

CONFRONTING THE DOUBLE MARGINALISATION OF GIRLS WITH DISABILITIES: PRACTICAL CHALLENGES FOR THE REALISATION OF THE RIGHT TO EDUCATION FOR GIRLS WITH DISABILITIES UNDER THE DISABILITY ACT OF MALAWI

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Summary

Girls with disabilities are subjected to multiple challenges due to their disabilities. They face discrimination that most women face. They are discriminated due to their disabilities. They encounter barriers that most children encounter. This is the double marginalisation that breeds and sustains the dehumanising problems experienced by girls with disabilities. This creates a vulnerable group within a vulnerable group. Most of the times, girls with disabilities are more likely than boys to encounter severe difficulties in accessing education. Fortunately, Malawi passed the Disability Act in 2012 which epitomises the social model approach to disability. The Act attempts – to a large extent – to domesticate the state’s obligations under the Convention on the Rights of Persons with Disabilities (CPRD). The hallmark of the Act is a myriad of rights including the right to education. This is an important right that can facilitate the elimination of most forms of discrimination that girls with disabilities face. However, the realisation of the right to education as provided in the Disability Act is hampered by several socio-legal and physical structural challenges. The Act, by failing to recognise that other persons with disabilities like girls with disabilities are multi-disadvantaged, fails to provide the reasonable accommodation that it purports to advance. The notion of dignity and equalisation of opportunities for persons with disabilities can only be realised if the right to education for girls with disabilities is properly articulated in the Act. Further, the remedial mechanisms provided under the Act and it is contended that the remedies it provides should be simplified to make them ‘user friendly’ to people that are multi-vulnerable – such as girls with disabilities. The paper proposes a more expansive formulation of locus standi in enforcement of the rights provided under the Act. It further appraises administrative penalties provided in the Disability Act.

1 Introduction

'Education has a vital role in empowering women' and it is 'one of the best financial investments states can make'.¹ Education is not only a right in itself but also indispensable for the exercise of other human rights.² The Disability Act of 2012 provides the right to inclusive education to persons with disabilities. This is commendable because education is the primary vehicle by which economically and socially marginalised people can lift themselves out of poverty and obtain the means to participate fully in their communities.³ Unfortunately, Malawi has not been making progress in education. The total literacy rate for all adults fell from 64,1 to 61,3 per cent.⁴ Remarkable progress has been made in gross primary school enrollment but the same is not true for secondary schools.⁵ Primary school enrollment rose from 23,6 per cent in 1995 to 38,0 per cent in 1999 to 34,2 per cent in 2012.⁶ According to UNESCO, in 2007 the enrollment ratio for Malawi was about 1 per cent compared to 6 per cent for sub-Saharan Africa and 26 per cent for the world as a whole. Just like the rest of the world, the enjoyment of the right to education remains a distant goal for many people.⁷ Although Malawi adopted free primary education, many people cannot afford quality education due to other hidden costs such as school uniforms and transport costs.⁸

The realisation of the right to education remains a pipe dream for girls with disabilities because they face multifaceted problems over and above other people. These problems hinder the realisation of the right to education. They are subject to disability related discrimination and challenges. They face the vulnerabilities of being children and they encounter challenges that all females encounter. It is imperative that the double discrimination faced by girls with disabilities should be addressed by reasonable accommodation over and above that accorded to the rest of persons with disabilities. Unfortunately, the Disability Act of 2012 does not recognise girls with disabilities as a vulnerable group within a vulnerable group.⁹ Its articulation of the right to education for girls with

1 Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No 13 'The right to education' Doc E/C.12/1999/10 (8 December 1999) para 1.

2 As above.

3 As above.

4 P Zeleza 'The persistent poverty of development and democracy in Malawi' Essay specially written for presentation as Keynote Address at the 2014 Social Science Conference on 'Towards Malawi at 50: Socioeconomic achievements and challenges' Chancellor College, University of Malawi, 26-27 June 2014.

5 As above.

6 As above.

7 General Comment No 13 (n 1 above) para 2.

8 Most primary schools impose development fees.

9 AC Munthali 'A Situation Analysis of People with Disabilities in Malawi' (2011).

disabilities is generalised and does not make special measures to ameliorate and compensate for the multifaceted challenges they face.¹⁰

This paper examines the normative content of the right to education with emphasis on the availability and accessibility of quality education to girls with disabilities. It discusses the core obligations of states *vis-à-vis* the positive realisation of the right to education for girls with disabilities. It establishes that the obligations of states in the realisation of the right to education are classified into core obligations and aspirational obligations.¹¹ States should perform core obligations immediately that do not require the expenditure of resources.¹² The state is obliged to take reasonable legislative and other measures to achieve progressive realisation of this right.¹³ 'Progressive realisation' requires states to continuously strive to strengthen the right to education.¹⁴ This requires clear legislative guarantees of the right to education embedded with affirmative action to address the peculiar predicament of girls with disabilities. There should be legislative provisions that mandate the government to progressively realise the right to education for girls with disabilities within the confines of available resources. In Malawi, there has been perpetual laxity in the allocation of resources towards education for girls with disabilities although the state is not obliged to go beyond available resources to realise it.¹⁵ Malawi wrongly attributes its failure to meet its minimum core obligations to lack of available resources without demonstrating that it has exhausted the available resources at its disposal to satisfy, as a matter of priority, those minimum obligations.¹⁶ This results in failure to realise the right to education which erodes human dignity, freedom and equality thereby rendering the aspiration to realise human rights having a hollow ring.¹⁷ Government policy should be rationally geared towards the realisation of this right.

10 *Price v United Kingdom* (2002) 34 EHRR 53. Under sec 11(2)(2) of The Constitution of the Republic of Malawi foreign case law and principles of public international law are persuasive.

11 M Langford (ed) *The justiciability of social rights: From practice to theory* (2008) 24.

12 *Purohit and Moore v The Gambia* African Commission on Human and Peoples' Rights Communication No 241/2001, Sixteenth Activity report 2002-2003, Annex VII (May 2003) para 84.

13 Cf sec 27(2) of the Constitution of the Republic of South Africa, 1996.

14 *Purohit* (n 12 above) para 84.

15 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

16 CESCR, General Comment No 3 'The Nature of States Parties Obligations' E/1991/23 (14 December 1990) [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En) (accessed 26 August 2014) para 10.

17 *Thiagraj Soobramoney v Minister of Health: Province of KwaZulu-Natal* D&CLD 5846/97 (21 August 1997) (unreported).

2 The double marginalisation of girls with disabilities and the right to education in Malawi

Malawi is a poor country with more than half of the population living below the poverty line.¹⁸ Poverty is incompatible with human dignity which is the foundation stone of human rights.¹⁹ In Malawi, poverty is more manifest amongst persons with disabilities. Malawi has a population of 13.8 million,²⁰ of which about 480 000 are persons with disabilities. This represents 4,18 per cent of the total population.²¹ The prevalence of disability amongst children is at 2,4 per cent²² as compared to 4,8 per cent for the general population.²³ About 2,2 per cent²⁴ of them are girls while 2,5 per cent are boy.²⁵ Statistics demonstrate access to social services is a challenge for persons with disabilities. For example, 40 per cent of people with disabilities fail to receive education. For instance, more than twice as many of children without disabilities 41,1 per cent attended school.²⁶

In Malawi, most girls with disabilities fail to access education due to their disabilities. They face peculiar hurdles to attend, and complete school.²⁷ However, the just like the majority of children with disabilities, they face problems of access to education and other public services.²⁸ Children with disabilities are not culturally accepted in education institutions due to a deep-seated prejudice and fear of disability, which is often viewed as a curse or punishment.²⁹ Parents feel embarrassed to have children with disabilities and rarely send them to school in order to hide their 'embarrassment'. Some parents do not send girls with disabilities to school in order to protect them from the stigma associated with education. Consequently, children with disabilities are isolated. The isolation of children with disabilities perpetuates such myths.³⁰ The National Policy on Special Needs Education demonstrates that lack of sufficient funding,

18 It is ranked 170 on the UN human development index income (UNDP, 2008). UN Human Development Report 2012 www.undp.org.com (accessed 15 April 2013).

19 P Alston 'Ships pebbling in the night: The and the debate seen through the lens of MDG' (2005) 27 *Human Rights Quarterly* 755 786.

20 National Statistical Office, The 2008 Malawi Housing and Population Census Republic of Malawi' Zomba National Statistical Office (NSO) (2008).

21 E Aide & M Loeb (eds) *Living conditions among people with activity limitations in Malawi: A national representative survey* (2004).

22 The 2008 Malawi Housing and Population Census 159,878.

23 The 2008 Malawi Housing and Population Census 498,122.

24 The 2008 Malawi Housing and Population Census 75,157.

25 The 2008 Malawi Housing and Population Census 84,721.

26 A Munthali et al 'From exclusion to inclusion – Promoting the rights of children with disabilities in Malawi' (2012) 40.

27 D Filmer 'Disability, poverty and schooling in developing countries: Results from 11 household surveys' (November 2005) 1.

28 Committee on the Rights of the Child 'Malawi State Report Submitted under article 44 of the Convention on the Rights of the Child' CRC/C/Add 43, 26 June 2001, para 78.

29 K Kallmann 'Child poverty paper: Alliance for children's entitlement to social security.'

30 Malawi State Report (n 28 above) paras 77-78.

environmental barriers, attitudinal barriers, limited capacity to train specialist teachers and the institutional structure impede the realisation of education for *inter alia* girls with disabilities.³¹ Further hurdles include distance to school, an inaccessible physical environment, physical and verbal abuse of children with disabilities.³² Girls with physical disabilities fail to attend and repeat classes due to difficulties in walking to school and home. Similarly girls with hearing impairments fail to participate in class activities.³³ These problems contribute to a failure in examinations and repeating classes or sometimes dropping out.³⁴ The attitude of the society is the main stumbling block to the realisation of the right to education for girls with disabilities. Lack of education affects the likelihood of girls with disabilities to acquire education that will enable them earn better incomes.³⁵ Children with disabilities must have access to regular schools. Governments should prioritise policies and budgetary support to improve their education system to include all children regardless of individual difficulties.³⁶ Girls with disabilities are not exempted from such challenges due to lack of clear legislation that addresses the plight of multi-disadvantaged groups like girls with disabilities and mandates systematic allocation of resources to address their cause.³⁷

Further, most girls with disabilities fail to attain education due to gender related marginalisation. In Malawian society, the female gender is mostly perceived as 'second class', destined for wifely duties due to gender stereotypes. Consequently, girls are raised as 'brides', girls with disabilities are raised to become good wives and are not sent to school. Girls are encouraged to marry early and ridiculed if they continue with their education unlike boys.³⁸ Sometimes, poverty forces girls to enter into early marriages and this results in teenage pregnancies.³⁹ Additionally, girls with disabilities are burdened with domestic chores due to their gender. Boys with disabilities are exempt from this predicament. On the other hand, girls with disabilities face gender related violence which includes sexual violence. This is perpetuated by some customary beliefs that hold that having sexual intercourse with girls with disabilities is a cure for HIV/AIDS or is a charm. Mostly, girls are forced to marry or encouraged to stay at home and help look after the family while boys are supported financially

31 Ministry of Education *National special needs education policy* Republic of Malawi Government: Office of Ministry of Education. Lilongwe, Malawi: Revised legislative document (2007).

32 H Rousso H *Education for all: A gender and disability perspective* (2007).

33 A Chavuta et al Shire Highlands Education Division – Malawi Baseline Study Report: Montfort Special Needs Education College and Leonard Cheshire Disability International Inclusive Education Project (2008) 31.

34 As above.

35 Filmer (n 27 above) 14.

36 The Salamanca Statement and Framework for Action on Special Needs Education, UNESCO, ED-94/WS/18, 1994 in International Save the Children Alliance 'Children's rights: A second chance' (2001).

37 Malawi State Report (n 28 above) para 81.

38 Malawi State Report (n 28 above) para 80.

39 Chavuta et al (n 33 above) 26.

to attain education. For instance, in a family, preference in attaining education is accorded to a boy child and not a girl child who is further laden with a lot of domestic work at the expense of her education.⁴⁰ These are traditional beliefs and customs that reinforce gender inequalities in education and perpetuate women's secondary status in society and invoke exploitative sexual relations.⁴¹ In schools, there are no remarkable affirmation actions that advance access to education for girls. For example, there are few places reserved for girls who make it at secondary school.⁴² This, over time, turns out to be discriminatory as more and more girls fail to get secondary school places.⁴³ This is evident by low literacy rate for females.⁴⁴ The state should specifically accommodate vulnerable people like persons with disabilities especially girls who suffer double marginalisation of being female and disabled. Paternalistic tendencies affect the positive realisation of the right to education for girls with disabilities.⁴⁵ At a communal level, cultural biases which lead to preferential treatment and allocation of resources and opportunities to male children and children without disabilities.⁴⁶ The entrenchment of widespread cultural attitudes and practices in homes, schools and the communities hinder the realisation of the right to education for girls.⁴⁷

3 The normative content of the right to education

This section discusses the normative content of the right to education for girls with disabilities. It contends that education should be available, affordable and of good quality. For example, states are legally obliged to adopt domestic legislation which effectuates the international right to education obligations.⁴⁸ It opines that despite key achievements in terms of the legal framework protecting the rights of disabled people, many girls with disabilities still fail to access education services that they require.⁴⁹ This predicament should be addressed by reasonable accommodation of girls with disabilities.⁵⁰ The 1995 Constitution of Malawi provides the right to education to everyone without specific provision for reasonable

40 Malawi State Report (n 28 above) para 79.

41 Human Rights Committee 'Consideration of Reports submitted by States parties under article 40 of the Covenant Initial Reports of States parties, Malawi Report' CCPR/C/MWI/1 (13 July 2012) para 76.

42 As above.

43 Zeleza (n 4 above) 13.

44 As above.

45 Malawi State Report (n 28 above) para 81.

46 Chavuta et al (n 33 above) 14.

47 Malawi State Report (n 28 above) para 81.

48 This includes repealing legislation that negatively affects the realisation of the right in question. See *Purohit* (n 12 above) para 84.

49 S Philpott 'Vulnerability of children with disability – The impact of current policy and legislation: Child health' in (2006) *Health Review* 271.

50 This requires private or public institutions to adopt certain measures on an individualised basis to accommodate specific needs of the individual with disability without imposing a disproportionate burden on the duty bearer. O De Schutter *International Human Rights Law* (2010) 641.

accommodation for persons with disabilities.⁵¹ Also, The Disability Act provides the right to education to persons with disabilities without specific reasonable accommodation to multi-disadvantaged groups like reference to girls with disabilities.⁵² These two instruments fail to adequately protect the right to education for girls through their vaguely articulated provisions.

3.1 Availability

The provision of quality and dignified life requires the availability of education to girls with disabilities.⁵³ Education should be available to everyone with functioning educational institutions and programmes in sufficient quantity.⁵⁴ This includes developed institutions, programmes, buildings or safety mechanisms, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, libraries, computer facilities and information technology.⁵⁵ Further, education should be available to disadvantaged groups like girls with disabilities with the necessary social facilities that are accessible and secure.⁵⁶ However, in Malawi most children with disabilities are likely to drop out of school due to the disability unfriendly environment.⁵⁷ The government does not have the finance and structural capacity to cater for education facilities, infrastructure, education materials and trainers and infrastructure like school are not adequately available.⁵⁸ Consequently, children with disabilities have traditionally been separated from other children and sent to special schools.⁵⁹ These special schools are poorly funded which makes their survival and development is made difficult.⁶⁰ This poses problems to many children with disabilities to develop to their fullest potential.⁶¹ However, some children with disabilities who pass their examinations are integrated in public secondary schools and universities.⁶² However, most schools are ill equipped and ill funded. For example, there are few secondary schools that can integrate vision impaired children.⁶³ The Malawi Government's Policy Investment Framework, states that government will commit to reducing inequalities in the schools across the social groups and regions by

51 Sec 25 of the Constitution of Malawi.

52 Sec 8 of Disability Act 8 of 2012.

53 Poverty makes people more vulnerable to disability and disability reinforces and deepens poverty. See Ministry of Social Development and Persons with Disability *National Policy on Equalisation of Opportunities for Persons with Disabilities* Republic of Malawi, Lilongwe (2006) para 2.1.

54 General Comment No 13 (n 1 above) para 6.

55 As above.

56 General Comment No 13 (n 1 above) para 16(e).

57 As above.

58 Malawi State Report (n 28 above) para 78.

59 As above.

60 Malawi State Report (n 28 above) para 78.

61 Malawi State Report (n 28 above) para 79.

62 Malawi State Report (n 28 above) para 81.

63 As above.

providing bursary schemes, increasing school enrolment of female learners, increasing community participation in management of local schools, and provision of enabling environments for learners with disabilities by 2012. The allocation of monetary resources is erratic. This can be addressed by amendment of legislation to compel the executive to make financial provision towards educational programmes.

3.2 Quality

The state should regulate the minimum quality of education provided. The Committee on Education stated that the form and substance of education, including curricula and teaching methods should be acceptable (for example, relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents.⁶⁴ Unfortunately, in Malawi the quality of education available to girls is affected by poor funding. Quality education should be flexible in order to adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.⁶⁵ Interestingly, the Malawi government is revising the curriculum and developing instructional materials to cater *inter alia* for girls.⁶⁶ Quality education can only be realised if educational opportunities of learners with disabilities are maximised when these learners receive classroom support, their teachers have the relevant skills, and funding is sufficient in order to provide appropriate teaching and learning resources.⁶⁷

3.3 Accessibility

Educational institutions and programmes should be physically and economically accessible to persons with disabilities. Dejectedly, there has been little progress made in the area of access and equity, especially for children with disabilities.⁶⁸ Even for those with some access, the infrastructure is not user friendly and most of the teachers are not trained to cater for children with disabilities.⁶⁹ There are plans to continuously integrate children with special needs in conventional secondary schools and adopting the architectural design of new schools to take into account children with special needs.⁷⁰ Education is not accessible if its cost threatens or compromises people's enjoyment of other human rights.⁷¹

64 The Commission on Human Settlements 'Global strategy for shelter for the year 2000' <http://www.un.org/documents/ga/res/43/a43r181.htm> (accessed 17 June 2013).

65 General Comment No 13 (n 1 above) para 8(d).

66 Malawi State Report (n 28 above) para 263(b).

67 P Farrell et al 'SEN Inclusion and pupil achievement in English schools' (2007) 7 *Journal of Research in Special Educational Needs* 172.

68 Malawi State Report (n 28 above) para 270.

69 As above.

70 Malawi State Report (n 28 above) para 263(a).

71 General Comment No 13 (n 1 above) para 8(c).

The government should facilitate free primary education for all. Primary education has been free in Malawi since the introduction of the Free Primary Education programme in 1994 which abolished the payment of tuition and all forms of charges and also abolished a school uniform requirement. However, secondary and higher education is not free. There are no plans to make them free despite states being obliged to progressively introduce free secondary and higher education.⁷²

Education programmes should prioritise underprivileged people like girls with disabilities who are unable support themselves.⁷³ It is imperative that there should be affirmative action like school fees waiver and special social protection programmes for girls with disabilities. Accessible education considers the specific needs of the disadvantaged and marginalised groups.⁷⁴ States should ensure reasonable accommodation of persons with disabilities in education programmes.⁷⁵ Education institutions should be located within short distance and should be physically safe.⁷⁶ States should address the varying needs of different people across the society's social strata in realising the right to education.

3.4 States' obligations

The right to education imposes three types of obligations on the state: to respect, protect and fulfil.⁷⁷ These obligations effectuate the realisation of education as a universal entitlement with programmed target. These targets include ensuring that by 2015 all children have access to good-quality primary education, with particular attention *inter alia* to girls. They include comprehensive early childhood education and care services, especially for the most vulnerable and disadvantaged children.⁷⁸

3.5 Obligation to respect

The obligation to respect requires states to refrain from interfering, directly or indirectly with the enjoyment of the right to education.⁷⁹ States should undertake positive steps to actualise the right to education.⁸⁰ The obligation to respect requires states to avoid measures that hinder or prevent the enjoyment of the right to education. The state should not

72 General Comment No 13 (n 1 above) para 14.

73 General Comment No 13 (n 1 above) para 94.

74 As above.

75 General Comment No 13 (n 1 above) para 31.

76 R Dworkin 'Is wealth a value?' in R Dworkin *A matter of principle* (2005) 293.

77 Langford (n 8 above) 12. Some Constitutions like the South African Constitution contain these obligations. See also General Comment No 13 (n 1 above) para 44.

78 M Woodhead & P Moss (eds) *Early childhood and primary education: Transitions in the lives young children* (2007).

79 General Comment No 13 (n 1 above) para 47.

80 *Grootboom* (n 15 above).

abduct its duty to respect the right to education by delaying the provision of learning materials.⁸¹

3.6 Obligation to protect

The obligation to protect requires states to take measures that prevent third parties from interfering with the enjoyment of the right to education.⁸² This obligation requires the state and its agents to prevent the violation of any the rights to education – by not only the state itself, but also individuals, private entities and other non-state actors.⁸³ This protects the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls with disabilities from going to school.⁸⁴ The right to education can be protected from improper invasion.⁸⁵ The obligation is to provide access to education health-care, sufficient food and water, and social security to those unable to support themselves and their dependants.⁸⁶ Malawi should protect the right to education from cultural practices that hinder girls with disabilities from realising the right to education.

3.7 Obligation to fulfil

The obligation to fulfil imports the obligations to *facilitate* and to *provide*.⁸⁷ States should take ‘whatever steps’ to fulfil their right to education obligations by taking positive measures that enable and assist individuals and communities to enjoy the right to education.⁸⁸ States are also obliged to provide the right to education when an individual or group is unable, for reasons beyond their control, to realise the right.⁸⁹ Arguably, this includes marginalised groups like girls with disabilities. Amusingly, pursuant to articles 2, 3, and 6 of the CRC, Malawi has made some effort to fulfil the provisions of article 4 of the CRC by prioritising budgetary allocations to ensure implementation of the economic, social and cultural rights of children, especially those belonging to economically and geographically disadvantaged groups.⁹⁰ Further, the obligation requires states to give sufficient recognition to the right to education in the national political and

81 *Minister of Health & Others v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 50

82 General Comment No 13 (n 1 above) para 47.

83 *Velasquez Rodríguez v Honduras* Judgment of 29 July 1988 Inter-Am.Ct.H.R. (Ser C) No 4 (1988).

84 General Comment No 13 (n 1 above) para 50. Comparatively, see also *SERAC v Nigeria* Communication No 155/96.

85 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) para 78.

86 *Soobramoney* (n 17 above).

87 General Comment No 13 (n 1 above) para 47.

88 As above.

89 As above.

90 Malawi State Report (n 28 above) para 78.

legal systems, preferably by way of legislative implementation, and to adopt a national education policy with a detailed plan for realising the right to education.⁹¹ States need to maximise the available resources.⁹² Scarcity of resources forces government authorities to adopt policies that effectively prioritise social services.⁹³ Further, the government should facilitate the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous people and of good quality for all.⁹⁴ Furthermore, government should ensure the availability of education by actively developing a system of schools including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.⁹⁵

3.8 Core obligations

States have ‘minimum core obligations’⁹⁶ to ensure the basic level of enjoyment of the right to education.⁹⁷ They have a duty to positively realise educational rights by immediately fulfilling the core obligation and gradually implementing aspirational obligations over time tabled framework.⁹⁸ The prohibition against discrimination is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.⁹⁹ States have a duty to ensure that no one is deprived of *inter alia* the most basic forms of education.¹⁰⁰ The right to education would be largely deprived of its *raison d’être* without establishing such a minimum core obligation.¹⁰¹ A state can only attribute its failure to meet at least its minimum core obligations to lack of available resources if it can demonstrate that it has exhausted every available resource to satisfy, as a matter of priority, those minimum obligations.¹⁰² Malawi as a party to the ICESCR should meet certain minimum core obligations. This minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity.¹⁰³ At a minimum, the state is required to adopt and

91 General Comment No 13 (n 1 above) para 46.

92 *R v Cambridge Health Authority, ex parte B* [1995] 2 All ER 129 (CA) 137cBd.

93 Minow, participating in an interdisciplinary discussion held at Harvard Law School in 1993, ‘Session I: Applying Rights Rhetoric to Economic and Social Claims, Economic and Social Rights and the Right to Health’ (Harvard Law School Human Rights Program, Cambridge MA 1995) 1, 3.

94 General Comment No 13 (n 1 above) para 50.

95 As above.

96 *Treatment Action Campaign (No 2)* (n 78 above) para 50.

97 General Comment No 13 (n 1 above) para 50.

98 Langford (n 11 above) 22.

99 General Comment No 13 (n 1 above) para 31.

100 General Comment No 13 (n 1 above) 16.

101 As above.

102 As above. See also: ‘The nature of states parties obligations’ in article 2(1) of ICESCR.

103 General Comment 3 (n 12 above).

implement a national educational strategy which includes the provision of secondary, higher and fundamental education.¹⁰⁴ This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.¹⁰⁵ Girls with disabilities should not be deprived of education which can move them out of a life below the basic level of dignified human existence.¹⁰⁶

States have core obligations which are minimum standards for the right to education.¹⁰⁷ These include availability, quality and accessibility of complimentary services like health services.¹⁰⁸ The services must be acceptable to the marginalised groups including girls with disabilities.¹⁰⁹ The availability of the services to girls with disabilities must be attained by the adoption of relatively low-cost targeted programmes.¹¹⁰ The needs of girls with disabilities should be considered.¹¹¹ The state is obliged to take the best interest of the child when dealing with any matter that involves her rights.¹¹² The obligation falls upon the state where parental care is inadequate.¹¹³ This approach is rational since the education of a person later in life is the product of services invested in their childhood.¹¹⁴ A sustainable approach must be anchored in human rights and gender equality in order to tackle educational rights concerns while addressing the structural challenges to the realisation of the right to education.¹¹⁵ Malawi is obliged to remove gender and other stereotyping which impedes the educational access of girls with disabilities.¹¹⁶ The law should create conditions for human rights to flourish.¹¹⁷

4 Malawi's international education rights obligations for girls with disabilities

The first international instrument that provided the right to education was

104 General Comment 13 (n 1 above) para 52.

105 General Comment 3 (n 12 above).

106 *Treatment Action Campaign (No 2)* (n 78 above).

107 *Treatment Action Campaign (No 2)* (n 78 above) para 43.

108 General Comment 13 (n 1 above) para 13.

109 General Comment 13 (n 1 above) para 43.

110 General Comment 13 (n 1 above) para 12.

111 *Treatment Action Campaign (No 2)* (n 78 above) was partly based on secs 28(1)(b) and (c) of the Constitution, which provide that every child has the right to social services.

112 P Alston 'The Legal Framework of the Convention on the Rights of the Child' 91(2) *Bulletin of H.A 1*.

113 *Grootboom* (n 15 above) paras 76-77.

114 DF Alwin & LA Wray 'A life-span developmental perspective on social status and health' (2005) *Journal of Gerontology: Social Sciences* 7.

115 S Fried et al 'Integrating interventions on maternal mortality and morbidity and HIV: A human rights-based framework and approach' (2012) 14 *Health and Human Rights* 21.

116 General Comment No 13 (n 1 above) para 55.

117 E Cameron 'What you can do with rights' Law Commission on England and Wales, The Fourth Leslie Scarman Lecture, Middle Temple Hall, London (25 January 2012) 147-159.

UDHR in article 26.¹¹⁸ It provides for compulsory and free elementary education. It furthermore states that education is aimed at the full development of the person. Subsequently, the (ICESCR),¹¹⁹ articulated the right to education in articles 13 and 14. Article 13, *inter alia* imposes an obligation on governments to provide free and compulsory primary education. Article 14 places an undertaking that 'within two years' of becoming a party, the state will adopt a detailed plan of action for the adoption of free and compulsory education. Article 23 of CRC states that a disabled person has the right to special care, education and training to help him or her enjoy a full and decent life in dignity and achieve the greatest degree of self-reliance and social integration possible. Article 28 of the CRC stipulates that the right to education should be progressively realised. Article 29 of the CRC provides that children have equal rights to free education which must respect and promote the rights of children who receive it. Despite the right to basic education being subject to progressive realisation it is specifically stated that primary education, as a component of basic education, should be free and compulsory.¹²⁰ Article 11 of the African Charter on the Rights and Welfare of the Child provides the right to education in order to promote and develop the child's personality, talents and mental and physical abilities to their fullest potential.¹²¹ Further, states are obliged to take measures that encourage regular attendance at schools and the reduction of drop-out rate.¹²² Additionally, there is a need to adopt special measures to ensure equal access to education for all female, gifted and disadvantaged children.¹²³ State parties under CEDAW are obliged to take appropriate measures to eliminate discrimination against women in the realisation of the right to education.¹²⁴ They should in particular ensure 'the reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely'.¹²⁵ It is clear that girls with disabilities have the right to education as children, females and persons with disabilities but there are robust international obligations that can address this double marginalisation.

118 1948.

119 1966.

120 Kallmann (n 29 above).

121 Art 11(2) of the African Charter on the Rights and Welfare of the Child (ACRWC) (1990).

122 Art 11(3)(e).

123 Art 11.

124 CEDAW, art 10.

125 Art 10(f).

5 The conceptualisation of the double marginalisation of girls disabilities in the Convention of the Rights of Persons with Disabilities (CRPD)

The CRPD is an anti-discrimination convention which requires that government plans prioritise the most vulnerable groups to ensure the realisation of the right to education for everyone.¹²⁶ It is a social model convention that uses a rights approach to disability.¹²⁷ Article 1 requires states to promote respect for the inherent dignity of persons with disabilities.¹²⁸ Article 9 requires states to adopt measures to identify and eliminate obstacles and barriers to access amongst others schools. This is attainable if states devise rights based legal institutions to effectuate legally recognised claims or demands.¹²⁹ The CRPD recognises the double marginalisation faced by girls with disabilities and affords them additional protection as a disadvantaged group within a disadvantaged group. It protects them as disabled. Article 6 recognises that girls with disabilities are subject to multiple discriminations and obliges states to take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms; it protects them as females. Article 6(2) places a further duty on states parties to take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms. It protects them as children. Article 7 imposes a duty on states to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

Article 24 of the CRPD recognises the right of persons with disabilities to education without discrimination and equalisation of opportunities. Further, states should ensure an inclusive education to fully develop human potential and sense of dignity, self-worth, strengthening of respect for human rights, fundamental freedoms and human diversity.¹³⁰ The gist is inclusive education, free and compulsory primary education via reasonable accommodation of the individual. States are obliged to take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille and to train

126 GC Christie & PH Martin *Jurisprudence: Text and readings on the philosophy of law* 2nd ed (1999).

127 Disabled people International 'Agreed statement' Human Rights Plenary Meeting in Support of European day of Disabled persons 1991 1994://www.ecpp.co.uk/humanrights.htm (accessed 9 July 2015).

128 Human dignity, freedom and equality are achievable if everyone is provided with basic necessities. *Grootboom* (n 15 above) para 44.

129 Christie & Martin (n 126 above) 122.

130 Art 24(1)(a) of CRPD.

professionals and staff who work at all levels of education.¹³¹ The training should incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.¹³² State parties should take positive steps to realise this aspiration.¹³³ This includes the adoption of necessary legal, financial and operational means of ensuring steady progress towards achieving the goals.¹³⁴ Further, states should identify specific national benchmarks designed to actualise the right to education.¹³⁵ Also, states should maintain meaningful statistics on needs, resources and results.¹³⁶ The CRPD does not adopt a 'one-size-fits-all' approach to education but makes positive discrimination of marginalised girls with disabilities.¹³⁷

6 The domestic law, policy and practice

The right to education is promulgated in the Constitution and various legislative instruments. The Constitution of Malawi does not specifically provide disability rights.¹³⁸ However, it obliges the state to actively promote the welfare and development of the people by progressively adopting and implementing policies and legislation that support persons with disabilities through greater access to public places, fair opportunities in employment and full participation in all spheres of the society.¹³⁹ The government is indulged to provide adequate resources to the education sector and devise programmes in order to eliminate illiteracy in Malawi.¹⁴⁰ Further, the government is obliged to make primary education compulsory and free to all citizens of Malawi and offer greater access to higher learning and continuing education.¹⁴¹ This is provided in principles of national policy rather than a bill of rights which dilute its significance.¹⁴² However, Section 25 of the Constitution grants every person the right to education and stipulates that primary education shall consist of at least five years.

131 Art 24(4) of CRPD.

132 As above.

133 *ERRC v Bulgaria* Complaint No 31/2005, Decision on the merits of 18th October 2006, para 35.

134 *International Movement ATD Fourth World v France* Complaint No 33/2006, decision on the merits of 5 December 2007, paras 58-71.

135 Commission on Human Rights Resolution, 1993/14 in Economic, social and Cultural rights, Handbook for National Human Rights Institutions, professional Series No 12: United Nations New York and Geneva (2005) 22.

136 *International Movement ATD Fourth World* (n 134 above) paras 58-71.

137 *ERRC v Bulgaria* (n 133 above) para 35.

138 FEDOMA has submitted that there ought to be a section in the Constitution specifically providing disability rights including the right to education: Federation of Disability Organisations in Malawi *Memorandum prepared by the Federation of Disability Organisations in Malawi for the Constitution of Malawi Review Commission* (2004) Blantyre.

139 Sec 13(g) of the Constitution of Malawi.

140 Sec 13(f)(i) of the Constitution of Malawi.

141 Sec 13(f)(ii).

142 Many socio-economical rights boil to nothing more than an objective of social policy. See G Tomuschet *Human rights: Between idealism and realism* (2003) 92.

This provision is inadequate to the prescriptions of section 13(f) of the Constitution which requires primary education to be both compulsory and free.¹⁴³ There is no social protection or any pro poor programmes to aid multi-advantaged groups like girls with disabilities. There is some saving grace in section 30 of the Constitution which states that children and persons with disabilities should be given special consideration on the application of the right to development. This compliments section 13(f) of the Constitution which requires the state to provide adequate resources for free and compulsory education.

Section 23 of the Constitution of Malawi encapsulates the right of children to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to be hazardous or interfere with their education. This read together with the anti-discrimination provisions in section 20 of the Malawian Constitution necessitates the adoption of special measures that include specially providing resources for education for persons with disabilities despite absence of express provision for the same.¹⁴⁴ Further, section 24(2) invalidates any legislation that discriminates on the basis of sex or marital status. It also provides for the passing of legislation to eliminate customs and practices that discriminate against women. The Child Care, Protection and Justice Act requires district councils

to keep a register of children with disabilities within its area of jurisdiction and give assistance to them whenever possible in order to enable those children grow up with dignity among other children and to develop their potential and self-reliance.¹⁴⁵

However, it does not specify what type of assistance the district councils should provide to such children.¹⁴⁶ While the Act provides for all children, including those with disabilities, to fully enjoy their rights, implementation is incomplete.¹⁴⁷ Section 22 of the Child Care Protection and Justice Act criminalises failure to provide for the education of the child for a person under a maintenance order.

The realisation of the right to education will depend upon a robust reasonable accommodation programme that provides financial support to the underprivileged. Educational programmes should be balanced and flexible and appropriately provide for crises, short, medium and long term needs.¹⁴⁸ The programmes should be reasonable by not excluding a significant segment of society.¹⁴⁹ The current Malawian development blue

143 Malawi State Report (n 28 above) para 67.

144 *Equality Minority Schools in Albania* PCIJ Rep Ser A/B, No 64 (1935); Judgment of 6 April 1935. See also *Steel Workers of America v Weber* 443 US 193 (1979).

145 Sec 72 of the Child Care Protection and Justice Act.

146 Munthali (n 26 above) 40.

147 As above.

148 *Grootboom* (n 15 above).

149 As above.

print, the MGDS II does not adequately provide for children with disabilities who are only mentioned in passing under education.¹⁵⁰ Nonetheless, the government is obliged to be 'promoting a conducive environment for girls and students with special education needs'.¹⁵¹ National Policy on Equalisation of Opportunities for Persons with Disabilities¹⁵² purports to promote the rights of persons with disabilities to enable them to fully participate in society. Furthermore, it seeks to guarantee that tangible steps are taken for disabled people to access the same fundamental rights and responsibilities as any other person in Malawi. The policy strives to streamline disability into all government development strategies, plans and programmes. This is congruent to National Education Strategic Plan and Policy Investment Framework¹⁵³ which advocate for increased enrolment of special needs pupils and greater numbers of specialised teachers. It espouses that learners with special educational needs should receive support through among others improving the supply of teaching and learning materials for special needs education. In the Policy Investment Framework, the government seeks to promote the establishment of special schools for children with disabilities. However, as noted in National Policy on Special Needs Education,¹⁵⁴ there are numerous barriers that affect the implementation of special needs education including inadequate funding, inadequate teaching and learning materials, inaccessible infrastructure, long distances to facilities and shortage of specialist teachers.¹⁵⁵ However, most special-needs schools and resource centres facilities are in a state of disrepair, non-functioning water taps and children with disabilities depend on the goodwill of teachers to access health care.¹⁵⁶ The government should adequately address these problems.¹⁵⁷

The National Policy on Early Childhood Development (ECD),¹⁵⁸ *inter alia* seeks to ensure that '[e]very child has the right to develop to his/her full potential'. This inevitably includes girls with disabilities. Further, it avers that '[n]o child shall be discriminated or abused on the basis of age, sex, race, tribe, health status, economic status, religious or political

150 Ministry of Development Planning and Cooperation 'Malawi Millennium Development Goals Report' Republic of Malawi, Lilongwe (2010).

151 There is no elaboration in the MGDS II as to what a 'conducive environment' might be, but the education and related policies provide some explanation. See Munthali (n 26 above) 40.

152 Approved by Cabinet in July 2006.

153 (NESP) 2008-2017.

154 The policy was developed by the Ministry of Education Science and Technology in 2007.

155 Ministry of Education and Vocational Training *The National Policy on Special Needs Education* (2007).

156 The policy developed by the Ministry of Education Science and Technology in 2007.

157 The 'progressive realization' clause imposes an obligation on states to move as expeditiously and effectively as possible towards realising fully the right to education. Cf *Grootboom* (n 15 above).

158 Approved in 2006, was developed by the Ministry of Gender, Children and Social Welfare.

affiliation in the provision of ECD services by any organisation'. Disability is arguably covered although it is not specifically mentioned one of the grounds of discrimination. National Policy on Orphans and Other Vulnerable Children recognise that children with disabilities are vulnerable.¹⁵⁹ There is an omission of children with disabilities despite including a child without a disability but living in a household headed by a person with a disability, but it excludes children with disabilities. These children too are generally abandoned, malnourished and abused and their needs should have been highlighted.¹⁶⁰ There is need to have a clear legislative and policy framework for education for girls with disabilities.¹⁶¹

7 The conceptualisation of double marginalisation of girls disabilities in the Disability Act of 2012¹⁶²

The Disability Act of 2012 seeks to equalise opportunities of persons with disabilities through the promotion and protection of their rights.¹⁶³ It adopts the social model of disability which stresses on the legitimate claim to be accommodated by the society and not to be treated or rehabilitated.¹⁶⁴ The government and relevant stake holders are obliged to ensure the enjoyment of these rights by persons with disabilities.¹⁶⁵ Section 8 of the Act protects the right of persons with disabilities to inclusive education.¹⁶⁶ This is to be attained by ensuring that persons with disabilities are not excluded from the general education system at all levels and have access to quality and compulsory primary education.¹⁶⁷ This provision is defeated by the fact that Malawi does not have compulsory primary education despite having free primary education. Further, the government ought to be taking into consideration the special requirements of persons with disabilities in the formulation of educational policies and

159 Ministry of Gender and Social Welfare *A Plan of Action for Orphans and Other Vulnerable Children 2010-2011* (2010). However, the definition in the policy does not include disability: a vulnerable child is said to be one 'who has no able parents and guardians, staying alone or with elderly grandparents or lives in a sibling headed household or has no fixed place of abode and lacks access to health care, material and psychological care, education and has no shelter'.

160 Munthali A (n 26 above) 23.

161 There are good policies like the National Policy on Equalisation of Opportunities for Persons with Disabilities, the National Education Strategic Plan (NESP), the National Policy on Orphans and Other Vulnerable Children which advocate for an enabling environment for children with disabilities but these are rarely implemented.

162 Munthali (n 26 above) 40.

163 Disability Act 8 of 2012. In particular it incorporates provisions of the CRC and the CRPD. See: Munthali (n 26 above) iii.

164 Disabled people International 'Agreed statement' Human Rights Plenary Meeting in Support of European day of Disabled persons 1991 1994://www.ecpp.co.uk/humanrights.htm (accessed 11 September 2015).

165 Sec 3 of the Disability Act.

166 Sec 2 of the Disability Act

167 Sec 8(1) of Disability Act.

programmes including assistive devices, teaching aids and learning support assistants.¹⁶⁸

In addition, the government should provide financial assistance to economically needy and deserving students with disabilities pursuing secondary and tertiary education.¹⁶⁹ Section 10 of the Disability Act provides the right to social security, despite being passively worded and forms a basis for the enforcement of the right to social security for persons with disabilities. Girls with disabilities can utilise this right to realise their right to education. Affirmative action is a welcome tool to address disparities in different social strata.¹⁷⁰ The government should adopt deliberate admission policies for girls with disabilities in education and training institution.¹⁷¹ However, the greatest weakness with respect to the right to education in the Disability Act is that it fails to recognise the double disadvantage of girls with disabilities. Further, the Disability Act is not fully operational as evidenced by the absence of a Disability Trust Fund which is meant to raise extra resources to support relevant programmes and services.¹⁷² The operation of the fund will be defined by the government and other stakeholders.¹⁷³ The non-establishment of the disability fund is obviously affecting the realisation of the right to education.

The act is reluctant to fully engage with disability and provide full and proper recognition to the rights of disabled person who face multiple disadvantages.¹⁷⁴ This demonstrates legislative vagueness causes marginalisation of girls with disabilities.¹⁷⁵ The Disability Act adopts a 'one-size-fits-all' approach to education but makes positive discrimination of marginalised girls with disabilities.¹⁷⁶ Section 8 of the Disability Act imports the core obligation of non-discrimination but neglects the aspirational respect of the right. The Disability Act should have specifically recognised the multiplicity of marginalisation that girls with disabilities encounter. It should have set a procedure to revise the right to education targets periodically to secure the rights through progressive

168 Sec 8(1)(a) of Disability Act.

169 Secs 8(1)(a) and 8(1)(c) of the Disability Act. In the form of scholarship grants, student loan programmes, subsidies, and other incentives in public institutions and ensure that a minimum of ten per cent of the allocation for students' financial assistance programmes as created by the local government is set aside for students with disabilities.

170 *Cummings v Birkenhead Corporation* [1972] Ch 12 37.

171 Sec 8(2) of the Disability Act proscribes discrimination in education or training institution on the basis of disability. In *Balaji v State of Mysore* [1963] Supp 1 SCR 439, it was held that college places may be reserved for marginalised candidates without stifling equal access to educational institutions for the more qualified candidates.

172 Sec 16 of Disability Act.

173 Munthali (n 26 above) 14.

174 J Rehman *International human rights law – A practical approach* 2nd ed (2010) 601.

175 The Standard Rules on Equalisation of Opportunity for Persons with Disability General Assembly Resolution 48/96 <http://www.un.org/disabilities/default.asp?id=26> (accessed 27 July 2014) para 3.

176 *ERRC v Bulgaria* (n 133 above) para 35.

realisation.¹⁷⁷ Previously, there was an affirmative programme called Girls Attainment of Basic Education (GABLE) which sought to address gender imbalance. The programme sought to increase girls' enrolment, achievements and persistence in schools. Its strategies included paying primary school fees for non-repeating girls, a social mobilisation campaign that emphasised the importance of girls education amongst girls themselves, parents and communities, and, thirdly, the development of gender-sensitive material.¹⁷⁸ This is an example of programmes that should be adopted and legislated into the Disability Act to cater for girls with disabilities and other marginalised groups. There ought to be deliberate legislative provisions that effectuate the right to education rather than vague and inadequate provisions.

There are three ways of enforcing any right under the Disability Act. These are criminal prosecution, administrative penalties and civil action. The Disability Act creates different administrative penalties. The Disability Act creates the offences of discrimination in education institutions. Denying access or expelling a person due to disability is an offence.¹⁷⁹ This is to ensure that persons with disabilities are not excluded from the general education system at all levels and have access to quality and compulsory primary education.¹⁸⁰ The employment of criminal law to eliminate discrimination in education is welcome as it is cheap and prosecution is done by the state machinery.¹⁸¹ The greatest advantage of criminal prosecution of discrimination and associated offences that offend the right to education is that it is cheap since it is publicly funded. This means that poor victims do not have monetary resources unlike civil law which mainly relies on the proficiency of lawyers. However, the downside of this tool is that there has not been any criminal prosecution despite the prevalence of discrimination.

Administrative penalty is a discretionary monetary sum which is imposed flexibly under civil law rather than criminal law.¹⁸² This means that a person who violates the right to education for girls with disabilities is amenable to administrative penalties. Administrative penalties have several advantages but their objectives are similar to criminal punishment.¹⁸³ These are retribution, reformation of the offender,

177 A Sengupta 'The right to food in the perspective of the right to development' in WB Eide & U Kracht (eds) *Food and human rights in development (2007) Vol II: Involving Issues and Emerging Applications* 107 131.

178 Unfortunately the programme is now defunct.

179 Section 8(1) of Disabilities Act.

180 As above.

181 The objectives of criminal punishment are retribution, deterrence, rehabilitation, restoration and incapacitation Per Mwangungulu J in *Gulumba v Republic* Misc Criminal Application Case No 51 of 2003, High Court Principal Registry (unreported).

182 Cf R Macroy & M Woods *Environmental civil penalties: A more proportionate response to regulatory breach* www.ucl.ac.uk/laws/environment/civil-penalty/ (accessed 29 August 2014) para 2.19.

183 Macroy & Woods (n 182 above) para 2.18.

elimination of any financial gain or benefit from non-compliance, restoration of the harm and deterrence.¹⁸⁴ The latter are easier to impose than criminal sanctions because the criminal procedure is complicated.¹⁸⁵ This ensures the punishment of offenders with reduced burden on regulators to secure a successful prosecution and lessening the procedural costs associated with criminal litigation.¹⁸⁶ Normally, a person who is punished by administrative penalty cannot be, subsequently, prosecuted on the original offence despite the fact that directors may still be prosecuted.¹⁸⁷ The power to impose the administrative penalties is vested in the minister. These include a written warning,¹⁸⁸ directing the person to do a specified act, or refraining from doing a specified act, restoration notices and enforcement undertakings to remedy the effects of the contravention or to compensate persons who have suffered loss because of the contravention;¹⁸⁹ or to ensure that the person or institution does not commit further contraventions.¹⁹⁰ Further, a direction may require the establishment of compliance programmes, corrective advertising or, in the case of a direction to a corporation, changes in the management of the institution.¹⁹¹ The administrative penalty is recoverable as civil debt but failure to comply with a penalty is an offence.¹⁹² The penalty is payable within thirty days.¹⁹³ Criminal prosecutions should remain appropriate for serious breaches where there was evidence of intentional or reckless or repeated flouting of the law.¹⁹⁴ Administrative penalties are user friendly and not technical too for the use of persons with disabilities but they are yet to be invoked

The right to education is enforceable by judicial review as the Constitution did not sell people a dummy by providing unenforceable rights.¹⁹⁵ The court has power to scrutinise any executive policy on the right to education for girls with disabilities without offending the doctrine of separation of power.¹⁹⁶ The court would not be usurping the executive function by reviewing the executive policy since its duty is to review a policy whether it is reasonable or not.¹⁹⁷ The state cannot deny an individual or group the ability to make Constitutional claims against it

184 Macroy & Woods (n 182 above) para 2.11.

185 Cf M Faure, A Ogus & N Philipsen 'Curbing consumer financial losses: The economic regulatory enforcement' (2009) 31 *Law and Policy* 161.

186 C Abbot 'The enforcement of pollution control laws in England and Wales: A case for reform?' (2005) 22 *Environmental Planning Law Journal* 68.

187 But the Disability Act is unclear.

188 Section 21(1)(a) of Disability Act.

189 Section 21(1)(b) of Disability Act.

190 Section 21(1)(b)(i)(ii) of Disability Act.

191 Section 21(2) of Disability Act.

192 Section 21(3) of Disability Act.

193 Section 21(4) of Disability Act.

194 Macroy & Woods (n 182 above) para 3.6.

195 *Treatment Action Campaign (No 2)* (n 78 above) para 5. See also sec 20(1) of The Disability Act.

196 *Soobramoney* (n 13 above) para 36.

197 *Grootboom* (n 15 above) para 24 & 38.

with respect and education and without any redress to the affected party.¹⁹⁸ The duty of the court is confined to defining the framework of the government policy and delimiting its scope.¹⁹⁹ The nature of the right infringed and the nature of the infringement guide the court as to the appropriate relief in a particular case.²⁰⁰ The courts can grant any orders which can remedy the violations actual or potential of human rights.²⁰¹ A declaratory remedy may not suffice as an effective remedy. Under the Disability Act, the court may award equitable relief.²⁰² This includes an injunction and specific performance.²⁰³ Further, the court may order the provision of auxiliary aid or services, modification of policies, practices and procedures or alternative methods.²⁰⁴ The court may also grant any other relief as the court may consider appropriate, including monetary damages to the aggrieved person.²⁰⁵

Practically, girls with disabilities may lack the knowledge and resources to bring court action to enforce the right to education. Sometimes organisations willing to pursue the public interest matter may not have the required sufficient interest. The enforcement of the right to education for girls with disabilities would be hindered by the rigid Constitutional provisions that confer *locus standi* to people interested in public interest litigation on behalf of disadvantaged groups. The relevant Constitutional provisions for an application for the protection of rights contained in the Bill of Rights are sections 15(2),²⁰⁶ 41(3)²⁰⁷ and 46(2).²⁰⁸ Accordingly, any person seeking to enforce any right should demonstrate sufficient interest in the protection and promotion of the rights in issue

198 S Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a New South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 28.

199 *Cruzan v Director, Missouri Department of Health* 497 US 261, 302 (1990) 303.

200 *Hoffmann v South Africa Airways* 2001 (1) SA 1 (CC) para 45.

201 *Maziko Sauti Phiri v The Privatisation Commission and Attorney General* Constitutional Cause No 13 of 2005 (unreported).

202 Sec 20(2)(a) of Disability Act.

203 Treatment Action Campaign (No 2) (n 78 above) para 22.

204 Sec 20(2)(b) of the Disability Act.

205 Sec 20(2)(c) of Disability Act.

206 It now reads as follows:

'Any person or group of persons, natural or legal, with sufficient interest in the promotion, protection and enforcement of rights under this Chapter shall be entitled to the assistance of the Courts, the Ombudsman, the Human Rights Commission and other organs of the Government to ensure the promotion, protection and enforcement of those rights and the redress of any grievances in respect of those rights.'

207 It now reads as follows:

'Every person shall have the right to an effective remedy by a Court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.'

208 It now reads as follows:

'Any person who claims that a right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled –

(a) to make application to a competent Court to enforce or protect such a right or freedom; and

(b) to make application to the Ombudsman or the Human Rights Commission in order to secure such assistance or advice as he or she may reasonably require.'

which is often difficult. The provisions have been interpreted narrowly presumably to avoid opening 'flood gates' for a variety of reasons pertaining to conflicting theoretical, historical and policy justifications.²⁰⁹ The courts have in a number of cases, interpreted the relevant provisions in two broad categories: the liberal and the restrictive approaches.²¹⁰ Under the liberal approach, courts are more amenable to widening standing to litigants while under the restrictive approach they have employed more restrictive standards.²¹¹ The restrictive approach is epitomised by the Malawi Supreme Court of Appeal, which can properly be stated as the current stand of the law, and liberal approach characterises the High Court.

The conclusive position of *locus standi* was articulated in *Civil Liberties Committee (CILIC) v Minister of Justice & Registrar General (CILIC case)*.²¹² The Supreme Court held that CILIC, a human rights non-governmental organisation whose objectives include the protection, promotion and enforcement of human rights and the rule of law lacked sufficient interest to enforce media freedom. It opined that organisations working in the area of press freedom could maintain an action.²¹³ The litigant must demonstrate that the conduct or decision complained of adversely affects his legal rights or interests in order to establish sufficient interest.²¹⁴ It held that, in determining 'sufficient interest', a court may consider the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach of duty for which relief is being sought, and the role of the applicants in giving advice, guidance and assistance.²¹⁵ Section 20 of the Disability Act give the right to sue to any 'person with a disability' or 'any aggrieved person' may commence legal action against that person in any court. This would restrict some organisation from enforcing rights of girls with disabilities.²¹⁶

Arguably, the amendment to section 15(2) of the Constitution by Constitutional Amendment Act Number 11 of 2010 opened a window for a better enforcement of human rights. The amended section 15(2) widens the category of public litigants to include persons, public or natural and

209 L Stein (ed) *Locus standi* (1979).

210 FE Kanyongolo 'Courts, elections and democracy: The role of the judiciary' 115, 213-14 in FE Kanyongolo 'Malawi Justice Sector and the Rule of Law: A Review by AFRIMAP and Open Society Initiative for Southern Africa' (2006) 138-140.

211 MJ Nkhata 'Public interest litigation and *locus standi* in Malawian constitutional law: Have the courts unduly fettered access to justice and legal remedies?' (2008) 2 *Malawi Law Journal*.

212 MSCA Civil Appeal No 12 of 1999 (unreported).

213 AP Mutharika 'The 1995 Democratic Constitution of Malawi' (1996) 40 *Journal of African Law* 216.

214 Relying on *Regina v Secretary of State for Foreign and Commonwealth Affairs, Ex parte World Development Movement Ltd* [1995] 1 WLR 386.

215 As above.

216 As above. Unlike the CILIC these organisations were specifically concerned with the rights and freedoms relating to the press.

organisations interested in the promotion, protection and enforcement of rights including the right to education. Nevertheless, the fact that the amended provision still requires proof of sufficient interest means that the argument of *locus standi* still exists. Consequently, it would be submitted that the present position on *locus standi* is not fully supportive to the protection of interests of vulnerable groups like girls with disabilities.

8 Conclusion

This paper has established that girls with disabilities face multiple disadvantages due to their age, sex and disability. Consequently, these increase the practical challenges which they face to realise the right to education. The paper explored the legal framework and its challenges for the realisation of the right to education for girls with disabilities. The principle legislation, the Disability Act is progressive but coy, the system, programmes and policies cracked and there is inadequate political will. Malawi fails its international obligations to improve the lives of girls with disabilities without a robust education legal framework and a properly implementable education programme.²¹⁷ Human rights can uplift girls with disabilities to realise their right to education. The Malawian human rights system should continually change to increase the level of protection afforded to girls with disabilities to raise their standard of living.²¹⁸ The right to education should be realised progressively but this should not be used as an excuse to indefinitely postpone its implementation but rather to establish clear obligations government for the full realisation of the right.²¹⁹ The state should manage its resources by adopting a holistic approach to the larger needs of the society than focusing on specific needs of particular individuals within the society.²²⁰ This will attain dignity which is inherent basic right for all human rights regardless of disabilities.²²¹

States have obligations to respect, protect and fulfil the availability, accessibility and adaptability of the right to education.²²² All other entities and persons have a negative obligation to desist from preventing or impairing the right of access to education.²²³ The right to education must be protected from improper invasion.²²⁴ The programmes for the realisation of the right to education must be realisable within the available resources and states should not adopt unreasonable policies that negatively

217 *Burnip v Birmingham City Council* EWCA Civ 629 447.

218 H Shue *Basic rights subsistence, affluence and US foreign policy* (1980) 55.

219 See General Comment No 3 (n 16 above) para 9.

220 *Soobramoney* (n 13 above) para 31.

221 *Purohit* (n 12 above) para 84.

222 General Comment No 13 (n 1 above) para 50.

223 *Grootboom* (n 15 above) para 254.

224 *Certification of the Constitution of the Republic of South Africa* (n 85 above) para 78.

affect its realisation.²²⁵ It should specifically accommodate vulnerable people girls with disabilities who suffer double marginalisation. Consequently, the state has the duty to provide education to girls with disabilities where parental support is inadequate.²²⁶ The state has a duty to provide free education benefits to the poor.²²⁷ Malawi is wrongly failing to realise the right to education due to the absence of legal foundation and paucity of resources.²²⁸

225 *Treatment Action Campaign (No 2)* (n 81 above) para 50

226 *Grootboom* (n 15 above) para 76-77.

227 *Cruz del Valle Bermudez v Ministry of Health and Social Assistance* Supreme Court of Justice No 916 15 July 1999.

228 O Nnamuchi 'Kleptocracy and its many faces: The challenges of justiciability of the right to health care in Nigeria' (2008) 52 *Journal of African Law* 1.