

Part II: Chapter II

## **Domesticating international standards of education for children with intellectual disabilities: a case study of Kenya and South Africa**

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### **1 Introduction**

The right to education for persons with disabilities is established in various international law instruments. It is also trite that the right to education for children, including children with disabilities, is universally acknowledged. This is evidenced by the near universal ratification of the Convention on the Rights of the Child (CRC), as well as the African Charter on the Rights and Welfare of the Child (ACRWC), which both provide for a right to education for all children without discrimination on any ground, including disability. The Convention on the Rights of Persons with Disabilities (CRPD), which is the latest addition to the list of human rights conventions relative to persons with disabilities, also addresses the rights of children with disabilities to education.

Notably however, international law approaches the right to education for children with disabilities in a rather generic way. This means that the rights of children with intellectual disabilities have to be gleaned from the general provisions of the conventions. In view of the centrality of intellectual capacity in the context of education, it is imperative to decipher the import of the right to education for children with intellectual disabilities. For this purpose, this chapter explores the content of international law on the right to education of children with intellectual disabilities. It uses two case studies to assess the approach of African states to the domestication of the obligations in this regard. Kenya and South Africa have both ratified the CRC, ACRWC

and the CRPD.<sup>1</sup> Further, Kenya has ratified and South Africa signed the International Covenant on Economic, Social and Cultural Rights (CESCR).

## **2 The definition of intellectual disability**

In conceptualising disability, two important models have been developed to express a lens through which disability is viewed. These two are the social and medical models of disability. The medical model aims to ‘conceptualise disability as a physical or mental condition that inheres in the body of the disabled person’.<sup>2</sup> As can be deduced from its name and this basic conceptualisation of this model, it can be determined that this model focuses solely on disability as a medical ‘condition’ for which a medical answer is needed. On the other hand, the social model defines ‘disability as resulting from an interaction between a person’s physical or mental characteristic and an inaccessible or inhospitable physical or social environment’.<sup>3</sup> In this way, the model locates the problem associated with disability outside the person with disability. The social model of disability places a focus on using legislative solutions to remedy the inequalities that persons with disabilities face each day. In other words, it philosophically views persons with disabilities as different, and not incapable.

The CRPD provides an inclusive definition of disability, which aims to cover all the different types of disabilities. In terms of article 1, a ‘person with a disability’ includes:

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

On the other hand, the definition of a person with a disability is not always static and changes depending on the context of the laws that covers such areas. It will therefore not be incorrect to argue that the definition of what constitutes a person with a disability does not come without its fair amount

<sup>1</sup> The CRPD was adopted by the UN General Assembly on 13 December 2006 and entered into force on 3 May 2008. South Africa ratified the CRPD on 30 November 2007, Kenya ratified on 19 May 2008.

<sup>2</sup> J Cantor ‘Defining disabled: Exporting the ADA to Europe and the social model of disability’ (2008–2009) 24 *Connecticut Journal of International Law* 403.

<sup>3</sup> Cantor (n 2 above) 404.

of complication, as this definition changes depending on which treaty or legislation it is contained within.<sup>4</sup>

Unlike the definition of what constitutes a person with a disability, defining what constitutes a person with an intellectual disability is not as problematic. Nevertheless, the explanation of what constitutes a person with an intellectual disability needs some explaining. A person with intellectual disability is commonly understood as someone with 'a diminished ability to adapt to the daily demands of the normal social environment'.<sup>5</sup> Intellectual disability can be categorised into four levels; mild, moderate, severe and profound. Persons are diagnosed with mild intellectual disabilities when their intellectual quotient (IQ) levels fall between 50 and 69. Those with moderate intellectual disabilities would normally have an IQ between 35 and 49, while persons with severe intellectual disabilities would have an IQ between 20 and 34. Profound intellectual disabilities are diagnosed on people with an IQ below 20.<sup>6</sup>

The World Health Organisation describes intellectual disability to include what is commonly termed as 'mental retardation', 'mental handicapped' and 'learning disabilities'.<sup>7</sup> The same report goes further to explain that all of these situations have two 'significant limitations' in common, being 'intellectual functioning and adaptive behaviour', as well as the 'manifestation of these symptoms before adulthood'.<sup>8</sup> The use of adjectives like 'significant limitations' implies a level of severity of the intellectual disability. It is thus arguable that the World Health Organisation definition does not include cases of persons with mild or moderate intellectual disabilities.

For purposes of this chapter, the following explanation of a person with an intellectual disability is adopted. It is drawn from the inclusive definitions

<sup>4</sup> H Combrinck 'The hidden ones: Children with disabilities in Africa and the right to education' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 303.

<sup>5</sup> H Combrinck 'Sexual offences against persons who are mentally disabled' in D Smythe & B Pithey (eds) *Sexual Offences Commentary: Act 32 of 2007* (2011) 14–3.

<sup>6</sup> Western Cape Forum for Intellectual Disabilities 'Discussion document for the education of learners with severe and profound intellectual disabilities' (2000) 5. (On file with the authors). See also P Mittler 'Meeting the needs of people with an intellectual disability: International perspectives' in S Herr *et al* (eds) *The human rights of persons with intellectual disabilities: Different but equal* (2003) 29–30 for an explanation of the levels of intellectual disability.

<sup>7</sup> World Health Organisation 'Atlas: Global resources for persons with intellectual disabilities' (2007) 19.

<sup>8</sup> As above.

of disability in both the CRPD and the CRC:

Persons with intellectual disabilities are those who have long-term intellectual impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

This inclusive definition of a person with an intellectual disability is preferred, as it covers the essential elements of disability in general, while placing a focus on long-term intellectual impairments, which speaks to the specificity of an intellectual disability.

### 3 International standards of education for children with intellectual disability

#### 3.1 General provisions

A general right to education in international law was first recognised in the Universal Declaration of Human Rights (UDHR).<sup>9</sup> However, the first internationally binding agreement on the right to education was the CESC. Article 13 thereof establishes the right ‘of everyone’ to education directed at the full development of the human personality and the sense of its dignity. This has been interpreted to mean that ‘education must make the individual aware of his own worth and of the human rights which accrue to him on this basis’.<sup>10</sup> Article 13(2) further sets out a range of duties for state parties to ensure that these objectives are met. Article 14 sets out the duty of state parties to deliver free and compulsory primary education. Where this standard is not yet established as at the time of ratification of CESC, then the state party is to adopt progressive measures to achieve free compulsory education within a ‘reasonable number of years’.

The CRC establishes the right of children to education and the duty of the state ‘to make primary education compulsory and available free for all’.<sup>11</sup> The article obliges states to encourage the development of different forms of secondary education including general and vocational education. The education of a child is directed, *inter alia*, to the development of a child’s

<sup>9</sup> Art 26.

<sup>10</sup> KD Beiter *The protection of the right to education in international law* (2006) 96.

<sup>11</sup> The CRC, art 28.

personality, talents and mental and physical abilities to their fullest potential.<sup>12</sup> It has been argued that in comparison to articles 13 and 14 of CESCR, the right to education in the CRC is couched in weaker terms.<sup>13</sup>

The ACRWC stipulates that ‘every child has a right to an education’ directed *inter alia* to the promotion and development of their personality, talents and mental and physical abilities to their fullest potential.<sup>14</sup> State parties to the ACRWC are to provide ‘free and compulsory basic education’ and to take special measures in respect of ‘disadvantaged children’ to ensure equal access to education for all sections of the community.<sup>15</sup> The duty to provide ‘free and compulsory basic education’ as stipulated in this article is an immediate obligation of state parties as distinct from that under the CRC which allows for progressive realisation.

### **3.2 The right to education for children with disabilities**

Article 23(3) of the CRC obliges state parties to ensure that children with disabilities have effective access to education and training. In addition, article 2(1) of the CRC requires state parties to ensure the realisation of rights under the CRC to every child in their jurisdiction without discrimination on any grounds including disability. Hence whereas articles 28 and 29 of the CRC do not mention children with disabilities, application of article 2 precludes their discrimination in accessing education. The CRC Committee in General Comment Number 1<sup>16</sup> helped to identify the relevance and significance of articles 28 and 29 of the CRC to children with disabilities.<sup>17</sup>

Article 23(2) of the CRC recognises the special needs of children with disabilities and obliges state parties to encourage and ensure assistance to the child or those caring for the child upon application and subject to the availability of resources. However, the preconditions for eligibility to the assistance render this right very weak.<sup>18</sup> Hence, some commentators argue

<sup>12</sup> As above, art 29(a).

<sup>13</sup> Beiter (n 10 above) 116.

<sup>14</sup> Art 11(1).

<sup>15</sup> As above art 11(3).

<sup>16</sup> Committee on the Rights of the Child, General Comment No 1 ‘The aims of education’ U.N. Doc. CRC/GC/2001/1 (2001).

<sup>17</sup> U Kilkelly ‘Disability and children: The Convention on the Rights of the Child (CRC)’ in G Quinn & T Degener (eds) *Human rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 199.

<sup>18</sup> Combrinck (n 4 above) 307.

that the other provisions of the CRC such as article 2 provide a higher standard of education for children with disabilities.<sup>19</sup>

Article 13 of ACRWC recognises the right of children with disabilities to special measures of protection in keeping with their ‘physical and moral needs and under conditions which ensure [their] dignity, promote [their] self-reliance and active participation in the community’. The article also recognises the need for support in qualified circumstances. Notably however, it does not point out areas of assistance such as education as does article 23(3) of the CRC. Even though education is catered for under article 11 of the ACRWC, the education needs of children with disabilities are different from those of their peers without disabilities.<sup>20</sup> Therefore, the failure to explicitly mention education, coupled with the limitations to accessing assistance, undermines the fulfilment of the rights of children with disabilities in the ACRWC.

The CRPD is the first legally binding international instrument to deal exclusively with the rights of persons with disabilities.<sup>21</sup> In article 7, the CRPD obliges state parties to take all necessary measures to ensure the full enjoyment of the rights and fundamental freedoms of children with disabilities on an equal basis with other children. Article 24 requires state parties to ensure an inclusive education system at all levels.<sup>22</sup> It prohibits the exclusion of children with disabilities ‘from the general education system on the basis of disability’ or denial of ‘access to an inclusive, quality and free primary education and secondary education on an equal basis with others in the community in which they live’.<sup>23</sup> State parties are to ensure that reasonable accommodation of an individual’s requirements is provided, and that children with disabilities receive the support required, within the general education system, to facilitate their effective education.<sup>24</sup>

It is apparent that international children’s rights law recognises the right to education for children with disabilities, and in as far as possible, their right to be educated within the general education system. It further recognises their entitlement to education on an equal basis with other children and to be provided with assistance where necessary to achieve this right.

<sup>19</sup> Kilkelly (n 17 above) 199.

<sup>20</sup> M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 91.

<sup>21</sup> Combrinck (n 4 above) 309.

<sup>22</sup> Art 24(1).

<sup>23</sup> Art 24(2)(a) & (b).

<sup>24</sup> Art 24(2)(c)–(d).

### **3.3 Interpretation of the states' obligations**

In General Comment No 1, the CRC Committee stated that the aims of education are to promote, support and protect the core values of the CRC. These are human dignity innate in every child, and his or her equal and inalienable rights. The Committee further stated that education is directly linked to the realisation of the child's human dignity and rights<sup>25</sup> and must be provided in a manner that respects such inherent dignity.<sup>26</sup> Education must recognise that every child has unique characteristics, interests, abilities and learning needs. The curriculum must be tailored to the different needs of different children in order to equip them with the necessary skills to face the challenges that confront them in life.<sup>27</sup> The text of the General Comment No 1 reiterates the need to respect the dignity of a child in education, which is fundamental to the realisation of the right to education for children with disabilities in general and those with intellectual disabilities in particular. The failure of General Comment No 1 to infer a right to an effective or inclusive education under articles 28 and 29 of the CRC has been criticised as missing an opportunity to satisfactorily address the right of children with disabilities to education.<sup>28</sup>

In General Comment No 9,<sup>29</sup> the CRC Committee, drawing from goal number 2 of the Millennium Development Goals, stated that 'children with disabilities have the same right to education as all other children and shall enjoy [that] right without any discrimination and on the basis of equal opportunity as stipulated in the Convention'.<sup>30</sup> The Committee further noted that the core message of article 23 of the CRC is that children with disabilities should be included in society and that measures taken for the implementation of the CRC should explicitly aim at their maximum inclusion.<sup>31</sup> In recognition of the diverse needs of children with disabilities, the Committee expressed need for individualised attention to help them develop their skills.<sup>32</sup>

<sup>25</sup> General Comment No 1, para 1.

<sup>26</sup> General Comment No 1, para 8.

<sup>27</sup> General Comment No 1 para 9.

<sup>28</sup> Kilkelly (n 17 above) 200.

<sup>29</sup> Committee on the Rights of the Child, General Comment No 9 (2006) 'The rights of children with disabilities, CRC/C/GC/9 27 February 2007.

<sup>30</sup> General Comment No 9 (as above), para 62.

<sup>31</sup> General Comment No 9 (as above), para 11–13.

<sup>32</sup> General Comment No 9 (as above), para 63.

In General Comment No 5,<sup>33</sup> the Committee on Economic, Social and Cultural rights (CESR) reiterated and supported the view that persons with disabilities are best educated in the general education systems.<sup>34</sup> State parties are thus bound to ensure that teachers are trained to educate children with disabilities within regular schools and to provide the necessary equipment and support to bring children with disabilities to the same level of education as their peers without disability.<sup>35</sup>

It is apparent thus far that the right to education for persons with disabilities as defined in international law does not take into account the various types of disability. This approach subtly presumes similarity of education needs for all types of disability. Even the CRPD, the only international instrument that recognises a category of persons with intellectual disability, addresses the rights of persons with disability in generic terms. This is problematic in view of the fact that in the context of education, cognitive ability, which often underlies intellectual disability, is the fundamental element. The generic approach is also evident in the proposed approach to education, particularly in the advocacy for an inclusive education system.

### **3.4 Approaches to education of children with intellectual disability**

Generally, the right to education is founded upon four essential features set out by the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR)<sup>36</sup> as the minimum standard for all forms and levels of education. These are availability, accessibility, acceptability and adaptability of education.<sup>37</sup> Availability refers to the presence of context appropriate and functional educational institutions and programmes. Accessibility requires that all people should be able to access institutions and programmes without discrimination in law and in fact, within physical and economic reach.

<sup>33</sup> Committee on Economic, Social and Cultural Rights, General Comment No 5 'Persons with disabilities' (eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995), U.N. Doc. HRI/GEN/1/Rev.6 at 24 (2003).

<sup>34</sup> The Committee on ESCR was quoting from Rule 6 of the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993.

<sup>35</sup> General Comment No 5, para 35. The Committee on ESCR reiterated this position in its General Comment No 13 on the right to education in article 13 of CESCR.

<sup>36</sup> Committee on Economic, Social and Cultural Rights, General Comment No 13 on the right to education (Art. 13) E/C.12/1999/10 (1999)

<sup>37</sup> As above, para 6.



Notably, the CESR's conception of accessibility does not seem to give credence to the needs of children with intellectual disabilities, who may be affected by factors other than distance or affordability. Acceptability, on the other hand, relates to the substance and form of education requiring it to be relevant, qualitative and culturally appropriate. Finally, adaptability requires that education is flexible enough to adapt to the needs of students within diverse social and cultural settings. These features address the standards of education in general, but they may, in as far as they apply to children with intellectual disabilities, be used as benchmarks for assessing whether states have complied with the duty to protect their right to education.

#### *3.4.1 Inclusive education*

Inclusion is 'the process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education. It involves changes and modifications in content, approaches, structures and strategies, with a common vision covering all children of the appropriate age range and a conviction that it is the responsibility of the regular system to educate all children ...'<sup>38</sup> Inclusion is concerned with the identification and removal of barriers.<sup>39</sup> Education of children with intellectual disability is therefore but one of the facets of inclusion. However, this broad definition of inclusion informs the understanding of inclusive education.

In General Comment Number 9, the CRC Committee defined inclusive education as 'a set of values, principles and practices that seek meaningful, effective, and quality education for all students, that does justice to the diversity of learning conditions and requirements not only for children with disabilities but for all students.'<sup>40</sup> In terms of the Salamanca Declaration,<sup>41</sup> inclusive education requires that education be provided for all within the regular education system.<sup>42</sup> This has also been interpreted to mean that such education should be provided in integrated settings in mainstream educational settings.<sup>43</sup> It is based on the belief that persons with disabilities

<sup>38</sup> UNESCO 'Guidelines for inclusion: Ensuring access to education for all' (2005) 13.

<sup>39</sup> UNESCO (n 38 above) 15.

<sup>40</sup> General Comment No 9, para 67.

<sup>41</sup> Salamanca Statement and Framework for Action on Special Needs Education adopted at the World Conference on Special Needs Education (1994).

<sup>42</sup> M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities: Handbook on the rights of persons with disabilities* (2009) 121.

<sup>43</sup> Beiter (n 10 above) 507.

have an equal right to share the opportunities of self-fulfilment enjoyed by the unimpaired.<sup>44</sup>

Inclusive education is widely endorsed as the appropriate channel for the education for children with disabilities.<sup>45</sup> Articles 24 and 7 of the CRPD, coupled with General Comments Numbers 1, 9 of the CRC Committee and 5, 13 of the Committee on ESCR, provide a comprehensive framework for the development of inclusive approaches to education of children with disabilities. In the opinion of the CRC Committee, inclusion of children with disabilities in the groups of children in the classroom can show them that they have a recognised identity and belong to the community of learners, peers and citizens.<sup>46</sup> This suggestion presumes peer support that is deemed to enhance the esteem of the child with disabilities. It is anchored in the belief that students in special schools do not enjoy the same range of academic and leisure activities as children in mainstream schools, and that the needs of individual pupils are not met in a comprehensive or dedicated manner.<sup>47</sup>

The CRPD lays down in explicit terms the commitment of states to the goal of inclusive education.<sup>48</sup> Rule 6 of the Standard Rules for the Equalisation of Opportunities for Persons with Disabilities<sup>49</sup> also calls upon State Parties to ensure that the education of persons with disabilities is an integral part of the education system. Rule 6(4) requires that where education is compulsory, it should be provided to children with 'all kinds and all levels of disability including the most severe'. The needs of children with learning disabilities should, as far as possible, be met in mainstream schools with extra support rather than in special schools<sup>50</sup> and free of charge.<sup>51</sup> In effect, schools, teachers, and students have a duty to adapt to learners with divergent needs and abilities.<sup>52</sup> There are also some egalitarian and economic arguments that are advanced to support inclusion and mainstreaming of education for children with disabilities.<sup>53</sup> In practice though, the concept of inclusive education or

<sup>44</sup> J Fortin *Children's rights and the developing law* (2003) 371.

<sup>45</sup> Beiter (n 10 above) 507.

<sup>46</sup> General Comment No 9, para 64.

<sup>47</sup> Kilkelly (n 17 above) 198.

<sup>48</sup> Art 24(2)b.

<sup>49</sup> UN General Assembly Resolution 48/96 of 20 December 1993.

<sup>50</sup> Fortin (n 44 above) 371.

<sup>51</sup> General Comment No 9, para 65.

<sup>52</sup> Beiter (n 10 above) 507.

<sup>53</sup> See generally, Beiter (n 10 above) 135 on the egalitarian arguments.

what it entails is ill understood. Whereas it is widely perceived that inclusive education entails moving children with disabilities from special schools to regular schools, the meaning of inclusive education in fact is teaching the child with disability in an environment that is best suited for learning in view of their disability.<sup>54</sup> In as far as children with intellectual disabilities are concerned, especially in the case of severe and profound disabilities, this may entail teaching such children in special schools. The manner and form of inclusion is to be dictated by the needs of the child, 'since the education of some children with disabilities requires a kind of support which may not really be available in the regular school system'.

There are some limits to inclusiveness. There is no hard and fast criterion for the determination of whether a child with disabilities is eligible for admission to an inclusive school. However, some factors that are particularly relevant to intellectual disability may be instructive; the nature and severity of the disability, advantages and disadvantages of such schooling and the possibility of strain on the human, financial, technical and organisational resources.<sup>55</sup> Children with severe intellectual disabilities often pose special difficulties that ordinary schools are either unable or reluctant to deal with.<sup>56</sup> Besides, even though the theory of inclusive integration is widely and pedagogically supported, it does not guarantee integration of the child with disabilities with their peers. Other realities such as 'the possibility of isolation of children with disabilities by other children or difficulty in making friends with the other learners'<sup>57</sup> exist. It has been shown for instance that despite the integration of pupils into the regular system, attitudes in regular schools are still tinged with prejudice against children with disabilities.<sup>58</sup>

### *3.4.2 Special education*

Special education refers to education of persons with disabilities in separate settings, apart from the regular educational system. With the current emphasis

<sup>54</sup> Kenya National Human Rights Commission (KNHRC) 'Objects of pity or individuals with rights: The Right to education for children with disabilities' (2007) 26, occasional report available at [http://www.knchr.org/dmdocuments/Occasional\\_Paper.pdf](http://www.knchr.org/dmdocuments/Occasional_Paper.pdf) (accessed 7 September 2011); South African Department of Education 'White paper 6: Special needs education: Building an inclusive education and training system' (July 2001) 3.

<sup>55</sup> Beiter (n 10 above) 509.

<sup>56</sup> Fortin (n 44 above) 371.

<sup>57</sup> Fortin (n 44 above) 373.

<sup>58</sup> KNHRC (n 54 above) 33.

on inclusive education, special education is increasingly viewed as a means of last resort or a transitive measure to the inclusive system. Hence, it may be considered only where the general school system does not adequately meet the needs of all persons with disability or in preparation of learners to join the general school system.<sup>59</sup> In terms of rule 6 of the Standard Rules for the Equalisation of Opportunities for Persons with Disabilities, special education should be seen as a temporary expedient pending the restructuring of the general school system to adequately meet the needs of children with disabilities.<sup>60</sup> This too connotes a transient role of special education. In general then, it is evident that the role of special education for persons with disabilities is increasingly diminishing. However, in as far as intellectual disabilities are concerned, special education still commands a niche in which regular education is not possible as in the case of severe and profound disability. For this reason, the CRC Committee proposes that 'a continuum of services and programme options in circumstances where fully inclusive education is not feasible in the immediate future' should be maintained.<sup>61</sup> This phraseology implies a need for progressive realisation of inclusive education and the possibility of the existence of circumstances in which inclusive education may not be feasible.

#### **4. South Africa's compliance with domesticating international standards on the right to education for children with intellectual disabilities**

##### **4.1 The constitutional right to education**

Before the dawn of constitutional democracy in South Africa, racial division existed in the provision of education. This system of segregation also found itself present in education provided to children with disabilities.<sup>62</sup> Thus children with disabilities were not only unfairly discriminated based on race, but also based on their respective disability.

With the dawn of democracy in South Africa, the right to basic education was entrenched in the Constitution.<sup>63</sup> Section 29(1)(a) of the Constitution

<sup>59</sup> Schulze (n 42 above) 124.

<sup>60</sup> Fortin (n 44 above) 371.

<sup>61</sup> General Comment No 9, para 66.

<sup>62</sup> South Africa Department of Education (n 54 above) 9.

<sup>63</sup> Act 108 of 1996.

grants everyone the right to basic education.<sup>64</sup> Woolman and Bishop here correctly argue that the word ‘access’ is absent in the wording of this right, which means this right is not subject to the general socio-economic rights limitations of ‘reasonable legislative measures’ and ‘availability of resources’.<sup>65</sup> Therefore, it would not be incorrect to argue that the constitutional right to basic education for children with intellectual disabilities is not subject to socio-economic limitations in South Africa and it is to be granted to everyone, which includes children with intellectual disabilities.<sup>66</sup>

This obviously does not mean that such right cannot be subject to general limitation, as per section 36 of the Constitution. Section 36 of the Constitution stipulates that all rights within the Bill of Rights may be subject to reasonable and justifiably limitations, by way of a law of general application. In other words, if any of the legislation, under discussion below, is reasonable and justifiable, it may limit a child with an intellectual disability to the right to basic education. This law of general application only applies to legislation and not policies and programmes.<sup>67</sup>

#### **4.2 Legislative and policy analysis of the right to education for children with intellectual disabilities**

South Africa has enacted legislation and policy documents to give effect to constitutional principles and international law that it has ratified. These include the National Education Policy Act,<sup>68</sup> the South African Schools Act<sup>69</sup> and more specifically in relation to the right to education for children with disabilities, White Paper 6 on Special Needs Education.

<sup>64</sup> Section 29(1)(a) of the Constitution reads: ‘Everyone has the right to a basic education, including adult basic education ...’

<sup>65</sup> S Woolman & M Bishop ‘Education’ in S Woolman, T Roux & M Bishop *Constitutional law of South Africa* (2009) 57–10.

<sup>66</sup> ‘Everyone’ in this instance means citizens and persons with permanent residence status as found by the Constitutional Court in the case of *Khosa and Others v Minister of Social Development and Others* 2004 6 BCLR 569 (CC). See also B Bekink & M Bekink ‘Children with disabilities and the right to education: A call for action’ (2005) 1 *Stellenbosch Law Review* 132.

<sup>67</sup> S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 94.

<sup>68</sup> Act 27 of 1996.

<sup>69</sup> Act 84 of 1996.

#### 4.2.1 *The National Education Policy Act*

The National Education Policy Act regulates the drafting, monitoring and evaluation of education policies. In terms of section 4(b) of this Act, education policies have to be created to enable ‘the education system to contribute to the full personal development of each student, and to the moral, social, cultural, political and economic development of the nation at large, including the advancement of democracy, human rights and the peaceful resolution of disputes’. Bekink and Bekink are of the view that this section indirectly addresses the issue of the right to education for children with intellectual disabilities, as it ‘guarantees an education system that enables every student to develop his or her personality to its full potential’.<sup>70</sup> More importantly, section 4(d) of this Act requires the Department of Education to adopt a policy to ‘ensure that no person is denied the opportunity to receive an education to the maximum of his or her ability as a result of physical disability’. Even though this section directly speaks to adopting policy based on physical disability, it fails to oblige the Government to adopt any policy on the right to education for children with other forms of disabilities, including those with intellectual disabilities. Thus, it is difficult to agree with Bekink and Bekink who argue that an expansive interpretation of physical disability should be adopted to include other forms of disability, other than physical disability.<sup>71</sup>

#### 4.2.2 *The South African Schools Act*

The principal piece of legislation governing the right to education in schools in South Africa is the South African Schools Act. In its preamble, the legislation recognises that a new system for schools that has a ‘strong foundation for the development of all people’s talents and capabilities ... combat racism and sexism and all other forms of unfair discrimination and intolerance ...’ is needed to redress the past injustices. It is evident from the preamble that the schooling system provided for in this Act is founded upon the values of non-discrimination and the development of everyone, including children with intellectual disabilities.

The South African Schools Act makes it compulsory for every learner to attend school up to age of 15 years or ninth grade, whichever comes first.<sup>72</sup>

<sup>70</sup> Bekink & Bekink (n 66 above) 137.

<sup>71</sup> As above.

<sup>72</sup> Sec 3(1).

'Learner' is defined in the Act as 'any person receiving education or obliged to receive education'.<sup>73</sup> Section 29 of the Constitution recognises everyone's right to basic education. As argued above<sup>74</sup>, 'everyone' includes children with intellectual disabilities. Therefore 'learner', as defined in the South African Schools Act includes a child with intellectual disability. Section 3(2) of the South African Schools Act sets a different standard for compulsory education for learners at special schools by requiring the Minister of Education to publish in the *Government Gazette* the age of compulsory school attendance. As of yet, no such age has been published. It is presumed that the age stipulated for compulsory school attendance for children without disabilities, would apply to children with disabilities.

Section 5(1) of the South African Schools Act stipulates that 'a public school *must* admit learners and serve their educational requirements without unfairly discriminating in any way'.<sup>75</sup> This provision implies a duty on public schools not to unfairly discriminate against any prospective learner. This could also mean that a school cannot unfairly discriminate against a student with an intellectual disability at the point of admission. Section 5(6) of the Act places a duty on both the head of the education department and the principal of a school to consider the 'rights and wishes' of parents of children with special education needs.

Considering that there are various degrees of intellectual disabilities,<sup>76</sup> it might not be such an obvious argument on what constitutes reasonable accommodation for children with intellectual disabilities in the mainstream public school system. In other words, whether reasonable accommodation in the mainstream public school system could be made for children with mild intellectual disabilities is not the same for children with severe intellectual disabilities. The level of intellectual disability for the latter requires much more care and attention, which could possibly not be provided for within the mainstream public school sector. Another area of confusion would be on whether it would constitute unfair discrimination to not reasonably accommodate a child with a moderate intellectual disability in the mainstream public school system. This brings evidence to light that a peculiar response is needed which would inform the broader notion of inclusive education for children with intellectual disabilities.

<sup>73</sup> Sec 1(ix).

<sup>74</sup> See 4.1 on the constitutional right to education.

<sup>75</sup> Authors' emphasis added.

<sup>76</sup> See point 2 above for an explanation of these levels of intellectual disability.

Where it is unreasonable to accommodate children with intellectual disabilities in the mainstream public school system, the duty is placed on the state to provide alternative schools to cater for their needs. The need for alternative schools for children with disabilities should only be justified by the inaccessibility of mainstream public school system, and the best interest of children with intellectual disabilities. It should also be kept in mind that this should be done within the goal of one uniform system of education, as envisaged by the South African Schools Act.<sup>77</sup>

*4.2.3 Education White Paper 6 on Special Needs Education: building an inclusive education and training system*

In 2001, the South Africa Department of Education published White Paper 6 (policy document) on Special Needs Education. This document reiterated the government's stance on strengthened special schools for children with disabilities, as part of an inclusive system.<sup>78</sup> The objective of the policy document was to 'extend the policy foundations, frameworks and programmes of existing policy for all bands of education and training so that our education and training system will recognise and accommodate the diverse range of learning needs'.<sup>79</sup> In the introduction, the then Minister of Education, professor Kader Asmal, placed an emphasis on creating improved special schools for children with severe disabilities.<sup>80</sup>

Inclusive education and training in the White Paper are defined fairly broadly and include important tenets such as: acknowledging that all children have the ability to learn; enabling education structures to meet the needs of everyone; and respecting differences in learners, which includes those with intellectual disabilities.<sup>81</sup> The policy also acknowledges that impaired intellectual development would require a curriculum adaptation to suit the needs of learners, which demands accommodation. In order to implement this White Paper, the Department of Education established a directorate for inclusive education.<sup>82</sup>

<sup>77</sup> The Preamble to the South African Schools Act; also B Bekink & M Bekink (n 66 above) 139–140.

<sup>78</sup> South African Department of Education (n 54 above) 3.

<sup>79</sup> South African Department of Education (n 54 above) 24.

<sup>80</sup> As above.

<sup>81</sup> South African Department of Education (n 54 above) 6–7.

<sup>82</sup> Combrinck (n 4 above) 315.



Various parts of the 2001 White Paper at the time of writing are not yet implemented.<sup>83</sup> One such example is the revision of the age grade norms to accommodate children with special learning needs such as children with intellectual disabilities. Apart from it being an obligation in terms of the White Paper,<sup>84</sup> it is also required in terms of the South African Schools Act.<sup>85</sup>

Another unfortunate feature of White Paper 6 is that it is aimed at progressively realising the right to inclusive education for children with disabilities.<sup>86</sup> As mentioned above,<sup>87</sup> the constitutional right to basic education in South Africa is not a socio-economic right and therefore it is not subject to the inherent limitations of such rights. The fact that White Paper 6 is structured around progressively realising the right to inclusive education for children with disabilities is therefore *prima facie* unconstitutional.

#### **4.3 Challenge to the education of children with severe and profound intellectual disabilities in South Africa**

In a relatively recent (at the time of writing) judgment by the Western Cape High Court, the right to education for children with severe and profound intellectual disabilities was under scrutiny.<sup>88</sup> In their heads of argument, the applicants contended that children with severe and profound intellectual disabilities receive no education at all and that the subsidy provided by the State is 'wholly inadequate' to realise the right to education for such children.<sup>89</sup> In its judgment, the High Court found that no provision for

<sup>83</sup> In a 2010 media report, the current Minister of Basic Education, Angie Motshekga, highlighted the need to implement South Africa's 'progressive policy' on inclusive education. See 'Motshekga highlights rights of disabled to education' *The Citizen* 13 August 2010 at [http://www.citizen.co.za/index.php?option=com\\_content&view=article&id=106221&catid=25:local-news&Itemid=34](http://www.citizen.co.za/index.php?option=com_content&view=article&id=106221&catid=25:local-news&Itemid=34) (Accessed 26 August 2010).

<sup>84</sup> South African Department of Education (n 54 above) 27.

<sup>85</sup> Section 3(2). The South African Schools Act provision relates to the compulsory enrolment of children with special education needs.

<sup>86</sup> Page 36 of the White Paper reads: 'The policy proposals described in the White Paper are aimed at developing an inclusive education and training system that will ensure that educational provision for learners with special needs is largely integrated over time into what are currently considered to be 'ordinary schools.'

<sup>87</sup> See part 4.1 of this chapter on the Constitutional right to education.

<sup>88</sup> See *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Government of the Province of the Western Cape* Case No: 18678/2007 (unreported judgment of 11 November 2010).

<sup>89</sup> Applicants Heads of Argument *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Government of the Province of the Western Cape* 8–10.

children with severe and profound intellectual disabilities was provided for in relation to attending special schools.<sup>90</sup> The High Court was also of the correct view that the State has a constitutional obligation to realise the right to basic education for everyone, and that mere cooperation with organisations like the applicant does not entirely fulfil this obligation.<sup>91</sup> Finally, the High Court also found that there was no reasonable and justifiable limitation for the infringement of the right to basic education for children with severe and profound intellectual disabilities.<sup>92</sup> The High Court ordered that the State take reasonable measures (which also include interim steps) to realise the right to basic education for children with severe and profound intellectual disabilities.<sup>93</sup>

Therefore, whereas South Africa has attempted to realise the right to education for children with disabilities (in general) through the South African Schools Act and White Paper 6, the Western Cape High Court found that the response to the right to basic education for children with intellectual disabilities is inadequate.

## **5 Education for children with intellectual disabilities in Kenya**

### **5.1 Legal and policy framework**

The new Constitution of Kenya<sup>94</sup> recognises the right of all children, without any discrimination on grounds such as disability, to free and compulsory basic education.<sup>95</sup> While the right to education in general is a socio-economic right in terms of the new Constitution,<sup>96</sup> education for children creates an immediate obligation and is not subject to progressive realisation implicit in socio-economic rights.<sup>97</sup> The Constitution further recognises the right of every person with a disability 'to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent

<sup>90</sup> The *Western Cape Forum for Intellectual Disability* case, para 18.

<sup>91</sup> The *Western Cape Forum for Intellectual Disability* case, para 24.

<sup>92</sup> The *Western Cape Forum for Intellectual Disability* case, para 45.

<sup>93</sup> The *Western Cape Forum for Intellectual Disability* case, para 52.

<sup>94</sup> The Constitution was adopted on 4 August and promulgated on 27 August 2010.

<sup>95</sup> Art 53 as read together with article 27 of the new Constitution.

<sup>96</sup> Art 43 of the Constitution.

<sup>97</sup> Art 53 states that 'Every child has the right ... to free and compulsory basic education'.

compatible with the interests of the person.’<sup>98</sup> The interpretation of this provision is likely to be problematic, because it seems to propagate the idea that the right of persons with disability to access educational facilities is limited to facilities for persons with disability. The meaning of the latter part of the provision is also not clear.

In terms of the Kenyan Children’s Act<sup>99</sup> a child may not be discriminated on the basis of disability.<sup>100</sup> The Act establishes the right of all children, including children with disabilities, to free and compulsory basic education in accordance with article 28 of the CRC.<sup>101</sup> However with respect to children with disabilities, the Act stipulates that they are entitled to ‘... education and training free of charge or at a reduced cost’ and to be treated with dignity.<sup>102</sup> This implies that unlike their peers, children with disabilities in Kenya, unlike their peers without disability, may be expected to cover a certain extent of the cost of their education on their own. To that extent, this provision contradicts section 7 of the same Act, and article 53 of the Constitution. It also contradicts article 28 of the CRC which requires state parties to make primary education compulsory and available free for all. Section 12 is also reflective of the other shortcoming of section 7(2), which apportions the responsibility for education on both parents and government. This is contrary to international human rights law which puts the responsibility for primary education solely on the government.<sup>103</sup> It should be noted however that the Act precedes the Constitution the provisions of which prevail.

The Persons with Disability Act<sup>104</sup> defines disability as ‘a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic and environmental participation’.<sup>105</sup> This definition includes persons with intellectual disability. The Act outlaws denial of admission to learning institution on the basis of disabilities if the prospective learner has the capacity to acquire substantial learning in the course.<sup>106</sup> The responsibility for the

<sup>98</sup> Art 54.

<sup>99</sup> Act No 8 of 2001.

<sup>100</sup> Sec 5.

<sup>101</sup> Sec 7(2).

<sup>102</sup> Sec 12.

<sup>103</sup> See part 3:1 above.

<sup>104</sup> Act No 13 of 2003.

<sup>105</sup> Sec 2.

<sup>106</sup> Sec 18(1).

realisation of this right vests on the government to the maximum of its available resources.<sup>107</sup> The Act proscribes denial of admission to any person with disability to any course of study by reason only of such disability, if the person has the ability to acquire substantial learning in that course.<sup>108</sup> This would mean that learners with mild and moderate intellectual disabilities should be accommodated in the regular education system. It embodies the principle of reasonable accommodation established under article 24 of the CRPD.

Education of children with disabilities in Kenya falls under the broader framework of Special Needs Education. It appears that this category of children was initially understood to cover children with sensory, physical and mental disabilities. The group has subsequently been expanded to include children with wide variety of other needs including children with cerebral palsy, 'mental handicaps', down syndrome and autism,<sup>109</sup> some of whom can be regarded as having intellectual disabilities. It is however apparent that the policy neither perceives of a specific category of children with intellectual disabilities nor envisages the internationally accepted levels of intellectual disabilities, that is, mild, moderate, severe and profound. The Special Needs Education policy<sup>110</sup> gives general directives that are intended to apply to all the children within that broad spectrum.

The government of Kenya introduced free primary education (FPE) programme in 2003. Soon thereafter, a task force<sup>111</sup> was established to 'carry out an appraisal exercise on special needs education' so as to enable the government to plan for the provision of education to learners with special needs. The task force observed that many children with disabilities who enrolled in regular schools as a result of the FPE eventually dropped out due to lack of equipment and facilities.<sup>112</sup> The task force also concluded that the

<sup>107</sup> Sec 11 of the Act. The Persons with Disability (Amendment) Bill, 2007 proposed an amendment to this provision to do away with the limitation based on resource availability. In section 6, the Bill proposed a section 11(2) of the Disability Act with specific immediate obligations of the state including 'the full enjoyment by children with disabilities of all human rights and fundamental freedoms.' The Bill is yet to be passed into law. The Bill predates Kenya's ratification of the CRPD but clearly progressively embodies the principles thereof.

<sup>108</sup> Sec 18 of the Act.

<sup>109</sup> Ministry of Education, Science and Technology 'The National Special Needs Education Policy Framework' final draft (July 2009) 17.

<sup>110</sup> Ministry of Education, Science and Technology Policy (n 109 above).

<sup>111</sup> Task Force on Special Needs Education (2003).

<sup>112</sup> KNHRC (n 54 above) 18.

only way that the government would provide special education for all children with disabilities was through inclusive education. It noted that inclusive education was already taking place in some of the schools but that the teachers were not sure of how it was to be implemented. Besides, very few of the teachers had training on special needs education and the physical facilities and learning materials in many schools were not appropriate for children with disabilities.<sup>113</sup>

In Sessional Paper No 1 of 2005, the government outlined its policy on education and training by recommending inclusive education, 'including the removal of barriers to education for children with disabilities and awareness creation to eradicate negative beliefs associated with disability'.<sup>114</sup> While committing itself to the goal of education for all by 2015, the policy failed to prescribe specific measures to address the challenges identified with respect to education for children with intellectual disability. This shortcoming suggests that the education of children with disabilities is not a priority in education planning in Kenya.<sup>115</sup>

It is apparent that even though children with intellectual disability benefit from the entirety of rights of children and persons with disability in Kenya, there is no particular focus on their needs in the context of education. The situation mirrors the international legal framework which also does not address the unique needs of children with intellectual disabilities as a distinct category. The Persons with Disability (Amendment) Bill of 2007, which is yet to be presented to Parliament, establishes a duty of the government to provide services to accommodate students with disabilities.<sup>116</sup> Though this slightly improves on the standard established under the Persons with Disabilities Act of 2003, a lot remains to fully realise the right to education for children with intellectual disabilities in Kenya.

## **5.2 Challenges to the education of children with intellectual disabilities in Kenya**

Persons with disabilities in Kenya have immense difficulties exercising the right to education despite the centrality accorded to this right in numerous existing government policy documents as a mechanism for poverty

<sup>113</sup> As above.

<sup>114</sup> As above.

<sup>115</sup> KNHRC (n 54 above) 19.

<sup>116</sup> Sec 10(a).

eradication and development.<sup>117</sup> Approximately 90% of children with disabilities in Kenya are either at home or in regular schools with little or no specialised assistance.<sup>118</sup> Special needs education in Kenya suffers inadequate funding, lack of a clear policy framework, low progress in assessing and placing children with disabilities, few qualified teachers and lack of teaching and learning resources.<sup>119</sup> Lack of clear guidelines on the implementation of inclusive education or reliable data on children ‘with special needs’ further constrains special needs education in Kenya.<sup>120</sup>

Education for children with disabilities in Kenya is undertaken within segregated, integrated or inclusive educational settings. Despite international pressure to educate children with disabilities in integrated settings, the bulk of children with disabilities in Kenya who are in school are in special schools.<sup>121</sup> Children with intellectual disabilities are particularly vulnerable in the Kenyan education system. There is growing understanding, both internationally and in Kenya, of the diversity intrinsic in this category of disability.<sup>122</sup> However, progress in aligning education services with this knowledge is slow and isolated, and most often not government initiated.<sup>123</sup> This illustrates disconnect between inclusive education as enunciated in government policy and its implementation.

The high number of learner enrolment associated with FPE affects children with intellectual disability disproportionately. Children with severe

<sup>117</sup> See for instance Ministry of Education, Science and Technology ‘Development of education in Kenya’ (2004) 2. Available at [http://chet.org.za/manual/media/files/chet\\_hernana\\_docs/Kenya/National/MEST%202004\\_Development%20of%20education%20in%20Kenya.pdf](http://chet.org.za/manual/media/files/chet_hernana_docs/Kenya/National/MEST%202004_Development%20of%20education%20in%20Kenya.pdf) (accessed 15 October 2010).

<sup>118</sup> As above, also report presented at the 47th Session of the International Conference on Education convened by UNESCO in 2004 available at <http://unesdoc.unesco.org/images/0014/001410/141072e.pdf> (accessed 7 September 2011).

<sup>119</sup> UNESCO ‘Fact book on education for all’ (2006) 28–29.

<sup>120</sup> UNESCO (n 119 above) 33 and Ministry of Education, Science & Technology (note 109 above) 7.

<sup>121</sup> KNHCR (n 54 above) 21.

<sup>122</sup> For instance, some groups of children previously regarded as mentally impaired such as those suffering from autism spectrum disorder are now recognised as a distinct group requiring interventions that are best administered separate from other children with intellectual disabilities. See KNHRC (n 54 above) 21.

<sup>123</sup> See the efforts of the Autism Society of Kenya including the establishment of pilot units for children with autism spectrum disorder in some of the Nairobi City primary schools in preparation of the children for integration into the regular school system. The work of the Autism Society of Kenya is donor funded. See [www.autismsocietyofkenya.org](http://www.autismsocietyofkenya.org) (accessed 12 October 2010).

or profound intellectual disabilities require specialised and personalised attention which is not feasible in large groups of students. Consequently, parents are increasingly opting for private schools that are adequately resourced to take in learners with disability.<sup>124</sup> Notably also, the FPE programme currently does not apply to early childhood education, the critical point at which the difficulties, if at all, of the child with intellectual disabilities are likely to be identified.<sup>125</sup>

Several reasons account for the failure of the concept of inclusive education to take off with respect to children with intellectual disabilities in Kenya. First is the question of resources ranging from teachers, facilities and learning materials.<sup>126</sup> Secondly, there is a lack of proper involvement of all the stakeholders, particularly the teachers in the formulation of the policy with the effect that teachers do not feel part of the process. In addition, there is lack of awareness on the rights of children with disabilities in education or government policy on the same. In addition, the school curriculum is at variance with the needs of children with disability burdening the teacher to effectively and innovatively interpret it.<sup>127</sup>

Evidently, inclusive education has the potential to achieve effective education of children with intellectual disabilities in Kenya. It is only in this way that education can be made accessible to these children in view of the large number of regular schools across the country. Reviewing the general curriculum will be necessary to accommodate the learners with intellectual disability. The competitive outcome based approach of the current (8–4–4) education system<sup>128</sup> systematically excludes children with intellectual disabilities because schools are more inclined to reject learners whose academic performance is likely to affect their ranking. The general system therefore needs to adapt to the needs of the children with intellectual disability.

<sup>124</sup> KNHRC (n 54 above) 25.

<sup>125</sup> General Comment No 9, para 65.

<sup>126</sup> For instance, while the recommended ratio of student – teacher numbers for children with intellectual disabilities is 6 pupils to 1 teacher, in many special schools that ratio is as high as 1:15 or 20 students, and worse in inclusive settings where some public primary schools have as high as 100 students per class. KNHRC (n 54 above) 29–30.

<sup>127</sup> KNHRC (n 54 above) 28.

<sup>128</sup> See DN Sifuna 'Prevocational subjects in primary schools in the 8–4–4 education system in Kenya' (1992) 12 *International Journal of Educational Development* 133–145 on the origins and operation of the 8–4–4 education system in Kenya.

## **6 Conclusion**

It is important to highlight that international law does not have a specific focus on children with intellectual disabilities, despite the centrality of intellectual capacity in the context of education. This lack of recognition at the international level is being reflected at the domestic level. Thus, as in the case of Kenya and South Africa, there is no special emphasis on the right to education for children with intellectual disabilities, as a specific category, in the domestic spheres.

Drawing from the foregoing, it is concluded that South Africa has not taken any steps to domesticate article 24 of the CRPD, since the 2001 White Paper has not been reviewed after South Africa ratified this instrument in November 2007. Kenya, on the other hand, has since ratification of the CRPD, drafted an education policy. This policy however does not seem to domesticate article 24 of the CRPD. Therefore, even in the presence of a constitutional framework and policy developments in relation to education for children with disabilities, both countries have not taken any concrete steps to realise the right to education for children with intellectual disabilities.