above, para 57.

¹⁵² Coomans (n 45 above) 236.

¹⁵³ These General Comments are available at <http://www2.ohchr.org/english/bodies/crc/comments.htm> (accessed 19 August 2013).

2.4.2.1 General Comment No. 1: The aims of education, 2001

As the first General Comment of the CRC Committee, General Comment No 1 elaborates on the aims of education set out under article 29 of the CRC.¹⁵⁴ The General Comment helped to highlight the relevance of articles 28 and 29 of the CRC to children with disabilities.¹⁵⁵ It underscored the fact that the aims of education address the content of the education, and that the educational process (including the educational curriculum, pedagogical methods and the environment in which education takes place) ought to reinforce all the fundamental values of the child.¹⁵⁶ This latter provision is particularly important in the determination of the appropriate environments for the education of children with disabilities, that is, whether in a special school or in a regular school. The stipulation that article 29 (1) essentially underlines the individual and subjective right to a specific education buttresses the individuality of education, and hence the burden upon the state to ensure that education is tailored towards the needs of the child.

2.4.2.2 General Comment No. 9: The rights of children with disabilities, 2006

In 1997, the CRC Committee held a day of general discussion on the rights of children with disabilities, one of the recommendations of which was the adoption of a General Comment on the rights of children with disabilities.¹⁵⁷ The General Comment would provide guidance and assistance to state parties in their efforts to

¹⁵⁴CRC Committee *General Comment No 1 (2001): article 29(1) - the aims of education* CRC/GC/2001/1, 17 April 2001.

¹⁵⁵Kilkelly (n 71 above) 199.

¹⁵⁶ CRC General Comment No 1 (n 154 above) para 8.

¹⁵⁷ CRC Recommendations on the Day of General Discussion 1997, CRC/C/69, para 310 – 339.

implement the rights of children with disabilities under the CRC in a comprehensive manner.¹⁵⁸ The process of the development of the General Comment did not take off immediately, but rather coincided with the period of the drafting of CRPD. Consequently, General Comment No 9 reflects to a large extent the prevailing views of the rights of persons with disabilities espoused during the negotiations and as enshrined in the CRPD.¹⁵⁹

The General Comment paid keen attention to the right to education even in the context of the more general obligations of the state for the rights of children with disabilities. It emphasised the duty to prioritise the rights of children in general in the budget, and an itemisation of the budget meant for children with disabilities in particular, especially in the area of education, and the provision of special assistance necessary to facilitate the exercise of other rights including education.¹⁶⁰ The General Comment reiterated the right to quality education, and emphasised an individualised approach to the education of every child as the appropriate method for the education of children with disabilities so as to sufficiently take into account and appropriately respond to the individual needs of each of the children.¹⁶¹ The Committee reiterated the duty to provide primary education of children with disabilities free of costs.¹⁶²

¹⁵⁸ CRC General Comment No 9 (n 82 above) para 16.

¹⁵⁹ As above, para 2, 7.

¹⁶⁰ As above, para 20.

¹⁶¹ As above, para 63.

¹⁶² As above, para 65.

Significantly, the General Comment was the first international instrument to reflect the emerging criticisms of the radical integration philosophy that had dominated the discourse around the education of children with disabilities at the peak of the UN decade on disability. The Committee interpreted inclusive education as calling for a middle-ground which though prioritising the education of all children in the same schools alongside the removal of barriers to facilitate access by all learners (i.e. integration), allows the education of children with disabilities in special schools in certain circumstances.¹⁶³ The Comment captured a growing sentiment based on research and experiences from the implementation and advocacy for inclusive education programs. It was also an indication that the voices of some of the groups representing certain categories of disabilities, particularly those of the deaf, blind and the deaf-blind had begun to weigh on the prevailing ideas. This marks a key point in the understanding of inclusive education as seen in the subsequent section on the CRPD and Chapter 4 of this work.

2.5 The UN Convention on the Rights of Persons with Disabilities

2.5.1 The drafting history

The CRPD is a product of protracted advocacy by individuals, non-governmental organisations (NGOs), organisations for persons with disabilities (DPOs), and government representatives.¹⁶⁴ Its adoption was the climax of a growing awareness

¹⁶³As above, para 66 – 67.

¹⁶⁴Quinn & Degener (n 73 above) 293 highlight some of the advocacy and consultative initiatives preceding the adoption of the Convention, including the World NGO Summit on Disability held in March 2000 in Beijing and the resulting Beijing Declaration on the Rights of People with Disabilities in the New Century. The Declaration expressed the conviction that full inclusion of people with

of the pervasive marginalization and denial of fundamental rights to persons with disabilities.¹⁶⁵ Formal negotiations and drafting of the CRPD began with the adoption of a UN General Assembly resolution establishing an Ad Hoc Committee (AHC) to draft a disability specific convention.¹⁶⁶ The AHC, which was open to all member states and observers of the UN, was charged with the responsibility of considering proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities.¹⁶⁷ Its work was to draw from preceding developments in the fields of social development, human rights and non-discrimination, and the recommendations of the Commission on Human Rights and the Commission for Social Development.¹⁶⁸

The CRPD is the first international treaty in the drafting of which the primary persons affected by its provisions, that is, persons with disabilities, were directly involved.¹⁶⁹ Civil society organizations were highly represented in the negotiation

disabilities in society required an internationally binding instrument. Subsequently in 2001, the Third Committee of the United Nations General Assembly adopted a resolution supporting the adoption of an international disability Convention.

¹⁶⁵A Lawson 'The United Nations Convention on the Rights of Persons with Disabilities: new era or false dawn?' (2007) 34 *Syracuse Journal of International Law and Commerce* 563 - 564. Byrne (n 71 above) 436 argues that in light of its significance, it was inevitable therefore, that it ignited great expectations for the realization of human rights for persons with disabilities.

¹⁶⁶General Assembly Resolution 56/168 19 Dec 2001. Third Committee of the UN General Assembly, Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, GA Res 56/119b, UN GAOR, 56th Session.

¹⁶⁷AS Kanter 'The promise of the United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 *Syracuse Journal of International Law and Commerce* 288.

¹⁶⁸Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, G.A Resolution 56/168, UN Doc.A/56/583/Add.2 (Dec 21, 2001) para 1.

¹⁶⁹AS Kanter (n 167 above) 308.

process,¹⁷⁰ with material influence upon the final text of the Convention.¹⁷¹ The high and radical participation is attributable to the history of disempowerment and paternalism towards persons with disabilities that had produced deep mistrust of holders of executive power. This backdrop accounts for the slogan 'nothing for us without us'¹⁷² which was constantly reiterated during the negotiation process. Significantly too, unlike other international covenants in which African states were hardly involved in the preparation, African states were generally well represented and actively involved in the broader process of drafting and the adoption of the CRPD.¹⁷³

Unlike the first attempts to introduce a disability specific treaty at the UN which were met with considerable hostility,¹⁷⁴ the CRPD recorded the highest number of signatories (82 countries) in the history of the UN on the day of opening.¹⁷⁵ In addition, it is argued that the process of adopting the Treaty was generally

¹⁷⁰R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 81 *Human Rights Law Review Issue 3*.

¹⁷¹Membership of the Ad Hoc Committee comprised of representatives of over 40 countries and over 400 different non-governmental organisations (NGOs) and Disabled Persons Organisations (DPOs). Kanter (n 167 above) 289. See also G Quinn 'Disability and human rights: a new field in the United Nations' in C Krause and M Scheinin *International protection of human rights: a textbook* (2009) 256.

¹⁷²Kayess & French (n 170 above) 10.

¹⁷³T Van Reenen, & H Combrinck 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 years' in (2011) 8 14 *SUR International Journal of Human Rights* 142. The foregoing authors nevertheless conclude that the enthusiastic involvement with the CRPD notwithstanding, the CRPD cannot be said to be the preferred normative framework among African states, but rather one of the possible options among others. Both Kenya and South Africa (which are discussed in subsequent chapters of this work) were represented in the negotiations.

¹⁷⁴Italy, following the lead of Sweden, unsuccessfully introduced a draft proposed treaty in 1987. This was because most of the members of the UN General Assembly felt that the existing human rights instruments seemed to guarantee persons with disabilities the same rights as other persons. See Standard Rules (n 30 above) Introduction; Quinn & Degener (n 73 above) 293.

¹⁷⁵UN Enable 'Convention on the Rights of Persons with Disabilities' available at <http://www.un.org/disabilities/default.asp?id=150> (accessed 5 May 2011).

conciliatory, each article being adopted by consensus with little dissent. Even when dissension did occur, it was usually resolved amicably and swiftly.¹⁷⁶ The foregoing implies an underlying consensus on the rights and the ideals that the CRPD stands for, as well as their role as a crucial buttress and facilitator for the rights of persons with disabilities. However, as is apparent in discussions later in this and the subsequent chapters, there were often divergent and sometimes radically irreconcilable opinions on the substance of the rights.

The years of laborious advocacy that highlighted the lacuna in the protection of the rights of persons with disabilities resulted in the recognition of a need to adopt a new specific convention on the issue. The AHC was appointed to facilitate this process. The mandate of the AHC did not require development of any new rights, but rather the adaptation of existing human rights to the particular circumstances of persons with disabilities. This fact was often reiterated in the negotiation process and permeates implementation dialogue and planning.¹⁷⁷ The regular use of the words 'on an equal basis with others' in the text of the Convention also corroborates the perceived purpose of the CRPD as not creating new rights for persons with disabilities which other nationals of the same countries do not have.¹⁷⁸ It is in fact argued that the whole leitmotif of the CRPD is to address the imbalance of rights,

¹⁷⁶Kanter (n 167 above) 308.

¹⁷⁷Kayess & French (n 170 above) 20; OM Arnardottir 'A Future of multi-dimensional disadvantage equality?' in OM Arnardottir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities; European and Scandinavian perspectives* 44.

¹⁷⁸S Trómel 'A personal perspective of the drafting history of the United Nations Convention on the Rights of Persons with Disabilities' in G Quinn and L Waddington (eds) *European year book of disability Law* (2009) 118 - 119; Arnardottir (n 177 above) 44; F Megret, 'The disabilities convention: human rights of persons with disabilities or disability rights' (2008) 30 2 *Human Rights Quarterly* 501.

and that the CRPD is firmly rooted in the principle of equality and non-discrimination.¹⁷⁹

2.5.2 Significance of the CRPD

The CRPD is not the first convention to address the rights of persons with disabilities, but it is the first potentially binding instrument specific to the rights of persons with disabilities.¹⁸⁰ In the period immediately preceding its adoption, the plight of persons with disabilities, and the perpetual denial of their rights was not the main focus of advocacy. This had already been established within the framework of the UN. The focus of advocacy at that point was rather the identification of the most appropriate way to enhance the protection of the rights. This is clear in the words of the Chair of AHC, who stated that ‘without creating for the most part new rights, the [CRPD] sets out a detailed code of implementation and spells out *how* individual rights should be put into practice.’¹⁸¹

A number of reasons were given to support the adoption of a new disability specific convention including its potential to increase the visibility of persons with disabilities in the human rights arena, and the need to provide clarity and focus by articulating precisely how general rights stipulated in the other international human rights

¹⁷⁹Arnardottir (n 177 above) 46.

¹⁸⁰H Combrinck ‘The hidden ones; children with disabilities in Africa and the right to education’ in J Sloth-Nielsen *Children’s rights in Africa: a legal perspective* (2008) 309.

¹⁸¹United Nations Information Service ‘Committee Negotiating Convention on Rights of Disabled Persons Concludes Current Session’ SOC/4680 15 August 2005 available at <http://www.unis.unvienna.org/unis/pressrels/2005/soc4680.html> (accessed 20 May 2011). A Lawson ‘The UN Draft International Convention on the Rights of Persons with Disabilities: purpose progress and potential’ paper delivered at London School of Economics, School of Law and Centre for Disability Studies, 9 March 2006 ‘emphasis mine.’

instruments would take concrete form in the context of disability.¹⁸² It was also submitted that a disability specific convention would act as a basis for compelling collection of data on persons with disabilities which would be applied to improve the position of persons with disabilities generally.¹⁸³ In addition, it was recognised that failure to expressly set out disability as a ground for non-discrimination in major international human rights treaties created a vacuum that had unsuccessfully attempted to be filled with soft law.¹⁸⁴ Also, a disability specific convention could prove to be the best possible catalyst for mainstreaming disability rights in pre-existing international instruments.¹⁸⁵

2.5.3 New rights versus adaptation of existing rights

The foregoing position notwithstanding, there is no consensus in the disability rights field on whether the final text of the CRPD did in fact create new rights. It is suggested that downplaying the degree of novelty of the CRPD may have been a strategy to manoeuvre the tense negotiations amongst states.¹⁸⁶ However, approaching the interpretation and implementation of the Convention from the same perspective has the potential to undermine the multi-layered normative reality of a

¹⁸²Quinn & Degener (n 73 above) 295.

¹⁸³Lawson (n 165) above 585.

¹⁸⁴Arnardottir (n 177 above) 45; L Alfonso de Alba 'The rights of the child in the UN Convention on the Rights of Persons with Disabilities' in C Bellamy et al *Realizing the rights of the child* (2007) 75.

¹⁸⁵Quinn & Degener (n 73 above) 295.

¹⁸⁶Degener had earlier highlighted that there was concern that states were overburdened by the abundance of existing human rights treaty obligations, making them less enthusiastic about accepting additional responsibilities under a new treaty. See T Dégéner 'International disability law - a new legal subject on the rise: The interregional experts' meeting in Hongkong, December 13 - 17 1999' (2000) 18 *Berkeley Journal of International Law* 193.

conceptually profound instrument.¹⁸⁷ It is imperative to apply an objective test of novelty to the provisions of the CRPD by identifying any new duties for states which attract a corresponding affirmative claim by persons with disabilities, if such claim was hitherto unknown in international human rights law.

In its preamble, the CRPD reiterates the continuing exclusion of persons with disabilities from participation as equal members of society and violations of their human rights in all parts of the world despite the existence of various instruments and undertakings.¹⁸⁸ The preamble also recognises that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, particularly those obligations that have already been undertaken by state parties to the CRC.¹⁸⁹ These assertions suggest that one of the purposes of the Convention is to correct the inequality in the application of existing rights.¹⁹⁰ However, the CRPD is not purely an anti-discrimination convention like the UN Convention on the Elimination of All forms of Discrimination against Women (CEDAW) or the Convention on the Elimination of Racial Discrimination (CERD) in as far as it does not merely affirm the application of existing rights to

¹⁸⁷Megret (n 178 above) 498.

¹⁸⁸ CRPD Preamble para (k).

¹⁸⁹ Para (r).

¹⁹⁰Indeed, one of the reasons given for the adoption of the Convention was to 'tailor the relevant norms of the existing human rights treaties to the circumstances of disability in such a way as to clear a path into the mainstream and to create genuinely inclusive and equal societies. Such tailoring should be informed by the need to secure equal rights and equal opportunities for all without discrimination.' See Quinn & Degener (n 73 above) 296. This view suggests that it was not intended to create new rights. However, the process of making rights relevant to a particular group does not automatically exclude the possibility of new proclamations of rights as dictated by the particular circumstances of the group. This is because a mechanical approach of transposing the existing rights into a new instrument devoid of the other human values that give full effects to the rights of the individual and facilitate equality would be a wasteful exercise.

persons with disabilities. It would do utter injustice to the ambit of the CRPD to regard it merely as a convention for the elimination of discrimination against persons with disabilities.

The CRPD is rather part of a general trend in international human rights law that entails adoption of human rights instruments specific to certain social groups. Whereas there are different views on the reasons for such multiple instruments, they are evidence of inequality in the application of the existing general instruments to the affected groups. From this point of view, such specific instruments would not be conceptually or ontologically novel, but would respond to contingent, historical and practical needs.¹⁹¹ The trend entails acceptance of the fact that 'certain groups do need separate restatements of how rights apply to them, either because they have specific needs to enjoy their rights, different versions of the same rights, or possibly even slightly different rights.'¹⁹² Hence, the fact that a group specific instrument such as the CRPD can restate, reformulate, or in as far as group difference dictates, introduce a new right supports the argument that the CRPD does not introduce new rights but rather contextualises existing rights to disability.

It is ironic that the CRPD, while adopted on the premise of covering the gaps left by preceding international instruments in the protection of the rights of persons with

¹⁹¹Megret (n 178 above) 497.

¹⁹²As above. Byrne (n 71 above) 419 argues that the development of the CRPD as a thematic convention is indicative of the increasing recognition of the complexity of disability issues, and the fact that the difference of disability is such that it has not and cannot be effectively addressed by mainstream human rights instruments. See also L Mute 'Domesticating the International Convention on the Rights of Persons with Disabilities: Key considerations for Kenya' Unpublished paper on file with the author.

disabilities, should be said not to create new rights.¹⁹³ In fact, some of the rights espoused in the CRPD, such as the rights to accessibility, habilitation and rehabilitation, and personal mobility, have not been set out as independent rights in any other international instrument.¹⁹⁴ Others such as ‘freedom from exploitation, violence and abuse’ or ‘the right to live independently and being included in the community’ are derived or reformulated from previous forms of the right. For instance, the right to freedom from exploitation, violence and abuse seems to be a derivative of the right to protection from ‘torture or cruel, inhuman or degrading treatment or punishment’. However, a separate right to ‘freedom from torture, cruel, inhuman or degrading treatment or punishment’ is set out in the Convention, suggesting that the right to ‘freedom from exploitation, violence and abuse’¹⁹⁵ adds a distinct value to the existing catalogue of rights.¹⁹⁶

Various commentators support the view that the CRPD does introduce new rights. Kayess and French argue that the CRPD does contain entirely new or amplified formulations of human rights, including a number of collective or social group rights. They further argue that the Convention ‘incorporates highly disability-specific interpretations of existing human rights, which transform formerly essentially non-

¹⁹³Kayess & French (n 170 above) 20. G Quinn ‘A short guide to the United Nations Convention on the Rights of Persons with Disabilities’ in Quinn & Waddington (n 178 above) 110. See also Trómel (n 178 above) 119.

¹⁹⁴ Articles 16, 20 and 9 respectively.

¹⁹⁵CRPD article 15.

¹⁹⁶Megret (n 178 above) 508.

interference based rights (or 'negative' rights) into positive state obligations.¹⁹⁷ Mégret on the other hand is of the view that the CRPD affirms, reformulates, and extends existing rights to make them relevant to persons with disabilities, and establishes rights which inhere to persons with disabilities and which are, in their particular form, specific to persons with disabilities.¹⁹⁸ Reformulation of rights and the duties of the state in this manner can create *sui generis* entitlements.¹⁹⁹ An authoritative conclusion on the sum of new and reformulated obligations under the CRPD necessitates an article by article assessment. It is however apparent that the CRPD indeed introduces some new duties and entitlements.

As far as article 24 is concerned, the right to education is generally re-affirmed.²⁰⁰ A great deal of detail is devoted to how the right is to be implemented. There are however some additions to the aims of education as stipulated in other international instruments on the right to education. For example, article 29 of the CRC, 11 of the ACRWC, and 13 of the ICESCR do not recognise fostering respect for human diversity, development of a child's creativity, or enabling persons with disabilities to participate effectively as aims of education. While these 'new' aims do not necessarily detract from the fundamental aim of education alluded to earlier (that is, the full development of the human potential), they nevertheless have the potential to

¹⁹⁷Kayess & French (n 170 above) 32, See also Mégret (n 170 above) 498 who argues that besides merely restating the applicability of the existing human rights to persons with disabilities, the CRPD through affirmation, reformulation, extension and innovation makes it difficult to out rightly deny the creation of new rights therein.

¹⁹⁸Mégret (n 178 above) 498.

¹⁹⁹As above, 506 - 507.

²⁰⁰As above 499.

alter the current parameters of the content of education. This is because the aims of education determine the content thereof.

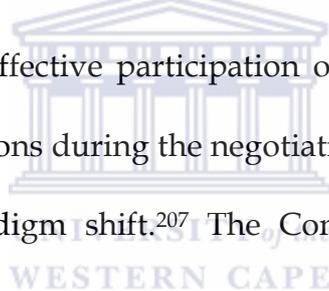
As will be shown in the discussion of the proposed principles for implementing education in Chapter 4 of this work, the new obligations of states in respect of the implementation of these principles yield new entitlements for learners with disabilities beyond the traditional confines of this right. Inevitably therefore, in the process of reformulating the right to education to enable its application to all without discrimination, the CRPD does introduce new entitlements in the context of education.

An alternative view has been advanced. It is argued that the CRPD does not introduce new rights but further develops the concept of equality. In this sense, the broad context of the development of inclusive societies is considered. Such broad context begins from CERD, through CEDAW, and now the CRPD. These instruments have incrementally addressed inequality and exclusion from society. Thus while CERD mainly addressed formal equality, CEDAW confronted cultural and social discrimination. The CRC focused on age based exclusion. The CRPD now introduces the cumulative theory of equality, participation and inclusion in society. This is reinforced by the recognition in the CRPD of relevance of the preceding instruments and the interconnectedness of those preceding instruments with the Convention.²⁰¹

²⁰¹CRPD Preamble Para (d) and (r). B Byrne 'Hidden contradictions and conditionality: conceptualizations of inclusive education in international human rights law' (2013) 28 2 *Disability and Society* 239 points out that in the context of education, the CRPD builds upon the provisions of the CRC and the ICESCR.

These instruments have effects beyond the particular groups affected. In line with this reasoning, the CRPD does not introduce new rights, but furthers the concept of equality through defining the impact of equal human rights and the resulting new duties.²⁰²

Ultimately, the overall significance of the CRPD is a function of its ability to improve the lives of persons with disabilities throughout the world.²⁰³ No doubt, it ought to facilitate effective responses to the gaps in the protection of all human rights and fundamental freedoms for persons with disabilities.²⁰⁴ The CRPD enshrines a paradigm shift in attitudes,²⁰⁵ which confronts the charitable and medical models of thinking about disability.²⁰⁶ Effective participation of persons with disabilities and their representative organizations during the negotiation of the CRPD is highly likely to have influenced the paradigm shift.²⁰⁷ The Convention affirms persons with



²⁰²Jenny Goldschmidt, (interviewed by J Anderson & J Philips), “Shifting the burden of proof: How the CRPD is transforming our understanding of discrimination, intersectionality, and priorities” in J Anderson & J Philips (eds) *Disability and universal rights: legal, ethical, and conceptual implications of the Convention on the Rights of Persons with Disabilities* (2012) SIM Special 35, 51.

²⁰³Kanter (n 167 above) 308; CO Cinneide, “Extracting protection for rights of persons with disabilities from human rights frameworks: established limits and new possibilities” in Arnardottir & Quinn (n 77 above) 189.

²⁰⁴D MacKay Statements made upon the adoption of the Convention on the Rights of Persons with Disabilities, available at <http://www.un.org/esa/socdev/enable/convstatementgov.htm#nz> (accessed 5 May 2011).

²⁰⁵B Byrne ‘Hidden contradictions and conditionality: conceptualisations of inclusive education in international human rights law’ (2013) 28 2 *Disability and Society* 233; Alfonso de Alba (n 184 above) 75; Kayess & French (n 170 above) 3.

²⁰⁶C Harnacke & S Graumann ‘Core Principles of the UN Convention on the Rights of Persons with Disabilities’ in Anderson & Philips (eds) (n 202 above) 33.

²⁰⁷Kayess & French (n 170 above) n 3.

disabilities as 'subjects of rights, able to claim those rights as active members of society'.²⁰⁸

2.5.3 General obligations for implementation of the CRPD

In terms of article 4 of the CRPD, state parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms, not only those under the CRPD, without discrimination of any kind on the basis of disability. In this way, the provision renews the commitment of states to pre-existing obligations. In particular, the state is bound to adopt legislative, administrative and other measures for the implementation of the rights in the Convention.²⁰⁹ With regard to economic, social and cultural rights, state parties are obliged to take measures to the maximum of their available resources including within the framework of international cooperation with a view to achieving progressively the full realization of the rights. This provision does not apply to obligations that are immediately applicable according to international law.²¹⁰

The right to education is generally classified as a socioeconomic right and is therefore subject to progressive realisation under article 4(2) above. There is however need to establish the implications of the prevailing understanding that the duty to implement

²⁰⁸Statement by L Arbour UN High Commissioner for Human Rights at the Ad Hoc Committee's adoption of the International Convention on the Rights of Persons with Disabilities, 5 December 2006, available at <http://www.un.org/esa/socdev/enable/rights/ahc8hrcmsg.htm> (accessed 25 March 2013).

²⁰⁹ CRPD Article 4(1) (a).

²¹⁰ CRPD article 4(2).

primary education is an immediate one²¹¹ particularly in light of the fact that the CRPD requires states to take all the necessary measures to ensure the full enjoyment by children with disabilities of *all* human rights and fundamental freedoms on an *equal basis* with other children.²¹² The interpretation of this provision as well as a discussion of the specific provisions of the CRPD on the right to education, i.e. article 24, are discussed in depth in Chapters 3 and 4 of this work respectively.

Some key points relevant to the present study (as drawn from the brief discussion of the CRPD above) may be highlighted at this point. Firstly, the CRPD is anchored upon the social model of disability, a factor that is definitive in the interpretation of the rights thereunder. In the context of education, application of the social model means that 'the focus should be on the socially constructed educational barriers, which, in interaction with impairment, hinder the full and effective participation of children with disabilities on the same basis as with their peers.'²¹³ Secondly, the CRPD redefines the dimensions of the purpose of education. This has the potential to alter the organisation and content of education.

Thirdly, the CRPD establishes an equality basis in its approach to the rights of children with disabilities. This necessitates establishing the general standards applicable to all children in general and to children with disabilities in particular.

²¹¹See the discussion in earlier parts of the chapter on the immediate duty to avail free primary education. The duty to provide free primary education is also discussed in Chapters 1 and 3 of this work.

²¹²CRPD, article 7(1).

²¹³Byrne (n 71 above) 426.

Finally, the CRPD consistently depicts children with disabilities as bearers of rights, particularly through the recognition of 'age' as a basis for dual discrimination experienced by children with disabilities, recognition of the evolving capacities of children with disabilities as a general principle of the Convention, and a specific article on children's rights.²¹⁴ This is significant to the discussion of appropriate approaches to the education of children with disabilities, particularly the exercise of choice between special and mainstream education systems.

2.6 African (regional) framework on the right to primary education and the education of children with disabilities

The international human rights framework comprises of three main levels of inter-governmental structures: sub-regional (comprising a part of a continent), regional (comprising states situated on a particular continent), and the global.²¹⁵ The instruments discussed in the preceding parts are adopted at a global level. At a regional level, the African human rights system is established under the auspices of the African Union, with the principle normative instrument being the African Charter on Human and Peoples' Rights (ACHPR) as supplemented by the African Charter on the Rights and Welfare of the Child (ACRWC). Several other instruments, both binding and non-binding, have been adopted at the regional level.

²¹⁴CRPD, Preamble paragraph P, Article 3(h), and article 7 respectively. Age-appropriate modifications are required in other provisions of the Convention including articles 13 and 23 on access to justice and respect for the family respectively. Byrne (n 71 above) 431 argues that the Ad Hoc Committee drafting the CRPD recognized a need to articulate rights in ways that could effectively address the combined effects of practices on the basis of disability and other grounds such as age and gender.

²¹⁵F Viljoen *International human rights law in Africa* (2012) 9.

The universality of rights means that the rights contained in the instruments at each of these levels are often the same, save for the potential for norm specification as a consequence of contextual proximity.²¹⁶ In the case of the right to education, the rights of children, and disability rights, a similar trajectory is evident at the regional as at the global level. Thus, whereas African states have signed or ratified international treaties discussed in the preceding part or participated in the other global initiatives highlighted, concurrent processes have also been undertaken at the regional level. These initiatives and instruments are discussed in the part below.

2.6.1 UNESCO Education Conferences

In view of the impending independence of a number of African states, and the inevitable manpower needs in the post-independence period, UNESCO in collaboration with the AU Commission convened a number of meetings of African Ministers of Education to identify a common regional education agenda, and to identify the needs and priorities on education in the region. These conferences set the regional agenda on education, and established a platform upon which a number of subsequent developments in the context of education were developed.

The first conference highlighted the fundamental position of primary education and the need for its prioritisation in the domestic education plans of each of the countries in the region. It noted the need for the educational agenda to be defined by the development needs of the newly independent countries. In the follow-up

²¹⁶ As above.

conferences, the focus on expansion of access and the prioritisation of primary education in the allocation of national resources was sustained. The 1961 conference in particular recommended a goal of achieving universal, compulsory and free primary education by 1980 which was not achieved.²¹⁷ The education of children and youth with disabilities was however not addressed until the 1976 Conference during which African states were called upon to identify youth with disabilities in their countries and to set up educational facilities for them.²¹⁸

The relevant outcomes of these conferences include the fact that they acted as a channel to integrate the international agenda on education into the new agenda of the region, through UNESCO. Most significantly, since African states were now independent members of the global community of states, embracing the international education agenda gave legitimacy to its application in the region. Secondly, recognition of the need to prioritise primary education set the pace for allocation of resources towards this phase of education. Evidently, the agenda was set in tune with the prevailing needs of the continent, and in the context of very limited resources and heavy dependency on external economic assistance. The invisibility of persons with disabilities in the education agenda was also largely reflective of the prevailing position at the global level.

²¹⁷Final Report of the Conference of African States on the Development of Education in Africa, Addis Ababa, 15 - 25 May 1961.

²¹⁸UNESCO, Conference of African Ministers of Education of African Member States, Final Report, ED/MD/41, Lagos Nigeria, 1976, Recommendation 7.

2.6.2 Charter of the Organisation of Africa Unity /African Union, 1963

The OAU was formed by newly independent African states to pursue a common regional integration agenda including educational and cultural cooperation.²¹⁹ As an organisational document, the Charter of the OAU did not make substantive contributions on the meaning of the right to education in general or primary education of children with disabilities in particular.²²⁰ The OAU was succeeded by the AU in 2000. The Constitutive Act of the AU then recognised the protection of human rights as one of its objectives and foundational principles.²²¹

Children's rights first featured in the OAU agenda in 1979 when the Assembly of the OAU adopted the Declaration on the Rights and Welfare of the African Child.²²² The Declaration urged Member States to implement programmes in the field of, *inter alia*, education, with a view to make these services accessible to all children within the shortest time, and to give priority to the most deprived children while paying particular attention to children with disabilities.²²³ It also urged the establishment of alternatives to the conventional schooling system commensurate with the skills, materials and resources of the state. ²²⁴

²¹⁹ Treaty of the Organization of African Unity, 1963 Article II.

²²⁰ Van Reenen & Combrinck (n 173 above) 135; Viljoen (n 215 above) 156.

²²¹ Constitutive Act of the African Union (2000), articles 3(h) and 4(m).

²²² Organization of African Unity, Declaration of the Rights and Welfare of the African Child, OAU Doc AHG/st.4 (XIV)Rev.1(1979) .

²²³ Declaration on the Rights and Welfare of the African Child, 1979 para 6(a) & (b).

²²⁴ Declaration on the Rights and Welfare of the African Child, 1979 para 7.

2.6.3 The African Charter on Human and Peoples' Rights, 1981

The African Charter on Human and Peoples' Rights (ACHPR) is the primary instrument on human rights in the region. The Charter has a minimalist approach to socioeconomic rights, containing only a limited number of these rights. The Charter does not also make distinctions on the nature of state obligations on the basis of the categories of rights, i.e. civil-political or socioeconomic.²²⁵ It is argued that part of the reason for this was a response to the prevailing situation of dire poverty and exploitation by non-democratic, non-accountable governments, and hence a desire to ensure accountability for all rights as a matter of law.²²⁶ On education, the Charter recognised everyone's right to education, but did not expound on any of the aspects thereof or the nature of state obligations thereunder as had already been established in a number of global instruments.²²⁷ However, the guidelines for national periodic reports under the Charter require states to report on the measures taken to achieve the full realisation of the right of everyone to receive compulsory and free primary

²²⁵The African Commission on Human and Peoples' Rights has however tended to 'read-in' the socioeconomic elements into the Charter, such as in *Purohit and another v The Gambia* (2003) *Africa Human Rights Law Report* 96 para 84. In addition, it is reported that in the earlier drafts of the ACHPR, an attempt was made to accept progressive obligations in respect of socio-economic rights as distinct from civil and political rights. This distinction was eliminated in the final draft, hence supporting the general view that socioeconomic rights, particularly the rights to education and health, place obligations on state parties to fulfil them and not merely to respect and protect them. This recognition of the progressive nature of the obligation also seems apparent in the African Commission's guidelines on state reporting. See Viljoen (n 215 above) 215; C Mbazira, 'Enforcing the economic, social and cultural rights of the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' in (2006) *Africa Human Rights Law Journal* 353 in this regard.

²²⁶ Viljoen (n 215 above) 214.

²²⁷ ACHPR, article 17(1).

education thereby pointing to an acceptance at the regional level of the right to primary education as established in international law.²²⁸

The ACHPR does not recognise disability as a ground of discrimination, though subsequent interpretation by the African Commission implicitly brought disability within the ambit of article 2 thereof.²²⁹ Significantly however, the African Commission affirmed the commitment of African states to the existing international human rights instruments, as well as the application of the standards in those instruments in the interpretation of the human rights obligations under the ACHPR.²³⁰

2.6.4 The African Charter on the Rights and Welfare of the Child, 1990

Adopted soon after the CRC, the ACRWC was intended to give an African voice to the rights of the child contained in the CRC.²³¹ Despite its adoption after the CRC, the Charter did not expressly prohibit discrimination on the grounds of disability.²³² It

²²⁸VO Nmehielle, *The African Human Rights System: its laws, practice, and institutions* (2001) 128; Ssenyonjo (n 7 above) 375, quoting the 'Guidelines for National Periodic Reports', in R Murray and M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights*, 70.

²²⁹Communication 241/2001 *Purohit and Moore v The Gambia* (2003) para 54 & 61.

²³⁰ ACHPR, article 60.

²³¹Viljoen (n 215 above) 392. Viljoen refers to both political and legal grounds underlying the adoption of the African Children's Charter within a year of the CRC. One of the legal reasons identified in this regard was that the CRC did not address the socio-economic conditions of children such as illiteracy and poor sanitary conditions that pose specific problems to the survival of children in Africa. The grounds were put forward by LG Muthoga, 'Introducing the African Charter on the Rights and Welfare of the African Child and the Convention on the Rights of the Child' in a paper delivered at the International Conference on the Rights of the Child organized by the Community Law Centre, University of the Western Cape, (1992), and SA Wako, 'Towards an African Charter on the Rights of the Child', paper delivered at a workshop on the Draft Convention on the Rights of the Child, Nairobi (9 - 11 May 1988).

²³² ACRWC, article 3.

did however contain a specific provision on the rights of children with disabilities in similar terms to the CRC, including a right to special assistance from the state to ensure access to effective training and preparation for employment.²³³ However, the provision on assistance, despite clearly drawing from the CRC, did not expressly refer to education as one of the aspects in respect of which a child with disabilities could access assistance.

Regarding education, the ACRWC provided for the right of every child to education, and the duty of state parties to provide free and compulsory basic education.²³⁴ Though this provision refers to 'basic' as opposed to 'primary' education, commentators equate the term to primary education.²³⁵ In addition, the subsequent provision regarding secondary education as well as the framing of the provision on primary education point to the understanding of the term as a reference to primary education. It is also significant to indicate that the article does not contemplate progressive realisation of primary education, a position that deviates from the general trend in preceding instruments.

The ACERWC is the custodian of another significant initiative on children's rights within the AU: the annual Day of the African Child (DAC), celebrated on 16 June every year.²³⁶ The DAC is used to draw attention to priority issues affecting children

²³³ ACRWC Article 13.

²³⁴ ACRWC Article 11(2)

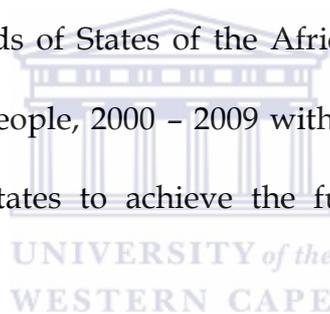
²³⁵ Beiter (n 3 above) 218.

²³⁶ The Day of the African Child was instituted by the Organisation of African Unity (OAU) in 1991 in commemoration of the 1976 massacre of school children during a protest march against the poor

in Africa, as well as review efforts undertaken towards improving various aspects of children's lives.²³⁷ In line with this objective, the theme of DAC in 2012 was 'the rights of children with disabilities: the duty to respect, protect and fulfil.' The ACERWC's concept note on the theme identified access to education for children with disabilities as one of the areas of concern for children with disabilities in the region.²³⁸ The prioritisation of the rights of children with disabilities through DAC is significant to the extent that it triggers national action and raises consciousness which is necessary for the fulfilment of the rights.

2.6.5 The African Decade for Persons with Disabilities

In 1999 the Assembly of Heads of States of the African Union proclaimed the first African Decade of Disabled People, 2000 – 2009 within which a Plan of Action was adopted to guide member states to achieve the full participation, equality and



quality of education for black children in Apartheid South Africa. The killings took place in Soweto, South Africa.

²³⁷L Wakefield & UM Assim 'Dawn of a new decade? The 16th and 17th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2011) 11 2 *African Human Rights Law Journal* 699; J Sloth-Nielsen & BD Mezmur 'Like running on a treadmill? The 14th and 15th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2010) 10 2 *African Human Rights Law Journal* 534; J Sloth-Nielsen & BD Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 1 *Africa Human Rights Law Journal* 336; J Sloth-Nielsen & BD Mezmur 'Win some, lose some: The 10th ordinary session on the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *Africa Human Rights Law Journal* 214; BD Mezmur 'The 9th Ordinary Session of the African Committee of Experts on the Rights And Welfare of the Child: Looking back to look ahead' (2007) 7 *Africa Human Rights Law Journal*, 555; BD Mezmur 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 6 *Africa Human Rights Law Journal* 566.

²³⁸See ACERWC, 'The rights of children with disabilities: the duty to respect, protect, promote and fulfil' Concept note on the Commemoration of the Day of the African Child, 2012 Para 25 – 29, available at <http://acerwc.org/wp-content/uploads/2011/03/English-ACERWC-Concept-note-DAC-20121.pdf> (accessed 19 December 2012).

empowerment of people with disabilities in Africa.²³⁹ The proclamation of the Decade stemmed partially from criticisms of the UN Decade of 1983 – 1992 to the effect that it had attempted to offer solutions without taking cognisance of the political and socioeconomic realities of developing countries and emerging democracies.²⁴⁰

One of the objectives of the Decade was to promote support services for persons with disabilities.²⁴¹ To ensure access to education, the Decade recognised an obligation upon states to adopt policies that ensure access to education in integrated settings paying particular attention to children in rural areas. It also called upon states to provide special education for children with disabilities where education in integrated settings is not possible, and to promote inclusive education.²⁴² The foregoing stipulation suggests an understanding of inclusive education as integration of learners into the mainstream classroom. The mandate of Decade has been extended for another decade, from 2010 to 2019.²⁴³

²³⁹Secretary - General report CM/2112 (LXX), adopted by the 23rd session of the Labour and Social Affairs Commission meeting in Algiers, Algeria, 12-13 April 2000, and endorsed by the 72nd session of the OAU Council of Ministers and 36th Assembly of Heads of State and Government, respectively, meeting in Lomé, Togo, 6-8 July 2000 (Decision CM/Dec. 535 (LXXII) Rev.1).

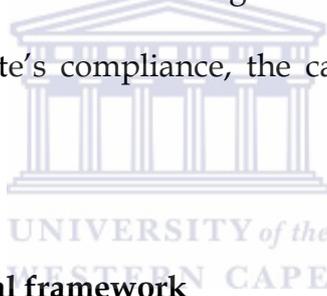
²⁴⁰Van Reenen & Combrinck (n 173 above) 138.

²⁴¹African Union, Continental Plan of Action for the African Decade of Persons with Disabilities 1999 – 2009, Objective 4.

²⁴²As above, para 27.

²⁴³A draft African Protocol on Disability was developed in 2009, but was withdrawn by the Working Group to allow further consultations thereon. See Van Reenen & Combrinck (n 173 above) 141.

Other key and related initiatives have been discussed and adopted at the regional level that have a bearing on the right to primary education, and the education of children with disabilities in particular. These include the Africa Fit for Children Plan of Action which called for accelerated action towards, among other things, the right to education. The Plan of Action committed to ensuring the universal access to comprehensive quality basic education while paying attention to the needs of children with disabilities.²⁴⁴ Similarly, the Decades of Education for Africa set out educational objectives to be pursued in the region.²⁴⁵ Also, the Africa Peer Review Mechanism, and the NEPAD, both of which are initiatives of the African Union, embrace the indivisibility approach to all the rights in the ACHPR, and set out as one of the key indicators of a state's compliance, the capacity of the state to provide education.²⁴⁶



2.7 Remarks on the regional framework

In general, it is evident that the approach to the rights of persons with disabilities within the regional human rights framework has been less forceful in comparison to the international framework. The references to the rights of children with disabilities have particularly been implied as opposed to being expressly stipulated, suggesting that the development of the protection of the rights of children with disabilities in the region has been out of step with developments at the international level. The global

²⁴⁴African Union, Call for Accelerated Action on the Implementation of the Plan of Action towards Africa fit for Children (2008 – 2012) PANA/FORUM/CHD/MIN/2(II) Para 6

²⁴⁵The first decade was between 1997 and 2006, while the second decade was proclaimed from 2006 – 2015.

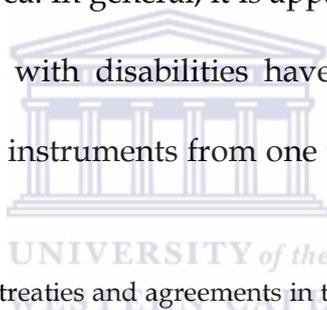
²⁴⁶Viljoen (n 215 above) 218.

framework therefore stands as a more formidable basis for the standards discussed further in this work.

2.8 Conclusion

The instruments discussed in this work are by no means exhaustive of the legal and quasi-legal instruments or initiatives addressing children, education or disability rights at the regional and international level.²⁴⁷ An in-depth discussion of all such instruments within the broad themes of this thesis is far beyond the ambit of this work. Those discussed are however sufficiently representative of the key developments in the interest area. In general, it is apparent that the approaches to the right to education of persons with disabilities have evolved along a time line.²⁴⁸

There is a clear build up of the instruments from one to the other with frequent cross



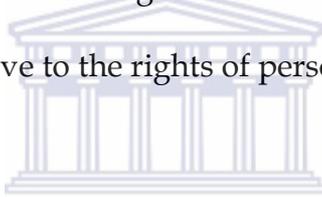
²⁴⁷ Other relevant international legal treaties and agreements in this regard include the Convention on the Elimination of Racial Discrimination (CERD) (1965), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979), the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987), The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), the Millennium Development Goals (2000), and the Universal Periodic Review Mechanism (Human Rights Council Decision 6/102 - 27 September 2007) There are also other political decisions or commitments on children with disabilities such as Economic and Social Council Resolution 1997/20 of 21 July 1997 on children with disabilities in which it highlighted the relevant legal provisions and significant action United Nations agencies, specialized bodies and NGOs. In addition, Resolution 2000/85 of 28 April 2000 and General Assembly resolution 2001/75 of 25 April 2001 both address the issues affecting children with disabilities. At the regional level, such instruments include the Protocol to the ACHPR on the Rights of Women in Africa (2003), the African Youth Charter (2006), the African Peer Review Mechanism (APRM), and the human rights instruments of the sub-regional economic communities.

²⁴⁸ While the 1950s and 60s focused on increasing enrolment of learners as well as national education planning for development, the 70s and 80s were informed by the failure of the system to accommodate the school leavers due to the mismatch between the education outcomes and the labour needs. The idea of basic learning needs and hence basic education as a foundation was therefore embraced in the 70s and 80s and later fully endorsed by the World Declaration of Education for All. See UNESCO, *World Education Report 2000- 'the right to education: towards education for all throughout life'* (2000) 39 - 46.

referencing in subsequent documents. Consequently, the developments in the concepts or approaches to the education of children with disabilities can be assessed on a linear pattern. It is also clear that international standards on education both internationally and regionally are generally susceptible to respective priorities to the extent that the prominence of an issue on the agenda of nations is directly linked to the resourcing and planning priorities.

The discussion in this chapter can be summarised in three broad categories:

- (i) Developments relative to the right to education,
- (ii) Developments relative to the rights of children, and
- (iii) Developments relative to the rights of persons with disabilities.



In view of the chronological design of this chapter, developments in each of these areas have been discussed concurrently. In the summary below, the significant aspects of each of these dimensions, as has emerged in the chapter, are discussed.

Regarding the development of the rights of persons with disabilities, before the CRPD, the rights of persons with disabilities were mainly contained in soft laws, a factor that compromised to a very large extent their potential to compel concrete responses from states. It is also evident that whereas discrimination was generally prohibited in a number of instruments in terms that could include the protection of persons with disabilities, the plight of people with disabilities was still largely

invisible and therefore not addressed.²⁴⁹ The situation of children with disabilities was even worse. It is argued that the textual absence of children with disabilities in the core treaties prior to the CRC exacerbated their invisibility within the mainstream human rights paradigm that is based on able-bodied adult norms.²⁵⁰ The concerted efforts during the UN Decade for Persons with Disabilities, the multiple initiatives of the 1990s, and ultimately the CRPD served to increase visibility and therefore spark relevant debate on issues affecting persons with disabilities.

On the developments relative to children, this chapter clearly illustrates the changing view of the child's position in the context of human rights. Though not an overt agenda of the instruments discussed herein, it is evident that the earlier instruments, particularly those preceding the CRC regarded the child as a passive beneficiary of rights. The attitude and response to the child with disabilities followed the same pattern. The approach of these instruments was mainly protectionist or paternalistic, an approach that inevitably over – emphasises the role of the 'protector' or 'guardian' in delivering education to the child.²⁵¹ The change of perception to embrace the child as the subject (active bearer) in subsequent instruments has had the effect of

²⁴⁹The invisibility of people with disability was pervasive in all aspects of rights, and became the most primary reason for the need to adopt a specific Convention. See Quinn & Degener (n 73 above) 294; IE Koch 'From invisibility to indivisibility: the international Convention on the Rights of Persons with Disabilities' in Arnardottir & Quinn (n 177 above) 67.

²⁵⁰Byrne (n 71 above) 423.

²⁵¹As in the case of the UDHR and the ICESCR. This is the approach adopted by most specific human right instruments which contextualise rights to marginalised groups in society such as women (CEDAW) and persons with disabilities.

reconceptualising rights to fit the child, as is the case with the CRC or the ACRWC.²⁵² The CRPD in particular has served to enhance the textual visibility of children with disabilities within international human rights law. The protection of the rights of children in the CRPD provides a substantial window of opportunity in providing effective redress to the violations of the rights of children with disabilities.²⁵³ Indeed, the realisation of the rights of children as rights-bearing persons ought to be the goal of state policies on children, and requires a paradigm shift from the protectionist approaches in which children are perceived and treated as objects in need of assistance rather than as right holders.²⁵⁴

On the developments relative to the right to education, it is apparent that primary education has had a prominent position in international education agenda both politically and in the context of education as a human right. It can also be said that while absolute consensus on the nature or scope of obligations on states in respect of primary education cannot be claimed, there is general acceptance of an urgency warranting prioritisation of universal primary education in the allocation of national

²⁵²J Doek 'What does the children's convention require?' (2006) 20 *Emory International Law Review* 199 argues that 'the most fundamental requirement for the implementation of the CRC is that the child is recognised and fully respected as a human being with rights.' The understanding of the child as a bearer of rights is directly related to the aims of education and the acceptability of education and is therefore a crucial point of departure in the identification of an appropriate approach to the rights of the child. See also J Doek 'The eighteenth birthday of the Convention on the Rights of the Child: achievements and challenges' (2007) 41 *University of Michigan Journal of Law Reform* 62.

²⁵³Byrne (n 71 above) 437.

²⁵⁴JCM Willems 'Principles and promises in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities' in L Waddington et al (eds) *European yearbook of disability law* 72.

and international resources. General normative standards on primary education have also been identified.

The discussion in this chapter shows that in the initial stages of the recognition and development of the right to education, the education of children with disabilities was mainly invisible or peripheral to the general education agenda. In the early efforts to highlight the exclusion of people with disabilities and call for appropriate responses, the emphasis was on establishing the fact that people with disabilities had, as a matter of right and equality, a right to education. This agenda started in the late 60s, but in the 70s and 80s, the focus shifted to the 'how' the right ought to be implemented.²⁵⁵ Consistent with the agenda of equality and participation of persons with disabilities in the community, there was in this period an emphasis on the integration of learners with disability into the mainstream education system.²⁵⁶ The push for integration was also driven in the broader context by the classification of

²⁵⁵In addition to the initiatives in this period discussed above, the Warsaw Conference on the Legal Protection of the Rights of the Child in January 1979 adopted an official Statement of Principles on the Legal Protection of the Child, Principle 7 of which stated that 'whereas it [was] desirable to provide special educational facilities for children who are exceptionalin their handicaps, it is important that their education should, so far as possible, be integrated with that of other children.' See Conference on the Legal Protection of the Rights of the Child, Official Statement of Principles, Principle 7. Notably however, the Warsaw conference was mainly attended by European countries. Also, in 1988 UNESCO argued for special education to fall within the ambit of the general education system as opposed to two separate systems. See UNESCO, *The review of the present situation of special education* (1988).

²⁵⁶Salamanca Statement (n 114 above), para 6. Commentators such as E Mannschatz 'Disabled children' in G Mialaret (ed) *The child's right to education* (1979) UNESCO writing during this period recognised the primary approach to the education of the child with disabilities as integration within the mainstream class, and separation as an exception. However, these views were still deeply rooted in the medical model of disability.

matters affecting persons with disabilities as welfare concerns as opposed to rights.²⁵⁷

It was therefore important at this point to establish that matters of persons with disabilities were to be treated on the same basis as the affairs of all members of the society.²⁵⁸

The period of the late 80s and early 90s experienced the most vibrant and often concurrent and overlapping international processes on the rights of persons with disabilities.²⁵⁹ And while international consensus was not yet reached on the necessity of a new and specific disability treaty, this period served to consolidate international acceptance of the existence of human rights of persons with disabilities, and the need to protect them through both general and specific laws, policies and programs. There was also growing acceptance of the need for everyone to be educated in the same school, and hence the idea of the inclusive school.²⁶⁰ At the time however inclusion was predominantly, if not entirely, focused on integrating learners in the same schools.

²⁵⁷The practice of giving the responsibility for education of children with disabilities to a different state authority other than the one dealing with education in general was a near-universal phenomenon. See Centre for Educational Research and Innovation, *Inclusive education at work: students with disabilities in mainstream schools* (1999) 18 for examples of similar approaches in OECD countries. The WHO *World report on disability* (2011) also highlighted the divided ministerial responsibility for education of children with disabilities as one of the system-wide problems affecting the education of children with disabilities.

²⁵⁸ See for instance the Salamanca Statement (n 114 above) para 11.

²⁵⁹In addition to the education specific instruments discussed above, the rights of persons with disabilities were discussed extensively in other platforms in the same period including the 1993 Vienna Conference on Human Rights, the Beijing Conference on Women's Rights (1995), and the World Summit on Social Development, Copenhagen (1995).

²⁶⁰ Salamanca Statement (n 114 above) para 3.

The changing interpretations of inclusive education are also reflective of a constantly changing philosophy driven by experience and emerging knowledge. It is argued that during the growth and development of public education systems, education and special education components grew side by side, rather independently of one another, and as the practical response to the challenges that were posed by learners with some kinds of special needs.²⁶¹ This understanding prompts the view that the goal of inclusion is ultimately the merger of the two systems.²⁶² The latter view has influenced current understanding of inclusion to the extent that inclusive education has tended to focus on the unification of the previously separate systems. It has also influenced the understanding of what an inclusive school entails.

With the goal of ultimate merger in mind, various pathways to this goal, including research drawn largely from anecdotal evidence, have characterised advocacy on inclusive education. The centre of focus in those circumstances has been the system as opposed to the child. Reorganisation of the approach to the education of children with disabilities around the subject as opposed to the object, (that is, the child with disability as opposed to the education system), is therefore likely to have ramifications for the conceptualisation of inclusive education. Indeed, the discourse

²⁶¹Centre for Educational and Research Innovation (n 257 above) 17.

²⁶²A Bray & S Gates, "Children with disabilities: equal rights or different rights?" in AB Smith et al (eds) *Advocating for children* (2000) 39 capture the assumptions underlying inclusive education succinctly as follows: "our children cannot learn respect for diversity, equality and non-discrimination when they are separated from children with disabilities. And our children with disabilities cannot be socialised to become responsible, self-determining adults if they do not learn and play amongst the diversity of children in our society." See also Centre for Educational and Research Innovation, (n 257 above) 17.

on the right to education has been more focused on the right of the child to be sent to school, without paying equal attention to the need for a child to be recognised as a bearer of rights, which is inherent in the acceptability of education.²⁶³

All the foregoing instruments feed into the CRPD, which is now the core international instrument on the rights of persons with disabilities. The CRPD contains provisions in respect of each of the themes discussed in this chapter. The background laid out in this chapter will therefore be a critical reference point in the interpretation of the CRPD in subsequent parts of this work.²⁶⁴

2.9 Prologue to chapter 3

The next chapter discusses the relationship between the themes discussed in this thesis, particularly how the normative standards in each of these themes interact with those in the other. Hence, the duties of the state with respect to socioeconomic rights in general and the right to education in particular, the interpretation of children's rights in this regard, particularly the application of the fundamental principles of children's rights to primary education of children with disabilities, and the general principles relative to the rights of persons with disabilities will be discussed. The chapter considers the position of each of the themes in international

²⁶³Beiter (n 3 above) 502.

²⁶⁴This is essential in view of article 31 (3)(c) & (4) of the Vienna Convention on the Law of Treaties that requires the interpretation of a treaty to take into account any rules of international law applicable between the states parties.

law, noting the interdependence thereof, and later proposes an approach that could be useful for the interpretation of article 24(2) in Chapter 4.



CHAPTER 3

Conceptual Framework

3.1 Introduction

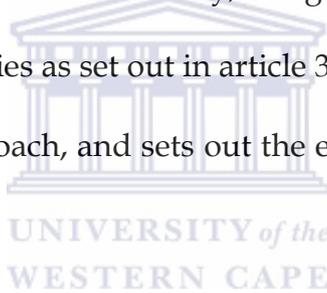
As indicated in Chapter 2, this thesis straddles three main fields of human rights; socioeconomic rights, children's rights, and the rights of persons with disabilities. Various concepts have developed within these themes in the interpretation of the respective state obligations. There is no reason to assume that the principles and concepts on this issue are prima facie in conflict, but there is the challenge of identifying a relational framework for these themes and concepts to manage their convergence and conflict in a manner that furthers the right to education for children with disabilities. To a significant extent, each of the areas of rights, i.e. children, socio-economic rights, and disability rights, have evolved distinctively. It is argued for instance that the human rights system has not sufficiently addressed the intersection between disability and childhood or children's rights.¹ On the other hand, there are some strains of interdependence between the key instruments as well as provisions that allow inference of a normative relationship.²

The purpose of this chapter is to consider a suitable basis for interaction which will shape the interpretation of the principles under article 24(2) in Chapter 4 of this study. This chapter considers the meaning of these concepts, as well as their

¹B Byrne "Minding the gap? Children with disabilities and the United Nations Convention on the Rights of Persons with Disabilities" in M Freeman, *Law and childhood studies* (2012) 436.

²For instance, article 3(h) of the CRPD draws from article 5 of the CRC, while article 7 of the CRPD draws from article 3 and 12 of the CRC.

relationship to one another. On the right to education, this enquiry looks into the nature of state obligations involved, particularly in respect of primary education, in light of the differentiated obligations with respect to each of the levels of education. The application of the typology of state obligations for socioeconomic rights to the right to education is also considered. It has already been indicated in Chapter 2 that inclusive education is endorsed as the appropriate approach to education in the context of disability. With respect to children's rights, and the defined principles underlying their fulfilment, it is essential to establish the role of the fundamental principles of children's rights in determining the appropriate approach to the education of children with disabilities. Finally, the general principles relative to the rights of persons with disabilities as set out in article 3 of the CRPD will be discussed. The CRPD embraces this approach, and sets out the essentials of inclusive education in article 24(2) thereof.



3.1.1 Basis and approach to conceptual relationships

How the concepts highlighted above relate to one other in the context of the education of children with disabilities can be deciphered from the express provisions of the treaties and other relevant instruments, or the jurisprudence of the respective treaty bodies such as the CRC, CESCR, and the CRPD committees. The nature of the relationship can be mutually reinforcing, hierarchical, conflicting, or complementary. However, all these concepts and principles have the common purpose which is the pursuit of the optimum standard of rights in their respective sphere. In conformity

with this goal, the relational framework that best achieves optimal standards of rights is preferred.

Some basic principles of international human rights law also guide this discussion. First, it is trite that human rights are indivisible and interdependent.³ This means that international human rights are a package of interrelated rights, which have to be interpreted in light of each other.⁴ Secondly, in view of the fact that the concepts discussed in this work are mainly drawn from treaties (CRC, CESCRC & CRPD), the Vienna Convention on the Law of Treaties applies to guide the interpretation of treaty obligations, and requires the performance of treaty obligations in good faith.⁵

The Vienna Convention further provides with regard to successive treaties that where the same parties are party to successive treaties on the same subject matter, the provisions of the earlier treaty only apply to the extent that they are consistent with the latter treaty.⁶ In the present case, the treaties concerned (CESCR, CRC and the CRPD) are adopted within the framework of the United Nations - essentially between the same states - and have provisions addressing the same rights. The treaties build upon the provisions of one another.

There are also treaty defined relationships. For example, the CRPD recalls the provisions of the CRC, and stipulates that children with disabilities should enjoy

³World Conference on Human Rights: Vienna Declaration and Programme of Action UN Doc. A/CONF.157/23, Part 1, Para 5; A Eide 'Economic and social rights' in J Symonides (ed) *Human rights: concepts and standards* (2000) 119.

⁴Eide (n 3 above) 123.

⁵Vienna Convention on the Law of Treaties (1969) article 26.

⁶Vienna Convention (n 5 above) article 30(3) & (4) (a).

equal rights with other children in terms of the CRC.⁷ Similarly, the CRPD subjects all actions thereunder to the best interests of the child, and the effective participation of the child having regard for their evolving capacities.⁸ As is evident from the *travaux préparatoires* of the CRPD, these principles are drawn directly from the CRC.⁹ This suggests a hierarchical relationship in which the application of rights under the CRPD must comply with children's rights principles.

3.1.2 The concepts

The first set of principles discussed is children's rights principles comprising of non-discrimination, best interests of the child, survival and development, and participation principles of children's rights. The second set comprises of the principles of socioeconomic rights, particularly the typology of state obligations, that is, the duties to respect, protect, and fulfil in general, as well as the standards of the minimum core, progressive realization, and reasonable measures within the state obligations. The application of these standards to the elements of education, that is, availability, accessibility, acceptability and adaptability to primary education are also considered. Thirdly, there are principles established under the CRPD, both the general principles at article 3, and the concepts under article 24(2). The principles of non-discrimination, full and effective participation and inclusion in society, equality

⁷ CRPD Preamble para (d) & (r).

⁸ CRPD article 7(2) & (3).

⁹See the Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its sixth session, Para 27 - 28 available at <http://www.un.org/esa/socdev/enable/rights/ahc6reporte.htm#recomm> (accessed 12 January 2013).

of opportunity, accessibility, and respect for the evolving capacities of children with disabilities – which are set out in article 3 - are especially relevant to this work.

3.2 Socio-economic rights and the right to primary education

Since the adoption of the Universal Declaration, rights have generally been classified as civil-political or economic, social and cultural with resultant variations in the nature of duties on states.¹⁰ This differentiation is evident in the primary global human rights instruments such as the ICCPR and ICESCR, as well as in the framing of different rights in subsequent national, regional and international human rights instruments.¹¹ Certain other instruments such as the CRC, CRPD, the ACHPR and the ACRWC make no distinction between categories of rights.¹² There are competing arguments on the validity or justification of the classification of rights which are beyond the purview of this work.¹³ There is however no universal consensus on the need or line of demarcation.

¹⁰HJ Steiner et al *International human rights in context* (2007) 263 – 264.

¹¹The CRC for instance desists from making a general classification of the rights into civil-political and socioeconomic rights, but makes a general resource reservation for socioeconomic rights in article 4. In effect, the approach of the CRC left the precise meaning of socioeconomic rights unclear, allowing different interpretations. One such interpretation, it is argued, is to deem as socioeconomic rights those rights in which resource limitations are expressly made such as article 23 on the rights of children with disabilities. See T Hammarberg 'Children' in A Eide et al (eds) *Economic, social and cultural rights* (2001) 365.

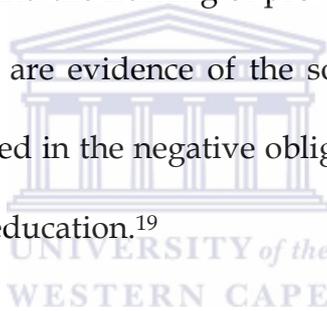
¹²OA Chidi 'Analysis of paralysis or paralysis of analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 2 *Human Rights Quarterly* 348.

¹³See for instance Ssenyonjo, M, *Economic social and cultural rights in international law* (2009); MA Baderin & R McCorquodale *Economic, social and cultural rights in action* (2007). In instruments such as the CRC and the CRPD, though the classification is not expressly highlighted in the text, recognition of the application of socioeconomic rights standards such as progressive realization as in the case of the CRC and the CRPD is indicative of the acceptance of such a demarcation.

The right to education is not easily or uniformly classified. It is often regarded as a socioeconomic right,¹⁴ though at times, it is also classified as a social right, and less often as a cultural right.¹⁵ It is hence aptly stated that the right to education,

‘has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also in many ways, a civil right and a political right, since it is central to the full and effective realisation of those rights as well.’¹⁶

Some aspects of the right to education cut across the civil-political and socio-economic rights spheres.¹⁷ Inclusion of the right to education in the ICESCR – a socioeconomic rights treaty – and the framing of provisions on the right to education such as article 28 of the CRC are evidence of the socioeconomic dimension.¹⁸ The civil-political nature is expressed in the negative obligation to ensure that people are not prevented from accessing education.¹⁹



¹⁴Ssenjonjo (n 13 above) 357.

¹⁵See OS Jovic ‘The right of a child to education in universal and regional documents in Serbian legislation’ *International Survey of Family Law* (2008) 338; Y Rabin ‘The many faces of the right to education’ in D Barak-Erez and AM Gross (eds) *Exploring social rights* (2007) 265. Similarly, M Nowak ‘The right to education’ in Eide et al (n 11 above) 246 argues that education is considered to be a cultural right. It is nevertheless also evident that most commentators on socioeconomic rights hesitate to fit this right easily into either category. For instance, while A Eide ‘Economic, social and cultural rights as human rights’ in A Eide et al (n 11 above) 18 – 19 easily categories some of the traditional rights into social or economic rights, he is of the view that the right to education is linked to all the three aspects of socioeconomic rights..

¹⁶CESCR *General Comment No 11: plans of action for primary education: article 14*, UN Doc E/C.12/1999/4 (10 May 1999), para 2.

¹⁷M Nowak ‘The right to education’ in Eide et al (n 11 above) 252. See also CESCR General Comment No. 11 (n 16 above) para 2 where the right to education was for this reason regarded as the epitome of the indivisibility and interdependence of rights.

¹⁸Article 28 of the CRC embraces the progressive realization approach to the right to education.

¹⁹S Woolman & M Bishop ‘Education’ in *Constitutional law of South Africa* (2008) 57-11.

As indicated above, the division between civil-political and socio-economic rights is partly based on the nature of state obligations under the right.²⁰ On this basis, differences in the nature of obligations at different levels of education is apparent in the approach of some international and regional human rights instruments, including the ICESCR, the CRC and the CRPD which envisage a duty upon state parties to implement free and compulsory primary education immediately, while allowing progressive realization in the other levels of education.²¹ The differentiation of obligations for the right to education is also reflected in some national legislation domesticating the right to education.²² The foregoing suggests that whereas the right to education would generally be a socioeconomic right, the right to primary education is a civil-political right.

The interpretation of an immediate duty to realise the right on its own is however insufficient to challenge the traditional classification of the right to education as a socioeconomic rights.²³ Classification of rights is important for determining the precise scope of a state's responsibility for the purpose of monitoring implementation

²⁰Other dimensions include the kinds of measures contemplated, such as whether there are positive measures necessary or whether abstention from certain conduct would suffice.

²¹ See articles 17(1) and 11(1) of the ACHPR and the ACRWC respectively.

²²Section 29 of the South African Constitution which provides for the right to education for everyone has for instance been interpreted to as comprising both civil-political and socioeconomic obligations. It is argued that the right to basic education thereunder is neither subject to the availability of resources, or the reasonability standard. See Woolman & Bishop (n 19 above) 57-7 to 57-10; and R Malherbe 'Education rights' in T Boezaart (ed) *Child law in South Africa* (2009) 407 in this regard. A similar approach is apparent in the Constitution of Kenya, which establishes a general right to education as a socio-economic right, and a right to basic education for children, which is not subject to the availability of resources or the reasonability standard. See the discussion of the Kenya Constitution in Chapter 5.

²³Eide et al (n 11 above) 25 argue that a delayed responsibility for the fulfilment of a right does not change its classification. See also The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights UN Doc. E/CN.4/1987/17 Annex, principle 8.

and enforcing accountability. But, in the absence of consensus on the place of primary education in either category, the subsequent discussion departs from the general position of education as a socioeconomic right, and the standards that have developed in that regard. In addition, it is also clear that the point of divergence between the schools of thought highlighted lies in the nature of the duty to implement the right, as opposed to the class of the right.

Due to its multiple classifications, the right to education is also deemed to have 'social' and 'freedom' aspects. In terms of this classification, the 'freedom' aspect entails the right of individuals to choose between state-organised and private education or for parents to choose moral or religious education for their children.²⁴ The social aspect on the other hand relates to the need for positive action by the state to avail education.²⁵ The interpretation of the right to education in terms of these two dimensions will be revisited in the discussion on choice between education systems for children with disabilities in Chapter 4.

3.2.1 The nature of obligations for the right to education

As with all other rights, socioeconomic rights impose three kinds of duties for state parties: the duties to respect, protect, and fulfil.²⁶ This classification of the obligations

²⁴The 'freedom' aspect, particularly the limits and content thereof, is revisited in chapter 4 in the context of the right of children with disabilities to choose between special education and education in integrated settings.

²⁵F Coomans 'In search of the core content of the right to education' in A Chapman & S Russell (eds) *Core obligations: building a framework for economic, social and cultural rights* (2002) 220.

²⁶Ssenyonjo (n 13 above) 389; Eide et al (11 above) 23 argues that the obligations are three tier; the duty to respect as the primary, duty to protect as the secondary, and duty to fulfil as the tertiary responsibility respectively. While it is incumbent upon the state to ensure the primary and secondary tiers of responsibility immediately, the responsibility at the tertiary tier is differentiated and more

is drawn from Shue's 1980 stipulation of the correlative duties emanating from all human rights: to avoid to deprive, to protect from deprivation, and to aid the deprived.²⁷ The criterion of defining the obligations is widely applied in the interpretation of the rights, and other levels of obligations have developed beyond the three traditional ones, such as the obligation to promote.^{28,29} The specifics of these obligations are expounded upon in the General Comments of the CESCR, as well as the Limburg and Maastricht Principles.³⁰

The first two dimensions of the duties, that is, the duties to respect and to protect are standard in all classes of rights.³¹ The duty to fulfil is variously defined as comprising of two aspects; the duties to facilitate and to provide, and is the point of divergence between the two groups of rights. Civil political rights are deemed fully fledged and

technical. See also Icelandic Human Rights Centre *Human rights reference handbook* (2009) 16; Eide et al (n 11 above) 23; KD Beiter *The protection of the right to education in international law* (2006) 48; Ssenyonjo (n 13 above) 23. F Viljoen *International human rights law in Africa* (2012) 214 points out that the respect, protect, and promote typology of human rights obligations is an alternative to the generations of rights approach.

²⁷H Shue *Basic rights: subsistence, affluence, and US foreign policy* (1980); Icelandic Human Rights Centre, *Human rights reference handbook* (2009) 17; M Sepulveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 157.

²⁸P De Vos 'Experience of human rights in Africa: challenges of implementing economic, social and cultural rights' in CM Peter (ed) *The protectors: human rights commissions and accountability in East Africa* (2008) 16; Beiter (n 26 above) 74; Ssenyonjo (n 13 above) 25 highlights 'promotion' as an aspect of fulfilling the duty alongside facilitation and provision. In *Social Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria Communication 155/96 ACHPR/COMM/A044/1* 27 May 2002 (hereinafter *SERAC v Nigeria*) para 44 the African Commission stated that as an aspect of the duty to fulfil, promotion entails the obligation to ensure that right bearers are able to exercise their rights and freedoms by promoting tolerance, raising awareness and installing the necessary infrastructure for that purpose.

²⁹Eide et al (n 11 above) 23; Sepulveda (n 27 above) 163.

³⁰Limburg (n 23 above); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

³¹ See discussion below on the content of the duties to respect, protect and fulfil.

therefore immediately realisable³² while socioeconomic rights, in view of the positive aspects thereof, require the adoption of reasonable measures and progressive realisation.³³ These two aspects distinguish economic social and cultural rights from civil and political rights. The concepts of progression and reasonable measures are discussed further below, while the aspects of the duty to respect, protect and fulfil, particularly in the context of the right to education, are considered immediately below.

The duty to respect is a negative one that enjoins the state to refrain from impairing enjoyment of fundamental rights.³⁴ Respect in the context of education requires states to refrain from all measures that directly or indirectly interfere, impair, hinder, or prevent the enjoyment of the right for all persons within their jurisdictions.³⁵ Respecting the right to education also includes the state's duty to respect parental choice.³⁶ Protection on the other hand relates to the state's duty to shield the beneficiaries of the right from political, economic and social interference in the enjoyment of that right.³⁷ It is argued that protection also requires the state to establish minimum educational standards applicable to all educational providers.³⁸

³²A Sachs 'The judicial enforcement of socio-economic rights: The Grootboom Case' in P Jones & K Stokke (eds) *Democratising development: the politics of socio-economic rights in South Africa* (2005) 144.

³³Ssenyonjo (n 13 above) 58; De Vos (n 28 above) 9.

³⁴Coomans (n 25 above) 223. Coomans however notes that the obligation to respect also has a positive aspect to the extent that 'it requires an positive, tolerant attitude from the State toward the religious or philosophical convictions of parents when a State wants to introduce subjects into the public schools curriculum which may interfere with those convictions.'

³⁵Ssenyonjo (n 13 above) 389.

³⁶W Kalin & J Kunzil *The law of international human rights protection* (2009) 98.

³⁷De Vos (n 28 above) 19.

³⁸Ssenyonjo (n 13 above) 390

The respect and protect aspects of the duty to ensure socioeconomic rights are mostly achievable predominantly through legislative measures, and hence comparatively less costly. For that reason, they are easily regarded as constituting part of the minimum core obligation of states.³⁹

The duty to fulfil on the other hand requires states to ensure that the essence of a right is provided to the people.⁴⁰ It includes both making it possible for people to access the rights themselves such as allowing or encouraging the establishment of private schools (i.e. facilitating the right), and actually providing the necessary services such as building and staffing of primary schools.⁴¹ To fulfil a right, the state must 'move its machinery towards the actual realisation of the right' which can include provision of basic needs.⁴² The duty to fulfil further requires the state to 'take measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognised in international human rights instruments, which cannot be secured by personal efforts.'⁴³ It also includes setting up a general supportive legal and policy framework, and taking action that creates, restores and maintains the realisation of all economic social and cultural rights.⁴⁴ The duty to provide as an aspect of the responsibility to fulfil has heightened

³⁹Chapman & Russel (n 25 above) 11; Coomans (n 25 above) 223 affirms the immediate nature of this right.

⁴⁰Ssenyonjo (n 13 above) 390; Chapman & Russell (n 25 above) 12.

⁴¹Eide (n 3 above) 128; Chapman & Russell (n 25 above) 12; Coomans (n 25 above) 242.

⁴²SERAC v Nigeria (n 28 above) para 46.

⁴³Beiter (n 26 above) 75; Ssenyonjo (n 13 above) 25.

⁴⁴Coomans (n 25 above) 241; Ssenyonjo (n 13 above) 25.

significance when individuals or groups are unable on reasonable grounds to avail themselves of the right in question.⁴⁵

3.2.1.1 Duty to take reasonable steps

To take reasonable steps towards the realization of a right requires state actions in that regard to be 'based on coherent and comprehensive policies and programs that are reasonable both in conception and implementation.'⁴⁶ In this sense, reasonableness is a yardstick on the 'appropriateness' of the steps taken.⁴⁷ It encompasses an element of recognizing the levels of deprivation in the subject society. This means that a measure adopted fails reasonability based on whether or not it promotes the rights of those who are most deprived in that society.⁴⁸ Reasonableness is a function of the available resources.⁴⁹ It applies to the right education to the extent that the fulfilment of certain aspects of the right to education, such as the duty to avail, is dependent upon the development level of a state.⁵⁰

3.2.1.2 Progressive realization

The concept of progressive realisation spreads the obligation of the state over a time period. It recognises the fact that 'full realization of all economic, social and cultural rights will generally not be feasible in a short period of time.'⁵¹ As with

⁴⁵Kalin & Kunzil (n 36 above) 116; Ssenyonjo (n 13 above) 25.

⁴⁶*Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 42; De Vos (n 28 above) 10.

⁴⁷De Vos (n 28 above) 10.

⁴⁸ As above.

⁴⁹ *Grootboom* (n 46 above) para 46.

⁵⁰CESCR *General Comment No 13: the right to education (art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 6(a).

⁵¹CESCR *General Comment No 3: the nature of States parties obligations (art. 2, par.1)*, 14/12/1990, para 9.

reasonableness discussed above, progressive realisation assumes that the obligations of states are not uniform or universal, but are relative to levels of development and available resources.⁵² It connotes a continuing obligation with a duty to constantly review progress and reduce the hurdles limiting in the realisation of the right. This means that the legal, administrative, operational and financial hurdles to the realisation of rights should be examined and progressively lowered.⁵³ The progressive approach is evident in the earliest discussions on socioeconomic rights where it was acknowledged that,

‘...recognition meant first and foremost that states would accept the obligation to do all in their power to achieve certain clearly defined aims, without however, undertaking to attain them in a specified period. Admittedly, they could be achieved only by slow degrees, and time would vary according to the relative magnitude of the problems of each country and the means at its disposal.’⁵⁴

⁵²Chapman & Russell ‘Introduction’ in Chapman & Russell (n 25 above) 4. In terms of the meaning of ‘resources’ as used in this statement, Chapman & Russell argue that the resources contemplated in this approach as in other human rights instruments include not only those that belong to the state, but all resources within it, including those owned individually by citizens and the private sector. The responsibility of the state is to mobilize these resources towards the fulfilment of the right. See Chapman & Russell (n 25 above) 11. G Van Bueren ‘Of floors and ceilings: minimum core obligations and children’ in D Brand & S Russell (eds) *Exploring the core content of socioeconomic rights: South African and international perspectives* (2002) 185 argues that resources for the implementation of socioeconomic rights ought not to be narrowly defined as direct economic resources, but should rather be broadly understood to include human and organizational resources. See also Committee on ESCR ‘Statement: an evaluation of the obligation to take steps to the ‘Maximum of Available Resources’ under an optional Protocol to the Covenant’ UN Doc E/C.12/2007/1 (10 May 2007), para 5 in which the CESCR reiterated that available resources include those available within the state party and those obtainable from the international community through international cooperation.

⁵³De Vos (n 28 above) 10.

⁵⁴UN Doc E/CN.4/AC.14/SR.1, 14 (17 May 1951) as quoted in Ssenyonjo (n 13 above) 367.

Subsequently, the Committee on ESCR stated that,

‘while the full realization of the relevant rights may be achieved progressively, steps towards the goal must be taken within a reasonably short time.....[and] such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.’⁵⁵

Essentially, while the obligations may be spread over time, the state does not have full discretion over the modalities of action. It must immediately, to the maximum extent of its available resources and while drawing as a matter of priority on the available resources, by all appropriate means, take steps towards the full realization of the rights.⁵⁶ The obligation to progressively realise applies also to increasing effectiveness in the use of the available resources, including prioritisation of the minimum core obligations.⁵⁷ To determine whether a state is progressively implementing socioeconomic rights therefore demands good quality data and statistical sophistication.⁵⁸

As shown in Chapter 2 of this work, the right to education as set out in the CRC, ICESCR and CRPD is subject to progressive realization.⁵⁹ But the definition of

⁵⁵Committee on ESCR General Comment No 3 (n 51 above) para 2.

⁵⁶Kalin & Kunzil (n 36 above) 116.

⁵⁷Eide (n 3 above) 126.

⁵⁸Chapman & Russell (n 25 above) 5; Ssenyonjo (n 13 above) 60.

⁵⁹Ssenyonjo (n 13 above) 367 argues that the term ‘recognise’ as used in article 13 of the ICESCR connotes progression. Article 28 of the CRC expressly provides for the duty to ‘progressively realize’ the right to education. Beiter (n 26 above) 516 also argues that article 14 of the CDESCR recognizes progressive realization within a reasonable period. She further argues that the effect of article 14 is to create urgency in the realization of the right to primary education. This position is reiterated by Sepulveda (n 27 above) 178. M Verheyde *Article 28: the right to education* (2006) 52 argues that since

progression in the context of this right poses methodological challenges. For instance, should the state pursue availability first and improve the quality later (as has often been the case)?⁶⁰ Or is the duty simultaneous, that is, to ensure all the 4As over a period of time.⁶¹ Both approaches have potentially undesirable effects: in the former case, more children are able to access some kind of education, though such education may be exclusionary or inadequate due to poor facilities or other resources. In the latter case, fewer children are able to access the education, though they are likely to have a better education. Having only certain children access education while others wait for resources to be available would both discriminate and perpetuate inequality. The urgency of childhood does not accord with the latter approach.⁶² It is highly likely that children with disabilities are more disadvantaged in both cases. Yet, international trends show that implementing all the 4As of education immediately is



progressive realization of the right to education is contained in the Chapeau of article 28, then it is applicable to the right to education in general.

⁶⁰The assessment of periodic state reports by both the CRC and ESCR committees has tended to focus on the availability of free and compulsory primary education. Similarly, international attention on EFA (See Chapter 2 of this work on these frameworks) which have all supported free and compulsory primary education have tended to focus on broadening access, an approach that often dwells on the numbers of children in or out of the education system. The instances where states are called upon to progressively address the quality of the education or the administration thereof are few. See R Hodgkin & P Newell *Implementation handbook on the Convention on the Rights of the Child* (2007) 412.

⁶¹The Dakar Framework for Action, para 16 & 43 supported this approach by arguing that the quality and expansion (that is, availability and accessibility) of education should be concurrent. The 4As are discussed in part 3.4 below.

⁶²Childhood is a period of rapid development in human beings, and often opportunities missed to stimulate cognitive ability in childhood significantly compromise the full development of the human potential. See J Doek 'The eighteenth birthday of the Convention on the Rights of the Child: achievements and challenges' 41 (2007) *University of Michigan Journal of Law Reform* 63. The urgency of childhood and hence the need for immediate attention and action for the fulfilment of their rights was also highlighted by the ACERWC in its decision on the case concerning the rights of children of Nubian descent in Kenya, Communication No. Com/002/2009, 22 March 2011, para 33.

often not feasible. In fact, no country in the world has reached an optimum.⁶³ A case on the right to education in Swaziland is instructive in this regard.⁶⁴

The case was brought to the High Court by a group of former mine workers who were generally indigent and therefore unable to pay school fees for their children. The applicants challenged the decision of the Swazi government to provide free primary education incrementally on the basis that the Constitution of Swaziland provided for a right to free and compulsory education for all children immediately. Save for a caveat against compromising quality, the provision of the Swazi Constitution did not envisage progressive realization of the right.⁶⁵ The government argued that free education under the provision was intended to be implemented year by year, that is, in the first year to grade 1, second year to grade 2, etc. The Court rejected this view, arguing rather that free primary education was intended for all Swazi children at the same time.⁶⁶ This case illustrates the probable exclusion of some children when progressive realization is interpreted as successive implementation of the elements of education.

⁶³The 2006 Global report on the right to education - Tomasevski K, "The state of the right to education worldwide; Free or for fee" Copenhagen (2006) highlighted the extent to which the right to free and compulsory primary education was not being achieved in the majority of states including developed countries. In addition, the concluding observations of both the CRC and the ICESCR Committees have consistently required developed states to improve on various aspects of their primary education systems. This shows that no country has achieved the ideal standard. See for instance the concluding observations of the CRC Committee on the report of the United Kingdom and Northern Ireland, 49th Session, CR/C/GBR/CO/4 para 67; CRC Concluding Observations: Finland, CRC/C/FIN/CO/4 17 June 2011, para 51 - 52.

⁶⁴ *Swaziland Ex-Miners Association vs The Minister for Education and Others* [2010] SZHC.

⁶⁵ Constitution of Swaziland, section 29(6) and section 60(8).

⁶⁶The progressive reasoning of the High Court was however overturned on appeal. See *Swaziland National Ex-Miners Workers Association v The Minister of Education and Others* (Civil Case No. 2168/09, and *Swaziland National Ex-Miners Workers Association v the Minister of Education and Others* [2010] SZSC 35.

3.2.1.3 The duty to ensure the minimum core

The concept of minimum core content of rights and minimum core obligations of states occupies a critical position in socioeconomic rights discourse. Minimum core obligations refer to the responsibility of the state to guarantee the minimum content of rights. 'Minimum content' on the other hand refers to 'the non-negotiable core of a right to which all individuals, in all contexts, and under all circumstances are entitled.'⁶⁷ Minimum core obligations emanate from 'claims to a secured economic floor below which a human being should not fall, as that would imperil their subsistence and survival and expose them to want and destitution.'⁶⁸ In support of the minimum core, it is argued that,

'the fact that there must exist [a minimum core] [seems] to be a logical implication of the use of the terminology of rights..... there would be no justification for elevating a 'claim' to the status of a right..... if its normative content could be so indeterminate as to allow the possibility that the right holders possess no particular entitlement to anything.'⁶⁹

To mitigate the potential for postponement of rights or the nullification of their *raison d'être* on the basis of lack of resources or progressive realisation, the CESCR prescribed minimum core obligations for the fulfilment of the rights under the

⁶⁷Ssenyonjo (n 13 above) 65.

⁶⁸F Coomans 'Economic, social and cultural rights' *SIM Special* 16 19; MN Wabwile *Legal protection of social and economic rights of children in developing countries; reassessing international cooperation and responsibility* (2010) 22.

⁶⁹P Alston 'Out of the abyss: the challenges confronting the new UN Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 353 as quoted in Ssenyonjo (n 13 above) 66.

Covenant.⁷⁰ The Limburg principles stated that state parties are obliged, 'regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.'⁷¹ This position was reiterated by the Committee on ESCR which stated that there is a minimum core obligation upon all states irrespective of their economic status 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.'⁷² In order for a state party to successfully attribute its failure to meet at least its minimum core obligations to lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.⁷³ The minimum core approach is therefore prescriptive, and operates on the basis of assessment of specific circumstances.

The minimum core approach entails both obligations of conduct and of result. The obligations of conduct are those that are calculated towards achieving a certain right (duty to take certain steps) while obligations of result are those that target the fulfilment of specific targets to satisfy a substantive standard.⁷⁴ The obligations of result give the state discretion on the means to achieve the result.⁷⁵ It has been argued that most obligations in education are located within the obligations of

⁷⁰CESCR General Comment No 3 (n 51 above) para 10; Chapman & Russell (n 25 above) 6.

⁷¹Limburg Principles (n 23 above) no 25.

⁷²CESCR General Comment No 3 (n 51 above) para 10; Maastricht Guidelines (n 30 above) para 9.

⁷³General Comment No 3 (n 51 above) para 10.

⁷⁴Maastricht Guidelines (n 30 above) para 7; General Comment No 3 (n 51 above) para 2 & 3; ILC 'Report of the International Law Commission' (1977) 2 *Yearbook of the International Law Commission* 20, para 8.

⁷⁵Sepulveda (n 27 above) 186.

result.⁷⁶ The duty to adopt a plan of action is an obligation of conduct, while obligations of result relate to the duty to meet the basic learning needs.⁷⁷

On the relationship between the obligations to respect, protect and fulfil and the minimum core, it is argued that there is a duty to guarantee conditions that are necessary to free beneficiaries of rights from threats to survival. This is achieved mainly through the negative duties under the right. Hence the duties to respect and protect are generally construed as being within the minimum core while the duty to fulfil entails enabling individuals to attain at least the conditions necessary for survival.⁷⁸ It is generally argued that the obligations are sequential, meaning that a state only moves to the progressive realization phase of socioeconomic rights once it has achieved the minimum core obligations.⁷⁹

⁷⁶M Nowak, "The right to education - its meaning, significance and limitations" (1991) 4 *Netherlands Quarterly of Human Rights* 422; Coomans (n 25 above) 244.

⁷⁷Coomans (n 25 above) 227.

⁷⁸D Bilchitz *Poverty and fundamental rights: the justification and enforcement of socioeconomic rights* (2007) 195. The author however takes issue with the assertion of other commentators [Chapman & Russell (n 25 above) 11] who argue that since the 'respect' and 'protect' aspects of the duty are 'cost-free', they ought to be automatically within the minimum core obligations. He argues that the negative nature of the obligation does not automatically translate into a minimum essential of the right. However, whereas this assertion is true in certain cases as in the examples the author gives, the main reason for recognition of minimum core obligation is the argument of the unavailability of resources to give effect to the full scope of the obligation. Thus if no resources are actually required to guarantee the right (though the phenomenon of an absolutely cost-free right in itself is doubtful), then it should be immediately available and clearly within the minimum core obligation to provide. I think that the author's contention is therefore true to the extent of the interpretation of the minimum core content of the rights in question, as opposed to the definition of the corresponding minimum core obligations of the state. Indeed, as Bilchitz subsequently acknowledges, [Bilchitz (above) 215] the availability or extent of resources need not be taken into account in the determination of the content of a right. Rather, the scarcity of resources would represent a limitation on the ability to fulfil a right whose content has been determined independently.

⁷⁹Chapman & Russell (n 25 above) 14; Eide et al *Economic, social and cultural rights*, (2006) 27 argue that core obligations differ between states based on capacity, but all must move progressively beyond their core. Van Bueren (n 52 above) 184 on the other hand argues that there would be no point in having a

3.2.1.4 Application of the minimum core to primary education

The CESCR is of the view that a state in which a significant number of individuals are deprived of 'the most basic forms of education' is prima facie in breach of its obligations under the ICESCR.⁸⁰ In 1999, the CESCR reiterated this position by stating that the entitlement of every person to free and compulsory primary education of one kind or another is one of the four elements that define the core content of the right to education.⁸¹ In addition, a number of commentators support the view that the obligation to make primary education free and universally available is commonly considered as a part of the minimum state obligation for the right to education.⁸² Nowak argues that the right of children to receive an education

minimum core of state responsibility if the minimum core were not universal. She does agree however that the minimum core expands over time and that a state must first implement the minimum core obligations and subsequently realize the remaining facets of the right. In addition, F Viljoen 'Children's rights: a response from a South African perspective' in Brand & Russell (n 52 above) 204 argues that the 'minimum core' is the point at which the other qualifiers of socioeconomic rights start to be measured, and that the core content of the right will always be reasonable and that resources will have to be available to ensure the core content of the right. Bilchitz (n 78 above) 185 argues that 'there are different levels to the realization of a right, some of which are more 'essential' than other levels' which essentially credits the minimum core as the baseline of rights for all people. Bilchitz supports the universality of a minimum core content of the right, and therefore challenges as incorrect the decision of the South African Constitutional Court in *Government of the Republic of South Africa v Grootboom and Others* 2001 SA 46 (CC) para 83. In that case, the Court rejected the minimum core approach to the right to housing on the basis that the determination of a minimum core required information relative to the circumstances of vulnerability that the Court did not have. Ssenyonjo (n 13 above) 67 argues that the minimum core is 'an absolute international minimum, and constitutes a basic level of subsistence necessary to live in dignity.' This relates to the universality of the standard. He however acknowledges that the minimum core evolves over time. Presumably, the evolution would also be universal. He also argues that the minimum core should be viewed as a springboard for further action by the state, and therefore that 'once the state has substantially met its core obligations, it is obliged to realize progressively the remainder of the right'. Ssenyonjo (as above) 67.

⁸⁰General Comment No 3 (n 51 above) para 10; Ssenyonjo (n 13 above) 378 argues that Primary Education is the minimum core obligation of the right to education.

⁸¹Committee on ESCR *Report of the Eighteenth and Nineteenth Sessions, Economic and Social Council, Official Records* (1999) 79.

⁸²Chapman & Russell (n 25 above) 10.

constitutes the core of the right to education under international law.⁸³ Coomans, on the other hand, identifies other elements of the core content of the right to education, including the right to enjoy free and compulsory primary education.⁸⁴

From the foregoing, there is no justification for a state's failure to provide free primary education for all children in its jurisdiction; in as far as primary education is a most basic form of education, and essential to the minimum acceptable level of human existence and dignity.⁸⁵ However, the minimum core approach and the resulting theory of immediate responsibility is rightfully criticised – especially in the context of the right to education - for its assumption that the minimum core is by definition affordable.⁸⁶ This perhaps partly explains why despite general acknowledgment of primary education as the minimum core element of the right to education, primary education is nevertheless not free and compulsory in the majority of countries across the development spectrum.⁸⁷ Indeed, even the ICESCR Committee impliedly recognised the impracticality of free education in some circumstances.⁸⁸

⁸³Nowak (n 15 above) 254.

⁸⁴Coomans (n 25 above) 225 – 230. The other elements identified include access to education on a non-discriminatory basis, special facilities for persons with an educational deficit, quality of education, free choice of education, and the right to be educated in the language of one's own choice.

⁸⁵Ssenyonjo (n 13 above) 60.

⁸⁶Ssenyonjo (n 13 above) 68.

⁸⁷Tomasevski (n 63 above) indicated that in fact there are very few countries in the world where primary education is truly free.

⁸⁸In *General Comment No 11: Plans of action for primary education* para 7 and *General Comment No 13* (n 50 above) para 51, the CESCR recognized certain circumstances when not providing free education was acceptable.

As a core of the right, primary education must have priority in resource allocation, because it deals with the fundamental basis for a person's and society's development.⁸⁹ Prioritisation of primary education conforms to the idea of a core content of rights.⁹⁰ It is the responsibility of the state to provide for primary education and maintain educational services, which cannot be discharged by giving more room to the private sector, or stimulating public-private partnerships for financing educational infrastructure.⁹¹

3.3 The right to education in the African human rights system

The African regional framework on the right to education has a slightly different (from the global) but significant approach. This difference is the absence of a differentiation in the obligations of the state with respect to socioeconomic or civil-political rights. The main instruments on rights – that is the ACRWC and the ACHPR – do not contain limitation clauses on the nature of the state's obligations. However, one of the implications of article 60 of the ACHPR and 46 of the ACRWC, which allow reference to other international instruments on human rights in their interpretation, is that the subjective element of the duty for realisation of socioeconomic rights may well be read-in to these regional instruments. In one such instance, the African Commission referred to the Committee on ESCR's interpretation of article 2(1) of the ICESCR which entails a limitation.⁹²

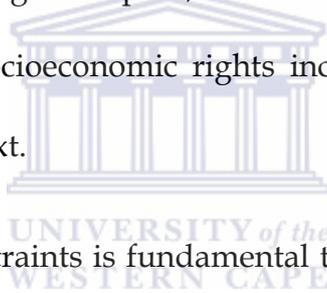
⁸⁹General Comment No 13 (n 50 above) para 5.1

⁹⁰Bilchitz (n 78 above) 208. Bilchitz argues that 'the minimum core approach is a means of specifying priorities'.

⁹¹Coomans (n 25 above) 228.

⁹²SERAC v Nigeria (n 28 above) para 48.

Whether such reference was prudent is debatable, particularly in light of the argument that imposition of non-limited duties for social economic rights achieves a better standard for their protection, and the potential effect of this decision as a precedent. Nevertheless, the case is indicative of the susceptibility of the standards under the African human rights instruments to prevailing international normative standards. It is argued that neither the ACHPR nor the African Commission has clearly indicated the extent of the immediate duty of the state in the positive realisation of socioeconomic rights and that in fact, the Commission's interpretation of these obligations⁹³ implies that state parties are required to act 'in a reasonable manner.'⁹⁴ If this line of thinking is adopted, then the reasonability test is inescapable in the conceptualisation of socioeconomic rights including the right to education, even within the regional context.



The question of resource constraints is fundamental to the realization of the right to free primary education in the African context, as majority of African states still grapple with limited financial resources in proportion to the needs of the citizens. Indeed, a vast majority of children in Sub-Saharan Africa live in abject poverty, and therefore cost is a determining factor in access to education. In such circumstances, the imposition of school fees becomes an exclusionary practice.⁹⁵ These contextual realities amplify the need for development of responsive legal frameworks that

⁹³Particularly in *SERAC v Nigeria* (n 28 above) para 52.

⁹⁴*De Vos* (n 28 above) 22.

⁹⁵UNESCO 'Overcoming exclusion through inclusive approaches in education; a challenge and a vision' (2003) 13.

would guide the application of the limited resources for the optimum protection of the rights of the children affected.

3.4 Application of socioeconomic rights standards to the right to primary education

It is essential to establish the relationship between the aspects of fulfilment of the right to education (respecting, protecting and fulfilling) and the four elements of the right to education. In her first report to the UN Human Rights Committee, the UN Special Rapporteur on the right to education outlined what she referred to as the '4As of education'. These were availability, accessibility, acceptability and adaptability.⁹⁶ These elements, she argued, portray governmental obligations corresponding to the right to education.⁹⁷ In General Comment No. 13,⁹⁸ the UN Committee on Economic, Social and Cultural Rights (CESCR), endorsed her approach to government obligations for the implementation of the right to education while setting out the basic features of education.

The 4A scheme has since attained considerably high normative value in the interpretation of the scope and content of state obligations in the sphere of education. These 4As are used increasingly as a yardstick for state's compliance with the international requirements for the fulfilment of the right to education.⁹⁹ It is argued that the duty to respect, protect and fulfil the right to education is achieved by

⁹⁶Preliminary report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33 para 50.

⁹⁷As above.

⁹⁸General Comment No 13 (n 50 above).

⁹⁹Malherbe (n 21 above) 402.

availing an accessible, acceptable, and adaptable education.¹⁰⁰ The CESCR states in this regard that ‘States have obligations to respect, protect and fulfil each of the “essential features” (availability, accessibility, acceptability, adaptability) of the right to education.’¹⁰¹ Availability and accessibility target the child’s right ‘to’ education, while acceptability and adaptability address the child’s rights ‘in’ education.¹⁰² Each of the elements of the right is discussed below.

3.4.1 Availability

In General Comment No. 13, availability is defined as the provision of functioning educational institutions and programmes in sufficient quantity within the jurisdiction of a state party.¹⁰³ The meaning of ‘functional’ depends on numerous factors, including the developmental context within which such facilities are found. The foregoing notwithstanding, there is a non-derogable minimum required of all states, irrespective of the level of development. These minimum requirements include buildings or other protection from the elements, separate sanitation facilities for male and female children, safe drinking water, trained teachers receiving domestically competitive salaries, and teaching materials.¹⁰⁴ The secondary level of ‘functionality’ depends on the developmental context and includes facilities such as libraries, computer facilities and information technology.¹⁰⁵ Hence, when exactly the

¹⁰⁰ Ssenyonjo (n 13 above) 359.

¹⁰¹ General Comment 13 (n 50 above) para 50.

¹⁰² LN Murungi ‘The right to education under the Constitution of Kenya: Scope and Prospects for Enforcement’ in J Biegon & G Musila (eds) *Judicial enforcement of socio-economic rights in Kenya: challenges and opportunities for Kenya* (2011) 228.

¹⁰³ General Comment 13 (n 50 above) para 6.

¹⁰⁴ General Comment 13 (n 50 above) para 6(a).

¹⁰⁵ General Comment 13 (n 50 above) para 6(a). The list is neither conclusive nor universal.

obligation to make education available is fulfilled can only be answered on a case by case basis.¹⁰⁶

Availability is the bedrock of compulsory education.¹⁰⁷ It relates to both the substance and form of education. The reference to 'availability and the adequacy of educational infrastructure' recognises that the quality of education depends not only on the content of the curriculum, but also on the material circumstances in which learners receive their education.¹⁰⁸ The duty to make education available embodies the obligation to take financial and technical action in order to ensure that an education system of good quality is established and maintained.¹⁰⁹ As highlighted in Chapter 1, it is difficult and irrational to enforce compulsory education when the cost of education is beyond the means of learners' households.

Another dimension of availability of education is the quantity of education facilities provided. This refers to the presence of context appropriate and functional educational institutions and programmes. In view of the capital intensive nature of this goal, availability of sufficient educational facilities requires both government and private investment in education. It is for this reason that it is argued that there are both civil and political obligations of the government to permit the establishment of

¹⁰⁶Verheyde (n 59 above) 16.

¹⁰⁷Beiter (n 26 above) 96.

¹⁰⁸Woolman & Bishop (n 19 above) 57-19.

¹⁰⁹Verheyde (n 59 above) 15 - 16.

schools, and a socio-economic duty to ensure that free and compulsory education is available to all school-age children.¹¹⁰

As highlighted above, the scope of the duty to avail primary education is to make it 'available free to all'. This formal standard would apply uniformly to all education. However, to avail primary education free to children with disabilities has a far more serious demand. It means that either all schools (which need to be numerically sufficient) are able to cater for children with disabilities, or that schools with such capacity (if special schools) are sufficient. This has an effect on the interpretation of inclusive education and the choices regarding integration of learners into regular schools. Similarly, the Committee on ESCR's scope of the minimum content of availability as indicated above, while seemingly standard to all children would be insufficient to enable education of children with disabilities. In order to make it relevant, this minimum core would need to be extended to the individualised and often non-itemised needs of children with disabilities such as technical aids and non-pedagogic support.

3.4.2 Accessibility

In brief, accessibility requires that 'once the schools have been built and stocked with the teachers and textbooks, that is, once they have been made available, learners are able to make use of them.¹¹¹ This entails removal of obstacles to entry into the education system and barriers to learning. Obstacles result from discrimination,

¹¹⁰K Tomasevski *Education denied; costs and remedies* (2003) 51.

¹¹¹Woolman & Bishop (n 19 above) 57-21.

physical or economic factors.¹¹² The Committee on ESCR states in this regard that 'educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party.'¹¹³ The Committee further stated that physical accessibility means that the educational facilities should be within safe physical reach and reasonable geographic convenience, or be accessible through modern technology.

Such an understanding of physical accessibility fails to address other accessibility concerns for children with physical disabilities who require accessible environments within the school in addition to proximity. The understanding is also rather mechanical, serving only the purpose of 'access to' to the exclusion of 'access in' education. It therefore leaves out the needs of children who require technical support to access the content of education such as those in need of Braille material or sign language interpretation. Inevitably, failure to provide technical aids and other appropriate support to children with intellectual disabilities impairs their access to the education. Accessibility also ought to address other barriers to meaningful participation of children in the learning process such as language. For instance, failure to provide sign language interpretation locks out children with hearing disabilities from the mainstream of education.

¹¹²S Kantry *et al* (eds) 'Enhancing enforcement of economic, social, and cultural rights using indicators: a focus on the right to education in the ICESCR' (2010) 32 *Human Rights Quarterly* 276.

¹¹³General Comment 13 (n 50 above) para 6(b); Disability is not one of the prohibited grounds of discrimination under the ICESCR. But by virtue of CESCR *General Comment No 5: the rights of Persons with Disabilities*, 12/09/1994, para 5 disability was included into the recognised grounds within 'other status' clause in article 2(2) of the Convention.

Economic access on the other hand, is interpreted to mean that the education ought to be affordable to all, and in the case of primary education, free to all.¹¹⁴ The obligations of the state in this regard are differentiated at primary, secondary and tertiary education levels.¹¹⁵ It has been shown in both this chapter and chapter 2 that as far as the primary level is concerned, the state's responsibility is to provide the education free of charge in order to ensure full accessibility.

Thus besides the need to expand the scope of accessibility beyond what is contemplated in General Comment No 13, the duty to make education accessible to all should include the establishment of new facilities sufficient to ensure geographic and physical accessibility, as well as the adaptation of existing facilities to facilitate accommodation of learners with disabilities. This dimension of interpretation has profound significance in interpreting the extent of the state's obligations in implementing inclusive education.

3.4.3 Acceptability

This element relates to the content of education, requiring it to be culturally appropriate and of an acceptable standard. The educational curricula must conform to the aims of education established in the conventions, such as article 13 of the ICESCR, 29 of the CRC and 11(2) of the ACRWC. In terms of the ICESCR, the form and substance of education, including curricula and teaching methods, have to be relevant, culturally appropriate, and of good quality for students and, in appropriate

¹¹⁴General Comment No 13 (n 50 above) para 6.

¹¹⁵Tomasevski (n 110 above) 51; General Comment 3 (n 51 above), para 5 was the first indication of the differentiated obligations in respect of primary education.

cases, parents.¹¹⁶ Acceptability therefore targets the substance of education. The relationship between acceptability and the aims of education sets the latter as the primary benchmark for this standard. In essence, education is only acceptable if it achieves the objectives set out in article 13(1), 11(2) of the ACRWC and 29(1) of the CRC. Acceptability requires a guaranteed quality of education, minimum standards of health and safety, and professional requirements for teachers which have to be set, monitored and enforced by the government.¹¹⁷

The limits of acceptability have been considerably broadened through the development of certain other aspects of international human rights law. For instance, indigenous and minority rights instruments have prioritized the language of instruction, while the prohibition of corporal punishment has transformed school discipline.¹¹⁸ The emergence of children as subjects of the right to education has further extended the boundaries of ensuring acceptability of education¹¹⁹ with the effect that methods of instruction must at all times respect the child's dignity.¹²⁰

Arguably then, the growing attention to the unique needs of children with disabilities stands to redefine the acceptability standard. Article 24(1) of the CRPD requires state parties to ensure that education is directed at strengthening respect for 'fundamental freedoms and human diversity' as well as the full development of 'human potential and sense of its dignity and self-worth.' These two elements, in as

¹¹⁶General Comment No 13 (n 50 above) para 6.

¹¹⁷Tomasevski (n 110 above) 51.

¹¹⁸CRC Committee *General Comment No 1(article 29(1)): the aims of education* CRC/GC/2001/1, para 8.

¹¹⁹Tomasevski (n 110 above) 51.

¹²⁰Beiter (n 26 above) 494

far as they were not included in pre-existing international treaties addressing the right to education, redefine acceptability and must be taken into account henceforth in determining whether education indeed meets international standards. One obvious effect is that the output of education can no longer be validated through academic performance alone. In addition, the focus on equal education for children with disabilities in both the CRC and the CRPD requires review of longstanding practices of relegating the education of children with disabilities to the less competitive types of education, such as emphasising vocational skills at the expense of an academic curriculum generally offered in mainstream schools.

3.4.4 Adaptability

Education ought to be flexible to the needs of changing societies and communities, and respond to the needs of students within their diverse social and cultural settings.¹²¹ Adaptability requires schools to adjust to the needs of learners, in this case children with disabilities, in accordance with the best interests of each child.¹²² This requirement counters longstanding practices of pushing children to adapt to whatever schools may have been available to them.¹²³ It entails accommodation of difference, and triggers the question of the appropriate criteria for identification of what constitutes a difference that demands accommodation.¹²⁴ Adaptability is a

¹²¹General Comment No 13 (n 50 above) para 6.

¹²²Kantry *et al* (n 112 above) 276.

¹²³Tomasevski (n 110 above) 52.

¹²⁴K Tomasevski *Human rights obligations in education: the 4A scheme* (2006) 110.

prerequisite for both safeguarding human rights within education as well as enhancing human rights through education.¹²⁵

An adaptable education system accommodates the educational needs of children with disabilities.¹²⁶ This is especially important in view of the fact that as in the other social spheres, the educational system, that is, its infrastructure and content, is tailored to the needs of the child without disabilities. As a result, children with disabilities have, in the past, had to adjust themselves in order to fit into the established system. With the renewed understanding of the rights of persons with disabilities, particularly in the run up to and after the adoption of the CRPD, the burden of adjustment has been shifted to the system. The heightened role of adaptability must be embraced and reinforced by conscious efforts of states to ensure that children with disabilities are not excluded from education due to the inflexibility of the system. In practice, adapting education to the needs of children with disabilities would have a bearing on the mode of instruction such as traditional oral lectures, the content of education, the role of teachers, testing and accreditation among others.

3.5 Principles of children's rights

During its first session in 1991, the CRC Committee designated four general principles of the Convention.¹²⁷ These principles were drawn from article 2 that prohibits discrimination, article 3 on the best interests of the child, article 6 on the

¹²⁵Tomasevski (n 110 above) 52.

¹²⁶Malherbe (n 21 above) 402.

¹²⁷Hammarberg (n 11 above) 356.

child's right to life, survival and development, and article 12 on the right of the child to express his or her views and to be heard. The principles together form an approach to the rights of the child to guide national programs of implementation. The ideas expressed in the general principles are rooted in basic values about the treatment of children, their protection and participation in society.¹²⁸ These principles are deemed to give a 'soul' to the Convention, and are hence relevant to all aspects of the interpretation and implementation of the CRC.¹²⁹

The principles on the rights of the child are generally interrelated, and the CRC Committee has therefore consistently urged their interpretation as a whole taking into account their interrelationships, particularly between the specific articles and the general principles.¹³⁰ State parties to the CRC ought to adopt legislation that sets out and emphasises the general principles.¹³¹ The CRC Committee has underscored the importance of these principles to the realization of the rights of children with disabilities, and highlighted in particular that the principles ought to anchor the special attention due to these children.¹³² The CRC Committee has further been emphatic that traditional societal attitudes cannot contradict the general principles.¹³³

¹²⁸As above 354.

¹²⁹F Ang et al 'Participation rights in the UN Convention on the Rights of the Child' in Fiona Ang et al (eds) *Participation rights of children* (2006) 10.

¹³⁰Hodgkin & Newell (n 60 above) 37.

¹³¹CRC Committee *General Comment No 5 (2003): general measures of implementation for the Convention on the Rights of the Child*, CRC/GC/2003/5 (2003) para 22; U Kilkelly 'Operationalising children's rights: lessons from research' (2006) 14 *Journal of Children Services* 41.

¹³²CRC *General Comment No 9 (2006): the rights of children with disabilities*, CRC/C/GC/9 (2007) para 28 – 33.

¹³³Ang et al (n 129 above) 11.

This is important in light of socially entrenched negative attitudes towards children with disabilities.

Below is an evaluation of the content and application of these principles to the right to primary education in general and primary education of children with disabilities in particular.

3.5.1 The principle of non-discrimination

Drawn from article 2 of the CRC, this principle embodies the message of equality to the effect that all children should be able to enjoy their rights without discrimination on a number of grounds including disability. Discrimination is not defined in the CRC, nor has the CRC Committee issued any definition of the concept. The general approach, including by the other treaty bodies, has been to explain the application of the concept of non-discrimination to specific circumstances.¹³⁴ The CRC Committee emphasises the need for an active approach to the implementation of non-discrimination by requiring that the implementation of article 2 of the CRC be integrated into all other articles, ensuring all the rights mentioned are available to all children without discrimination.¹³⁵ Non-discrimination includes the responsibility to take proactive measures to ensure that all children have a genuine chance to live.¹³⁶

¹³⁴See for instance CESCR General Comment No 5, CRC Committee General Comments No 1 and 7, and Human Rights Committee General Comment No 18 of 1989.

¹³⁵Hodgkin & Newell (n 60 above) 21.

¹³⁶Hammarberg (n 11 above) 356.

The duty not to discriminate applies equally to private institutions and individuals as to the state.¹³⁷

The meaning of discrimination against children with disabilities in education is discussed in further detail in chapter 4 of this work. It is however useful to highlight at this point the main tenets of this right and principle in the context of education. Firstly, non-discrimination is an omnipresent requirement in all the elements of the right to education – that is – education ought to be available to all, accessible to all, acceptable to all, and adapted to accommodate all children. Secondly, non-discrimination is implicit in the education provisions of the relevant Conventions. Article 13 of the ICESCR embodies substantive equality in education.¹³⁸ In General Comment No. 13, the Committee on ESCR urged states to monitor education in order to identify and redress *de facto* discrimination, and to that end, to disaggregate education data for the prohibited groups.¹³⁹ Thirdly, the primary purpose of the provisions relative to children with disability in both the CRC and the ACRWC is the elimination of their discrimination in various aspects of their lives including education.¹⁴⁰

¹³⁷Hodgkin & Newell (n 60 above) 22. B Abrahamson *Article 2: the right of non-discrimination* (2008) 103 argues that whereas the CRC does not create a direct duty for non-state actors. It does however enjoin the state to ensure that private actors in their jurisdiction do not abuse such rights.

¹³⁸Beiter (n 26 above) 404.

¹³⁹ Beiter (n 26 above) 404.

¹⁴⁰ Such as article 23 of the CRC and article 13 of the ACRWC.

3.5.2 The principle of the best interests of the child

The principle is set out in article 3(1) of the CRC, and reflected in specific rights provisions including articles 9, 18, 20, 21, 37 and 40.¹⁴¹ As indicated in Chapter 2 of this work, the ‘best interests’ or ‘interests’ of the child approach to matters affecting children was neither invented by, nor is it peculiar, to the CRC.¹⁴² It had previously been applied in the context of family law, and included in other international legal instruments such as the 1959 Declaration of the Rights of the Child¹⁴³ and CEDAW¹⁴⁴ as well as in general comments of the Human Rights Committee.¹⁴⁵

As a general principle, best interests of the child anchors a rights-based approach to children’s affairs, and has, in view of its wide acceptance and application, become a legal norm capable of very wide application.¹⁴⁶ Despite its centrality to the rights of children, the concept is not defined in the Convention. Some definitions have however been suggested. It is for instance argued that the best interests refer to a number of things including

¹⁴¹As used in the rest of the articles, the term ‘best interests of the child’ is a specific and individual standard. Hodgkin & Newell (n 60 above) 37.

¹⁴² M Freeman *Article 3: the best interests of the child* (2007) 1.

¹⁴³ Adopted by UN General Assembly Resolution 1386 (XIV) of 10 December 1959, Para 2.

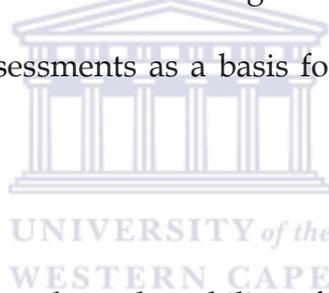
¹⁴⁴ Articles 5(b) and 16(1) (d).

¹⁴⁵The UN Human Rights Committee in *General Comment No 19: Protection of the family, the right to marriage and equality of the spouses* (Art. 23): 27/07/1990, the Committee called for respect of a child’s interests in matrimonial legal proceedings. ; In *General Comment No 17: rights of the child* (Art. 24): 07/04/1989, para 2 the Human Rights Committee called for recognition of a child’s best interests in the context of judicial proceedings.

¹⁴⁶J Sloth-Nielsen ‘Strengthening the promotion, protection and fulfilment of children’s rights in the African Context’ in A Alen et al (eds) *The UN Children’s Rights Convention: theory meets practice* (2007) 98.

'basic interests, for example to physical, emotional and intellectual care, developmental interests, to enter adulthood as far as possible without disadvantage, [and] autonomy interests, especially the freedom to choose a lifestyle of their own.'¹⁴⁷

The CRC Committee has, in an approach similar to that of the non-discrimination principle, developed interpretations of the principle in relation to different issues as opposed to issuing a single interpretative comment. The Committee requires the principle to be applied by systematically considering how children's rights are likely to be affected by decisions and actions including laws and policies.¹⁴⁸ It further calls for the use of child impact assessments as a basis for the determination of the best interests of the child.¹⁴⁹



The principle takes into account the vulnerability of children, and requires that the interests of the state or parents are not the all-important factor in decisions affecting the child. It plays a mediating role between conflicting rights, or between the interests of the child and those of other parties.¹⁵⁰ This function accounts for the

¹⁴⁷J Eekelaar, 'The importance of thinking that children have rights' (1992) 6 *International Journal of Law and the Family* 230 - 231 as quoted in M Freeman *Article 3: the best interests of the child* (2007) 27.

¹⁴⁸CRC General Comment No 5 (n 131 above) para 12.

¹⁴⁹See CRC *General Comment No. 14: The right of a child to have his or her best interests taken as a primary consideration - article 3 Para 1* (2013) for a comprehensive interpretation of the best interests of the child principle. See also General Comment No 5 (n 131 above) para 45 - 47; Hammarberg (n 11 above) 356 - 357; Hodgkin & Newell (n 60 above) 38.

¹⁵⁰Freeman (n 147 above) 32; P Alston 'The best interests principle: towards a reconciliation of culture and human rights' in M Freeman (ed) *Children's Rights* (2004) 198; AG Mower Jr. *The Convention on the Rights of the Child* (1997) 24.

indefinite article 'a' in 'a primary consideration' that allows flexibility where necessary.¹⁵¹ The principle acts as a starting point for dialogue on the content of the right in question and how the rights of the child can be fully realised in the circumstances.¹⁵²

Even when the other parties have legitimate interests, it must be shown that those other interests deserve to override the interests of the child.¹⁵³ The best interests of the child principle also serves as a gap filler where specific provisions of the Convention do not apply.¹⁵⁴ It re-emphasises the status of a child as a right bearer, and therefore the interpretation of the principle must be consistent with spirit of the entire convention.¹⁵⁵



The CRC Committee has expressly highlighted the need to take into account the best interests of the child in the context of education.¹⁵⁶ The principle also ought to be a primary consideration in the determination of the appropriate placement of a child

¹⁵¹The ACRWC adopts a different standard, indicating the best interests of the child as 'the primary' consideration (article 4). Arguably, this gives the principle a higher standing. See BD Mezmur 'African Children's Charter versus the UN Convention on the Rights of the Child: A zero sum game?' (2008) 23 *South African Journal of Public Law* 8.

¹⁵²R Roose & M Bouverne-De Bie 'Do children have rights or do their rights have to be realized? The United Nations Convention on the Rights of the Child as a frame of reference for pedagogical action' (2007) 41 3 *Journal of Philosophy of Education* 438.

¹⁵³Alston (n 150 above) 195.

¹⁵⁴Hodgkin & Newell (n 60 above) 35.

¹⁵⁵As above 38.

¹⁵⁶CRC General Comment No 7: *implementing child rights in early childhood*, (2005) CRC/C/GC/7/Rev.1 para 13.

with disabilities between the general and special education systems.¹⁵⁷ The Committee on ESCR has also indicated that the best interests of the child should be the basis for determination of the appropriate application of the essential features of education.¹⁵⁸ Guaranteeing the best interests of the child requires an individualised approach to the rights of every child, which is in turn consistent with ensuring the individual development of the child.

Regarding the application of this principle to the rights of children with disabilities, it is argued that the best interests principle captures the essence, object and purpose of the CRPD better than any of the other principles.¹⁵⁹

3.5.3 The principle of survival and development

Drawn from the right of every child to life, and the duty of the state to ensure survival and development of the child to the maximum extent possible, the principle addresses both the need to ensure the bare necessities of a child's life in order to guarantee life, as well as factors that enhance the quality of the child's life. In the former category would be factors such as immunization and other preventative actions. In view of the centrality of the right to life, it is argued that article 6 of the CRC should be the platform for all other articles in the CRC.¹⁶⁰

¹⁵⁷Beiter (n 26 above) 138.

¹⁵⁸General Comment 13 (n 50 above) para 7.

¹⁵⁹JCM Willems 'Principles and promises in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities' in L Waddington et al (eds) *European yearbook of disability law* (2012) 70.

¹⁶⁰Hammarberg (n 11 above) 357.

The developmental dimension relates to the child's health, mental, emotional, cognitive, social and cultural development.¹⁶¹ This aspect of the principle is particularly relevant to the right to education, and the rights of children with disabilities. It ties to the aim of education to ensure 'the full development of the human personality' which is deemed the most important aim of education.¹⁶² The duty to ensure the development of the child's personality to the fullest is also the basis for the provision that the education of the child ought to be individualised.¹⁶³ The principle of survival and development is further important to children with disabilities because in most societies, the quality of life is deemed to be diminished by disability.¹⁶⁴



The duty to ensure the development of the child is limited by the phrase 'to the maximum extent possible.'¹⁶⁵ This means that the measures in this regard are relative to the state's level of development. The principle of survival and development is the only of the four core child rights principles that is not reproduced in the CRPD. It is however argued that this principle can be inferred or be deemed to be subsumed in the holistic best interests principle.¹⁶⁶

¹⁶¹Hammarberg (n 11 above) 357. J Doek 'The eighteenth birthday of the CRC: Achievements and challenges' (2007) 41 *University of Michigan Journal of Law Reform* 63 argues that the right of the child to survival and development under article 6 of the CRC is meant to ensure that the child moves into adulthood with maximum opportunities to form and pursue life goals.

¹⁶²Beiter (n 26 above) 470.

¹⁶³General Comment 9 (n 132 above) para 63.

¹⁶⁴U Kilkelly, 'Disability and children: the Convention on the Rights of the Child' in G Quinn & T Degener *Disability and human rights* (2002) 194.

¹⁶⁵CRC, article 6(2).

¹⁶⁶Willems (n 159 above) 71.

3.5.4 The principle of child participation

Article 12 of the CRC establishes the right of the child to express their views in all matters concerning them and for such views to be duly considered in such matters, taking into account the child's age and maturity. Alongside certain other provisions of the CRC such as the articles on freedom of thought, conscience and religion,¹⁶⁷ article 12 embodies the principle of child participation.¹⁶⁸ This principle is critical to the recognition of the child as a duty bearer. It is argued in that regard that article 12 (and by extension the principle that it embodies) can be used as a benchmark on whether children are recognised as rights holders in a state party jurisdiction.¹⁶⁹ In General Comment No 12, the CRC Committee elaborated on the meaning of and the practical requirements for the implementation of the principle.¹⁷⁰

This elaboration notwithstanding, practical questions abound such as the criterion of competence or capability to express views, on who ought to make the decision as to a child's competence, or the scope of competence (whether general understanding of all matters is required or whether competence in respect of the particular matter in question is) needed. It is argued with respect to the latter (albeit in the context of judicial proceedings) that the child need not understand the full spectrum of issues involved, but rather that they have a sufficient understanding and intelligence

¹⁶⁷ CRC, article 14.

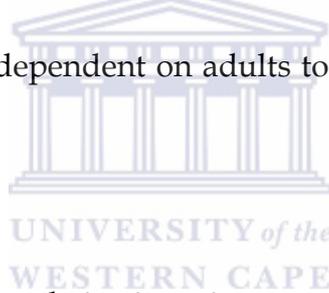
¹⁶⁸E Verhellen *Convention on the Rights of the Child* (1994) 112; Ang et al (n 129 above) 9.

¹⁶⁹ J Doek 'What does the children's convention require?' (2006) *Emory International Law Review* 200-201.

¹⁷⁰CRC Committee *General Comment No 12: The right of the child to be heard* (2009) CRC/C/GC/12. The interpretation and application of the principle of child participation has often tended to the expression of the views of the child in the context of children in conflict with the law.

regarding what is proposed.¹⁷¹ By analogy, while the child may not be competent in all matters concerning his or her education, that fact alone ought not to preclude them from giving their views on specific questions regarding their education including choice of an appropriate system.

A key challenge to the exercise of the freedom of expression for children is the need to balance the child's right 'to express their views without interfering yet appropriately guiding'.¹⁷² The interaction of parental rights and responsibilities and the child's rights has to be delicately balanced.¹⁷³ The right of the child to participate acknowledges that children are individual human beings with rights, as opposed to passive beneficiaries who are dependent on adults to act on their behalf in decision-making.¹⁷⁴



The right of the child to express their views is a component of the child's rights 'in' education.¹⁷⁵ The right to choose where to receive an education is however more

¹⁷¹N Thomas & C O'Kane, 'When children's wishes and feelings clash with their "best interests" (1998) 6 2 *International Journal of Children's Rights* 140.

¹⁷² Ang et al (n 129 above) 15.

¹⁷³The balancing of parental/guardianship rights and duties and the right of the child with disabilities to participate in choosing the right context of education is discussed in more detail in Chapter 4 part 4.5 of this work.

¹⁷⁴A Kronborg & IL Svendsen 'Children's right to be heard: the interplay between human rights and national law' in P Lodrup & E Modvar (eds) *Family life and human rights* (2004) 411; M Verheyde 'Participation at school' in Ang et al (n 129 above) 182 highlights the fact that allowing children to participate in education fosters their fulfilment.

¹⁷⁵UN CRC *General Comment No 1: the aims of education* (2001) CRC/GC/2001/1 para 8; Verhellen (n 168 above) 99 also construes a right to participation within the right to education for children, particularly as a rights 'in' education; Verheyde (n 174 above) 182 argues that participation is an indispensable tool in ensuring the aims of education.

aply located in article 28 which covers the organisational aspects of the right to receive an education.¹⁷⁶ This is because, distinct from other human rights instruments that provide for the right to education, article 28 of the CRC recognises the child, as opposed to ‘everyone’, as a holder of the right to education, thereby emphasising the self-determination and responsibility of children in education.¹⁷⁷ The CRC Committee has further made a number of recommendations regarding the participation of children in various aspects of education such as decisions regarding expulsion from school.¹⁷⁸

The principle of child participation is closely related to the principle of the best interests of the child to the extent that the determination of the best interests requires obtaining the views of the child.¹⁷⁹ It is also recognised that full participation of children with disabilities is central to the fulfilment of the rights under the Convention.¹⁸⁰

3.5.5 Application of the principles of children’s rights to the right to education

While the right to education applies to all people, the majority of the beneficiaries of education are children.¹⁸¹ General Comment No 1 of the CRC helped to establish the link between the right to education (articles 28 and 29) and the rights of children with

¹⁷⁶Verheyde (n 174 above) 186.

¹⁷⁷As above.

¹⁷⁸See for instance, CRC Committee, Concluding Observations: The United Kingdom of Great Britain and Northern Ireland (UN Doc. CRC/C/121, 2002) para 140.

¹⁷⁹Hammarberg (n 11 above) 358.

¹⁸⁰CRC Committee, ‘Summary of the record of the 418th meeting: general discussion on the rights of persons with disabilities’ (06/10/1997) CRC/C/SR.418, para 6; Kilkelly (n 164 above) 194.

¹⁸¹Rabin (n 15 above) 265.

disabilities under article 23. It also highlighted the relationship between the education articles and the principles of the Convention.¹⁸²

The general principles are interrelated and mutually reinforcing. For instance, it is impossible to ensure the full development of children's mental and physical capacity, which is closely related to the principle of survival and development, without guaranteeing their participation in education.¹⁸³ Similarly the best interests of the child principle balances participation rights by mediating between the autonomy and protectionist views of childhood.¹⁸⁴ Also, it is argued that the principle of child participation is furthered by ensuring that the best interests principle is applied to all children.¹⁸⁵ In addition, it is said that an education system that fails to take into account the best interests of the child in disciplinary or other matters or fails to facilitate the child's participation is *prima facie* in breach of the CRC.¹⁸⁶ It is possible to infer a hierarchical relationship between the principles of children's rights and the other provisions of the CRC. In effect, the fulfilment of the right to education is subject to the advancement of the fundamental principles of children's rights.

Children's rights principles underscore the urgency and priority due to the education of children in general and primary education in particular. It is in the best interests of the child to be educated in the early and formative years of their life. This also

¹⁸²Kilkelly (n 164 above) 199.

¹⁸³Verheyde (n 174 above) 182.

¹⁸⁴As above 196.

¹⁸⁵Mower Jr. (n 150 above) 24.

¹⁸⁶Kilkelly (n 164 above) 199.

influences the child's development. For this reason, the principles of children's rights are more definitive of the appropriate approach to implementation of the right to education.

3.6 Disability rights principles

Two sets of principles on disability rights are highlighted in this work; the general principles on disability rights, and the principles relative to the right to inclusive education. The latter principles, that is, the duties of the state to ensure non-exclusion from the general education system, access to an inclusive, quality and free primary education on an equal basis with other children in the society in which they live, reasonable accommodation and effective individualised support, are discussed in detail in the subsequent chapter. The general principles are set out at article 3 of the CRPD. The principles of non-discrimination, full and effective participation and inclusion in society, equality of opportunity, accessibility, and respect for the evolving capacities of children with disabilities are especially relevant to the present study.

As evident in the earlier discussion, the approach of applying general principles in a human rights context was pioneered by the CRC Committee. The CRPD is however the first textual reference to general principles in a treaty.¹⁸⁷ The idea of general

¹⁸⁷M Schulze, *Understanding the UN Convention on the Rights of persons with Disabilities* (2010) 44. Notably however, the underlying principles of human rights have often been set out in the preamble of human rights treaties before. Their inclusion in the text of the Treaty however confers them with more authority.

principles underpinning the core purpose of the Convention was adopted right at the beginning of the negotiations on the CRPD, and save for additions in respect of accessibility, children's rights, and equality between men and women, the principles as set out in the first draft of the Working Group were warmly embraced by the negotiators.¹⁸⁸

The principles are interlinked and reiterated in right specific articles of the Convention. They buttress the shift to a human rights perspective in light of the social model of disability and act as guidelines for 'design and refinement' in the interpretation of the other rights in the Convention.¹⁸⁹ This is especially important in light of potential ambiguities in the Convention that need to be reconciled with the purpose thereof.¹⁹⁰ It is argued that besides their role as interpretative tools for the other provisions under the CRPD, the general principles of the CRPD are a standard against which other law can be tested for conformity with the object and purpose of

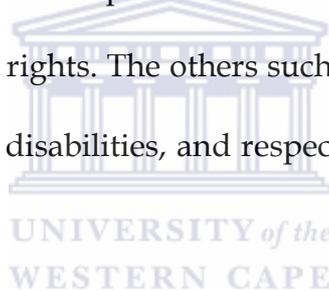
¹⁸⁸See the comments on Draft Article 2: General Principles, A/AC.265/2004/WG/1 available at www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm (accessed 10.01.2013). During the second session of the Ad Hoc Committee, a 'Discussion Paper on Founding Principles of the Convention on the Rights of Persons with Disabilities' prepared by the Danish Institute for Human Rights was introduced to inform the discussion on the principles. The paper is available at www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp9.htm#_ftn1 (accessed 10.01.2013).

¹⁸⁹C Harnacke & S Graumann 'Core principles of the UN Convention on the Rights of Persons with Disabilities' in J Anderson & J Philips (eds) *Disability and universal rights: legal, ethical, and conceptual implications of the Convention on the Rights of Persons with Disabilities* (2012) 38.

¹⁹⁰G Quinn 'A short guide to the United Nations Convention on the Rights of Persons with Disabilities' in G Quinn & L Waddington (eds) *European yearbook of disability law* (2009) 101; G Quinn, 'Disability and human rights: a new field in the United Nations' in C Krause & M Scheinin (eds) *International protection of human rights: a textbook* (2009) 258.

the CRPD.¹⁹¹ As an interpretative tool, the principles 'should serve as a rule of fundamental and general character which gives specific, particularized application.'¹⁹²

Despite the high significance attached to the general principles under the CRPD, their meaning is generally presumed by most commentators on the CPRD. This is perhaps because the principles under article 3 are drawn from longstanding concepts of human rights, most of which have been widely discussed in pre-existing legal jurisprudence and literature. Some such as the principles of non-discrimination, participation, gender equality, and respect for the inherent dignity of the person have an established niche in human rights. The others such as accessibility, autonomy and independence of persons with disabilities, and respect for human diversity are more disability specific.¹⁹³



The principle of access for instance is not new to the discourse on equality.¹⁹⁴ But, their application to disability is mainly traceable to the Standard Rules on

¹⁹¹JE Lord 'Accessibility and human rights fusion in the CRPD: assessing the scope and content of the accessibility principle under the CRPD' presentation for the General Day of Discussion on Accessibility CRPD - Committee UN-Geneva, 6.

¹⁹²As above.

¹⁹³Schulze (n 187 above) 45.

¹⁹⁴See for instance application of the principle as an element of the rights to education and highest attainable standard of health in General Comment 13 (n 50 above) para 6, and Committee on ESCR *General Comment No 14: the right to highest attainable standard of health* E/C.12/2000/4, para 12 respectively.

Equalization of Opportunities for Persons with Disabilities.¹⁹⁵ As set out in the CRPD, the principle of access is a constituent element of substantive equality.¹⁹⁶ It comprises the dimensions of non-discrimination, physical, economic, and information accessibility.¹⁹⁷ The principle of the evolving capacities of children with disabilities, on the other hand, is significant in light of the ubiquitous negative presumptions regarding the effect of disability on a child's capacity.¹⁹⁸ This means that in addition to the four principles of the CRC which are endorsed by the CRPD¹⁹⁹, respect for the evolving capacities of the child should be given utmost attention in interpretation of the rights. Ultimately, all these principles will need to be extrapolated to allow their application in the context of disability.

The CRPD further sets out principles relative to its application to children. Article 7 thereof requires that children with disabilities shall enjoy the rights under the Convention on an equal basis with other children. The article also establishes the best interests of the child as a primary consideration in all matters concerning the child, and reiterates the right of the child with disabilities to express their views and for such views to be taken into account on an equal basis with other children. It is argued that, just as with the general principles in article 3, article 7 was intended to safeguard the need to nurture, protect and empower children with disabilities and to

¹⁹⁵Standard Rules on the Equalization of Opportunities for Persons with Disabilities A/RES/48/96 (1993), Rule 5: Accessibility.

¹⁹⁶J Lord (n 190 above) 3.

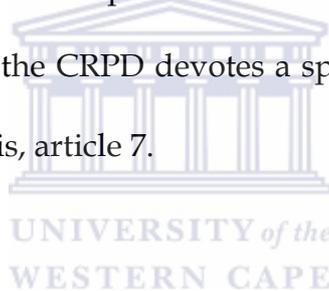
¹⁹⁷As above. These dimensions are drawn from The Standard Rules on Equalization of Opportunities for Persons with Disabilities (1993) and the General Comments of the CESCR indicated above.

¹⁹⁸Schulze (n 187 above) 49.

¹⁹⁹CRPD Preamble paragraph (r) recognizes the commitments made in under the CRC.

guide the determination of how the other provisions are applied to children in cases of ambiguity.²⁰⁰

Also, as indicated in Chapter 2 of this work, the CRPD does integrate a child perspective throughout its provisions, adopting a multi-track approach to the issue.²⁰¹ First, children are protected by virtue of the application of the provisions of the CRPD to all without discrimination on any basis including age.²⁰² Secondly, the need to take into account the evolving capacities of the child with disabilities is stipulated as a general principle of the Convention.²⁰³ Thirdly, the need to make age-appropriate accommodations and responses for the child in the context of various rights is recognised.²⁰⁴ Finally, the CRPD devotes a specific provision to the rights of children with disabilities, that is, article 7.



3.7 Conclusion

This chapter has discussed the interaction of the principles of children, disability and education rights. In general, it can be said that the principles are mutually reinforcing. However, with the child as the primary subject in this study, children's rights principles remain at the core of contextualising the right in question. It is therefore proposed to retain a child rights perspective in interpretation of the rights

²⁰⁰Quinn (n 190 above) 103.

²⁰¹L Alfonso de Alba 'The rights of the child in the UN Convention on the Rights of Persons with disabilities' in C Bellamy et al *Realizing the rights of the child* (2007) 77.

²⁰²Article 2 as read together with para (p) of the Preamble of the CRPD; Alfonso de Alba (n 201 above) 76

²⁰³ CRPD article 3(h).

²⁰⁴ For instance in articles 4, 8, 13, 16, and 23 of the Convention

and corresponding state obligations on the right to primary education for children with disabilities. This is consistent with the determination that has been made in this chapter that both the CRPD and the jurisprudence regarding the right to education endorse the position of the child as an active bearer of rights. This approach is succinctly defined in the most recent General Comment of the CRC - General Comment No 13 in which the Committee defined a child rights approach in the following terms:

‘Respect for the dignity, life, survival, well-being, health, development, participation and non-discrimination of the child as a rights-bearing person should be established and championed as the pre-eminent goal of States parties’ policies concerning children. This is best realized by respecting, protecting and fulfilling all of the rights in the Convention (and its Optional Protocols). It requires a paradigm shift away from child protection approaches in which children are perceived and treated as “objects” in need of assistance rather than as rights holders entitled to non-negotiable rights to protection. A child rights approach is one which furthers the realization of the rights of all children as set out in the Convention by developing the capacity of duty bearers to meet their obligations to respect, protect and fulfil rights (art. 4) and the capacity of rights holders to claim their rights, guided at all times by the rights to non-discrimination (art. 2), consideration of the best interests of the child (art. 3, para. 1), life, survival and development (art. 6), and respect for the views of the child (art. 12). Children also have the right to be directed and guided in the exercise of their rights by caregivers, parents and community

members, in line with children's evolving capacities (art. 5). This child rights approach is holistic and places emphasis on supporting the strengths and resources of the child him/herself and all social systems of which the child is a part: family, school, community, institutions, religious and cultural systems.²⁰⁵

There is no reason to presume conflict or a potential disintegration of jurisprudence on the themes discussed in this chapter in as far as they apply to children with disabilities. In fact, the treaties concerned cross-reference and acknowledge the standards established in the preceding instruments, depicting a cumulative standard.²⁰⁶ In addition, the treaty bodies and the scholarly community are often in agreement on the interpretation of the obligations. This diminishes the threat of conflict in normative interpretation.

It is also apparent from the discussion on the interpretation of state obligations for socio-economic rights that whilst the obligations of states to fulfil the right to education are progressive in nature, there is general consensus that primary education, as the minimum content of the right to education, imposes immediate obligations upon the state. Nevertheless, it is also evident that the content of this minimum core is seldom universally defined or fulfilled. In view of the fact that

²⁰⁵CRC Committee *General Comment 13: the right of the child to freedom from all forms of violence* (2011) CRC/C/GC/13 para 59.

²⁰⁶The preamble of the CRC for instance attributes the adoption of a children specific instrument to various treaty recognitions of the need for such a convention. The same case applies to the CRPD which acknowledges the standards on the rights of persons with disabilities that had been established in other instruments before its adoption. Thus as evident from the historic background set out in chapter 2, no instrument is an isolated or independent one.

education is by its very nature a constantly evolving ideal, as characterised by rapid changes in pedagogical approaches and curricula to correspond with social developments, a duty to continually improve on existing measures on education is implicit. There is therefore a minimum core duty to ensure availability of an accessible, acceptable and adapted education system, and to subsequently improve on all these aspects over a defined period of time.

It has also been established that interpretation of the right to education under the CRPD ought to take into account the fundamental principles of the Convention. Therefore the interpretation of the concepts set out in article 24(2) of the CRPD ought to conform to the general principles of the CRPD. On the relationship of the duties of the state for the right to education as defined within the 4A Scheme and the general obligations for socioeconomic rights, the obligations are concurrent and mutually fulfilling.²⁰⁷ On the relationship between essential features of education, that is, the 4As and the principles of children's rights, the Committee on ESCR in General Comment No 13 stated that when considering the appropriate application of these features, the best interests of the child ought to be a primary consideration.²⁰⁸ This effectively subordinates the 4As to the general principles.

The effect of the recognition and development of the child as an active bearer of rights – which has been traced in the development of international law on the rights of the child as shown in Chapter 2 of this work – is that the protection of childhood

²⁰⁷See Ssenyonjo (n 13 above) 391 for examples on how the state can meet its socioeconomic obligations (respect, protect and fulfil) on each of the elements of education.

²⁰⁸ General Comment No 13 (n 50 above) para 7.

becomes the central tenet of delivering the right to education to children with disabilities. The particular significance of socio-economic rights of persons with disabilities to their ultimate emancipation must also be factored in this discussion.

It is argued that socio-economic rights help to forge pathways into inclusive societies and economies, and help to set the terms of access, entry and participation in the mainstream. Socio-economic rights as contained in the CRPD were 'tailored to tackle the various barriers faced by persons with disabilities in achieving a life of independence as well as inclusion.'²⁰⁹ Hence, while it is essential to observe the principles of socioeconomic rights, it is equally important to remember that socioeconomic rights have a critical other role in guaranteeing equality of persons with disabilities.

In summary, assessment of the nature and scope of duty of state parties under article 24(2) of the CRPD as drawn from the discussions in this chapter would entail: an assessment of how each component of the provision can be respected, protected or fulfilled, determination of whether such an interpretation of the state obligation furthers the principles of the CRPD, and determination of whether the interpretation of the obligation conforms to or furthers the principles of the rights of the child. This approach is applied in the interpretation of article 24(2) in the subsequent chapter.

²⁰⁹Quinn (n 190 above) 250.

CHAPTER 4

Interpretation of Article 24(2) of the CRPD

4.1 Introduction

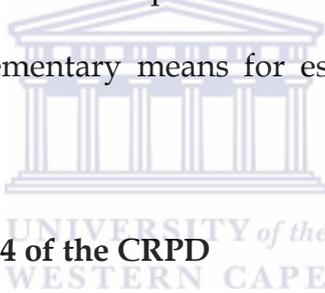
The core purpose of this thesis is to establish the significance of article 24(2) of the CRPD on the right to primary education of children with disabilities in Africa. This chapter seeks to determine the meaning of the provisions under article 24(2) of the CRPD with a view to establish its implications for state obligations under the article. Sub-article 24(2) sets out principles to guide the implementation of the right to education under the CRPD. The article prescribes in considerable detail the measures to be adopted by states towards its implementation.¹

Through interpretation of the principles set out therein, it is possible to contemplate the practical ramifications of the provision on the education of children with disabilities. In addition, engaging with the provision would help to determine whether, in as far as education is concerned, the CRPD adds to the existing scope of state obligations. This is important in view of the prevailing argument that the CRPD does not create new rights, but rather only seeks to contextualise existing rights to disability which was highlighted in Chapter 2 of this work.

A brief background to the CRPD was set out in Chapter 2. This chapter therefore immediately proceeds to undertake a textual analysis of article 24 of the Convention.

¹B Byrne 'Hidden contradictions and conditionality: conceptualizations of inclusive education in international human rights law' (2013) 28 *2 Disability and Society* 242 points out that the CRPD spells out the right to education in much greater detail than has hitherto been the case.

After a general introduction to the provision, sub-articles 24(2) (a) – (e) are discussed in turn. Each of the sub-articles addresses a distinct issue. However, article 24(2) (d) and (e) both address the question of provision of support measures, albeit in different settings. The sub-articles are therefore addressed together. The general rules of treaty interpretation, as contained in articles 31 – 33 of the Vienna Convention on the Law of Treaties² will guide the interpretation. In terms of the Vienna Convention, a treaty ought to be interpreted in good faith, and accorded the ordinary meaning of its provisions. Where a literal interpretation is unreasonable or yields an absurd meaning, interpretation may be aided by taking account of the context and purpose of the treaty as may be set out in the preamble or annexes thereto. The *travaux préparatoires* are also a supplementary means for establishing the meaning of the provision.³



4.1.1 Introduction to article 24 of the CRPD

The first draft article on the right to education in the CRPD was introduced through the Chair's draft during the third session of the Ad Hoc Committee (AHC) in 2003.⁴ This draft formed the basis of discussions on the right, with the bulk of the discussions and amendments on the article being undertaken during the third and

²Vienna Convention on the Law of Treaties, 1969.

³M Sepulveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 76 – 77.

⁴Chair's Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, December 2003 available at <http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm> [accessed 24 Oct 2011]. The Ad Hoc Committee was formed through resolution General Assembly Resolution 56/168 of 19 December 2001 to consider proposals for an international and integral convention for the protection and promotion of the rights of persons with disabilities. See <http://www.un.org/disabilities/default.asp?id=1423> (accessed 27 December 2012) for an elaboration on the formation and operation of the Committee.

sixth sessions of the AHC.⁵ Save for the splitting of article 24(2) (d) into two sub-articles, the text emerging from the 6th session remained largely unchanged in the final article 24.⁶

⁵Byrne argues that in fact the article was intensely debated at each stage of the negotiations, but that it was towards the final stages that the article began to take a form close to what it is now. See Byrne (n 1 above) 239.

⁶ Article 24 currently reads:

'1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

- a. The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
- b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
- c. Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that:

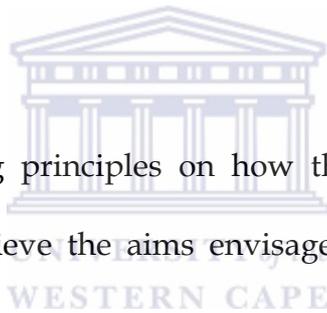
- a. Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
- b. Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
- c. Reasonable accommodation of the individual's requirements is provided;
- d. Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
- e. Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

- a. Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
- b. Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;
- c. Ensuring that the education of persons, and in particular children, who are blind, deaf or deaf-blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and

In brief, article 24(1) establishes the right of persons with disabilities to education and sets out the aims of such education. The article is drawn largely from existing international instruments, especially the CRC and the ICESCR.⁷ The article adds to the existing aims of education the duty to ensure that education is directed towards the full development of the human sense of dignity and self-worth, as well as the development of the 'creativity' of persons with disabilities. The requirement that education be directed towards the development of respect for human diversity is also new. In view of the connection between the aims of education and the content of education,⁸ these additions could impact upon the existing scope of state obligations for the right to education.



Article 24(2) sets out guiding principles on how the right to education is to be implemented in order to achieve the aims envisaged in sub-article 24(1).⁹ Article

alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.'

⁷The AH Committee noted that article 24 draws on article 13(1) of the ICESCR and 29(1) of the CRC by selecting the aspects of both that are relevant to persons with disabilities. See UN Enable 'Working Group; Draft article 17, Education available at <http://www.un.org/esa/socdev/enable/rights/ahcstata24wgtext.htm> (accessed 3 September 2011) at footnote 57; B Byrne 'Minding the gap? Children with disabilities and the United Nations Convention on the Rights of Persons with Disabilities' in M Freeman *Law and childhood studies* (2012) 432.

⁸ See Chapter 3 part 3.4.3 of this work.

⁹The first sentence of article 24(2) states that 'in realizing this right, State Parties shall...' The framing of this sentence is a clear indication that the principles are a pathway through which the right as established in article 24(1) is to be achieved.

24(3) addresses the right of persons with disabilities to learn life and social development skills in order to facilitate their full and equal participation in education and as members of the society, while article 24(4) sets out state obligations in respect of training and employment of teachers including teachers with disabilities and other staff and professionals working at all levels of education. Finally, article 24(5) provides for the right of persons with disabilities to access various forms of tertiary education and lifelong learning.

The principles set out under article 24(2) and their implications for the implementation of primary education of children with disabilities are discussed in the subsequent section.



4.2 The duty to ensure non exclusion from the general education system: article 24(2) (a)

The duty under article 24(2)(a) is twofold; to ensure that no person with disability is excluded from the general education system on the basis of disability, and secondly, to ensure that children with disabilities are not excluded from free and compulsory primary education, or from secondary education on the basis of disability.¹⁰ Ideally, children would be included in the ‘persons with disabilities’ group in the first clause. It seems however, that the latter part was intended to distinguish the general right to education from international developments in children’s education, particularly the

¹⁰ Refer to Chapter 1 of this work for the meaning of free and compulsory primary education.

differentiated responsibility in respect of primary education.¹¹ The distinction was suggested during the 3rd session of the AHC.¹² In an attempt to explain the inclusion of what currently constitutes the second part of the article, the AHC stated that

‘the reference, which now reads “free and compulsory primary or secondary education,” did not create any new obligation for states to provide free and compulsory secondary education. Rather, the provision is a non-discrimination one, and means that if a state did provide free and compulsory secondary education to the general population, then it should also be provided to persons with disabilities.’¹³

This submission implicitly acknowledges an existing framework (in practice) with respect to free and compulsory primary education that is distinct from measures relative to the general right to education in international instruments.

The terms ‘general education system’ and ‘exclusion’ as used in this provision are considered below.

¹¹ Refer to the discussion on the differentiated state obligations for each level of education in Chapter 3 of this work.

¹²Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities A/AC.265/2004/5 9 June 2004 on Article 17 Education, as well as the Chair’s Draft Elements (n 4 above).

¹³Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its sixth session A/60/266 17 August 2005 Draft article 17, para 2.

4.2.1 The general education system

For a long time, matters affecting persons with disabilities, including their education, were considered within the social welfare sphere.¹⁴ This approach was consistent with the prevailing medical model of thinking about disability at the time which yielded welfare and charity responses to disability.¹⁵ Such an approach undervalued the agency and capacity of persons with disabilities. It compromised the quality of their education and often further alienated them from their peers in the regular education system. Hence a significant part of the struggle for the protection of the right to education for persons with disabilities entailed recognition of their education as part of the general education system in society.

The Standard Rules attempted to address this phenomenon by urging that;

‘General education authorities are responsible for the education of persons with disabilities in integrated settings. Education of persons with disabilities shall form an integral part of national educational planning, curriculum development and school organisation.’¹⁶

In its technical sense, an education system is a complex organisation consisting of a variety of social structures collectively involved in the provision of education within

¹⁴Refer to Chapter 2 discussion on the development of the rights of persons with disabilities.

¹⁵This was recognised in Rules 1 and 2 of the Standard Rules on Equalization of Opportunities for Persons with Disabilities (1993).

¹⁶Standard Rules (n 15 above) Rule 6(1).

a community.¹⁷ Generally, it comprises of an educational structure, management and administrative structures, a system of supporting services, and social structures with interest in education.¹⁸ The managerial structure is responsible for implementing measures necessary to ensure effective functioning of all activities connected with educative teaching in order to achieve the educational objectives of a community. The functions of the management include determination of policy, planning, decision making, organisation, recruitment, financing, control and administration of educational activities.¹⁹ The management structure on the other hand includes the government departments responsible for education, policy making bodies, educational planning authorities, and the actual school management such as the governing bodies.

The educational structure is the central part of an educational system. It provides a framework within which different types of teaching and learning structures are arranged and mutually related.²⁰ The function of an educational structure is to create and organise teaching and learning situations in order to balance between the differences in abilities, interests and choices of learners on the one hand, and the rightful and differentiated vocational demands of the society on the other.²¹ The educational structure manifests in educational levels such as pre-schools, primary, secondary and tertiary levels of education.

¹⁷E Dekker & OJ Van Schalkwyk (eds) *Modern education systems* (1995) 6.

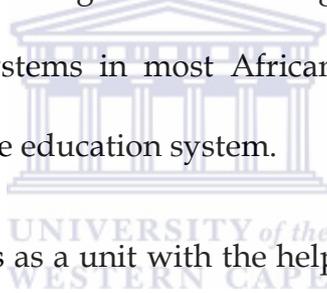
¹⁸See also OJ Van Schalkwyk *The education system: theory and practice* ((1992) 72; Dekker & OJ Van Schalkwyk (n 17 above) 12.

¹⁹OJ Van Schalkwyk (n 18 above) 75 - 76.

²⁰Dekker & Van Schalkwyk (n 17 above) 12.

²¹As above 13.

The support services component refers to the outside help given to the individual schools so that their education may run smoothly by enriching and supporting educative teaching. They include advisory, assessment and placement, transport, library, and medical or feeding services.²² Finally, organisations with an interest in education refer to social structures which do not have education as their core function but which nevertheless influence or are affected by educational outcomes. They include the state, religious organisations, the family, and commerce and industry.²³ The extent of influence of any of these organisations varies from one jurisdiction to another. But it is arguable that in light of the relatively weak and underdeveloped education systems in most African states, these structures exert relatively more influence on the education system.



The education system operates as a unit with the help of nodal structures that act as ligaments between the different components. Nodal structures bring together representatives of various bodies such as school management councils or committees.²⁴ An education system can be differentiated in terms of levels such as national, regional or local units of governance depending on the level of sophistication of a society. The underlying theory of education is determined or set out in the national education policy. It is also at the national level that irrespective of the internal governance model adopted, the responsibility for implementation of

²²As above 20.

²³Dekker & Van Schalkwyk (n 17 above) 21; Van Schalkwyk (n 18 above) 143 – 164.

²⁴ Van Schalkwyk (n 18 above) 167.

international human rights obligations accrues. The duty of policy formulation is a function of the managerial and administrative components of the system. The actual implementation of the policy however affects all the other components.

From the foregoing, it is apparent that the re-conceptualisation of the education system to align with the inclusive education paradigm established under the CRPD would demand targeted adjustments to all the components of the education system discussed above. However, there is reason to question whether in fact the term 'general education system' as used in this provision is intended to be applied in the technical sense.

The phrase 'general education system' was liberally used during the CRPD negotiation process without question as to its meaning. It also appears that the phrases 'general education' or 'general education system' were applied as an antonym to the term 'special education' in the course of the negotiations.²⁵ This means that rather than refer to the term in its technical sense, 'general education system' as used in the CRPD could simply have been intended to represent the opposite of 'special' education.

The phrase 'general education system' was also often used in comparative context, and often interchangeably with other terms, thereby giving credence to this

²⁵See generally the comments, proposals, submissions and background documents tendered by various groups during the drafting sessions available at <http://www.un.org/disabilities/default.asp?id=1423> (Accessed 23 January 2011); CRC Committee *General Comment No 9 : the rights of children with disabilities* (2006) CRC/C/GC/9 para 43 - 44.

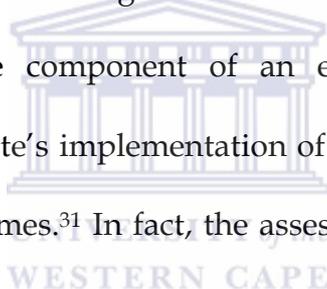
interpretation. For instance, the terms 'mainstream', 'regular', or education 'in the communities in which they live in' were used interchangeably with 'general education system', while the terms 'specialist', 'alternative', or 'special' were used to depict the opposite.²⁶ In addition, as used in legal literature and jurisprudence, 'general education system' suggests a meaning that largely de-emphasizes technicality, or in which 'general' is contextually defined as the educational structure used by a majority of learners in the society.²⁷ Further the term 'education system' in legal literature predominantly refers to the organisational component of the technical structure of an educational system. This can be inferred from the casual sense in which the term is applied in ordinary legal parlance.²⁸

²⁶For instance, Kenya's proposal on special education stated specifically that special education should 'allow a free and informed choice between general and special systems,' clearly depicting and understanding of the terms as opposites of each other. See Background Documents of the Seventh Session of the Ad Hoc Committee Article 24 - Education; Comments, proposals and amendments submitted electronically 7; CRC Committee *Concluding Observations Benin* CRC/C/BEN/CO/2, para 50; CRC *Concluding Observations Azerbaijan* CRC/C/AZE/CO/2 para 46 - 48.

²⁷The concluding observations of the CRC refer to 'general education system' in a manner that de-emphasizes the technical aspects. See for instance the CRC Committee's use of this term in the concluding observations on Sierra Leone CRC/C/15/Add.116, para 66, on Cambodia CRC/C/15/Add.128, para 55, Cape Verde CRC/C/15/ADD.168 (CRC, 2001), Angola CRC/C/15/ADD.246 (CRC, 2004), Liberia CRC/C/15/ADD.236 (CRC, 2004), Algeria CRC/C/15/Add.269 (CRC, 2005), Congo (Republic of the) CRC/C/COG/CO/1 (CRC, 2006), United Republic of Tanzania CRC/C/TZA/CO/2 (CRC, 2006). The use of the phrase 'education system' in the Salamanca Statement and the emphasis on regular schools as opposed to special schools therein point to an understanding 'education system' as the organisational structure as opposed to the entire educational machinery. See also R Hodgkin & P Newell *Implementation handbook on the UN Convention on the Rights of the Child* (2007) 440 on assessing the capacity of an education system to develop the full potential of children. In General Comment No 9 (n 25 above), the CRC Committee's use of the phrase 'regular education system' was a clear reference to the regular school as opposed to the system. See also the WHO & World Bank, *World disability report* (2011) 210 where the regular and mainstream schools or classes were applied to mean the schools used by the majority of the population and the opposite to special schools.

²⁸See for instance the Standard Rules (n 15 above) Rule 6; Salamanca statement and framework for action on special needs education (1994) para 2 & 23; Committee on CESCR *General Comment No 5: the rights of persons with disabilities* 12/09/1994 para 35.

The foregoing overwhelmingly supports an interpretation of 'general education system' to mean the system of schools attended by majority of the population in a country. This determination is important because, the discourse on inclusive education (which is engaged in detail further below) tends to pay more attention to the 'location' of education than to the technical aspects of its organisation. Hence for instance, failure to ensure inclusive schools is a primary indicator of non-compliance with the CRPD.²⁹ The framing of article 24(2) (a) of the CRPD is consistent with this interpretation. In addition, the universally accepted criterion for assessment of the fulfilment of state obligations for the right to education (the 4A Scheme) also focuses on the educational structure component of an education system.³⁰ The CRC Committee's assessment of state's implementation of the right to education has also often focused on school outcomes.³¹ In fact, the assessment criterion for the right to



²⁹In its concluding observations on the initial state report of Argentina and Spain, the Committee on the CRPD called upon the state parties to ensure inclusive and mainstream schools respectively. See Committee on CRPD Concluding observations: Argentina (2012) CRPD/C/ARG/CO/1 para 38; Committee on CRPD Concluding observations: Spain (2011) CRPD/C/ESP/CO/1 para 43.

³⁰CRC General Comment No 9 (n 25 above) para 66. The 4A Scheme is discussed in Chapter 3 of this work.

³¹For instance, when assessing the report of Japan, the CRC Committee stated that 'the excessively competitive nature of the education system' has a negative impact on the children's physical and mental health and hampers their development. CRC Committee, *Concluding observations: Japan* CRC/C/15/Add.231, para 49(a). The foregoing statement only makes sense in reference to the organizational structure as a component of the education system. While assessing the report of China, the Committee once again questioned the state's failure to develop a 'bilingual education system' which would include adequate teaching in Chinese. This comment was doubtlessly focused on the organizational aspect of the education system. CRC Committee *Concluding observations: China* CRC/C/15/Add.56, para 19.

education in terms of the CRC reporting guidelines focuses entirely on the schooling (educational structure) component.³²

Thus, though one cannot conclusively rule out the intention to apply the term 'education system' in its technical sense, there is ample evidence that, in the legal and human rights context, the term has been applied to refer to the educational structure as manifested in the various levels of schooling. Even if a distinction between the technical and minimalist interpretations thereof may have been made, such distinction does not seem purposeful.

The choice of meaning has implications for the interpretation of inclusive education. If education system is understood in the technical sense, inclusive education can be implemented through measures targeting each of the components of the system. Such an overhaul is a daunting task, and certainly beyond the ambit of article 24(1) (a) alone – it is rather the goal of article 24 in its entirety. If understood in the non-technical sense however, the interpretation of inclusive education is heavily skewed towards integration of learners with disabilities into the mainstream classroom.

4.2.2 Non-exclusion

In light of the discussion above, to not exclude a child from the general education system would mean to not hamper their access to education within the education system utilised by a majority of learners in the community in which the child lives.

³²CRC Committee, 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States Parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child' CRC/C/58/Rev.2 para 20(e).

Exclusion can happen either through failure to recognise a child's entitlement to such education, or through a system of segregation of children with disabilities from the mainstream education system into special schools. While the non-recognition dimension can be addressed through appropriate legislation, the state has to actively invest resources into ensuring that children with disabilities can learn in the mainstream education system. Hence, the duty to ensure non-exclusion in this provision calls for positive measures.

In terms of the features of education, exclusion is primarily related to the 'accessibility' of education, even though (arguably) failure to avail educational facilities or an inflexible curriculum can indirectly exclude some learners.³³ In the context of article 24(2) (a) however, the apparent mischief targeted is the exclusion of children with disabilities from an existing education system. Recalling the preceding discussion on the general education system, it is clear that the provision targets discrimination against children on the basis of disability in accessing an existing system of free and compulsory basic education.

A background to the non-exclusion of learners with disabilities from the general education system is apposite. The World Declaration on Education for All was the first international expression of the need to cater for all learners within the general education system.³⁴ It is however the Standard Rules that contextualized the exclusion of persons with disabilities in various aspects of life and called for, *inter*

³³See Chapter part 3.4.2 for a discussion on the essentials of accessibility of education and its application to children with disabilities.

³⁴See for instance The World Declaration on Education for All (1990), article 3 para 5.

alia, inclusion in education. According to the Standard Rules, states 'should ensure that the education of persons with disabilities is an integral part of the educational system' and that 'general educational authorities are responsible for the education of persons with disabilities in integrated settings.'³⁵ The Standard Rules further provided that education for persons with disabilities should form an integral part of national educational planning, curriculum development and school organization.³⁶ Article 24(2) (a) therefore seems to consolidate this position.

To fulfil article 24(2) (a) therefore, state parties to the CRPD have to legislate for free and compulsory primary education of children with disabilities, and ensure that education of children with disabilities is part and parcel of the national general education management.

4.3 Duty to ensure access to inclusive, quality and free primary education: article 24(2) (b)

In terms of this article, state parties are required to ensure that 'persons with disabilities can access an inclusive, quality and free primary education, on an equal basis with others in the communities in which they live.'³⁷ Seeking to clarify the purpose of an earlier draft of the provision, the Working Group of the AHC on article 17 of the CRPD indicated that the provision was intended to provide the right to choose inclusive and accessible education, without creating an obligation on students

³⁵Standard Rules (n 15 above) Rule 6 (1) and (2).

³⁶As above Rule 6 (1) and (2).

³⁷Article 24(2) (b).

with disabilities to attend general schools where their needs may not be adequately met.³⁸ The provision was also intended to ensure that children with disabilities were not discriminated in the provision of free and compulsory primary education on the basis of their disability.³⁹ This is not so different from article 24(2) (a).

A textual analysis of this provision would entail an assessment of four clauses: (i) the duty to ensure access, (ii) inclusive education, (iii) quality and free primary education, and (iv) on an equal basis with others in the community in which they live.

4.3.1 The duty to ensure access

Ensuring access generally entails the elimination of barriers.⁴⁰ In the context of education, the duty to ensure access involves removal of physical, economic and geographical barriers to enrolment and retention of learners.⁴¹ This requires both positive action for the removal of barriers (as in the case of establishing an appropriate learning environment), and desisting from conduct that hinders access by eligible learners.

As discussed in Chapter 3, it is incumbent upon the education provider to ensure accessibility of both the facilities and the content of education in order to facilitate

³⁸Working Group Draft (n 7 above) note 58. The article as at then required state parties to ensure that 'all persons with disabilities can choose inclusive and accessible education in their own community.'

³⁹In the report of the AHC's sixth session (para 37) it was noted that the paragraph on non-exclusion of children from free and compulsory primary education was a non-discrimination one.

⁴⁰The 'duty to ensure access' in this provision is distinct from the general principle on accessibility discussed in Chapter 3 part 3.6.

⁴¹Committee on CESCR *General Comment No 13: The right to education* E/C.12/1999/10 para 6(b).

effective benefit for the learners with disabilities. The duty to ensure that one 'can access' education also embodies choice as opposed to an obligation to attend a particular system. This is supported by the argument of the AHC Committee that the purpose of the provision is not to oblige students with disabilities to attend regular schools, but rather to ensure that they can make that choice.⁴²

4.3.2 Inclusive education

Inclusive education is one of the most topical and controversial recent developments on the right to education. Inclusive education is widely applied and acclaimed as an appropriate approach to education for all.⁴³ The inclusive approach to education is a response to recognition of the fact that certain groups of learners such as children with disabilities, indigenous children, or girls have historically been directly or indirectly excluded from the existing system of education. It requires that the framework within which education is delivered is broad enough to accommodate the needs and circumstances of every learner in the society equally. This view is captured in the Dakar Framework's statement that as a matter of principle education must neither exclude nor discriminate.⁴⁴

The key challenge with inclusive education is that it is not consistently or universally defined. The distinction between inclusion and inclusive education, or between

⁴²Working Group Draft (n 7 above) note 58.

⁴³L Wakefield & LN Murungi 'Domesticating international standards of education for children with intellectual disabilities: case study of Kenya and South Africa' in I Groeblaar du Plessis & T Van Reenen *Aspects of disability law in Africa* (2011) 142; KD Beiter *The protection of the right to education in international law* (2007) 507.

⁴⁴Expanded commentary on the Dakar Framework for Action paragraph 20, available at http://www.unesco.org/education/efa/wef_2000/expanded_com_eng.shtml (accessed 15 January 2013).

inclusion in the broader and narrow senses in the context of education is not clearly cut out.⁴⁵ Inclusion in education has been termed as the

'process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education. It involves changes and modifications in content, approaches, structures and strategies, with a common vision which covers all children of the appropriate age range and a conviction that it is the responsibility of the regular system to educate all children.'⁴⁶

In the 'broad' sense, inclusive education has been defined as

'the understanding that the education of all children including those with disabilities, should be under the responsibility of the education ministries or their equivalent with common rules and procedures. In this model, education may take place in a range of settings such as special schools and centres, special classes, special classes in integrated schools or regular classes in mainstream schools, following the model of the least restrictive environment.'⁴⁷

This latter definition is consistent with the interpretation of the general education system and non-exclusion therefrom in the preceding part. It presumes that 'all

⁴⁵ UNESCO *Guidelines for inclusion: ensuring access to education for all* (2005).

⁴⁶ As above 13.

⁴⁷ World report on disability (n 27 above) 209.

children can be educated and regardless of the settings or adaptations necessary, all students should have access to a meaningful curriculum and outcomes.⁴⁸

In the narrower sense, inclusive education is equated to integration. For instance, the aforementioned understanding notwithstanding, the World Disability Report interpreted inclusive education as that 'all children should be educated in regular classrooms with age-appropriate peers.'⁴⁹ To achieve this, barriers to education must be removed through various measures including reasonable accommodation. Such a view is traceable to earlier documents on the rights of persons with disabilities. For instance, the Salamanca Statement and Framework for Action⁵⁰ proclaimed that 'those with special education needs must have access to regular schools which should accommodate them within child-centred pedagogy capable of meeting these needs.'⁵¹



The Salamanca Statement further noted that 'regular schools with inclusive orientation are the most effective means of combating discriminatory attitudes, creating welcoming communities, building an inclusive society and achieving education for all.'⁵² It was further stipulated that 'the fundamental principle of the inclusive school is that all children should learn together, wherever possible,

⁴⁸ As above 7.

⁴⁹ *World disability report* (n 27 above) 209 – 210.

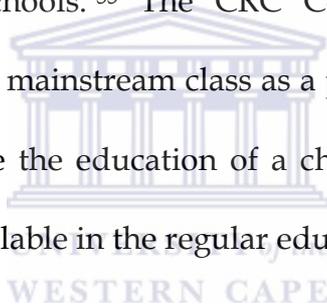
⁵⁰ Salamanca Statement (n 28 above) para 2.

⁵¹ As above para 2.

⁵² As above para 2 and 3.

regardless of any difficulties or differences they may have,⁵³ and that 'a child with disability should attend the neighbourhood school, that is, the school that would be attended if the child did not have a disability.'⁵⁴ These statements are evidence that inclusive education as contemplated in the Salamanca Statement entails in the most part, integration into regular schools.

Subsequently, in General Comment No 5, the Committee on CESCR was of the view that to implement education in integrated settings as contemplated by the Standard Rules, 'states should ensure that teachers are trained to educate children with disabilities within regular schools.'⁵⁵ The CRC Committee has also called for integration of learners into the mainstream class as a priority, though conceding that there are circumstances where the education of a child with disabilities requires a kind of support that is not available in the regular educational system.⁵⁶



As forerunners to the CRPD, the conceptualisation of inclusive education in these instruments has influenced the understanding of the concept as set out in the CRPD. During the CRPD negotiations, it was argued that the low incidence and demographic distribution of some kinds of disabilities, particularly deaf, blind and deaf-blind amongst children, means that at a local level it is difficult to establish appropriate or quality education and peer support between children of similar age and interests, and therefore that failure to educate these children in mainstream

⁵³ As above para (7).

⁵⁴ As above para 18.

⁵⁵ CESCR General Comment No 5 (n 29 above) para 35.

⁵⁶ CRC General Comment No 9 (n 25 above) para 66.

schools would deny them the opportunity to achieve their potential.⁵⁷ In 2011, the world disability report (the preparation of which was especially triggered by the adoption of the CRPD) called upon states to 'not build a new special school if no special school exists. Instead, use the resources to provide additional support for children with disabilities in mainstream schools.'⁵⁸ Also, the CRPD Committee in its concluding observations on state party reports has adopted an approach that heavily leans towards the understanding of inclusion as integration.

In its recommendations to Spain for instance, the CRPD Committee called upon the state to ensure that children with disabilities are included in the mainstream system.⁵⁹ To Argentina, the Committee expressed concern over the high number of children with disabilities attending special schools (as opposed to mainstream schools). The Committee therefore called upon the state party to ensure that the children attending special schools were enrolled in mainstream schools, and to offer them reasonable accommodation within the regular education system.⁶⁰ It is however in its comments on China's report that the Committee clearly showed its inclination to the understanding of inclusive education as heavily skewed towards integration.

The Committee stated that it

⁵⁷Background documents of the seventh session of the AHC, 'Article 24 - education: comments, proposals and amendments submitted electronically' para 24.

⁵⁸World disability report (n 27 above) 226.

⁵⁹CRPD Committee, Concluding observations of the committee on the CPRD: Spain CRPD/C/ESP/CO/1 (2011) para 43.

⁶⁰CRPD Committee, Concluding observations of the Committee on the CRPD: Argentina CRPD/C/ARG/CO/1 (2012) para 38.

'.....wishes to remind the state party that the concept of inclusion is one of the key notions of the Convention, and should be especially adhered to in the field of education. In this regard, the Committee recommends that the state party reallocate resources from the special education system to promote inclusive education in mainstream schools, so as to ensure that more children with disabilities can attend mainstream education.'⁶¹

Though the foregoing arguments do not entirely support the idea that inclusive education is synonymous with integrated education, they are clearly indicative of the fact that integration is a fundamental component of inclusive education. A fundamentally distinguishing feature between inclusive education from integration is that where and when appropriate, inclusive education seeks to accommodate the needs of all students, and to give all learners choice on where to undertake their education on a basis of equality. It is therefore rightfully argued that to interpret inclusive education simply as the requirement that all children have a right to be educated in a mainstream school oversimplifies the issue. Rather, the overriding right is for all children to have a good education and to have their needs for education met.⁶²

⁶¹CRPD Committee Concluding observations of the Committee on the CRPD: China CRPD/C/CHN/CO/1 (2012) para 36.

⁶²P Farrel 'The impact of research on developments in inclusive education' (2000) 4:2 *International Journal of Inclusive Education* 154.

As shown in the discussion on the development of inclusive education in Chapter 2 of this thesis, the inclusive education philosophy succeeded or developed from the integration one. Evidently, the remnants of the integration philosophy are still apparent in the present day conceptualisation of inclusive education.

As used in article 24(2) (b), the term 'inclusive' is more inclined towards the (narrower) non-discrimination aspect as opposed to the broader meaning on inclusive education. Arguably, the latter is the purpose of article 24 in its entirety.

4.3.3 Quality and free primary education

The meaning of free primary education has been discussed in Chapter 1 of this work. The fundamental element of free education is that both direct and indirect costs of education should be borne by the state in order to remove barriers to access. To ensure equal access by children with disabilities, the state must cover the cost of the disability specific support measures and accommodations.

With regard to the reference to quality however, the clause has to be interpreted in the context of past relegation of persons with disabilities to less competitive vocational training and careers. The clause is therefore a safeguard against poor standards of education for children with disabilities as has often been the case in the past. It introduces a standard of education that serves as a benchmark for the choices made on the education of children with disabilities.

4.3.4 'On an equal basis with others in the communities in which they live'

4.3.4.1 'Equal'

To determine the meaning of this phrase, an exploration of the meaning of 'equal' is imperative. Equal means having the same value as another – it is a relational concept, and the basis of equality. Equality is not defined in the CRC or the CRPD. In terms of the CRPD however, equality encompasses equality before the law, non-discrimination, affirmative action and provision of reasonable accommodation.⁶³ The principle of equality lies at the heart of international protection of human rights and permeates the entire text of the CRPD.⁶⁴

Equality is closely related to non-discrimination, and as evident in the CRPD, the two concepts are mutually reinforcing.⁶⁵ It is argued that 'conceptually, equality and non-discrimination connote the same idea and can be seen as simply the positive and negative statements of the same principle.'⁶⁶ Thus while legal instruments are often formulated with reference to what is prohibited, such as discrimination, the ultimate purpose of the prohibitions is to secure the ideal of equality. Non-discrimination is

⁶³CRPD, article 5.

⁶⁴F Mégret 'The disabilities convention: human rights of persons with disabilities or disability rights' (2008) 30 2 *Human Rights Quarterly* 501 notes that in fact, the expression 'on an equal basis with others' is repeated no less than 35 times in the CRPD. See also OM Arnardottir 'A future of multi-dimensional disadvantage equality?' in OM Arnardottir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities; European and Scandinavian perspectives* (2009) 42 & 44.

⁶⁵ Article 5 of The CRPD depicts non-discrimination as a means of ensuring equality.

⁶⁶O Mjoll 'A future of multidimensional disadvantage equality?' Anardottir & Quinn (n 64 above) 43.

an overriding human rights principle and the starting point in operationalizing economic, social and cultural rights.⁶⁷

The Human Rights Committee is of the opinion that there is an obligation on the state to prevent discrimination and to enable children to take part in society as equally viable members thereof.⁶⁸ The CRC Committee in interpreting the rights of children with disabilities⁶⁹ focused first on the interpretation of article 2 on non-discrimination in order to anchor the rights of children with disabilities to equal treatment with other children in society. General Comment No. 9 of the CRC, in tandem with the Convention itself, steers clear of 'equality' preferring rather to discuss the rights of children with disabilities without a comparator.

Ssenyonjo argues that

'although the principles of equality and non-discrimination can be differentiated, the prohibition against non-discrimination is understood as the negative restatement of the principle of equality. In other words, equality and non-discrimination are positive and negative statements of the same principle.'⁷⁰

⁶⁷Nowak, M 'The right to education' in A Eide et al *Economic, social and cultural rights* (2001) 258.

⁶⁸G Van Bueren *The international law on the rights of children* (1995) 40; See also Human Rights Committee *General Comment No. 17, article 24 (rights of the child)* (1989) HRI/GEN/1/Rev.9 (Vol. I).

⁶⁹CRC General Comment No 9 (n 25 above).

⁷⁰M Ssenyonjo *Economic, social and cultural rights in international law* (2009) 85.

Similarly, it is argued that 'equality means the absence of discrimination and non-discrimination between groups will produce equality.'⁷¹

In view of the relationship established above, a discussion on equality should include a discussion of what discrimination means. In terms of article 2 of the CRC, the state has a duty to ensure that the rights set out in the Convention accrue to all children without discrimination on the basis of the prohibited grounds, including disability. Article 23 specifically requires state parties to ensure that children with disabilities enjoy a full and decent life in conditions that ensure dignity and promote self reliance.⁷²

However, as has been recognised by the Human Rights Committee equal treatment does not necessarily result in similar outcomes.⁷³ The principle of equality and non-discrimination requires the equal treatment in equal situations and different treatment in unequal situations.⁷⁴ In the present case for instance, to facilitate education of children with disabilities on an equal basis with other children in the communities in which they live would mean that the children should be able to freely choose a neighbourhood school to attend. But such an option would only be feasible if all schools are invariably equipped to deal with the full range of needs of all children. Unfortunately, this is not the case, especially in a majority of developing

⁷¹H Charlseworth 'Concepts of equality in international law' in G Huscroft & P Rishworth (eds) *Litigating rights: perspectives from domestic and international law* (2002) 145.

⁷²CRC Article 23(1) provides that 'States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community.'

⁷³Human Rights Committee, *General Comment No 18: non-discrimination 10 November 1989* HRI/GEN/J/Rev 8, para 10.

⁷⁴Arnardottir (n 64 above) 43.

countries. In circumstances of grossly underdeveloped infrastructure, the attendance to the neighbourhood school has the potential to compromise their access to quality education.

4.3.4.2 The 'other' standard

To determine what equality means in real terms in the context of primary education, it is important to reiterate what 'other' children are entitled to. As evident in the discussions in chapters 1 – 3 of this work, the duties in respect of the right to primary education include priority in resource allocation and implementation, immediate (as opposed to progressive) measures towards the realisation thereof, and provision free of charge. It has also been highlighted in Chapter 3 that primary education is considered to be a minimum core obligation for all states and therefore that there is a duty upon states to implement it immediately.

Regarding the immediacy of the obligation to provide primary education to children with disabilities, the right to education under the CRPD is generally subject to progressive realization.⁷⁵ In terms of article 4(2) of the CRPD, state parties 'undertake to take measures to the maximum of their available resources and where needed, within the framework of international cooperation, with a view to achieving progressively the full realization' of socioeconomic rights including the right to

⁷⁵During the drafting of article 24, there were frequent references to inclusion of a clause on progressive realization of the right to education. It was finally agreed that the clause on progressive realization was better covered in a general clause, which turned out to be the current article 4(2). See AHC report of the 6th session available at <http://www.un.org/esa/socdev/enable/rights/ahc6.htm> (accessed 15 May 2013) para 31 where the AHC noted that it was generally agreed that rather than qualify the obligations of the state in the article, the issue of progressive realization was to be dealt with in an earlier general article that applied to the whole Convention including the article on education.

education. The provision does not apply to immediate obligations for socioeconomic rights that are established in international law.⁷⁶

If it is accepted that the implementation of the right to 'free and compulsory primary education' yields an immediate obligation in international law, then by virtue of article 4(2), free and compulsory primary education is excluded from progressive realization under the CRPD. Consideration of whether the view that the duty to implement the right to primary education is of an immediate nature is fundamental to the determination of the nature of responsibility accrued by the state.⁷⁷

Both the CRC and the ICESCR establish a duty to provide free and compulsory primary education. Article 28(1) of the CRC recognises the right of children to education 'with a view to achieving [it] progressively'. Article 13(2) (a) of the ICESCR provides for the duty to ensure primary education that is compulsory and available free to all. As read together with articles 2(1) and 14 however, the right to primary education under the ICESCR is subject to progressive realization.⁷⁸ Article 2(1) addresses the general nature of obligations under the Covenant. Article 14 requires state parties to the ICESCR to come up with a plan for the progressive implementation of free and compulsory primary education, within a reasonable number of years, to be fixed in the plan. One can therefore argue that on a strictly

⁷⁶ CRPD, article 4(2).

⁷⁷ Refer to Chapter 3 part 3.2.3 for a discussion of the nature of state obligations for the implementation of the right to primary education.

⁷⁸ Beiter (n 43 above) 516. The prospect of the immense responsibility on the state to implement the right to primary education immediately under the CRC triggered reservations to article 28 from some states. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed 24 September 2012).

textual basis, the right to free and compulsory primary education under these two treaties is subject to progressive realization. It is also clear from the *travaux préparatoires* that article 24 was intended to be subject to progressive realisation along with other socioeconomic rights under the Convention.⁷⁹

The prevailing view that state obligations for primary education are immediate has developed through interpretation by both the CESCR and CRC Committees.⁸⁰ Whether or not the jurisprudence of the CESCR and CRC Committees on the right to education in general can be deemed to form part of international law is therefore a decisive factor on the nature of obligations of the state under the provision. General comments expound on specific provisions of international instruments. But for lack of consensus inherent in the drafting process of international instruments, they do not have binding value.⁸¹

Nevertheless, general comments and concluding observations of the respective committees have substantial jurisprudential and guiding value that must be duly acknowledged.⁸² The near universal ratification of the CRC and the wide acceptance of the standards established under the ICESCR could also support the view that the

⁷⁹Report of the 6th session (n 75 above) para 31.

⁸⁰CESCR General Comment No 13 (n 41 above) para 51.

⁸¹HJ Steiner & P Alston *International human rights in context: law politics and morals* (2000) 732; E Reidel 'Economic, social and cultural rights' in C Krause & M Scheinin *International protection of human Rights: A textbook* (2009) 144. Reidel also argues that whereas the application of the principles established in General Comments is voluntary, generally there is little opposition to the interpretations of the rights as espoused therein. M Verheyde 'The Convention on the Rights of the Child as a tool for the promotion of education rights' in P Van der Auweraert et al (eds) *Social, economic and cultural rights; An appraisal of current European and international developments* (2002) 90, and M Verheyde *Article 28: the right to education* (2006) 4 further emphasises the 'great moral authority' of general comments.

⁸²J Rehman *International human rights law: a practical approach* (2003) 86.

jurisprudence of the Committees does amount to international law. Indeed, the understanding of the duty to provide free and compulsory primary education by all states has been widely endorsed and propagated by national and international judicial decisions and the works of renowned publicists on human rights. These works are of great persuasive value in terms of article 38 of the Statute of the International Court of Justice, and support the credibility of the interpretation as a normative standard.⁸³

Notably also, throughout the negotiation of article 24, the progressive nature of the obligations in respect of primary education was constantly highlighted, suggesting that state parties were either oblivious of (which is unlikely) the jurisprudence on immediate obligations, or consciously endorsing a different standard with respect to primary education of children with disabilities.⁸⁴ In addition, the ultimate removal of the progressive realisation clause from the final provision was not prompted by acceptance of an already established immediate responsibility to provide free primary education, but rather by agreement that the progressive nature of social economic rights should be addressed in a common general clause, i.e. article 4(2) of the Convention.⁸⁵ Such a general clause would apply to all rights including article 24. This suggests that there was an almost explicit intention to make the right to primary education under the CRPD subject to progressive realization.

⁸³Article 38 of the ICJ statute lists the sources of international law. According to article 38 (d), judicial decisions and writings of publicists in various countries are subsidiary means of determining the rule of law.

⁸⁴The AHC Report of the 3rd session 38 Kenya, Sierra Leone and Thailand proposed inclusion of progressive realization in article 17(1) [now 24(1)].

⁸⁵See the argument to this end at n 75 above. See also the Report of the AHC sixth session. para 9.

Such a conclusion is inconsistent with the expressed intention of article 24(2) (b) which is to provide education for children with disabilities on an equal basis with others in the communities in which they live. The inherent inconsistency notwithstanding, the dominant theme of the provision is to ensure that children with disabilities have access to free and compulsory education on similar terms with other children. The clause nullifies the justification of progressive establishment of inclusive schools where the state is already implementing free and compulsory primary education for other children.⁸⁶ The equality basis also means that measures taken towards improving the education of children with disabilities cannot be prioritised over those of other children in the community. The balancing affects both sides.

4.4 The duty to ensure reasonable accommodation of a learner's needs: article 24(2) (c)

In terms of article 24(2) (c), state parties are under duty to ensure reasonable accommodation of the individual's requirements in education. Reasonable accommodation is defined as,

‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to

⁸⁶The difficulty with differentiating obligations of an immediate nature from those that are subject to progressive realization is the fact that many of the rights contain aspects of both. See G Quinn 'A short guide to the United Nations Convention on the Rights of Persons with Disabilities' in G Quinn & L Waddington (eds) *European yearbook of disability law* (2009) 101.

ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.⁸⁷

In terms of article 2 of the CRPD, denial of reasonable accommodation constitutes discrimination. By virtue of its integration into the principle of non-discrimination under the Convention, reasonable accommodation is one of the fundamental and cross-cutting principles of the Convention.⁸⁸ The need to reasonably accommodate the needs of persons with disabilities in different contexts inheres to the entire Convention.⁸⁹ The duty to reasonably accommodate is also expressly required in the articles on equality and non-discrimination,⁹⁰ deprivation of liberty,⁹¹ and employment.⁹²

The CRPD is the first international human rights treaty to provide a right to reasonable accommodation and is regarded as one of the most potent innovations thereof. But, the concept builds upon developments in domestic and international law on accommodation of persons with disabilities in various contexts including education.⁹³ The origins and application of reasonable accommodation in

⁸⁷ CRPD, article 2.

⁸⁸ CRPD article 3(b).

⁸⁹It is argued that the concept of reasonable accommodation is tipped to become the most important legal concept of the CRPD, and the most crucial instrument whenever a case of implementation has to be decided. See H Kallehauge 'General themes relevant to the implementation of the UN Disability Convention into domestic law: who is responsible for the implementation and how should it be performed?' in Arnardottir & Quinn (n 64 above) 211.

⁹⁰CRPD Article 5.

⁹¹Article 14(2).

⁹²Article 27.

⁹³JE Lord & R Brown 'The role of reasonable accommodation in securing substantive equality for persons with disabilities: the UN Convention on the Rights of Persons with Disabilities' available at

international and domestic legislation is explored below to aid understanding of the principle as applied to the CRPD.

4.4.1 General remarks on reasonable accommodation

The concept of reasonable accommodation is at the core of ensuring the realization of the rights of persons with disabilities and the optimum implementation of the CRPD. Reasonable accommodation acts as a bridge between socio-economic rights and civil political rights, and ensures that all rights, the category notwithstanding, become meaningful to persons with disabilities.⁹⁴ It demands that duty bearers take reasonable steps to adjust their policies, practices and premises so as to remove the disabling factor and/or to provide specific equipment, aids or services to enable individuals with disabilities to access work places, schools, transport systems or other facilities.⁹⁵ Reasonable accommodation requires the would-be discriminator to take positive account of the difference inherent in the disability and to 'reasonably accommodate' it.⁹⁶

The concept derives from the broader concept of substantive equality and complements the social model of disability.⁹⁷ As a measure for ensuring substantive equality, reasonable accommodation is not limited to persons with disabilities, but

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1618903&download (last accessed 20 April 2013) 14.

⁹⁴A Lawson 'The UN Convention on the Rights of Persons with Disabilities and European disability law: a catalyst for cohesion?' in Arnardottir & Quinn (n 64 above) 104.

⁹⁵As above 93.

⁹⁶G Quinn 'Disability and human rights: a new field in the United Nations' in C Krause and M Scheinin *International protection of human rights: a textbook* (2009) 249.

⁹⁷C Ngwenya 'Equality and disability in the workplace: a South African approach' *A Seminar presentation in the school of law university of Leeds England* 29 November 2004, 15.

rather applies to all minority groups in need of accommodation.⁹⁸ It requires allowing for individual differences and undertaking reasonable alterations to ensure equal opportunities.

The purpose of reasonable accommodation in the CRPD is to make the non-discrimination provision relevant to people with disabilities. It is intended to cure the failure of discrimination legislation to require the discriminator to adopt appropriate action to ensure equality.⁹⁹ Reasonable accommodation is used to found a basis for positive action. The classic understanding of discrimination entails a negative duty to desist from certain conduct. This conceptualisation is consistent with the notion of formal equality. Including reasonable accommodation in non-discrimination effectively redefines this concept and anchors substantive accommodation.

The concept of reasonable accommodation has mainly developed from the field of employment and labour law. Consequently existing interpretations and construction of the responsibilities of various parties to ensure reasonable accommodation are to a large extent influenced by employment law. A good example of this phenomenon is the fact that reasonable accommodation is mainly conceptualised in terms of cost. For instance, 'undue hardship' as a component of reasonable accommodation is measured in terms of the expense on the employer.¹⁰⁰ It is argued that in the context of employment, the reasonable accommodation standard is an 'all or nothing' duty

⁹⁸AP Aggarwal *Sex discrimination: employment law and practices* (1994) 271 – 312.

⁹⁹A Jo Gittle 'Fair employment and the handicapped: a legal perspective' (1978) 27 *DePaul Law Review* 960.

¹⁰⁰MH Rioux et al 'Undue hardship and reasonable accommodation: the view from the court' (2001) 29 *Policy Studies Journal* 642.

because where the adjustment necessary is within the employer's capacity, they are under duty to act, while so long as they can show the adjustment to be unreasonable, the duty is fully discharged.¹⁰¹ Applying a similar standard in respect of other rights where costs and reciprocal benefit cannot be easily established is difficult.

Another factor attributable to the employment background is that the parameters of 'burden' in reasonable accommodation entail a balancing of the cost relative to the profit likely to accrue to the employer. It is therefore not an absolute entitlement. It is difficult to apply this interpretation in the context of the right to education where the benefit of education does not always or solely accrue to the education provider,¹⁰² or is difficult to quantify. Save in as far as education of all citizens benefits the government in the long-term, the traditional parameters of reasonable accommodation need to be adapted to the context of education. In fact, engaging the cost-benefit debate in education tempts a relapse into the pre-rights debate which discounted the education of persons with disabilities on the basis that the benefit was not worth the cost.

Evidently, the framing of the concept of reasonable accommodation is both a sword and a shield in as far as the claimant's case must be based on the argument that the needed accommodation is reasonable, while the onus is on the education provider

¹⁰¹As above 641.

¹⁰²This sentiment was captured in the submissions of the European Disability Forum to the Third session of the AHC Working Group on draft article 5; equality and non-discrimination available at <http://www.un.org/esa/socdev/enable/rights/ahcstata5tscomments.htm> (accessed 19 January 2012). The Forum argued that it is hard to qualify a human rights obligation intended to be enjoyed by all by means of the associated cost.

(particularly the state) to prove the unreasonableness, disproportion or undue burden of the required measure.

4.4.2 Reasonable accommodation in domestic legislation

During the negotiation process on the CRPD, the AHC considered the concept of reasonable accommodation in domestic legislation of various countries in order to determine how it was construed, and how it could be applied to the CRPD.¹⁰³ Some common features in the application and framing of the concept are evident from the jurisdictions considered.

The earliest codification of reasonable accommodation of persons with disabilities in the context of employment was in the American Rehabilitation Act of 1973.¹⁰⁴ Sections 503 and 504 of the Act read into the corresponding statutory provisions a requirement of reasonable accommodation as part of prohibition of employment discrimination against persons with disabilities. The purpose of integrating reasonable accommodation into discrimination at this point was anchored in the recognition that failure to do so would merely amount to an equality provision, which was insufficient to address the unique problems of people with disabilities.¹⁰⁵ The concept was further entrenched into US domestic legislation through the

¹⁰³AHC 'The Concept of Reasonable accommodation in selected national disability legislation' Background conference document prepared by the department of economic and social affairs, A/AC.265/2006/CRP.1. The document considered the laws of Australia, Canada, European Union, Ireland, Israel, New Zealand, the Philippines, South Africa, Spain, Sweden, United Kingdom, United States and Zimbabwe.

¹⁰⁴The concept had earlier been applied in prohibition of discrimination on the grounds of religious practice through the United States Civil Rights Act of 1968.

¹⁰⁵A Jo Gittler (n 99 above) 960.

adoption of the Americans with Disabilities Act (ADA).¹⁰⁶ The ADA, rather than define the concept of reasonable accommodation, lists actions which constitute reasonable accommodation such as modification of existing facilities, acquisition or modification of equipment, or adjustment of examinations.¹⁰⁷

In Canada, the equality clause of the Canadian Charter of Rights and Freedoms requires 'reasonable positive measures to meet the special needs of those who by reason of disability ... cannot be adequately served by accommodations or arrangements suitable for the majority.'¹⁰⁸ In *Eldrige v British Columbia (Attorney General)*¹⁰⁹ the Supreme Court of Canada developed reasonable accommodation as a principle for the elimination of discrimination so as to achieve substantive equality.¹¹⁰ The court stated,

'the principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. It is also a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation.....'

¹⁰⁶ Americans with Disabilities Act (ADA), 1990 (as amended in 1998).

¹⁰⁷ ADA (above) section 12111.

¹⁰⁸Gibson *The law of the charter: equality rights* (1990) 133-137 as quoted in C Ngwena 'Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the employment equity act from comparative law, part II: Reasonable accommodation' (2005) *Stellenbosch Law Review* 544.

¹⁰⁹ [1997] 3 S.C.R 624.

¹¹⁰Ngwena (n 108 above) 546. See *Eldrige v British Columbia (Attorney General)* 1997 3 S.C.R 624 630.

In the European context, the concept of reasonable accommodation was considered in the case of *Price v United Kingdom*.¹¹¹ The applicant in that case suffered phocomelia resulting in foreshortened limbs and a serious kidney condition. She was sentenced to seven days in jail. The sentencing court did not take into account the fact that she had a disability or the suitability of the jail facilities for her detention. As a result, Ms Price was subjected to undignified and potentially harmful treatment for the period of her sentence, including inability to access toilet facilities, and having to be assisted by male warders to use the toilet.

After the period of detention, Ms Price required medical treatment due to her inability to use the toilet during the period of detention. Ms Price's case before the European Court of Human Rights was that through failure to accommodate for her disability in the prison setting the state had violated her right to not be subjected to torture or to inhuman or degrading treatment or punishment. The court found in her favour, arguing that whereas it was not intentionally intended to humiliate or debase her, the treatment that she underwent was nevertheless degrading and therefore a violation of the Convention.¹¹²

While not explicitly mentioning 'reasonable accommodation', the case established a duty upon states to ensure that the needs of a person with disabilities are taken into account in all decision-making and in that case, to ensure that the needs of the person with disabilities could be reasonably accommodated. In a separate opinion,

¹¹¹ European Court of Human Rights, App. No 33394/96 (2001) 34 EHRR 1285.

¹¹² *Price v United Kingdom* para 30.

Judge Greve argued that failure to take into account and respond to the difference inherent in the disability constituted discrimination, and that the applicant, in view of her circumstances, should never have been imprisoned in the first place.

From the foregoing provisions in domestic jurisdictions, at least two prominent features of reasonable accommodation are evident: that it is intended to facilitate substantive equality, and that it entails a positive obligation.

4.4.3 Reasonable accommodation in international law

At the international level, the concept of reasonable accommodation was first applied in General Comment No. 5 of the CESCR on the rights of persons with disabilities.¹¹³

In the General Comment, the CESCR also linked reasonable accommodation to discrimination against persons with disabilities. The Committee stated that,

‘disability based discrimination can be defined as any distinction, exclusion, restriction or preference, or *denial of reasonable accommodation* based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social and cultural rights.’¹¹⁴

¹¹³ CESCR General Comment No 5 (n 29 above) para 15.

¹¹⁴ As above.

The foregoing definition of discrimination was retained in CRPD, and was extended to apply to both purposeful and passive discrimination, and to all human rights and fundamental freedoms.¹¹⁵

Some commentators argue that inclusion of reasonable accommodation into the definition of discrimination has the effect of making implementation of positive measures under the CRPD an immediate obligation.¹¹⁶ This would rule out the application of the principle of progressive realization of the rights under the Convention. These assertions give the impression that application of reasonable accommodation to all rights redefines the nature of duties in respect of socio-economic rights. However, reasonable accommodation does not make all rights immediately realisable save in as far as the duty to implement them is immediate for other people in similar social circumstances.¹¹⁷ Reasonable accommodation is individualised. Also, in light of the underlying theme of equality embedded in the CRPD, it is difficult to sustain the view that the concept has the effect of elevating the duties in respect of one group of people over others. Instead, the positive steps necessary to accommodate each individual ought to be acknowledged on a case by case basis.

¹¹⁵CRPD, article 2. The inclusion of reasonable accommodation into the anti-discrimination clause of the CRPD was opposed by some groups that felt that its purpose was already served by the general accessibility requirement in the Convention. See S Trómel 'A personal perspective of the drafting history of the United Nations Convention on the Rights of Persons with Disabilities' in Quinn & Waddington (n 86 above) 122.

¹¹⁶Lawson (n 94 above) 103 - 104.

¹¹⁷Quinn (n 86 above) 100.

The argument that reasonable accommodation makes positive duties immediately realisable is however distinct from the fact that the duty to provide reasonable accommodation in itself is not subject to progressive realisation, consistent with the argument that the principle now constitutes part and parcel of non-discrimination principle.¹¹⁸ Non-discrimination is a long standing principle in international human rights law that must be immediately ensured.

The concept of reasonable accommodation under the CRPD is further criticised for its failure to depart significantly from the welfarist assertions of assistance contained in other human rights treaties.¹¹⁹ It is argued that,

“implicit within understandings of justifiable discrimination and reasonable adjustment is the idea that children with disabilities and their needs are both burdensome and expensive and wherein the notion of reasonableness and its subjective parameters risks becoming something of a safety net and/or an institutional conversation strategy against structural change.”¹²⁰

This criticism further asserts that the CRPD fails to recognize the way in which the principle can become a barrier and therefore hinder full and equal participation of children with disabilities in society on an equal basis with others.¹²¹ Also, it is argued that the limitations of the concept, though intended to delimit its scope, have the

¹¹⁸The CRPD Committee also seems to have adopted this interpretation. In CRPD Committee Concluding observations of the Committee on CRPD: Spain CRPD/C/ESP/CO/1 (2011) para 44 the Committee argued that the duty to provide reasonable accommodation is not subject to progressive realisation.

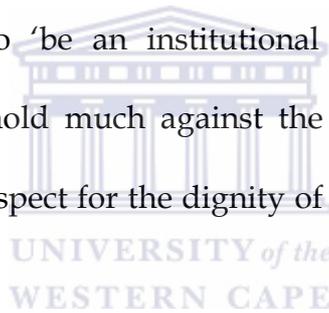
¹¹⁹Byrne (n 7 above) 433.

¹²⁰As above.

¹²¹As above.

potential to significantly undermine its purpose in countering exclusion.¹²² In addition, while disproportion or extent of burden could benefit those who require relatively marginal accommodations the limitations are likely to undermine the potential of the principle to address exclusionary practices affecting persons who require significant structural adjustments.¹²³

The potential of reasonable accommodation to perpetuate a view of helplessness cannot be entirely eliminated, but it can be reasonably mitigated by a purposive interpretation of the concept (a factual recognition of human diversity), and the duty to approach the Convention on the basis of good faith. Also, the potential of reasonable accommodation to 'be an institutional conversation strategy against structural change' does not hold much against the overarching goal of universal design, and the principle of respect for the dignity of persons with disabilities which are set out in the CRPD.¹²⁴



4.4.4 The building blocks of reasonable accommodation: 'reasonable' and 'undue burden'

The core of the concept of reasonable accommodation is 'accommodation'. The terms 'reasonable' and 'disproportionate or undue burden' define the parameters of the concept. The limitations have co-existed with the concept since its inception albeit

¹²²R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review Issue* 10. It is observed that the terminology 'undue burden' activates precisely the construction of persons with disability as 'burdens' on the community that the CRPD otherwise attempts to dispel. See Kayess & French (above) 27.

¹²³Kayess & French '(n 122 above) 27.

¹²⁴ CRPD articles 4(1) (f) & (3) (a) respectively.

with some small variations.¹²⁵ As a standard, reasonableness, proportionality or the extent of burden are highly subjective. Hence, assessment of reasonable accommodation entails a subjective examination of a variety of factors including the cost of the adjustment relative to the benefit of the accommodation, potential effect of the accommodations on other people, and the financial capacity of the service provider.¹²⁶

Reasonableness is a fluid standard referring to fairness or justice as perceived by an ordinary person. 'Undue burden' on the other hand is often interpreted in terms of costs, a factor that is telling of its origins, particularly in the context of employment. The Americans with Disabilities Act (ADA) for instance defined 'undue burden' as 'an action requiring significant difficulty or expense in light of the nature and cost of the accommodations required, the overall financial resources of the would be accommodator and the type of operation.'¹²⁷ In Canadian legislation, determination

¹²⁵The variants of reasonable accommodation include 'reasonable adjustment' and 'reasonable measures'. Variants of 'undue burden' include 'undue hardship', 'unjustifiable hardship' or 'reasonable limits'. Similarly, the term 'accommodation(s)' seems to have been applied interchangeably with 'adjustment(s)', or 'modifications' during the negotiations of the CRPD. See AHC 'The concept of reasonable accommodation in selected national disability legislation' A/AC.265/2006/CRP.1 - A/AC.265/2006/CRP.1 available at <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm> (accessed 6 February 2012). In *Central Okanagan School District No. 23 v Renaud* (1992) 2 SCR 970 984 - 995 the Supreme Court of Canada was of the view that 'undue hardship' and 'reasonableness' are alternative ways of expressing the same concept. The AHC on the other hand, after assessing the application of the concept in various domestic jurisdictions, concluded that 'reasonableness' and 'undue or unjustifiable burden' are a means of differentiating a plaintiff's case from a defendant's legitimate defense. See AHC 'The concept of reasonable accommodation in selected national disability legislation' Background conference document prepared by the Department of Economic and Social Affairs A/AC.265/2006/CRP.1 available at <http://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm> (accessed 6 February 2012).

¹²⁶AHC document on reasonable accommodation (above); Ngwenya (n 108 above) 558.

¹²⁷ADA (n 106 above) section 12111.

of whether hardship is undue entails an assessment of factors like financial cost, potential or extent of disruptions of services to the public, the potential of an employer's operation and the overall economic climate.¹²⁸ Disproportion is a relational term defining a quantitative value relationship between the cost of an accommodation and the overall value of the accommodation.

Article 2 of the CRPD requires that reasonable accommodation does not impose a 'disproportionate or undue burden'. The provision can be interpreted in a cumulative or alternative sense. Regarding the framing of the provision, it is arguable that the use of 'or' in the sentence could imply alternative standards. However, whereas the terms may have been intended as alternatives, it is argued that they were drafted as additives, effectively, creating a two element test.¹²⁹ From this perspective, the obligation to accommodate can be discharged at the lower threshold. But there is no reason to overlook the cumulative value, even though it is difficult to envisage a burden that is proportionate yet undue. The Ontario Human Rights Commission submitted to the AHC that 'appropriateness'¹³⁰ is distinct from undue hardship, and the determination of what is appropriate or due should be a process along a continuum rather than an all or nothing proposition.¹³¹ In effect, if a

¹²⁸AHC document on reasonable accommodation (n 125 above).

¹²⁹Kayess & French (n 122 above) 27.

¹³⁰The use of 'appropriateness' synonymously with 'reasonableness' discussed above should be recalled in this submission.

¹³¹See the submissions of the Ontario Human Rights Commission in the Comments, proposals and amendments submitted electronically to the third session of the working group on article 5; Equality and non-discrimination, available at <http://www.un.org/esa/socdev/enable/rights/ahcstata5tscomments.htm> (accessed 19 January 2012).

certain kind of accommodation is considered undue, other alternatives within the power of the accommodating party should be explored.

In any case to ensure reasonable accommodation, a level of burden beyond nominal must be expected.¹³² During the drafting of the CRPD, the Working Group on the right to equality and non-discrimination was of the view that the availability of state funding should limit the use of 'disproportionate burden' as a justification for non-provision of reasonable accommodation.¹³³ Arguably, the limitations as to proportion and burden can mitigate the effect of the immediate duties implied by the incorporation of reasonable accommodation into the non-discrimination clause.

It is argued that,

“Whether a burden is disproportionate or undue depends on whose duty it is to fulfil the obligation. If it is a duty of a government or public authority or a major private company, the burden will have to be extremely heavy before it can be considered disproportionate or undue. Perhaps it cannot ever be so. But if the duty rests upon an individual or a small firm or organisation, the scales will be tipped down so much more easily and the burden may deserve to be seen as disproportionate or undue. The question must always be answered

¹³²The European Disability Forum submitted to the AHC that ultimate outcome of the framing of the reasonable accommodation provision ought to be the elimination to the maximum extent possible of the exception to the rule of providing reasonable accommodation. See the submissions of the European Disability Forum to the Third session of the AHC Working Group on draft article 5; equality and non-discrimination available at <http://www.un.org/esa/socdev/enable/rights/ahcstata5tscomments.htm> (accessed 19 January 2012).

¹³³Working group Draft (n 7 above) note 27.

based on a concrete assessment in each case, compared to previous cases of a similar nature.”¹³⁴

The foregoing interpretation is significant to the right to education where the government is the main service provider.

4.4.5 Reasonable accommodation in education

In the context of education, whether hardship is undue is a function of the financial resources required to provide the accommodation, the degree and kinds of effects that the accommodation will have on other students, the impact of the accommodations on the educational program itself, and the unusual risk if at all, that the accommodations may pose for the staff or other students, including students that have a disability. ¹³⁵ The extent of measures necessary to reasonably accommodate students is difficult to catalogue since they are individually defined and diverse.

It was argued during the CRPD negotiating process that to reasonably accommodate a student’s requirements requires state parties to ensure an accessible curriculum, accessible teaching medium and technologies, alternative and augmentative communication modes, sign language, Braille, alternative learning strategies, accessible physical environment, and specialised training of teachers to ensure full participation of students with disabilities.¹³⁶

¹³⁴Kallehauge (n 89 above) 211.

¹³⁵AHC documents on reasonable accommodation (n 125 above).

¹³⁶Seventh Session ‘Article 24 - Education: comments, proposals and amendments submitted electronically’ 2.

Canada is one of the few national jurisdictions in which the law outlines measures necessary to evaluate reasonable accommodation in the context of education. In terms of Canadian law, deciding whether hardship is excessive or 'undue' in a school, college or university setting, a court or tribunal may look at factors such as the financial resources required to provide the accommodation, the degree and kinds of effects that accommodations will have on other students, the impact of accommodations on the educational program itself, and risks if any that such accommodations may pose for other students, including others with disabilities.¹³⁷

4.4.6 'Of the individual requirements'

Reasonable accommodation is an individual, as opposed to a general measure. It demands an individual approach to the needs of the person with disability.¹³⁸ This is epitomised in the statement 'where needed in a particular case'. Failure to make customised adjustments in a particular instance, which need not be relative to other people in the same circumstances, suffices to found a course of action for the violation of an individual's right to non-discrimination. Reasonable accommodation demands interaction between the individual and relevant entities to specifically determine the individual's specific need for accommodation.¹³⁹

The individuality of the measures envisaged in reasonable accommodation is also one of the fundamental distinguishing factors between reasonable accommodation

¹³⁷AHC documents on reasonable accommodation (n 125 above).

¹³⁸Quinn (n 86 above) 100; Ngwena (n 108 above) 555; Lawson (n 95 above) 103.

¹³⁹Working group draft text 'Draft Article 7; equality and non-discrimination' note 27; Ngwena (n 108 above) 555.

and affirmative action. Both measures are intended to facilitate substantive equality but are significantly distinct.¹⁴⁰ Affirmative action is defined as

‘a coherent package of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.’¹⁴¹

However, while affirmative action gives the affected people relative advantage over other groups to compensate for past injustice or inequality, reasonable accommodation does not confer any such advantage.¹⁴² Rather, reasonable accommodation enables the beneficiary of affirmative action to effectively make use of the opportunity at hand.¹⁴³ Also, reasonable accommodation is not a temporary measure like affirmative action. Affirmative action is aimed at the removal of obstacles to the advancement of the rights of vulnerable groups such as persons with disabilities within a period of time, at the end of which the measures must cease.¹⁴⁴ The concepts are therefore distinct but complimentary. This distinction is important because affirmative action measures are regularly used in the context of education, and are in some cases applied as a means of implementing the provisions of the CRPD but reported as reasonable accommodation measures.

¹⁴⁰Affirmative action is covered under article 5(4) of the CRPD.

¹⁴¹Economic and Social Council, “Prevention of discrimination and protection of indigenous peoples and minorities: The concept and practice of affirmative action” Progress report submitted by Mr. Bossuyt, Special Rapporteur, in accordance with Sub Commission resolution 1998/5 E/CN.4/Sub.2/2001/15 26 June 2001, para 7.

¹⁴²See Ngwena (n 108 above) 534 – 542 for a discussion on the range of distinctions between the two concepts.

¹⁴³Affirmative action addresses access to opportunities, while reasonable accommodation enables equal outcomes. The latter ensures a level ground. Ngwena n 108 above) 538.

¹⁴⁴Sepulveda (n 3 above) 387.

Article 24(2) demands an individualised response in respect of two main areas: reasonable accommodation of ‘individual requirements’ and ‘individualized support measures’ for students.¹⁴⁵ Individuality is a fundamental feature of education systems as well as of the concept of reasonable accommodation.¹⁴⁶ In addition, individualised student support is considered a minimum standard in relation to the right to education.¹⁴⁷ Submissions in support of individuality as a prerequisite for education abound.

In the Working Group draft article on education for instance, the principle of the best interests of the child in education was to be achieved by *inter alia* use of individualised education plans. During the 6th session of the AHC, the question of whether to retain the reference in the final text was discussed, but consensus was not achieved. In General Comment No. 9, the CRC Committee stated that every person dealing with the child should help ‘each and every individual child’ to develop his or her own potential. It further recommended that all persons furthering the child’s skills, abilities and self-development have to

‘precisely observe the child’s progress and carefully listen to the child’s verbal and emotional communication in order to support their education and development in a well targeted and most appropriate manner.’¹⁴⁸

¹⁴⁵Article 24(2) (c) & 24 (2) (e) respectively.

¹⁴⁶ See discussion of adaptability of education in Chapter 3 of this work.

¹⁴⁷Human Rights Council, ‘Report of the Special Rapporteur on the right to education, Vernor Munoz’ A/HRC/4/29 19 February 2007 paragraph 26. Byrne (n 1 above) 238 however argues that the focus on the individual needs of the child in the context of inclusive education.

¹⁴⁸CRC General Comment No 9 (n 25 above) para 64.

Inclusive education emphasises the need to meet the individual needs of all learners within the regular education system. Individual attention to the student also facilitates early identification and intervention that benefits the rehabilitation and reintegration of children with disabilities.

Individualisation of education has a direct bearing on availability of education, particularly teacher-student ratios. It demands development of individual education plans. Provision of individual responses is consistent with the requirement that education ought to 'provide a range of support that meets the diverse needs of all students, including students without disabilities, to the greatest extent possible' in order to guarantee inclusive education.¹⁴⁹

'Individuality' has also been used to depict one group of persons with disabilities relative to another, such as those having a similar kind of disability. Submitting on the unsuitability of prescribing general measures for all during the CRPD negotiation process, the World Blind Union stated that while people with disabilities share many common barriers to full and equal opportunity in society, 'individual' disability groups have specific needs particular to the disability that must be affirmatively addressed to ensure that their needs are recognized and guaranteed.¹⁵⁰ The perspective was however neither pursued by other organisations nor is there

¹⁴⁹UNOHCHR, 'From exclusion to equality: realizing the rights of persons with disabilities: handbook for parliamentarians on the UNCRPD and its Optional Protocol' (2007) 83.

¹⁵⁰Submissions of the World Blind Union in the Seventh session, Background documents, Article 24 - Education Comments, Proposals and Amendments submitted electronically available at <http://www.un.org/esa/socdev/enable/rights/ahcstata24sevscomments.htm> (accessed 15 May 2013).

evidence that it was taken into account in the use of the term in the final text. In any case, interpretation of individual as a group would be inconsistent with the phrasing of the provision.

In summary, implementation of the reasonable accommodation provision under article 24(2) (c) requires that teachers should have dynamic skills to respond to the needs of all the learners. It also means that predetermined or inflexible budgets and curricula would be inappropriate to adequately respond to the requirements of the CRPD. In addition, though the use of individual education plans did not eventually appear on the text of the CRPD, it is poised to be a good channel to deliver tailored educational solutions for children with disabilities.

4.5 Duty to provide support measures: article 24(2) (d) and (e)

These articles require state parties to ensure that persons with disabilities receive the support they require within the general education system and in environments that maximize academic and social development consistent with the goal of full inclusion.¹⁵¹ As highlighted at the beginning of this chapter, the two articles are discussed together because they address the same issue of support, albeit in different settings. The provisions were initially contained in one sub-article. Following extensive discussions and modifications to the initial draft provision, the sub-article was broken down into two. Below are some clauses drawn from earlier drafts of article 24(2).

¹⁵¹Article 24(2) (d) & (e) respectively.

The original suggestion for this provision was a single sentence which stated,

“In exceptional circumstances where the general education system cannot adequately meet the support needs of persons with disabilities, States Parties shall ensure that effective alternative support measures are provided, consistent with the goal of full inclusion.”¹⁵²

Subsequently the Chair’s draft article on the right to education provided that,

‘where the general education system does not yet adequately meet the needs of persons with disabilities, special and alternative forms of learning may be made available.’¹⁵³

Draft article 17 of 2004 provided inter alia that state parties should ensure

‘17(2) (a) That all persons with disabilities can choose inclusive and accessible education in their own community.’

(3) State Parties shall ensure that where the general education system does not adequately meet the needs of persons with disabilities special and alternative forms of learning are made available. Any such special and alternative forms of learning should;

.....

(c) Allow a free and informed choice between general and special systems’

¹⁵²M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities: a handbook on the human rights of persons with disabilities* (2009) 135.

¹⁵³Chairman’s draft elements (n 4 above) article 24(3).

The International Disability Caucus (IDC) argued that the clause in its original state presented a lacuna in that it did not define the 'exceptional circumstances' envisaged therein.¹⁵⁴ It had the potential to perpetuate indiscriminate special education because it neither explicitly require prioritisation of inclusive education, nor contemplated eventual integration of children with disabilities in the mainstream class. The main purpose of breaking the original article 24(2) (d) into two was therefore to emphasise provision of support measures within the regular system as the norm and in separate settings as the exception.¹⁵⁵

Read together with article 24(3), article 24(2) (e) targets certain groups of learners with disabilities particularly the blind and deaf, who would benefit more from support facilities provided in separate settings, particularly in training on life skills.¹⁵⁶ Article 24(3) calls for states to ensure that persons with disabilities can learn life and social development skills to facilitate their full and equal participation in education and as members of the community. Measures to facilitate this goal include ensuring that the education of children 'who are blind, deaf or deaf-blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments that maximise academic and social development.'¹⁵⁷ Article 24(3) thus reinforces the right of children with

¹⁵⁴M Schulze (n 152 above) 135.

¹⁵⁵Quinn (n 86 above) 110.

¹⁵⁶Schulze (n 152 above) 41 note 65.

¹⁵⁷ CRPD article 24(3) (c).

disabilities to choose to learn in special schools or mainstream schools as appropriate.

The net concern in defining the parameters of 'special' education and the limits of integration was whether there were sufficient objective justifications based on different learning capacities that would warrant some separate provision of education for certain groups.¹⁵⁸ Without engaging at length the discussions preceding the changes in the provision, some fundamental lines of thought are evident. These include that special education was always regarded as the exception as opposed to the norm; that the ultimate goal is to gain the best standard of education for all children and that choice between education systems should be retained. Ultimately, the article was split on the basis of the context in which support can be provided. Article 24(2) (d) addresses support within the general education system while article 24(2) (e) addresses the provision of support in separate settings for children with disabilities.

4.5.1 The context of support: choice between systems

The Working Group of the AHC on article 24 stressed that there was no intention in the foregoing provisions to create an obligation for students with disabilities to attend general schools where their needs may not be adequately met.¹⁵⁹ Rather, the provision was meant to provide the right to choose inclusive and accessible education, as opposed to creating an obligation on students with disabilities to attend

¹⁵⁸Quinn (n 86 above) 110.

¹⁵⁹Beiter (n 43 above) 137-8.

general schools where their needs may not be adequately met.¹⁶⁰ This view was supported through various submissions on the article. The proponents of choice in the system of education were emphatic that the right of the child with disabilities to study in specialised settings ought to be considered on an equal basis with the right to access inclusive education.¹⁶¹ This means that for the affected groups of children, particularly those with sensory disabilities, the choice of special education should be available on an equal basis with inclusive education.¹⁶²

During the third session of the AHC, it was specifically highlighted that some of the members of the Working Group thought that 'specialist education services should be provided not only where the general education system was inadequate, but should rather be made available at all times without a presumption that one approach was more desirable than the other.'¹⁶³ Further, expounding on draft article 17 of the Working Group text, which provided that where special or alternative forms of learning were made available, they were to be provided in such a manner as to allow children with disabilities to participate in the general education system to the maximum extent possible, the Group argued that the purpose of this provision was

¹⁶⁰AHC Working Group; Draft article 17, Education available at <http://www.un.org/esa/socdev/enable/rights/ahcstata24wgtext.htm> (accessed 3 September 2011) note 58.

¹⁶¹ Other advocates for individual choice between special and mainstream schools include Norwhich, B. 'Education, inclusion, individual differences: recognising and solving dilemmas' (2002) 50 *British Journal of Education Studies*; V Pitt & M Curtin 'Integration versus segregation: the experiences of a group of disabled students moving from mainstream schools into special needs further education' in (2004) *Disability and Society*.

¹⁶²*World report on disability* (n 27 above) 211. The report highlighted that deaf students and those with intellectual disabilities argue that mainstreaming is not always a positive experience. The argument is even more prevalent in the low income countries or regions where special schools are the only chance for high quality specialised learning.

¹⁶³AHC Report of the 3rd session A/AC.265/2004/5 9 June 2004 note 63 40 (emphasis mine).

to ensure that the general education system and special education were not mutually exclusive options, but rather that there was a range of options in between.¹⁶⁴

The position of the Working Group on choice was supported by other groups. It was argued for example that choice was ‘necessary because of the major communication barriers that have to be addressed to enable these children and students to have the opportunity to achieve their full educational potential.’¹⁶⁵ UNESCO highlighted in its submissions that promoting inclusion implies allowing for choice, and that inclusiveness does not mean supporting one model, but rather that the entire system should be inclusive.¹⁶⁶ Effectively therefore, choice between education systems is unequivocally entrenched in the CRPD.¹⁶⁷



¹⁶⁴ AHC Working Group Draft Text, article 17 note 62.

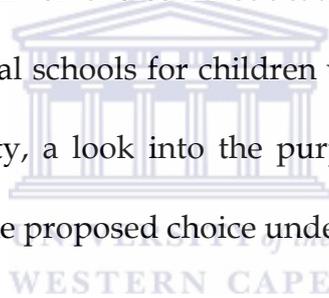
¹⁶⁵See the statement of the International Disability Caucus in the Seventh Session: Comments, proposals and amendments submitted electronically 21.

¹⁶⁶AHC Background documents article 24 ‘Comments, Proposals and amendments submitted electronically’ 12.

¹⁶⁷See further, AHC Seventh session ‘Article 24 – Education’ Comments, proposals and amendments submitted electronically 5. In its proposal, Japan called for ‘17(3) (c) [to] allow for choice between general and special systems to the greatest or maximum extent practicable in a manner consistent with best interests of the child/student.’ A similar proposal was made by Kenya stating that the state should ensure ‘all persons with disabilities can choose inclusive education’. Reference to choice can only mean that there should be at least more than one system to choose from. It must however be highlighted that there was formidable opposition to allowing choice on systems of education. The Centre for Studies on Inclusive Education for instance strongly argued that based on existing evidence, allowing choice between the two systems was very ill advised. This argument had to be balanced by the expressed needs of the concerned groups. Ultimately, the current position is more of a compromise than a consensus on the need for co-existence of special and regular education systems. See further AHC ‘Background documents of the Seventh Session, Article 24 – Education: Comments, Proposals and amendments submitted electronically’ 30. Byrne (n 1 above) 239 highlights the fact that the question of educational placement was one of the most hotly debated issues in the drafting process.

4.5.2 Meaning of choice

The question of choice is not new in the context of the right to education.¹⁶⁸ Indeed, free choice of education without interference by the state or by a third person is one of the four elements of the core content of the right to education recognised by the CESCR.¹⁶⁹ However, choice in education is often applied to parents' choice of appropriate moral or religious education of their children, and choice between private and public schools.¹⁷⁰ Arguably, the recognition of the right of individuals and bodies to establish and direct educational institutions under the CRC is aimed at guaranteeing such choice.¹⁷¹ The critical question in light of the requirements of the CRPD is whether this freedom of choice in education can be extended to choice between the regular and special schools for children with disabilities. An enquiry in this regard entails, of necessity, a look into the purpose of parental choice, to see whether it is consistent with the proposed choice under the CRPD.



Parental choice in education is a counterweight to the state's power to impose public education. It balances the power of the state to compel a child to learn with that of the parent to determine where and how.¹⁷² Parental power is rooted in parental

¹⁶⁸VO Nmehielle, *The African human rights system: its laws, practice, and Institutions* (2001) 130 argues that the right to choice in education is often linked to parental exercise of freedom of conscience and religion.

¹⁶⁹CESCR *Report on the Eighteenth and Nineteenth Sessions, Economic and Social Council, Official Records, 1999, United Nations, New York and Geneva, (1999) 79.*

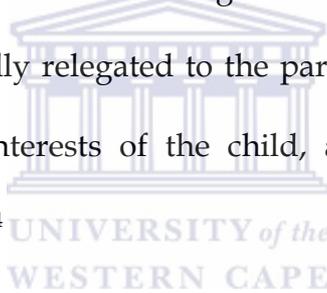
¹⁷⁰D Hodgson *The human right to education* (1998) 189; Beiter (n 43 above) 539. See for instance articles 26(3) of the UDHR, 5(1) (b) of the UNESCO Convention against Discrimination in Education, 13(3) of the ICESCR and 18(4) of the ICCPR.

¹⁷¹ CRC article 29(2)

¹⁷²K Tomasevski *Human rights obligations in education: the 4A Scheme* (2006) 29.

responsibility, and it has been indicated that most parents are adamant to give up the (privileges inherent in the) responsibility.¹⁷³

The argument of choice makes profound sense with respect to adults who have the capacity to exercise such choice – even though the capacity of adults with certain kinds of disabilities such as intellectual disability is also not universally accepted or recognised. However, the exercise of choice by children is limited in several respects by virtue of minority. As the primary beneficiary of education, the child has the primary interest in choosing the type of education that they will receive. But because children are deemed incapable of foreseeing the long-term implications of their choice, this decision is rightfully relegated to the parents or guardians albeit within the framework of the best interests of the child, and in the context of mutual consultation and persuasion.¹⁷⁴



Consultation is particularly in line with the children's rights principle of participation and recognition of the evolving capacities of the child.¹⁷⁵ In terms of the CRC, respect for or conformity with parental convictions in a child's education is not required. It is argued that this critical omission shifts the role of parents or caregivers

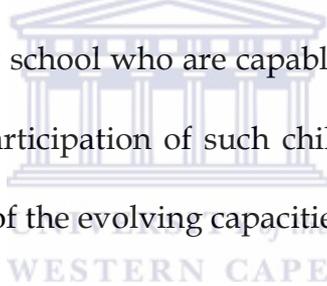
¹⁷³Farrel (n 62 above) 155.

¹⁷⁴Y Rabin 'The many faces of the right to education' in D Barak-Erez & AM Gross (eds) *Exploring social rights* (2007) 275. C Sawyer 'Children of our time' in P Lodrup & E Modvar (eds) *Family life and human rights* (2004) 677-678 highlights the fact that childhood is socially constructed, and that the liberation of the individual child is inimical to the social construction of humanity. It is the consequence of structured hierarchical relationships of the family.

¹⁷⁵Hodgson (n 170 above) 196; Verheyde 'Article 28' (n 81 above) 48 argues in this regard that parental choice is not an exclusive prerogative, and is rather subject to the fundamental principles of the children's rights.

in education under the CRC from being decisive in nature, to guiding.¹⁷⁶ It is argued in light of this exclusion of parental prerogative that where there is a conflict between the convictions of a child and those of the parent regarding *inter alia* the choice of school, there can be no *a priori* exclusion of the views of the child.¹⁷⁷

It is hereby acknowledged that participation of children at the primary education level (which is the ambit of this work) is to a large extent limited in view of the average age at this level of education. In fact, some educationalists argue that at the primary level, parents should have the determinative voice because the children are incapable of making reflective decisions.¹⁷⁸ Nevertheless, there is a significant number of children in primary school who are capable of forming and expressing an opinion in this regard. The participation of such children should be encouraged in accordance with the principle of the evolving capacities of the child.



The net effect of the foregoing discussion is that the two systems of education ought to be maintained, without preference for either because choice is only viable when there is an acceptable range of alternatives to consider.¹⁷⁹ This does not change the *status quo* in most states which have traditionally maintained a system of special education, and the elimination of which was the main point behind the call for

¹⁷⁶M Verheyde 'Participation at school' in F Ang et al (eds) *Participation rights of children* (2006) 187. Hodgson (n 170 above) 191 highlights that, read together with article 14(2) of the CRC, the omission of parental right to choose under the CRC is considerably weakened to a level of offering guidance to the child as the primary right holder.

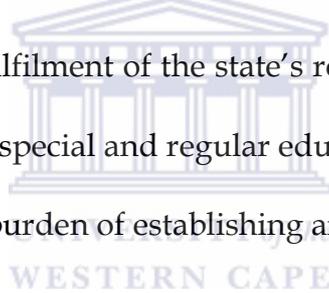
¹⁷⁷Verheyde (n 176 above) 187.

¹⁷⁸Hodgson (n 170 above) 196.

¹⁷⁹AB Smith et al *Advocating for children: international perspectives on children's rights* (2002) 36.

inclusive education. In fact, entrenchment of a right to choose special education on an equal basis with other children could as well mean that states now have a responsibility to increase and equip special schools. It is nevertheless clear that article 24 is biased towards 'inclusive' education, understood to mean education in mainstream settings.

One of the key arguments advanced in support of inclusive education is its economic and utilitarian value. It is argued in this regard that the cost of maintaining parallel (special and regular) education systems is prohibitively high relative to that of ensuring inclusive education, understood to mean education of all learners in the same schools.¹⁸⁰ If however fulfilment of the state's responsibility under article 24(2) requires equal choice between special and regular education systems, then the state is not absolved of the economic burden of establishing and maintaining both systems.



¹⁸⁰UNESCO 'Understanding and responding to children's needs in inclusive classrooms' (2001) argued that establishing and maintaining inclusive schools is less costly than separate education. See also Salamanca Statement (n 28 above) para 2; Centre for Educational Research and Innovation 'Inclusive education at work: students with disabilities in mainstream schools' (1999) 14 & 21. Arguably, these assumptions are based on education infrastructure priorities in developed countries. It is not clear whether similar outcomes can be expected in developing countries where the infrastructure is mainly underdeveloped and where the infrastructural priority is expansion of access. There however alternative economic arguments. One of these is that the high cost of special schools means that in practice only a minority of students, particularly the urban elite, are likely to benefit from them. The other argument is that excluding children with disabilities from education has high costs in the long-term because it increases the number of dependants in adulthood and also raises the chances of such children living in poverty as adults. See Salamanca Framework for Action (n 28 above) para 10; *World report on disability* (n 27 above) 205.

The alternative interpretation to equal choice is the preference for integration, with special education as the exception.¹⁸¹ Article 24(3) of the CRPD anchors specialised education for children with sensory disabilities as a preferred choice in teaching life skills, and pegs such specialised education to the goal of enabling participation in education. In this way, the provision reinforces the goal of full inclusion and implies the need for a roadmap towards reintegration of the learner who is placed in special education into the mainstream classroom. The Chair's draft article on the right to education provided;

'24(3) Where the general education system does not yet adequately meet the needs of persons with disabilities, special and alternative forms of learning may be made available. However, *these should be aimed at preparing students for education in the general education system* and the quality of education provided should reflect the same standards and objectives as that provided in the general education system' (emphasis mine).¹⁸²

Further, during discussions of the Working Group draft, it emerged that one reason for supporting specialised education was to allow children with certain types of disabilities, particularly deaf, blind and deaf-blind, to commence their learning in an

¹⁸¹Recall in this regard earlier discussion in this part, on the inclination of inclusive education towards integration. This view is anchored by article 24(3) and implies the need for an exit point.

¹⁸²Chairman's Draft Elements (n 4 above) article 24. The Working Group Draft text also reiterated the importance of choice for children with sensory disabilities as well as their right to receive the curriculum in sign language or Braille. In the Seventh Session 'Article 24 - Education: comments, proposals and amendments submitted electronically 6' Kenya proposed that special education should 'be provided in such a manner to allow children with disabilities to participate in the general education system to the maximum extent possible.'

environment that is more specific to their needs in order to allow them to 'gain maximum benefit from a fully inclusive general education system.'¹⁸³

The 'goal of full inclusion' as used in article 24(2) (e) also suggests that the kind of learning that the student is engaged in should be aimed at ultimately ensuring that the child is fully included both in the education system and in the society. A similar argument was made in General Comment No. 9 of the CRC. The CRC Committee has stated that for education to ensure inclusion, it ought to increase the participation of the learner in learning, cultures and communities as well as to reduce exclusion within and from education.¹⁸⁴ It has also been argued that as used in the General Comment No. 9, the goal of full inclusion depicts a process towards inclusion.¹⁸⁵ These arguments suggest that full inclusion is a robust approach to matters affecting persons with disabilities, and entails a range of facets one of which is inclusive education.

In line with the latter interpretation, the goal of full inclusion means that the skills acquired in such settings should enable the child to both live independently in the community and to join mainstream classes.¹⁸⁶ If understood to mean that separate education should aim at 'full inclusion' in education, then special education must only be used on a transient basis, and there must be a clear roadmap to the ultimate

¹⁸³AHC Report of the 6th session 11.

¹⁸⁴General Comment No 9 (n 25 above) para 6.

¹⁸⁵Byrne (n 1 above) 241.

¹⁸⁶Byrne (n 1 above) 237 argues that the conceptualisation of inclusive education as a goal as opposed to a right dilutes its reformist potential.

goal of education in mainstream settings. The point of convergence of the separate and mainstream education is however not established in the provision. It also ought to be borne in mind that not all students are ultimately able to integrate into the regular education system. The few cases where integration is not possible should however be the exception and not the norm.

4.5.3 The meaning of support

The concept of support is not restricted to the field of disabilities or to the right to education. As discussed earlier in this chapter, a system of support services is an integral part of any education system.¹⁸⁷ Support services serve the divergent needs and interests of all learners, as well as accomplish a specific task in the interest of education. They enrich and support educative teaching.¹⁸⁸ Support services directed to all students include library services, transport and hostel services, feeding schemes, vocational guidance or medical services.¹⁸⁹ Some of these services are regarded as 'indirect costs' of education and their provision is within the responsibilities of the state for provision of free and compulsory primary education as currently understood.¹⁹⁰ There is no universally accepted catalogue of education services that ought to fall within the responsibility of the state.

It is therefore arguable that the requirement to provide support measures for children with disabilities within the general education system does not introduce a

¹⁸⁷ See part 4.2.1 above on the components of an education system.

¹⁸⁸E Dekker & OJ Van Schalkwyk (n 17 above) 20.

¹⁸⁹As above 21.

¹⁹⁰F Coomans 'In search of the core content of the right to education' in A Chapman & S Russell (eds) *Core obligations: building a framework for economic social and cultural rights* (2002) 228; CRC Committee, *Concluding Observations for Senegal (UN DOC.CRC/C/46, 1995)* para 128 & 142.

new responsibility, but rather expands the limits of support as currently understood. As shown in Chapter 1, the range of services considered to be within the support component of education (and the cost of which therefore ought to be covered in order to guarantee free education) varies from one commentator to another.¹⁹¹ Arguably, the contemporary interpretation of the range of support services that constitute the minimum core responsibility of states on the right to education uses the child without disabilities as the reference point. This is because none of these commentators or treaty monitoring bodies contemplates disability specific services such as the need for technical or human aides. Ideally, substituting the reference point with a child with disabilities could subsume the needs of the child without disabilities.

The choice of the range of support services regarded as indirect costs of primary education and the responsibility for provision of which vests in the state is not circumscribed. There is therefore no justification for exercising the discretion to exclude the needs of children with disabilities from the costs eligible to be covered by the state in order to ensure education without discrimination.

4.5.3 Purpose of Support

Provision of support measures facilitates the exercise of rights by persons with disabilities.¹⁹² It also serves to preserve dignity and promote their autonomy.¹⁹³ In this sense, provision of support measures is closely linked to independent living, and

¹⁹¹Chapter 1 part 1.7.4.

¹⁹²Standard Rules (n 15 above) Rule 4.

¹⁹³World report on disability (n 27 above) 138.

its nature is defined by the needs of the recipient. In the context of education, the support required by a child with disabilities, is such as is necessary to enable them effectively benefit from learning on an equal basis with other learners.

Articles 24(2) (c) and (d) also create safeguards for the standard of education in separate settings by establishing benchmarks such as the requirement that special education of children with disabilities must maximise academic and social development, and be consistent with the goal of full inclusion. Consequently, it is not enough to merely show that the kind of support needed to facilitate a child's effective learning is not possible in the general education system, it must also be shown that the academic benefit that the child is likely to achieve if educated in a separate system is the highest available to them.

The requirement for education to be provided in 'environments that facilitate social development' is consistent with the need to teach life skills to children with some kinds of disabilities so as to ensure that they are able to live independently in the community and to benefit from education. It emphasises development of life skills in order that the concerned child is able to participate effectively in education and in the community as opposed to the incapacity of the child with disabilities to learn in the mainstream classroom.

The Salamanca Statement of Action stated that 'within inclusive schools, children with special educational needs should receive whatever extra support they may

require to ensure effective education.¹⁹⁴ It also stated that ‘there should be a continuum of services to match the continuum of special needs encountered in every school.’¹⁹⁵ The CESCR reiterated the duty of states to ensure that ‘the necessary equipment and support are available to bring persons with disabilities to the same level of education as their non-disabled peers.’¹⁹⁶ The Standard Rules state that ‘education in mainstream schools presupposes the provision of interpreter and other appropriate support services. Adequate accessibility and support services, designed to meet the needs of persons with different disabilities, should be provided.’¹⁹⁷

In general, it can be inferred that support measures were intended to facilitate effective benefit from education, to facilitate equality between children with disabilities and those without, and to address individual needs of learners.

4. 5.4 The meaning of support measures

It has been noted that whereas formal organized support services and programmes for people with disabilities are common in high income countries, they are a fairly new concept in many low income and middle income countries.¹⁹⁸ Yet, in order to successfully ensure support measures in developing countries, it is fundamental to have effective collaboration between various providers of formal support, while complementing, respecting and supporting informal support. The government retains the responsibility to ensure equal access to support services including

¹⁹⁴Salamanca Statement (n 28 above) 12.

¹⁹⁵As above.

¹⁹⁶CESCR General comment No 5 (n 29 above) para 35.

¹⁹⁷ Standard Rules (n 15 above) Rule 6(2).

¹⁹⁸ World report on disability (n 27 above) 142.

through making policies and implementing them, regulating service provision, funding and organizing services for people with disabilities who cannot afford to purchase them.¹⁹⁹

Support measures have been defined as such measures as are necessary to enable children with disabilities to benefit from free primary education, including personal assistance, particularly 'teachers trained in methodology and techniques (such as appropriate languages and other forms of communication) for teaching children with a diverse range of abilities, and appropriate and accessible teaching materials, equipment and assistive devices, which should be provided to the maximum extent of available resources.'²⁰⁰



From the Salamanca Statement, support measures may be understood to include resource personnel from various agencies, departments and institutions, such as advisory teachers, educational psychologists, or speech and occupational therapists co-ordinated at the local level.²⁰¹ In terms of the Standard Rules, support measures include assistive devices and equipment, personal assistance and interpreter services, according to the needs of persons with disabilities.²⁰² According to the Chair's draft of the CRPD support includes an accessible curriculum, medium and technologies,

¹⁹⁹ As above 157.

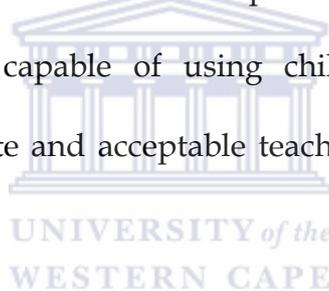
²⁰⁰H Combrinck 'The hidden ones: children with disabilities in Africa and the right to education' in J Sloth-Nielsen (ed) *Children's rights in Africa: a legal perspective* (2008) 309.

²⁰¹Salamanca Statement (n 28 above) para 31.

²⁰²Standard Rules (n 15 above) Rule 4(1).

learning strategies, and an appropriate environment to ensure full participation of students with disabilities in that system.²⁰³

In the Working Group draft text of the article, 'support' was detailed to include 'specialised training of teachers, school counsellors and psychologists, an accessible curriculum, an accessible teaching medium and technologies, alternative and augmentative communication modes, alternative learning strategies, accessible physical environment, or other reasonable accommodations to ensure the full participation of students with disabilities.'²⁰⁴ In General Comment No. 9, the CRC Committee listed support measures to include personal assistance, appropriate and adequately trained teachers capable of using child-centred and individualised teaching strategies, appropriate and acceptable teaching materials, equipments and devices.²⁰⁵



Article 24(3) of the CRPD also outlines (support) measures geared at facilitating full and equal participation in education as members of society. These include facilitating learning of Braille, alternative script, augmentative and alternative modes and formats of communication, orientation and mobility skills, and facilitating peer support and mentoring. In addition, state parties ought to take measures to ensure learning of sign language and promotion of the linguistic identity of the deaf community.

²⁰³Chair's Draft Elements (n 4 above) article 24(2).

²⁰⁴Working Group; Draft (n 7 above) 22.

²⁰⁵CRC General Comment No 9 (n 25 above) para 65.

The duty to provide support largely depends on the general obligation of the state to 'undertake or promote the availability and use of new technologies, including information and communication technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost.'²⁰⁶ This obligation demands substantial capital investment by the state as a matter of legal duty. In General Comment 9, the CRC Committee recognised that such measures can only be provided to the maximum of a state's available resources.

The foregoing examples, though largely repetitive, illustrate the scope and content of support contemplated under article 24(2) (d) & (e). They also show that provision of support measures is highly technical and definitely calls for a dynamic redefinition of the support component in an education system. The nature of measures to be adopted depends on the child's needs and context. Indeed, emphasis on 'individual measures' as in article 24(2)(e) implies that such measures may only be understood on a case by case basis and are as diverse as the needs of the children concerned.²⁰⁷ Support measures vary according to the context in which they are required.²⁰⁸

4.6 Conclusion

In summary of the discussions in this chapter, it can be said that article 24 of the CRPD embraces the philosophy of inclusive education, and contextualises the right

²⁰⁶CRPD, article 4(1) (g).

²⁰⁷ General Comment No 9 (n 25 above) para 63 & 66.

²⁰⁸ Standard Rules (n 15 above) Rule 4(1).

to education in international human rights law to the peculiar needs of children with disabilities. The discussion in this chapter has focused exclusively on how the article applies to children in primary school. Article 24(2) sets out guiding principles on how the state obligations for education of persons with disabilities may be implemented.

The principles set out in article 24(2) are intricately intertwined and mutually reinforcing. For instance, the duty to ensure that a child with disabilities is not excluded from the general education system requires taking measures to enable them to study within a mainstream school in as far as possible. This is facilitated through reasonable accommodation and provision of support measures.

In general, the language of article 24(2) seems to create entitlements and corresponding duty bearers. As components of the general right to education, a breach of any of the principles can constitute a cause of action. Thus, though the principles do not constitute *sui generis* rights, the differentiated aspects thereof make it easier to establish breach thereby enhancing justiciability of the right to education for children with disabilities.

Regarding the duty to ensure that children with disabilities are not excluded from the general education system, it has been established that it is necessary that the education of children with disabilities is part of the overall education management, and within the responsibilities of national education management authorities. State parties also have a responsibility to legislate for the education of children with

disabilities and against their exclusion from education in general and from the established system of free and compulsory primary education in particular. It is essential to factor in the education of children with disabilities in the planning of free and compulsory primary education.

With respect to the duty to ensure that children with disabilities can access an inclusive and quality free primary education, state parties have a responsibility to address the barriers to access, and to facilitate the exercise of choice of an education system for children with disabilities. The duty to ensure quality is a safeguard for the standards of education given to children with disabilities, particularly in light of the history of their relegation to the peripheries of quality education by emphasising vocational training. Inclusive education as applied in the provision refers to both content and location of education. However, whereas inclusive education is understood to refer to the process of responding to the needs of all learners in the education system, article 24(2) (b) is biased towards integration of learners into the mainstream education system. This also means that it is essential for teachers to have the requisite training to enable them respond to the diverse needs of all learners within the general education system.

On reasonable accommodation, there is a duty to provide individualised responses to the needs of learners in the education system. In view of the range of needs of every individual, reasonably accommodating such needs demands flexibility of resources, which means that strictly itemised budgets would not be appropriate. It has also been established that the burden to reasonably accommodate is relative to

the party required to accommodate, but that it cannot be too onerous for the state. The importance of reasonable accommodation both to the entire CRPD and in the context of education has also been pointed out. It has been highlighted that failure to provide reasonable accommodation in education is now a valid ground in proof of discrimination in education.

As far as the provision of support measures in education is concerned, it is necessary to recall that support measures are highly specialised and technical, and mostly located in other professional disciplines. It is therefore difficult to exhaustively catalogue the kind of responses that would satisfy the need for support measures. The purpose of the law is rather to establish a legal framework within which the support can be provided and accessed. In view of the diversity of responses needed in this regard, optimum support in education requires coordination of various entities beyond education.

It has been established in this chapter that support services are an integral component of all education systems. It is however the ambit of support measures that ought to be understood to include the measures necessary to facilitate the effective education of children with disabilities. Article 24(2) (d) and (e) also highlight the essentials of choice between education in the mainstream or special education systems. It has been established in this regard that the CRPD requires that persons with disabilities are able to meaningfully exercise choice between the general and special education systems. The role of children's rights principles in guiding the exercise of choice has also been highlighted. It has particularly been established that

parental choice ought to be exercised to guide as opposed to absolutely determining where a child with disabilities can undertake their studies. The views of the child have to be taken into account in making the decision in accordance with the principle of child participation.

The discussion on the context of education and choice between systems also reveals other concerns. For instance, by virtue of the recognition of the need to avail special education sufficient to sustain equal choice, state parties to the CRPD undertake to provide well equipped special schools to facilitate the exercise of choice for all learners, particularly those with sensory disabilities. The cost implications of this responsibility are enormous, and to a large extent they are discordant with utilitarian and economic arguments put forth in support of inclusive education.

The extent to which article 24(2) affects the right to education as previously understood in international human rights law is briefly revisited in the concluding chapter of this work. Some pointers to the discussion can however be made at this point. First, article 24 strongly advocates for choice for persons with disabilities with respect to where they want to undertake their education. Secondly, article 24(2) redefines the acceptable standards of education in special schools and the justifiable reasons for choice of education in these settings. Thirdly, article 24(2) brings the support measures necessary to enable a child with disabilities to acquire an effective education within the ambit of state responsibility to provide free and compulsory primary education. Finally, article 24(2) elevates into actionable entitlements the duty

of the education system to adapt to the needs of learners with disabilities, and to reasonably accommodate their needs in this regard.

4.7 Prologue to chapters 5 and 6

The next two chapters consider how the principles in article 24(2) are translated into the national law and policy on primary education in Kenya and South Africa respectively. The laws and policies are primarily evaluated as against the international standards discussed in chapters three and this chapter of the work. In the concluding chapter, a brief horizontal comparison of the two jurisdictions will be undertaken.

The CRPD predominantly departs from the premise of equality of rights which by default entails a comparison. In line with this approach, chapters 5 and 6 evaluate the general standard applicable to the right to education, and measures specific to the education of children with disabilities. The education of children with disabilities is an integral part of the education system, which means that it is impossible to discuss education of children with disabilities without discussing the general education system.

CHAPTER 5

Primary Education of Children with Disabilities in Kenya:

An evaluation of the legal and policy framework

Part I

5.1 Introduction

The government of Kenya has consistently maintained a strong commitment to the provision of primary education, and has made primary education one of its key priorities.¹ The influence of factors such as colonialism, ideological inclination, national and international politics and international human rights commitments is evident in the current organization and policy on primary education in the country. Also, as a vibrant member of the international community, Kenya is a state party to several international and regional human rights treaties and non-binding instruments that address the right to primary education. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights (ACHPR), the African Charter on the Rights and Welfare of the Child (ACRWC), and the UN Convention on the Rights of Persons with Disabilities, (CRPD). The influence of these commitments is acknowledged in domestic law, including the Constitution.²

¹The hallmark of the recognition of the significance of education in Kenya is its stipulation as one of the social pillars of the long-term development agenda. See Republic of Kenya *Vision 2030: a globally competitive and prosperous Kenya* (2007). A sector specific plan to implement the education component was adopted in 2008. See Republic of Kenya, *Sector plan for education and training 2008 – 2012* (2008).

²Constitution of Kenya (2010) section 2(5) & (6); Children Act No. 8 of 2001 (Preamble). Some of the arguments in this chapter have been published as LN Murungi 'The right to education' in Musila G &

In 2003, the government introduced the Free Primary Education (FPE) programme. This was a milestone in the fulfilment of the right to education in Kenya. Soon thereafter, the Persons with Disabilities Act³ was adopted to provide for the rights of persons with disabilities and to achieve equalization of opportunities for them.⁴ Subsequently, Kenya ratified the CRPD thereby committing itself to protect and fulfil the rights of persons with disabilities in the country,⁵ and specifically, the right to free and compulsory primary education of children with disabilities on an equal basis with other children. According to the 2009 population census in Kenya, about 3.5% of the population consists of persons with disabilities.⁶ The census data was not disaggregated to determine the number of children represented in this group, but in view of the fact that children constitute 46% of the country's population, it is likely that a significant number of the persons with disabilities in Kenya are children.⁷

In 2010, the rights of persons with disabilities in Kenya received a further boost in the form of a constitutional recognition of the need for specific measures and the prohibition of discrimination on the basis of disability in the implementation of all rights under the Bill of Rights.⁸ These developments have fundamentally altered the country's approach to the education of children with disabilities because, though in

Biegon, J (eds) *Judicial enforcement of socioeconomic rights in Kenya: challenges and prospects for enforcement* (2011).

³ Act No. 14 of 2003.

⁴ The Act was enacted in 2003 and came into force in 2004.

⁵ Kenya ratified the CRPD on 19 May 2008.

⁶ Kenya Bureau of Statistics, *Population and housing census 2009* available at <http://www.knbs.or.ke/censusdisability.php> (accessed 2 April 2012).

⁷ Kenya National Bureau of Statistics, *2009 Population and housing census report Vol. II – population and household distribution by economic characteristics*, August 2010, 23.

⁸ Constitution (n 2 above) section 27(4) & 54.

practice the government traditionally established educational institutions for children with disabilities, there was no duty anchored in human rights law. It was rather steeped in welfare sentiments as evidenced by the overrepresentation of charitable and religious organizations in this sector.⁹ The shift to a human rights paradigm calls for an evaluation of existing laws, policies and practices on primary education against the standard established in both domestic and international human rights law.

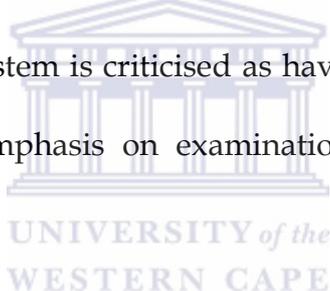
5.2 Structure of the chapter

As highlighted at the end of Chapter 4, this chapter explores the general legal and policy framework on primary education of children with disabilities in Kenya. The chapter is divided into three main parts. In the first part, a historical account of primary education exploring in brief the key milestones in education, the structure of the education system and the institutional mandate for primary education are set out. The second part is an exposé and critique of the legal and policy provisions on the right to primary education in Kenya. The final part is an evaluation of Kenya's approach to implementing the principles under article 24(2) of the CRPD in the education of children with disabilities.

⁹As of 1982, 60% of special schools and 55% of vocational training institutes available in Kenya were operated by missionaries and volunteer organisations. See JA Nkinyangi & J Mbindyo *The condition of disabled persons in Kenya: results of a national survey* (1982) 9; Republic of Kenya *National Policy on Special Needs Education* (2009) 22.

5.3 Organisation of education in Kenya

The current education system consists of eight years in primary, four in secondary, and a minimum of four years in tertiary education i.e. 8-4-4.¹⁰ The primary education level caters for learners between the ages of 6 – 13 years.¹¹ The objectives of primary education under the 8-4-4 system include acquisition of literacy, numeracy and manipulative skills, as well as the development of self-expression, self-discipline, self-reliance and full actualisation of a child's senses. At inception, the system was intended to equip learners with pre-vocational skills and technical education.¹² The pre-vocational skills component was removed from the system between 2002 and 2005 during a review of the curriculum to lessen the load on students.¹³ This removal notwithstanding, the 8- 4-4 system is criticised as having an overloaded curriculum, high costs to parents, overemphasis on examinations, and overconcentration on theory.¹⁴



The education of children with disabilities in Kenya falls within the Special Needs Education Program, which seems distinct from the mainstream education system.¹⁵ Special education is organised along the same structure as the general education

¹⁰Republic of Kenya, *Sessional paper No 1 of 2005 on education, training and research*, para 3.8; Republic of Kenya, 'Report of the task force on re-alignment of education sector to the Constitution of Kenya 2010' (2012) (hereinafter Odhiambo Task Force) available at http://www.vision2030.go.ke/cms/vds/Task_Force_Final_Report_Feb_2012.pdf (accessed 11 April 2013) 28.

¹¹Sessional paper No 1 (n 10 above) para 3.9.

¹²It was intended to replace an elitist system that was no longer responding to the needs of a rapidly growing population. DT Arap Moi *Kenya African nationalism: nyayo philosophy and principles* (1986) 42.

¹³MOEST *The Development of Education: National Report of Kenya: Inclusive education – the way to the future*, Paper presented to the International Conference on Education, Geneva, November 2008, p5.

¹⁴Odhiambo Task Force report (n 10 above) 34 & 50.

¹⁵MOEST Development of education (n 13 above) 5.

system, but fewer children with disabilities transition into secondary and tertiary education as compared to those going into vocational training outside the mainstream education system. Special schools are also fewer, often privately run and are much more expensive than regular primary schools. There are also intra-disability disparities in the distribution of special schools with more institutions established for children with sensory disabilities (deaf and blind) than for children with physical or intellectual disabilities.¹⁶

5.4 Institutional responsibility for primary education in Kenya

Under the current governing structure, the responsibility for organisation, policy and implementation of primary education in Kenya vests in the Ministry of Education.¹⁷ Though some of the duties are devolved to the lower administrative units, the core responsibilities such as the employment of teachers and disbursement of primary education funds is managed centrally. The Ministry also operates through a number of functionally defined semi-autonomous agencies, including the Kenya Institute of Special Education.¹⁸ This institute bears the responsibility for spearheading the

¹⁶Nkinyangi & Mbindyo (n 9 above) 9 noted that in 1982 for instance, 60% of special schools catered for the deaf and blind students (42 and 18% respectively).

¹⁷The organisation of the current government is based on the former Constitution of Kenya which was repealed in 2010. After the general elections held in March 2013, the organisation and responsibilities for key social service governance are bound to change particularly to accommodate the devolved government structure created under the Constitution. In terms of the Fourth Schedule of the 2010 Constitution however, education policy, standards, curricula, examinations, as well as primary schools, special education, secondary schools and special education institutions are within the competence of the national government.

¹⁸ Established through legal notice number 17 of 14/02/1986.

implementation of government policies with respect to education of children with special needs and disabilities.¹⁹

The Persons with Disabilities Act also establishes a National Council for Persons with Disabilities (NCPWD)²⁰ with the broad mandate of developing measures and policies designed to achieve equal opportunities for persons with disabilities.²¹ The NCPWD is also the designated focal point within government for matters relating to the implementation of the CRPD.²² The link between the NCPWD and the implementing ministries such as the Ministry of Education is however not clearly established. Further, the Ministry of Education does not have reporting responsibilities to the Council. This makes it difficult for the Council to co-ordinate disability related action in the education sector.



5.5 Brief History of primary education in Kenya

Formal education in Kenya was introduced by Christian missionaries in late 19th century for the sole purpose of teaching Africans (in Kenya) to read the bible and therefore assist in spreading the gospel.²³ The colonial government took over control of formal education in 1911 and supported education solely because it wanted Kenya to become self-sufficient, and this could only be achieved if 'the Africans were

¹⁹Kenya Institute of Special Education, 'core functions and values' available at www.kise.co.ke/ (accessed 2 April 2012).

²⁰ Persons with Disabilities Act (PDA) section 3.

²¹As above, section 7(b).

²² CRPD, article 33(i)

²³G Eshiwani *Education in Kenya since independence*, (1993) 15; Odhiambo Task Force (n 10 above) 256.

educated to form a largely labouring and clerical class'.²⁴ This resulted in a curriculum that emphasised technical and vocational skills at the expense of an academic component. It sparked resistance from Africans who preferred an education that could help them develop socially, economically and politically.²⁵

Consequently, several 'independent' schools were established for Africans, run by Africans. These schools were not (financially) supported by the government. The colonial government maintained a policy of strict stratification of education between Europeans, Indians and Africans till independence, with variations in curricula, financing and structure.²⁶ In addition, the colonial government did not invest in education in areas predominantly inhabited by the nomadic communities of Kenya.²⁷ Hence, though more schools have been built in the region over the years, the inadequacy and poor infrastructure of schools in this region of the country is evident to date.

In anticipation of independence, the ruling political party, KANU, prioritised provision of free primary education in its manifesto.²⁸ Upon attaining independence,

²⁴G Wainana 'An inequality perspective of education structure and performance in Kenya' in Society for International Development, *East Africa reading on inequality in Kenya* (2006) 159; Eshiwani (n 23 above) 15.

²⁵Eshiwani (n 23 above) 17.

²⁶Republic of Kenya, *Kenya Education Commission Report, Part I* (1965) (hereinafter Ominde report) 21; MJ Bondesio 'The education system of Kenya' in E Dekker & OJ Van Schalkwyk (eds) *Modern education systems* (1995) 375.

²⁷These parts of the country constitute part of present day Eastern, North Eastern and Rift Valley provinces. Republic of Kenya 'Report of the National Committee on Educational Objectives and Policies' (1976) 42.

²⁸KANU *What a KANU government offers you* (1963). Through the Manifesto, the party committed to offering seven years of free primary education. Refer to Chapter 1 part 1.7.3.1 on the meaning of the terms 'primary' and 'basic' as used in Kenyan law and policy.

a Commission (The Ominde Commission) was established to survey the existing educational resources of Kenya and to advise the government in the formulation and implementation of the national policies for education, particularly in respect of educational needs and capacities of children.²⁹ The findings of this Commission were endorsed by Sessional Paper No 10 of 1965³⁰ and extensively informed the structure and development of education in Kenya between 1964 and 1975. These findings laid out the ideological blue-print for independent Kenya as a basis for post-independence educational development.³¹ The Sessional Paper regarded education as an economic as opposed to a social good³² and as 'the principal means for relieving the shortage of domestic skilled manpower and equalizing economic opportunities.'³³ The Education Act³⁴ was also adopted in the same period.

By 1975, it was recognized that the existing education system was not achieving the stated objectives and was too academically oriented. A committee was constituted in 1976³⁵ to redefine the objectives of the education system and to recommend policies to achieve these objectives within the available financial resources of the state. The Committee was also expected to formulate feasible programmes of action to achieve

²⁹Kenya Education Commission of 1964 (Commonly referred as the Ominde Commission) whose report was published in 1965. This notwithstanding, the government is of the view that education was recognised as a human right and tool for human and social development since 1963. See MOEST Development of Education (n 13 above) 1.

³⁰Government of Kenya, 'Sessional Paper No 10: African socialism and its application to planning in Kenya' (1965).

³¹Eshiwani (n 23 above) 27; *Sessional paper No 1 of 2005* (n 10 above).

³²Sessional Paper No 10 (n 30 above) 111.

³³Eshiwani (n 23 above) 19.

³⁴Education Act (1968) Chapter 211 Laws of Kenya

³⁵Republic of Kenya The National Committee on Educational Objectives and Policies (1976) (hereinafter the Gachathi Commission).

the objectives.³⁶ The report of the Committee largely reproduced the objectives of education identified by the Ominde Commission.

By 1980 however, it was clear that the education system was unsustainable because the primary and secondary school graduates could no longer be absorbed into formal employment. This necessitated a Presidential Working Party to consider an education system geared towards self-reliance.³⁷ The report of the Working Party (Mackay Working Party) formed the basis of 8-4-4 system, which is geared towards technical and practical education.³⁸ In 1986, another Presidential Working Party was appointed to review national education and training for the next decade and to make recommendations thereon.³⁹ The Working Party made far-reaching recommendations including the formalisation of cost-sharing in education.⁴⁰ The recommendations thereof were reiterated and added upon by a subsequent commission of inquiry into the education system appointed in 1999.⁴¹ Following the adoption of a new Constitution in 2010, a Task Force (the Odhiambo Task Force) was formed to align the education sector to the new Constitution.⁴² The report of this Task Force formed the basis for the Basic Education Act.⁴³

³⁶Gachathi Commission Report (n 35 above) 193.

³⁷Republic of Kenya, Presidential Working Committee on the Second University (1981) (hereinafter McKay Commission).

³⁸Eshiwani (n 23 above) 29.

³⁹Republic of Kenya 'Report of the Presidential Working Party on Education and Manpower Training for the Next Decade and Beyond' (1988) (hereinafter Kamunge Commission).

⁴⁰Kamunge Commission Report, 118.

⁴¹Republic of Kenya, 'Report of the Commission of inquiry into the education system of Kenya: totally integrated quality education and training' (1999) (hereinafter Koech Commission).

⁴²Odhiambo Task Force (n 10 above).

⁴³Basic Education Act, No 14 of 2013.

From the foregoing historical account, it is clear that the foundations of formal education in Kenya were, from the very beginning, segregative and exploitative.⁴⁴ In the organisation of education, the inherited colonial system of education remained the same even after independence.⁴⁵ The strategies and policy on education adopted by the young post-colonial state were largely an emotive response to the colonial segregationist policy, and therefore short-sighted and unsustainable. This accounts for the rapid changes in policy recommendations through the commissions and committees highlighted in this chapter.

5.6 Background to special (needs) education in Kenya

Special needs education in Kenya started after the end of the World War II and was offered mainly to children with 'hearing impairments, mental handicap, visual impairment and those with physical handicap.'⁴⁶ Nevertheless, children with disabilities have traditionally been largely excluded from mainstream education in Kenya.⁴⁷ The work of the commissions/committees/working parties highlighted above highlight the germane issues in this regard.

The Ominde Commission did not dwell on the needs of children with disabilities in education. It endorsed the use of special schools as 'grant aided' schools for children with 'graver forms of handicap,' but did not elaborate on the role of the government

⁴⁴Bondesio (n 26 above) 373.

⁴⁵Eshiwani (n 23 above) 38.

⁴⁶Kenya National Special Needs Education Policy Framework (2009).

⁴⁷Koech Report (n 41 above) 83 highlighted the fact that as of 1999, only about 1% of children with disabilities were enrolled in school.

in enhancing the education of children with disabilities.⁴⁸ The Commission suggested that teachers get a rudimentary acquaintance with the challenges of disability and the possible small adjustments that they could make in the classroom to accommodate children with disabilities.⁴⁹ The Commission also recommended that children with mild handicaps should be integrated to learn in regular schools.⁵⁰ Following the recommendations of the Ominde Commission, a Sessional Paper on Special Education was adopted.⁵¹ The Paper laid down the public policy framework for children with disabilities as well as special education management infrastructure, thereby creating the foundations of present day special education in Kenya.⁵²

The cursory and peripheral manner in which the Ominde Commission approached the education of children with disabilities seems to have set the tone for the education of children with disabilities in post-independence Kenya. Thus, the post-independence education system maintained a special needs component, but as separate and peripheral to the regular system. The majority of children with disabilities did not access any form of formal schooling whatsoever.

Subsequently, the Gachathi Committee acknowledged the role of education and training in enabling children with disabilities to realize their potential and to participate in community life.⁵³ In its view, such education ought to be carried out in

⁴⁸Ominde Commission Report (n 26 above) 132; KNCHR 'Objects of pity or individuals with rights: the right to education for children with disabilities' Occasional report (2007) 16.

⁴⁹Ominde Commission Report (n 26 above) 132.

⁵⁰ As above.

⁵¹ Sessional Paper No 5 on Special Education (1968).

⁵²As above; MOEST *National action plan on Education for All in Kenya* (2003) 91.

⁵³ Gachathi Commission report (n 35 above) 74.

the 'normal' environment save in as far as the special needs of the child outweighed the capacity of the teachers and parents, in which case special education could be introduced.⁵⁴ The Committee thus called for provision of amenities to support learning of children with disabilities in regular schools. It was of the opinion that special education serves or ought to serve a transient role, and that very few students would require the services of a 'special school' in any case. In the view of the Committee, students in special schools would be integrated at a later stage of education, such as secondary, college and university.⁵⁵

The Gachathi Committee recognised the role of social attitudes and responses to persons with disabilities in defining disability. It stated in that regard that

'the apparent inability of the handicapped child is in reality and for the most part a reflection of the hopelessness of those of his immediate environment to help him to achieve a degree of parity in contributing to the progress and prosperity of society.'⁵⁶

The Committee acknowledged the extra costs associated with the education needs of children with disabilities and argued that it is the duty of the society (as opposed to their parents only) to provide for their education.⁵⁷ It therefore called for the purchase of the necessary equipment at public expense, with parents being required to contribute according to their ability.⁵⁸ Where such ability was completely

⁵⁴ As above.

⁵⁵ As above 75.

⁵⁶ As above 74.

⁵⁷ Gachathi Commission report (n 35 above) 75.

⁵⁸ As above 77.

diminished, the Committee called for remission of fees. The benchmark of support envisaged in this report was such as would enable an individual child with disabilities to possess basic individual literacy equipment. The report recommended flexibility of the equipment grant to allow it to follow the student if they were to transfer between a special to a regular school,⁵⁹ or if they eventually transitioned to colleges or universities.⁶⁰

In summary, the Gachathi Committee called for: inclusive education with an emphasis on integration, highlighted the role of social attitudes in creating disability, pointed out the need for a clear exit point from the special education to mainstream education for all students in order to avoid perpetual exclusion, and established the full responsibility for the cost of educating children with disabilities as a public duty. The Committee's approach to funding, (particularly the vesting of primary responsibility for education of children with disabilities on the state, and its proposal that the equipment grant to be flexible on the basis of the needs of the student), are consistent with the individual approach to education of children with disabilities that is required under the CRC and the CRPD. The views of this Gachathi Committee were exceptionally progressive taking into account the time when they were expressed. They foresaw contemporary arguments on disability, particularly those underlying the CRPD and recent jurisprudence on disability rights. Unfortunately, the recommendations of this Committee were not taken on board to restructure the education system.

⁵⁹ As above 78.

⁶⁰ As above 74.

Kenya declared 1980 the year of the disabled, thereby focusing attention on issues affecting persons with disabilities and triggering a change of attitudes towards education of children with disabilities.⁶¹ One of the dividends of this year was an increase in the enrolment of children with disabilities in school.⁶² Subsequently, the Kamunge Working Party addressed the needs of children with disabilities in education according to the category of disability. In general however, the Working Party emphasised the integration of learners with disabilities in the regular education system, and special education in the severe cases,⁶³ an approach which was still steeped in the medical model of disability.

The Koech Commission⁶⁴ made comprehensive recommendations for reform of the special education sector. It highlighted that the rapid growth in the education sector had not been reflected in the special education sector hence vitiating the right to equal education for children with disabilities.⁶⁵ It endorsed the recommendations of the Kamunge Report and added to these, *inter alia*, the goal of holistic development of the children, preparation for career, preparation for independent living, and preparation for integration into the mainstream education system.⁶⁶ As highlighted

⁶¹Nkinyangi & Mbindyo (n 9 above).

⁶²Eshiwani (n 23 above) 138.

⁶³Kamunge Commission Report 135. In Sessional Paper No 6 of 1988, 21 the government endorsed the recommendations of the Kamunge Party highlighting that one of the objectives of special education was to integrate learners with disabilities into formal education and training.

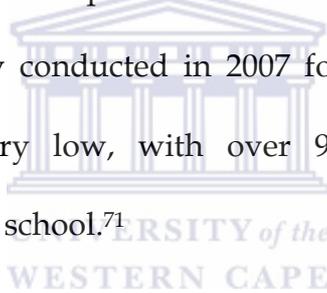
⁶⁴Koech Commission (n 41 above).

⁶⁵As above 97; KNCHR (n 48 above) 17.

⁶⁶Koech Commission Report (n 41 above) 99.

above, the Commission's recommendations, including those relating to education of children with disabilities, were not implemented.⁶⁷

In 2003, a ministerial task force was constituted to determine the status of special education in Kenya and to make recommendations.⁶⁸ The report of the Task Force was comprehensive on matters affecting special education. The work of the Taskforce notwithstanding, the need to ascertain the educational needs of persons with disabilities in education was reiterated in 2005.⁶⁹ In 2007, the government commissioned a survey of persons with disabilities in Kenya. The findings of the survey were used to found the Special Needs Education Policy of 2009.⁷⁰ A concurrent independent study conducted in 2007 found that enrolment in special education programs was very low, with over 90% of children with special educational needs being out of school.⁷¹



In 2008, the Ministry of Education reported that Kenya had embraced inclusive education that 'provides quality education for all children, youth and adults through targeted support to specific or vulnerable groups, moving away from the traditional view of inclusive education as providing education for children with special needs.'⁷²

⁶⁷Former President Moi dismissed the report as unrealistic. DC Woolman 'Educational reconstruction and post-colonial curriculum development: a comparative study of four African countries' (2001) 2 5 *International Education Journal* 33: KNCHR (n 48 above) 17.

⁶⁸ MOEST, *Report of the task force on special needs education: appraisal exercise*, (2003).

⁶⁹Republic of Kenya, *Sessional paper No 1*(n 10 above) 48.

⁷⁰SNE Policy (n 46 above) 14.

⁷¹KNCHR (n 48 above) 18.

⁷²MOEST Development of Education (n 13 above) ix.

In the same period, an education sector support program, KESSP, was developed to guide the development of education. The first phase of KESSP identified the main challenges for education of children with disabilities to include lack of clear guidelines on the implementation of an all inclusive education policy, lack of reliable data on children with special needs, inadequate tools and skills in identification and assessment, and a curriculum that is not tailored to the needs of learners with special needs.⁷³ KESSP further noted that the problem is exacerbated by inappropriate infrastructure, inadequate facilities and equipment, lack of capacity amongst the teachers, lack of coordination amongst service providers, incorrect placement of children with disabilities, inadequate teaching and learning materials, and inadequate supervision and monitoring of special education programs.⁷⁴

The Odhiambo Task Force of 2012 generally sidelined the education of children with disabilities, perhaps because in its view, the existing frameworks on education adequately addressed the needs of children with disabilities, and that the only outstanding challenge was the allocation of the necessary resources to facilitate implementation.⁷⁵ Thus the report of the Task Force mentioned special needs education, but still clustered children with disabilities with a variety of other special needs categories without specific measures for the education of each.⁷⁶ For instance, the report indicated that 'there were 22,000 learners with special needs enrolled in

⁷³Republic of Kenya, 'Kenya Education Sector Support Program 2005 -2010' (hereinafter KESSP), para 4.2

⁷⁴ KESSP (n 73 above) para 4.2.

⁷⁵ Odhiambo Task Force (n 10 above) 50.

⁷⁶ As above 140.

special schools, units and integrated programmes.⁷⁷ However, despite referring to several categories of children with special education needs, the statistics used were drawn from numbers of children in special schools and special units in regular schools which only serve children with disabilities.⁷⁸

The Odhiambo Task Force argued that the Constitution recognises the duty of the state to make provision for an integrated system of special and non-formal education.⁷⁹ It is not clear from which constitutional provisions this inference is drawn. The Task Force also recognised the need to prioritise interventions in the education of children in vulnerable groups including children with special education needs.⁸⁰ However, its report did not add anything new to the pre-existing framework on education of children with disabilities. It did not make concrete proposals as it did with the other sub-sectors in education despite listing special needs education as one of the sub-sectors of education.

In terms of the international legal framework to which Kenya is party, the Odhiambo Taskforce did not highlight the CRPD, despite Kenya having ratified the Convention. This is a major omission that directly affects the response of the education system to the education of children with disabilities. In addition, despite reiterating a commitment to inclusive education, the report neither gave meaning to the concept, nor expounded on the measures necessary to realise inclusive education. These

⁷⁷ As above.

⁷⁸ As above.

⁷⁹ As above 141.

⁸⁰As above 133.

omissions are critical to the extent that the findings of the Task Force are the basis for the Basic Education Act, 2013.

Part II: Legal and policy framework on primary education in Kenya

5.7 The legal framework on education in Kenya

5.7.1 International obligations

In terms of the Constitution, general rules of international law as well as treaties and conventions ratified by Kenya 'form part of the law of Kenya'.⁸¹ Literally interpreted, this provision implies that Kenya is a monist state. However, in terms of section 21(4) of the Constitution, the state is bound to enact and implement legislation to fulfil its international human rights obligations. This provision implies the need for a domestication process through legislation. Further, by virtue of section 94(1) of the Constitution, the legislative mandate and the exercise thereof is a preserve of Parliament. The treaty ratification mandate on the other hand vests in the executive arm of government.⁸² Therefore, until the Ratification of Treaties Bill (2011) comes into force, the monist provision cannot take effect due to the separation of powers between executive and legislative arms of government.⁸³ Even once the Bill is adopted, automatic translation of treaties into the domestic law only affects treaties

⁸¹Constitution of Kenya, sections 2(5) and (6).

⁸²Ratification of Treaties Bill (2011) sections 7(1) and 8.

⁸³The Bill has passed the third reading in Parliament, and only awaits the President's assent. See <http://www.kenyalaw.org/klr/index.php?id=517> (last accessed 08 April 2013).

ratified after the adoption of the Constitution. Those ratified or acceded before have to be domesticated through a Bill, which is published and discussed by parliament.⁸⁴

Effectively therefore, treaties ratified by Kenya, in as far as they are yet to be directly domesticated, do not form part of Kenyan law. Once the appropriate Bills are adopted, the treaties would be, in terms of hierarchy, at the statutory level. Courts in Kenya draw their normative jurisdiction from the Judicature Act⁸⁵ which does not allow the application of international law save in as far as it is incorporated into the Constitution or statute.⁸⁶ The Ratification of Treaties Bill does not however clarify the domestication process for the general rules of international law to the extent that they too form part of the law of Kenya.⁸⁷ Only such rights as have acquired the status of international customary law may constitute general rules of international law.⁸⁸ The consent of states may not be strictly necessary to bind them under customary international law at the international level, save in as far as a state has persistently objected to the application of the rule.⁸⁹ In the domestic sphere however, the

⁸⁴ The Ratification of Treaties Bill (2011) section 16(2).

⁸⁵ Chapter 8 of the Laws of Kenya. The Kenyan legal system is designed on the basis of the commonwealth model which is dualist in nature. It is therefore unlikely that the singular directive of the Constitution towards monism could, in the short-term, take effect in the absence of a systemic review of the entire legal framework. It would be imperative to define the applicability, normative hierarchy and force of the treaties especially in view of the fact that Parliament retains the legislative function under the Constitution. Whereas the Constitution is silent on the treaty ratification process, this function traditionally vests with the executive arm of government. The actions of the executive in ratifying or acceding to an international treaty would therefore need to be validated by Parliament in order to give them legislative force, a process that embodies domestication of international treaties.

⁸⁶ Section 3(1)

⁸⁷ Constitution of Kenya section 2(5)

⁸⁸ JO Ambani 'Navigating past the 'dualist doctrine': the case for progressive jurisprudence on the application of international human rights norms in Kenya' in Magnus Killander (ed) (2010) *International law and domestic human rights litigation in Africa* 32.

⁸⁹ J Dugard *International law: a South African perspective* (2007) 29; MN Shaw *International law* (1986) 74.

constitutional framework defines the legislative criteria for the application of such custom in its jurisdiction. In Kenya, the Constitution requires that the rules of customary international law are legislated in order to be enforceable by citizens. Nevertheless, such general principles of international law have persuasive value.

All the treaties relative to the right to education were ratified by Kenya before the new Constitution was adopted, which means they are not directly applicable in Kenya save in as far as they are domesticated by statute. Only the CRC and the ACRWC have so far been domesticated by the Children Act.⁹⁰ Thus since the principles of the CRPD are yet to constitute general principles of international law, the Convention is not yet part of Kenyan law.

5.7.2 The Constitution of Kenya, 2010

The 2010 Constitution is the first Constitutional recognition of the right to education in Kenya. The Constitution provides that every person has a right to education⁹¹ and that the state shall take legislative, policy and other measures towards the progressive realization of this right.⁹² In a separate provision, the Constitution recognises a right to free and compulsory basic education for children.⁹³ The limitation concerning resources and hence progression applies to the right to

⁹⁰ Children Act (n 2 above) Preamble.

⁹¹ Constitution section 43(1) (f).

⁹² Constitution section 21(2).

⁹³ Constitution section 53(b).

education in general in terms of section 21. But, children's right to basic education is not subject to progressive realization.⁹⁴

The Constitution further entitles a person with disabilities to, *inter alia*, 'access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person.'⁹⁵ This provision has been interpreted to mean that persons with disabilities should be educated in the same schools as other students.⁹⁶

In the initial draft of the Constitution, the right to education was contained in a dedicated provision which in addition to establishing the right of everyone to education required the state to institute a program for implementation of free and compulsory primary education while paying 'particular attention to children with special needs.'⁹⁷ The emphasis on the duty to address the educational needs of children with disabilities was lost in the amalgamation of socioeconomic rights into one provision, i.e. section 43.⁹⁸

⁹⁴YP Ghai & JC Ghai *Kenya's Constitution: an instrument for change* (2011) 67. This differentiation of obligation for provision of primary education from the progressive approach has been acknowledged in the latest report on the alignment of the education sector to the Constitution. See Odhiambo Task Force (n 10 above) 8.

⁹⁵ Constitution, section 54(1) (b).

⁹⁶Ghai & Ghai (n 94 above) 58.

⁹⁷ Section 62 of the Bomas Draft of the Constitution

⁹⁸After the failure of the proposed constitution at the 2005 constitutional referendum, a committee of experts was constituted to review the contentious clauses of the Constitution in order to prepare the document for another referendum. During this review process, the provisions of the Constitution on individual socioeconomic rights were collapsed into one provision.

There are fundamental principles to keep in mind when interpreting the rights under the Constitution: the interpretation adopted must be one that most favours the enforcement of the right and promotes the values of a society based on human dignity and equality, that it is the responsibility of the state to show that the resources necessary to implement socioeconomic rights are not available, and that the state shall give priority to ensuring the widest possible enjoyment of the right having due regard to the vulnerability of particular groups in the allocation of resources.⁹⁹

Constitutional interpretation also ought to give effect to the spirit, purport and objects of the Bill of Rights.¹⁰⁰ These can be inferred from the views of the citizens during the Constitution making process. One such view is that the right to education is essential to life, comfort and dignity and prepares every citizen to lead a productive and dignified life. Education should therefore emphasize creativity, knowledge acquisition, talent development, innovativeness and functional application of learned skills through formal and non-formal means.¹⁰¹ Also, during the Constitutional negotiation process, persons with disabilities reported that they felt marginalised and excluded from education and that their education needs were not being met in the preceding constitutional dispensation.¹⁰² The Constitutional

⁹⁹Constitution section 20(3)(b), (4)(a), 5(a) & (b) respectively. In term of section 260 of the Constitution persons with disabilities qualify for a disadvantaged group.

¹⁰⁰ Constitution section 20(4)(b).

¹⁰¹ Constitution of Kenya Review Commission Report (hereinafter CKRC Report) (2005) 97.

¹⁰² CKRC Report 102.

provision on education therefore ought to be interpreted in a way that fosters their inclusion.

In summary, the Constitution establishes a right to basic education, free and compulsory for all children, the implementation of which is an immediate duty of the state. If the resources for implementation of this right are said not to be available, the onus is on the state to prove the unavailability. Also, children with disabilities, as a disadvantaged group, should be given particular attention in education.

5.7.3 The Children Act

The Children Act¹⁰³ is the principal legislation on the rights of children in Kenya, and a pathway to universal primary education.¹⁰⁴ In terms thereof, every child is entitled to education, the responsibility for the provision of which vests on the government and parents.¹⁰⁵ The Act further provides that every child is entitled to 'free basic education which will be compulsory in accordance with the United Nations Convention on the Rights of the Child.'¹⁰⁶ This provision is particularly important because it makes the jurisprudence of the CRC Committee on the right to education applicable in Kenya. The sub-sections make a fundamental distinction in the differentiated responsibility for the right to education at different levels. Section 7(1) recognises the right to education in general, which extends beyond formal or basic education, and the responsibility for which is shared. Section 7(2) distinguishes the

¹⁰³Children Act (n 2 above).

¹⁰⁴UNESCO 'National Education Support Strategy (UNESS) for the Republic of Kenya 2010 -2011' 12; MOEST Development of Education (n 13 above) 9; Sessional paper No 1(n 10 above) para 4.13.

¹⁰⁵Children Act section 7(1).

¹⁰⁶Children Act section 7(2).

basic education component and aligns it with the CRC in terms of which the duty to provide such education accrues to the state.¹⁰⁷

The Children Act prohibits discrimination on the basis of disability,¹⁰⁸ and recognises the right of a child with disabilities to 'education and training free of charge or at a reduced cost whenever possible.'¹⁰⁹ The latter part of this provision contradicts the entitlement of 'every child' to free and compulsory basic education established in a section 7 of the Act, because it creates a standard different from other children.¹¹⁰ Also, in the absence of clearly defined circumstances in which the child's caregivers would be required to cover the 'reduced costs', the provision is susceptible to abuse. In any case, subsidy of a social service does not suffice to discharge the government's responsibility to provide free education for children with disabilities.

5.7.4 The Persons with Disabilities Act

The Persons with Disabilities Act (PDA)¹¹¹ is the principle and comprehensive statute on matters of persons with disabilities in Kenya. The Act outlaws denial of admission of any person with a disability to any course of study by reason only of their disability, if the person has the ability to acquire substantial learning in the course.¹¹² The provision is ambiguous to the extent that capacity to learn or the degree of such learning is a subjective standard. The Act further requires learning institutions to

¹⁰⁷ CRC Article 28(1)(a).

¹⁰⁸ As above section 5.

¹⁰⁹ As above section 12.

¹¹⁰ As above section 7(2).

¹¹¹ PDA (n 21 above).

¹¹² PDA (n 21 above) section 18.

take into account the special needs of persons with disabilities with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical education requirements and other similar considerations.¹¹³The latter provision embodies the concept of affirmative action with respect to the education of persons with disabilities.¹¹⁴

The PDA provides for the establishment of special schools and institutions 'especially for the deaf, the blind and the mentally retarded' to cater for formal education, skills development and self-reliance.¹¹⁵ It also calls upon the NCPWD, in consultation with the government, to 'make provision in all districts for an integrated system of special and non-formal education for persons with all forms of disabilities and the establishment where possible of Braille and recorded libraries for persons with visual disabilities.'¹¹⁶ The integration contemplated in this latter provision relates to special and non-formal education within special institutions.¹¹⁷ While the Act acknowledges both integrated and special education, it falls short of specifically indicating the circumstances under which a learner can be found in either category. The rights under the Act are subject to progressive realization, a factor that is deemed to

¹¹³PDA (n 21 above) section 18.

¹¹⁴GO Ochich 'Bold and generous or timid and faint-hearted? A panoramic assessment of Kenya's Persons with Disabilities Act, 2003' (2008) *Law Society of Kenya Journal* 97 argues that affirmative action was necessary in light of the historical marginalization that persons with disabilities have been exposed to.

¹¹⁵PDA (n 21 above) section 18.

¹¹⁶ PDA (n 21 above) section 19

¹¹⁷Ochich (n 114 above) 101.

significantly compromise its potential to ensure the rights of persons with disabilities.¹¹⁸

5.7.5 The Basic Education Act

The Act¹¹⁹ was adopted upon the recommendations of the Odhiambo Task Force on the alignment of education with the Constitution of 2010 and repealed the Education Act of 1968.¹²⁰ The Act is progressive to the extent that it expressly recognises free and compulsory basic education as a right of all children.¹²¹ Regarding the education of children with disabilities, it provides that they may learn either in special schools or in regular basic education institutions suitable to their needs.¹²² In section 44(2) and (4), the Act explicitly recognises the duty of the state to establish special schools and provide the necessary infrastructure and resources necessary for learners with disabilities. This approach is consistent with the concept of choice for learners with disabilities as established under the CRPD.

The Act makes fundamental milestones towards aligning the education sector to the inclusive education philosophy as reflected in contemporary international and

¹¹⁸PDA (n 114 above) section 11; DRPI/AFUB *The rights of persons with disabilities* (2007) 38. An amendment to the Act was proposed and a Bill to that effect, the Persons with Disabilities (Amendment) Bill 2007, was developed. The Bill was never finalised and is now redundant, since the ratification of the CRPD in 2008 and the adoption of a new Constitution in 2010. A new amendment Bill is necessary to align the Act with these new documents. A copy of the unpublished Bill is available at www.kenyalaw.org (accessed 15 March 2012).

¹¹⁹Act No 14 of 2013.

¹²⁰Chapter 211 Laws of Kenya (As revised in 1970, 1980)

¹²¹Basic Education Act (n 43 above) section 4(a).

¹²²Basic Education Act (n 43 above) section 44(2). In terms of section 45 of the Act, the details as to the establishment of the schools, placement of learners and curriculum for special needs education are to be set out in regulations. These have not yet been developed, but will be a critical determinant of whether a right to inclusive education is actually ensured.

national discourse on the right to education. Nevertheless, the approach of addressing children with disabilities as a separate category in education, still reminisces the exclusivist approach of the past. It is rather more consistent with the inclusion agenda to address the education of children with disabilities throughout all the provisions of the Act, than as a subset thereof.

5.8 Policy Framework on primary education in Kenya

Primary education in Kenya is delivered through the Free Primary Education (FPE) programme which is supported by two main policy documents and an investment programme. The main education policy predates both the ratification of the CRPD and the new Constitution. The SNE policy was adopted after the CRPD, but before the Constitution.



5.8.1 Policy on Education, Training and Research

The Policy on Education, Training and Research in Kenya¹²³ was adopted in 2005 as the government's blueprint on education and training for all. The Policy embraces the objectives of the Education for All frameworks and the Millennium Development Goals.¹²⁴ The policy was intended to provide responses to some of the challenges identified in the implementation of education in the preceding years, including 'access, equity, quality, relevance, efficiency in the management of educational resources, cost and financing of education, gender and religious disparities, and

¹²³Sessional paper No 1 (n 10 above).

¹²⁴KNCHR (n 48 above) 18. See Chapter 2 Part 2.3 for a discussion of the Education for All Frameworks and the MDGs respectively.

teacher quality [and] utilisation.’ It was also intended to harmonise preceding policies, guidelines and legislation on education.¹²⁵

The Policy outlines government objectives in the management and planning of education, human resource, and the financing of education. But, despite acknowledging the gaps in the implementation of education for vulnerable categories of children including children with disabilities, the Policy only sets educational targets for children in arid and semi-arid areas (ASAL), informal settlements and for girl children, leaving out targets for the education of children with disabilities. This makes it difficult to track progress or lack thereof in this regard.¹²⁶

5.8.2 Kenya Education Sector Support Programme

To support the implementation of the Policy above, a sector wide investment programme, the Kenya Education Sector Support Programme, KESSP was adopted to operationalize budgets for priority areas.¹²⁷ KESSP was to be developed in two phases; 2005 – 2010 in the medium term, and 2011 – 2015. The first phase, the lifespan of which has now lapsed, was linked to the Medium Term Expenditure Framework (MTEF).¹²⁸ The programme called for the development of a national policy that comprehensively defines areas of all special needs, and the specific needs identified. Following this recommendation, the National Special Needs Education Policy (SNE

¹²⁵Sessional paper No 1(n 10 above) para 1.28.

¹²⁶KNCHR (n 48 above) 19.

¹²⁷Sessional paper No (n 10 above) para 1.29; KESSP (n 73 above) xiii.

¹²⁸Sessional paper No 1 (n 10 above) para 1.29.

Policy) was subsequently developed in 2009. The second phase of KESSP was overtaken by the adoption of the Constitution in 2010 and the Education Act of 2013.

5.8.3 Special Needs Education Policy

The need for a SNE Policy had been stipulated by the Koech Task Force which argued that despite the existence of several policy guidelines on education, there was no comprehensive policy or legal framework on special needs education in the country.¹²⁹ Such policy would comprehensively define areas of special needs, and the specific needs identified in harmony and accordance with the law, and other policy frameworks.¹³⁰ But as above indicated, no such Policy was adopted until this need was reiterated in KESSP. The SNE Policy 2009 contains a comprehensive framework of the principles and strategies to be followed in order to create equal access to quality and relevant education and training for learners with disabilities.¹³¹ The Policy applies to all educational, training and research activities, and educational intervention programs of special needs and disabilities in Kenya.¹³²

As earlier mentioned, the FPE Programme, as guided and supported by the foregoing policies is the medium through which primary education in Kenya is delivered. FPE is therefore both a policy goal and a means to the goal of universal primary education. The programme is considered in greater detail below.

¹²⁹ SNE Policy (n 46 above) 21.

¹³⁰ Sessional paper No 1 (n 10 above) 62.

¹³¹ KESSP (n 73) 19.

¹³² SNE Policy (n 46 above) 26.

5.8.4 Free primary education programme

The phrase 'free primary education' was part of primary education discourse even before independence in Kenya.¹³³ In 1965 it was acknowledged that whereas FPE was the ultimate goal, 'to provide [it] fully and freely [at the time] would bankrupt the nation and mortgage economic growth for generations'.¹³⁴ Instead, the 'government would make steady and substantial progress towards the attainment of these objectives.'¹³⁵ In the meantime, it was expected that all citizens would contribute to the development of education 'through self-help, payment of school fees and taxes, and service as teachers.'¹³⁶

'Free' education was first introduced by presidential decree and progressively implemented between 1974 and 1979.¹³⁷ The decree took both the planners and the public by surprise.¹³⁸ There were no concurrent or pre-planned measures to cover the revenue lost in fees. Consequently, levies which in most cases turned out to be higher than the school fees charged prior to the decree were introduced at the schools level. Kenya had acceded to the ICESCR two years before commencing this programme, but there was no indication that the adoption of the free primary education policy

¹³³SN. Bogonko, *A history of modern education in Kenya (1895 - 1991)* (1992) 115.

¹³⁴Sessional Paper No 10 (n 30 above) para 85.

¹³⁵Sessional Paper No. 10 (n 30 above) para 85. This approach was informed by the findings of the Ominde Commission discussed above.

¹³⁶Sessional Paper No. 10 (n 30 above) para 111.

¹³⁷Eshiwani (n 23 above) 43; Bogonko (n 133 above) 115.

¹³⁸DN Sifuna 'The illusion of universal free primary education in Kenya' available at http://africa.peacelink.org/wajibu/articles/art_6901.html (accessed 12 April 2013).

had anything to do with the implementation of the Covenant. In fact, the independence Constitution did not recognise socioeconomic rights.¹³⁹

FPE as understood in this first cycle meant that students did not pay tuition fees. But, the responsibility for putting up primary schools was left to the local communities, or sponsors such as religious and non-governmental organisations, while the government took the responsibility for maintaining the schools.¹⁴⁰ The escalation of non-fee costs led to a high number of children dropping out of school, and the establishment of Parent-Teacher Associations (PTA) to collect funds through voluntary contributions from parents.¹⁴¹

With time, the government shifted more and more financial responsibility to the communities as demand for education grew against dwindling resources.¹⁴² Following the suggestion and support of the Kamunge Commission, cost-sharing (of tuition fees) was formalised on the basis that the government scheme for providing infrastructural material was, at that time, inefficient and thus affecting the quality of

¹³⁹Constitution of Kenya 1963 was repealed by the Constitution of Kenya 2010 which was promulgated on the 28th of August 2010.

¹⁴⁰Eshiwani (n 23 above) 47 & 139; Bondesio (n 26 above) 384. In the 1974 – 1978 and the 1979 – 1983 development plans, it was stated that the government would provide education and pay teachers' salaries, but the parents had to build the schools. See also Ominde Report (n 26 above) 50.

¹⁴¹Eshiwani (n 23 above) 139. The Gachathi Commission also noted that despite the removal of tuition fees, the non-fee costs that parents could not anticipate were hindering enrolment and retention of students. These included uniforms, building funds, equipment levies, and activity fees. The Commission therefore proposed control of the non-fee levies and waiver for genuinely destitute children. See Gachathi Commission Report (n 35 above) 51.

¹⁴²Bondesio (n 26 above) 395.

teaching and learning.¹⁴³ This re-introduction of the fees triggered further decline in enrolment and completion rates in primary schools.

Despite being required in terms of the Children Act, the re-introduction of FPE in 2003 was a matter of political expediency. There was neither a situational analysis of the existing primary education system to determine the needs of the system or the feasibility of FPE, nor any blueprint for its implementation.¹⁴⁴ The FPE fund was established to support the programme, but its existence was dependent on the will of the executive.¹⁴⁵ A substantial amount of the contributions to the FPE fund was drawn from donors, a factor that cast doubt on the sustainability of the programme.¹⁴⁶ Indeed, it is considered that the ambitious implementation plan for the FPE, that is, KESSP, would not be feasible in the absence of support from development partners and the private sector.¹⁴⁷ The flow of donor funds is unpredictable and not necessarily consistent with the government funding cycle, hence complicating spending patterns.¹⁴⁸ There are also other decentralised fiscal expenditure channels, such as the Constituency Development Fund (CDF) and the Local Authorities Transfer Fund (LATF), that contribute to education but are not taken into account in the computation of the central government spending towards

¹⁴³Sessional paper No (n 10 above) para 1.6.

¹⁴⁴E Mukudi 'Education for all: a framework for addressing the persisting illusion for the Kenyan context' (2004) 24 *International Journal of Educational Development* 239. The KESSP, discussed further below, was later developed to support the implementation of the programme.

¹⁴⁵Institute for Economic Affairs (hereinafter IEA) 'Devolution in Kenya: prospects, challenges and the future' (2010) 24 *Institute for Economic Affairs Research* 95 - 96.

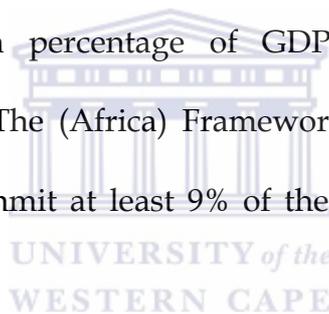
¹⁴⁶M Wabwile *Legal protection of social and economic rights of children in developing countries* (2010) 6; Mukudi (n 144 above) 238.

¹⁴⁷KESSP (n 73 above) xxxiv.

¹⁴⁸Odhiambo Task Force (n 10 above) 250.

the FPE kitty.¹⁴⁹ This makes it difficult not only to plan for the programme, but also to adequately monitor progress in implementation.

Since the reintroduction of FPE, government expenditure on education has continued to grow and surpass allocations to other sectors.¹⁵⁰ On average, since the reintroduction of FPE, expenditure on education has constituted about 7% of the GDP¹⁵¹ yet the programme is still underfunded.¹⁵² 50% of the education budget goes to primary education¹⁵³ about 90% of which is taken up by recurrent expenditure.¹⁵⁴ Thus very little is left for development of education. This is particularly worrying in light of the extensive modifications necessary to effectuate inclusive education. Besides, the allocation as a percentage of GDP is still below the regional commitments in the regard. The (Africa) Framework for Action on Education for All¹⁵⁵ calls upon states to commit at least 9% of their GDP to education within 10



¹⁴⁹Odhiambo Task Force (n 10 above) 109.

¹⁵⁰Eshiwani (n 23 above) 133.

¹⁵¹That is 7% in 2008, 6.9% for 2003 -2006, 7.1% for 2004 – 2008, and 6.7% in 2010. See MOEST Development of Education (n 13 above); ACPF *The African report on child wellbeing 2008: how child-friendly are African governments?* (2008) 60; and ACPF *The African child observatory: 2012 pocket statistics on children in Africa* (2012) 59 in this regard. There are however varying reports of the figures, with the Odhiambo Task Force (n 10 above) 105 indicating that education expenditure as a percentage of GDP has averaged 6.1% between 2005 and 2010.

¹⁵² Odhiambo Task Force (n 10 above) 15.

¹⁵³Sessional paper No (n 10 above) para 10.1. The high allocations to the sector relative to the other sectors is attributed to the responsibilities under the EFA and MDGs. Odhiambo Task Force (n 10 above) 106.

¹⁵⁴Mukudi (n 144 above) 237; Odhiambo Task Force (n 10 above) 109. In 1998, personal emoluments accounted for 97% of the primary education budget. See Koech Commission Report (n 41 above) 253.

¹⁵⁵Preceding the World Education Forum 2000 during which the 'Dakar Framework for Action - Education for All; Meeting our Collective Commitments' was adopted, regional conferences were held, during which regional frameworks were adopted. The African regional framework called for the aforementioned commitment on percentages of the budget to be allocated to education. See Dakar Framework for Action, 'Education for All, A framework for Action in Sub-Saharan Africa: Education for African Renaissance in the 21st Century' paragraph 5.9.

years of its adoption, i.e. by 2010. The government acknowledges the need to increase budgetary allocation towards basic education.¹⁵⁶ To what end the additional amounts will be applied is essential to the determination of whether the state is meaningfully pursuing the goal of universal free primary education.

It has been indicated in Chapter 1 that whether primary education is actually free depends on the scope and extent of costs covered from public funds. It is implied in Kenya's policy and government pronouncements that the scope of costs covered by FPE is comprehensive.¹⁵⁷ If such a perspective is adopted, the proposed additional amounts would increase the volume of expenditure on the existing cost items. It is apparent however that the current scope of costs covered under the FPE is narrow, which means that it is necessary to expand the range of cost items to such areas as student transport, library services, uniforms, country-wide school feeding, and medical services. However, even those aspects that are currently covered under the FPE programme are inadequately funded.¹⁵⁸ In light of the limited resources available, there is need for determination of priority between progressive expansion and improvement of the quality of supporting services for primary education.

In summary, FPE as implemented in Kenya does not extend to all the costs of education. A significant cost of primary education is still borne by individual learner households. Also, the components of education covered are limited, as is the extent

¹⁵⁶Sessional paper No 1 (n 10 above) para 10.14

¹⁵⁷Mukudi (n 144 above) 238.

¹⁵⁸Odhiambo Task Force (n 10 above) 130 for a breakdown of the current allocations to various cost-items.

of cover for each of the components covered. Arguably, if further funds are available for FPE, they ought to prioritise enhancement of the quality of services currently covered, and subsequently to extend cover to services not currently covered. It is also evident that the cost of education has had a direct impact on the enrolment and retention of learners. In addition, since a significant proportion of the FPE funds are donor sourced, the sustainability of the programme is extensively compromised.

5.8.4.1 The application of FPE to children with disabilities

Primary education of children with disabilities in Kenya is covered under the FPE programme. The sub-sector takes up an average of only 0.29% of the total education budget¹⁵⁹ and is supplemented by significant contributions from civil society organisations.¹⁶⁰ Application of some of the operational mechanisms of FPE to children with disabilities inadvertently yields adverse results. For instance, FPE funds are allocated per student on a pro rata basis,¹⁶¹ which means that schools with larger numbers of students receive more money and are therefore better poised to finance necessary adjustments to facilitate inclusive education.¹⁶² A system of financing education that favours large numbers is discordant with the goal of inclusive education because education of children with disabilities requires smaller numbers of students per class. Special schools which receive FPE funds on the same basis often have fewer students than regular schools.

¹⁵⁹Odhiambo Task Force (n 10 above) 106. The percentages are also not consistently progressive, with the reduction from 0.43% to 0.13% between 2008/9 and 2009/10.

¹⁶⁰Sessional paper No 1 (n 10 above) para 10.10.

¹⁶¹DRPI (n 118 above) 29; KNCHR (n 48 above) 22.

¹⁶²Odhiambo Task Force 15. The Task Force highlighted that in terms of an audit of 2009, small schools did not benefit from the economies of scale under the FPE funding.

Secondly, FPE funds do not extend to boarding costs in primary schools¹⁶³ save for public boarding schools established in arid as semi-arid lands (ASALs),¹⁶⁴ and yet children with disabilities are often educated in special boarding schools. Taking into account the prevailing challenges in transport, geographical terrain and limited support and capacity of families of children with disabilities, boarding schools are arguably better suited to maximize academic and social development for these children.¹⁶⁵

Following intense lobbying, a capitation grant scheme in terms of which special schools receive a fixed amount of money in addition to the amount per student, while regular schools receive a smaller amount for use in adjusting the schools to the needs of children with disabilities was established.¹⁶⁶ The approach of capitation grants is now enshrined in policy.¹⁶⁷ The provision of these funds notwithstanding, there is still a large deficit in education financing for children with disabilities which is often covered by other sources such as donors, fees or allocations from CDF.¹⁶⁸

Finally, the situation of children with disabilities in marginalized areas of the country poses unique challenges in education. A significant percentage (84%) of Kenya's

¹⁶³MOEST, *Report of the Task Force on Special Needs Education: appraisal exercise* (2003) 24.

¹⁶⁴KNCHR (n 48 above) 23. See further below on the establishment of public boarding schools in ASAL regions.

¹⁶⁵It is argued that the day-school environment often disadvantages children with disabilities. KNCHR (n 48 above) 23; K Wilson 'Services for deaf children in Kenya: Report from a visit to Kenya' (2006) 6.

¹⁶⁶KNCHR (n 48 above) 18; DRPI (n 118 above) 29 - 30; KESSP (n 73 above) para 4.3.

¹⁶⁷Sessional paper No 1 (n 10 above).

¹⁶⁸KNCHR (n 48 above) 23. The Constituency Development Fund is established under the CDF (Amendment) Act, 2007 and the CDF Regulations of 2005 to ensure that a specific portion of the national annual budget is devoted to the constituencies for purposes of development, and fighting poverty at the constituency level. IEA (n 145 above) 93.

landmass is classified as arid or semi-arid (ASAL), 62% of which is arid.¹⁶⁹ ASALs are characterised by low amounts of rainfall, scarce population and are predominantly inhabited by nomadic communities.¹⁷⁰ The regions are also marginally developed, have a difficult geographical terrain, and have deeply rooted traditional practices. Implementation of education in these areas calls for special adaptations, a situation which is even further exacerbated in respect of children with disabilities.¹⁷¹

Some adaptations to the general education system, including the construction of low-cost boarding schools, special bursaries for schools in these regions, feeding programs, mobile schools and grants in mitigation against hunger have been undertaken to facilitate access.¹⁷² Yet still, access to education in the regions is largely compromised. For instance, it is reported that the boarding schools in these regions are overcrowded, and that the mobile schools operate from a very basic resource and logistical base that is inadequate to support the needs of children with disabilities.¹⁷³ In addition, the link between the FPE Policy and the SNE Policy in these circumstances has not been made. The changes envisaged for the implementation of inclusive education are conceptualised on the basis of conventional schools as opposed to adapted schools such as mobile units. Thus while all children in ASALs

¹⁶⁹Vision 2030 (n 1 above) 48.

¹⁷⁰SJ Ruto et al 'Educational marginalization in Northern Kenya: background paper for the Education for All Global Monitoring Report 2010' (2009) 7.

¹⁷¹The government considers mobile schools as the solution for meeting the needs of nomadic families. Ruto et al (n 170 above) 32.

¹⁷²KESSP (n 73 above) xiv; Odhiambo Task Force (n 10 above) 66.

¹⁷³Odhiambo Task Force (n 10 above) 68.

experience difficulties in accessing education, children with disabilities face additional barriers that demand special responses.

Part III: Evaluation of compliance

5.9 Evaluation of the domestication of the principles under article 24(2)

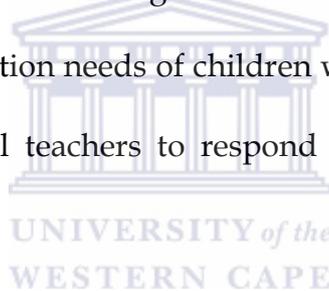
In this part, how or whether the law and policy on the right to primary education in Kenya takes into account the principles under article 24(2) of the CRPD is considered.

5.9.1 Non-exclusion from free and compulsory primary education

As discussed in Chapter 4, article 24(1) (a) comprises two main aspects. The first component is non-exclusion, and it emphasises integration of learners in the regular school system as far as possible. Non-exclusion also requires that planning and management of education for children with disabilities is an integral component of the general education planning and management. The second component relates to the need to ensure that children with disabilities benefit from free and compulsory basic education. This part recalls the differentiated immediate duty to provide free and compulsory primary education. From an equality point of view, the latter obligation requires that where the state is implementing free and compulsory primary education, children with disabilities should be able to benefit on an equal basis with all other children.¹⁷⁴

¹⁷⁴ Refer to Chapter 4 part 4.2 for the discussion of these elements.

As far as non-exclusion is concerned, FPE in Kenya has been characterised by low enrolment and high drop-out rates for children with disabilities.¹⁷⁵ It emerged during a study in 2007 that the measures proposed in Policy such as the review of curriculum to facilitate inclusion, and removal of barriers to facilitate education of children with disabilities had not resulted in increased enrolment of children with disabilities, yet the rate of enrolment amongst other children soared.¹⁷⁶ The failure of FPE to respond to the education of children with disabilities is attributable to several barriers including physical inaccessibility of school infrastructure for children with physical disabilities, the long distance between schools in some areas which makes it difficult for children with disabilities to get to school, the prohibitively high cost of financing the additional education needs of children with disabilities, and the lack of capacity of the regular school teachers to respond to the needs of children with disabilities.



As was earlier highlighted, there are capitation grants to each primary schools to facilitate the removal of barriers,¹⁷⁷ by for instance providing specialised teaching or learning materials and other assistive devices so as to enable children with disabilities access regular education. The amount of money provided is however paltry for the purpose.¹⁷⁸ In addition, the spending guidelines under FPE are

¹⁷⁵KNCHR (n 48 above) 17 - 18.

¹⁷⁶KNCHR (n 48 above) 22.

¹⁷⁷SNE Policy (n 46 above) 34.

¹⁷⁸SNE Policy (n 46 above) 36. It should be noted that there are disparities in the amounts allocated per student under the program. According to the ESCR Committee, 'Periodic Report of Kenya' E/C.12/KEN/1 para 161; DRPI (n 118 above) 30; and Wilson (n 165 above) the amount given to each mainstream school for this purpose is Kshs. 10,000 p.a. The KNCHR reports the amount to be Kshs.

inflexible, meaning it is difficult to apply the FPE funds to the needs of learners with disabilities without evoking bureaucratic procurement procedures.¹⁷⁹ This has implications for swift responses necessary for the circumstances of children with disabilities, particularly with respect to measures meant to facilitate reasonable accommodation.¹⁸⁰

It is acknowledged that the success of inclusive education is dependent upon a well trained, well educated and highly motivated education sector and teaching staff.¹⁸¹

To address the current lack of capacity, there is need for teachers and support staff to receive in-service training on needs assessment and maintenance of specialised equipment and technology devices, as well as implementation of special education programs in pre-service and in-service teacher training.¹⁸² In terms of the CRPD, the state should ensure training of professionals and teachers working at all levels of education.¹⁸³ The main education policy is therefore in tune with the CRPD requirement. However, the policy does not clearly stipulate where, in view of the fact a significant portion of the current teaching workforce is either untrained or

2000 per student per annum and a lump sum of 153,600 to Special schools and Units (KNCHR (n 48 above)22). In some cases it is cited as Kshs 1020. See in this regard Government of Kenya *Kenya Vision 2030 – First Annual Progress Report on the Implementation of the First Medium Term Plan (2008 – 2012)*, (2010) 94. It is also reported that of the amount per student, Kshs. 650 is earmarked for purchase of books and learning materials; Princeton University ‘Free to Learn; a rights based approach to primary education in Kenya’ (2006) 8; Odhiambo Task Force Report (n 10 above) 128. The disparities notwithstanding, these values are far below the estimated cost of education of a child with disabilities as recommended by the Task Force on Special Needs Education (n 163 above) 32. The Task Force found that a child with a disability in a day school requires an average of Kshs. 17,000 per year.

¹⁷⁹KNCHR (n 48 above) 24.

¹⁸⁰Reasonable accommodation is a personalised ad hoc measure that cannot be exhaustively pre-planned.

¹⁸¹Odhiambo Task Force Report (n 10 above) 196.

¹⁸²Sessional paper No (n 30 above) para 4.23; SNE Policy (n 2009 above) 36.

¹⁸³ CRPD article 24(4)

undertrained, priority would lie between basic teacher training and training for education of children with disabilities.

There are limited training facilities for teachers of children with disabilities, with limited capacity and high cost for training.¹⁸⁴ Current primary school teacher training focuses on subject content, meaning that the teachers study all the subjects within the primary school curriculum without specialization.¹⁸⁵ To fully implement the inclusive education agenda, training on education of children with disabilities ought to be an integral part of training for all teachers rather than an additional optional component to the basic training as is currently implemented in Kenya. Education policy should therefore address the teacher training curriculum in general.

For children to access free and compulsory primary education, the education curriculum ought to be sufficiently inclusive. The 8-4-4 curriculum is overloaded and inflexible.¹⁸⁶ It is also too examination oriented, with the outcomes only validated by success in the national examination.¹⁸⁷ This orientation of the curriculum is inconsistent with education for the purposes of 'development of the person's personality, talent and creativity.'¹⁸⁸ These aspects of human potential are not examinable on paper. Consequently, children with disabilities are forced to take standardised academic examinations that are not comprehensively reflective of their

¹⁸⁴As mentioned above, the mandate for training of special needs education teachers vests on KISE, whose capacity is too limited to provide training for all teachers that need it.

¹⁸⁵ Odhiambo Task Force Report (n 10 above) 243.

¹⁸⁶ As above 50.

¹⁸⁷ As above xxv.

¹⁸⁸ CRPD article 24(1) (a).

potential. The approach accounts for the exclusion of children with disabilities from mainstream post-primary education, and their confinement to vocational skills training which is credited lower than high school education.¹⁸⁹ The primary school curriculum also includes sport and recreation, a component that is not ultimately examined. Even then, inaccessibility to and unsuitability of sports and recreational facilities hinder the participation by learners with disabilities.

The cost of financing the education of children with disabilities is prohibitively high for a majority of Kenyans. This is compounded by the fact that majority of learners with disabilities come from poor families, a factor that makes it difficult to implement cost-sharing measures as envisaged under the FPE and SNE policy frameworks.¹⁹⁰ In recognition of this factor, the SNE Policy reiterates the government's commitment 'to offer free basic education to learners with special needs and disabilities through provision of funds to institutions hosting them.'¹⁹¹ Specifically, the Ministry of Education proposes allocation of funds per child 'commensurate with the needs, circumstances and cost of living for learners with

¹⁸⁹Nkinyangi & Mbindyo (n 9 above) 35 noted a lack of training and employment opportunities for persons with disabilities because persons with disabilities were channelled into predetermined vocational areas that were out of touch with the contemporary job market. In Report of Task Force on SNE (n 163 above) 58 it was noted that children with disabilities were forced to limit the subjects that they could study, which also limits their career choices.

¹⁹⁰SNE Policy (n 46 above) 56; Nkinyangi & Mbindyo (n 9 above) 46 highlighted the fact that at the time, many institutions for the education of persons with disabilities charged levies which were beyond the means of the majority of people with disabilities.

¹⁹¹SNE Policy (n 46 above) 57.

special needs and disabilities in day and boarding institutions respectively' and to review the allocations periodically.¹⁹²

The government further commits to 'take up the full responsibility of educating students with special needs and disabilities at all levels.'¹⁹³ This commitment if implemented would require much more than the current FPE scheme. There is however no clear road map to the full implementation of the SNE policy proposals, or an indication as to whether it is intended to be achieved immediately or progressively. However, in view of the progressive nature of its supporting investment program, KESSP, it is possible to infer that the commitment may only be achieved progressively. It is therefore essential that a roadmap to that end is developed.

Regarding the management of education under one system, it has been indicated in the part above that the education of children with disabilities has always been at the margins of the education system, and mainly undertaken in special schools.¹⁹⁴ It is also reported that the 8 - 4 - 4 education system does not cater for children with special needs.¹⁹⁵ The SNE policy brings the education of children with disabilities within the ambit of one education system, the management and administration of which is spearheaded by the Ministry of Education.¹⁹⁶ It is duly recognised that the

¹⁹² SNE Policy (n 46 above) 57.

¹⁹³ SNE Policy (n 46 above) 57; Sessional paper No 1(n 10 above) para 5.1.

¹⁹⁴DRPI (n 118 above) 33 - 34. The special education section in the Ministry of Education was set up in 1975 while the Educational Assessment and Resource Centres were established in 1984.

¹⁹⁵Sessional Paper No 1 (n 10 above) para 3.11.

¹⁹⁶SNE Policy (n 46 above) 61.

services necessary to actuate the education of children with disabilities may be found in different sectors, a fact that calls for collaboration and coordination between such ministries.¹⁹⁷

5.9.2 Access to an inclusive, quality and free primary education on an equal basis with other children

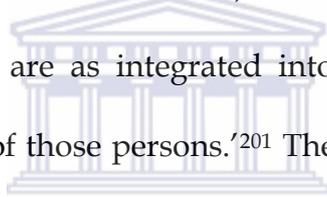
As discussed in Chapter 4, article 24(2) (b) is aimed at ensuring non-discrimination of children with disabilities in the provision of primary education solely on the basis of disability. It requires that children with disabilities have equal choice in education, particularly as to whether to attend the neighbourhood school that other children in the community in which the child lives would attend.

It was highlighted when discussing the Constitution that article 54 thereof calls for inclusive education. However, the framing of the article makes it susceptible to various interpretations. For instance, the provision that a person with disability is entitled to access institutions for persons with disabilities could mean that the right of access is limited to facilities designated for persons with disabilities.¹⁹⁸ Further, pegging access to ‘compatibility with the interests of the person’ unduly reduces the scope of the duty to ensure access. Access to educational and other public facilities ought to be a universal standard, not limited to an individual’s needs.

¹⁹⁷SNE Policy (n 46 above) 61.

¹⁹⁸Constitution section 54(1) (b).

On the other hand, if section 54 is read as a whole, especially with the subsequent entitlement to ‘reasonable access to all places,’ the effects of the limitations under section 54(1) (b) can be considerably mitigated.¹⁹⁹ This section therefore calls for a purposive interpretation of the provision and hence the need to revisit the intention of the drafters. The recommendation of the Constitution of Kenya Review Commission in this regard was that the state would ensure that ‘education, institutions and facilities for persons with disabilities were integrated into society as a whole in step with the interests of persons with disabilities.’²⁰⁰ Following that recommendation, the Bomas Draft Constitution provided that persons with disabilities had a right to ‘access to education, and to institutions and facilities for persons with disabilities that are as integrated into the society as a whole as is compatible with the interests of those persons.’²⁰¹ The provision created two distinct entitlements; access to education and access to integrated institutions and facilities.



WESTERN CAPE

Thus the original provision could be interpreted to mean that the state had a duty to ensure that education is integrated into society in accordance with the needs of persons with disabilities. ‘Access to education’ in the Bomas Draft also meant that the content of education should be accessible to persons with disabilities. Whereas the language of the provision was altered in the final draft with potential implications for the nature of the right, there is no recorded intention to alter the purpose thereof.

¹⁹⁹ Constitution section 42(1) (c) – (e).

²⁰⁰ CKRC Report (n 101 above) 124.

²⁰¹ Bomas Draft Constitution 42(2) (b).

Essentially therefore, a purposive interpretation of the current provision which embraces the unlimited duty to ensure access to education is imperative.

In policy, the government of Kenya considers inclusive education as a way of realizing the Millennium Development Goals and the Education for All (EFA).²⁰² Education programs are therefore designed to cater for inclusion by ensuring that all children; including girls, children in difficult circumstances, and those from marginalised or vulnerable groups have access to and complete the basic education cycle.²⁰³ This explains the broad definition of inclusive education in Kenya as the concept of adopting a broad vision of EFA by addressing the spectrum of needs of all learners, including those who are vulnerable through marginalization and exclusion.²⁰⁴ Following this understanding, inclusive education in Kenya embraces special responses for a broad range of children classified as children in special circumstances.²⁰⁵ But, despite policy pronouncements and a relatively long usage of the term,²⁰⁶ inclusive education is neither properly understood nor embraced by regular schools.

²⁰²Sessional Paper No 1 (n 10 above) para 3.3; MOEST *Development of education (n 13 above)* 36.

²⁰³MOEST *Development of education (n 13 above)* 3.

²⁰⁴As above 3.

²⁰⁵SNE Policy (n 46 above) 17 – 18 lists 22 categories of children who are regarded as having special needs. The Kamunge Commission defined special education as the education of those with a disability or are specially gifted or talented. Kamunge Commission Report (n 39 above) 45. The broad categorisation of children as falling within this group has long been applied in educational organisation in Kenya. In the Koech report (1999), special education was defined as the education of children with various disabilities, including gifted and talented children.

²⁰⁶Inclusive education was being implemented in Kenya before the 2003 Task Force on Special Needs Education. See Report of the SNE Task Force (n 163 above) 18.

It has been argued above that inclusive education as understood in Kenya emphasises the integration of children with disabilities into the regular education system.²⁰⁷ For instance, the KISE curriculum defines inclusive education as ‘the philosophy of ensuring that schools, centres of learning and educational systems are open to **all** children’ to enable the participation of all learners in all aspects of school life.²⁰⁸ While the module attempts to distinguish inclusive education from mere integration of learners into the regular education system, it embraces the view that ‘the regular classroom is the first option of education for learners with special needs, including those with disabilities.’²⁰⁹ This view is incongruent with the CRPD’s requirement on choice in education. Yet this module is intended to equip teachers with the skills to implement inclusive education.²¹⁰ The challenge with this approach is that not all teachers are special education teachers or undertake the course. Therefore not all schools are sufficiently equipped to respond to the needs of children with disabilities within the general education system.

It is felt that one of the reasons for the failure of the inclusive education policy proposal to break ground successfully is that it had not been explained or validated at the implementation level, and that the key stakeholders in the implementation of inclusive education, including teachers, had not been consulted in developing the

²⁰⁷For instance, in the long-term economic blue-print, inclusive education is conceptualised as the integration of learners with special needs into the regular schools. See Vision 2030 (n 1 above) 86 – 87. The same position is expressed in Republic of Kenya, *Special Needs Education Handbook for Quality Assurance and Standards: an addendum to the handbook for inspection of educational institutions* (2006) 4.

²⁰⁸KISE ‘*Special Needs Education: Module ID 010 (Introduction of Inclusive Education)*’ (2007) 5.

²⁰⁹KISE (n 208 above) 11.

²¹⁰KISE *Diploma Curriculum in Special Needs Education: Module II (Inclusive Education)* (2006).

policy. They had rather only been instructed to abide thereby.²¹¹ This is contrary to the CRPD requirements that in the development and implementation of legislation and policies to implement the CRPD, state parties shall actively consult with and actively involve persons with disabilities, including children with disabilities through their representative organisations.²¹²

The SNE Policy indicates that government emphasises inclusive education through regular schools for learners with special needs and disabilities as opposed to the use of special schools and special units attached to regular schools.²¹³ It is argued that only through the integration of learners with disabilities into the regular education system can all the children with disabilities have a chance to access education.²¹⁴ This would suggest a departure from past practice in terms of which there was more emphasis on the establishment and equipping of special schools and special units with appropriate equipment as opposed to adaptation of the regular education system to deliver inclusive education.²¹⁵

Special units and integrated programmes were initiated in the 1970s and grew in number over the years, while integration of learners with disabilities into the regular

²¹¹KNCHR (n 48 above) 26.

²¹² CRPD article 4(3)

²¹³SNE Policy (n 46 above) 37; DRPI (n 118 above) 30; MOEST Development of Education (n 13 above) 39.

²¹⁴Report of the Task Force on SNE (n 163 above) 1; KISE (n 210 above) (ii).

²¹⁵In terms of the KESSP 2010 – 2015 log frame on the implementation of education for children with disabilities, such education is to be achieved through the establishment of special units in the regular schools.

classrooms began in 1990.²¹⁶ The commitment in the SNE Policy notwithstanding, KESSP, the lifespan of which overlaps with that of the SNE Policy, calls for establishment and equipping of special units in regular schools, along with the provision of learning materials and equipment for a set number of special schools.²¹⁷ The policies are clearly inconsistent with one another.

To facilitate inclusive education in the sense of educating all children within the general education system, the SNE Policy suggests provision of funds for adaptation of infrastructure, equipment and facilities in learning institutions.²¹⁸ These funds are provided on the basis of the presence of a learner with disability in the institution. Such an approach to funding falls short of the ideal of universal design required in terms of the CRPD. In addition, the approach is reactive as opposed to proactive which inevitably means there will be time lapse between the admission of new students and allocation of necessary funds to enable their access to education.

To facilitate access to quality and relevant education for children with disabilities, it is proposed to increase the capacity of regular schools to cater for children with disabilities. Such capacity growth would entail expansion of educational services to cater for other categories of youth or children with special needs and disabilities that are not currently catered for in regular educational institutions, as well as maintaining and increasing the necessary support for special institutions to cater for

²¹⁶SNE Policy (n 46 above) 17; DRPI (n 118 above) 30; Ministry of Education (2001) *Education for All in Kenya: a national handbook for 2000 and beyond* 37.

²¹⁷KESSP (n 73 above) 47 table 4.8.

²¹⁸SNE Policy (n 46 above) 37.

those that are not able to benefit from inclusive education.²¹⁹ Capitation grants are also envisaged as a measure to facilitate quality education for children with disabilities.²²⁰

In principle, if every primary school was providing inclusive quality primary education as intended in policy, it would be possible to argue that children with disabilities had education on an equal basis with other children in the communities in which they live as required under the CRPD.²²¹ But as was noted as far back as 2003, most learners with disabilities are unable to benefit from free primary education because the school environment is not conducive.²²² This assertion still holds true today. In these circumstances the approach of the state to inclusive education inadvertently creates inequality in access and quality of learning.

5.9.3 Duty to provide reasonable accommodation

In terms of article 24(2) (c), the state is obliged to ensure that the individual needs of a child with disabilities are accommodated in order to enable them to effectively benefit from education. Reasonable accommodation entails adjustments to the content, method or environment of the child's education. It may entail a financial cost or other non monetary adjustment.

The Kenya Constitution does not make any provision for reasonable accommodation, save for the entitlement of persons with disabilities to reasonable access to all places,

²¹⁹ SNE Policy (n 46 above) 33.

²²⁰ Sesssional Paper No 1 (n 10 above) para 4.10.

²²¹ CRPD article 24(2) (b).

²²² Report of Task Force on SNE (n 163 above) 24.

public transport and information.²²³ Reasonable accommodation is also not centrally required under the Persons with Disabilities Act. Article 18 of the Act which deals with the right to education does not mention reasonable accommodation at all.²²⁴ Subsidiary legislation created under the Act however obligates every educational institution to 'ensure that students with disabilities are reasonably accommodated within that institution.'²²⁵ In view of the fundamental role of this principle in protecting the rights of persons with disabilities, the lacuna in the law relating to education is concerning.

Reasonable accommodation is however required in the context of employment of persons with disabilities. The PDA provides that an employer cannot be deemed to have discriminated a person with disabilities if, 'special facilities or modifications, whether physical, administrative or otherwise, are required at the work place to accommodate the person with a disability, which the employer cannot reasonably be expected to provide.'²²⁶ The provision is consistent with the definition of reasonable accommodation under the CRPD, but it has not yet been subject to judicial interpretation in Kenya. The framing thereof does however suggest that the understanding of the concept under the CRPD should be applicable in the Kenyan context.

²²³ Constitution of Kenya, section 54(1)(c)

²²⁴ Even the Persons with Disabilities (Amendment) Bill 2007, while amending article 18 to introduce inclusive education and call for support measures, did not call for reasonable accommodation of the needs of children with disabilities in education.

²²⁵ The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, (2009) Regulation 9(2).

²²⁶ PDA (n 21 above) section 15(2) (c).

The SNE Policy does not mention the concept of reasonable accommodation at all despite being adopted after the ratification of the CRPD and the adoption of the Persons with Disabilities Act. It does however propose that the Ministry of Education shall enforce affirmative action in admission for learners with special needs and disabilities at all levels of learning, including those with low vision.²²⁷ It ought to be recalled in this chapter that the concepts of affirmative action and reasonable accommodation, though both applicable to persons with disabilities, are distinct in scope and purpose.²²⁸ Hence, the policy directive does not suffice to ensure reasonable accommodation.

Reasonable accommodation is particularly critical in the context of examination. The national examinations process does not seem to sufficiently take into account the unique needs of children with disabilities.²²⁹ The examination process also fails to adequately accommodate the individual needs of a learner with disabilities. For instance, in allocating extra time for writing the examination, an equal amount of extra time is allocated for all children with disabilities, the nature or extent of impairment notwithstanding.²³⁰ Also, the effect of a child's impairment on their handwriting is not taken into account at the point of marking of the examinations.²³¹

²²⁷SNE Policy (n 46 above) 38; Sessional paper No 1 (n 10 above) para 3.1.

²²⁸See Chapter 4, part 4.4 of this thesis for a discussion of the place of affirmative action relative to reasonable accommodation in the implementation of the rights of persons with disabilities.

²²⁹KNCHR (n 48 above) 28.

²³⁰All students with disabilities are entitled to an extra 30 minutes over the standard time for national examinations. KNCHR (n 48 above) 38.

²³¹KNCHR (n 48 above) 28.

These generalised measures violate the individuality required under the principle of reasonable accommodation.

The strict criterion for regulation of spending under the FPE as well as delays in the arrival of the money also undermine spontaneity and promptness in responding to the needs of the child, yet the hallmark of reasonable accommodation is prompt individual responses.²³² In addition, the allocation of the FPE funds on the basis of the cost per student per annum removes discretion from school administrators in determining how much may be used to facilitate reasonable accommodation of an individual student.²³³

5.9.4 Provision of support

Article 24(2) (d) requires state parties to ensure that children with disabilities receive support within the general education system so as to facilitate effective education, while article 24(2)(e) requires such measures to be provided in environments that maximise a child's development. In Chapter 4 it was highlighted that the core purpose of these two provisions is to underscore choice between education in the regular and the special education systems. Nevertheless, it is evident that the CRPD advocates for integration of children with disabilities into the regular education system as far as possible and special education in exceptional cases. As has been pointed out in Chapter 4, support measures are technical and specialised. It would be difficult to catalogue all such measures as would be necessary. The law rather

²³²K King 'Balancing basic and post-basic education in Kenya: national versus international policy agendas' (2007) 27 *International Journal of Educational Development* 365.

²³³IEA (n 145 above) 97.

provides a framework for the regulation of the provision and access to such measures.

In Kenya, there has been a sustained call for provision of support to children with disabilities to enable their access to education. These calls are reflected in the law, policy and reports of the committees and commissions discussed above. As with the CRPD, the precise nature of the support measures envisaged is not defined. For instance, the Kamunge Commission recognised that the education of children with disabilities required the input of various professionals such as physiotherapists, occupational therapists, nurses, doctors and social workers.²³⁴ This was reiterated in the Koech Report as well as the report of the Task Force on Special Needs Education.²³⁵

Neither the Basic Education Act nor the PDA recognises a right or duty to provide support measures in education, thus greatly undermining effective education for children with disabilities. In recognition of this omission, an amendment to the PDA was proposed to the effect that learning institutions would 'provide appropriate equipment, assistive devices and other services to accommodate the special needs of children with disabilities.'²³⁶ But the amendment falls short of expressly vesting the responsibility for provision of such measures on the government. Thus whereas in the case of public schools, the duty to provide the measures would still be traceable

²³⁴Kamunge Commission Report (n 39 above) 56.

²³⁵Koech Commission Report (n 41 above) 101; Report of Task Force on SNE (n 163 above) 40.

²³⁶The Persons with Disabilities (Amendment) Bill (2007) section 10(a).

to the government, private institutions would not be able to demand support from the state in this regard if the amendment were to be adopted.

In view of the predominantly private ownership of schools for children with disabilities, this approach would be insufficient to ensure access to education for children with disabilities. The Bill also proposed amendment of the meaning of 'assistive devices and services' to include 'implements, tools and devices (including the services of qualified interpreters for the deaf, qualified teachers for the blind, guides for visually impaired persons and other life assistants and intermediaries) provided to persons with disabilities to assist them in education, employment and other activities.'²³⁷

In terms of the regulations under the PDA, every institution of education shall provide students with disabilities with the appropriate core service or services necessary to ensure equal access.²³⁸ The Regulations define these services to include;

- 'a) sign language;
- (b) oral and tactile interpreter services or other technological alternatives;
- (c) textbooks and other educational materials in alternative media, including, but not limited to, large print, Braille, electronic format, and audio tape;
- (d) access to adaptive equipment including FM communicators, closed caption devices, amplified telephone receivers, closed circuit televisions, low-vision reading aids, player and recorders for 15/16 4-track tapes, photocopy

²³⁷PDA (Amendment) Bill (n 118 above) section 2(c).

²³⁸The Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009 Regulation 8(3).

machines able to use eleven-by-seventeen inch paper, brailing devices, and computer enhancements;

(e) release of syllabi, study guides, and other appropriate instructor-produced materials in advance of general distribution, and access beyond the regular classroom session to slides, films, overheads and other media and taping of lectures.²³⁹

The regulations also provide for complimentary resources outside the school framework such as the possibility of applying and obtaining support for 'purchase and repair of personal technical auxiliary devices'.²⁴⁰ These proposals are commendable, and if fully implemented would guarantee quality education to children with disabilities. However, there is an apparent disconnect between the proposed measures, and the funding policy despite the concurrent development of both the regulations and the policy. It is difficult to comprehend how these services and equipments can be obtained with the amounts of money designated under the FPE. Indeed, the disability specific grants to regular schools are meant for accessibility adjustments as opposed to purchase of equipments, which effectively negates the capacity of 'every' institution to fulfil their duty as set out in this provision.

The SNE Policy recognises that provision of the necessary assistive and functional devices both at the individual and school level is well beyond the means of

²³⁹As above, Regulation 8(4).

²⁴⁰As above, Regulation 7(1) (a).

government and the affected individuals. The government thus hopes to review and increase budgetary allocation to institutions and programs that provide special needs education.²⁴¹ It is further suggested that the government would 'provide instructional materials through waiver of duty on local production of such equipment as a way of reducing the cost of providing special needs education.'²⁴² But even with such waiver, the equipment would still be prohibitively expensive for a majority of children with disabilities, and certainly beyond the amounts available to individual schools for that purpose under the FPE.

Also, whereas the employment of teachers for public schools is covered under the FPE programme, funding towards hiring of non-teaching staff/teacher aids is not standardised in all schools. In practice, requisition for a teacher aid or support would only be approved after a visit by the Quality Assurance and Standards Division of the Ministry of Education.²⁴³ Since this does not happen regularly, schools often have to source the cost of hiring such assistants from parents, through contributions.²⁴⁴

5.9.5 Education in environments that maximise academic and social development

Throughout its post-independence history, Kenya has maintained a system of special education for children with disabilities in the form of special schools and special units attached to regular schools.²⁴⁵ It is reported that the bulk of children with

²⁴¹ SNE Policy (n 46 above) 54.

²⁴² Sessional paper No 1 (n 10 above) para 4.22.

²⁴³ KNCHR (n 48 above) 24.

²⁴⁴ Report of Task Force on SNE (n 163 above) 49.

²⁴⁵ Sessional paper No 1 (n 10 above) para 4.20.

disabilities who go to school in Kenya learn in special schools.²⁴⁶ It is also acknowledged that the primary constraint to access for children with disabilities is the unavailability of special schools, and the lack of the necessary equipments in mainstream schools to accommodate the needs of children with disabilities. Even where the special schools are available, they are incapacitated by lack of specialised equipment or trained personnel.²⁴⁷

In terms of the Persons with Disabilities Act,

‘Special schools and institutions, especially for the deaf, the blind and the mentally retarded, shall be established to cater for formal education, skills development and self-reliance.’²⁴⁸

The approach of the Act to automatically assign children with certain impairments to special schools without provision for re-entry of these learners into the mainstream education system is inconsistent with the CRPD. The CRPD allows special education where it is based on choice as opposed to circumstantial compulsion. Such special education is meant for teaching life skills necessary for the learner to join the regular education system, as well as to enhance the social development of the learners. The approach of the PDA vitiates choice for the listed categories of learners, and negates the inclusive education policy proclaimed by the government.

²⁴⁶KNCHR (n 48 above) 21.

²⁴⁷Government of Kenya & UNICEF, ‘Mid-term review report: country programme of cooperation 1999 – 2003’ (2003) 36.

²⁴⁸PDA (n 21 above) section 18(3).

An amendment to this section was proposed to the effect that the government would establish

‘inclusive schools and institutions for the deaf, the blind, the mentally retarded and other categories of persons with disabilities to cater for formal education, skills development and self-reliance. Provided that there shall be established special institutions and schools to provide or cater for the needs of persons with disabilities of such degree as cannot be adequately served in inclusive schools and/or institutions.’²⁴⁹

It seems that the amendment, especially in view of the latter phrase, was intended to mitigate the exclusion in the preceding provision by introducing inclusive education. But the first part of the proposed amendment is still confusing because inclusive schools and institutions are not only for these children, but for all children.

The Basic Education Act now recognises the right of children with disabilities to learn in the environment of choice. Also as has already been highlighted, though the government has embraced inclusive education through regular schools, it maintains special schools and units to cater for ‘children with special needs in the areas of hearing, visual mental and physical challenges.’²⁵⁰ An additional amount of money is set aside for ‘physically challenged children enrolled in special education institutions and units attached to regular schools’ to facilitate procurement of the necessary

²⁴⁹ PDA (Amendment) Bill (n 118 above) section 10(b).

²⁵⁰ Sessional paper No 1 (n 10 above) para 4.21

teaching or learning materials and equipment.²⁵¹ As with the other amounts discussed above, the grant amount is insufficient to cover all the costs of adapting the institutions to the needs of the children with disabilities.²⁵²

Evidently, though special schools remain an integral part of the education system, and whereas choice between education in regular schools and these schools is proclaimed in law and policy, in reality children with disabilities do not have a meaningful choice in that regard. The special education sector has been and still remains grossly underfunded, taking less than 1% of the education budget.²⁵³ The number of special schools is insufficient, yet with the focus on inclusive education, the establishment of new special schools is less likely. With the high cost of the specialised equipment necessary in these schools and which is not being covered by the government, it is arguable that the state is in breach of its obligations under article 24(2)(e).

5.10 Conclusion

5.10.1 General Remarks

A number of conclusions may be drawn from the discussion in this chapter. First, it is constantly reiterated in government documents and reports that the education of children with disabilities has moved from a 'special needs education' approach to inclusive education. However the continued use of 'special needs education' in policy implies that the rhetoric has not percolated into law, policy or organisation of

²⁵¹ As above, para 4.22.

²⁵² As above para 4.22.

²⁵³ Education for All handbook (n 216 above) 39.

education. Also, while the continued establishment of 'special units' within regular schools can be part of implementing inclusive education with proper organisation, in practice, the special units are reported to provide sub-standard education. Besides, to allow for progression as with the regular system, what is needed is not 'units' but parallel streams. A single unit would not simultaneously cater for new enrolments and progression of learners to other levels of education. There is therefore no principal difference between special schools and special units in regular schools as prescribed in policy other than their location.

Though a departure from special to inclusive education has been proclaimed by the Kenyan government, the education of children with disabilities in regular schools is largely tokenistic for a number of reasons. First, the policy framework within which the education of children with disabilities is set out identifies a range of special needs but the policy statements do not address all the needs identified. A specific focus on inclusion of children with disabilities is necessary so as to enhance the visibility of issues relative to children with disabilities. In addition, financing of the education of children with disabilities is not in tandem with the stipulated priorities. In terms of the express commitments in Policy, inclusive education would be prioritised, but instead, the bulk of the money earmarked for education of children with disabilities is spent through special schools. Funds committed to the education of children with disabilities are also by and large inadequate to meet their educational needs. Though the amount of money is generally insufficient for all learners under the FPE and is in need of consistent and progressive review till the scope of needs is fully covered, the

current system of equal allocations results in indirect discrimination of children with disabilities. Other than the Kshs.10, 000 that is allocated to regular schools, no amount is given to facilitate adaptations to the individual needs of children with disabilities in regular schools.

On paper, the government is committed to an education system that guarantees the right of every learner to quality and relevant education²⁵⁴ in line with international declarations, protocols and conventions as resolved in the world conferences on EFA and the MDGs.²⁵⁵ The relevant policies also recognise the need for education to address emerging challenges including 'respect for human rights.'²⁵⁶ In its report to the Committee on ESCR on the implementation of the right to education in Kenya, the government reiterated the broad objective of providing FPE was 'to give every child the right to free and compulsory basic education and training regardless of his/her economic status.'²⁵⁷ A keen assessment of education policy however reveals that the philosophy underlying the provision and organisation of education is not drawn from human rights obligations.

For instance, right after attaining independence, government concerns on education were aimed mostly at using schools to develop manpower for economic

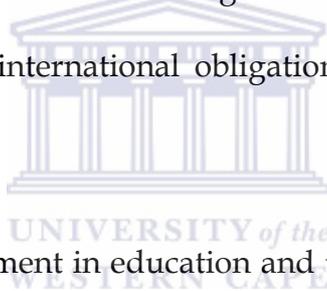
²⁵⁴ Sessional Paper No 1 (n 10 above) para1.9 & 1.10.

²⁵⁵ As above, para 4.1.

²⁵⁶ As above, para 3.1.

²⁵⁷ Committee on ESCR, 'Replies by the Government of Kenya to the list of issues (E/C.12/KEN/Q/1) to be taken up in connection with the consideration of initial report of Kenya' E/C.12/KEN/Q/1/Add.1 para 213.

development and africanisation of the civil service.²⁵⁸ Consequently, the country prioritised the expansion of secondary and tertiary education over basic education²⁵⁹ contrary to the contemporary focus on primary education. Similarly, primary education was intended to 'prepare students for agriculture, family welfare, and community development.'²⁶⁰ These aims were circumstantially defined, despite the existence of the Universal Declaration which had already set out the aims of education.²⁶¹ Also, the first phase of FPE was not compulsory despite the fact that at the time of its implementation, Kenya had ratified the ICESCR and the Universal Declaration, both of which called for free and compulsory primary education.²⁶² It is therefore arguable that Kenya's educational agenda and the implementation thereof has been little influenced by international obligations, and rather that it has been driven by national priorities.



Indeed, government's involvement in education and training is justified on the basis that 'human capital development has large social returns, and because the market fails to provide socially optimal returns.'²⁶³ The government also considers that 'achieving universal education would reduce poverty, achieve the desired economic

²⁵⁸Woolman (n 67 above) 33.

²⁵⁹In Part II of its report, the Kenya Education Commission (Ominde Commission) para 541 argued that in light of the economic realities at the time, primary education had to concede a prior claim to secondary, technical, commercial and higher education. Woolman (n 67 above) 33.

²⁶⁰Woolman (above) 33.

²⁶¹Universal Declaration, article 26(2).

²⁶²Bondesio (n 26 above) 394.

²⁶³Sessional paper No 1 (n 10 above) para 2.14. It is argued that right from independence, policy makers were preoccupied with the utility of the school leaver, and that there was a political tendency to think that education should make a direct contribution to the labour market. See King (n 232 above) 360 in that regard.

growth, create more employment, and guarantee sustainable development for the Kenyan people.²⁶⁴ To address the challenges relating to the financing of education, government seeks to 'promote increased private sector financing of education services'.²⁶⁵ The education and care of vulnerable groups, which include children with disabilities, is further deemed a social responsibility.²⁶⁶ This approach to education is also indicative of commoditization of education, hence making it susceptible to the forces of supply and demand.²⁶⁷

The foregoing does not discount the fact that the extent of a country's dependency on external funding is a determining factor for its policies, including those on education.²⁶⁸ Nor is it intended to deny that even if offered as a matter of right, education does indeed have economic ends for the country. But it does mean that the ratification of the international human rights instruments does not guarantee their influence on domestic educational priorities. It is imperative that the government of Kenya considers a human-rights-based approach to education policy. This would align with the EFA goals in terms of which the realization of basic education for all demands an expanded vision beyond resource levels, institutional structures,

²⁶⁴Sessional paper No 1(n 10 above) para 2.16.

²⁶⁵As above, para 10.13.

²⁶⁶As above, para 3.2.

²⁶⁷Mukudi (n 144 above) 233 argues that the cost-sharing model proposed by the World Bank through structural adjustment programmes is an economic one that assumes that education is a good whose demand should determine the price, which assumed that the demand for education exists and that parents would be willing to pay for it. This model perpetuates inequality to the extent that the most poor would not be able to access education and is inconsistent with the objectives of human rights.

²⁶⁸King (n 232 above) 359.

curricula and conventional delivery systems.²⁶⁹ Recognition of education as a right helps to balance the competing interests of education between the state and the individuals.

One of the greatest and most potent impediments of the primary education system in Kenya is lack of capacity, including resource, managerial and skill inadequacy, amongst key stake holders. In the face of multiple barriers, lack of specialized equipment and training, and few teachers with the requisite knowledge, the task of realizing the aspiration on inclusive education is seemingly an insurmountable one for the government.²⁷⁰ This shortcoming is widely acknowledged in policy and factored-in in the programmatic responses.²⁷¹ The government proposes a review of teacher training programmes so as to set a diploma as the minimum level of qualification necessary for a teacher.²⁷² Whereas this is consistent with the circumstantial realities in the country, the nature of responsibilities envisaged for teachers under the CRPD demands a higher level of qualification than that offered in the primary teacher training colleges.²⁷³

²⁶⁹World Declaration of Education for All 1990 Article II (1).

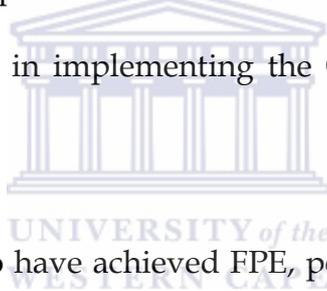
²⁷⁰Odhiambo Task Force Report (n 10 above) 140; Koech Commission (n 41 above) 83 highlighted the difficulty with integration of learners with disabilities into the regular education system, particularly the fact that key stakeholders were apprehensive about it since the schools did not have the facilities (specialized teachers, accessible buildings, and equipment) necessary to accommodate the learners.

²⁷¹Sessional paper No 1 (n 10 above) para 4.9 – 4.12 & para 4.21.

²⁷²Sessional paper No 1 (n 10 above) para 7.7.

²⁷³Article 24(4). The current focus of teacher-training for primary school teachers focuses on mastery of the content of primary school subjects.

Inclusive education requires proper planning, which is not possible without accurate data, resources and legislative support.²⁷⁴ Kenya has adopted what may be termed as an 'inclusion now' approach to education for children with disabilities in a bid to comply with the international obligations. The shortcomings of this approach are now emerging. For instance, it is evident that before integration as a component of inclusive education can be successfully implemented, regular schools need to be adequately and appropriately resourced.²⁷⁵ It is also apparent in this chapter that there is a gap between the policy and practice. This illustrates need for self-paced, contextually defined approaches and standards to the education of children with disabilities. The [over] prescriptive nature of the CRPD which largely restricts the state's margin of appreciation in implementing the Convention could compromise the necessary flexibility.



Though Kenya reports itself to have achieved FPE, policy programmes indicate that the policy is subject to progressive realization. Implementation of FPE is phased in short, medium and long-term goals, with the KESSP representing the midterm objectives.²⁷⁶ As discussed in chapter 2 and 3, the prevailing international understanding of the duty to provide primary education is that the duty is of an immediate nature. The Constitution of Kenya also establishes an immediate obligation with respect to the provision of free and compulsory basic education. Consequently, the approach of the government is *prima facie* in breach of the

²⁷⁴KNCHR (n 48 above) 18.

²⁷⁵As above, 27.

²⁷⁶G Wainana 'An inequality perspective of education structure and performance in Kenya' in Society for International Development East Africa *Reading on inequality in Kenya* (2006) 160.

constitutional, statutory and treaty obligations. This shortfall however affects all children benefiting from the FPE program, and not children with disabilities only.

There is a general emphasis on General Enrolment Rates (GER) as a measure of the success of the FPE, an approach which fails to take into account the other aspects of educational evaluation, especially quality.²⁷⁷ It is particularly difficult to gauge from GER statistics the number of children with disabilities who have effectively benefited from inclusive education. As above indicated, the numbers of children in special units have indeed increased, but these numbers do not automatically mean that inclusion is taking place. The GER approach is applied at the international level as well, but only assesses the availability aspect of education.

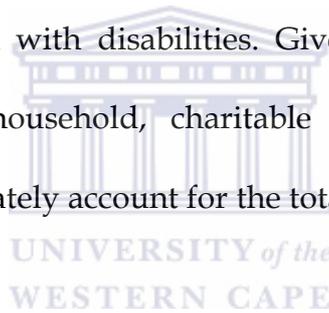
The assessment of states' compliance with the duty to provide free and compulsory education by the CRC and ESCR committees has focused more on the availability element. Thus for instance, the ESCR Committee commended Kenya for introducing the FPE program without taking into account whether the other aspects of the right had been satisfactorily achieved.²⁷⁸ Instead, the Committee called on the state to take measures in respect of particular vulnerable groups, that is, 'children from poor families, pregnant girls, children living in remote rural areas and in informal

²⁷⁷Odhiambo Task Force Report (n 10 above) 56. General enrolment rates are mainly a measure of accessibility, but only a symptomatic pointer to possible failures in the other aspects of the right to education. Dropping GER can indicate educational disincentives such as poor quality (acceptability), or adaptation of the content of the education.

²⁷⁸Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant Kenya Concluding Observations of the Committee on Economic, Social and Cultural Rights E/C.12/KEN/CO/1,1 December 2008 para 7.

settlements, nomadic children, children with disabilities, refugee children and internally displaced children have limited access to education.²⁷⁹ Though it did not expressly say so, the statement implies that the Committee was satisfied with Kenya's implementation of FPE in regular schools and that the state now needed to focus more on the areas that had been left out.

The multiplicity of commissions/committees and task forces set up to study and recommend education reforms and the extensive duplicity of their mandate is symptomatic of poor coordination between relevant government agencies. Indeed, lack of proper coordination is also evident in the application of resources available for the education of children with disabilities. Given that the sector is severally funded from government, household, charitable and other non-governmental sources, it is difficult to adequately account for the total cost of the education in order to plan effectively.



5.10.2 Remarks on compliance with Article 24(2)

From the discussions in part III of this chapter, a couple of conclusions can be made in respect of the response of the Kenya legal and policy framework on primary education of children with disabilities to the concepts under article 24(2).

The law and policy on primary education in Kenya guarantee non-exclusion of children with disabilities from the general education system. The management of the

²⁷⁹Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Kenya Concluding Observations of the Committee on Economic, Social and Cultural Rights E/C.12/KEN/CO/1,1 December 2008 para 34.

education of children with disabilities is also clearly within the mandate of the general education management authorities. There is a free primary education programme, but in fact primary education is not free in light of other indirect costs of education. Further, the approach adopted to inclusive education that seeks to ensure that all schools are adapted for the education of children with disabilities would be a good way to ensure that children with disabilities have access to a school within their reach. However, it is clear that in light of resource limitations, this approach adversely affects the education of children with disabilities because it compromises the capacity of schools to make meaningful adjustments that make the school inclusive. Indeed, children with disabilities are disproportionately overrepresented in the school-drop out and out of school statistics.

As with the CRPD, the understanding of inclusive education in Kenya has tended to overemphasise integration of learners into the mainstream education system, perhaps even much more than is contemplated under the article 24(2) (b). As mentioned in the preceding paragraph, ensuring that all schools are inclusive would be a very instrumental way of guaranteeing that children with disabilities have equal choice to attend a neighbourhood school. However, in light of the poor infrastructure in a majority of the schools, this choice is not a meaningful one, a situation that results in substantive inequality. Also, the increased enrolment rates following the introduction of FPE make the learning environment unfavourable to children with disabilities, due to the high teacher – student ratios in the classrooms.

It has been indicated that the law does not expressly recognise a responsibility to ensure reasonable accommodation of the needs of children with disabilities. But the concept is not new to Kenya, and having been applied in the context of employment law, it could be applied in the context of primary education of children with disabilities. It has also been highlighted that the inflexible procurement and expenditure regulations hinder prompt and individualised responses as are necessary to facilitate reasonable accommodation. In addition, the fact that the FPE programme does not cover the hiring of non-teaching staff limits the kind of support and adjustments available to children with disabilities in education. Besides, in view of the limited capacity of teachers that has been mentioned earlier in the chapter, it is unlikely that most teachers would be able to respond appropriately.

In as far as the duty to provide support for children with disabilities within the general education system is concerned, it has been shown that with the limited amounts of money available, and an underdeveloped support component in the general education system, children with disabilities are not receiving the necessary support to ensure an effective education in the system. In fact, the duty to provide support to children with disabilities in the education system is not expressly provided in the law. It has also been shown that special schools continue to form an integral part of the education system, and that a significant number of children with disabilities who attend school in fact attend special schools. Yet, since the adoption of an inclusive education agenda, efforts towards the expansion and development of special schools have significantly reduced.

CHAPTER 6

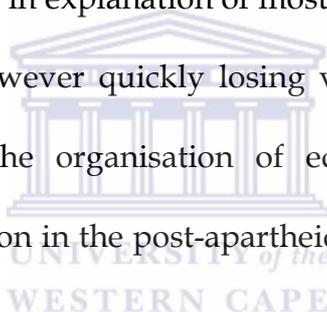
Primary Education of Children with Disabilities in South Africa:

An evaluation of the legal and policy framework

Part I

6.1 Introduction

South Africa's implementation of the right to education has endured criticism over the years. With respect to primary education, such criticism has centred on aspects such as the quality of, and equality in, education.¹ The legacy of the apartheid education policy that led to a highly unequal and disproportionately resourced education system is often cited in explanation of most of the shortfalls of the system.² The currency of history is however quickly losing value in view of the wealth of experience accumulated in the organisation of education and the increase in resources available for education in the post-apartheid period.³ There have also been



¹In recent times, the Department of Basic Education (DBE) has been taken to task both through the media and through the courts over its failure to ensure adequate basic education. The allegations against DBE include lack of schooling materials such as textbooks and failure to make adequate post provisioning in some of the provincial departments as in *Centre for Child Law & Others v The Minister of Basic Education & Others* [2012] 4 All SA 35 (ECG) and *Centre for Child Law and 7 others v Government of the Eastern Cape Province and others*, Eastern Cape High Court, Bisho, case no 504/10. The DBE has also been the subject of incessant media criticism over the quality of educational infrastructure and outcomes.

²B Bekink & M Bekink 'Children with disabilities and the right to education: a call for action' (2005) 16 *Stellenbosch Law Review* 125; S Woolman & M Bishop 'Education' in Woolman *et al*, (eds) *Constitutional law of South Africa* (2010) 57-4; S Woolman & B Fleisch *The constitution in the classroom: law and education in South Africa 1994-2008* (2009) 24, 109 & 123. Section 34(1) of the South Schools Act 84 of 1996 (SASA) instructs states to fund public schools on an equitable basis with the goal of redressing past inequalities in education.

³The Department of Women, Children and Persons with Disabilities reported that the amount of resources allocated to the education sector has grown over the years, and as of 2012, it constitutes more than 21% of government expenditure and 6% of GDP. See draft Department of Women, Children & Persons with Disabilities "The UN Convention on the Rights of the Child: South Africa's combined second, third and fourth periodic state party report to the Committee on the Rights of the

significant developments in international law and jurisprudence on the right to education that ought to influence the duty of the state to ensure the right to education. Indeed, South Africa has ratified a number of international and regional instruments relevant to the right to primary education, including the CRC, the ACRWC, the ACHPR, and the CRPD.⁴ It is also a signatory to the ICESCR.⁵

Both the rights to education and equality are constitutionally guaranteed in SA.⁶ Statutes and policies have also been adopted to ensure the implementation of these rights. The Constitution and statutory law to a great extent embrace the international legal and jurisprudential positions regarding the right to primary education. But there are continuous developments in the human rights sphere that often challenge and ultimately redefine the scope of state obligations for the realisation of the rights, and require a change of existing approaches to the implementation of those rights. One such development is the adoption of the CRPD and its ratification by South Africa.⁷

During the apartheid era, persons with disabilities in SA suffered dual discrimination in education, based on race and disability.⁸ As with most other sectors of the South

Child (reporting period: 1998 - June 2012)' para 275; S Pather 'Evidence on inclusion and support for learners with disabilities in mainstream schools in South Africa: off the policy radar?' (2011) 15 10 *International Journal of Inclusive Education* 1103.

⁴ South Africa ratified the CRC, ACRWC, ACHPR, & CRPD in 1995, 1996, 2000, and 2008 respectively.

⁵ South Africa signed the ICESCR in 1994.

⁶ Constitution, sections 29 and 9 respectively.

⁷As at the time of writing, a comprehensive disability specific law was yet to be adopted, but was mooted as a potential pathway to the domestication and implementation of the CRPD.

⁸H Combrinck 'The Hidden ones: children with disabilities in Africa and the right to education' in Julia Sloth-Nielsen (ed), *Children's rights in Africa* (2008) 314; T Boezaart, 'A constitutional perspective

African society, post-apartheid law and policy on education set out to redress the exclusion of various groups from education as a matter of priority.⁹ The term 'inclusive education' as used in the post-apartheid education policy therefore has, as part of its central agenda, the inclusion of a range of previously excluded groups into the education system, as opposed to the near exclusive disability dimension with which it is often associated in international jurisprudence and literature.¹⁰ In the years following the adoption of Education White Paper 6 (WP6)¹¹ however, the tide has seemingly changed to associate inclusive education in South Africa more with disabilities than any other grounds of exclusion.

6.2 Purpose and structure of the chapter

The core purpose of this thesis is to determine the significance of article 24(2) of the CRPD on state obligations for the right to primary education of children with disabilities. The interpretation of these principles has been undertaken in Chapter 4. In this chapter, how the principles are interpreted and incorporated in South African law and policies on education is considered. Unlike the case of Kenya in the preceding chapter, the special needs education law and policy in SA predate the

on the rights of children with disabilities in an educational context' (2012) 27 *South African Journal of Public Law* 465.

⁹Woolman & Fleisch (n 2 above) 14; Woolman & Bishop (n 2 above) '57-4 & 57-12 highlight the restitutive character of education in South Africa and the potential of this reality to influence the interpretation of section 29. See also SY Stofile & L Green 'Inclusive Education in South Africa' in P Engelbrecht & L Green (eds) *Responding to the challenges of inclusive education in Southern Africa* (2007) 53.

¹⁰P Engelbrecht 'The implementation of inclusive education in South Africa after ten years of democracy' (2006) XXI 3 *European Journal of Psychology of Education* 253 - 254, & 256.

¹¹Department of Education 'Education White Paper 6: Special needs education - building an inclusive education and training system' (2001) (hereinafter WP 6).

CRPD. Consequently, this chapter is not an assessment of how the CRPD has been domesticated. The chapter rather considers how domestication of the CRPD is likely to affect or interact with the current education policy and legal framework. A collation of the findings from the comparative study on education of children with disabilities in Kenya and South Africa is undertaken in the subsequent chapter.¹²

In line with comparative methodology, the structure used in the previous chapter is followed in this chapter. Hence, this introduction is followed by a brief highlight of factors historically relevant to education in South Africa so as to contextualise the discussion. Subsequently, a discussion of legal provisions affecting primary education in South Africa is undertaken, followed by an outline of the education policy framework. The relationship of both the legal and the policy frameworks to the principles of article 24(2) is discussed in latter part of the chapter.



6.3 Organization of education in South Africa

Education in SA is organised into 6 levels; early childhood education (ECD), General Education and Training (GET) comprising of the reception grade (R) to grade (9), Further Education and Training (FET) covering grades 10 to 12, adult basic education (ABE), and higher education.¹³ Schooling is compulsory for children between the

¹²I have made some of the arguments in this chapter in LN Murungi 'Educating Children with Disabilities in South Africa: mid-term review and critique of Education White Paper 6 on Special Needs Education' (2012) Report for the R2E Campaign, (forthcoming); and N Murungi, 'Case review: The duty to provide basic education for children with intellectual disabilities' (2011) No. 12, Vol. 3 *ESR Review*.

¹³Organization for Economic Co-operation and Development (hereinafter OECD), *Reviews of national policies for education: South Africa* (2008), available at

ages of 7 and 15 or grade 9 whichever comes first.¹⁴ In terms of Education White Paper on Education and Training (WP1), compulsory education comprises of two elements which are compulsory provision of material and human resources necessary to facilitate education, and compulsory attendance.¹⁵

The responsibility for implementation of the right to education is both cooperative and a concurrent between the national and provincial governments.¹⁶ Primary education is a responsibility of the Department of Basic Education (DBE).¹⁷ The duty for policy development, programme conceptualisation and monitoring is a responsibility of the national government, while a significant component of the financing of basic education is provided by the provincial governments.¹⁸

6.4 Preliminary clarifications

6.4.1 Definition of a child for the purpose of education

Though section 28 of the Constitution defines a child as any person under the age of 18 years, the section also specifies that the definition is only for purposes of the

<http://www.education.gov.za/LinkClick.aspx?fileticket=sKsxhYorWOk%3D&..> (Accessed 29 March 2013) 20.

¹⁴ SASA section 3.

¹⁵Department of Education, White Paper on Education and Training, Notice 196 of 1995 (hereinafter WP1) para 13.

¹⁶Department of Education, White Paper 2: the organisation, governance and funding of schools Government (1996) Gazette No. 16987 - Vol 169 - 14 February 1996 [GGN16987] (hereinafter WP2), para 6.7; Bekink & Bekink (n 2 above) 136; Boezaart (n 8 above) 458.

¹⁷The Department of Basic Education was established in 2009 following the split of the former Department of Education into the Department of Basic Education, and the Department of Higher Education and Training.

¹⁸M Seleokane 'The right to basic education' in E Coetzee & J Streak (eds) *Monitoring socioeconomic rights in South Africa: achievements and challenges* (2004) 241; WP1 (n 15 above) chapter 7.

provision.¹⁹ This implies that the age of a child can be defined otherwise in other provisions including section 29 of the Constitution. The Adult Basic Education Act²⁰ defines an adult as a person of 16 years or older.²¹ As indicated above, the SASA defines the upper limit of basic education as 15 years. If these three provisions are read together, they suggest that a child for the purpose of basic education refers to a person below the age of 16 years.²² The issue of the age of a child for purposes of basic education has not yet been considered by SA courts.

However, SA has ratified the CRC which defines a child as a person below the age of 18 years. Whereas most children complete the primary school phase of education while still below the age of 16 years, some children may still be in primary school beyond that age. In such circumstances, the child would, in terms of international law, be entitled to free primary education. Taking into account the effect of the definition on the distribution of educational resources i.e. the prioritisation of resources for children's basic education, it would be unjustified to arbitrarily exclude children between the ages of 16 and 17 from basic education purely on the basis of age.

¹⁹ Constitution, section 28(3).

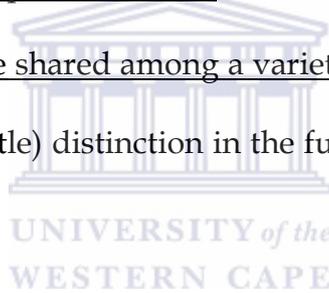
²⁰ Adult Basic Education and Training Act, 2000.

²¹ As above, section 1.

²²Seleoane (n 18 above) 228.

6.4.2 Free basic education

Basic education for a majority of students in South Africa is not free.²³ Instead, education is provided on a graduated scale of exemptions as directed in law and policy.²⁴ This is despite historic evidence of an intention to make such education free. For instance, one of the constitutional drafts placed before the negotiators by the South African Law Commission provided for free primary education.²⁵ This aspiration was reiterated in WP1 which provided that ‘the cost of the provision of schooling for all children to the GET level, at an acceptable level of quality, must be borne from public funds’²⁶ and ‘the cost of the provision of basic education programmes for all young people and adults who require them cannot be borne by public funds alone but must be shared among a variety of funding partners.’²⁷ In this way, WP1 clearly made a (subtle) distinction in the funding of basic education based on age.



Despite acknowledging and recommending school development contributions from parents as voluntary contributions to assist with improving facilities, educational resources, and other development activities,²⁸ WP1 also stated that,

²³Tomasevski, K “The state of the right to education worldwide: global report 2006; free or for fee?” (2006) 58; Woolman & Bishop (n 2 above) 57 - 4; D Roithmayr ‘Access, adequacy and equality: the constitutionality of school fee financing in public education’ (2003) 19 *South African Journal of Human Rights* 391. Refer to Chapter 1 part 1.7.3.1 on the use of the terms ‘basic’ and ‘primary’ education in the South African context.

²⁴SASA Section 34; WP2 (n 16 above) part 5.

²⁵Seleoane (n 18 above) 230; Roithmayr (n 23 above) 396. JC Claasen, ‘The Education System of South Africa’ in OJ Van Schalkwyk *Modern education systems* (1996) 472 also argues that the political will to introduce free and compulsory primary education was there at the onset of democracy.

²⁶WP 1 (n 15 above) chapter 7, para 17.

²⁷WP 1 (n 15 above) chapter 7.

²⁸As above chapter 13.

'The government is committed to the goal of providing access to general education for all children from a reception year up to grade 9 (standard seven) funded by the state at an acceptable level of quality, and to achieve this goal in the shortest time possible,'²⁹

and that,

'The Ministry of Education considers the provision of General Education of acceptable quality in the compulsory phase as a public responsibility, to be funded by the state at an affordable and sustainable level.'³⁰

Furthermore, the SASA provides that a child should not be denied access to education solely on the basis that his or her parents are unable to pay the prescribed school fees.³¹

There is an apparent conflict between the express intention as stipulated in the law and policy and current practice on free primary education. It is reported that despite the legal provisions such as SASA above, and in the absence of a constitutional right to free education, children do in fact get sent home for unpaid fees and are subjected to embarrassment and humiliation.³² In 2005, the government declared the bottom

²⁹ WP 1 (n 15 above), chapter 7.

³⁰ WP 1 (n 15 above) chapter 13.

³¹ SASA section 5(3).

³²Seleoane (n 18 above) 231; Roithmayr (n 23 above) 387.

two quintiles of schools as 'no fee' schools.³³ These schools constitute only 40% of schools nationally and are unequally distributed across the provinces.³⁴

The fee debate is a highly contentious and complex issue in SA with vehement arguments on both sides which cannot be adequately engaged in this work.³⁵ But it is relevant to the discussion in the chapter because the education of children with disabilities builds upon international standards on the right to education, including the duty to provide universal free primary education, as well as the horizontal notion of equality that requires all children to be treated equally, disability notwithstanding. The CRPD presumes that state parties are providing free primary education in accordance with the existing international standards.³⁶

In summary, the arguments advanced in support of the abolition of fees regard fees as a barrier to access and to quality education, and hence a violation of the Constitutional duty to ensure the right to basic education and to equality.³⁷ The justifications for fees on the other hand include: the need for cross-subsidization of education between rich and poor families and hence supplementation of state

³³F Veriava 'The amended legal framework for school fees and school funding: A boon or a barrier?' (2007) 23 180 *South African Journal of Human Rights* 186.

³⁴As of 2011, the DBE reported that these schools cover the poorest 60% of learners in the country. See DBE 'South African Country Report: Progress on the Implementation of the Regional Education and Training Plan (integrating the Second Decade of Education in Africa and Protocol on Education and Training) SADC and COMEDAF V' May 2011 19. There are apparently conflicting reports on whether the number is actually 60% of learners or 60% of schools. See for instance Equal Education 'Unequal schools unequal outcomes' Youth Group Fact Sheet 1 (2011) which refers to 60% as the number of schools falling within the no-fee category.

³⁵Woolman & Bishop (n 2 above) 57 - 24.

³⁶See discussion in Chapter 4 on the interpretation of article 24(2) (a).

³⁷Roithmayr (n 23 above) 387; F Veriava & F Coomans 'The right to education' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 70.

funding by wealthier parents (which argument is also advanced to redress economic inequalities), the potential of the fee charging regime to facilitate democracy in education through empowering community and parental decision making (where control or management of schools is tied to the funding), the argument that in fact fees are not the main barrier to access and hence that elimination of fees would not guarantee expansion of access, and lastly the argument that the constitutional drafters intentionally avoided making education 'free' in view of the domestic realities.³⁸

Indeed, the SASA embraces the latter position by providing that state funding of public schools is done 'on an equitable basis', as opposed to *equal*, in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.³⁹ It is also argued that fees notwithstanding, the rates of enrolment of eligible learners in South Africa compare favourably above other developing countries and therefore that in fact fees are not affecting access.⁴⁰

Woolman & Fleisch argue that the lack of limitation in the right to basic education relates to the substance as opposed to cost of education.⁴¹ Nevertheless, historical

³⁸See Woolman & Bishop (n 2 above) 57 - 25; Woolman & Fleisch (n 2 above) 213 - 240; Fleisch & Woolman, 'On the constitutionality of school fees; a reply to Roithmayr' (2004) 22 1 *Perspectives in education*. Woolman & Bishop (above) 57-25 & 35 specifically argue that the wilful departure of the constitutional drafters from a widely used international formulation of the right ought to be respected, and that if the drafters had intended for basic education to be both free and equal, that would have been reflected in the text.

³⁹SASA, section 34.

⁴⁰As of 2009, the enrolment rate for learners between the ages of 7 and 15 was 98.2% while that of learners between the ages of 16 - 18 was 82.9%.

⁴¹Woolman & Fleisch's thesis is that section 29 does not in fact call for 'free' education for all, but that it inevitably demands an *adequate basic* education. They argue that the absence of an internal limitation is rather recognition of historical circumstances as opposed to a hard and fast stipulation of how

factors and the economic realities of a majority of South Africans support an alternative argument in as far the cost of education would continue to deny historically disadvantaged groups access to quality education.

The anti-abolition argument acknowledges the dismal quality of education across the board especially for students in poor schools, yet it does not confront the direct link between poverty and poor education. The commentators arguing in support of fees also concede that the current policy regime does in fact prop or reproduce apartheid-style education patterns which favour affluent (former) white areas over poor (former) black areas in the townships.⁴² This latter admission undermines the cross-subsidization for equality claim.⁴³ The potential of the current fee-exemption framework to affront the dignity of applicants is duly acknowledged.⁴⁴ Also, the fact that 'fees' in themselves were not the main barrier to access does not take into account the 'opportunity' cost of education for poor families, especially in light of the

resources must be directed. See Woolman & Fleisch (n 2 above) 125. The same authors in Fleisch & Woolman (n 38 above) 115 argue that the absence of an internal limitation on the provision should be viewed through the lens of apartheid era funding inequalities, and in that sense serve as a reminder that the state can no longer use education to reproduce patterns of inequality.

⁴²R Malherbe 'Education rights' in T Boezaart (ed) *Child Law in South Africa* (2009) 407; Roithmayr (n 23 above) 397.

⁴³Albie Sachs, J argues that the interrelationship between rights in the Constitution means that measures taken to expand access to rights must also ensure that no one's dignity is compromised. See A Sachs 'The judicial enforcement of socioeconomic rights: the Grootboom case' in P Jones & K Stokke *Democratising development: the politics of socio-economic rights in South Africa* (2005) 147. It is argued that the exemption regime would 'offset the inevitable re-inscription of class that would flow from pro-fees policies.' This theory is however continually disapproved by the continued exclusion of children from poor households from school, which in view of South Africa's past tends to have a racial dimension. See Woolman & Fleisch (n 2 above) 215.

⁴⁴South Africa Human Rights Commission, 'The right to education; 5th economic and social report' series 21 June 2004 24; Seleane (n 18 above) 257; Veriava & Coomans (n 37 above) 70.

enforceable duty of compulsion incumbent on all parents.⁴⁵ The scope of costs included in the definition of 'fees' is central to the determination of whether or not school fees are considered a barrier, yet this definition is not standard.

The fact that children are in school is not conclusive on whether their families are unduly struggling to keep them in school.⁴⁶ The state has the overall responsibility for funding all public schools on an equitable basis so as to ensure the proper exercise of the right to education for all learners and to redress past inequalities in education provision.⁴⁷ In addition, even though the link between fees and access to basic education under section 29 of the Constitution is debunked, the duty to provide free and compulsory primary education in terms of international obligations still remains unfulfilled in South Africa.⁴⁸

While the arguments in support of the fee-paying regime are fairly grounded, and while the case for a total abolition of fees for all quintiles of schools has been vehemently discredited, some gaps relevant to the present study require attention.

⁴⁵Several factors could account for the disparity between the enrolment rates in the compulsory schooling phase and the subsequent two years of school, and the effect of the end of the duty to compel attendance could be one of these. Children's Rights Institute, *South African child gauge* (2012) 96. This in-turn suggests that where payment of fees is not compulsory, indigent families would readily apply the amounts to other needs at the expense of the education of the children. The difference between enrolment and attendance rates is unfortunately often overlooked, and non-attendance of enrolled students is not reflected in the out of school children statistics.

⁴⁶Roithmayr (n 23 above) 387. Roithmayr argues that income based exemptions do not accurately measure poverty or the ability or willingness to pay.

⁴⁷SASA section 34; E Bray 'Law, education & the learner' in T Boezaart (n 42 above) 467.

⁴⁸In terms of section 39(1) of the Constitution there is a duty to refer to international law in interpreting the Bill of Rights. This provision has been interpreted to require reference to international human rights law in general, including instruments that SA has not ratified. See J Dugard 'The role of international law in interpreting the bill of rights' (1994) 101 *South Africa Journal of Human Rights* 208. The interpretation was endorsed by the Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC) para 9; Seleane (n 18 above) 231.

First, these arguments regard education as a social service with economically beneficial potential and hence needing economically sound responses, as opposed to a right creating an affirmative claim against the government. Secondly, there is, in both international law and the SA Constitution, a fairly differentiated nature of obligations of the state in respect of children's right to education.⁴⁹ There is further need to interpret children's right to basic education in light of section 28 of the Constitution, particularly the best interests of the child principle, and international instruments to which South Africa is party. The central question of such an approach would be what fees policy choice best furthers the interests of the child. In addition, the arguments advanced in both cases interpret 'fees' in the limited sense of direct charges such as registration, tuition or examination fees.⁵⁰ However, the term 'fees' can also refer to the indirect cost of education that parents are obliged to incur such as the purchase of uniforms, transport and meals for learners to enable their attendance to school.⁵¹

A final observation on fees that is particularly important to this chapter is that the views of both the proponents and opponents converge on the fact that children with disabilities are a significant proportion of those left out of education, and that

⁴⁹See the discussion in Chapter 3 of this thesis on the nature of obligations for the right to primary education in international law. See also part 6.4.1 below on the interpretation of section 28 and 29 of the Constitution in relation to children's rights.

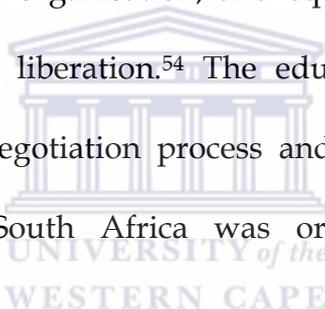
⁵⁰Section 39 of the SASA as well as the exemption criteria set out in the National Norms and Standards indicates that fees are the direct payments to the schools by parents to finance both capital and other expenditure of the school.

⁵¹ Refer to Chapter 1 of this thesis on the meaning of 'free' primary education.

disability in itself is a basis for exclusion.⁵² This conclusion both confirms the nexus between disability and poverty, and underscores the need for targeted measures to ensure education of children with disabilities. It suggests that the current approach to the funding of primary education for children with disabilities is not sufficiently responsive to their needs or circumstances.

6.3 Historic backdrop to education in South Africa

The history of education in South Africa is intricately intertwined with the history of the country, particularly the exclusionary policies of the pre-democracy era.⁵³ The general quality, content, aims, organisation, and equality in education were hotly contested in the struggle for liberation.⁵⁴ The education liberation agenda thus informed the constitutional negotiation process and continues to date.⁵⁵ In brief, before 1994, education in South Africa was organised in separate systems



⁵²P Proudlock, 'Children's socio-economic rights' in Boezaart (n 42 above) 306; Fleisch & Woolman (n 38 above) 113; Woolman & Fleisch (n 2 above) 139 & 220. The latter authors discount the effect of school fees on access in general, but subsequently acknowledge that a significant percentage of those left out of school are children with disabilities.

⁵³Education was a central theme of the anti-apartheid struggle as both a tool of separation and a subject of liberation for the oppressed. The new government had the responsibility of both rebuilding the system and addressing past inequalities. See Claasen (n 25 above) 453 & 461; OECD (n 13 above) 19; Veriava & Coomans (n 37 above) 60. Woolman & Bishop (n 2 above 57-4 highlight how the prevailing political circumstances at the dawn of democracy influenced the choice of SA's approach to educational resourcing and administration. It is imperative to highlight that whereas the skewed education policy of the apartheid era and its legacy of inequality in education are uncontested, the role that history ought to play in shaping the structural and financing policy options for education in the transitional and post-apartheid period is not generally agreed amongst education commentators. This accounts for some diametrically opposed arguments relative to redress and re-distributive measures in education as is apparent in the fee discussion above.

⁵⁴See Claasen (n 25 above) 472.

⁵⁵Boezaart (n 8 above) 464.

distinguished on the basis of race. Each system had a distinctive management authority, organisational structure, and set of support services.⁵⁶

The inequalities apparent in mainstream education during apartheid were replicated in the education of persons with disabilities.⁵⁷ But the latter was more adversely affected because apartheid policy segregated learners both along racial and disability divides.⁵⁸ Consequently, children with disabilities were generally educated in special schools. However, schools that served white learners with disabilities were relatively well-resourced while the few that catered for learners with disabilities from other racial groups were systemically under-resourced.⁵⁹ Furthermore, only learners with organic medical disability could access support programmes in special schools.⁶⁰ Children who experienced other kinds of barriers to education such as socioeconomic deprivation, psychosocial problems or who were affected by HIV/Aids were technically excluded from either system.

⁵⁶Claasen (n 25 above) 456.

⁵⁷Stofile & Green (n 9 above) 53; Department of Education 'Quality education for all: overcoming barriers to learning and development' NCSNET & NCESS Report (1997) 21.

⁵⁸WP1 (n 15 above) chapter 5; Bekink & Bekink (n 2 above) 138; L Lomofsky & S Lazarus, 'South Africa: first steps in the development of an inclusive education system' (2001) Vol 31 No 3 *Cambridge Journal of Education* (2001) 303; L Wakefield & LN Murungi, 'Domesticating international standards of education for children with disabilities: a case study of Kenya and South Africa' in I Grobbelaar-du Plessis & T Van Reenen (eds) *Aspects of disability law in Africa* (2011) PULP, Pretoria, 144; DoE NCSNET & NCESS Report (n 57 above) 23. The NCSNET & NCESS noted that the education of children with disabilities (or special education at the time) was marginal to the education system. See NCSNET & NCESS Report (n 57 above) 1.

⁵⁹WP 6 (n 11 above) 9; Pather (n 3 above) 1103.

⁶⁰WP 6 (n 11 above) 9; P Engelbrecht (n 9 above) 256 argues that the 'special needs' approach applied at the time, and which was anchored in the medical model, resulted in a 'deficit' understanding of special education, and therefore equated 'special needs' to disability. Naturally therefore, it was children with disabilities who ended up in the special schools.

In 1996, a commission and committee were established to 'investigate and make recommendations on all aspects of 'special needs' and support services in education and training in South Africa.'⁶¹ These were the National Commission on Special Needs in Education and Training (NCSNET) and the National Committee for Education Support Services (NCESS).⁶² The NCSNET/NCESS report was phrased in human rights terms and departed radically from the medical model of disabilities.⁶³ This report became the basis for a policy of integration of learners with disabilities (special education needs) into the regular education system. A Green Paper was developed in response to the report of the NCSNET/NCESS,⁶⁴ ultimately culminating in the Education White Paper 6 on Special Needs Education (WP 6) discussed further below.



The findings of the Committee and Commission are very significant to the understanding of the subsequent policy direction regarding the education of children with disabilities in South Africa. Of utmost importance is the fact that the NCSNET/NCESS introduced a shift in the conceptualisation of education needs from

⁶¹ NCSNET & NCESS Report (n 57 above) 2.

⁶²The NCSNET and NCESS were appointed by the president in 1996 and delivered their joint report in 1997. Though the NCSNET & NCESS started off separately, they were subsequently merged upon recognition of the fact that the areas of 'special education needs' and 'education support services' are so interlinked that it was necessary to have the mandate of the both teams jointly executed. See DOE NCSNET & NCESS Report (n 57 above) 3. The report is available at <http://www.education.gov.za/LinkClick.aspx?fileticket=BNWeQZpNO14=&tabid=97&mid=400> (accessed 5 March 2013).

⁶³Engelbrecht (n 9 above) 256.

⁶⁴DOE *Green Paper on Emerging Policy on Inclusive Education* (1999).

a 'special needs' to a 'barriers to learning' paradigm.⁶⁵ It departed from the pre-existing classification of learners as either needing less support (therefore able to learn in mainstream schools) or as needing 'special' support (and hence educated in special schools).⁶⁶ It was argued that the foregoing approach failed to take into account the full range of barriers to learning that were underlying the exclusion of certain groups of learners, such as socioeconomic circumstances, social attitudes, an inflexible curriculum, language and physical factors.⁶⁷ The shift in paradigm was premised on the reasoning that focusing on these barriers as opposed to the 'deficit' in learners would facilitate an understanding of the causes of exclusion and the appropriate responses in order to open access to all excluded children.⁶⁸ The NCSNET/NCESS therefore envisaged a single education and training system with a range of learning contexts, offering a varied curriculum and support interventions to address the diverse needs of all learners. In such a system, special schools would provide a supporting role to the centres of learning.⁶⁹

The NCSNET/NCESS report also noted the inappropriateness and impracticality of extending curative individualised and specialist interventions to all learners as had

⁶⁵ NCSNET & NCESS report (n 57 above) 11 – 51.

⁶⁶ As above, 11.

⁶⁷ As above.

⁶⁸ As above, 12; S Pather 'Evidence on inclusion and support for learners with disabilities in mainstream schools in South Africa: off the policy radar?' (2011) 15 10 *International Journal of Inclusive Education* 1104 argues that the shift initiated by the NCSNET/NCESS report understood 'special needs' as a consequence of various systemic barriers to learning and participation experienced by learners, not only those with disability and impairment.

⁶⁹ NCSNET/NCESS Report (n 57 above) ii & 56.

been made available to a very limited group of students during apartheid.⁷⁰ In this light, an incremental approach to changing the system was suggested. To support the change of paradigm, this approach was to go beyond physical infrastructure, to include public education and awareness, and re-orientation of education and support service personnel.⁷¹

Arguably, as a result of the history of exclusion along social lines and the resulting class differences, equality in education has disproportionately concentrated on race and class inclusion to the further exclusion of other marginalized groups including persons with disabilities.⁷²

Part II

6.6 The Legal Framework on Primary Education in South Africa

The legal framework on the right to education in South Africa comprises of the Constitution, and statutory law. The Schools Act⁷³ and the National Education Policy Act⁷⁴ are the specialised instruments in this regard. Since the current study focuses on the rights of children, the relevant provisions of the Children's Act⁷⁵ are also

⁷⁰Lomofsky & Lazarus (n 58 above) 310. Arguably, the quality of education support services available to white children with disabilities in South Africa during apartheid was far better than those available even in some developed countries. But these children represented a very small percentage of the general population. The cost of extending the same services to a larger group would be very high. In any case, the approach was starkly opposed to the equity and disability discourse prevailing at the time which was inclined to integration of all learners into one education system.

⁷¹NCSNET & NCESS Report (n 57 above) 140.

⁷²Lomofsky & Lazarus (n 58 above) 304.

⁷³SASA, 84 of 1996.

⁷⁴The National Education Policy Act 27 of 1996.

⁷⁵The Children's Act No 38 of 2005.

considered. These laws are complemented by a number of policy papers that are discussed further below.

6.6.1 The Constitution

Article 29 of the South African Constitution provides that everyone has the right to ‘a basic education, including adult basic education.’⁷⁶ The right to basic education as set out in this provision is unqualified to resource availability or progressive realisation. It is a direct and immediate right.⁷⁷ It is argued that for this reason, the right to basic education under section 29 is of higher priority relative to other rights.⁷⁸ Section 29 encompasses both positive and negative dimensions of the right.⁷⁹ The positive dimension requires that basic education is not subject to the reasonableness standard, is not dependent on the availability of resources, and is a source of a direct, immediate and specific entitlement.⁸⁰ The negative dimension entails ensuring that people are not prevented from accessing education.⁸¹ This means that the state must not only make available the necessary infrastructure for education, it must also ensure that educational facilities are open to everyone on the basis of non-

⁷⁶ Constitution section 29(1)(a).

⁷⁷Woolman & Bishop (n 2 above) 57-11; Seleoane (n 18 above) 224 – 225; F Viljoen *International human rights law in Africa* (2012) 549.

⁷⁸Roithmayr (n 23 above) 421 – 422; Veriava & Coomans (n 37 above) 62; Boezaart (n 8 above) 456.

⁷⁹Bekink & Bekink (n 2 above) 135.

⁸⁰Seleoane (n 18 above) 224; Woolman & Bishop (n 2 above) 57-11; C McConnachie & C McConnachie ‘Concretising the right to basic education’ (2012) 129 *South Africa Law Journal* 585. The argument that the right to basic education embodies an immediate duty does not make the right an absolute one. Rather, it means that the onus is on the state to show that the means are not available, and that the measures taken in that regard are reasonable in the circumstances.

⁸¹Woolman & Bishop (n 2 above) 57-8.

discrimination.⁸² Section 29 does not recognise a general freedom of choice in education. Rather, it recognises choice between public and private schools, and choice of a language of instruction.⁸³ This is significant to the discussion on choice between special and general education systems envisaged under the CRPD.

It is noteworthy that while the meaning of the content of the right to education has not been determined by South African courts, a body of jurisprudence on some aspects of the right is slowly emerging. These cases include the *Western Cape Forum for Intellectual Disability* case,⁸⁴ the Eastern Cape *mud schools* and *post-provisioning* cases,⁸⁵ and the *Juma Masjid primary school* case.⁸⁶ The *Musjid* case was the first time the Constitutional Court considered the content of the right to education alongside the principle of the best interests of the child.⁸⁷ The Court acknowledged the significance of the right to basic education in light of the history of apartheid⁸⁸ and adopted the aims of education in article 29 of the CRC in the interpretation of section

⁸²Bekink & Bekink (n 2 above) 135. In *Re School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 537 para 9 the Court stated that the basic education provision creates a positive right that basic education be provided, and not merely a negative right to not be prevented from accessing education.

⁸³Bekink & Bekink (n 2 above) 133. Veriava & Coomans (n 37 above) 81 argue that section 29(3) implies (as opposed to expressly establishing) a right to attend a school of one's choice. However, while it is logical to infer a right to choose to attend a public or private school from the right to establish and maintain private schools, the nexus between section 29(3) and choice between special and regular schools in particular is more farfetched.

⁸⁴*Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* (2011 5 SA 87 (WCC)) 2010 ZAWCHC 544; 18678/2007 (11 November 2010).

⁸⁵*Centre for Child Law and Others v Government of the Eastern Cape Province and Others* case no 504/10 (unreported); and *Centre for Child Law and Others v Minister of Basic Education and Others* (1749/2012) [2012] ZAECGHC 60; 2012 4 All SA 35 (ECG); 2013 3 SA 183 (ECG) (3 July 2012) respectively.

⁸⁶*Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* (CCT 29/10) 2011 ZACC 13; 2011 8 BCLR 761 (CC) (11 April 2011).

⁸⁷J Sloth-Nielsen & H Kruuse 'A maturing manifesto: the constitutionality of children's rights in South African Jurisprudence 2007 – 2012 (2013) *International Journal of Children's Rights* (forthcoming) 12.

⁸⁸*Musjid* case (n 86 above) para 42.

29 of the Constitution.⁸⁹ This is important as an entry point for international jurisprudence on the aims of education.

As has been indicated in chapter 3 of this work, the aims of education define the content and hence quality and acceptability of education. Following the lead established in the *Musjid* case, the aim of fully developing the personality and talents of children with disabilities as under article 29(1) of the CRC should therefore be the primary agenda of section 29 of the Constitution.⁹⁰ The Court also highlighted ‘access to a school’ as a necessity for achieving the right to basic education.⁹¹ This is significant in light of the state of educational infrastructure highlighted in this chapter, particularly the inadequacy of appropriately equipped schools to facilitate access by children with disabilities.

In the *Western Cape Forum* case, the Western Cape High Court addressed the rights of children with severe and profound intellectual disabilities to basic education. The Court stated that the state has a duty to provide equally for the education of all children, including those with severe and profound disabilities.⁹² This reasoning is significant because it accords with understanding that education is broader than classroom education with examinable outcomes. Rather, education includes the development of a child’s potential, personality, talents and creativity,⁹³ which may

⁸⁹*Musjid* case (n 86 above) para 40.

⁹⁰In Chapter 3, it was established that whereas there are various aims of education as set out in the various international instruments on the right to education, the aim of developing the potential of the child to the maximum potential is the most fundamental of these. See Chapter 3 part 3.5.3.

⁹¹ *Musjid* case (n 86 above) para 43.

⁹² *Western Cape Forum* case (n 84 above) para 52.

⁹³ CRPD article 24(1) (a) & (b).

not be academically assessable. The Court also determined that the national Strategy on Identification, Assessment and Support (SIAS) that is applied in the implementation of WP6 had the effect of excluding children with severe and profound disabilities from educational provision, and that such exclusion was discriminatory and unconstitutional.⁹⁴

From the earlier socio-economic rights jurisprudence of the Constitutional Court, certain other interpretations may be anticipated. For instance, the Constitutional Court has maintained a preference for the reasonableness standard in the interpretation of the Bill of Rights as opposed to the minimum core approach.⁹⁵ It has also been argued in line with this reasoning that education ought to be interpreted in accordance with what the state can afford.⁹⁶ It can therefore be anticipated that though it is generally accepted that children's right to basic education is an unqualified right, courts are less likely to interpret an absolute duty to realise it immediately.

⁹⁴*Western Cape Forum* case (n 84 above) para 19 – 24; C Ngwena & L Pretorius, 'Substantive equality for disabled learners in state provision of basic education: a commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*' (2012) 28 *South Africa Journal of Human Rights* 88 – 89 argue that the National Screening, Identification and Support Strategy (SIAS) has been used as a tool of exclusion as opposed to a tool for identification of individual specialized support needs.

⁹⁵*Minister of Health v Treatment Action Campaign* (No. 2) 2002 (5) SA 721 (CC), para 34; *SA v Grootboom*, 2001 (1) SA 47 (CC) para 32; Roithmayr (n 23 above) 403; McConnachie & McConnachie (n 80 above) 564. Refer to the discussion of these two approaches and their application to the right to education in Chapter 3 part 3.2.

⁹⁶Bekink & Bekink (n 2 above) 134.

6.6.1.1 The role of dignity interpreting the right to education under the Constitution

Along with the reasonableness and minimum core approaches that have dominated the discussion of judicial decisions on socioeconomic rights, there has also been a consistent use of the value of dignity in interpretation of the Bill of Rights which could be insightful to the interpretation of the right to education for children with disabilities.⁹⁷ Indeed, this trend is also seen in the context of children's rights. It is argued that there is

'a marked tendency to draw on the established jurisprudence of the Constitutional Court in isolating dignity (especially) as the cornerstone of the value-driven philosophical foundations of constitutionalism. The recent jurisprudence of the South Africa courts ...calls into question the absence of the right to dignity as a pillar of the CRC.'⁹⁸

The *Grootboom* case is one of the socioeconomic cases in which the Constitutional Court applied the value of dignity in its determination. It argued that an assessment of state actions was only constitutionally meaningful if the value of human dignity was taken into account in such an assessment.⁹⁹ It is argued that in the *Treatment Action Campaign* case, despite not expressly referring to dignity, the decision in fact

⁹⁷S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal of Human Rights* 3. Liebenberg identifies a number of the decisions predating the more common socioeconomic rights cases, in which the Constitutional Court relied on the value of human dignity to interpret various rights under the Constitution.

⁹⁸Sloth-Nielsen & Kruuse (n 87 above) 18. The authors consider how a number of decisions on children's matters have relied on the value of dignity in determination of the matters.

⁹⁹ *Grootboom* case paras 44 & 83.

furthered a relational concept of dignity to the effect that to deny the poor women and children access to cheap and potentially life-saving antiretroviral treatment was tantamount to disrespecting their value as human beings.¹⁰⁰ In the subsequent decision in the *Khosa* case,¹⁰¹ the Court stated that,

‘sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of a community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.’¹⁰²

While the foregoing statement was made in relation to totally different matters from those discussed in this thesis, the statement clearly represents what has been termed as relational dimension of the value of dignity.¹⁰³ The relational dimension of human dignity is expressed in the interconnectedness of human beings with the effect that the human senses of self-worth, self-development, and wellbeing are dependent on the value that others attach to it.¹⁰⁴ This is important in so far as disability is in itself a relational concept. The measures that the state takes to implement the rights of persons with disabilities relative to the other members of society have a definitive effect on the dignity of persons with disabilities.

¹⁰⁰Liebenberg (n 97 above) 13.

¹⁰¹*Khosa v Minister for Social Development* (2004) SA 505 (CC).

¹⁰²*Khosa* case (above) para 74.

¹⁰³ Liebenberg (n 97 above) 12.

¹⁰⁴ Liebenberg (n 97 above) 11.

In the context of children's rights (especially education), a number of cases are instructive. In *Centre for Child Law v Minister for Basic Education*,¹⁰⁵ the court argued that the prevailing circumstances at a school hostel run by the respondents compromised the dignity of the children.¹⁰⁶ In the *Western Cape Forum* case the Western Cape High Court found the rights of the children to dignity had been violated since they had been

'marginalised and ignored and in effect stigmatised. The failure to provide children with education places them at the risk of neglect for it means that they often have to be educated by parents who do not have the skills to do so and are already under strain. The inability of the children to develop their own potential, however limited that may be, is a form of degradation.'¹⁰⁷

Ultimately the Court found that the respondents' failure to ensure the right to education for children with severe and profound disabilities was a violation of the right to human dignity.¹⁰⁸ Subsequently in the *Musjid* case, the Constitutional Court considered the significance of the right to basic education in light of the legacy of apartheid.¹⁰⁹ In this way the court contextualised basic education in South Africa as a tool for self-emancipation through the development of children's abilities to the fullest potential, and arguably as an opportunity to redeem the equal dignity of all children.

¹⁰⁵ *Center for Child Law and others v MEC for Education and others* 2008 1 SA 223 TDP.

¹⁰⁶ *Center for Child Law v MEC* (n 105 above) para 21.

¹⁰⁷ *Western Cape Forum* case (n 84 above) para 46.

¹⁰⁸ As above para 52(1).

¹⁰⁹ *Musjid* case (n 86 above) 24.

The dignity approach and the way it has been applied in the interpretation of children's rights in SA rights is important because it accords with a view of the role of dignity in the interpretation of rights at the international level. As was discussed in Chapter 3, respect for the inherent dignity of persons with disabilities is one of the general principles of the CRPD.¹¹⁰ That means that it ought to inform the interpretation of all rights under the CRPD including article 24(2). It is therefore arguable that assessing SA's approach to the implementation of the right to primary education (particularly in as far as it applies to children with disabilities) on the basis of the potential of such choice to protect or undermine the dignity of the child is an alternative to the traditional reasonableness and minimum core approaches which have preoccupied contemporary socioeconomic rights discourse in SA.

Section 28 of the Constitution specially provides for the rights of children. The section establishes the principle of the best interests of the child as of paramount importance in every matter concerning the child.¹¹¹ The section does not address the right to education. However, the principle of the best interests set out therein is a cross-cutting one and applies to all matters affecting children, including education.¹¹²

¹¹⁰ Chapter 3 part 3.6. As evident in the discussions in that chapter, the role of 'dignity' is an enduring theme in the interpretation of and implementation of international human rights obligations.

¹¹¹ Constitution section 28(2).

¹¹² A Friedman et al 'Children's rights' in S Woolman et al (eds) *Constitutional law of South Africa* (2010) 47 - 40 & 41 argue that the judgment of the Constitutional Court in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others*, 2003 3 SA 389 (W), 2003 1 All SA 449 (W) is to the effect that 'where children's best interests enter the analysis of a non-section 28 right, they do so only at the limitation stage. However if a non-section 28 right is a right of a child [such as the right to education], then the best interests criteria are inseparable from the determination of whether the challenged law or action violates the non-section 28 right.'; Boezaart (n 8 above) 462 argues that section 28(2) creates a right independent of those in section 28(1) and is hence applicable to all other rights as they affect children. Also, in *Laerskool Middleburg v Departmentshoof, Mpumalanga*, 2003 4 SA

Indeed, the best interests of the child principle in section 28(2) is deemed a self-standing right of children.¹¹³

Other provisions of the Constitution that have a bearing on the education of children with disabilities under the South African Constitution include sections 2, 9, and 36. Section 2 establishes the supremacy of the Constitution, thereby setting the Constitution as the ultimate benchmark in determining the appropriateness of a law or policy. In terms of section 9, everyone is equal before the law, and in the enjoyment of all rights and freedoms. Neither the state nor private persons can discriminate, whether directly or indirectly, against anyone on any of the prohibited grounds including disability in the enjoyment of the rights.¹¹⁴ The Constitution also calls for delivery of services impartially, fairly, equitably and without bias. It further calls for public administration to respond to the needs of the people.¹¹⁵ These provisions together lay a solid foundation for the provision of education to children with disabilities on a basis of equality.

160 (T), para 61 the court, albeit impliedly, relied on the principle of the best interests of the child to resolve conflicting interests between the parties. See also JP Visser, 'Some ideas on the "best interests of a child" principle in the context of public schooling' (2007) 70 *Journal for Contemporary Roman-Dutch Law* 460 who argues that it would be natural for the interests of the child to be covered by the 'all matters concerning the child' phrase of the section 28(2). See also *Van Der Burg and Another v National Director of Public Prosecutions (Centre for Child Law as Amicus Curiae)*, 2012 2 SACR 331 (CC) on the duty to consider the best interests of children in asset forfeiture cases. Sloth-Nielsen & Kruse (n 87 above) 12 point out that recent jurisprudence on education in South Africa has considered how the best interests as a right ought to be applied in the education sphere, including in procurement and evictions. For instance, the court in the *Musjid* case outlined the positive obligations of the state in ensuring that the best interests of the child are met.

¹¹³Visser (n 112 above) 460; Friedman et al (n 112 above) 47 - 43; T Davel 'General principles' in CJ Davel & A Skelton (eds) *Commentary on the Children's Act* (2007) 2-10.

¹¹⁴Constitution section 8(2).

¹¹⁵Constitution section 195(1) (d) & (e).

Section 36 of the Constitution addresses the limitation of rights, and provides that the rights in the Bill of Rights may only be limited to the extent that such a limitation is reasonable and justifiable in an open and democratic society based on human rights, dignity, equality and freedom, and taking into account the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and less restrictive means to achieve the purpose.

On the application of international law, the SA Constitution provides that in the interpretation of any legislation, preference must be given to any reasonable interpretation that is consistent with international law over alternative interpretations that are inconsistent with international law.¹¹⁶ Any forum interpreting of the Bill of Rights is obliged to consider international law on the same issue,¹¹⁷ and has discretion to consider foreign law.¹¹⁸ The recognition of international law has enabled the application of international standards of rights including the right to education.¹¹⁹

6.6.2 The Children's Act, 38 of 2005

The Act does not provide for children's right to education. It does however establish general principles on dealing with children as well as provisions on children with

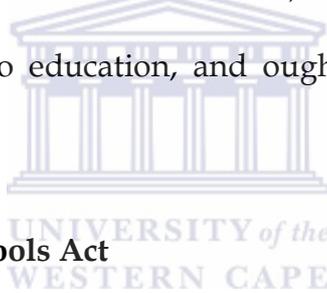
¹¹⁶Constitution section 233.

¹¹⁷Constitution section 39(1) (b). The Constitutional Court in *S v Makwanyane* 1995 (6) BCLR 656 (CC) para 35 reiterated the mandate of the court to consider international law in making its decision.

¹¹⁸Constitution section 39(1) (c). See I Currie & J De Waal *The bill of rights handbook* (2005) 160.

¹¹⁹Bekink & Bekink (n 2 above) 126.

disabilities that are relevant to the present study.¹²⁰ It is one of the objectives of the Act to recognise any special needs that children with disabilities might have.¹²¹ Section 9 thereof reiterates the constitutional principle that in all matters concerning the child, their best interests shall be paramount. The Act further provides that in any matter concerning a child with disability, due consideration must be given to, *inter alia*, making it possible for the child to participate in social, cultural, religious and educational activities while taking into account any special needs that the child might have in that regard, and providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.¹²² In view of the empowerment function of education, these provisions anchor the right of children with disabilities to education, and ought to be reflected in education policy.¹²³



6.6.3 The South African Schools Act

The Act directs ordinary public schools to admit learners with special needs whenever it is practicable.¹²⁴ This actively requires schools to make effort to ensure that they are accessible. It also forms the legal basis for inclusive education, particularly the duty to reasonably accommodate a child with disabilities.¹²⁵ A

¹²⁰In terms of section 8 thereof, the Children's Act supplements the rights of children as set out in the Constitutional Bill of Rights.

¹²¹Children's Act, Section 2(h). T Boezaart, 'The Children's Act: A valuable tool in realizing the rights of children with Disabilities' (2011) 74 *Journal of Contemporary Roman Dutch Law* 271 argues that this provision is the basis for priority accorded to children with disabilities under the Act.

¹²²Children Act, section 11(1).

¹²³Boezaart (n 121 above) 272 argues that the provision is especially significant in light of the recent challenges to the education system's response to children with disabilities.

¹²⁴SASA section 5.

¹²⁵Seleoane (n 18 above) 240; OECD (n 13 above) 262.

fundamental concern with this provision is its subjectivity. It is not clear the point at which accommodation of a learner's needs is impractical.

The SASA further provides for the duty of every parent responsible for a learner to cause them to attend school from the age of 7 years up to 15 years or grade 9, whichever comes first.¹²⁶ It gives discretion to the Minister for Education to determine the compulsory education period for learners with special education needs.¹²⁷ This responsibility has not yet been discharged. The Act further obliges public schools to admit learners and to serve their educational requirements without unfairly discriminating in any way.¹²⁸

Other statutes affecting education in South Africa include the National Education Policy Act (NEPA)¹²⁹ which establishes the power of the Minister for Education to determine policy in relation to the organization, management and governance of the national education system.¹³⁰ NEPA requires education policy to adhere to the principle of the advancement and protection of the constitutionally guaranteed rights including the right of every person to basic education and equal access to education institutions.¹³¹ The Act further requires that education policy ensures that children are not denied education on the basis of physical disability.¹³² It is not clear why the

¹²⁶ SASA (n 2 above) section 3.

¹²⁷ As above section 3(2).

¹²⁸ As above section 4.

¹²⁹ National Education Policy Act (NEPA), No. 27 of 1996.

¹³⁰ As above section 3.

¹³¹ As above section 4(a) (ii) & (iv).

¹³² As above section 4(b).

Act only addresses children with physical disability to the exclusion of other kinds of disabilities.¹³³

The Promotion of Equality and Prevention of Unfair Discrimination Act¹³⁴ makes it mandatory to eliminate obstacles that unfairly limit or restrict people with disabilities from enjoying equal opportunities or taking steps that reasonably accommodate the needs of such people.¹³⁵ The Act recognises the duty and responsibility of the state to eliminate discrimination and promote equality, and specifically to enact or audit laws and policies for this purpose, and develop viable action plans to promote and achieve equality on grounds including disability. The Act further requires the state and public institutions to give priority to the elimination of unfair discrimination and promotion of equality.¹³⁶ Finally, the Admissions Policy for Ordinary Schools Act¹³⁷ provides that learners with special education needs ought to be accommodated in ordinary schools where 'reasonably practical.'¹³⁸

¹³³Bekink & Bekink (n 2 above) 137 argue that the section is discriminatory and should be amended in accordance with section 9(1) of the Constitution.

¹³⁴ Act No 4 of 2000.

¹³⁵ Section 9(c).

¹³⁶ Promotion of Equality and Elimination of Unfair Discrimination Act, 2000 section 28.

¹³⁷ Admissions Policy for Ordinary Schools Act, 27 of 1996.

¹³⁸ As above, section 22 - 25.

6.7 Education Policy Framework

6.7.1. White Paper on Education and Training Policy framework

The White Paper (WP 1)¹³⁹ was adopted at the dawn of democracy and was developed in line with the Interim Constitution. It discussed among other things the implications of the Interim Constitution for the education system, the division of functions between national and provincial governments in education, and the organisation, governance, and funding of schools including an approach to the provision of free and compulsory general education.¹⁴⁰ The Paper set out the principles underlying the education and training policy, including: that education and training are basic human rights, that parents and guardians have the primary responsibility for the education of their children and hence a right to be consulted on the form and governance thereof, that the education system must increasingly open access to education and training opportunities of good quality to all children, and that the state's resources must be deployed according to the principle of equity so as to provide the same quality of learning opportunities to all citizens.¹⁴¹ WP1 recognised the impossibility of meeting all the needs of the education system at once, and the need to take into account the financial sustainability of funding options.¹⁴²

Regarding the education of learners with special education needs (LSEN), the Paper considered services to LSEN as part of Educational Support Services (ESS)

¹³⁹ WP 1 (n 15 above).

¹⁴⁰ As above, chapter 1.

¹⁴¹ As above chapter 4.

¹⁴² As above chapters 5 & 13.

encompassing alongside 'all education-related health, social work, vocational and general guidance and counselling, as well as other psychological programmes and services.'¹⁴³ It however sought to distinguish between the specialised services required by learners with severe disabilities by stating that these were related but were not encompassed by ESS.¹⁴⁴ No explanation for this conclusion was given.

According to WP1, there is a positive duty on the state to ensure availability of educational facilities of an acceptable quality, and a negative duty on parents and guardians not to interfere with the child's right to attend school.¹⁴⁵ The Policy does not however highlight the positive duty of parents or guardians to ensure attendance of the child to school, which includes compelling parents or guardians to pay school fees. The interpretation of 'compulsion' in the Paper emphasises protection of the child from denial of education, as distinct from the approach of SASA which criminalises failure to cause a child to attend school.¹⁴⁶

6.7.2. Education White Paper 2: the organisation, governance and funding of schools

Adopted in 1996, the Paper (WP2) sets out a framework within which education is to be organised, governed and funded.¹⁴⁷ It noted the need to address the huge disparities among South African schools through a new organisational structure

¹⁴³ As above chapter 5.

¹⁴⁴ As above chapter 5.

¹⁴⁵ As above chapter 13.

¹⁴⁶ SASA (n 2 above) section 3(6).

¹⁴⁷ Government Gazette No. 16987 – Vol. 169 February 1996.

during the period of transition from apartheid to democratic administration. To this end, the Paper noted the need for an education structure that was

‘adequately uniform and coherent, but flexible enough to take into account the wide range of school contexts, the significant contrasts in the material conditions of African schools, the availability or absence of management skills, and the physical distance between many parents and their children’s schools.’¹⁴⁸

WP2 expressed the need to ensure equity and redress in funding from public resources in order to ensure a fair distribution of public funds and the elimination of backlogs caused by unequal treatment in the past.¹⁴⁹ It therefore set out to reorganise schools for the foregoing purpose by creating only two categories of schools, that is, public and independent schools. The public school category encompassed all pre-existing school categories including special schools, other than private and independent ones.¹⁵⁰ The public schools would be funded totally or largely from public resources.¹⁵¹ Schools for LSEN would be governed as other public schools, save as far as necessary to accommodate their distinctive needs.¹⁵² LSENs would also be financed on the same principle with ordinary schools, though priority in funding would be given to reaching the out-of-school learners, and the distinctive costs of the

¹⁴⁸ WP 2 (n 16 above) para 1.6.

¹⁴⁹ As above, para 1.7.

¹⁵⁰ As above para 2.2

¹⁵¹ As above para 2.9

¹⁵² As above para 2.10

education of learners with disabilities would be recognised in capital, staffing and operating budgets.¹⁵³

WP2 stated that the system of obligatory fees on an income-related sliding scale ought to apply to parents of LSEN as to all other parents.¹⁵⁴ Such an approach is in line with formal equality, but in practice, it places a disproportionately onerous burden on parents of LSEN. This is because whereas budgetary funding covers the capital, equity, core and salary components of educational finance, the operational costs are born by individual households. Operational costs are enrolment driven and include textbooks, stationary and learning materials, and maintenance costs.¹⁵⁵ Children with disabilities often require specialised learning materials and equipments that are more costly than those required by the other students.

All schools are expected to discharge their obligations within the Constitution. WP2 however noted that ‘the need to base the public provision of schooling for all South African children on the principles of equity and redress of past inequality and discrimination’ ought to have priority in discharging such responsibility.¹⁵⁶ The Paper called for the availability of a continuum of integrated services in both ordinary and public special schools and highlighted in particular that in order to

¹⁵³ As above para 5.2, 5.39

¹⁵⁴ As above para 5.41

¹⁵⁵ As above para 5.18

¹⁵⁶ As above para 2.11

safeguard the interest of LSEN within the ordinary public schools, a sub-committee of the governing body of the school would be established.¹⁵⁷

To ensure equitable distribution of schools catering for learners with special needs, WP2 called for targeting of at least one school for the placement of learners with specific disabilities within any cluster of mainstream schools, and separate schools for learners with special education needs that are comprehensively equipped to cater for a wide range of students.¹⁵⁸ This provision is the forerunner to the establishment of Full Service and Special Schools in WP6 discussed below.

6.7.3. Education White Paper 6: special needs education

Education White Paper 6 (WP6) is the seminal policy framework on the education of persons with disabilities in South Africa.¹⁵⁹ The Policy is anchored in human rights, and embraces the theory of system change as opposed to changing the individual, drawing extensively from the reports of the NCSNET & NCESS.¹⁶⁰ It was adopted upon the realization that learners with disabilities were predominantly excluded from the education system as a result of physical, social, financial, and historic factors.¹⁶¹ It is argued that WP 6 'reflects the struggles and settlements ...of a highly

¹⁵⁷As above para 3.39, 5.40

¹⁵⁸ As above para 5.41

¹⁵⁹WP 6 (n 11 above).

¹⁶⁰The Policy furthered upon the foundation of the Integrated National Disability Strategy White Paper of 1997 which pioneered the shift from a medical to a social perspective on disability. Bekink & Bekink (n 2 above) 141.

¹⁶¹WP 6 (n 11 above) 15.

contested area of policy development in South Africa between 1996 and 2001.¹⁶² It is thus intended to guide the development of an inclusive education system that can accommodate the needs of all learners in the education system.

WP6 would guide the establishment of an inclusive education system through: (i) departure from the use of categories of disability as the organising principle for institutions, (ii) basing the provision of education for children with disabilities on the level of support needed to overcome the debilitating effect of the disabilities, (iii) emphasis on supporting learners through full service schools that have a bias towards certain kinds of disabilities depending on need and support, (iv) directing how the initial facilities would be set up and the additional resources necessary, (v) indication of how identification, assessment and placement of learners with disabilities would take place, (vi) giving directions for the education support system needed, and (vii) clearly stipulating how the dual role of special schools to serve identified learners with disabilities on site and to serve as a resource to educators and schools in the area would be discharged.¹⁶³

WP6 is founded on 2 key principles; moving away from disability as an organising principle of special needs education (SNE), and favouring availability of support programmes as opposed to the movement of learners between ordinary and special schools.¹⁶⁴ These principles are drawn from the shift initiated by the

¹⁶²C Howell & S Lazarus 'Education White Paper 6: a framework for change or limiting new possibilities?' in N Muthukrishna (ed) *Educating for social justice and inclusion in an African context: pathways and transitions* (2008) 26.

¹⁶³WP 6 (n 11 above) 10.

¹⁶⁴OECD (n 13 above) 68.

recommendations of the NCSNET/NCESS which are highlighted further below.¹⁶⁵ It is however argued that despite this statement at the beginning, WP 6 failed to fully embrace the shift as conceptualised by NCSNET/NCESS.¹⁶⁶

WP 6 defines what an inclusive education system means, sets out a framework for the establishment of the education system, identifies a funding criterion for the plan, and draws a roadmap to the ultimate goal of an education system. The process is projected to take place in a period of twenty years (2001 - 2021) apportioned into short, medium and long-term phases of three, five and twelve years respectively.¹⁶⁷ WP6 covers the entire spectrum of education from early childhood education (ECD) to higher education, including adult basic education (ABE). It however has a particular emphasis on primary and secondary education. As highlighted at the beginning of this chapter, this work considers the aspects of the policy that affect the GET phase of education. As the principal Policy on education of children with disabilities, the specific provisions thereof in respect of the principles under article 24(2) of the CRPD are discussed in Part III below.

WP6 is supported by guidelines on the various aspects of implementation. These include the national strategy on Screening, Identification, Assessment and Support (SIAS), the DBE's Guidelines on Special Schools as Resource Centres (2005), and the Guidelines for Full Service Schools/Inclusive Schools (2010).

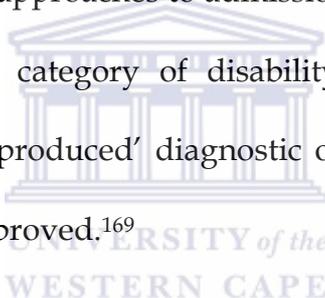
¹⁶⁵Part 6.8.1 below.

¹⁶⁶Howell & Lazarus (n 162 above) 31.

¹⁶⁷WP 6 (n 11 above) 43.

6.7.3.1 Conceptual and Operational Guidelines on Special Schools as Resource Centres

These Guidelines¹⁶⁸ were adopted to give a conceptual framework and suggest operational procedures consistent with WP6. Conceptually, the Guidelines acknowledged an underlying ‘philosophical shift’ in addressing disability that requires a concurrent shift from special education to inclusive education theory. The distinguishing characteristics of this shift include a move from understanding disability as pathological or individual deficiencies to system deficiencies, a shift from organising services according to disabilities to organising them according to levels of support needed, new approaches to admission based on the level of support necessary as opposed to the category of disability involved, and a shift from standardised tests to ‘teacher-produced’ diagnostic ones in determining a learner’s potential and how it can be improved.¹⁶⁹



On the operational dimension, special schools would move systemically away from organising themselves on the basis of disability. They would rather be used to provide support to other schools in their districts (as resource centres) and to cater for learners who require high levels of support.¹⁷⁰ The Guidelines indicate that the strengthening of special schools as contemplated under WP6 means strengthening

¹⁶⁸Department of Education, *Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Special Schools as Resource Centres* (2005) (hereinafter *Conceptual Guidelines on SS*).

¹⁶⁹As above para 3.1.

¹⁷⁰As above para 2.2.

them to provide support through availing support to local schools. The changes required to implement the new role of special schools would be incremental.¹⁷¹

6.7.3.2 Guidelines on Quality Education and Support in Special Schools and Special School Resource Centres

These Guidelines¹⁷² are aimed at guiding special schools to function well and to offer appropriate quality education to learners, as well as to set out the requirements of a special school resource centre. On admission of learners, the Guidelines stipulate that admission to a special school should be considered as a last option for a learner, where appropriate support is not available in the local school.¹⁷³ Yet the same Guidelines stipulate that learners who meet the requirements for support have a choice as to whether they are educated in a special school or in a mainstream full service school.¹⁷⁴ The two provisions are contradictory to the extent that choice is limited where it is only available as a last option. Indeed, the Guidelines provide that special schools may only admit learners who are assessed to require high levels of support. Also, all admissions have to be ratified by the district-based support teams.

The Guidelines further provide that no learner may be denied admission on the basis of the severity of the learner's support needs.¹⁷⁵ This latter provision can only be understood to refer to severity on the scale of 1 - 5 established under SIAS because as

¹⁷¹ As above para 2.4

¹⁷²Department of Basic Education, 'Guidelines to ensure quality education and support in special schools and special schools resource centres' (2007) (hereinafter guidelines on quality & support).

¹⁷³ As above para 5.1.1.

¹⁷⁴ As above para 5.1.4.

¹⁷⁵ As above para 5.1.4.

indicated above, in the *Western Cape Forum* case, it was conceded that children with educational support needs beyond level 5 would not be accommodated within the education system.¹⁷⁶

Regarding the curriculum, the Guidelines provide that learners must, *inter alia*, receive formal tuition on each school day, have individual support plans for learners which emphasise the acquisition of learning and strategies for cognitive development and academic success, and that literacy, especially reading, must be a key focus for all learners.¹⁷⁷ This provision narrowly focuses on the traditional defining elements of a curriculum. A flexible curriculum ought to acknowledge the fact that while literacy is central to learning, the education of children with some kinds of disabilities, particularly severe and profound intellectual disabilities, could dictate an alternative learning priority such as the acquisition of life skills.

The Guidelines also propose that all teachers should have training on special needs or inclusive education, and should be accorded appropriate additional professional and non-professional staff as necessary to facilitate the education of children with disabilities.¹⁷⁸

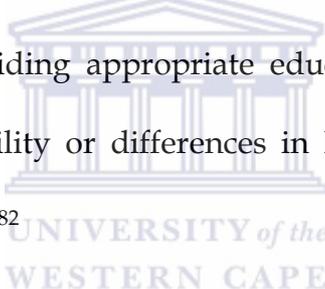
¹⁷⁶In terms of SIAS, there are 5 levels of learner support needs on an ascending scale of intensity of support necessary to support learning. Level 5 is comprised of learners with high support needs. See DoE *National strategy on identification, assessment and support: school pack* (2008) (hereinafter SIAS) 19.

¹⁷⁷Guidelines on quality and support (n 172 above) para 5.3.3.

¹⁷⁸ As above para 5.6.1.

6.7.3.3 Guidelines on Full Service Schools (FSS)

These Guidelines¹⁷⁹ were adopted to guide the implementation of aspects of WP6 on FSSs. Being so recent, the Guidelines allude to the obligations of the state under the CRPD to ensure the right to education for persons with disabilities, and to do so through providing 'equal opportunities to life-long learning for all in an inclusive education system at all levels without discrimination.'¹⁸⁰ But save for this mention, not much attention is devoted to the importance of the CRPD in the conceptualisation of the FSSs. The Guidelines define a FSS as a mainstream education institution that provides quality education to all learners by supplying the full range of learning needs in an equitable manner.¹⁸¹ Such schools are to have the capacity to respond to diversity by providing appropriate education for individual needs of learners, irrespective of disability or differences in learning styles or pace, or the social difficulties experienced.¹⁸²



The Guidelines embrace the progressive approach to the implementation of inclusive education by noting that a FSS may not have all the forms of learner support in place, but it should have the potential and capacity to develop and provide them, and has to incrementally work to ensure that all children in its locality can attend the school.¹⁸³ The support for learners in FSSs is organised both at the institutional level and from the District Based Support Teams (DBST) established in terms of WP6. It

¹⁷⁹Department of Basic Education 'Guidelines for full-service/inclusive schools' (2010) (hereinafter FSS guidelines).

¹⁸⁰ As above para 2.8 & 3.2.1.

¹⁸¹ FSS guidelines (n 165 above) para 3.1.

¹⁸² As above para 3.1.2.

¹⁸³ As above para 3.2.7.

includes additional staff, teacher assistants and professional support from non-educators.

In terms of WP6, FSSs are designed to offer support to learners with a moderate level of support needs. However, the FSS Guidelines emphasise the duty of the FSS to admit all learners with disability including those with high and very high intensive support needs.¹⁸⁴ This implies an overlap between the functions of special schools and those of FSSs. The Guidelines require a FSS to review its capacity to accommodate the needs of any learner who needs additional support before referring the learner to a special school. Such review is followed by the development of the school's own capacity to provide the support, and if that is insufficient, the school can call upon the District for support, mentoring and training.¹⁸⁵ Inevitably, the self-evaluation and the measures contemplated in this provision to facilitate supporting the child within the FSS would be time consuming. No provision is made for interim measures during that period.

6.7.3.4 Strategy on Identification, Assessment and Support

As its name suggests, the SIAS Strategy was adopted to guide the screening, identification, assessment and support to children with disabilities in order to support the objectives of WP6.¹⁸⁶ Though it was indicated that the Strategy was intended to increase the participation of all learners through identification and thus

¹⁸⁴ As above para 8.1.

¹⁸⁵ As above, para 8.1.3.

¹⁸⁶SIAS (n 176 above) 8 – 9.

removal of all barriers,¹⁸⁷ SIAS is, as with WP6, almost exclusively focused on children with disabilities. The SIAS strategy is highly technical and clinical. It is founded on the medical model of disabilities, in so far as it relies to a significant extent on medical diagnosis guided by the International Classification of Functioning.¹⁸⁸

6.7.4 Draft Minimum Uniform Norms and Standards for Public Schools Infrastructure, 2013

The draft Norms and Standards, were published along with a call for comments in January of 2013.¹⁸⁹ This development was precipitated by a growing body of litigation against the DBE for its numerous failures to both provide guidance in respect of and to ensure an adequate learning environment in some schools.¹⁹⁰ The draft Norms and Standards are scanty in detail regarding critical issues that they ought to address such as the quality of school infrastructural, curriculum, funding, and language in public schools.¹⁹¹ Though public schools include special schools,¹⁹²

¹⁸⁷As above 1; WP 6 (n 11 above) 18.

¹⁸⁸SIAS (n 176 above) 13. The International Classification of Functioning has, since the shift from medical to the social model of disability, largely fallen into disfavour in the disability rights discourse in view of its focus on a person's impairment.

¹⁸⁹DBE 'South African Schools Act, 1996 (Act No. 84 of 1986): (Draft) Minimum Uniform Norms and Standards for Public Schools Infrastructure' Notice 6 of 2013.

¹⁹⁰*The Equal Education & Others v Minister of Basic Education & Others, the Governing Body of Amasango Career School v MEC for Education, Eastern Cape (Amasango)* case was particularly instrumental in this regard. As part of the settlement reached with the DBE, the Minister for Basic Education committed to developing binding norms and standards by end of March 2013. Another set of draft Norms and Standards had been developed by the DBE (Gazette Notice 1439 GG31616 of 21 November 2008) but were never finalised.

¹⁹¹The purpose of Norms and Standards according to SASA is, but not limited to, to address the organization, governance and funding of schools, and to give direction on language policy in public schools. See the Preamble, sections 6 and 35 of SASA.

¹⁹²SASA, section 12(3)

the draft Norms and Standards do not give any guidance on the modifications necessary, whether for special schools, or for regular schools, in view of the responsibility contemplated under WP6 to accommodate children with disabilities.¹⁹³ Save for requiring that sports facilities be made available to children with disabilities, the draft Norms fail to require universal access and therefore fundamentally undermine the possibility of the necessary transformation to accommodate children with disabilities. Further, the draft Norms are based on a progressive realization approach, contrary to both the Constitution and international standards on state obligations for the provision of basic education. In general, the draft Norms need to be amended to align with the Constitution, statutory and policy commitments discussed in this part.



Part III: Evaluation of compliance

6.8 Legal and policy response to Article 24(2): analysis of compliance

6.8.1 General remarks

For the most part, SA law relative to primary education complies with international obligations for the education of children with disabilities as set out in the CRC, the ICESCR, and the CRPD. As has been pointed out in the preceding part, there are however some gaps in critical respects, particularly in the implementation policies. These include the question of payment of fees, the fact that neither the law nor WP6 expressly requires the provision of reasonable accommodation, the fact that support

¹⁹³For instance, Regulation 4 regarding provision of learning environment only recognizes the need to provide a school with water, energy, and communication facilities.

measures necessary to facilitate the education of children with disabilities are not defined, that progressive realization is contemplated under the provision, and finally that the special needs education policy in South Africa does have the effect of stifling choice through generally prescriptive provisions. Some of these issues are considered further below.

WP6 highlights the fact that the contextual (economic) realities of SA necessitate a progressive approach to the realization of education for all.¹⁹⁴ The pathway to inclusive education under WP6 is therefore set on a progressive realisation platform typified by a three-phased implementation plan. The plan provides for the designation of schools to be converted into full service schools, starting with 30 then 500. The Policy stipulates that the eventual number of full service schools (FSS) will be determined by need and availability of resources.¹⁹⁵ The progressive realisation approach is also reflected in the funding strategy which is predicated upon the need to make more use of the existing resources and the imminent possibility of inadequate budgetary allocation in the existing fiscal environment.¹⁹⁶

The idea of progressive realisation of the right to education, particularly basic education, rekindles the discussion on the nature of state obligation for the implementation of socio-economic rights of children. The fact that the right to education under section 29 is unqualified is not contested. The critique of the

¹⁹⁴WP 6 (n 11 above) 12 & 38.

¹⁹⁵WP 6 (n 11 above) 22 & 23.

¹⁹⁶WP 6 (n 11 above) 37; The approach of WP6 to inclusive education is largely drawn from the Salamanca Statement on Special Needs Education (1994), especially paragraphs 8 & 9. The approach of the Salamanca Statement is highlighted in greater detail in Chapter 2 of this work.

government's commitment to the realisation right to basic education in South Africa has rather centred on the issue of 'free' basic education as discussed in part 6.2.2 above.

The origins of the fee framework in South Africa are traceable to the recommendations of the Review Committee on the Organisation, Governance and Funding of Schools which recommended a 'financial system for public schools based on partnership between the government and communities, on the basis that nothing else is affordable in the present conditions.'¹⁹⁷ It was pointed out that this proposal was likely to compromise the commitment to free and compulsory schooling. In rebuttal, the Review Committee argued that the goal of free and compulsory education was to ensure that no child was denied access to a minimum quality of basic education, and that for as long as children below the fee threshold could be admitted to school, then there was no breach of this provision. In fact, the Review Committee was of the view that the approach would 'ensure that free and compulsory education is available to all who require it.'¹⁹⁸

Generally, socioeconomic rights such as the right to education are subject to progressive realisation.¹⁹⁹ However as indicated in Chapter 3 of this work, there is widespread acceptance at the international level that the children's right to primary

¹⁹⁷WP 2 (n 16 above) para 5.1.

¹⁹⁸WP 2 (n 16 above) para 5.19.

¹⁹⁹Progressive realisation means that concrete incremental steps are taken towards the fulfilment of the right in question.

education is not subject to progressive realization.²⁰⁰ The ‘unqualified’ nature of the right to basic education under section 29 applies both to the elimination of fees and to the availability, of education infrastructure.²⁰¹ On the infrastructure dimension, it would be unreasonable to suggest that some children with disabilities will wait for 20 years (the lifespan of WP6) for a school to be provided in order to have access.²⁰² Such an approach would be tantamount to condemning the vulnerable to pay the price of the fiscal burden due to all, and is both unreasonable and unjustifiable.²⁰³

Children’s rights under section 28 of the Constitution have been interpreted as containing ‘no internal limitation subjecting them to availability of resources and legislative measures for their progressive realization.’²⁰⁴ The right to education is not addressed in this provision.²⁰⁵ There is however no reason why a similar approach to the rights of children in other provisions such as section 29 cannot be applied.²⁰⁶ It is not contested that a progressive approach as proposed in WP6 (to availing inclusive education infrastructure) limits the right to basic education. What remains to be established is whether this limitation is legitimate in terms of section 36 of the Constitution. One of the requirements for a justified limitation is that such limitation

²⁰⁰See Chapters 3 and 4 of this thesis for the discussion of the international interpretation of the nature of state responsibility to provide primary education.

²⁰¹ Refer to content of the duty to avail in Chapter 3 of this thesis.

²⁰²Sloth-Nielsen & Kruuse (n 87 above) 10.

²⁰³Sloth-Nielsen & Kruuse (n 87 above) 12.

²⁰⁴*Centre for Child Law v MEC for Education* (n 105 above) para 15.

²⁰⁵Constitution, section 28.

²⁰⁶It is argued that the guarantee to ‘basic’ entitlements under section 28 is partly necessitated by the vulnerability of childhood. Currie & de Waal (n 118 above) 602 – 603; S Liebenberg *Socio-economic rights; adjudication under a transformative Constitution* (2010) 233 - 234. Arguably, the significance of basic education to the full development of the child ought to be accorded similar protection.

be by a law of general application.²⁰⁷ The limitation in the present case is based solely on a policy document i.e. WP6 which does not satisfy the section 36 criterion and cannot therefore be a justifiable limitation.²⁰⁸

Nevertheless, it is acknowledged that the Constitutional Court has tended to resist the argument that children's rights impose a higher claim relative to other rights under the Constitution. In the *Grootboom* case, the Constitutional Court regarded as unacceptable the idea that the rights of children (particularly via section 28 of the Constitution) trump the progressive realization approach under the Constitution.²⁰⁹ As has been discussed above, the Constitutional Court also seems to have shunned the application of the minimum core approach, in terms of which it is incumbent upon the state to guarantee free and compulsory primary education at the international level. The dignity of the child approach discussed above offers an alternative prism through which the appropriate measures in the SA context may be conceptualised.

In addition to disability, WP6 recognised a range of 'learning needs' that had the potential to cause exclusion of learners from education. These needs were similar to the barriers to learning identified by in the NCSNET/NCESS report.²¹⁰ Arguably therefore, 'learning needs' as used in WP6 refer to 'barriers to learning' as conceptualised by NCSNET/NCESS. WP6 also recognises that the learners who are

²⁰⁷Constitution section 36(1)

²⁰⁸See Liebenberg (n 206 above) 94; Currie & de Waal (n 118 above) 169; Woolman & Bishop (n 2 above) 57 - 14; Boezaart (n 8 above) 468.

²⁰⁹Grootboom case (n 95 above) para 71.

²¹⁰WP 6 (n 11 above) 17; OECD (n 13 above) 67; NCSNET/NCESS Report (n 57 above) 23 - 40.

most vulnerable to barriers to learning and exclusion are those with disabilities and impairments. The Policy therefore focuses mainly on children with disabilities.²¹¹ It is argued that

‘there is a subtle but important distinction between ensuring that the [Policy] reaches and benefits the most vulnerable learners (i.e. learners with disabilities) and limiting the focus of inclusive education to only being about learners with disabilities.’²¹²

The eventual exclusive focus on education of learners with disabilities in WP6 is attributable to the aforementioned interchange of ‘barriers to leaning’ with ‘learning needs.’ It is correctly argued that while these distinctions seem merely semantic, in effect they fail to give full meaning to the new paradigm.²¹³ This is because the concept of ‘learning needs’ as used in WP6 does not move far enough from the learner deficit theory as to contemplate a barrier outside of the learner (such as their socioeconomic circumstances or physical environment) because ‘needs’ inevitably invoke ownership (i.e. whose needs?).

WP6 recognises the shortfalls in the provision and accessibility of education both generally and especially for children with disabilities. It nevertheless does not address the economic barriers, particularly payment of fees, in its proposed measures for the establishment of an inclusive education system.²¹⁴ This is despite an

²¹¹WP 6 (n 11 above) 18.

²¹²Howell & Lazarus (n 162 above) 32.

²¹³As above 31 – 32.

²¹⁴ See for instance WP 6 (n 11 above) 30.

indication that children with the greatest need such as those who are socio-economically deprived would be prioritised.²¹⁵ It is documented that the majority of the out-of-school learners cite school fees as the main reason for their exclusion from education.²¹⁶ Some children with disabilities benefit from targeted social security services, particularly the Care Dependency Grant.²¹⁷ Eligibility for the grant is however highly restrictive, and the amount thereof often insufficient to ensure effective access to education amongst the other needs of a child with disability.²¹⁸

A great deal of responsibility is placed upon educators and institutions in the realization of the right to basic education, especially in as far as the setting up and operation of IBSTs. It is argued that this was precisely the intention of NCSNET/NCESS in line with the shift from the medical model under which health professionals had a lead role in services relating to children with disabilities.²¹⁹ This means that there ought to be a correspondingly strong focus on pre- and in-service training of educators.

²¹⁵WP 6 (n 11 above) 38.

²¹⁶OECD (n 13 above) 22.

²¹⁷K Malherbe 'The social security rights of caregivers of persons with disabilities' in Groebblaar-du Plessis & Van Reenen (n 58 above) 187. The Care Dependency Grant (CDG) is a non-contributory monthly cash transfer to caregivers of children with severe disability who need permanent care. According to the Children's Institute (n 45 above) 81 about 117 000 children were receiving the CDG as of July 2012.

²¹⁸See P du Plessis & L Conley 'Children and poverty in South Africa: the right to social security' (2007) 24 *Educational Research and Review* 51 - 52; Children's Institute, 'Statistics on Children in South Africa' available at <http://childrencount.ci.org.za/indicator.php?id=2&indicator=40> (accessed 27 March 2013); and Malherbe (n 217 above) 186 - 188 for an appraisal of the grant and its limitations.

²¹⁹Howell & Lazarus (n 162 above) 37. These authors however criticise WP 6 for failing to take forward this agenda boldly enough with the effect that specialised education personnel retained the lead.

In terms of the Guidelines to Ensure Quality Education and Support in Special Schools, all teaching staff should be qualified at least with a first degree or a diploma which includes training on special needs or inclusive education.²²⁰ It is acknowledged that in view of 'the history of the dual system of special and ordinary schools, as well as the ideological training of staff, there is need for wide-scale human resource development.'²²¹ Additionally, it is expected that more teachers with disabilities will be employed to enable role modelling.²²² But these measures are suggested in the context of special schools and are of a long-term in nature. The need for adequate training of education personnel ought to apply to all staff.

Below is an assessment of the responses specific to article 24(2).

6.8.2 Non-exclusion of children from the general education system, and from free and compulsory primary education

To fulfil the requirements of article 24(2) (a), it is essential to ensure that the management of education for children with disabilities is an integral part of the general education management, and that children with disabilities are not left out of free and compulsory primary schooling.

The constitutional and statutory protection of children with disabilities from discrimination has been highlighted above. Similarly, responsibility for the management of the education of children with disabilities is an integral part of general education management, consistent with the requirements of article 24(2).

²²⁰See WP 6 (n 11 above) 13; Guidelines on Quality Support (n 172 above) 11.

²²¹Guidelines on Special Schools (n 168 above) 23.

²²²As above 13.

However, in so far as the CRPD requires children with disabilities to have access to free and compulsory primary education, this right is not expressly recognised in the Constitution, or implemented in practice. Since the CRPD presumes that state parties are already implementing free and compulsory education in their respective jurisdictions, the fact that this is not yet a reality in South Africa means that it is difficult to achieve the standard.

Regarding access to free and compulsory primary education, it is argued that the current system of graduated fees and exemptions does not guarantee access to education for all children, and that it in fact perpetuates systemic inequalities in the allocation of funding among learners.²²³ It has been highlighted above that children with disabilities constitute a significant portion of out of school learners, and that a majority of the excluded learners with disabilities are from indigent backgrounds. The Constitutional Court has indicated that government measures taken towards the implementation of rights ought to prioritise vulnerable groups.²²⁴ This reasoning ought to be equally applicable to children with disabilities.

WP6 proposes the restructuring for inclusive education upon the understanding that the neighbourhood or FSS should be promoted as the first choice for children with disabilities.²²⁵ The Paper however acknowledges the challenges of implementing inclusive education in the face of inadequate infrastructure which is characteristic of

²²³Roithmayr (n 23 above) 391 - 2.

²²⁴Grootboom case (n 95 above) para 36.

²²⁵WP 6 (n 11 above) 27.

most schools.²²⁶ The wisdom of including learners with disabilities in the mainstream education facilities in the foregoing circumstances has been rightfully questioned because though the goal is noble, its feasibility in the present circumstances is doubtful.²²⁷ It is argued for instance that it is paradoxical that the poor have been mainstreamed by default in a majority of previously disadvantaged schools due to the unavailability of well resourced schools. Yet, even though such mainstreaming may indeed have occurred, it is not sufficient to guarantee a sufficient quality of education for the learners.²²⁸

McConnachie & McConnachie rightly argue that 'decent school facilities are ... an important prerequisite for teaching and learning that is capable of satisfying basic learning needs.'²²⁹ Indeed, that is the rationale behind the duty of the Minister to develop Minimum Norms and Standards on school infrastructure.²³⁰ To integrate learners with disabilities (particularly in view of the heightened need for support and accommodation) in the context of such poor infrastructure would be de facto exclusion from effective education.

²²⁶The huge infrastructural backlog is widely documented. As far back as 2000, the CRC Committee voiced a concern with the poor state of education infrastructure in South Africa. CRC Committee 'Concluding observations: South Africa' UN Doc CRC/C/15/Add 122 (2000) para 34. As of 2006 for instance, only about 2% of schools had paved access, ramps and appropriate toilet facilities for learners with disabilities, and 36% of schools had poor or very poor infrastructural conditions, with the rates of these varying from province to province. See OECD (n 13 above) 108. McConnachie & McConnachie (n 80 above) give a picture of the state of education infrastructure across the country, and point out the impact of such inadequate infrastructure on learner performance.

²²⁷Malherbe (n 42 above) 406.

²²⁸Lomofsky & Lazarus (n 58 above) 315.

²²⁹McConnachie & McConnachie (n 80 above) 570.

²³⁰SASA (as amended by Gazette Notice No. 15 of 2011: Basic Education Laws Amendment Act, 2011) section 5A.

The proposed FSS that are to serve as key drivers of inclusive education are biased towards certain kinds of disabilities.²³¹ This could mean that in the unfortunate case of districts where there is only one such school, some children with an impairment other than that catered for in such school would be left out, especially taking into account that the initial 30 schools are distributed in 30 school districts.²³²

6.8.3 Access to quality inclusive education on an equal basis with other children

The requirement of the CRPD in this regard is for the state to ensure the removal of barriers to access to education for children with disabilities both in content and location, and to ensure access to education on an equal basis with other children in the neighbourhood of the child concerned. The latter particularly requires ensuring that all schools are adequately equipped and teachers have the requisite capacity to respond to the needs of children with disabilities.

WP6 sought to develop a 'South African' model of inclusion that takes into account the conditions of severe resource constraints.²³³ Such a model would be geared towards inclusion of children with a range of special needs in education, but biased towards children with disabilities, and would prioritise education in mainstream settings. As indicated above, WP6 conceived of inclusive education in terms of accepting that all children have learning needs, respecting diversity in learning

²³¹WP 6 (n 11 above) 10. It is worth noting however that despite this express intention, WP 6 did not elaborate on how the measures would be further implemented.

²³²The 30 districts were chosen from the poorest areas of the country, out of the 81 school districts in total.

²³³OECD (n 13 above) 261.

capacities and needs, and acknowledging that all children can learn if given support.²³⁴

The shift to inclusive education in South African policy is part of the general move from the segregated education system of the apartheid period towards the principle of social inclusion by promoting diversity, citizenship, and economic and social well-being.²³⁵ Inclusion is also justified on the fiscal ground that in the long-term, the education of persons with disabilities will reduce the government's fiscal burden by reducing the number of dependant citizens relative to productive members of the society.²³⁶

According to WP6, the components of inclusive education include an acknowledgement that all children and youth can learn, recognition that different people have different learning needs that are equally valued for the full human experience, acknowledgement of the differences in learners, and recognition of the fact that learning is not confined to formal schooling. WP6 also acknowledges that inclusive education and training ought to maximise the participation of all learners, as well as develop their individual strengths and enable them to participate critically in the process of learning.²³⁷ The understanding of inclusion in WP6 also embraces the ambition of addressing past inequalities by increasing access to previously marginalised groups and the poor.²³⁸ In accordance with this goal, education

²³⁴Ngwena & Pretorius (n 94 above) 90.

²³⁵OECD (n 13 above) 261.

²³⁶WP 6 (n 11 above) 25.

²³⁷WP 6 (n 11 above) 16.

²³⁸OECD (n 13 above) 19. WP 6 (n 11 above) 11; McConnachie & McConnachie (n 80 above) 565.

financing has been redirected specifically towards considerations of equity, redress, accessibility and affordability.²³⁹

The model of inclusion advocated in WP6 is heavily biased towards integration of learners despite denunciation of the practice of integration. For instance, it is envisaged that the inclusion of learners with intellectual disabilities would be much easier to implement because all that is needed was curriculum adaptation as opposed to intensive medical support or structural adjustments to the built environment.²⁴⁰ This reasoning not only discounts the levels of support that must nevertheless be provided to enable the education of all children in a mainstream class, but also underscores an underlying assumption that inclusion equals integration of learners into the mainstream classroom. Thus while the WP6 suggests a nuanced understanding of inclusive education, there is an integration undertone, which is also apparently sanctioned by law.²⁴¹

Regarding equality between children with disabilities and other children in access to education, this is provided for under the Constitution and reiterated in statute. These laws require equal access, equal resources, and equal opportunities. Equality includes accessibility of the built environment and provision of requisite support measures.²⁴² It is argued that a combined reading of articles 9 and 29(1) of the Constitution means that the state is obliged to take positive steps to undo the

²³⁹OECD (n 13 above) 38.

²⁴⁰WP 6 (n 11 above) 25.

²⁴¹SASA discussed above.

²⁴²Boezaart (n 8 above) 460.

systemic patterns of disadvantage in society.²⁴³ However, despite the formal acknowledgment and measures in this regard, it is evident that the system advocated in WP6 neither guarantees formal nor substantive equality of choice in education between children with disabilities and other children. As has been indicated above, the prevailing view in WP 6 and its implementing guidelines is that education in a special school is a matter of last resort. This essentially means that a child with disability does not have unfettered choice on where to study. While the choices of all children may be limited by certain other factors such as distance and availability of space, under the current framework the child with disabilities definitely has comparatively fewer options.

6.8.4 Provision of reasonable accommodation

In terms of article 24(2) (c) of the CRPD, it is incumbent upon the state to provide individualised responses to the rights of children with disabilities, which in turn demands flexibility of resources at the contact point between the child and the school. Further, the burden of accommodating the needs of learners cannot be too onerous for the state.

As noted by the court in *MEC for Education, Kwazulu-Natal v Pillay*,²⁴⁴ the concept of reasonable accommodation is not new to SA law, but has rather been applied in various matters particularly in the context of religion and employment law.²⁴⁵ Thus while the duty to reasonably accommodate persons with disabilities is not expressly

²⁴³McConnachie & McConnachie (n 80 above) 571.

²⁴⁴ 2008 1 SA 474 (CC).

²⁴⁵ *Pillay* case (above) para 72.

established in the Constitution or the law, it is implied in the right to equality. In terms of the Promotion of Equality Act, unfair discrimination includes the unfair exclusion of learners from education institutions and failure to reasonably and practicably accommodate them.²⁴⁶ The court in the *Pillay* case indicated that reasonable accommodation envisaged in the foregoing provision entails positive measures and the possibility of incurring additional expenses or hardship to allow equal enjoyment of rights.²⁴⁷

As far as education policy is concerned, WP6 does not expressly address the provision of reasonable accommodation. FSS and ordinary schools are however expected to take measures to accommodate learners with disabilities in mainstream classes. The absence of a specific provision in this regard is especially concerning in view of the centrality of reasonable accommodation in the protection of the rights of persons with disabilities. It is especially important that the law and policy sets out the limits of reasonable accommodation and the incidence of the cost of adjustment. This is because the conceptualization of reasonable accommodation entails a subjective assessment.²⁴⁸ The defence of 'undue burden' is relative to the capacity of the duty bearer. In addition, the individuality of the measures required to effect reasonable accommodation means that the funding norms ought to allow flexibility at the point of contact, that is, the school.

²⁴⁶ Promotion of Equality Act section 29(1) & (2).

²⁴⁷ *Pillay* case (n 244 above) para 73.

²⁴⁸ See interpretation of reasonable accommodation in Chapter 4 of this thesis.

6.8.4 Provision of support within the general education system

It has been established in Chapter 4 that whereas it is difficult to exhaustively catalogue support measures, it is imperative that the law establishes an appropriate framework in terms of which such support can be provided or accessed. Such a framework ought to contemplate the coordination mechanism from which the services are drawn. It has also been established that the support component of the general education system needs to be generously interpreted to include services which are basic to the education of children with disabilities. Article 24(2) (d) further reiterates a child's right to choice between the general and special education systems. The exercise of choice must be consistent with the rights of the child, particularly the principles of the best interests of the child and child participation.

The SASA does not provide for the allocation of any money for secondary fees relative to education, such as the cost of transport, uniforms, textbooks or related expenses.²⁴⁹ This omission ought to be understood in a broader context. The role of constituent (non-academic) components of education such as transport on access to education is increasingly recognised.²⁵⁰ It is also implicit in international instruments on the right to education.²⁵¹ As has been argued in Chapter 4 of this work, provision of support in education is an integral part of any functional education system. It has

²⁴⁹Roithmayr (n 23 above) 391.

²⁵⁰Sloth-Nielsen & Kruuse (n 87 above) 15.

²⁵¹Committee on ESCR *General comment No 13: The right to education* (1999) para 6; CRC Committee *General Comment No 1: the aims of education* (2001) para 8. In the latter General Comment, the Committee highlighted the need to pay attention to 'not only the content of the curriculum but also the educational processes, the pedagogical methods and the environment within which education takes place, whether it be the home, school, or elsewhere.'

also been argued in that Chapter that the determination of the scope of costs included in the 'fees' component is significant to the legal incidence of the duty to cover the costs. In as far as the support measures necessary to facilitate effective education of children with disabilities are both expensive and beyond the ambit of costs covered by the state, the current framework disproportionately affects children with disabilities.

WP6 does not actually define or catalogue what constitutes support. But, it does imply that services of a technical nature are to be offered by the support centres. The Guidelines on Quality and Support define support as 'all activities that increase the capacity of schools to respond to diversity and to the challenges faced by its learners and teachers.'²⁵² They however envisage a duty of special schools to provide transport for all learners who require transport in order to be able to access the school.²⁵³ The support needs of each learner would be defined by their personal and environmental circumstances. An elaboration of the nature of services or devices envisaged is however useful for planning as well as evaluation of capacity.

In line with the CRPD, WP6 recognises that the provision of support is key to the reduction of barriers to learning.²⁵⁴ It therefore approaches the choice of an appropriate school on the basis of the level of support necessary to facilitate effective education for the learner.²⁵⁵ Whereas this approach is largely consistent with the

²⁵²Guidelines on quality support (n 172 above) 25.

²⁵³As above 18.

²⁵⁴ WP 6 (n 11 above) 29.

²⁵⁵Guidelines on Special Schools (n 168 above) 9.

concept of 'barriers to learning', it by default necessitates an assessment of the learner's limitations in order to the level of support necessary for them. In this way, the attention is focused on the student in a manner that reproduces the medical approach to disabilities.²⁵⁶ The very clinical approach to the assessment also risks compartmentalization of learners.

The support framework proposed by WP6 de-links site from support in a bid to broaden access to support programmes. It is considered that opening up the resources in special schools to the FSS as well as the use of site based support teams to neighbouring schools will mean that more students have access to the support resources. The Conceptual Guidelines on Special Schools suggest eventual transformation of some of the special schools into FSSs if there are too many facilities in one area.²⁵⁷ The net effect of such an approach would be to further diminish the number of special schools, yet as highlighted in Chapter 4,²⁵⁸ there is a defined sphere within which special schools ought to operate and which cannot be adequately covered by FSSs. The centralised shared resource model could also make it more difficult to implement the spontaneous individual responses required in terms of article 24(2) of the CRPD.

The proposed delivery channel for support is through the District Based Support Teams (DBSTs) whose primary function is to evaluate and through supporting

²⁵⁶Ngwena & Pretorius (n 94 above) 108 argue that the SIAS has had (in view of focusing on the impairments inherent in the child) served to perpetuate labelling and stereotyping.

²⁵⁷ Guidelines on Special Schools (n 168 above) 10.

²⁵⁸ See Chapter 4 part 4.5.

teaching, build the capacity of schools, early childhood and adult basic education and training centres to recognise and address severe learning difficulties and to accommodate a range of learning needs.²⁵⁹The DBSTs also have the responsibility to coordinate with other government departments such as the departments of Health and Social Development to provide support to schools.²⁶⁰ The approach of using DBSTs is adopted on the basis that it is a cost-effective and contextually relevant solution to the challenges of providing inclusive education.²⁶¹

6.8.5 Provision of support in special schools

The essence of article 24(2) (e) of the CRPD is to set out the legal parameters within which 'special education' operates. In this regard, where a child's maximum development is best achieved in a special school, then they should be able to study in such special school. The move to inclusive education does not therefore mean the elimination of special schools. On the contrary, the recognition of the role of special schools in this provision means that the state now has a duty to ensure that such schools are available and adequately resourced. Finally, the provision envisages design of special education in a manner that contemplates an exit point into the general education system. Special education must also be of good quality, comparable to the standards in the general education system.

WP6 highlights a mismatch between needs and provision of education for children with disabilities and attributes it to apartheid policies that led to the distribution of

²⁵⁹ WP 6 (n 11 above) 47.

²⁶⁰ Guidelines on Special Schools (n 168 above) 6.

²⁶¹ As above 25.

facilities on a racial basis.²⁶² The interrelationship between race and geographical distribution under apartheid policies means that educational resources, particularly schools for LSEN are unequally distributed.²⁶³ This disparity was also highlighted by the South African Human Rights Commission in 2004 when it stated that learners in rural areas suffer the worst forms of exclusion since there were very few special schools in rural areas or none at all in some areas. The Commission stated that even where such special schools existed, they were in deplorable condition and lacked qualified staff and specialists.²⁶⁴

The foregoing disparities notwithstanding, WP6 neither proposes nor provides for the establishment of new special schools or support centres for provinces with the least number of such schools. If the distribution of former special schools remained as is at the time of the adoption of WP6, certain parts of the country, particularly rural areas and former 'black areas' are likely to be inadequately served, especially taking into account the distribution of disability amongst the general population which is more prevalent amongst the poor.²⁶⁵

²⁶²WP 6 (n 11 above) 14; OECD (n 13 above) 108.

²⁶³Engelbrecht (n 10 above) 255; The Constitutional Court in *Pretoria City Council v Walker*, 1998 (2) SA 363 (CC), para 32 recognised that race and geography are inextricably linked as a consequence of apartheid laws. Roithmayr (n 23 above) 410 - 411. Bekink & Bekink (n 2 above) 127 highlight the racial dynamics of the exclusion of children with disabilities, noting that 'black' children are more likely to live in abject poverty and to not receive adequate support for their education. See also Lomofsky & Lazarus (n 58 above) 305; Liebenberg (n n 192 above) 245; Ngwena & Pretorius (n 97 above) 89.

²⁶⁴See WP 6 (n 11 above) 13; Guidelines on Special Schools (n 168 above) 3.

²⁶⁵ WP 6 (n 11 above) 39.

It is expected that when ultimately all schools are fully inclusive, natural geographic distribution will mean that only a few individuals with special education needs will be in any one school.²⁶⁶ This does not however address the absence of special schools in areas where they were not previously provided. The failure to provide for further establishment of special schools is perhaps attributable to the overwhelming focus on the integration of all learners into the mainstream school.

Despite the emphasis on inclusive education and mainstreaming, special schools are still the most frequently used way of educating learners with special education needs in South Africa.²⁶⁷ It has been acknowledged that premature implementation of the recommendations of the NCSNET and NCESS had previously resulted in the closure of a number of special schools before the adoption of WP6. This practice was renounced by the Department of Basic Education upon the rightful recognition of the possibility that immediate mainstreaming would result in learners who previously studied in the special schools being far worse off because the mainstream schools were poorly equipped and had such high learner to educator ratios.²⁶⁸

In terms of the Guidelines on Quality Education and Support, education in special schools should be considered a last option for learners only where the appropriate support is not available in the local school, and if the learner has been assessed to be

²⁶⁶ As above.

²⁶⁷ OECD (n 13 above) 275.

²⁶⁸ WP 6 (n 11 above) 54.

in need of high levels of support.²⁶⁹ The preference for education in the mainstream education system is consistent with the CRPD. However, the foregoing circumstances limit the choices of a child with disabilities to the extent that attending a special school is not an option in the first instance. As has been discussed in Chapter 4, the CRPD recognises the right of children with disabilities to equal choice in education. The predetermined placement of a child is also likely to conflict with the best interests of the child principle, in as far as it takes away the opportunity to individually assess the needs of the child and the optimum response thereto. In addition, over-prescription tempts exclusion of children who are not neatly within the parameters of either category, and forecloses on other pathways to an inclusive education.



The Guidelines further stipulate that all admissions of learners to special schools have to be ratified by the DBST.²⁷⁰ The process of such ratification is not defined but it can be safely presumed that some time will lapse between when the child is assessed, referred to the special school, admitted, and such admission is ratified. There is need to define the intermediate measures to be taken to ensure that the child is not excluded from education in the meantime.

Further, the Guidelines on Quality Education and Support also stipulate that a child may not be refused admission to special schools on the basis of the severity of their

²⁶⁹See WP 6 (n 11 above) 13; Guidelines on Special Schools (n 168 above) 7.

²⁷⁰See WP 6 (n 11 above) 13; Guidelines on Special School (n 168 above) 3.

support needs.²⁷¹ However as emerged in the *Western Cape Forum* case, there is indeed a category of children, that is children with severe and profound intellectual disabilities, that is not contemplated under SIAS, i.e. children with an IQ of between 20 and 30 (severe intellectual disability), or less than 20 (profound intellectual disability).²⁷² The exclusion of these children stems from the manner in which education is defined.²⁷³ That is, the fact that the validation of education is based on examinable academic outcomes. The evaluation framework as well as SIAS ought to take into account non-academic education that focuses on a child's potential and personal and social development.

The Guidelines on Quality Education and Support also require that individual support plans for learners should emphasise acquisition of learning strategies for cognitive development and academic success, and that literacy, especially reading, must be a key focus for all learners.²⁷⁴ This perspective fails to acknowledge that there are learners, especially children with severe and profound intellectual disabilities, who while they may benefit from reading skill, are likely to benefit more from other forms of instruction and development of their talent. This is not to discount the value of literacy. Rather, it is an acknowledgement that the

²⁷¹See WP 6 (n 11 above) 13; Guidelines on Special Schools (n 168 above) 7.

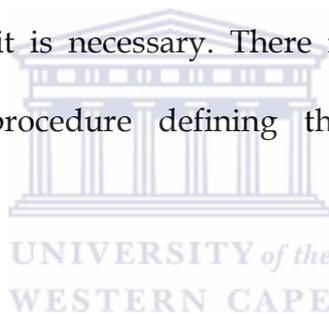
²⁷²*Western Cape Forum* case (n 84 above); Ngwenya & Pretorius (n 94 above) 91; McConnell & McConnell (n 80 above) 568.

²⁷³This was indeed the underlying view of the state when it argued that children with severe and profound intellectual disabilities were uneducable. The view was refuted by expert evidence and rightfully dismissed by the court. See Murungi (n 12 above) 12.

²⁷⁴See WP 6 (n 11 above) 13; Guidelines on special schools (n 168 above) 10.

circumstances of the learner ought to define the educational response as opposed to learners working towards a defined outcome.

Closely related to this is the question of the extent to which the law and policy contemplate an exit point from the special education system. It was discussed in Chapter 4 that article 24(2) contemplates an exit from the special education system to the mainstream education system. As indicated above, WP6 emphasises mainstreaming as far as possible, while the national SIAS is used as a basis for placement.²⁷⁵ Neither of these two, nor the Guidelines adopted under WP6, provide for a follow up evaluation to ensure that learners in a special school do not remain in these schools forever unless it is necessary. There is therefore need for a clearly articulated (re)-integration procedure defining the responsibilities of various stakeholders in that regard.

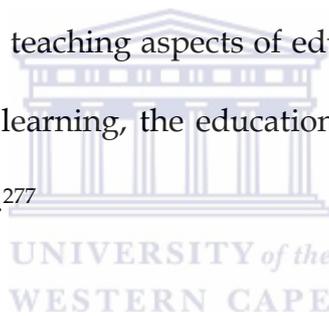


SIAS guides the determination of the nature and extent of support that a learner with disabilities requires. The strategy is a relatively complex 'clinical' diagnosis of the functional limitations that the learners experience as a result of their particular impairment. Considering that the implementation thereof is to be undertaken by educators and parents alongside the specialists in the DBSTs, the complexity could pose an implementation challenge. The approach of subjecting the learner to a clinical assessment process to determine the right response to their education is

²⁷⁵SIAS (n 176 above).

reminiscent of the medical model of disabilities and possibly inconsistent with the inclusive education philosophy.

The Conceptual Guidelines on Special Schools call for the elimination of barriers to learning through pedagogical responses as opposed to carrying out psychometric tests that offer little in terms of planning.²⁷⁶ However, despite this assertion, the SIAS which was adopted subsequently emphasises clinical evaluations of learners to determine the levels of support needed. The Conceptual Guidelines embrace 'barriers to learning' as the theory of knowledge that must be applied to any framework of thinking that relates to teaching and learning. The Guidelines apply this theory to the learning and teaching aspects of education and locates the barriers within the learner, the site of learning, the education system, or the broader social, economic and political context.²⁷⁷



The challenge with the foregoing conceptualisation of disability in the educational context is that by making teaching and learning the central and defining ligaments of education, a lot of emphasis is thus placed on the student and teacher. Teaching and learning is a key component of an education system. It is however one component thereof and can only work effectively alongside other key components of an education system such as the management, support services and services with an interest in education.²⁷⁸ Teachers may take a lead role as was intended by

²⁷⁶Guidelines on Special Schools (n 168 above) 8.

²⁷⁷As above.

²⁷⁸ See Chapter 4 of this work for the discussion of the components of an education system.

NCSNET/NCESS in line with the re-orienting the education of children with disabilities from the medical to a social model of disabilities, it is essential to observe a balance between all actors.

6.9 Conclusion

As highlighted in Chapter 4, article 24 of the CRPD presumes, amongst other things, the existence of functional government institutions with adequate education infrastructure. It also presumes that primary education is free and compulsory in party states, and that there are adequately trained personnel. In addition, to implement inclusive education as contemplated under the CRPD, a proper legal and policy framework is apposite. It is evident from the foregoing discussion that the law and policy on primary education of children with disabilities in South Africa is, to a considerable extent, sufficient to ensure the realization of the right. But whereas the responsibility for such education is adequately apportioned, and there are continuous efforts to grow the capacity of key stakeholders, certain other issues still undermine the realization of the right to primary education of children with disabilities in South Africa.

Such issues include the question of availability and adequacy of resources to ensure the full implementation of the right, particularly to facilitate an inclusive education system. The fee payment policy for primary school learners is also noteworthy to the extent that a significant number of learners with disabilities do in fact cite school fees as a barrier to access to education. Also, as evident in the discussion of the situation

in Kenya discussed in Chapter 5 of this work, the translation of the legal and policy framework into practice is the greatest challenge. It is in this regard particularly important to recall the discussion in part 6.8.1 above regarding the paradigm shift introduced by the NCSNET/NCESS report.

It has emerged in the discussion on WP 6 and its supporting guidelines that this shift was neither fully embraced nor furthered by the subsequent policy documents.²⁷⁹ From the discussions on WP6 and the Guidelines developed thereunder, there is an apparent drift away (albeit unintended) from the propositions of NCSNET/NCESS on the appropriate approach to education of persons with disabilities as well as the education of all other learners with 'special' education needs. In fact, save for the brief reference to a new paradigm in WP6, the 'barriers to learning' concept upon which the transformation of the educational approach was to be anchored seems to have 'fallen out' along the way.

As a result, WP 6 seems to have relapsed to the 'special needs' paradigm and predictably as would be the case within such a frame, to the conceptualisation of 'special education' as only applicable to children with disabilities. That trend is followed in the Guidelines. It is not surprising therefore that SIAS drifts even further away to not only exclusively focus on children with disabilities, but to also apply the medical model of disabilities in that regard. It is also the reason why while the NCSNET/NCESS conceptualised inclusive education in broad terms to address the

²⁷⁹Howell & Lazarus (n 162 above) 29 & 37 - 38 argue that on account of the ambiguities lurking in WP 6, the Policy's potential to leverage the change envisaged by NCSNET/NCESS is largely compromised.

education of all learners,²⁸⁰ the inclusive education discourse in the post-WP6 period has been, to a large extent, limited to the inclusion of children with disabilities.

In terms of responses to the specific requirements of article 24(2), it is arguable that while the law and policy do advocate for inclusion in the general education system, the same laws and policies do not facilitate access to free and compulsory primary education for all children and especially for children with disabilities. It is evident that the fee policy, in conjunction with other factors, disproportionately affects children with disabilities.

It is affirmative that both the legal and policy framework in South Africa advocate for integration of learners into the mainstream education system. But they do not facilitate access on an equal basis for both children with disabilities and other children. The choice of a neighbourhood school is not equal between children with disabilities and other children. It is rather limited by a 'disability bias'²⁸¹ and infrastructural underdevelopment. It has also been highlighted that the progressive realisation approach to the right to primary education for children with disabilities as adopted in WP6 is at variance with internationally recognised standard of immediate implementation, and the unqualified right to basic education under the Constitution.

²⁸⁰ As above, 27.

²⁸¹As earlier indicated, WP 6 designates that FSS are focused on certain disabilities as opposed to the full range of disabilities.

On reasonable accommodation, the concept is not expressly recognised in law in the context of education but is implicit in the provisions regarding non-exclusion from education and the duty of schools to make adjustments as far as practicable under the SASSA. The parameters of such reasonable accommodation are not clearly defined which makes it difficult to enforce.

On the duty to provide support within the general education system, this is provided for in SA's law and policy. However, as distinct from article 24(2) (d), SA's approach uses the level of support needs as a basis for placement in accordance with the barriers to learning paradigm. The implementation framework for this approach is the SASSA strategy which as above highlighted is steeped in the medical model of disability. The SASSA criterion focuses attention on the individual child and his or her impairment as opposed to the systemic changes necessary to facilitate the child's education. Effectively, the approach adopted by SASSA significantly erodes the gains made by both NCSNET/NCESS and WP6 towards recognition of how extrinsic factors affect the education of children with disabilities. Also, the potential bureaucracy in the operations of DBSTs and IBSTs are likely to hamper swift responses to the needs of children with disabilities at the school level.

As far as support within special schools is concerned, South Africa's approach to inclusive education de-emphasises separation of learners on the basis of disability. WP6 therefore proposes the conversion of existing special schools into support centres in order for them to assume the new role of providing support services to learners in the neighbouring schools. The Policy does not however make a

commitment to the establishment of new special schools or support centres despite an acknowledgment of insufficiency and unequal geographical distribution of the existing ones. This is despite the fact that under the current policy framework, children with very high levels of support needs will still need the services of special schools.²⁸²

In general, it is arguable that whereas the legal and policy framework in SA are well intended and drafted, there are apparent gaps in the approach to primary education of children with disabilities that are likely to compromise the ultimate realization of inclusive education, and more specifically, the implementation of article 24(2). Also, the role of historic factors in defining the educational priorities, organisation and aims of education in SA is undeniable. As has been argued in this regard, there is indeed evidence that 'the inequities of the past have at a structural, attitudinal and practice level, created deep and pervasive barriers that create enormous challenges for inclusion.'²⁸³ The theme of redressing past inequalities, and the aftermath of systemic exclusion are fundamental factors that must be taken into account in the understanding and implementation of inclusive education.

²⁸²It is worth mention however that the number of special schools has increased since the adoption of WP6. The problem is that this development does not have a policy backing. See WP6 (n 11 above) 13, and Guidelines on Quality & Support (n 172 above) 3 respectively.

²⁸³Howell & Lazarus (n 162 above) 29 - 30.

CHAPTER 7

Synopsis of Findings and Conclusion

7.1 Introduction

The first chapter of this thesis set out the structure of the work, particularly the background to the research, definition of the problem and delimitation of the scope of the research. To rephrase the primary question of this research, the enquiry undertaken has been on whether in fact norm creation (as undertaken under article 24(2) the CRPD) adds any value to the quality of primary education available to children with disabilities in practice. The research questions outlined at the beginning have guided the organization and focus of the thesis.

In this chapter, the key findings of the research are highlighted in summary, followed by a brief discussion of the findings from the comparative study. General concluding remarks will be discussed at the end.

7.2 Synopsis of findings

The conclusions relative to each chapter of the thesis have already been made at the end of the respective chapters. However, in order to appreciate the conclusions arrived in this chapter, it is imperative to reiterate in brief the core findings of the research as guided by the research questions set out in Chapter 1.¹

¹ Refer to chapter 1 part 1.3

7.2.1 Background to the development of a right to primary education for children with disabilities

In Chapter 2, an account of the developments in the three thematic areas of the thesis, i.e. developments relative to the right to primary education, developments relative to the rights of children, and finally the development of the rights of persons with disabilities, was undertaken. From this account, it is apparent that approaches to the education of children with disabilities have evolved chronologically. This timeline is characterised periods of invisibility, misapprehension and pathological diagnosis, and finally a human rights dimension. The corresponding responses in these phases have been apathy, sympathy or charity, medical diagnosis and treatment, and ultimately equality and inclusion in society.

Regarding the development of a right to primary education, it was highlighted that whereas education has been a part of human society from antiquity, formal education as a public function is a much more recent phenomenon, the beginnings of which are traceable to the early 20th century. Primary education in particular has, throughout the course of the development of the right to education, been accorded more attention and priority. It is in light of such significance that it is argued that states have differentiated obligations in respect of primary education, which demand prioritisation of resources towards that end.

As far as the development of children's rights is concerned, it was established that the conceptualisation of the child has changed over time. The CRC is the culmination of international recognition of the child as a subject of rights. This means that a child-

centred interpretation of rights is imperative. It was also established in Chapter 2 that in the period after the adoption of the CRPD, the rights of persons with disabilities as a distinct social group are unequivocally established. The CRPD introduced an equality basis as a benchmark for the protection of the rights of persons with disabilities. The Convention built further on what the CRC had established in respect of children with disabilities. It also added other principles and concepts to guide the interpretation of the rights thereunder.

The right to education of children with disabilities is at the intersection of the foregoing three spheres of rights. It was therefore necessary to explore the relationship of these concepts.

7.2.2 Conceptual framework for the interpretation of primary education of children with disabilities

From the discussion on the conceptual framework of the thesis, it was established that the principles of children, education and disability rights have developed almost distinctively. Nevertheless the interdependence and indivisibility of rights is evident in the fact that in order to ensure the education of children with disabilities, in accordance with children's and disability rights principles, such an education must respect, protect and fulfil this right by availing an accessible, acceptable and adaptable education. Such an education should also be in the best interests of the child, and be non-discriminatory. It ought to facilitate the child's achievement of optimum development of their personality, and to allow the child to be an active subject of the education. Inclusive education as contemplated in the CRPD,

particularly in accordance with the concepts under article 24(2), is one of the approaches of ensuring such a kind of education.

There is no particular reason to presume potential conflict between the concepts. However, to the extent that this thesis focuses exclusively on children, the prominence of children's rights principles ought to be considered. Children's rights principles help to make rights, including the right to education and disability rights, relevant to childhood. For instance, while the importance of the right to education is generally accepted, primary education is prioritised because it is critical to the full development of the human personality and potential of the human being. This function has heightened significance in childhood relative to other stages of human development.

Chapter 3 also shed light on another issue of interest to the interpretation of state obligations for the right to education, that is, the interpretation of progressive realisation of the right to primary education. Three key findings were made in this regard. It was established that at the international level primary education is the minimum core content of the right to education, and is therefore incumbent on all states to implement immediately, levels of development notwithstanding. Secondly, it was established that the elements of education are a concurrent standard. It is important that a skewed assessment of implementation, that is, more focus on availability (as currently dominates the assessment of the implementation of the right to education) at the expense of acceptability and adaptability of education, is consciously avoided. The question of whether there ought to be a distinction between

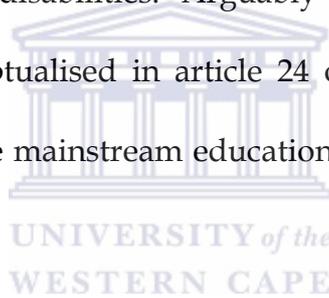
the duties to realize primary education immediately, but to work towards inclusive primary education progressively was also mooted. It was determined that the call for equality and non-discrimination under the CRPD would preclude such an interpretation.

7.2.3 Interpretation of the principles under article 24(2)

In Chapter 4, the possible interpretations of the provisions of article 24(2) were set out. Some of the key findings of that chapter include that article 24(2), while not creating an entirely new right, creates specific sub-entitlements (to non-exclusion from the general education system, access to inclusive education, reasonable accommodation, support within the general education system, and support in special education settings) within the right to education which enhance its justiciability in relation to education of children with disabilities. This is because the itemisation of specific components of the right makes it easier to found a cause of action without the need to prove violations of the right to education in general.

Article 24 in its entirety also helps to put into perspective what has otherwise been an elusive meaning of inclusive education. It is acknowledged that inclusive education as a philosophy of education draws from a variety of provisions in the CRPD (such as articles 3, 5 and 19) and article 24 in its entirety. Yet even with the discussion relative to article 24(2) and the limited references to article 24(1) made in this work, it is possible to dispel some of the existing misconceptions on the meaning of inclusive education.

It has been shown that inclusive education is indeed not mere integration of children with disabilities in the mainstream education system, but that the two concepts (inclusion and integration) are certainly strongly correlated. As seen from the discussions in Chapter 2, inclusive education has a long history of being equated to integration. Integration is the physical location of children with disabilities in the mainstream education system. It is one of the main components of inclusive education but certainly not the only component. The constant equation of inclusion to integration is traceable to the history of the concept. Indeed, inclusive education developed from integration, with the latter as the currently accepted approach to the education of children with disabilities. Arguably therefore, the argument that inclusive education as conceptualised in article 24 of the CRPD does not call for integration of learners into the mainstream education system ought to be a lot more cautious.²



It is possible to view inclusive education as set out in the CRPD from two perspectives. From the first point of view, inclusive education may be understood as part of the broader agenda for the transformation of education to align with the pursuit of a totally inclusive society anchored in human rights. Such a view is consistent with the understanding of the equality agenda of the CRPD as an

²B Byrne 'Hidden contradictions and conditionality: conceptualizations of inclusive education in international human rights law' (2013) 28 2 *Disability and Society* 234 has taken a more radical approach arguing that the conceptualization of 'inclusion' in recent human rights instruments 'represents little more than reconstituted and institutionalized conceptions of integration and normalization.'

incremental enterprise, building upon the general equality discourse.³ From this point of view, inclusive education is not confined to the education of persons with disabilities. Rather, it takes into account the exclusion of other marginalised groups, such as indigenous, language or religious minorities. This would mean that whereas the measures proposed in article 24(2) would be critical to the establishment of an inclusive education system, they would not be exhaustive of the changes necessary to ensure that education is entirely inclusive to everyone in society.

The alternative point of view regards inclusive education (as advocated within the CRPD) as the pursuit of an education system that caters for persons with disabilities satisfactorily. This minimalist approach would be consistent with the purpose of the CRPD, that is, that the CRPD is a disability specific convention, limited to addressing the equality and inclusion of persons with disabilities, and hence addressing social systems only in as far as they affect persons with disabilities. In the context of the latter view, the realisation of inclusive education requires changes to the full ambit of the education system, including the law and policy on education, the aims of education, the organisation and management thereof, and the establishment of an appropriate learning environment.

7.2.3.1 Non-exclusion from the general education system

It was also established that article 24(2) (a) calls for state parties to ensure for the mainstreaming of the management of the education of children with disabilities into the rest of the education management system. Such mainstreaming ought to be done

³ Refer to the discussion of this perspective in Chapter 2 part 2.5.3.

through legislation, policy and the practice of education management. It was also established that article 24(2) (a) departs from the assumption that state parties are implementing free and compulsory primary education in their jurisdictions. The provision enjoins the state to ensure that the understanding of and implementation of free and compulsory primary education applies to children with disabilities as it does to other children in the communities in which they live.

7.2.3.2 Access to free and compulsory primary education on an equal basis

A distinction has been made between the 'duty to ensure that [children] with disabilities can access an inclusive, quality and free primary education' under article 24(2) (b) and the implementation of inclusive education in general. The *travaux préparatoires* on article 24(2) (b) indicate that the article is geared towards integration of learners with disabilities in the regular classroom as a matter of priority. The broader agenda of inclusive education for persons with disabilities is, on the other hand, covered by article 24 in general. The bias towards integration is buttressed by the general emphasis in article 24 of inclusion of children with disabilities in the mainstream class by giving them support and accommodating their needs as far as possible. Indeed, it was further highlighted in Chapter 4 of this thesis that article 24(2) contemplates an exit point for children with disabilities from the special school to the mainstream school.

7.2.3.3 Duty to provide reasonable accommodation of individual needs

With respect to reasonable accommodation, it has been established that a certain amount of adjustment must be expected in order to accommodate children with

disabilities in education. Such adjustments may or may not entail a financial cost. Adjustments are necessary both to the learning environment and to the content of education. Due to the development of the concept of inclusive education within the context of employment law, it is difficult to apply the traditional parameters thereof (i.e. the cost of adjustment relative to the profit, and the capacity of the duty bearer) in the context of education. It is particularly difficult to determine the point at which the 'burden' of reasonably accommodating children with disabilities in education can be deemed too onerous since the benefit of education is neither immediate nor monetarily quantifiable. It is argued in this work that in order to ensure inclusion of children with disabilities, the burden of reasonably accommodating children with disabilities should never be regarded as too onerous on the state.

The implementation of reasonable accommodation demands flexibility of resources and adequate capacity of all persons involved in the education of children with disabilities. The flexibility of resources needs to be taken into account in the development of regulations for funding of education. As evident from the comparative studies, bureaucratic procurement procedures meant to safeguard against misappropriation of education funds often compromise the capacity of stakeholders to promptly respond to the needs of children with disabilities at the point of contact, and hence diminish their capacity to provide reasonable accommodation as conceptualised under the CRPD.

7.2.3.4 Duty to provide support measures

From the discussion on the provision of support measures for children with disabilities, it can be concluded that article 24(2) (d) necessitates the expansion of the existing scope of support measures as understood in the context of education to include such services as are necessary to facilitate the education of children with disabilities. Support services have long been an essential component of all education systems. But as highlighted in Chapter 4, the traditional scope of such services does not contemplate the needs of children with disabilities. Also, article 24(2) (d) posits support services for children with disabilities as a core entitlement as opposed to a basis for the determination of their placement in the general or special education system. Consequently, in accordance with article 24(2) (d) & (e), provision of support for children with disabilities is a general requirement for all education systems. The determination of whether a child with disabilities should be educated in a mainstream or special school is, on the other hand, a function of the environment in which the child can achieve the maximum development of their capacity and talents as guided by the core principles of children's rights. Determination of whether the child should be in the general or special education is also a function of choice which is exercised in accordance with the child's best interests and their right to participate in the decision.

It was established in Chapter 4 that in as much as there is a clear move towards inclusive education which is understood to emphasise integration of children with disabilities in the regular classroom, there is still a significant role to be fulfilled by

special schools. This is especially important in order to safeguard the right to equal choice in education for children with disabilities. The state has a duty to establish and maintain functional special schools and improve the quality of the existing ones. This guarantees children with disabilities a meaningful choice on the school setting most suited for their education.

7.2.4 Does article 24(2) create any new rights?

The CRPD does not create a new right to education. However, gleaned from the interpretations set out in the part above, it is affirmative that article 24 of the CRPD re-defines the parameters of the right to education as understood in international instruments in this regard. As was indicated in Chapter 2, article 24(2) sets out the 'how' of inclusive education. By benchmarking the appropriate responses necessary to facilitate the realisation of the right to education, article 24(2) enhances the justiciability of the right for children with disabilities by introducing actionable sub-entitlements within the right. In addition, the provisions of article 24(1) on the aims of education set out additional aims of education, and centralise the development of the human potential and sense of dignity and self worth as a core aim of education. This provision broadens the scope of the right to education, and by extension bestows a responsibility on state parties to ensure that non-academic components of education (particularly those geared towards development of other aspects of the child such as talents) are incorporated and validated in the curriculum. The recognition of the non-academic aspects of the right is particularly fundamental to the education of children with disabilities.

7.2.5 Synthesis of findings from the comparative studies – horizontal comparison

It will be recalled from Chapter 1 that the purpose of the comparative study was to find out how the concepts under article 24(2) of the CRPD are incorporated into law and policy on education of children with disabilities in Kenya and South Africa. Chapters 5 and 6 therefore explored the legal and policy frameworks on education of children with disabilities in both countries, and assessed these against the standard of article 24(2) as interpreted in Chapter 4.

7.2.5.1 Similarities in approaches to education of children with disabilities

Some general similarities are evident which may be summarized as follows: both countries accept inclusive education as the appropriate approach to the education of children with disabilities in accordance with the CRPD. The legal and policy framework in both countries are buttressed by constitutional protection of the right. It is also arguable that the two countries have demonstrated a measure of political will to implement primary education for children with disabilities.⁴ In both countries, contextual factors have been instrumental in defining the parameters of inclusive education and the appropriate responses thereto.

A further similarity is the fact that inclusive education is pursued mainly through policies targeted at the education of persons with disabilities, i.e. the Special Needs Education Policy in Kenya and WP 6 in South Africa. Consequently, though there is

⁴It is difficult to gauge political will. The term is loosely applied in this part to mean the expressed commitment of the state as manifest through various platforms including national reports, development plans and executive rhetoric. Whether such rhetoric percolates into practice is an essential further enquiry, but is not taken into account in this case.

the broader argument in both countries that an inclusive education philosophy is aimed at the transformation of the entire education system, this approach fundamentally circumscribes the effect of the policies on the general education system to only such aspects as affect children with disabilities.

Also, the 'special needs' policies in both countries are the tool used to facilitate the inclusion of a broad category of children with 'special needs'. Ultimately however, the policies focus exclusively on the education of children with disabilities. The historic use of special education as a synonym for the education of persons with disabilities could be a major factor contributing to this state of affairs. The approach generates disability circumscribed responses that are insufficient to instigate meaningful changes to the general education system.

The other pitfall of an approach that departs from the 'needs' point of view is that the responses that are necessary to facilitate their inclusion are targeted at their circumstances (such as affirmative action for girls' education) as opposed to adapting the system to respond to them. Factors of vulnerability are often interconnected. An adaptation of the education system to eliminate barriers to access is a much more viable way of addressing the range of needs in the society.

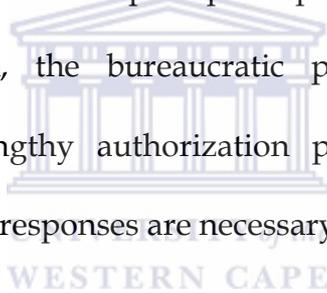
7.2.5.2 Responses specific to article 24(2)

In terms of responses specific to the principles under article 24(2), both countries by law and policy advocate for the non-exclusion of children with disabilities from free and compulsory primary education, and thereby comply with the negative dimension of the duty to ensure non-exclusion. In addition, while there is a

difference in the fee policies, the cost of education (both direct and indirect) is still cited as a significant barrier to access to education for children with disabilities in both countries. In fact, neither of the two countries has achieved universal free and compulsory education for children with disabilities in practice. This is significant to the extent that article 24(2) (a) of the CRPD presumes that State Parties are already implementing free and compulsory primary education in their jurisdictions, and regards this as a precondition for the implementation of inclusive education.

As far as ensuring equality of access between children with disabilities and other children in the society, it can be concluded that despite the proclamation of this guarantee in law and policy, neither country has achieved the standard in practice. As was highlighted in Chapter 4, equality of access would include equality of choice on where to obtain education – the potential to meaningfully choose to attend a neighbourhood school. Kenya’s approach of making every school inclusive and hence to accessible to children with disabilities in the short-term would appear to be ideal in this case. However, the resources allocated to facilitate adjustments to that end are inadequate, thereby compromising the effectiveness of the education accessed. On the part of South Africa, WP 6 seems to sanction unequal choice to the extent that only certain schools are targeted for restructuring to accommodate children with disabilities. Even ultimately, when WP 6 is fully implemented, choice for children with disabilities will still be confined to such schools as are designated as full service schools or special schools.

Regarding the provision of reasonable accommodation, it appears that in both countries, the duty to reasonably accommodate learners has to be inferred from the legal and policy provisions. In the absence of clearly defined parameters, it is difficult to enforce reasonable accommodation. Furthermore, reasonable accommodation is not taken into account at the policy level, and therefore is not itemized in the planning phase. For instance, the allocation of resources for adjustments in primary schools in Kenya is targeted at the general infrastructural adjustment. It does not seem to take into account the adjustments necessary for individual student responses, as may be required to facilitate reasonable accommodation. This has consequences for the individual and prompt responses necessary for reasonable accommodation. In addition, the bureaucratic procurement and expenditure mechanism that involves lengthy authorization procedures means that where adjustments requiring prompt responses are necessary, they may not be undertaken.



In both countries, there is a clear bias towards education in integrated settings as a priority and in special schools in exceptional cases. This accords with the CRPD as noted above. In Kenya, placement of the child in a special school is preceded by an assessment at the EACs. In South Africa, the assessment may be done within the school but must be ratified by the DBST. In both cases, the process results in delays in placement of the child, and no interim measures are prescribed to safeguard access to education in the meantime. The overt preference for integration has also diminished focus and resources channelled to special schools, particularly to the establishment of new special schools.

It is also evident that while the CRPD regards the provision of support as a basic requirement for all children, in the two countries, the scope of disability specific support measures is not expressly set out. South Africa's 'barriers to learning' paradigm as a result of which the level of support that a learner needs is used as a basis for determination of placement between the regular and special school is unique. In Kenya, the nature or level of support necessary to facilitate effective learning does not seem to count towards the decision of where the child should be educated. The determination that the child has a disability alone seems sufficient to prompt a referral.

It has already been indicated that support measures are highly technical, diverse and evolving. It may not be possible to exhaustively define or catalogue them in law. The function of law however is to create an operational framework within which such supporters may be provided and accessed. This fact notwithstanding, even the traditional support components of an education system such as transport and library services have barely been realized in either country.

The allocation of available education resources is significant to the furtherance of the right to education for children with disabilities. Particularly, it is important to ensure that the educational development component of the education budget is sufficient to ensure meaningful development of the educational infrastructure so as to facilitate inclusive education. As evident in the cases of both Kenya and South Africa, the lion's share of education budgets go into servicing recurrent expenditure especially

personnel costs to the detriment of the education development aspect, including adjustments necessary to ensure inclusive education.

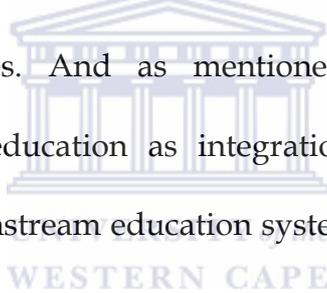
7.2.5.3 The role of contextual factors in education policy choices

A further observation from the case studies relates to the role that contextual factors have played in shaping inclusive education policy in the countries examined. This is significant to the question of whether the adoption of an international instrument necessarily means that the benefits of the guarantees thereof will trickle down to the subject group. As apparent from Chapter 5, the international education agenda has had a much lesser impact on Kenya's domestic education policy than have domestic factors such as economic priorities and historic injustices. A similar trend is evident in South Africa, where despite express commitments to international obligations, the country's political and social past has shaped current policy and resource allocation choices. Indeed, in South Africa, even the judicial interpretation of rights has favoured a contextually defined approach over the traditional internationally accepted standards. It seems therefore that in both countries, an educational policy that responds to the prevailing domestic needs would be accorded priority over compliance with international standards. This means that it is essential to ensure the prominence of the inclusive education philosophy in the national sphere and to anchor it in domestic priorities.

7.2.5.4 The effects of adequate planning on inclusive education

The comparative study also brings to the fore the effect of adequate planning on the implementation of inclusive education. While both countries display a measure of

political will to ensure the education of children with disabilities, the kinds of responses adopted in both cases vary.⁵ In Kenya, the inclusive education platform is set out in different, overlapping and often disjointed policies. As a result, there is no precise programmatic planning, which in turn makes it difficult to monitor implementation. As was earlier highlighted, there is a general emphasis on integration of children with disabilities into regular classrooms yet the education infrastructure is in a dire state in most of the country. Lack of capacity in dealing with matters of children with disabilities permeates the entire education management machinery. The dash to implement inclusive education in these circumstances has resulted in further deterioration of access and quality of education for children with disabilities. And as mentioned earlier, the overwhelming understanding of inclusive education as integration has focused attention and resource allocation to the mainstream education system at the expense of the special education system.



Arguably, the approach adopted by Kenya expands access while compromising quality of education for children with disabilities. In light of insufficient resources, the distribution of the little that is available across all schools in the country means that the amounts received in each of the schools is insufficient to ensure meaningful services or adjustments for children with disabilities.⁶ It also means that since the

⁵This is debatable. There is certainly demonstrable intention to avail effective and quality primary education to children with disabilities that permeates government rhetoric. On the flip side though, resource allocation patterns suggest that the issue is not so much of a priority..

⁶This is besides endemic organisational ineptitude as evidenced in the overlapping initiatives which significantly undermines a concrete approach to the duty.

development of special schools is no longer a priority, it is unlikely that there will be support for optimum development of the infrastructure necessary to facilitate such education. This is at variance with the requirements of the CRPD as highlighted above.

In the case of South Africa, the centralization of the inclusive education agenda in WP 6 and the defined roadmap towards that end is useful as a benchmark for progress in the implementation of the right. WP 6 draws from the NCSNET & NCESS report (which was prepared on a consultative basis) and seems to have taken into account the international standards on inclusive education at the time, particularly the progressive transformation of the education system proposed by the Salamanca Statement on Special Needs Education.

Essentially, WP 6, albeit arguably inconsistent with the constitutional duty to ensure primary education immediately and on the basis of equality for all children, is (in relative terms) well thought-out. The criticisms thereof notwithstanding, WP 6 has been the basis for evaluations of progress towards education of children with disabilities and often the basis for advocacy on the right to education for children with disabilities. In fact, it is arguable that the utmost pitfall of WP 6 has been the backlog in its implementation. In terms of its own timeline, as of 2013, WP 6 ought to be at its long-term implementation phase, beyond the basic question of opening access to a more nuanced discourse on the qualitative dimensions of access.

The irony is that, despite the adverse effects of Kenya's approach on the education of children with disabilities, Kenya would seem (formally) compliant with the duty to provide inclusive education immediately in terms of the CRPD. Such an assessment would be vain to the extent that it misrepresents the reality on the ground and defeats the purpose of the international conventions. The disconnection between the fulfilment of the obligations in the CRPD and the practice obtaining on the ground is not unique to the CRPD; it is rather symptomatic of a problem in translating international norms and standards into national realities.

7.3 Implications of the comparative study findings

The findings set out in the preceding part have some fundamental implications for future action towards the realization of the right to primary education for children with disabilities, particularly in the context of developing countries. It is duly acknowledged that the two countries studied in this work are not perfectly representative of the circumstances of other countries in the region. Nevertheless, some of the general findings can be replicated in a significant number of African countries.

It has emerged in this work that at the legal and policy levels, article 24(2) is unlikely to significantly affect the provisions on education of children with disabilities. This is because the existing frameworks do in fact contemplate the provisions of the CRPD or are broad enough to allow 'reading-in' of the standards required under article 24(2). The greatest challenge to the realization of the primary education for children

with disabilities is in the implementation of the provisions. In fact, a trend seems to be emerging amongst state parties to the CRPD to the effect that the legal frameworks may be relatively sufficient, but that the practical implementation of the provisions is highly wanting.⁷ This suggests a disconnection between the conceptualisation of the norms and their translation into practice.

A number of reasons can be given for the failure of these norms to be translated into action. But most of these reasons are in fact not unexpected. The argument of lack of or insufficiency of resources for the implementation of rights in the context of developing countries is, for instance, highly predictable. Indeed, the issue of unavailability or insufficiency of resources to implement inclusive education for children with disabilities pervades all aspects of the enquiry in chapters 5 and 6. This is not to discount the impact of resource limitations on the realisation of the right. But beyond this argument is the question of how the available (albeit limited) resources are applied, and therefore the issue of prioritisation of rights.

Implementation priorities are defined by the contextual realities in a country. The competing needs of a developing state relative to the available resources mean that prioritisation is needed at two levels. First, priority has to be established in funding

⁷In a majority of the state reports considered by the CRPD Committee as at the date of this thesis, the Committee has noted the gap between the law or/and policy in the state and the actual practice of inclusive education. See for instance CRPD Committee, *Concluding observations of the Committee on the CRPD: Peru* CRPD/C/PER/CO/1 (2012) para 36 – 37; CRPD Committee *Concluding observations of the Committee on the CRPD: Argentina* CRPD/C/ARG/CO/1 (2012) para 37; CRPD Committee *Concluding observations of the Committee on the CRPD: Spain* CRPD/C/ESP/CO/1 (2011) para 43; and CRPD Committee *Concluding observations of the Committee on the CRPD: Tunisia* CRPD/C/TUN/CO/1 (2011) para 30.

of various sectors of the government such as education, healthcare, and other infrastructure development. For the present study, the second level of priority is to be determined within the resources allocated for education. The discussion in this thesis has not engaged substantively with the priority in resource allocation to education relative to other rights. It has however been established in Chapters 2, 3 and 4 that the primary level of education is entitled to priority in resource allocation in accordance with international commitments. This fact is reiterated in the Constitutions of Kenya and SA.

In light of the equality approach of the CRPD, it is arguable that within the primary level of education, available resources ought to be equally allocated to the education of all children. But in light of historic exclusion of children with disabilities from the general education system, and the transition into the inclusive education paradigm embodied in the CRPD is bound to take time; it is a process. That means that an action plan towards that goal is necessary, and therefore that priorities have to be set in terms of measures. The principles set out in article 24(2), along with the other principles discussed in Chapter 3 ought to serve as roadmaps towards this end.

As was highlighted in Chapter 1, one of the criticisms of the CRPD is the fact it is overly prescriptive. It is argued in that regard that the CRPD boldly intrudes into state's margin of appreciation, and has the potential to compromise optimum protection of the rights. Article 24 is one of the most detailed provisions in the CRPD. Evidently, states will need to exercise a margin of appreciation in respect of the rights under the CRPD. It is therefore essential to establish benchmarks to ensure that the

exercise of a margin of appreciation does not undermine the realization of the right to education.

7.4 Conclusion

This thesis affirms that the CRPD furthers the existing discourse regarding the education of children with disabilities. The CRPD also establishes benchmarks for equality of children with disabilities. Article 24 specifically re-defines the right to education and the nature of state obligations for this right, and presents an opportunity to revisit the existing approaches to inclusive education. Ultimately however, the greatest impact of the CRPD on the education of children with disabilities is dependent on how or whether the provisions thereof can be translated into practical action. The gap between a progressive and rich normative discourse and the practice of education of children with disabilities as pointed out in this work suggests the need for a re-evaluation of current approaches to implementation with a view to develop more responsive methods, beyond the resource argument.

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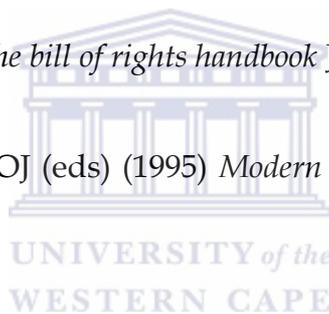
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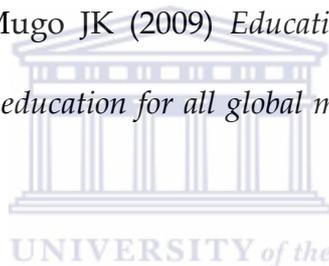
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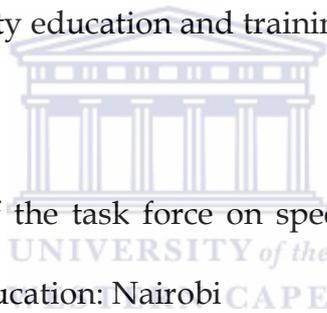
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