
**A critical appraisal of the right to primary education of
children with disabilities in Malawi**

**Submitted in partial fulfilment of the requirements of the Master of Laws Degree (LLM)
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Centre for Human Rights, Faculty of Law, University of Pretoria, Republic of South Africa**

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30 October 2011

Declarations

I Enoch MacDonnell Chilemba, do hereby declare, certify and affirm that this research is my own work and that to the best of my knowledge, has not been submitted nor is it currently being considered either in whole or in part, in fulfilment of the requirements of a Masters of Law Degree at any other institution of learning. The ideas used herein have been taken from different scholars, but have been presented in a manner that has not been taken from other literature hence it is deemed original. I assume personal responsibility to the correctness of facts contained herein and to the presentation thereof. Where someone's work has been used (whether from a printed source, the internet or any other source) due acknowledgment has been given and reference made according to the requirements of the Faculty of Law

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Dedication

Dedicated to my brother, Jonathan Chilemba, and my sister, Miriam Chilemba Kabota (Mrs), who have always been there for me and the other four Chilemba brothers and sisters: Maggie, Aubrey, Dianna and Peter. Together we have soldiered on in life despite losing both parents in the mid 1990's. This has been possible due to Yahweh's unwavering grace. Indeed, Yahweh alone makes all things fine. Just as orphans can realise their full potential in any aspect of life in society, children with disabilities have the potential to achieve their goals if the society gives them the opportunity to do so.

Hence, I also dedicate the study to the children with disabilities in Malawi and in Africa, who continue to struggle to attain education as if education is not one of their inherent human rights. And to all persons with disabilities and human rights advocates, the goal of human rights advocacy is to ensure that the society appreciates that all human beings are entitled to enjoy human rights on an equal basis. One of the ways of attaining this goal is by ensuring the inclusion of persons with disabilities in all aspects of life in the society, which include education. In view of this, I dedicate this study to you all.

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Key words

Human rights

Children's rights

Disability rights

Socio-economic rights

Right to education

Inclusive education

Primary education

Persons with disabilities

Children with disabilities

Malawi

List of abbreviations

ACHPR.....	African Charter on Human and Peoples' Rights
ACRWC.....	African Charter on the Rights and Welfare of the Child
AU.....	African Union
AYC.....	African Youth Charter
CCPJA.....	Child Care, Protection and Justice Act
CESCR.....	International Covenant on Economic Social and Cultural Rights
CPRs.....	Civil and Political Rights
CRC.....	Convention on the Rights of the Child
CRPD.....	Convention on the Rights of Persons with Disabilities
CWD.....	Child with disabilities
CWDs.....	Children with disabilities
DPO.....	Disabled persons' organisation
DPOs.....	Disabled persons' organisations
EA.....	Education Act
EFA.....	Education for All
ESIP.....	Education Sector Implementation Plan
FPE.....	Free primary education
HPA.....	Handicapped Persons Act
ICCPR.....	International Covenant on Civil and Political Rights
ISCED.....	International Standard Classification of Education
MoE.....	Ministry of Education
NCCDI.....	National Coordinating Committee on Disability Issues
NESP.....	National Education Sector Plan
NGO	Non-governmental organisation
NGOs	Non-governmental organisations
NHRI.....	National Human Rights Institution
NHRIs.....	National Human Rights Institutions
PWD.....	Person with disabilities

PWDs.....	Persons with disabilities
SEN.....	Special Educational Needs
SER.....	Social and economic right
SERs.....	Social and economic rights
SNE.....	Special Needs Education
UN.....	United Nations
UNESCO.....	United Nations Education, Scientific and Cultural Organisation
WAP.....	World Programme of Action Concerning Persons with Disabilities

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Chapter one

General introduction and background

1.1 Background to the study

Malawi is a state party to a number of international human rights instruments that guarantee the rights of children with disabilities (CWDs), which include the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD);¹ the UN Convention on the Rights of the Child (CRC);² and the African Charter on the Rights and Welfare of the Child (ACRWC).³ The instruments guarantee the right to education, among other rights.⁴

A study by Filmer has found that most CWDs, especially from developing countries such as Malawi, do not attain education or enjoy other rights guaranteed in the human rights instruments.⁵ Another study commissioned by the Cheshire International and Montfort College (the Cheshire and Montfort study) found that Malawi faces challenges to provide primary education to CWDs due to, among others, inaccessible school environments and infrastructure and lack of resources and facilities.⁶ In 2005, the Malawi Government acknowledged that almost 98% of the CWDs could not attain education.⁷

¹ Signed on 27 September 2007, ratified on 27 August 2009
<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en>
(accessed 19 August 2011).

² Ratified on 2 January 1991
<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>
(accessed 20 August 2011).

³ Signed on 13 July 1999, ratified on 16 September 1999
<<http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf>> (accessed 20 August 2011).

⁴ Further discussion on the instruments is contained in Chapter 3 of the study.

⁵ D Filmer 'Disability, poverty, and schooling in developing countries: Results from 14 household surveys' (2008) 22 *World Bank World Economic Review* 141.

⁶ A Chavuta et al 'Baseline study report on inclusive education in Shire Highlands Education Division in Malawi' (2008) 7-9.

⁷ Malawi Government, National Policy on the Equalisation of Opportunities for Persons with Disabilities (Disability Policy) (2005) 5.

In light of this situation, this study analyses the extent to which Malawi is taking appropriate measures to implement the right to primary education of CWDs.⁸ Malawi has been chosen to present a case study of the extent to which African states parties to the international instruments that guarantee the right to education of CWDs, such as the CRPD and the CRC, can take necessary measures in order to realise the right.

1.2 Problem statement and underlying assumption

The study proceeds on the premise that Malawi has an obligation to ensure the enjoyment of the right to education and all human rights that are guaranteed by the instruments it ratifies by taking appropriate measures to realise the rights.⁹ Yet, most CWDs in Malawi do not attain primary education.

Therefore, the essay identifies the failure by Malawi to realise the right to primary education of CWDs in practice as the problem that must be investigated. Accordingly, the underlying assumption is that if Malawi does not undertake appropriate legislative, policy and other measures that comply with international standards to implement the right, the CWDs will not be able to enjoy their right to primary education.

1.3 Objectives and scope of the study

This study aims at critically assessing the extent to which Malawi undertakes appropriate measures to realise the right to primary education of CWDs. The analysis focuses on the constitutional, legislative and policy implementation measures; the extent to which the measures comply with international standards; and the recommendations that can be suggested to ensure the realisation of the right. Accordingly, the study seeks to answer the following four questions: What are the international standards on the right to primary education of CWDs? Which measures does Malawi undertake to ensure that CWDs are able to enjoy the right? Do the identified measures comply with international standards in order to ensure the implementation of the right? What recommendations can be suggested to ensure the realisation of the right?

⁸ Further discussion on the provision of primary education of CWDs in Malawi and the challenges that beset it is contained in section 4.2 of Chapter 4.

⁹ See *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001), para 40.

1.4 Significance of the study

The right to education is a very important right for all children to the extent that their future and enjoyment of most rights such as employment predominantly depend on getting education.¹⁰ Accordingly, the right is regarded as having double dimensions as a human right in itself and an indispensable means of realising other rights.¹¹

Therefore, the study discharges the significant duty of investigating the options that can enable Malawi to take appropriate implementation measures to ensure that CWDs are able to enjoy the right to primary education.

1.5 Literature review

The author has consulted different sources pertaining to the right to education and the rights of PWDs and CWDs. A number of observations have been made in respect of the writings.

Firstly, Combrinck has discussed the right to education of CWDs in her study.¹² Her work gives a general picture of the right to formal education in the African context. Any specific references were by way of illustrations and do not include Malawi.¹³

Secondly, Basser has written on the right to education of CWDs. His work focuses on the obstacles to the enforcement of the rights before the domestic courts in selected jurisdictions outside Africa, namely, Ireland, Canada, New Zealand and Australia.¹⁴

Thirdly, Akinbola has discussed the right to education of CWDs in a journal article.¹⁵ The article does not focus on primary education alone and is specifically about inclusive education in Nigeria.

¹⁰ World Health Organisation (WHO) & World Bank *World report on disability* (2011)10.

¹¹ M Verheyde 'Article 28: The right to education' in A Allen et al (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2006) 7.

¹² H 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) 299.

¹³ The study mentions South Africa, Kenya and Uganda as examples. See Combrinck (n 12 above) 314.

¹⁴ LE Basser 'Justice for all? The challenges for realising the right to education for children with disabilities' 2005 (8) *Journal of Race, Gender & Justice* 531.

¹⁵ BR Akinbola 'The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities' (2010) 10 *African Human Rights Law Journal* 457.

In addition, Kamga in his journal article discusses the right to primary education. The discussion specifically relates to Cameroon and does not analyse the right from the perspective of disability.¹⁶

Furthermore, Jere in his LLM dissertation explores the laws and policies that are relevant to the rights of PWDs in Malawi.¹⁷ His work approaches the analyses from the stand point of equality in the work place.

On its part, this study takes a different approach with different focus from the writings discussed above. For example, unlike Combrinck, Bassar, Akinbola and Kamga, it focuses on appraising the right to education of CWDs at primary level within the context of Malawi from the perspectives of disability and the rights of the child; and unlike Jere, it focuses on the rights of CWDs in Malawi from the perspective of primary education.

It can be observed from the analysis above that there are limitations in the existing literature in relation to the investigation of the options which Malawi could take to realise the right to primary education of CWDs. Therefore, although there is abundant literature pertaining to the education of CWDs, such literature does not address the topic with the focus and specificity that this study does. Accordingly, this study provides unique insights into the subject.

1.6 Methodology and limitation of the study

The study relies on desk-based and internet research with particular focus on different writings on primary education, disability and the rights of children, including a number of international human rights instruments, national laws and policies that influence the education of CWDs.

The study faces few limitations as it focuses on reviewing Malawi's relevant laws and policies without undertaking a field research to analyse the factual situation. The field research would have involved the holding of interviews with the relevant stakeholders involved in providing education to CWDs such as Malawi Government officials who are involved in policy development, persons working in disabled persons' organisations (DPOs) and primary school authorities.

¹⁶ SA Kamga 'Realising the right to primary education in Cameroon' (2011) 11 *African Human Rights Law Journal* 171.

¹⁷ V Jere 'The right to equality in the work place for persons with disabilities in Malawi: Does the Convention on the Rights of Persons with Disabilities offer any hope?' unpublished LLM thesis, University of Pretoria, 2008.

The interviews would have given insights, among others, into the stakeholders' understanding of disability, the education of CWDs and the role of laws, policies, plans and budget allocations in the education of CWDs. The information obtained could have been used in determining the gaps that exist in the available literature on the topic which would have informed this study to adequately fill the gaps and/or identify other areas for further study to fill the gaps.¹⁸

In addition, the author did not manage to get first hand information or a copy of the 2007 Special Needs Education (SNE) Policy of Malawi, which sets out the government's policy in providing education to PWDs.

In order to overcome the limitations, the study makes recourse to a number of reports on the status of the right that have been published following field research conducted in Malawi by other researchers. It also uses the facts contained in documents approved by Malawi Government such as policies and government reports to other agencies that give the factual situation pertaining to the right.¹⁹ In order to obtain information regarding the SNE Policy, the study consulted secondary sources that discussed the contents of the Policy, such as reports of field research findings conducted in Malawi.

Accordingly, it is the author's considered view that the identified limitations will not affect the validity and accuracy of the findings and conclusions of the study.

1.7 Outline of chapters

This study has five chapters. The first two chapters are foundational while the third and fourth chapters deal with the substantive issues. The last chapter offers some recommendations.

Chapter one is the introduction. Among others, it gives a general introduction and background to the study; the significance of the study; the problem statement and the underlying assumption that shape the research questions which the study seeks to address; literature review; and an outline of the chapters.

¹⁸ Nevertheless, the study has identified a number of possible areas for further research in relation to the topic, which are discussed in section 5.4 of Chapter 5.

¹⁹ Since government reports are inherently prone to be biased towards the state in trying to paint a positive picture, the study considered the government documents with caution and counterbalanced their findings with the independent research findings on the same issues.

Chapter two explores the conceptual basis of the study. It discusses the models of disability, the concept of inclusive education and the nature of primary education of CWDs.

Chapter three analyses the international legal standards on the right to primary education of CWDs. It also discusses the measures that are expected to be taken at national level to comply with the international standards in implementing the right.

Chapter four analyses the measures that Malawi is taking to implement the right to primary education of CWDs. It investigates the extent to which Malawi's relevant laws and policies relating to primary education of CWDs comply with international standards to ensure the implementation of the right. The chapter also assesses the general factual situation of the right in Malawi.

Chapter five gives the conclusions of the study and suggests a number of practical recommendations.

Chapter two

The conception of disability and the right to primary education of children with disabilities

2.1 Introduction

This chapter explores the conceptual underpinnings of disability and the right to primary education of CWDs. It first discusses the nature of primary education and the concept of free and compulsory primary education. Thereafter, it analyses the concept of inclusive education by discussing the special schools, integrated schools and inclusive schools approaches to the provision of education to CWDs. Lastly, it discusses the medical, social and human rights models of disability.

2.2 The nature of primary education

Education does not have a single agreed definition. Nevertheless, it can be understood broadly as an act, process or experience that systematically promotes learning, knowledge and development.²⁰ Education can also be understood in the narrow sense as formal instruction of knowledge within recognised and well structured system of institutions and programmes.²¹ This study takes the narrow approach of formal education that is systematically provided in educational institutions such as schools, which comprises primary, secondary and higher education.²² The 1997 International Standard Classification of Education (ISCED) has elaborated the narrow approach of formal education.²³

²⁰ P Mittler 'Special needs education: An international perspective' (1995) 22 *British Journal of Special Education* 105.

²¹ G Mialaret (ed) *The child's right to education* (1979) 11.

²² KD Beiter *The protection of the right to education by international law* (2006) 19.

²³ The ISCED 1997 was approved by the UNESCO General Conference at its 29th session, November 1997.

2.2.1 The 'definition' of primary education

Primary education consists of at least six years of full time schooling.²⁴ The CRC Committee has recommended that it must consist of eight years.²⁵ Its entry age for children is expected to be between five and seven years.²⁶ Primary education forms the first level of formal education.²⁷

2.2.2 The concept of free and compulsory primary education

The right to education is one of the social and economic rights (SERs) guaranteed in the International Covenant on Economic Social and Cultural Rights (CESCR).²⁸ The CESCR, among others, provides for the right to primary education and the concept of free and compulsory primary education.²⁹ The Committee on Economic, Social and Cultural Rights (Committee on ESCR)³⁰ has explained the concept of free and compulsory education in General Comment No 11.³¹ Although general comments are not binding, they give meanings to rights and duties in the human rights treaties since they seek to interpret and elaborate the provisions of the particular treaties³² and their norms as understood by the treaty monitoring bodies.³³

The concept of compulsory education has at least two elements. Firstly, it entails that parents or guardians and the state are not entitled to consider the decision of access of a child to education as optional.³⁴ Hence, it is a mandatory requirement to ensure that all children access primary education. Secondly, it implies access to education without discrimination.³⁵

²⁴ ISCED, para 46.

²⁵ CRC Committee, Concluding Observations on Kenya (CRC/C/KEN/CO/2, 2007), para 58(a).

²⁶ ISCED, para 46. The other levels of formal education are secondary and tertiary levels.

²⁷ ISCED, para 37. There may also be pre-primary education provided to children aged between three and five years, which is regarded as level zero.

²⁸ CESCR, art 13(1). Chapter 3 contains further discussion on the CESCR and the right to primary education.

²⁹ CESCR, art 13(2)(a).

³⁰ Further discussion on the CESCR and the Committee is contained in sections 3.2.2 and 3.4.1 of Chapter 3.

³¹ Committee on ESCR, General Comment No 11 'Plans of action for primary education' (1999), para 6.

³² See P Alston 'The historical origins of the concept of "general comments" in human rights law' in L Boisson de Chazornes & V Gowland-Debbas (eds) *The international legal system in quest of equity and universality: Liber Amicorum Georges Abi-Saab* (2001) 726; S Kalantry et al 'Enhancing enforcement of economic, social, and cultural rights using indicators: A focus on the right to education in the ICESCR (2010) 32 *Human Rights Law Quarterly* 267.

³³ H Steiner et al *International human rights in context: Law, politics, morals* (2007) 878.

³⁴ General Comment No 11, para 6.

³⁵ As above. Further discussion on the concept of non-discrimination is contained in sections 3.2.2, 3.2.3 & 3.2.4 of Chapter 3.

In addition, the principle of compulsory education is considered to be applicable to children only since it 'implies that it is in the best interests of the child that children are not entitled to refuse education below a specified level'.³⁶

The concept of free primary education (FPE) entails primary education that is available without charge to the child, the parent or the guardian.³⁷ This requires the elimination of any fees and direct costs of education,³⁸ including compulsory levies and other indirect costs such as the obligation to wear a school uniform that is relatively expensive.³⁹ The costs to be eliminated, as direct or indirect costs, may also include costs related to stationery, transport, school books, and other obstacles to education comprising 'opportunity costs' of education that poor families have to bear where they send children to school thereby dispensing with the children's contribution to the family through their labour.⁴⁰ In addition, the principle of FPE is aimed at preventing the exclusion of any children from education.⁴¹

The requirement of free and compulsory education in respect of primary education of CWDs may raise unique issues pertaining to the state's obligations since CWDs need special facilities to be accommodated in education.⁴² For example, some children with visual impairments may need Braille facilities. On its part, the CRC Committee expects primary education of CWDs to be free of direct costs.⁴³ Hence, issues may arise whether the state must cover the costs for the special facilities or whether the expenses for such materials are direct or indirect costs of education.⁴⁴

³⁶ G Van Buren *The international law on the rights of the child* (1995) 237.

³⁷ General Comment No 11, para 7.

³⁸ As above.

³⁹ As above.

⁴⁰ CRC Committee, Concluding observations on Mocambique (UN Doc CRC/C/114, 2002), para 306; Beiter (n 22 above) 513,514; J Sloth-Nielsen & BD Mezmur 'Free education is a right for me: A report on free and compulsory primary education' (2007) 10.

⁴¹ Sloth-Nielsen & Mezmur (n 40 above) 15.

⁴² See Committee on ESCR, General Comment No 5 'Persons with disabilities' (1994), para 35.

⁴³ CRC Committee, General Comment No 9 'Children with disabilities' (2006), para 65.

⁴⁴ The implementation of the right to primary education of CWDs is addressed in section 3.4 of Chapter 3 and the issue of providing free 'special' facilities to CWDs is addressed in section 4.5.2 of Chapter 4.

2.3 The concept of inclusive education

The concepts of special needs education (SNE) and inclusive education are used in relation to the education of CWDs.⁴⁵ There is controversy over the meanings and definitions of the concepts.⁴⁶ Nonetheless, the concept of inclusive education is currently favoured over SNE.⁴⁷

SNE is understood as the educational delivery system that puts the primary focus on enabling learners with special educational needs (SEN) to learn in a modified environment or with individualised accommodations for the disability that has been diagnosed.⁴⁸

On its part, Inclusive education is conceptualised as a process of responding to the diversity of needs of learners through increasing participation in learning, cultures and communities, and reducing exclusion in education.⁴⁹ It aims at addressing the learning needs of all persons, especially those that are vulnerable to marginalisation and exclusion, by ensuring that schools accommodate all children in spite of their differences and impairments.⁵⁰

There are three approaches to the provision of education of CWDs, namely, special schools, integrated schools and inclusive schools approaches.⁵¹

2.3.1 The special schools approach

The special schools approach refers to the provision of education to CWDs in a different environment where they learn separately from other children.⁵² It is based on the perception that the impairments in the CWDs cause them to face challenges to learn in mainstream schools.⁵³ Thus, the approach focuses on the CWDs and their impairments and not on the school system.

⁴⁵ Mittler (n 20 above) 105.

⁴⁶ WHO & World Bank (n 10 above) 209.

⁴⁷ See V Muñoz *Report of the UN Special Rapporteur on Education on the right to education of persons with disabilities* (UN Doc A/HRC/4/29, 2007), para 9.

⁴⁸ AN Itimu & PB Kopetz 'Malawi's special needs education (SNE): Perspectives and comparisons of practice and progress' (2008) 8 *Journal of Research in Special Educational Needs* 153.

⁴⁹ R Rieser *Implementing inclusive education* (2008) 21.

⁵⁰ Reiser (As above).

⁵¹ WHO & World Bank (n 10 above) 210.

⁵² S Nock 'Implementing inclusive education: A Commonwealth guide to implementing article 24 on the UN Convention on the Rights of People with Disabilities' (2011) 21 *Development in Practice* 447-448.

⁵³ Muñoz (n 47 above), para 11.

According to this approach, it is considered that CWDs are different from other children; they do not respond to learning; they have special needs; and ultimately, they have to be segregated from mainstream schools.⁵⁴ Consequently, CWDs are placed in their own schools.⁵⁵

2.3.2 The integrated schools approach

The integrated schools approach also puts the focus on the CWDs themselves and views their impairments as the problem that hinders their learning in the mainstream schools. Hence, it is similar to the conception behind special education in terms of its thinking and techniques.⁵⁶

However, instead of putting the CWDs in segregated environments, measures are taken to 'fix' the CWDs to fit in the mainstream schools.⁵⁷ For example, CWDs can be provided with special teachers and taught with special techniques but are expected to fit in the mainstream schools without making any changes or adjustments to the education system and environment.⁵⁸ In view of this, it has been said that integrated education fixes or fails the CWDs since their ability to attain education depends on whether they fit into the mainstream schools.⁵⁹

2.3.3 The inclusive schools approach

The inclusive schools approach refers to the education of CWDs in the mainstream schools where CWDs and other children learn together.⁶⁰ The approach focuses on the school environment and its barriers.⁶¹ It perceives the impediments in the mainstream education system and school environment as the cause of the challenges faced by CWDs in education.⁶² It aims at identifying and eradicating such hindrances to enable all children, including CWDs, to attain education.⁶³ Therefore, the inclusive schools approach seeks to 'fix' the school system to accommodate the learning of CWDs.

⁵⁴ Rieser (n 49 above) 27.

⁵⁵ Muñoz (n 47 above), para 11.

⁵⁶ Rieser (n 49 above) 28.

⁵⁷ n 49 above, 22.

⁵⁸ n 49 above, 28.

⁵⁹ n 49 above, 27.

⁶⁰ S Peters et al 'A disability rights in education model for evaluating inclusive education' (2005) 9 *International Journal of Inclusive Education* 142.

⁶¹ Rieser (n 49 above) 28.

⁶² UNESCO *Open file on inclusive education* (2001) 22.

⁶³ WHO & World Bank (n 10 above) 210.

2.3.4 Observations on the approaches to the provision of education of CWDs

The inclusive schools approach is widely recommended in the provision of education to CWDs for respecting the equality of all children.⁶⁴ Nonetheless, it may be difficult to ensure full inclusion of CWDs to the extent that no state has a fully inclusive education system.⁶⁵ In view of this, the report by WHO and the World Bank recommends flexibility in conceptualising the provision of education to CWDs.⁶⁶

In addition, other scholars, such as Mittler, argue that inclusive schools overlook some CWDs with severe learning impairments and other categories of CWDs such as the deaf-blind.⁶⁷ Hence, they advocate that such CWDs may need to learn in separate environments.⁶⁸ For example, schools where students and teachers use sign language for all communication may be regarded as the best environment for a child with hearing impairments.⁶⁹ Therefore, the special schools approach may act as a necessary exception to the inclusive schools approach.

2.4 The conception of disability

Disability is said to be a dynamic and contested concept which does not have an agreed definition.⁷⁰ Its definition remains one of the controversial issues in the disability field.⁷¹ In addition, there are various faces of disability that include visual, hearing and intellectual disabilities and disfigurement.⁷²

Furthermore, there are at least three models of disability, which include the medical model, the social model and the human rights model.

⁶⁴ As above.

⁶⁵ As above.

⁶⁶ As above.

⁶⁷ Mittler (n 20 above) 105.

⁶⁸ As above.

⁶⁹ WHO & World Bank (n 10 above) 211.

⁷⁰ n 10 above, 3.

⁷¹ R Traustadóttir 'From social policy to the human rights law of the 21st century' in OM Arnadóttir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities* (2009) 8.

⁷² Combrinck (n 12 above) 303.

2.4.1 The medical model

The medical model locates the ‘problem’ of disability within the individual PWDs and attributes the ‘problem’ to their physiological limitations.⁷³ Hence, it views the physiological condition of PWDs itself as the problem associated with disability.⁷⁴ According to the model, PWDs and their inability to ‘properly’ function in mainstream society are considered to require charitable intervention.⁷⁵ Consequently, it perpetuates the segregation of PWDs from the mainstream society.⁷⁶

According to the medical model, the education of CWDs is not perceived as a human rights issue. Hence, it is considered that the provision of primary education to CWDs based on the medical model would emphasise segregated education as the state would not feel obliged to ensure the inclusion of CWDs in mainstream society.⁷⁷

2.4.2 The social model

The premise of the social model is that disability is the outcome of the interaction between PWDs and the environment where environmental barriers, including individual prejudices and institutional discrimination, impose restrictions upon PWDs.⁷⁸ The model holds that the failure of the environment to adjust to the needs of PWDs causes the ‘problem’ of disability.⁷⁹

Relevant examples pertaining to the education of CWDs would include the presence of steps and not ramps in the school environment making it difficult for CWDs who are wheelchair users to move about; the failure to make provision for sign language to accommodate children with hearing impairments; and the locking up of CWDs in homes for apparent fear of suffering the shame associated with disabilities.⁸⁰

⁷³ M Oliver *Understanding disability: From theory to practice* (1996) 32.

⁷⁴ G Quinn & T Degener *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.

⁷⁵ C Ngwena ‘Deconstructing the definition of “disability” under the Employment Equity Act: Social deconstruction’ (2006) 22 *South African Journal on Human Rights* 620.

⁷⁶ M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities* (2010) 16.

⁷⁷ As above.

⁷⁸ Oliver (n 73 above) 33.

⁷⁹ H Hahn ‘Public support for rehabilitation programs: The analysis of US Disability Policy’ (1986) 1 *Disability, Handicap & Society* 128.

⁸⁰ R Lang & G Charowa *DFID scoping study: Disability issues in Zimbabwe* (2007) 19.

Consequently, the social model advocates for the need to make substantial changes to the physical and social environment to eradicate the barriers to equal participation of PWDs. In respect of the education for CWDs, this entails the need to make the school environment accessible to all CWDs by eradicating all barriers.

Since the social model advocates for the inclusion of CWDs in society, it will inevitably emphasise inclusive education, especially the inclusive schools approach, since the mainstream schools would be adjusted to accommodate all children.

2.4.3 The human rights model

According to the human rights model, disability is perceived as a human rights issue and the 'problem' associated with disability is attributed to external factors such as the society.⁸¹ As a result, the model holds that the state has the responsibility to 'tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons'.⁸² In respect of the education of CWDs, the model requires the state to take measures to ensure that CWDs are able to attain primary education on an equal basis with other children.

Moreover, since the human rights model emphasises equalisation of opportunities of CWDs in the enjoyment of all rights, it will inevitably require the state to promote inclusive education so that CWDs are not excluded from the mainstream society.

In view of the three models of disability, it can be observed that the social and human rights models are more likely to ensure the enjoyment of the right to primary education of CWDs as they expect the state to take measures to foster the inclusion of PWDs in society and ensure that they enjoy human rights on an equal basis with others. Indeed, the medical model has since fallen out of favour and there has been a shift in the disability approach from the medical to the social and human rights models.⁸³

⁸¹ Combrinck (n 12 above) 31.

⁸² Quinn & Degener (n 74 above) 10.

⁸³ Schulze (n 76 above) 16.

2.5 Conclusion

This chapter has analysed the conceptual understanding of disability and the right to primary education of CWDs. It can be observed that primary education consists of at least six years of schooling. In addition, it is supposed to be free and compulsory by eradicating the payment of fees and direct costs and by making the decision to send children to school mandatory.⁸⁴

Furthermore, there is a movement in the conceptualisation of the education of CWDs from the emphasis on utilising segregated schools towards the provision of their education in inclusive schools. However, it is acknowledged that the concept of inclusive education does not imply the elimination of special schools since they may be necessary in special circumstances, such as in cases of severe and multiple disabilities.

It can also be noted that there has been a shift in the disability approach from the medical model, which perpetuates the exclusion of PWDs from the mainstream society, to the social and human rights models, which emphasise the creation of equal opportunities to ensure the inclusion of PWDs in society.

Therefore, it can be concluded that there is a shift in the approach to the rights or affairs of CWDs from their segregation to their inclusion in the mainstream society in all aspects of life, including the provision of education. The next chapter analyses the international standards on the right to primary education of CWDs in the light of the current conception of disability and the provision of primary education to CWDs.

⁸⁴ The concept of compulsory education is particularly crucial in ensuring the right to education of CWDs since the factors that impede their access to education include negative attitudes of parents, guardians and certain state officials or stakeholders involved in education.

Chapter three

International standards on the right to primary education of children with disabilities

3.1 Introduction

This chapter explores the international standards pertaining to the right to primary education of CWDs. It focuses on instruments to which Malawi is a state party since Malawi has obligations to implement the guaranteed rights if such instruments are binding.⁸⁵

Malawi is a dualist state which entails that after ratification of any international instruments, they must be domesticated by an Act of Parliament to make them enforceable at national level.⁸⁶ Malawi has since domesticated the CRC and the ACRWC.⁸⁷

The Chapter first explores the international standards by analysing international human rights instruments that include the Universal Declaration on Human Rights (Universal Declaration), the CESC, the CRPD and the CRC; and African regional instruments that include the African Charter on Human and Peoples' Rights (ACHPR); the ACRWC; and the African Youth Charter (AYC). Thereafter, it analyses the implementation measures that the instruments prescribe pertaining to the right to primary education of CWDs. Lastly, the Chapter analyses the standards developed by four world conferences on education which include the Salamanca Conference on Special Needs Education.⁸⁸

⁸⁵ Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, art 26.

⁸⁶ Malawi Constitution 1995, sec 211 (1). See also *Chakufwa Tom Chihana v The Republic* (Supreme Court) MSCA Criminal Appeal No 9 of 1992.

⁸⁷ Sec 4(c) of the Third Schedule to the Child Care, Protection and Justice Act 22 of 2010. Sections 4.3.4 and 4.5.2 of Chapter 4 contain further discussion on the domestication.

⁸⁸ Held in Salamanca, Spain, June 1994.

3.2 International legal framework on the right to primary education of CWDs

3.2.1 The Universal Declaration

The Universal Declaration,⁸⁹ which is the first human rights instrument to be adopted by the UN, contains both civil and political rights (CPRs) and SERs, which include the right to education.⁹⁰ It provides for the concept of compulsory education in elementary stages and the concept of free education in elementary and fundamental stages.⁹¹ Since it guarantees its rights without discrimination,⁹² it guarantees CWDs the right to education.⁹³ However, the Universal Declaration is not binding as it is a declaration as opposed to a convention although there has been a debate on whether some of its provisions have attained the status of customary international law to impose binding obligations on states.⁹⁴

3.2.2 The CESC

The CESC is the main international human rights instrument that provides for SERs.⁹⁵ It guarantees the right to education,⁹⁶ which includes free and compulsory primary education.⁹⁷ Although the CESC does not spell out the elements of the right, the Committee on ESCR, which monitors the implementation of the CESC, has developed the elements in General Comment No 13.⁹⁸ The Committee has also explained the SERs of PWDs in General Comment No 5.⁹⁹ Hence, the two general comments are relevant in expounding the international standards on the right to primary education of CWDs. The standards, among others, require the education to satisfy the elements of availability, accessibility, acceptability and adaptability.¹⁰⁰

⁸⁹ Adopted by the UN General Assembly resolution 217 A (III) on 10 December 1948.

⁹⁰ Art 26.

⁹¹ Art 26(1).

⁹² Arts 1 & 3.

⁹³ Art 26

⁹⁴ See eg LB Sohn 'The human rights law of the Charter' (1977) 12 *Texas International Law Journal* 133. A discussion on the debate of the legal status of the Universal Declaration does not fall within the scope of this study.

⁹⁵ Adopted on 16 December 1966, entered into force on 3 January 1976.

⁹⁶ Art 13.

⁹⁷ Art 13(1).

⁹⁸ Committee on ESCR, General Comment No 13 'The right to education' (1999).

⁹⁹ Committee on ESCR, General Comment No 5 'Persons with disabilities' (1994).

¹⁰⁰ General Comment No 13, para 6.

Availability

The standard of availability of education implies that functioning educational institutions and programmes must be available in sufficient quantity within the state to cater for all children, including CWDs.¹⁰¹ This entails availability of adequate functioning inclusive education institutions with sufficient buildings; sanitation facilities; safe drinking water; trained teachers, who receive domestically competitive salaries; teaching materials; and special facilities that ensure the accommodation of CWDs in education.¹⁰²

Accessibility

The standard of accessibility of education requires the state to ensure that educational institutions and programmes, including the environment, services, and all necessary facilities are accessible to all children including CWDs.¹⁰³ It has three overlapping dimensions of non-discrimination, physical accessibility and economic accessibility.¹⁰⁴

Firstly, the non-discrimination dimension requires education to be accessible to all children without discrimination in law and fact¹⁰⁵ by ensuring the eradication of all forms of discrimination, including segregation and isolation brought about by physical and social barriers.¹⁰⁶ This obligation is subject to immediate realisation.¹⁰⁷ Secondly, the dimension of physical accessibility requires (inclusive) education institutions to be within safe physical reach to enable physical attendance by CWDs and other children.¹⁰⁸

Thirdly, economic accessibility implies education that is affordable to all children.¹⁰⁹ Since primary education is supposed to be free,¹¹⁰ economic accessibility would be reinforced as children may not be required to pay fees and other direct costs of education.¹¹¹

¹⁰¹ General Comment No 13, para 6 (a).

¹⁰² As above.

¹⁰³ General Comment No 13, para 6(b).

¹⁰⁴ As above.

¹⁰⁵ General Comment No 13 para 6(b)(i).

¹⁰⁶ General Comment No 5, para 15.

¹⁰⁷ General Comment No 13, para 31. The nature of state party obligations is discussed in section 3.4 of this Chapter.

¹⁰⁸ General Comment No 13, para 6(b)(ii).

¹⁰⁹ General Comment No 13, para 6(b)(iii).

¹¹⁰ CESCR, art 13(2) (a).

¹¹¹ Further discussion on free primary education is provided in section 2.2.2 of Chapter 2.

Acceptability

The standard of acceptability entails that the form and substance of education, curricula and teaching methods are relevant, culturally appropriate and of good quality;¹¹² and are regarded as such by parents and learners, including CWDs.¹¹³ For example, for children with hearing impairments, the curricula should include sign language.¹¹⁴

In addition, the CDESCR requires education to serve certain objects and purposes to be acceptable, which include ensuring the full development of the human personality and dignity and enabling all persons to participate effectively in a free society.¹¹⁵

Adaptability

The standard of adaptability requires education to be flexible to adapt to the needs of changing societies and to be responsive to the needs of learners within their diverse social and cultural settings.¹¹⁶ This entails that the teaching methods, curriculum, and programmes must be flexible and capable of accommodating the learning of CWDs.

3.2.3 The CRPD

The CRPD¹¹⁷ is the only global covenant that specially guarantees the rights of PWDs.¹¹⁸ It provides for the rights of CWDs in article 7. Its preamble recognises the entitlement of CWDs to enjoy all human rights on an equal basis with other children and it acknowledges the obligations undertaken by state parties to the CRC in respect of the rights of CWDs.¹¹⁹

The CRPD provides for the right to education in article 24, which also expressly guarantees all CWDs the right to free and compulsory primary education.¹²⁰

¹¹² General Comment No 13, para 6(c).

¹¹³ General Comment No 5, para 35.

¹¹⁴ As above.

¹¹⁵ CDESCR, art 13(1).

¹¹⁶ General Comment No 13, para 6(d).

¹¹⁷ Adopted on 13 December 2006, entered into force on 3 May 2008.

¹¹⁸ Combrinck (n 12 above) 309.

¹¹⁹ CRPD preamble, para (r).

¹²⁰ CRPD, art 24(2)(a).

The CRPD sets a higher standard of accessibility than the CESC. ¹²¹ In respect of accessibility without discrimination, it provides that discrimination on the basis of disability includes the denial of reasonable accommodation, ¹²² which it defines as:

...necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed *in a particular case*, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. ¹²³

It can be observed that reasonable accommodation is individualistic as it aims at accommodating CWDs in education according to their individual needs. ¹²⁴ In addition, the definition of reasonable accommodation implies that states are required to provide reasonable accommodation to the extent that the provision does not impose on them a disproportionate or undue burden. ¹²⁵ Nevertheless, the CRPD particularly requires states to provide reasonable accommodation in making education accessible to all CWDs. ¹²⁶ On its part, the Committee on the Rights of Persons with Disabilities (CRPD Committee) has emphasised that reasonable accommodation must be provided in the education of CWDs to ensure non-discrimination. ¹²⁷

Furthermore, the CRPD's standard of physical accessibility entails, among others, the removal of physical environmental barriers to accessibility in schools ¹²⁸ by ensuring that the school environment has appropriate infrastructure such as ramps to be accessible to CWDs with physical and mobility impairments. Indeed, the CRPD requires the state to ensure physical accessibility of all services to PWDs; ¹²⁹ which is a specific obligation in respect of schools. ¹³⁰

¹²¹ The monitoring committee of the CRPD (CRPD Committee) is yet to be given comprehensive interpretations to the CRPD. It has which since examined two state party reports (of Tunisia and Spain) and issued concluding observations, which, though not binding, give insights into the CRPD's provisions since concluding observations are based on the interpretation of treaties as viewed by their monitoring bodies. See T Buergenthal 'The Human Rights Committee' (2001) 5 *Max Planck Yearbook of United Nations Law* 347.

¹²² Art 2.

¹²³ As above (my emphasis).

¹²⁴ See CRPD's definition of reasonable accommodation (n 125 above). See also CRPD, art 24(2) (c) which requires reasonable accommodation of the individual learner to be provided in education.

¹²⁵ Art 2.

¹²⁶ Arts 24(2)(c) & 5(3).

¹²⁷ See CRPD Committee, Concluding Observations on Spain (Un Doc CRPD/C/ESP/CO/1, 2011), paras 43 & 44(a).

¹²⁸ Art 9(1)(a).

¹²⁹ Art 9 (1).

¹³⁰ Art 9(1)(a). Accessibility is also one of the fundamental principles of the CRPD. See art 3(f).

The CRPD also requires primary education to be acceptable and adaptable to CWDs.¹³¹ This entails that the education system including the environment, teaching methods and the curricula must be designed to accommodate the learning of CWDs.

In addition, the education of CWDs or PWDs must be capable of achieving certain purposes to be acceptable. According to the CRPD, the education of PWDs must ensure, among others, the full development of the PWDs' human potential and sense of dignity; the development of PWDs to their fullest potential of their personality, mental and physical abilities; and the enabling of PWDs to participate effectively in a free society.¹³²

The standards of acceptability and acceptability of education can be achieved by pursuing inclusive education since it is designed to accommodate the learning of all children, and hence is expected to provide education that is adaptable and acceptable to the CWDs.¹³³ Moreover, the CRPD requires the inclusive schools approach in providing education to CWDs¹³⁴ as it expressly recognises the right to inclusive primary education.¹³⁵ On its part, the CRPD Committee has emphasised the need to prioritise the inclusive schools approach by ensuring inclusive education that allows CWDs to learn in all (mainstream) schools.¹³⁶

Nonetheless, the CRPD in article 24(3) recognises that it may be necessary to provide the education of other children with specific disabilities in different environments.¹³⁷ Hence, it impliedly acknowledges that special schools may serve as a necessary exception for some categories of CWDs such as the deaf-blind.¹³⁸

In light of the above, it can be observed that the CRPD modifies, extends, and contextualises the CESC's international standards on the right to primary education of CWDs.

¹³¹ Art 24(4).

¹³² Art 24(1).

¹³³ See sections 2.3.3 and 2.3.4 of Chapter 2 for a discussion on inclusive education.

¹³⁴ Schulze (n 76 above) 133.

¹³⁵ Art 24(2)(a) & (b).

¹³⁶ See CRPD Committee, Concluding Observations on Tunisia (UN Doc CRPD/C/TUN/CO/1, 2011), paras 30 & 32(b) & (d).

¹³⁷ Art 24(3) (c).

¹³⁸ Schulze (n 76 above) 135.

3.2.4 The CRC

The CRC¹³⁹ is the only binding global human rights instrument that was specially 'designed to provide special safeguards and legal protections to children' and their rights.¹⁴⁰ It is the most widely ratified international human rights instrument with only USA and Somalia having not ratified it.¹⁴¹ It has general principles for its implementation and specific provisions that influence the right to primary education of all children.

General principles for the implementation of the CRC

The CRC Committee has identified four cardinal principles as the general principles for the implementation of the CRC,¹⁴² namely, non-discrimination;¹⁴³ best interest of the child;¹⁴⁴ child's survival and development;¹⁴⁵ and child participation.¹⁴⁶ The principles have an impact on the right to primary education of CWDs.

Firstly, non-discrimination entails the recognition of children's equality and their protection from discrimination in law and in practice.¹⁴⁷ It requires the state to take special measures that eradicate barriers and ensure equal opportunities to enable CWDs to access primary education. Secondly, the best interest of the child principle expects the best interest of children, as individuals or a group, to be the primary consideration in any undertaking concerning children with a view to maximise the enjoyment of their rights and interests.¹⁴⁸ Therefore, the state must ensure that education policies, laws, or plans must be in the best interests of CWDs to enable them to attain primary education.

¹³⁹ Adopted on 20 November 1989, entered into force on 2 September 1990.

¹⁴⁰ S Aird et al *Stateless children: Youth who are without citizenship* (2000) 3.

¹⁴¹ <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en> (accessed 20 August 2011).

¹⁴² CRC Committee, General Comment No 5 'General measures of implementation of the Convention on the Rights of the Child' (2003), para 12.

¹⁴³ Art 2.

¹⁴⁴ Art 3.

¹⁴⁵ Art 6.

¹⁴⁶ Art 12.

¹⁴⁷ J Carp 'Concepts underlying the Convention on the Rights of the Child' (1998) 4 *Loyola Poverty Law Journal* 116.

¹⁴⁸ CRC Committee, General Comment No 5, para 12; Carp (n 147 above) 117; BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SA Publiekreg / Public Law* 18.

Thirdly, the concept of child's survival and development recognises that the child is entitled to live, survive and develop. It is related to other rights such as education,¹⁴⁹ which is an enabling right¹⁵⁰ that ensures the survival and development of all children to self sustenance and independent living.¹⁵¹ Therefore, the state must ensure that CWDs attain (primary) education, which in turn facilitates their survival and development.

Lastly, the principle of child participation recognises that children are not docile or lesser human beings¹⁵² but partners and participants in taking actions that affect them.¹⁵³ Hence, it expects the state to involve the CWDs themselves or disabled persons' organisations (DPOs)¹⁵⁴ in developing primary education policies, laws, or any related measures.¹⁵⁵

It can be observed that the cardinal principles of the CRC emphasise equal dignity of all children. Accordingly, they can complement the provisions of the CRPD in determining the appropriate standards on the implementation of the rights of CWDs.

Provisions of the CRC

The CRC is the first binding global human rights instrument to expressly prohibit discrimination on the basis of disability.¹⁵⁶ It further guarantees the protection of the rights of CWDs by obliging state parties to ensure the provision of free special care and assistance to CWDs in accordance with their needs to enable them, among others, to access education.¹⁵⁷

¹⁴⁹ Carp (n 147 above) 118.

¹⁵⁰ General Comment No 13, para 1.

¹⁵¹ WHO & World Bank (n 10 above) 10.

¹⁵² Carp (n 147 above) 118.

¹⁵³ CRC Committee General Comment No 5, para 12.

¹⁵⁴ CRPD, art 33(3).

¹⁵⁵ J Sloth-Nielsen & BD Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 347.

¹⁵⁶ General Comment No 9, para 2. The CRC Committee has further explained the rights of CWDs in this General Comment.

¹⁵⁷ Art 23.

Furthermore, the CRC provides for the right to primary education,¹⁵⁸ which should be compulsory and available free to all children on the basis of equal opportunity.¹⁵⁹ The CRC Committee requires that primary education of CWDs must be free of direct costs.¹⁶⁰ It also expects inclusive primary education that is flexible enough to accommodate CWDs.¹⁶¹

In addition, the CRC provides that the education of all children must be capable of achieving the purposes of education outlined in article 29, which include the 'development of the child's personality, talents and mental and physical abilities to their fullest potential.'¹⁶²

The CRC Committee has further elaborated the aims of education of a child in General Comment No 1.¹⁶³

3.2.5 Other international instruments

There are other international instruments that recognise the right to primary education of CWDs. They include the World Programme of Action Concerning Persons with Disabilities (WAP)¹⁶⁴ and the Standard Rules on the Equalization of Opportunities for PWDs (Standard Rules), which are non-binding.¹⁶⁵ Rule 6 of the Standard Rules outlines the measures to be taken to realise the right, including the requirement to prioritise inclusive education.

In addition, the UNESCO Convention against Discrimination in Education, which is a binding instrument, also recognises the right to education of CWDs.¹⁶⁶

¹⁵⁸

Art 28.

¹⁵⁹

Art 28(1)(a).

¹⁶⁰

General Comment No 9, para 65.

¹⁶¹

As above.

¹⁶²

CRC, art 29 (1)(a).

¹⁶³

CRC Committee, General Comment No 1 'The aims of education' (2001).

¹⁶⁴

UN General Assembly Resolution 37/52 adopted on 3 December 1982.

¹⁶⁵

UN General Assembly Resolution 48/96 adopted on 18 December 1992.

¹⁶⁶

Adopted on 14 December 1960. A discussion of these documents does not fall within the scope of this study.

3.3 The African regional legal framework on the right to primary education of CWDs

3.3.1 The ACHPR

The ACHPR¹⁶⁷ guarantees the right to education¹⁶⁸ and other rights without discrimination.¹⁶⁹ Hence, it guarantees CWDs the right to primary education.

The ACHPR also recognises that PWDs have the right to special measures of protection but it does not guarantee them specific rights beyond the rights guarantees to all people.¹⁷⁰

3.3.2 The ACRWC

The ACRWC provides for the rights of Africa's children.¹⁷¹ It also specifically provides for the rights of CWDs.¹⁷² Among other things, it requires state parties to ensure that CWDs have special assistance and effective access to training and preparation for employment.¹⁷³ Although some authors such as Gose regret the omission of education as an area that requires special assistance to be provided to CWDs, they commend the article for making the provision of special assistance by the state a specific right to CWDs.¹⁷⁴

In addition, the ACRWC guarantees every child the right to education¹⁷⁵ and requires states parties 'to provide free and compulsory basic education',¹⁷⁶ which includes primary education.¹⁷⁷

¹⁶⁷ Adopted on 26 June 1981, entered into force on 21 October 1986.

¹⁶⁸ Art 17(1).

¹⁶⁹ Art 2.

¹⁷⁰ Art 18(4).

¹⁷¹ Adopted on 11 July 1990, entered into force on 29 November 1999.

¹⁷² Art 13.

¹⁷³ Art 13(2).

¹⁷⁴ M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 89-90.

¹⁷⁵ Art 11(1).

¹⁷⁶ Art 11(3)(a).

¹⁷⁷ General Comment No 13, para 9.

3.3.3 The AYC

The AYC¹⁷⁸ defines the youth as persons aged between 15 and 35 years and hence applies to CWDs aged between 15 and 18 years.¹⁷⁹ It guarantees CWDs the right to special care that ensures their equal and effective access to education.¹⁸⁰ This may include the elimination of barriers to the full inclusion of CWDs in society.¹⁸¹ Accordingly, the AYC guarantees African CWDs, who are also African youth, the right to access to education, among other rights.¹⁸²

3.4 Implementation measures of the right to primary education of CWDs

3.4.1 Implementation under the CESC, CRC and ACRWC

SERs are subject to progressive realisation in that the state is not obliged to fulfil them immediately.¹⁸³ This distinguishes the nature of obligations imposed by SERs from the CPRs contained in the International Covenant on Civil and Cultural Rights (ICCPR)¹⁸⁴ which are subject to immediate realisation.¹⁸⁵ The CESC requires state parties to take steps, individually or through international co-operation, to the maximum of their available resources to achieve progressively the full realisation of all SERs,¹⁸⁶ including the taking of concrete, targeted and non-retrogressive steps aimed at realising the right to education progressively.¹⁸⁷

Since primary education is one of the SERs, it implies that states are not obliged to implement it immediately but over time.¹⁸⁸ However, since 'free and compulsory education' is subject to a stronger requirement than progressive realisation, it brings a different dimension to the right to primary education.¹⁸⁹

¹⁷⁸ Adopted on 2 July 2006, entered into force on 8 August 2009.

¹⁷⁹ See AYC preamble.

¹⁸⁰ Art 24(1).

¹⁸¹ Art 24(2).

¹⁸² It is noteworthy that the AYC refers to youth with disabilities as 'mentally and physically challenged youth'.

¹⁸³ Committee on ESCR, General Comment No 3 'Nature of states parties obligations' (1990), para 9.

¹⁸⁴ Adopted on 16 December 1966, entered into force on 23 March 1976.

¹⁸⁵ It is generally assumed that unlike CPRs, the implementation of SERs requires the state to allocate and spend its resources, and hence, that SERs cannot be realised immediately. Nevertheless, a detailed discussion of this distinction is not within the scope of the study.

¹⁸⁶ CESC, art 2(1).

¹⁸⁷ General Comment No 13, paras 43-45.

¹⁸⁸ Kalantry et al (n 32 above) 269.

¹⁸⁹ As above.

Indeed, the CESCR requires states to work out and develop a detailed plan within a period of two years from the time they become state parties that indicates a specific period, which must be within a reasonable number of years,¹⁹⁰ within which they will provide free and compulsory primary education.¹⁹¹ Hence, the obligation to provide free and compulsory primary education requires that immediate action must be taken.¹⁹² Accordingly, the notion of progressive realisation in the CESCR applies to primary education in a more restricted sense due to article 14, which has the effect of ‘accelerating’ the progressive realisation that is required by the CESCR for general SERs.¹⁹³

However, the obligation seems to be different under the CRC and the CESCR to the extent that some scholars such as Verheyde argue that the CESCR expressly requires immediate realisation of free and compulsory primary education while the CRC requires progressive realisation.¹⁹⁴ Nevertheless, the CRC Committee has recommended the adoption of a plan of action or detailed study aimed at ensuring speedy realisation of the right.¹⁹⁵

The CESCR imposes three levels of obligations in respect of the right to education.¹⁹⁶ Firstly, states must respect the right by avoiding measures that hinder its enjoyment by all children.¹⁹⁷ Secondly, states must protect the right by preventing third parties from interfering with its enjoyment.¹⁹⁸ Thirdly, states must fulfil (facilitate) the right by taking positive measures that enable and assist CWDs to attain primary education.¹⁹⁹ In addition, states must fulfil (provide) the right by providing the means that ensure the education of CWDs who cannot afford to attain education on their own.²⁰⁰

¹⁹⁰ As above.

¹⁹¹ Art 14.

¹⁹² Kalantry et al (n 32 above) 270.

¹⁹³ Beiter (n 22 above) 516.

¹⁹⁴ Verheyde (n 11 above) 10.

¹⁹⁵ CRC Committee, Concluding Observations on Mauritius (UN Doc CRC/C/15/Add.64, 1996), para 29.

¹⁹⁶ General Comment No 13, para 46.

¹⁹⁷ General Comment No 13, para 47.

¹⁹⁸ As above.

¹⁹⁹ As above.

²⁰⁰ As above.

Furthermore, states are expected to ensure that their laws make all SERs enforceable before the courts in order to achieve the three levels of obligations.²⁰¹

The CRC²⁰² and the ACRWC²⁰³ impose similar obligations. The CRC Committee recommends the enactment of laws, policies and national plans in the implementation of the right to primary education of CWDs.²⁰⁴

3.4.2 Implementation under the CRPD

The CRPD imposes general obligations on state parties regarding the implementation of its rights, which also apply to the right to primary education.²⁰⁵ It recognises that although SERs are subject to progressive realisation, international law may allow other obligations to be immediately applicable.²⁰⁶ Hence, it impliedly acknowledges that the obligation to provide free and compulsory education requires immediate action to be taken. In addition, the CRPD Committee has indicated that in implementing the right to education of CWDs, the obligation ‘to provide reasonable accommodation is immediately applicable and not subject to progressive realisation.’²⁰⁷

In respect of specific implementation measures, the CRPD obliges state parties to enact laws to enforce the right to education;²⁰⁸ to enact policies and run programmes that promote the right to education;²⁰⁹ to eradicate all forms of discrimination in education against CWDs;²¹⁰ and to ensure that education authorities act in conformity with the CRPD.²¹¹

²⁰¹ General Comment No 3, para 5.

²⁰² Art 4(1).

²⁰³ Art 1(1).

²⁰⁴ General Comment No 9, paras 17 & 18.

²⁰⁵ Art 4.

²⁰⁶ Art 4(2).

²⁰⁷ See Concluding Observations on Spain (n 127 above), para 44.

²⁰⁸ Art 4(1), para (a).

²⁰⁹ Art 4(1), para (c).

²¹⁰ Art 4(1), para (b).

²¹¹ Art 4(1), para (d).

Furthermore, it provides for a unique implementation mechanism compared to other instruments. Firstly, it requires the state to ‘closely consult with and actively involve’ PWDs, CWDs and DPOs in the development and implementation of legislation and policies to implement the rights it guarantees.²¹² The CRPD Committee has also emphasised this requirement.²¹³

In addition, the CRPD requires the state to designate one or more focal points within government to coordinate the implementation of its rights and obligations and to facilitate the implementation in different sectors.²¹⁴ Accordingly, it envisages a national focal point in the education sector to coordinate the implementation of the right to primary education of CWDs.

Furthermore, states are expected to set up independent mechanisms, such as independent bodies dealing in the protection of human rights, to promote, protect and monitor the implementation.²¹⁵ For example, national human rights institutions (NHRIs) can be given the responsibility to independently protect and monitor the implementation of the right to primary education of CWDs.²¹⁶ In addition, states must provide for the focal points and independent monitoring mechanisms in the applicable legislative and policy implementation measures.²¹⁷

Accordingly, the CRPD requires the active and inclusive participation of the state, CWDs, PWDs and DPOs in the implementation of the right to primary education of CWDs.

3.4.3 Implementation standards developed by international conferences on education

General conferences on education

At least three general world conferences on education have developed implementation standards that impact on the education of CWDs.

²¹² Art 4(3).
²¹³ See Concluding Observations on Tunisia (n 136 above), para 10.
²¹⁴ Art 33 (1).
²¹⁵ Art 33(2).
²¹⁶ Schulze (n 76 above) 176.
²¹⁷ As above.

Firstly; the Jomtien Conference produced the World Declaration on Education for All (1990).²¹⁸ The Declaration requires states to achieve universal access and equity in education by paying special attention to the learning needs of CWDs and to take steps to provide equal access to education to every category of PWDs as an integral part of the education system.²¹⁹ It requires specific measures to be taken by states to achieve basic education for all backed by fiscal measures and reinforced by educational policy reforms.

Secondly, the Dakar Framework of Action on Education for All: Meeting our Collective Commitments,²²⁰ commits states to achieve education for all (EFA) goals and targets for every citizen in every society.²²¹ The goals include ensuring that by 2015 all children, particularly those in difficult circumstances, have access to and complete, free and compulsory primary education.²²² However, it does not expressly mention SNE or education for CWDs.

Lastly, the Sub-Saharan Framework for Action²²³ requires states to pay special attention to CWDs in implementing EFA²²⁴ but it does not elaborate the states' obligations.

The Salamanca Conference on SNE

The Salamanca Statement

The Salamanca Statement on SNE²²⁵ recognises the necessity and urgency of inclusive education to CWDs.²²⁶ It expects education to take into account the wide diversity and learning needs of each child to enable CWDs to access regular schools.²²⁷

²¹⁸ Adopted by the World Conference on Education for All: Meeting Basic Learning Needs, held at Jomtien, Thailand, 5-9 March 1990.

²¹⁹ Jomtien Declaration, art 3(5).

²²⁰ Adopted by the World Education Forum, Dakar, Senegal, 26-28 April 2000.

²²¹ Para 1.

²²² Para 7(ii).

²²³ The Education for All: Framework for Action in Sub-Saharan Africa: Education for African Renaissance in the Twenty-first Century, adopted by the Regional Conference on Education for All for Sub-Saharan Africa, Johannesburg, South Africa, 6-10 December 1999.

²²⁴ Art 3(1).

²²⁵ Adopted by acclamation in Salamanca, Spain on 10 June 1994.

²²⁶ Art 1.

²²⁷ Art 2.

In addition, it requires states to enact laws or policies that implement inclusive education principles and to enrol CWDs in regular schools and to give highest policy and budgetary priority to ensure inclusive education.²²⁸

The Salamanca Framework

The Salamanca Framework on SNE was adopted for the purpose of informing and guiding the implementation of the Salamanca Statement.²²⁹ It expects reforms of social institutions to prioritise inclusive education through concerted efforts.²³⁰ Furthermore, it requires the adoption of legislation that recognises the principle of equality of opportunity for CWDs in schools.²³¹ It also advocates for the adoption of policies that require CWDs to attend the regular schools unless specific cases have demonstrated that special education is ideal for particular CWDs.²³² Furthermore, the Framework requires states to mainstream education of CWDs in national plans for achieving EFA.²³³

3.5 Conclusion

This chapter has analysed the international standards and implementation measures on the right to primary education of CWDs. In light of the analysis, it can be observed that the standards oblige states to ensure that primary education of CWDs is free and compulsory. They further require adequate and functioning primary education institutions, programmes and all necessary facilities to be available, accessible, acceptable and adaptable to CWDs to accommodate their learning.

²²⁸ Art 3.

²²⁹ Art 1.

²³⁰ Art 6.

²³¹ Art 16.

²³² Art 18.

²³³ Art 19.

In addition, the standards require states to ensure inclusive primary education that must prioritise the learning of CWDs in inclusive schools within the mainstream school environment as expressly required by the CRPD²³⁴ and the Salamanca principles, which also emphasised the mainstreaming of inclusive education in national education plans.²³⁵

Furthermore, the standards oblige states to take appropriate implementation measures to the maximum extent of their available resources to ensure the progressive realisation of the right to primary education of CWDs.²³⁶ They also expect states to take immediate action to realise free and compulsory education of CWDs within a reasonable number of years.

Lastly, the standards require the implementation measures that emphasise the utilisation of appropriate enabling laws and policies that have the potential of ensuring the right to inclusive free and compulsory primary education of CWDs. Above all, the implementation of the right must be done with the close and active participation of DPOs, CWDs and PWDs.

The next chapter assesses the extent to which the implementation measures being undertaken by Malawi comply with the international standards.

²³⁴ Art 24(2)(b).

²³⁵ Salamanca Framework, art 19.

²³⁶ CRC, art 4.

Chapter four

Malawi's implementation framework on the right to primary education of children with disabilities

4.1 Introduction

This chapter analyses the extent to which Malawi complies with the international standards on the right to primary education of CWDs in taking appropriate measures for the implementation of the right. In order to give Malawi's general factual situation of the right, the chapter first explores the provision of primary education to the CWDs and the challenges that beset it. Thereafter, it explores Malawi's constitutional, legislative and policy implementation measures. Ultimately, it assesses the extent to which the implementation framework complies with the standards.

4.2 The general factual situation of primary education of CWDs in Malawi

Malawi commonly uses the concept of SNE in the provision of education to all persons who face learning challenges and are said to have special educational needs (SEN). Malawi's learners with SEN include CWDs who require access to academic accommodation to ensure their schooling.²³⁷

The Ministry of Education (MoE) identifies learners with SEN as those with sensory impairments (vision, hearing, deaf-blind); cognitive difficulties (intellectual and specific disabilities); socio-emotional, and behavioural difficulties (autism, hyperactivity and other vulnerable children); and physical and health impairments (spina bifida, hydrocephalus, asthma and epilepsy).²³⁸

²³⁷ Itimu & Kopetz (n 48 above) 153.

²³⁸ As above.

4.2.1 A synopsis of the provision of primary education of CWDs in Malawi

The responsibility of providing SNE in Malawi has historically been undertaken by church missions following the special schools approach.²³⁹ The state eventually started to participate.²⁴⁰

The Cheshire & Montfort study found that the provision of SNE in Malawi started with two mission schools for learners with visual impairments in 1950.²⁴¹ The Roman Catholic Church also commenced the provision of SNE to learners with hearing impairments at Montfort campus in Chiradzulu in 1968.²⁴² The MoE introduced another SNE programme in 1996.²⁴³

SNE at primary education level in Malawi is provided through resource rooms, itinerant programmes, and special schools.²⁴⁴ The special schools are usually residential while the resource rooms entail special classes within the regular schools,²⁴⁵ which follow the integrated schools approach.²⁴⁶ The itinerant programme entails SNE teachers travelling to schools within a particular school zone to provide SNE.²⁴⁷ It sometimes results in one SNE teacher catering for 15 different schools.²⁴⁸ It can be observed that Malawi mostly uses the integrated schools approach in providing education to CWDs since SNE is mostly provided in integrated schools.²⁴⁹

4.2.2 A synopsis of the challenges facing primary education of CWDs in Malawi

The provision of primary education of CWDs in Malawi is beset by impediments, which include lack of adequate schools providing inclusive education. The Cheshire & Montfort study found that Malawi faces difficulties to implement inclusive education due to, among others, limited resources; insufficient funding; and environmental barriers.²⁵⁰

²³⁹ A Salmonsson 'Disability is not inability: A final report of a baseline study of steps taken towards inclusive education in Blantyre, Balaka and Machinga districts in Malawi' (2006) 10.
²⁴⁰ As above.
²⁴¹ Chavuta et al (n 6 above) 11.
²⁴² As above.
²⁴³ As above.
²⁴⁴ Itimu & Kopetz (n 48 above) 156.
²⁴⁵ n 48 above, 157.
²⁴⁶ Salmonsson (n 239 above) 9.
²⁴⁷ Itimu & Kopetz (n 48 above) 157.
²⁴⁸ Salmonsson (n 239 above) 9.
²⁴⁹ See the findings in Salmonsson (n 239 above) 18, 19.
²⁵⁰ See Chavuta et al (n 6 above). 7

Furthermore, the study found that the challenges facing teachers and learners include²⁵¹ lack of knowledge and skills in teaching CWDs; inadequate teaching and learning resources; negative attitudes of teachers and the community towards CWDs; inaccessible school infrastructure; and lack of assistive devices. The study observed that most schools had steps and did not have ramps to ensure access for learners with (physical) disabilities.²⁵²

The Malawi Government acknowledges that by 2008, the country was short of between 34,203 and 60,203 primary school teachers to achieve the teacher-pupil ratio of between 1-60 and 1-40 respectively by 2015.²⁵³ In respect of teachers trained in SNE, Malawi had 500 teachers against 50, 586 students in primary schools by 2006.²⁵⁴

In addition, the Montfort College, which is owned by the Catholic Church, is the only school that has been training SNE teachers in Malawi. It is operated jointly by the Church and the Malawi Government's SNE Department,²⁵⁵ which also funds and influences the work at the college.²⁵⁶ The SNE Department has since proposed the setting up of a state institution to train teachers in SNE.²⁵⁷

By 2006, Malawi had two special schools for the blind and four special schools for the deaf.²⁵⁸ Three of the four schools were not using sign language but oral teaching methods, which require the CWDs to read the lip movements of teachers and interpret them. This is not effective as the students have to guess what the teacher could be saying.²⁵⁹

²⁵¹ n 6 above, 8, 9.

²⁵² n 6 above, 23.

²⁵³ See, Malawi Ministry of Education & Malawi National Commission for UNESCO *National report for Malawi: The development of education* (2008) 13.

²⁵⁴ Salmonsson (n 239 above) 9.

²⁵⁵ n 239 above, 10.

²⁵⁶ As above.

²⁵⁷ n 239 above, 11.

²⁵⁸ n 239 above, 9.

²⁵⁹ n 239 above, 17.

4.3 Legal framework on the right to primary education of CWDs in Malawi

4.3.1 The Constitution

The 1995 democratic Constitution of Malawi (the Constitution) is the supreme law.²⁶⁰ It has provisions of national policy contained in section 13 which are not justiciable but directory. They consist of goals that the government is expected to implement through policies and legislation.²⁶¹ Some of the goals can impact on the right to education of CWDs.

Firstly, the provisions on education expect the state to 'devise programmes in order to make primary education compulsory and free'.²⁶² Secondly, the provisions on disability expect the government to support PWDs by ensuring greater access to public places; fair opportunities in employment; and the fullest possible participation in all spheres of society.²⁶³

The provisions on disability are in the process of being amended.²⁶⁴ Although one amendment seeks to refer to the disabled as PWDs, the other amendments will not change the provisions in substance.

The Constitution guarantees justiciable substantive rights in chapter four.²⁶⁵ Some of the rights have implications on the right to education of CWDs. Firstly, the Constitution provides for equality and non-discrimination and recognises disability as a prohibited ground of discrimination.²⁶⁶ It also requires the enactment of laws to address inequalities and prohibit discrimination.²⁶⁷ Secondly, the Constitution provides for the right to education,²⁶⁸ which requires primary education to consist of at least five years of education.²⁶⁹ However, it does not guarantee free and compulsory primary education.

²⁶⁰ Malawi Constitution, 1995, sec 5.

²⁶¹ Sec13.

²⁶² Sec 13(f).

²⁶³ Sec 13(g)(iii).

²⁶⁴ Constitution (Amendment) Bill 13 of 2009.

²⁶⁵ Sec 15.

²⁶⁶ Sec 20(1).

²⁶⁷ Sec 20(2).

²⁶⁸ Sec 25.

²⁶⁹ Sec 25(2).

4.3.2 The Handicapped Persons Act

The Handicapped Persons Act (HPA) is Malawi's disability specific legislation.²⁷⁰ It defines handicapped persons as:

those persons who, by reason of any defect or impairment of the mind, senses or body, congenital or acquired, are unable to take part in normal education, occupation and recreation, or who, by reason of any such defect or impairment, require special assistance or training to enable them to take part in normal education, occupation or recreation...²⁷¹

This definition expresses the medical model of disability as it attributes the 'problems' associated with disability to the PWDs' impairments and not to the environment. Furthermore, the Act does not guarantee any substantive rights to PWDs.

The Act establishes the Malawi Council for the Handicapped (MACOHA) to act as the government's agent in respect of the affairs of PWDs.²⁷² MACOHA's core functions include advising the responsible Minister on matters affecting the welfare, education, training and employment of PWDs.²⁷³

4.3.3 The Education Act

Malawi's Education Act (EA) provides for formal education.²⁷⁴ It defines primary education as the first eight years of formal education.²⁷⁵ It does not recognise compulsory or free primary education and it mandates the Minister of Education to prescribe primary school fees.²⁷⁶ Furthermore, it does not make any reference to education of CWDs or inclusive education.

The EA is in the process of being amended following a review by the Law Commission of Malawi, which has proposed to make primary education in state schools compulsory and free to all children who are under the age of 18 years.²⁷⁷

²⁷⁰ Enacted in 1971.

²⁷¹ Sec 2.

²⁷² Secs 3 & 10.

²⁷³ Sec 10.

²⁷⁴ Chapter 30:01 of the Laws of Malawi.

²⁷⁵ Sec 2.

²⁷⁶ Sec 64(1).

²⁷⁷ Malawi Law Commission 'Report on the review of the Education Act' (2009), 21.

4.3.4 The Child Care, Protection and Justice Act

The Child Care, Protection and Justice Act (CCPJA) provides for the rights and welfare of children in different spheres of life.²⁷⁸ However, it has only one small provision on CWDs which requires district assembly (local government) officials to record and keep a register of all CWDs within their areas and give them assistance whenever possible in order to enable them 'grow up with dignity among other children and to develop their potential and self-reliance'.²⁷⁹

Nevertheless, the Act domesticates the CRC and the ACRWC but it provides that the rights in the two instruments apply domestically 'with appropriate modifications to suit the circumstances in Malawi that are not specifically mentioned in this Act'.²⁸⁰

4.3.5 The Disability Bill²⁸¹

Malawi is in the process of enacting new disability legislation in the form of the National Equalisation of Opportunities for Persons with Disabilities Bill.²⁸² The Bill defines disability as any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered 'normal' for a human being.²⁸³ It defines SNE as a 'system for providing a conducive environment for learners who may not benefit much from the regular education system'.²⁸⁴

Furthermore, the Bill provides for accessibility of the environment for PWDs,²⁸⁵ which requires the state to ensure the attainment of a barrier-free environment that will enable PWDs to have access in public and private buildings and establishments.²⁸⁶ It also requires the state to recognise and develop sign language as an official language.²⁸⁷

²⁷⁸ Act 22 of 2010.

²⁷⁹ Sec 72.

²⁸⁰ Sec 4(c) of Third Schedule.

²⁸¹ The author managed to get the original version of the Bill as drafted in 2005 but could not access the version that is currently at cabinet level. Nevertheless, it is most likely that the differences, if any, are not substantive.

²⁸² Disability Bill, sec 1.

²⁸³ Sec 2(v).

²⁸⁴ Sec 2(o).

²⁸⁵ Sec 11(a).

²⁸⁶ Sec 11(a)(i).

²⁸⁷ Sec 13(b).

The Bill contains a detailed provision on education of PWDs.²⁸⁸ It requires the state to provide PWDs with adequate access to quality education; to take appropriate steps to make such education accessible to all PWDs; and to take into consideration the special requirements of PWDs in the formulation of educational policies and programs.²⁸⁹

In respect of SNE, the Bill expects the State to establish, maintain and support an integrated system of SNE.²⁹⁰ Among other things, it requires the MoE to establish SNE units in public schools and to provide for the regular review of the curriculum in teachers' training colleges to include a disability foundation course.²⁹¹ It also provides for state administered education schemes which expect the state, among others, to provide every 'needy' CWD with free of cost special books and equipment needed for their education.²⁹²

Furthermore, the Bill requires the state to ensure the availability of adequate numbers of training institutions to train teachers in SNE to ensure availability of trained teachers in special and integrated schools.²⁹³ By expressly mentioning integrated and special schools, this provision reiterates the government's emphasis on special and integrated education.

In addition, the Bill intends to establish a government agency to act as the principal regulatory and implementing authority in all disability matters.²⁹⁴ It also mandates the responsible Minister to establish the National Coordinating Committee on Disability Issues (NCCDI) to constitute a 'national forum of all stakeholders on disability issues'.²⁹⁵ The functions of the NCCDI will include reviewing and coordinating the activities of government departments and DPOs; advising the Government on the formulation of disability policies, legislation and programmes; and monitoring and evaluating the impact of the policies and programmes.²⁹⁶

²⁸⁸ Sec 14.
²⁸⁹ Sec 14(a).
²⁹⁰ Sec 14(c).
²⁹¹ Sec 14(c).
²⁹² Sec 14(g).
²⁹³ Sec 11(i).
²⁹⁴ Secs 4 & 2(r).
²⁹⁵ Secs 5(b) & 2(k).
²⁹⁶ Sec 6(b).

4.4 The policy framework on the right to primary education of CWDs in Malawi

4.4.1 The Disability Policy

Malawi's National Policy on the Equalization of Opportunities for Persons with Disabilities (Disability Policy) was adopted in 2005.²⁹⁷ It notes that 98 percent of CWDs in Malawi could not receive formal education.²⁹⁸

The Bill has a number of policy statements that have an impact on the education of CWDs as they seek, among other things, to promote easy access to the physical environment²⁹⁹ by developing building standards and guidelines that ensure accessibility for PWDs;³⁰⁰ and to develop a multi-sector integrated national disability awareness strategy,³⁰¹ including providing information and education materials in accessible formats to PWDs³⁰² and establishing a national sign language.³⁰³

Above all, the statement on education and training of PWDs seeks to promote equal access and inclusion of PWDs in education by, among other things, designing and developing appropriate technologies, assistive devices and learning materials; providing free appropriate resources to assist PWDs with their learning needs; reviewing and reforming the delivery of the national curriculum to cater for CWDs; adapting and adopting communication systems appropriate for learners with SNE; training specialist educators; incorporating SNE in the teacher-training curriculum; and supporting and encouraging inclusive education.³⁰⁴

²⁹⁷ It is meant to be reviewed after five years from its adoption. See Disability Policy (n 7 above) 31.

²⁹⁸ Disability Policy (n 7 above) 5.

²⁹⁹ n 7 above, 12.

³⁰⁰ n 7 above, 12.

³⁰¹ n 7 above, 13.

³⁰² n 7 above, 14.

³⁰³ n 7 above, 14.

³⁰⁴ n 7 above, 14,15.

4.4.2 Education policies

National Education Sector Plan (NESP, 2008)

The NESP sets out the government's goals and objectives of the education sector to be realised over the 2008-2017 period.³⁰⁵ The NESP recognises that primary education is for six to thirteen year old children to be attained over an eight year schooling period.³⁰⁶ The NESP intends to strengthen primary education through three sets of strategies and priorities.³⁰⁷

The first priority relates to quality and relevance of primary education,³⁰⁸ which aims at moving towards the 'recommended' ratio of 1 teacher to 10 pupils in special schools and 1 teacher to 5 pupils in resource centres by the end of 2017.³⁰⁹ It also intends to foster the development of tools for special needs such as sign language and Braille.³¹⁰

The second priority relates to access and equity of education,³¹¹ which, among other things, seeks to increase net enrolment and completion rates of those disadvantaged by gender, poverty, special needs and geographical location.³¹²

The third priority of the NESP is to ensure the governance and management of education³¹³ which, among other things, seeks to mobilise community participation in 'whole-school development' and management for 'ordinary' learners and learners with SEN.³¹⁴

The NESP also intend to introduce additional programmes in teacher training institutions to increase capacity in SNE and to expand the intake in teacher training colleges for mainstream education and SNE.³¹⁵

³⁰⁵ NESP (2008) v.
³⁰⁶ n 305 above, 5.
³⁰⁷ n 305 above, 11.
³⁰⁸ As above.
³⁰⁹ As above.
³¹⁰ As above.
³¹¹ n 305 above, 12.
³¹² As above.
³¹³ As above.
³¹⁴ As above.
³¹⁵ n 305 above, 19.

Education Sector Implementation Plan (ESIP, 2009)

The ESIP serves as a guide for the articulation of the broad development objectives of the NESP.³¹⁶ Its objective is to provide details of the activities that each education sub-sector will undertake in the four-year period (2009-2013) in order to fulfil the strategies to achieve the NESP goals.³¹⁷

Malawi's Special Needs Education Policy (Revised) 2007 (SNE Policy)³¹⁸

The SNE Policy specifically relates to SNE. It identifies eight major components of SNE that include early identification assessment and intervention; advocacy; care and support; management, planning, and financing; access; quality; equity; and relevance.³¹⁹ It aims at overcoming SNE implementation challenges that include financial constraints, physical environmental considerations, and attitudinal barriers. Its objectives include: Providing education and training to learners with SEN; ensuring equitable access for all learners with SEN; providing educational facilities with needed supportive provisions; ensuring accommodating learning environments for all learners with SEN; and increasing SNE services provisions.

4.5 Observations on the domestic implementation of the right to primary education of CWDs in Malawi

4.5.1 Observations on the general factual status

At least three observations can be made from the factual situation of the right to primary education of CWDs. Firstly, Malawi emphasises the integrated and special schools approaches in providing education to CWDs. This is contrary to international standards to the extent that the Cheshire and Montfort study has concluded that: 'This form of integration does not reflect the sort of inclusive education addressed in the Salamanca Statement'.³²⁰

³¹⁶ ESIP (2009) 12.

³¹⁷ As above.

³¹⁸ The author did not manage to get a copy of the SNE Policy but obtained insights of its contents from the discussion on the Policy in the article by Itimu & Kopetz (n 48 above) 155.

³¹⁹ Itimu & Kopetz (n 48 above) 155.

³²⁰ Chavuta et al (n 6 above) 12.

Secondly, the provision of primary education to CWDs faces a lot of hurdles, which are mainly caused by lack of functioning inclusive education institutions and programs. Consequently, most CWDs cannot attain primary education and are excluded from the mainstream schools. To this extent, the provision of primary education of CWDs does not satisfy the standards of availability, accessibility, acceptability and adaptability; and the standards required by article 24 of the CRPD.

4.5.2 Evaluation of the implementation framework

The constitutional framework

The Malawi Constitution contains provisions that make the right to education justiciable. This is commendable as CWDs can be protected from its violation. However, the provisions require primary education of at least five years contrary to international standards which require at least six years.³²¹ Furthermore, the provisions do not guarantee free and compulsory primary education contrary to the international standards.

In addition, the provisions on disability, among others, restrict the need to ensure accessibility of PWDs to public places and they do not expressly recognise the need to equalise the opportunities of PWDs in education. Hence, they are not adequate to effectively guarantee the rights of PWDs, including the right to primary education. Therefore, on the whole, the Constitution does not present the normative framework that satisfies the international standards on the right to primary education of CWDs.

The legislative framework

A number of observations can be made on the three pieces of legislation and the proposed Bill that influence the right to primary education of CWDs in Malawi.

Firstly, the HPA expounds the medical model and does not grant any substantive rights to CWDs or PWDs, which is a major drawback as it is the only disability legislation in Malawi. It is submitted that the HPA is so outdated that it cannot be utilised in the implementation of any rights of CWDs.

³²¹ ISCED, para 46.

Secondly, although the proposed Education Bill provides for free and compulsory primary education unlike the current EA,³²² it does not provide for inclusive education. Hence, the EA and the proposed Bill do not meet the prevailing international standards on the right.

Thirdly, Since the CCPJA guarantees the CWDs the rights contained in the CRC and ACRWC,³²³ it is possible to invoke the rights before the courts of Malawi. Nevertheless, although the Act expects local government authorities to register all CWDs and provide them with assistance to enable them grow with dignity; it does not elaborate the measures that must be taken to ensure this. Accordingly, it can be concluded that the Act does not grant any specific rights to CWDs despite being enacted while Malawi had been a state party to the CRC for 20 years; and to the ACRWC for 12 years.

Consequently, the Act does not provide any guidance on the implementation of the rights of CWDs apart from judicial enforcement. Therefore, the CCPJA cannot act as enabling legislation in implementing the rights of CWDs.

Lastly, the Disability Bill is not entirely based on the social model of disability. This is evident in the definitions of disability, PWDs and SNE, which are out of touch with the CRPD and the social model as they attribute the 'problems' associated with disability to the PWDs and not to environmental barriers.³²⁴ This is contrary to the CRPD Committee's recommendation that state parties to the CRPD must ensure that their disability laws and policies provide definitions that are consistent with the CRPD.³²⁵

In addition, the SNE definition is too broad and vague in that it seeks to embrace all learners who cannot 'benefit much' from the regular schools as learners with SEN. Furthermore, it does not clarify whether the mainstream school environment would be made conducive for learning.

³²² It is noteworthy that learners in state primary schools have not been paying fees since 1994 as a matter of practice and policy but without any legal basis.

³²³ These rights include the rights of CWDS contained in arts 23 & 13 of the CRC & ACRWC respectively

³²⁴ CRPD, art 1.

³²⁵ See Concluding Observations on Tunisia (n 136 above), para 9.

The Bill expects the state to provide free education facilities and equipment to ‘needy’ CWDs only.³²⁶ This implies that it excludes CWDs who are not ‘needy’.³²⁷ However, the CRPD obliges states to provide the required facilities to all CWDs to ensure their right to education.³²⁸ It also expects states to provide reasonable accommodation to make education accessible to all CWDs regardless of whether they are ‘needy’ or not.³²⁹ The CRPD Committee has reiterated that state parties must provide FPE that includes the provision of free special facilities in ensuring reasonable accommodation of CWDs in mainstream schools.³³⁰

In addition, necessary materials such as ‘texts and other books, learning materials, equipment which is essential to the educational undertaking’ are considered as direct costs of education, which should be provided free of charge in implementing FPE.³³¹ Consequently, in terms of the prevailing international standards, the provision of free special education facilities cannot be limited to ‘needy’ CWDs.³³²

Furthermore, the Bill does not provide guidelines for the appointment and the composition of the two government bodies that will be entrusted with the regulation of disability issues. Hence, it does not put mechanisms in place to ensure that DPOs and PWDs are adequately represented to ensure that the bodies serve the interests of PWDs. The CRPD Committee has further emphasised the requirement to ensure the active participation of DPOs, PWDs and CWDs in the implementation of the rights of PWDs.³³³

Moreover, although the Bill makes reference to inclusive education, it does recognise or emphasise the inclusive schools approach but mentions special and integrated education. Therefore, the Disability Bill does not satisfy the international standards on the implementation of the right to primary education of CWDs.

³²⁶

Sec 14(g).

³²⁷

However, the Disability Policy expects the government to provide necessary educational resources to all PWDs. See (n 7 above) 14.

³²⁸

CRPD, art 24(2)&(3).

³²⁹

CRPD, art 24(2) (c).

³³⁰

See Concluding Observations on Spain (n 127 above), para 44(c).

³³¹

Sloth-Nielsen & Mezmur (n 40 above) 10.

³³²

Further discussion on the elements of FPE is contained in section 2.2.2 of Chapter 2.

³³³

Concluding Observations on Spain (n 127 above), paras 15 & 16.

The policy implementation framework

A number of observations can be made on the Disability Policy, the NESP, the ESIP and the SNE Policy, which constitute policies that complete the implementation framework on the right to primary education of CWDs in Malawi. Firstly, although the Disability Policy recognises inclusive education and outlines a number of measures of promoting SNE, which include provision of free appropriate resources,³³⁴ it does not expressly prioritise the inclusive schools approach. Instead, it requires the provision of SNE while putting emphasis on special and integrated schools, contrary to the international standards.

Secondly, although the three education policies have a number of positive aspects such as recognising the concept of inclusive education and the need to increase the capacity and provision of SNE, they do not put emphasis on inclusive schools. This is contrary to the international standards recognised by the CRPD; the Salamanca Statement; and the Salamanca Framework, which explicitly requires the mainstreaming of inclusive education in national education plans.³³⁵

Therefore, although the policies have such positive aspects, they ultimately do not comply with the international standards.

Discrepancies between the legislative and policy implementation frameworks

There are a number of discrepancies between the relevant laws and policies that guide the provision of primary education to CWDs. For example, the education Act does not make provision for the education of CWDs, SNE or inclusive education and free and compulsory primary education while the education policies make provision for them. The discrepancies are problematic since legislation can be enforced before the courts while policy is non-justiciable in Malawi.³³⁶ Therefore, by having progressive policies while maintaining regressive laws, the implementation of what is contained in the policies is made ineffective.

³³⁴ Disability Policy (n 7 above) 14-15.

³³⁵ Salamanca Framework, art 19.

³³⁶ Malawi Constitution, sec 9 requires the judiciary to protect the Constitution and the laws of Malawi.

The same problem arises in respect of the disability laws and policies. For example, the Disability Policy recognises the rights of CWDs while the HPA does not.³³⁷ Hence, there is no mechanism for CWDs to enforce the enjoyment of what the policies prescribe. This is compounded by the fact that it is not certain if Malawi will enact the proposed new disability law in the immediate future.

4.6 Conclusion

This chapter has analysed the measures that Malawi is taking in the implementation of the right to primary education of CWDs from which a number of conclusions can be drawn.

Firstly, the factual situation in Malawi shows that a number of obstacles prevent the achievement of the international standards of availability, accessibility, acceptability and adaptability of education in the provision of primary education of CWDs. In addition, the provision of primary education to CWDs is mostly done in special and integrated schools as opposed to inclusive schools. This is contrary to the international standard of inclusive education prescribed by the CRPD and the Salamanca Conference principles.

Secondly, the constitutional and legislative frameworks do not guarantee free and compulsory primary education. Although in practice, learners in state primary schools do not pay fees, the 2006 global report on education has found that primary education in Malawi is not compulsory or completely free.³³⁸ In addition, the Constitution and the laws do not make reference to inclusive education. Consequently, they do not meet the international standards on the right to primary education of CWDs.

Furthermore, although the CCPJA domesticates the CRC and the ACRWC, it does not provide for specific rights of CWDs. The effect is that it merely makes the rights contained in the two instruments enforceable before the courts of Malawi but does not provide adequate mechanisms for their implementation.

³³⁷ It is also noteworthy that the Disability Policy requires free educational resources to be provided to CWDs while the Disability Bill, which will replace the HPA, restricts the provision to 'needy' CWDs.

³³⁸ K Tomasevski *State of the right to education worldwide-Free or for fee: 2006 global report* (2006) 45.

In addition, the Disability Bill and the Disability Policy do not to fully follow the social model of disability. Moreover, they emphasise special and integrated schools as opposed to inclusive schools in their quest to achieve inclusive education. As a result, they do not satisfy the international standards on the implementation of the right to primary education of CWDs.

It can further be concluded that although the education policies provide for measures that would ensure compliance with some of the international standards, such as recognising inclusive education and the strategies to improve the quality, access and management of SNE, they do not prioritise the inclusive schools approach or expressly follow the social and human rights models of disability in conceptualising the education of CWDs. Therefore, they ultimately fall short of satisfying the international standards. Accordingly, regardless of whether they would comply with the other standards, the education policies cannot be used as effective implementation tools to realise the right to primary education of CWDs in practice.

Furthermore, there are discrepancies between the legislative and policy implementation frameworks to the extent that the laws are more retrogressive while the policies are more progressive. This weakens the implementation framework.

Moreover, the legislative and policy framework does not clearly provide for the mechanisms that are in place to ensure that Malawi discharges its three levels of state obligations in respect the right to education, namely to promote, to protect and to provide primary education to CWDs.

Therefore, it can be concluded that Malawi's constitutional, legislative and policy implementation measures on the right to primary education of CWDs do not comply with international standards, including the standards required by article 24 of the CRPD, to be in a position to ensure the enjoyment of the right. In light of this, the next chapter explores the recommendations that can be suggested for Malawi to address the shortfalls in the current implementation framework to be able to ensure the realisation of the right.

Chapter five

Conclusions and recommendations

5.1 Introduction

This chapter provides the conclusions and recommendations of the study. Firstly, it gives the general conclusions based on the analyses in the preceding four chapters. Thereafter, it offers the practical recommendations on the appropriate constitutional, legislative and policy measures, which comply with international standards that Malawi can take to realise the right to primary education of CWDs. Thereafter, it suggests the possible areas for further research and gives the overall conclusion.

5.2 General conclusions on the findings of the study

5.2.1 The international standards on the right to primary education of CWDs

The study has observed that the international standards on the right to primary education of CWDs can be derived from a number international instruments to which Malawi is party or a signatory, which include the CDESCR, the CRPD, the CRC, and the Salamanca Principles. The standards expect the primary education of CWDs to contain at least six years of full time schooling and to be free and compulsory. In addition, they require the education of CWDs to satisfy the elements of availability, accessibility, acceptability, and adaptability, which imply that functioning educational institutions and programmes must be available and sufficient; the education must be physically and economically accessible without discrimination; the form and substance of education, curricula and teaching methods must be relevant, culturally appropriate and of good quality; and the education must be flexible and capable of accommodating the learning of all children.

Furthermore, the provision of primary education must be based on the concept of inclusive education,³³⁹ and must prioritise the inclusive schools approach, which entails the provision of education that ensures the effective learning of CWDs in the mainstream schools together with other children.³⁴⁰ Special schools can be utilised in exceptional circumstances if it is in the best interests of the CWDs concerned.³⁴¹

Above all, the conceptualisation of the education of CWDs must be based on the social and human rights models of disability, which require the equalisation of opportunities so that the CWDs are able to exercise their rights on an equal basis with others.³⁴²

5.2.2 Malawi's implementation framework on the right to primary education of CWDs

The study has observed that Malawi's constitutional, legislative and policy implementation framework on the right to primary education of CWDs does not comply with the international standards to be able to ensure the realisation of the right. The framework is not based on the social model of disability; does not emphasise inclusive education, especially the inclusive schools approach; and does not recognise the concept of free and compulsory primary education that is backed by law.

In addition, the framework does not provide for clear and targeted government plans aimed at ensuring that primary education is available, accessible, acceptable and adaptable to CWDs progressively or otherwise. Furthermore, it does not clearly provide for the mechanisms to be put in place to ensure that Malawi discharges the three levels of state obligations pertaining to the right to education, namely, to promote, to protect and to provide primary education to CWDs. There are also a number of discrepancies between the applicable laws and policies to the extent that the laws are more retrogressive in their compliance with the international standards than the policies.

³³⁹ WHO & World Bank (n 10 above) 210.

³⁴⁰ CRPD, art 24(2) (b).

³⁴¹ Schulze (n 76 above) 135.

³⁴² n 76 above, 16.

5.3 Recommendations

5.3.1 The constitutional framework

The Constitution, as the supreme law, is required to provide an effective normative framework to ensure the enjoyment of the right to primary education of CWDs. It is recommended that the provisions on education should be revised to recognise the right to free and compulsory primary education of all persons under the age of 18 years;³⁴³ to provide that primary education should consist of at least six years;³⁴⁴ and to require the state to ensure an inclusive education system at all levels, including primary education.

In addition, the provisions on PWDs³⁴⁵ should be further revised to include the requirement to ensure accessibility of PWDs to public and private places and services as required by the CRPD;³⁴⁶ and to extend the need to ensure the equalisation of opportunities for PWDs to education.³⁴⁷

5.3.3 The legislative framework

The Child Care, Protection and Justice Act

It is recommended that the CCPJA should expressly be made applicable to CWDs by incorporating a provision to the effect that all CWDs are entitled to enjoy the rights that it provides without any discrimination. In addition, the Third Schedule, which domesticates the CRC and the ACRWC, should be revised to the effect that the substantive rights guaranteed by the two instruments must prevail over the inconsistent provisions in the Act and other practices and customs regarding children in Malawi.

³⁴³ Sec 25.

³⁴⁴ Sec 25(2).

³⁴⁵ Sec 13(g).

³⁴⁶ See CRPD, art 9(2)(b).

³⁴⁷ Currently, the provision guarantees accessibility to public places and services only and requires equalisation of opportunities in employment only.

The Education Act

It is recommended that the provision in the Education Bill that seeks to provide for free and compulsory primary education must be retained.³⁴⁸ In addition, the Bill must provide for inclusive education at all levels, including primary education.

Furthermore, the Bill must also dedicate a specific provision on the education of PWDs which should prohibit any disability based discrimination in education; recognise the right of PWDs to inclusive education; require the state to provide special facilities for the education of CWDs; require the state to recognise SNE training as part of the curricular in teacher training institutions; and recognise the need for coordination between the MoE and the Ministry responsible for PWDs in ensuring the education of PWDs, including CWDs, through the development of education policies, plans and programmes.

The Handicapped Persons Act

It is recommended that the HPA must be replaced with a new Act as it very outdated since it is based on the medical model of disability. It is recommended that the government must 'speed up' the on-going process of replacing the Act.

The Disability Bill

It is recommended that the Bill, which seeks to replace the HPA, must provide for the domestication of the CRPD and the application of all the rights in the CRPD to the PWDs in Malawi. In addition, it should provide for definitions that are based on the CRPD as reaffirmed by the CRPD Committee.³⁴⁹ For example, it should expressly recognise that discrimination on the basis of disability includes the failure to provide reasonable accommodation.

Furthermore, the Bill should adopt the concept of inclusive education as opposed to SNE and must expressly provide for the right of CWDs to inclusive education that prioritises the inclusive schools approach.

³⁴⁸ Malawi Law Commission (n 277 above) 21.

³⁴⁹ See Concluding Observations on Tunisia (n 136 above), para 9.

In addition, the provision that restricts the provision of free special educational equipment to ‘needy’³⁵⁰ CWDs should be revised to include all CWDs.³⁵¹

The Bill should also provide for the active coordination among the Ministry responsible for PWDs, the DPOs, CWDs and PWDs in the implementation of the right to education of PWDs. In this respect, the Bill should expressly make provision for the active participation of PWDs, CWDs and DPOs in the implementation of the rights of CWDs, including education.³⁵²

In addition, the Bill should require the composition of the disability statutory bodies, such as the Disability Agency and the NCCDI, to be representative of PWDs. Accordingly, it should provide that a specific number of the membership must be CWDs and PWDs and other members appointed from among the DPOs to ensure that the bodies serve the interests of PWDs. This will also ensure the implementation of the rights of CWDs as the bodies will have powers in the development and execution of disability related policies, laws, plans and other affairs. This requirement would be consistent with the CRPD which requires the active participation of DPOs in the implementation of the rights of PWDs.³⁵³

Furthermore, the Bill should provide for the national focal points for the monitoring and coordinating mechanism envisaged by the CRPD that will include a specific focal point that focuses on the education of PWDs.³⁵⁴ In addition, the Bill should provide for the Malawi Human Rights Commission, which is Malawi’s NHRI, or another independent organisation dealing in human rights protection, to independently monitor, protect and facilitate the implementation of the rights of PWDs, including the right to primary education of CWDs.³⁵⁵

³⁵⁰ Sec 14(g).

³⁵¹ CRPD, art 24(2)&(3). Section 4.5.2.2 in Chapter four of the study discusses the rationale for requiring the state to provide special facilities to all CWDS.

³⁵² The study has made recommendations on education provisions in respect of the Disability Bill and the Education Act because the Bill in its draft form contains a substantial provision on education of CWDs, which is feasible as it will result in the disability specific legislation which must contain the rights of CWDs, including the right to education.

³⁵³ See CRPD, art 4(3). See also CRPD preamble, para (o).

³⁵⁴ Art 33 (1).

³⁵⁵ Art 33(2); Schulze (n 76 above) 176.

Lastly, the Bill should recognise the need to ensure the development of policies, plans, and programmes on disability and the education of CWDs. The Bill should also provide for the need to ensure the collection and utilisation of disability data and statistics, including data relating to the education of CWDs, as required by the CRPD.³⁵⁶ This will guide the proper planning and implementation of the rights of CWDs, including education.³⁵⁷

5.3.4 The policy framework

It is recommended that the Disability Policy, the NESP, the ESIP and the SNE Policy should expressly provide that the inclusive schools approach shall be the priority in providing education to CWDs, and that special schools shall only be utilised as exceptions in particular cases. They should make it a clear government policy to provide primary education of CWDs in inclusive mainstream schools.

Furthermore, the policies should recognise that the implementation of primary education of CWDs should be done in coordination with the MoE and DPOs. This is consistent with the requirements of the CRPD.³⁵⁸

In addition, it is recommended that the Disability Policy and the SNE Policy must be based on the CRPD and the social and human rights models of disability. This entail that all measures outlined by the policies and the corresponding operative provisions in the policies should aim at eradicating barriers to the inclusion of CWDs in mainstream society.

In addition, the policies should aim at ensuring equal opportunities for CWDs to enjoy and exercise all human rights on an equal basis with others. For example, the current applicable policies emphasise integrated and special education, which are based on the medical model. It is recommended that they should prioritise inclusive education, which is based on the social and human rights models of disability and is also recommended by the CRPD.

³⁵⁶ CRPD, art 31.

³⁵⁷ WHO & World Bank (n 10 above) 22.

³⁵⁸ See CRPD, art 4(3). See also CRPD preamble, para (o).

It is noteworthy that the international standards require urgent and targeted action to be taken to ensure the speedy progressive realisation of compulsory and free primary education as opposed to the other SERs.³⁵⁹ Accordingly, since policies are ordinarily flexible, it is recommended that they should provide for a targeted government plan to ensure that all primary schools are adjusted progressively over a reasonable period of time to be able to provide inclusive education. This must be done by utilising the available resources to their maximum extent possible and by resorting to international cooperation and assistance as required by the CRPD.³⁶⁰

In addition, the adjustment to the schools to ensure inclusive education must not be restricted to state primary schools but must be extended to include private owned and private operated primary schools. This would be consistent with the CRPD which requires private entities to ensure non-discrimination against PWDs.³⁶¹ In addition, the CRPD requires private entities that offer services or facilities that are open or provided to the public to ensure accessibility to PWDs.³⁶²

Meanwhile, considering that almost 98% of CWDs in Malawi do not attain education, the policies should require a deliberate government plan or programme to ensure that every school zone should have at least one primary school that provides inclusive education in the immediate future. The state could develop a plan and identify a possible number of primary schools in each education zone that should be adjusted to provide inclusive education within a reasonable period of time. This is consistent with the obligation to ensure accessibility to education without discrimination which is subject to immediate realisation.³⁶³

In addition, the policies should require the state to ensure that all new primary schools to be constructed should be able to provide inclusive education.

³⁵⁹ Section 3.4.1 of chapter 3 discusses the distinction between the implementation of the right to primary education broadly and compulsory and free primary education.

³⁶⁰ CRPD, art 4(3).

³⁶¹ See CRPD, art 4(1)(e).

³⁶² See CRPD, art 9(2)(b).

³⁶³ See General Comment No 13, para 31.

The policies should also provide for a deliberate government plan to ensure that it trains adequate teachers in inclusive education or SNE by requiring teacher training institutions to incorporate SNE in their curricular. In addition, the policies should provide for the setting up of a special training institution to train teachers in SNE or inclusive education so that the country should have experts in inclusive education. The training of such personnel is also a specific requirement of the CRPD.³⁶⁴

5.4 Areas for further research

The study focused on investigating the constitutional, legislative and policy measures that comply with international standards that Malawi can take to ensure the right to primary education of CWDs. However, there are other factors that affect the right such as societal attitudes, traditional beliefs and harmful practices against CWDs; and budgetary implications of providing primary education to CWDs.

In addition, the right to education is an individual right to the extent that the concept of inclusive education seeks to ensure that all children as individuals, including CWDs, are accommodated in education. Yet, there are various categories of CWDs with different impairments such as visual, hearing, mobility sensory, mental and intellectual impairments. The children with different disabilities may need different facilities, measures and interventions, including provision of reasonable accommodation, to ensure a system of inclusive education that accommodates the education of all CWDs.

The importance of ensuring inclusive education can be illustrated by the South African case relating to the provision of education in the Western Cape Province whereby the education of children with severe intellectual disabilities was being provided in ‘special care centres’, which were owned and operated by NGOs and which had to rely on subsidies and funding from the government.³⁶⁵ The funding was insufficient to accommodate a number of the CWDs since the state education authorities could not provide sufficient funding to the ‘special care centres’ because it was perceived that the CWDs were not ‘capable’ of attaining education due to lack of ‘appropriate skills. As a result, a number of the CWDs could not receive any education.

³⁶⁴ See CRPD, art 24(4).

³⁶⁵ See *Western Cape Forum for Intellectual Disability v The Government of the Republic of South Africa* 2011 JDR 0375 (WCC).

The High Court acknowledged that all CWDs are capable of learning and are entitled to attain education. It faulted the state for providing less funding towards the education of such CWDs compared to the education of other children. It held that the state had to spread its funding towards the education of all categories of children, including the CWDs that were affected. The Court ordered the state to develop a programme that would ensure the education of the CWDs.³⁶⁶

Similarly, the government of Malawi is required to provide education that accommodates the learning of all categories of CWDs in order to be effectively inclusive. This entails that appropriate measures need to be taken to ensure that no category of CWDs is disadvantaged while pursuing inclusive education. However, the study has not analysed the specific obstacles that would impede the implementation of effective inclusive education in practice.

In addition, community based rehabilitation (CBR) is considered as one of the strategies of ensuring the inclusion of PWDs in society.³⁶⁷ The study has not explored any role that CBR can play in promoting the right to education of CWDs. It has also not explored whether there are community health or social workers who assist in ensuring CBR in practice and whether the government is taking appropriate measures to include CBR in implementing the right to primary education of CWDs.

Furthermore, there is need to investigate the extent to which the education of CWDs in Malawi is being mainstreamed as required by the Salamanca Framework. Likewise, there is need to identify the government departments that are responsible for implementing the primary education of CWDs and the extent of the coordination among them.

Accordingly, it is suggested that future research on the subject should focus on these areas to identify how they affect the right to primary education of CWDs and the recommendations that could be suggested.

³⁶⁶ It should be noted, however, that the court's decision was not based on the concept of inclusive education but on the violations of the right to receive education, the principle of equality and equal human dignity.
³⁶⁷ P Coleridge et al *Study of disability in EC development cooperation* (2010) 48.

5.5 Conclusion

Although most CWDs in Malawi do not enjoy their right to primary education, the government has taken the bold step to ratify at least five international human rights instruments that guarantee the right, among other rights. These include the CRPD, the CRC, the ACRWC, the CESC, and the AYC. This shows Malawi's commitment to ensuring the enjoyment of the right to primary education of the CWDs. Furthermore, Malawi has the constitutional, legislative and policy framework that influences the right. This shows that there are sufficient opportunities for Malawi to take further steps to ensure the realisation of the right. The further steps just require the government to review and modify the existing implementation framework to be in line with the international standards on the right to primary education of CWDs.

Accordingly, there is tangible hope that the CWDs in Malawi could start enjoying their right to primary education as soon as the government takes the further and crucial steps to modify the implementation framework and align it with the international standards.

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