

**UNIVERSITY OF NAIROBI
SCHOOL OF LAW
MASTER OF LAWS**

**ACCESS TO UNIVERSITY EDUCATION FOR PERSONS WITH DISABILITIES:
TOWARDS INCLUSION.**

**A THESIS SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF
LAWS (LL.M) OF THE UNIVERSITY OF NAIROBI.**

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G62/79562/2012

DECLARATION

I JANE WANJIKU GITHINJI do declare that this thesis is my original work and has not been submitted for a Degree in any other University.

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This thesis has been submitted with my knowledge and approval as the University supervisor.

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DEDICATION

To all whose love, prayers and support made this possible, and to all persons with disabilities in Kenya for whom this study is intended.

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ACRONYMS

CESCR	-	UN Committee on Economic and Social Cultural Rights
CRC	-	Convention on the Rights of the Child
CRPD	-	United Nations Convention on the Rights of Persons with Disabilities
CUEA	-	Catholic University of East Africa
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
HE	-	Higher Education.
HELB	-	Higher Education Loans Board
JAB	-	Joint Admissions Board
KU	-	Kenyatta University
PDA	-	Persons with Disabilities Act.
PWDs	-	Persons with Disabilities.
SECRs	-	Socio- Economic and Cultural Rights
CESCR	-	UN Committee on Economic and Social Cultural Rights
UDHR	-	Universal Declaration of Human Rights
UE	-	University Education
UON	-	University of Nairobi
USIU	-	United States International University

- UNESCO - The United Nations Educational Scientific and Cultural Organization
- NCPWD - The National Council for Persons with Disabilities

STATUTES

The Basic Education Act, 2012.

The Constitution of Kenya 2010.

The Council of Legal Education Act Chapter 16A

The Persons with Disabilities Act, 2003.

The Universities Act, 2012.

INTERNATIONAL CONVENTIONS

African Charter on People and Human Rights, Adopted by the Organization of African Unity Resolution 67/3 on 27th June 1981 (Entry into Force 21 October 1986).

African Charter on the Rights and Welfare of the Child, Adopted by the OAU in 1990 (Entry into Force in 1999).

Convention on the Rights of Persons with Disabilities, Adopted by the United Nations General Assembly Resolution 3447 of 13 December 2006, Opened for Signature on 30 March 2007 (Entry into Force 3 May 2008).

Convention on the Rights of the Child, Adopted and Opened for Signature on 20th Nov 1989 (Entry into Force on 2nd September 1990).

International Covenant on Civil and Political Rights, Adopted for Signature Ratification and Accession by General Assembly Resolution 2200A (XXI) of 16th December 1966, (entry into force 23rd March 1976).

International Covenant on Economic, Social and Cultural Rights, Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 2200A (XXI) of 16th December 1966 (Entry into Force 3 January 1976).

Universal Declaration of Human Rights, Adopted by the UN General Assembly Resolution 217A (III) on December 10 1948.

CASE LAW

Kenyan

Supreme Court of Kenya, Reference No. 2 of 2012.

Kenya Society for the Mentally Handicapped vs. Attorney General and Others, Nairobi Petition No. 155 A of 2011.

South Africa

Government of Republic of South Africa and Others vs Grootboom and others 2000 ZACC 19.

United States of America

Brown vs. Board of Topeka 349 US 483 1954.

Orberti vs. Board of Education 995 F.2d.1204 (3d Circuit 1993).

Plessy vs. Ferguson 163 US 537 1986.

Sweatt vs. Painter 339 US 629 1950.

US Airways Inc vs. Bartlett 535 US 391 2002.

Canadian

Eldridge vs. British Columbia (Attorney General) 1997 3 SCR. 624.

Argentina

R.C.S Case, Tucuman Administrative Court of Appeals, Chamber I, R.C.S. Y otro I.P.S.S.T. Y otro s amparo 3/25/2005.

Australia

Alex Purvis on Behalf of Daniel Horgan vs. the State of South Wales Department of Education 2000 HREOC.

Finney vs. the Hills Grammar School 1999 AREOC.

Marita Murphy and Burkh and Grahil on behalf of themselves and Singh Grahil State of New South Wales 2000 HREOC 27 March 2000.

Gambia

Purohit and others vs. the Gambia, ACHPR, Comm No. 241/2000

ABSTRACT

This study contains a summary of findings from the interviews of persons with visual, hearing and physical disabilities in four Universities in Kenya. This is done with a view to establishing the magnitude of the barriers they face in access to inclusive education. The study highlights instances of compliance or otherwise with international and municipal laws on inclusion, non discrimination and equality by Universities. Interviews conducted during this research have shown that experiences of persons with disabilities depend on the particular University that they attend once they finish high school. The findings indicate that PWDs face numerous instances of exclusion and discrimination which is against the law. Of the four Universities Kenyatta University was the most inclusive in regard to students with physical, visual and hearing disabilities. United States International University which was also accessible to persons with physical disabilities had not admitted any students with visual or hearing disabilities. Catholic University of East Africa had a number of accessible buildings but the environment was largely inaccessible. The University admitted students with visual disabilities without restructuring of the environment. University of Nairobi had also admitted persons with physical, hearing and visual disabilities without removing environmental barriers. The study calls for amendment of national laws where the same are found to be inadequate in comparison with international standards and calls on Universities to comply with the law on inclusion for PWDs.

1.0 INTRODUCTION

The drafters of the Convention on the Rights of Persons with Disabilities (CRPD)¹ were concerned that despite various institutions and undertakings, persons with disabilities (PWDs) continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world. The Preamble to the CRPD also recognizes the importance of accessibility to the physical socio economic & cultural environment to health and education and to information and communication in enabling PWDs to fully enjoy all human rights and fundamental freedoms.

This study investigates the nature of the barriers faced by persons with physical, visual and hearing impairments in four Universities in Kenya. It also investigates whether Universities and other players in the education sector are taking inclusive measures, to ensure bridging of the gap in the law and practice in the area of access to UE for PWDs. In instances where the law is found to be inadequate, suggestions for amendments will also be made. The study will then suggest ways of addressing barriers within Universities. It will develop recommendations to ensure truly inclusive Universities. The research will cover views and experiences of PWDs in four Universities and will interview officials in the Universities and other players in the education sector.

Education especially at the UE level increases chances of employment and a dignified life for PWDs.² According to the CESCR, education is a human right in itself.³ It is also an indispensable means of realizing other rights. The CESCR further states that as an empowerment right, education is the primary vehicle through which PWDs can lift themselves out of poverty. It is also a means to participate fully in their communities. Limited access to education makes it

¹*The UN Convention on the Rights of Persons with Disabilities*, Adopted by the United Nations General Assembly Resolution 3447 of 13 December 2006, Opened for Signature on 30 March 2007 (Entry into Force 3 May 2008) Preamble. Ratified by Kenya on 19th May 2008.

² Syed Jamal, 'Disability in the Context of Higher Education: Issues and Concerns in India' (2010) 2 (7) *Electronic Journal for Inclusive Education* 627.

³*UN Committee on Economic and Cultural Rights (CESCR)*, Comment No. 13: The Right to Education. Adopted at the 21st Session of the Committee on Economic Social & Cultural Rights on 8th Dec 1999, Contained in Document E/C.12/1999/10.

difficult for PWDs to compete for employment.⁴ There are various provisions that reserve elective, appointive and nominative positions for PWDs.⁵ PWDs cannot however access these positions unless they have attained a certain level of education.

Higher Education institutions have a legal obligation to make reasonable adjustments to remove barriers that hinder access to education for PWDs. At the Municipal level, Article 4 (3) of the Constitution provides that every person has a right to education. Article 54 of the Constitution elaborates certain rights to ensure greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons. The right of PWDs to access educational institutions is one right which is referred to in specific application of rights of PWDs at Article 54 (1) (b) of the Constitution. Section 18 (1) and (2) of the Persons with Disabilities Act (PDA) provides that no person or learning institution shall deny admission of a PWD to any course or study by reason only of such disability, if the person has ability to acquire substantial learning in that course. In addition learning institutions are required to take into account the special needs of PWDs with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical educational requirements and other similar considerations. Section 3 (1) (d) of the Universities Act provides that one of the objectives of University education is to promote equalization for PWDs.

In the International arena, Article 24 of the CRPD provides that PWDs should have full rights to education in inclusive settings. The *United Nations International Covenant on Economic and Social Cultural Rights*⁶ (ICESCR), declares in Article 13 that higher education (HE) shall be made accessible to all, on the basis of capacity, by every appropriate means and in particular the progressive implementation of education. The *Universal Declaration of Human Rights* (UDHR)⁷ states at Article 26 that HE shall be equally accessible to all on the basis of merit. Article 17(1)

⁴Bathseba Opini, 'A review of the Participation of Disabled Persons in the Labour Force: The Kenyan Context.' (2010) 25 Disability and Society Journal 271, 274.

⁵ See for example, The Constitution of Kenya, Article 54(2); Persons with Disabilities Act, Section 12 & 13.

⁶*International Covenant on Economic, Social and Cultural Rights*. Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 2200A (XXI) of 16th December 1966 (Entry Into Force 3 January 1976). Accession by Kenya on 1st May 1972.

⁷*United Nations Universal Declaration of Human Rights*, Adopted by the UN General Assembly Resolution 217A (III) on December 10 1948.

of the *African Charter on Human and Peoples Rights* (African Charter)⁸ provides that every individual shall have a right to education.

The first chapter contains the introduction which also defines terms that will be constantly used in the study, the background to the problem, statement of the problem, literature review and theoretical framework. The chapter also contains research objectives, questions, hypothesis and methodology. The second chapter looks at inclusion for persons with physical disabilities. It first looks at the law generally, then includes the experiences of students with disabilities in Universities Vis a Vis the law. The chapter also looks at a rights based approach to inclusion and the principle of reasonable accommodation. The third chapter reports on the experiences of students with visual disabilities and whether the Universities are in compliance with the law on inclusive education. The fourth chapter reports on experiences of students with hearing disabilities and the law and whether there is a gap between the law and its implementation on the ground. The fifth chapter contains a conclusion, recommendations and reviews whether the hypothesis has been proved or disproved.

1.1 Definition of Terms

The terms defined herein will constantly be used in the study. The definitions include the term inclusion which is the main basis of this study. Inclusion is defined because it's often confused with integration and the two terms have been differentiated. The rationale for inclusion is also included. The other terms that will be defined include the meaning that the study will attribute to disability. This is because there is no agreed meaning of disability and the term is defined differently in different Conventions and Statutes. Access to education is also defined as it has different dimensions. Reasonable accommodation is also defined as the term is used frequently in the research.

⁸*African Charter on People and Human Rights*, Adopted by the Organization of African Unity Resolution 67/3 (Entry into Force 21 October 1986). Accession by Kenya on 23rd January 1992.

1.1.1 Inclusion and Integration in Education

According to Hernandez, integration focuses on placement and making sure PWDs are educated in the same schools as their able bodied counterparts.⁹ She goes on to differentiate integration from inclusion. While inclusion focuses on quality and equality of education for PWDs, integration attempts admission into mainstream schools without accompanying structural changes. She states that for instance, integration does not result in the restructuring the physical environment and teaching and learning strategies. According to her integration may lead into exclusion in mainstream schools. Chimedza also differentiates integration from inclusion.¹⁰ According to him, the aim of integration is to change the PWDs to fit into the environment. Inclusion however demands that the learning environment be changed to accommodate the PWD. It calls for provision of reasonable accommodation. Integration in the place of inclusion in education has resulted to discrimination on the basis of disability in the mainstream.¹¹ The study agrees with Chimedza and Hernandez differentiation of inclusion and integration.

Fuller defines inclusion in an education context to mean reducing barriers to education for PWDs.¹² He further argues that inclusion refers to the process of learning from experiences of overcoming barriers to access and participation of PWDs. For Beckett inclusion is also about change of attitudes and prejudices of able bodied persons.¹³ He rightly argues that inclusion ensures an inclusive society where PWDs are respected beyond the school gates. For Momanyi inclusion creates creating a feeling of belonging, equality, access and opportunity to education.¹⁴ The study agrees with Fuller, Beckett and Momanyi on the meaning of inclusion.

⁹Vanessa Hernandez, 'Making Good on the Promise of International Law: The Convention and Inclusive Education in China and India' (2008) 17 Pacific Rim Law & Policy Journal 497, 508.

¹⁰ Robert Chimedza, 'Disability and Inclusive Education in Zimbabwe' in Len Barton and F. Armstrong (eds) *Policy Experience and Change: Cross Cultural Reflections on Inclusive Education* (Springer 2007) 5.

¹¹Human Rights Council, Implementation of General Assembly Resolution 60/25 of 15th March 2006, The Right to Education of Persons With Disabilities. www.internationaldisabilityalliance.org/sites/disalliance.e-presentaciones.net/files/public/files/SR_on_education_Report_on_persons_with_disabilities_2007.pdf rule 7 accessed on 9 August 2013.

¹²Mary Fuller, 'Incorporating Disabled Students within an Inclusive Higher Education Environment' (2004) 19 Disability and Society Journal 455.

¹³Anghard Becket, 'Challenging Disabling Attitudes, Building an Inclusive Society: Considering the role of Education in Encouraging Non-disabled Students to Develop Positive Attitudes towards Disabled People' (2009) 30 British Journal of Sociology and Education 317, 318.

¹⁴Gichana Momanyi, 'Challenges Facing the Implementation of Inclusive Education Programme in Public Primary Schools in Mombasa District of Kenya' (Med Thesis, UON 2009) 15-25.

The United Nations Educational Scientific and Cultural Organization (UNESCO), states that the aim of inclusive education is to transform the education system.¹⁵ Further the system should respond to the diversity of learners. According to UNESCO inclusive education aims towards enabling teachers and learners both to feel comfortable with diversity. Further diversity should be seen as a challenge and enrichment of the learning environment rather than a problem. Inclusive education leaves open the possibility of personal choice. It also leaves open options for special assistance and facilities for those who need them. The study agrees with UNESCO on these aims of inclusive education.

The law supports inclusive education. Article 24 of the CRPD provides that PWDs should have full rights to education in inclusive settings. The CESCR interprets inclusive education to mean that states should ensure teachers are trained to educate PWDs within regular schools.¹⁶ Necessary equipment and support should be made available to bring PWDs to the same level of education as their non disabled peers.¹⁷ Article 10 (2) of the Constitution provides that the national values and principles of governance include inclusiveness. Article 54 (1) (b) of the Constitution provides for the right of PWDs to access educational institutions and facilities for persons with disability that is integrated into society to the extent compatible with the interests of society to the extent compatible with the rights of the person. This provision supports inclusion. Section 18 (1) & (2) of the PDA provides for inclusion by providing that no person or learning institution shall deny admission to a PWD to any course or study by reason only of such disability, if the person has the ability to acquire substantial learning in that course. In addition special needs of PWDs are to be taken into account in respect to inter alia, entry requirements and pass marks.

The study will however restrict itself to school based factors of inclusion only. It will assess whether Universities and other players in the education sector are doing enough to include PWDs as required by the law. The study does not argue for inclusion in education of PWDs as provision

¹⁵UNESCO, 'Guidelines for Inclusion; Ensuring Access to Education for All' (2005)
<unesdoc.unesco.org/images/0014/001402/140224e.pdf> accessed 30 March 2013.

¹⁶CESCR, Comment no.5, para 9.

¹⁷ibid.

of a social economic and cultural right (SECR). Rather the study argues for the right to inclusion as a right to equality and non discrimination.

1.1.2 Rationale for Inclusive Education

Inclusive education enhances a sense of equality and self worth. The United States case of *Brown vs. Board of Education of Topeka*¹⁸ did not relate to disability but to racial segregation. In this case Brown was refused admission to a local school because she was black. The case however established the right to inclusion and non segregation. The Court held that segregation despite equal facilities is against the right to equality. Segregation also creates a sense of inferiority that may affect the students in a way that they may never overcome. The Court in this case declared that ‘separate educational facilities are inherently unequal’. It overturned the decision in *Plessy vs. Ferguson*¹⁹ in which the court had emphasized the doctrine of ‘separate but equal’. The basis for the holding in *Plessy vs. Ferguson* was because different schools for whites and colored were substantially equal in all respects, including qualification of teachers and infrastructure.

Inclusion University education is necessary. Currently in Kenya there are no special schools for PWDs at University level. There is for example no University for the blind. Furthermore PWDs are expected to live and work after school in an integrated environment.²⁰ Inclusive education ensures that the PWD in a setting which he/she will work as an adult.²¹ In the United States case of *Sweat vs. Painter*, where a student had also been denied admission to a school on the basis of race. It was held that separate schools isolated students from persons whom they would interact with after school.²²

Inclusive education was emphasized during the Salamanca Declaration and its framework for special educational needs.²³ The declaration states that inclusive schools are the most effective means of combating discriminating attitudes. The Declaration further states that inclusive

¹⁸[1954] 349 US 483.

¹⁹[1986] US 537.

²⁰Mueni Kithuka, ‘Factors Affecting Implementation of Inclusive Education Policy of Children with Special Needs in Public Primary Schools in Kitui North District Kenya’ (Med thesis, UON 2008) 10-15.

²¹ *ibid.*

²² 339 US 629 1950.

²³The Salamanca Statement and Framework for Action on Special Needs Education (Adopted by the World Conference on Special Needs Education, Salamanca 1994).

<unesdoc.unesco.org/images/0009/000984/098427eo.pdf > accessed 27th August 2013.

schools create welcoming communities build an inclusive society and achieve education for all. Moreover, the schools improve the efficiency and quality of education. The Declaration also states that inclusion also leads to the cost effectiveness of the entire education system.

The study also adopts Nyende's view that inclusion is also advantageous to the able bodied.²⁴ He argues that segregation disadvantages them by depriving them of the opportunities to discover PWDs as peers and as friends. The able bodied then grow up with a narrow view of the richness and diversity of humanity. In the United States case of *Orbeti vs. Board of Education*, a school had failed to admit and provide reasonable accommodation a student with disability. The court stated that able bodied students in class would benefit from inclusion of a student with disability.²⁵ Inclusion is also about human rights and inclusion in society for those who are excluded.²⁶

The United Nations handbook for Parliamentarians on the CRPD argues that human rights of PWDs should be promoted for the same reason that rights of other people are promoted.²⁷ This is due to the inherent and equal dignity and worth of each human being. Other reasons included in the handbook are the fact that it is beneficial to the whole society if PWDs are able to be independent. Further everyone is likely to experience some form of impairment at one time or another due to illness or accident.

1.1.4 Meaning of Disability

Article 260 of the Constitution of Kenya defines disability to include 'any physical, sensory, mental, psychological or other impairment condition or illness that has or is perceived by significant sectors of the community to have a substantial or long term effect on an individual's ability to carry ordinary day to day activities'. This definition focuses more on the person's impairment rather than socially imposed factors.

²⁴Farouk Nyende, 'Children with Disabilities in Universal Primary Education in Uganda: A Rights Based Analysis to Inclusive Education' (MA thesis, December 2012) 14.

²⁵995 F. 2d.1204 (3d Circuit 1993).

²⁶Martyn Rouse and Lani Flovian, 'Effective Inclusive Schools: A Study in Two Countries' in Peter Hicks and Gary Thomas (eds), *Inclusion and Diversity in Education* (Sage Publications Limited 2001) 253.

²⁷ United Nations Handbook for Parliamentarians on the CRPD. <www.un.org/disabilities/default.asp?id=212> accessed 2 July 2013.

This study adopts the definition of disability in the CRPD. Article 2 of the CRPD defines PWDs to 'include those who have long term physical, sensory, 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'. According to the United Nations handbook interpretation of the CRPD, this definition is not exhaustive and the CRPD recognizes that disability is an evolving concept.²⁸ According to the handbook the Convention does not impose a rigid view of disability. It assumes a dynamic approach that allows for adaptations overtime and within different socio-economic settings. The handbook states that the drafters of the Convention were clear that disability should be seen as the result of the interaction between a person's impairment and the environment. It's not something that resides in the individual as the result of some impairment.

The study acknowledges Harris's view that in a majority cases PWDs face discomforts and pain in their bodies.²⁹ His view is that it is however the barriers in society that makes people with impairments unable to live their lives to the fullest potential. He argues that the barriers therefore cause inability to perform functions which PWDs would otherwise perform very easily. The study therefore adopts his view and sees the problem in how Universities respond to persons with impairments. The physical and social environments were designed by non disabled people for the non disabled only. The study also agrees with Tinklin's view that disability is due to social organization that takes no or little account of people who have impairments, and thus excludes them from the mainstream of social activities.³⁰

This study will restrict itself to students with three categories of biological disabilities namely visual disabilities, hearing disabilities and physical/mobility disabilities. This is not only because they are easily ascertainable, but also according to the Kenya National Census 2009, these categories of disabilities constitute over 70% of all PWDs in Kenya.³¹

²⁸ Ibid.

²⁹ Alison Harris, *Disability Equality and Human Rights* (Oxfam 2003) 171.

³⁰ Teresa Tinklin, Sheila Riddell & Alaster Wilson, 'Policy and Provision for Disabled Students in Scotland and England' (2004) 29 *Studies in Higher Education Journal* 637, 642.

³¹ National Report, Office of the High Commissioner For Human Rights
<www2.ohchr.org/SPdocs/.../CRPD.C.KEN.1-en.doc> accessed 16 June 2013.

1.1.5 Access to Education

The CESCR interprets access to education in three dimensions; they include non discrimination, physical accessibility and economic accessibility.³² Non discrimination according to CESCR means education must be accessible to all especially the most vulnerable groups in law and fact without discrimination on any of the prohibited grounds. Physical accessibility requires that education facilities are within safe physical reach and reasonably convenient whether geographically or through modern technology. Economic accessibility means that education is available and free for all. State parties are required to progressively introduce free secondary and HE.

1.1.6. Reasonable Accommodation

Article 24 (2) (c) of the CRPD provides that the provision of reasonable accommodation is necessary in realizing the right to inclusion, non discrimination and equality for PWDs. Article 2 of the CRPD defines reasonable accommodation to mean necessary and appropriate modifications and adjustments, not imposing a disproportionate and undue burden where needed in a particular case, to ensure the enjoyment or exercise on an equal basis with others of all human rights and freedoms.

2.0 Background to the Problem

There are no recent statistics on the number of PWDs in Kenya. According to the 2009 census, 1,330,312 out of 38,610,097 (3.5%) of Kenyans experience some form of impairment.³³ Out of this percentage physical disabilities constitute the highest number, 31% (413,698), visual disabilities follow with 25% (331,594), hearing disabilities constitute are third with 14% (187,818).³⁴ The numbers may represent a small percentage. However marginalization of PWDs may represent a greater loss to society than the cost of implementing equalization policies.³⁵

³²CESCR, Comment No. 13, para 6 (b).

³³ 'Kenya Census 2009 Report' <www.knbs.or.ke/census%20Results/KNBS%20Brochure.pdf. >accessed 15 March 2013.

³⁴ *ibid*

³⁵ Standard Rules on Equalization of Opportunities for Persons with Disabilities 1993, United Nations General Assembly Res/48/96 of 20th December 1993, Preamble.

There have been many notable developments in the law on the rights of PWDs in Kenya. The PDA came into force on 16th June 2004.³⁶ The Constitution of Kenya 2010, for the first time in Kenyan constitutional history, specifically provided for the rights of PWDs.³⁷ Kenya is a member of the United Nations and has also ratified the CRPD, the African Charter on the Rights and Welfare of the Child, the African Charter on Human and Peoples Rights, the CRC, the ICCPR and the ICESCR. These instruments either directly or by implication provide for the right to inclusive education for PWDs. The situation on the ground in Universities does not reflect compliance with the provisions contained in the law. PWDs face exclusion in Universities. This is against the principles of inclusion and non discrimination on the basis of disability as provided in the law.

879 students with disabilities sat the 2012 Kenya Certificate of Secondary Education exams; they included the visually impaired, physically handicapped, low vision and mentally handicapped students.³⁸ According to the Minister for Education, ‘this shows the Ministry’s Commitment to ensure all persons have access to education and examinations in the country irrespective of their conditions and environment in line with the Constitution’.³⁹ Section 45 (1) (b) of the Basic Education Act provides that at the end of basic education the County Education Board shall make recommendations on among other issues, the proposal of a school of higher learning to be attended by the child with special needs.

The question is whether Universities are inclusive as required by law, to enable admission of PWDs. Once PWDs join Universities from special schools they face a number of exclusive practices. These are inherent in the physical environment, provision of assistive devices, exam arrangements, choice of subjects and attitudinal barriers. Most Universities have not adjusted their environments to accommodate PWDs.

³⁶ Sections 22, 23, 24, 35(1), 35(2), 39 and 40 came into force on 1st January 2010.

³⁷ See for example The Constitution of Kenya 2010, Articles 27(4) and 54.

³⁸ Nation Team, ‘2012 KCSE Results’ Daily *Nation* (Nairobi 2 March 2013).

³⁹ *ibid.*

The necessity of Universities to ensure inclusive education cannot be overemphasized. Issac, Raja and Ravannah rightly argue on the importance of University education.⁴⁰ They argue that in order to have access to employment and participate in the economy and be self reliant; PWDs need to have the same level of education as their non- disabled counterparts. They further state that disability when combined with illiteracy often leads to exclusion and increased exposure to poverty. They emphasize on the importance of UE for PWDs; it brings benefits to the PWD, family, community, and economy. It also enables the PWD to be employed on merit and exercise their rights just like everyone else. They place the responsibility on all to acknowledge and respect the rights of PWDs and help in enforcement. The study agrees with Isaac Raja and Ravannah on the importance of UE for PWDs.

The Antidiscrimination laws⁴¹ can prohibit discrimination in education but without reasonable accommodation the right to non discrimination will not be realized.⁴² Reasonable accommodation and inclusive measures are necessary to put PWDs in the same position as others. One of the barriers to access to employment for PWDs is the quality of their education standards as compared to the rest of the people.⁴³ In the recent 4th March 2013 general elections, two PWDs were elected as Members of Parliament.⁴⁴ This shows that with education which is an empowerment right, PWDs can excel in society just like anyone else. Inclusive education can remove barriers in society and enable PWDs to live and learn within settings that are truly inclusive.⁴⁵ This paper seeks to investigate the gap between the legal provisions and the situation on the ground by interviewing PWDs and officials in Universities with a view of making recommendations for inclusion.

⁴⁰Rebecca Isaac, William Raja & MP Ravanah, 'Integrating People with Disabilities: Their Right our Responsibility' (2010) 25 Disability and Society Journal 627, 629.

⁴¹ See for example, The Constitution of Kenya, Article 27 (4) ; Section 5 of the Employment Act.

⁴²Bagentos S, 'The Future of Disability Law' (2004)114 Yale Law Journal 1.

⁴³ Kenya National Survey for Persons with Disabilities' (2008) (n9).

⁴⁴Nation News, 'Disabled, electable Yussuf Hassan and Tim Wanyonyi Defy Odds' <www.ntv.co.ke> (Nairobi, 7 March 2013).

⁴⁵ Isaac, Raja and Ravannah (n40) 629.

3.0 Statement of the Problem

The problem is the gap between the law and the implementation in access to inclusive UE for PWDs. Despite the law the situation on the ground does not reflect compliance with the law.

There are no special schools at the University level. There is for example no University for the visual or hearing impaired. PWDs only have to do with the mainstream Universities. The PWDs who perform well in Kenya Certificate of Secondary Education examinations would want to join Universities. Those with visual, hearing and physical disabilities can only access education with great difficulties. In most Universities the physical environment is largely inaccessible. There are no materials in Braille or adaptive computer technology in the libraries. The staff and students are not trained to use sign language. There is a shortage of sign language interpreters and assistive devices are generally not provided for. This means PWDs are completely excluded from UE or can only access Universities with a lot of difficulties. This amounts to exclusion and discrimination on the basis of disability. The problem is the Universities failure to comply with the law and create an inclusive environment for PWDs.

4.0 Literature Review

There is a lot of literature that has been written in the area of education generally. However, most of the research done in the area of access to HE for PWDs has been done in other countries. Kenyan literature on the area of access to education and inclusion of PWDs focuses on primary and secondary education. Little has been done on UE on why the gap between the law and the situation on the ground in the area of UE. The research is especially important as the right of access to educational institutions for PWDs is now entrenched in Section 54 (1) (2) of the Constitution. It is therefore a responsibility for every University. Kenya has also ratified the CRPD and ICESCR among other international instruments that provide for inclusive education for PWDs.

The literature review is divided in three main themes according to the chapters. These are physical impairments, visual impairments and hearing impairments. Though chapter one's concern is physical disabilities, it also covers a rights based approach to inclusion, the concept of reasonable accommodation and the legal framework. These subheadings will be included under the physical impairments theme. The other themes of visual and hearing impairments will be as

specific as possible to the issues concerning persons with visual or hearing impairments respectively.

1.1 Physical Impairments

4.1.1 A Rights Based Approach to Inclusion

Sandkull⁴⁶ and Boesen & Martin⁴⁷ summarize the main principles followed by a rights based approach as participation, accountability and transparency, non discrimination, empowerment and linkages to human rights standards. As regards participation, it must be active, free and meaningful. Raising levels of accountability and transparency is done by identifying right holders and duty bearers. It also calls for the development of adequate laws and mechanisms of redress and accountability that can deliver both on entitlements and respond to denial of violations. Non discrimination is fundamental because vulnerable groups in society are prone to human rights violations and exclusion. The human rights approach therefore focuses on the same principles that underline inclusive education.

Empowerment is concerned with making people know and defend their rights and know their responsibility. It shifts the focus from the fact that people have needs to the fact that people have rights. The rights based approach integrates the standards and principles of the international human rights system into plans, policies procedures and processes of Government. Sandkul and Boesen & Martin point out the main principles that this study will emphasize on when advocating for a human rights approach. Sandkull in his paper merely explained the principles without going into details into how the same should be applied in a real situation. The current study will concern itself on how these principles should be applied in the University situation. Boesen & Martin's concern was on the applicability of a rights based approach to development. The concern of this study is UE.

4.1.2 Reasonable accommodation

⁴⁶Olof SandKull, 'Strengthening Inclusive Education by Applying a Rights Based Approach to Education Programming' Inclusive and Supportive Education Congress. <www.isec2005.org.uk/isec/abstracts/papers_s/sandkull_a.shtml>. Accessed on 31 October 2013.

⁴⁷ Jacob Boesen & Tomas Martin, 'Applying a Rights Based Approach: An Inspirational Guide for Civil Society' Danish Institute for Human Rights. <www.humanrights.dk/files/pdf/Publikationer/applying_a_rights_based_approach.pdf> accessed on 31 October 2013

Martel⁴⁸ outlines some proposals on how to interpret the dual concepts of reasonable accommodation and undue burden. She states that there will always be discrimination for PWDs if reasonable accommodation is not provided to the point of undue burden. She argues that PWDs are according to the social model of disability the holders of a fundamental right to reasonable accommodation. This right is to be exercised to the point of undue burden and this depends on a case by case basis. She defines reasonable as the effective accommodation and states that the effectiveness includes the prevention and elimination of segregation, humiliation and stigma. The defense of reasonable accommodation is that it will cause an undue and disproportionate burden. This occurs in two cases; adopting an accommodation excessively undermines the purpose of the general measure posing risks to safety, health, well being etc. Secondly in the balance of costs and benefits the accommodation proves to be too expensive. The cost benefit analysis is not limited to financial aspects, nor does it consider only the two parties involved. According to Mariel, although the state has a responsibility to accommodate, private parties as well are included where there is a connection with fundamental rights. This includes schools. Martel contributes to the study by defining reasonable accommodation, where it ends and where undue burden begins and whose responsibility it is to provide it. This study will go further and look at how reasonable accommodation should be provided in Universities.

Crock, Ernest & McCallum, in their article, explain the paradigm shift that the CRPD represents for PWDs who find themselves displaced by war or persecution.⁴⁹ They state that to provide reasonable accommodation to PWDs is the cornerstone of the CRPD. Reasonable accommodation is however not absolute. Accommodations must be reasonable and need not be made where they would impose a disproportionate and undue burden. They note that the concept of reasonable accommodation refers to both reasonableness and disproportionate and undue burden which can be used to evade liability. Resources of a Government or in this particular case, a University is a factor in deciding what is practically reasonable. They continue to note that if a society has negative attitudes to PWDs a court should question whether action or inaction in a particular case is due to negative attitudes. This study points out to some of the

⁴⁸Leticia Martel, 'Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective' (2011) 8 (14) *International Journal of Human Rights* 85.

⁴⁹Mary Crook, Christine Ernest & Ron McCallum AO, 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2013) 24 *International Journal of Refugee Law* 735.

difficulties and how reasonableness and disproportionate and undue burden should be decided upon. The study further dealt with the situation of refugees with disabilities. This study will look at the situation of students with disabilities.

4.1.3 Legal Framework

Onyango in his MA thesis has critiqued the legal framework for the promotion of rights of PWDs in Kenya.⁵⁰ He noted that despite the ratification and domestication of international instruments, there is still a very big gap between the law and the situation on the ground. This is because PWDs still remain among the most marginalized groups in Kenya. He proceeds to look at how the CRPD has been domesticated and translated through the Constitution of Kenya 2010 and the PDA. He notes that the drafters of the PWD and the Constitution took a minimum approach thereby resulting to the continued exclusion of PWDs. In his view the minimum approach is found in the definitions of disability in Article 260 of the Constitution and Section 11 of the PDA which still adopt the medical rather than the social model of disability. The study is significant to this study as it shows the gaps in the Constitution and the PDA as compared to international standards. It also points out that PWDs are unable to challenge discrimination against them as the language in the PDA is very weak and does not have enough sanctions for violation. It would be important to note however that the Constitution is very progressive and is self implementing as stated in Article 22 on the enforcement of the Bill of Rights. The rights of PWDs provided in the Constitution can therefore be enforced. The study however analyses the participation of PWDs in leadership where they will be able to influence laws concerning them. The current study investigates the gap in the law and its implementation thereof in the area of inclusive UE as an empowerment right for PWDs. The current study also looks at the ICESCR and other international and soft law documents which are not part of Onyango's study.

Tesemma in his D Phil. thesis critically analyses the law and policy on the education of disabled children in South Africa.⁵¹ He points out that the main impediment to inclusive education for PWDs is that domestic laws and policies are not in line with the right to education enshrined in

⁵⁰Gilbert Onyango, 'A Socio- Legal Critique of the Legal Framework for the Promotion of Rights of Persons with Disabilities in Kenya' (MA Thesis, International Institute of Social Studies 2012) 17.

⁵¹ShimelisTesemma, 'A Critical Analysis of the Law and Policy on the Education of Disabled Children in South Africa' (D Phil thesis, University of South Africa 2012) 5.

international and human rights instruments. He clearly points out that access to education is not enough for PWDs. The way educational laws and policies are formulated and implemented determines the success or failure of inclusive education. His view is that Governments need to put in place legal and policy frameworks that are in keeping with international and human rights standards and current educational knowledge and practice. This research provides a legal framework of selected international and regional instruments which the researcher will consult in this current research. It also points out the need for domestication and making sure domestic laws are in line with international standards. However while this research looks at the situation of education for children with disabilities the current study concerns itself with UE. Tesemma's research only criticizes the law. The current study collects data on the experiences of PWDs in Universities in order to investigate compliance with the law on inclusive education.

Ngulu in his thesis assessed whether the PDA is in compliance with the Constitution and the CRPD.⁵² He finds that while provisions of the Constitution are immediate, some of the most important provisions of the PDA which came into force in June 2004 do not take place immediately. His findings are that the PDA provisions are not compliant with the CRPD which is now part of Kenyan law. The provisions of the PDA have not been implemented fully in order to protect and enhance the rights and fundamental freedoms of PWDs. While this research is significant as it points at gaps in the PDA, it was primarily concerned with compliance of the PDA to the Constitution and the CRPD. The current study is primarily concerned with the gap between the law and practice in the area of UE. Ngulu's study conducted an analysis of all the provisions of the PDA. It therefore gave very little attention to education; this study's main focus is education. It therefore gives more weight and considers in detail the provisions of the PDA, Constitution and CRPD which concern education. The current study also looks at other international laws including ICESCR and soft law documents.

Kamundia while critically analyzing the provisions of the PDA noted that the PDA provides for progressive implementation of its provisions.⁵³ In her view, this could be used as a justification

⁵²Joshua Ngulu, 'The Kenya's Persons with Disabilities Act No. 14 of 2003: A Case for Compliance of the Act with the Constitution of Kenya 2010 and International law'. (LLM thesis, UON 2012) 104-108.

⁵³Kamundia E, 'Employment of Persons with Disabilities: A Critical Analysis of the Persons with Disabilities Act 2003' LLM thesis, UON 2010) 77-79.

for stagnating or retrogressing on the rights of PWDs. She proposes that obligations that are immediately applicable to international law should be held to be immediately enforceable in national law. She also proposes the enhancement of penalties for violation, awareness raising and importance of accessibility of transport and buildings. The main focus of her study was employment for PWDs; the concern of the current study is UE. The current study's concern is not only the PDA but also the Constitution and international laws on education.

4.1.4. Physical Barriers

Opini examined the factors that motivate female students with disabilities to participate in University education.⁵⁴ The factors include, economic independence, realizing personal dreams of becoming a better person, self worth and identity, credentialism and the need to continuously prove themselves more than their non disabled counterparts before being acknowledged in society. He points out that UE opens the career dreams of PWDs and breaks the social, economic and psychological barriers and restrictions created by society. Although this study only collected data from women, the reasons for seeking UE are universal and are the same for all PWDs. Opini points out that PWDs have to fight harder than their non disabled counterparts to attain their ambitions and succeed. The study significantly points out that Universities should therefore ensure access and required financial and other support to ensure PWDs achieve their dreams just like anybody else. The study is important in that it recognizes the right to education for PWDs. It also points out that it is necessary for PWDs just like anyone else to obtain UE. Opini however restricted himself to women students only and the factors that motivate them to attend University; this study seeks views from both male and female students the main focus being barriers that students face once in Universities.

Chalwe and Desleighde point out at the physical environment as the major contributing factor to the inclusion of PWDs in education.⁵⁵ An environment is accessible if an individual with any impairment can function independently with minimal or no assistance. This enhances participation and access to facilities, services and opportunities within the education

⁵⁴Bathseba Opini, 'Examining the Motivation of Women Students with Disabilities Participation in University Education In Kenya' (2012) 14 (3) Scandinavian Journal of Disability Research 1, 74.

⁵⁵Martha Chalwe & Jeniffer Desleighde, 'Globalizing Accessibility: Drawing on the Experiences of Developing Countries to Enable the Participation of Disabled People in Zambia' (2012) 27 (7) Disability and Society 917.

environment. Failure by Universities to meet the accessibility needs increases social and economic burden to PWDs. They point out that an enforceable legal mechanism is the main way of ensuring compliance with accessibility standards. The study significantly emphasizes the need for an accessible environment to PWDs. It also emphasizes the need to ensure enforcement of provisions of the law on accessibility. The current study looks at accessibility of the University environment for PWDs. The current study includes other school based factors other than physical accessibility.

Opini in his Article reviewed the participation of disabled persons in the labour force in Kenya.⁵⁶ He notes that Kenyan Universities appear more involved in the practice of income generation than inclusive education. This is because negative attitudes towards PWDs result in enforcement of the rights of PWDs being viewed as charitable. Universities in Kenya have physical structures and attitudes that exclude PWDs. The study drew on one story of an academic with physical disability in a University institution in Kenya, to highlight some of the forms of discrimination that PWDs have to endure in their work places. He noted that Universities had failed to make their buildings accessible to PWDs therefore leading to limited mobility of PWDs. The PDA has not been enforced and buildings remained largely inaccessible. PWDs were not in leadership positions and decisions were top down therefore little chances to participate in decision making. The study paid little attention to barriers causing exclusion of students with disabilities in Kenyan Universities which is the main concern of the current study. Further his study did not consider persons with visual or hearing disabilities who are also the concern of the current study. Opini's study however contributes to this study in emphasizing the laxity found in Kenyan Universities in removing physical barriers to access for PWDs. The current study seeks to investigate the extent of the problem for the students and suggest appropriate measures that need to be taken to ensure inclusion.

Tinklin and Hall in a study conducted in Scotland noted that students with physical disabilities were being forced to go round obstacles which should instead be removed.⁵⁷ Students could only access the ground floor of libraries as there were no lifts or lifts were too small for wheelchairs to

⁵⁶ Opini (n4) 284.

⁵⁷ Teresa Tinklin & John Hall, 'Getting Round Obstacles: Disabled Students Experiences in Education in Scotland' (1999) 24 (2) Studies in Higher Education 183.

pass. Book stacks were also very close together. Students were forced to give up their first choice of University due to inaccessibility. Students were therefore excluded from their choice of courses for reasons other than academic results. This was discriminating as able bodied students had a range of choices to choose from. Students had to use their disabled students allowance to get helpers to take them places and to get books for them in the library. This study significantly points to some of the barriers students with physical disabilities have to go through. This study does not concern itself with the law as does the current study. The current study also looks at the Kenyan experience.

Holloway states that PWDs are likely to apply to University if the provision is good.⁵⁸ In her article, she describes the findings and examines the issues arising from a small scale investigation into the experience of UE from the perspective of students with disabilities at a University in the UK. She states that some measures that may cause students with disabilities to obtain poor grades include lack of finances, access to buildings, library system and exam arrangements. Her findings were that the Universities practiced the medical model of disability. She proposes some measures to ensure inclusion of PWDs, this include a separate disability committee to deal with issues of PWDs. She also proposes the need for someone to advocate on the behalf of PWDs. The study is significant as it proposes important measures to ensure inclusion. It also points at some of the factors that this study should consider in accessing whether Universities are inclusive. The study does not however concern itself so much with the law. It does not also concern itself with students with visual or hearing disabilities.

Vickerman and Blundell state that Universities need to hear the voices of PWDs.⁵⁹ Otherwise the Universities will remain ignorant of the problems faced by PWDs. The study reported on the findings of PWDs live experiences in the United Kingdom. They identified key issues that need to be addressed in order to enable access and entitlement to UE. These include, pre induction, commitment by Universities to facilitating a barrier free curriculum, consultation and empowerment of students with disabilities views, institutional commitment to develop students

⁵⁸Sarah Holloway, 'The Experience of Higher Education from the Perspective of Disabled Students' (2001) 16 *Disability and Society* 597, 606.

⁵⁹Philip Vickerman and Milly Blundell, 'Hearing the Voices of Disabled Students in Higher Education' (2010) 25 *Disability and Society* 21.

support services and embedding of personal development planning. Tinklin, Riddell and Wilson⁶⁰ while examining policy and provision for PWDs in HE in Scotland and England state that institutions can be measured on compliance by having a disability statement, arrangements in place for addressing disabled students needs in examinations, application and admission procedures relating to needs of students with disabilities, disability policy and quality of provision for students.

The two studies carried out by Vickerman and Blundell and Tinklin, Riddell and Wilson contribute immensely to this study as they emphasize the importance of seeking views from PWDs which this study seeks to do. They also point out to the factors that should be addressed to enhance access to inclusive UE for PWDs. The current study is important because it is done in the Kenyan context.

4.2 Visual Impairments

Harris and Oppenheim emphasize the need for amendment of copyright laws.⁶¹ This is in order to make exceptions to enable libraries to make soft copies of books for persons with visual impairments. In addition the law should provide a bare minimum of what assistive devices libraries should provide as a bare minimum for visually impaired students. Libraries should publicize their services to visually impaired students and train staff to assist the students. Software can be expensive but when acquired it can help a lot of students. This research is significant as it focuses on library services which are also a concern of the current study. However, this study will also look at other school based factors for the visually impaired other than library services.

Bishop and Rhind in a study conducted at a UK University point out the barriers that students with visual impairments face when they enter Universities.⁶² These can be attitudinal, institutional, environmental and physical. Others include provision of materials in inaccessible

⁶⁰Tinklin, Riddell and Wilson (n30).

⁶¹Claire Harris & Charles Oppenheim, 'The Provision of Library Services for Visually Impaired Students in UK Further Education Libraries in Response to the Special Educational Needs and Disability Act' (SENDA) (2003) 35 *Journal of Librarianship and Information Science* 243, 245.

⁶²Daniel Bishop & Daniel Rhind, 'Barriers and Enablers for Visually Impaired Students at a UK Higher Education Institution' (2011) 29 (3) *British Journal of Visual impairment* 177.

formats and the fact that their status is not communicated to lecturers and staff. In their study most experiences of students were positive as they had access to computer technology, school level support and note takers. The students also benefited from a disabled students allowance. This study provides the themes that the current study will focus on. The importance of the current study arises from the fact that each of the two countries is unique and hence different barriers which should be addressed are experienced by students with visual disabilities in each country. The current study goes further and includes students with physical and hearing disabilities.

Kochung in his Article sought to define the role of UE in promoting inclusive education in Kenya.⁶³ He points out that the main challenge to inclusive education for PWDs is policy. Policies are either nonexistent or only exist on paper and are hardly translated in practice. This means that institutions do not invest in measures to eliminate exclusion. Other challenges include lack of transitional systems in place for PWDs moving from high schools to UE. There is lack of representation of students with disabilities in student organizations and University Management. Lack of financial commitment to support PWDs initiatives. Negative attitudes of teachers and stakeholders. Resource barriers such as sign language interpreters and Braille transcribers. Rigid examination systems and rigid curricula. The study most significantly points out at the limited role being played by the Joint Admission Board (JAB) and Higher Education Loans Board (HELB) which have a mandate to support UE in offering financial and technical support to PWDs. This study is especially important as it points out the main areas of concern in provision of inclusive UE for PWDs. The current study will look at the legal perspective. It will also seek the views of PWDs in Universities in order to enrich the quality of the work.

Tinklin and Hall reported on experiences of students going round obstacles in Universities.⁶⁴ There were no books in Braille and talking books in the libraries. This meant students had to engage readers to read for them. The students also had to use the disabled students allowance to buy laptops for themselves and obtain guides to places. This study significantly points to barriers that student's face that should instead be removed. This will be the concern of the current study.

⁶³ Edwards Kochung, 'Role of Higher Education in Promoting Inclusive Education: Kenyan Perspective' (2011) 2 (3) *Journal of Emerging Trends in Educational Research and Policy Studies* 144, 145.

⁶⁴Tinklin and Hall (n57) 189.

The current study will also look at legal provisions against the practice. This was not a concern of Tinklin and Halls study.

Chataika, Mckenzie, Swart and Cleophas⁶⁵ state that, inaccessible environments, lack of reasonable accommodation, negative attitudes, discriminatory application and admission procedures, lack of disability policies and recourses disadvantage students with disabilities in Africa. Education institutions also need to be made aware of their responsibility not only to become accessible to PWDs but also to educate their students in ways that are inclusive. The literature points out the accommodation measures that need to be taken as provision of note takers, time extension, assistive computer technology, taped lectures, voice activated software, accessible teaching methods, sign language interpreters and flexible entry requirements. The study significantly points out to areas of inaccessibility and measures that need to be taken and which will be the concern of the current study.

4.6 Hearing Impairments

Angelides and Aravi in their article sought to compare the views and experiences of deaf and hard of hearing students as students in mainstream and special schools.⁶⁶ They have commented on the debate that the attendance of students with hearing impairments in mainstream schools excludes them. This is because they are set apart due to their difficulties in communication which in turn result in limited participation in class discussion and socialization with their peers. Their argument is that what is practiced in such schools is integration where students are admitted without any reasonable accommodation. Inclusion presupposes that able bodied students and teachers also learn sign language in order to communicate with their hearing impaired counterparts. The significance of this study is that it points out that integration of persons with hearing impairments leads to exclusion in the mainstream. It also points out to measures that

⁶⁵Tsitisi Chataika, Judith McKenzie, Estelle Swart & Marcia Cleophas, 'Access to Education in Africa, Responding to the United Nations Convention on the Rights of Persons with Disabilities' (2012) 27 Disability and Society 385, 394.

⁶⁶Panayiotis Angelides & Christiana Aravi, 'A Comparative Perspective on the Experiences of Deaf and Hard of Hearing Individuals as Students in Mainstream and Special Schools' (2006) 151(5) American Annals of the Deaf 476.

need to be taken to include students with hearing impairments. The current study will look at the Kenyan context and will also include students with visual and physical disabilities.

Trovato in her article states that the right to sign language is of a stronger nature than the right to minority language.⁶⁷ She argues that no one who could possibly have a language should be left without one. The right to a language is fundamental, individual and absolute and demands guarantees from everyone. Sign language is not a minority language but a universal right and must therefore include everyone hearing or hearing impaired. She rightly argues that the right to a language ensures a person's right to develop one's cognitive faculties and one's right to experience appropriate social interaction which are fundamental and inviolable rights.

Magongwa in his article on deaf education in South Africa, also talks about sign language being in the realm of human rights.⁶⁸ It is a right to language, information and communication. His view is that the hearing impaired in South Africa are excluded because sign language is not recognized as a subject in schools. He rightly argues that it's a violation of human rights if the hearings impaired are denied a right to information through the only language they can understand. Other barriers include lack of role models and lack of teacher training.⁶⁹ The studies by Magongwa and Trovato significantly points at the areas that will be the focus of the current study. They emphasize the right of persons with hearing disabilities to sign language which language should be learnt by both hearing and non hearing persons. The current study will look at the importance of this right in an educational context and will also look at other school based factors of inclusion apart from language for students with hearing impairments.

Ngundo in his thesis on implementation of inclusive education in Kenyatta University, noted that despite the need for education by PWDs and strategies implemented by Universities, there continues to be a sense of neglect, lack of knowledge and resources as essential components of the implementation of inclusive education.⁷⁰ His study investigated the implementation of inclusive education in KU. He noted that most of the resources and facilities were available but

⁶⁷Sarah Trovato, 'A Stronger Reason for the Right to Sign languages' (2013) 13 (3) Sign Language Studies 401.

⁶⁸Lucas Magongwa, 'Deaf Education in South Africa' (2010) 155 (4) American Annals of the Deaf 493, 494.

⁶⁹ibid 495.

⁷⁰George Ngundo, 'Implementation of Inclusive Education in Kenyatta University Kenya' (Med thesis, KU 2012) 7.

not adequate. The most affected being persons with hearing impairments there being an inadequate number of sign language interpreters. He proposes a common course on inclusive education where sign language would be taught as a subject. Ngundo's study is relevant as it points out some of the barriers to inclusive education. His study however focused only on KU. The current study adds to the literature as it draws a comparison of other Universities and also looks at the problem via a legal perspective.

5.0 Theoretical Framework

The study is based on the social model of disability and the theory of justice as advanced by John Rawls in his book, *A Theory of Justice*.

The social model of disability was launched in Western Academia in 1990 by Michael Oliver's, *The Politics of Disablement: A sociological approach*.⁷¹ He called for a social theory of disability to challenge the medical and charity models of disability. He put forward that disablement is not a problem located in the individual but an institutional problem shaped by economic, political and ideological forces.

Samaha sheds more light on the social model of disability.⁷² He argues that according to the social model, disability is caused by a person's physical or mental traits and the surrounding environment. He identifies the problem as the society's failure to provide reasonable accommodation. Societies therefore fail to ensure the needs of PWDs are fully taken into account in its social organization. He identifies the factors that impose restrictions to PWDs range from attitudes, discriminatory laws and the physical environment. The model argues that removal of barriers faced by PWDs is possible and is beneficial to the community and PWDs.

Protection of the rights of PWDs depends to a large extent on the model of disability adopted by the country's laws.⁷³ Hirandani defines the medical and the charity model of disability.⁷⁴ The

⁷¹ Michael Oliver's, *The Politics of Disablement: A Sociological Approach* (Palgrave Macmillan 1990).

⁷² Adam Samaha, 'What Good is the Social Model of Disability?' University of Chicago, Public Law Working Paper No. 166/2007 <http://ssrn.com/abstract_id=983818> 12 accessed 2 May 2013.

⁷³ Lize Plessis & Shevan Eck, 'Protection of Disabled Employees in South Africa: An analysis of the Constitution and Labour Legislation' in Lize Plessis and Tobias Reemen (eds), *Aspects of Disability Law in Africa* (Pretoria University Law Press 2011) 232.

medical model of disability defines disability in regard to the person's traits. His view is that the model sees the person's impairment as the problem and therefore isolates the PWD. His view is that the charity model regards PWDs as objects of pity. It accordingly includes welfare services and care with no regard for PWDs to become independent in society. The study agrees with Hirandani's view that the medical and charity models lead to a limited understanding of disability.

Goering sheds more light on the social model of disability.⁷⁵ The model according to her does not deny impairment. It calls attention to how barriers may disable individuals unnecessarily and unjustly. It therefore calls for reasonable accommodation that will allow for greater inclusion of people with impairments and recognition of their value. She states that the model acknowledges that PWDs have impairments that the society can do nothing about. The study agrees with Goering's view that most of the problems faced by PWDs are however as a result of barriers in the environment which the society can do something about.

The social model of disability argues for a human rights approach to disability. According to Nyende the problem is the 'lack of responsiveness by state and society to the difference that disability represents'.⁷⁶ He differentiates the social model from the medical model which does not view exclusion of PWDs as discriminatory. According to him the medical model views exclusion to be as a result of impairments which make PWDs incapable of coping with life's activities. He further states that the social model by adopting human rights based approach sees the PWDs as recipients of rights enforceable by law rather than welfare recipients. Nyende further rightly observes that a right based approach 'offers a mechanism that ensures that the rights holders can claim their rights while duty bearers also fulfill their obligations to fulfill these rights'. The social model emphasizes on human dignity and is indicative of the value of the person as compared to others.⁷⁷

⁷⁴ V Hiranani, 'Towards a Critical Theory of Disability in Social Work' 2005 6 (1) Critical Social Work <<http://www.criticalsocialwork.com>> accessed 2 May 2013.

⁷⁵ Sarah Goering, 'Revisiting the Relevance of the Social Model of Disability' (2010) 10 (1) The American Journal of Bioethics 54.

⁷⁶ Nyende (n24) 16.

⁷⁷ Lize De Plessis and Tobias Reenen, *Aspects of Disability Law in Africa* (Pretoria University Law Press 2011) xxvi.

The CRPD provides a shift to the social model. According to Hernandez, first the model affirmatively recognizes the basic human rights of PWDs.⁷⁸ It also underscores the extent to which disability is socially constructed. His view is that the social model focuses on the inherent dignity of human beings. It also focuses on the person's abilities rather than his or her disability. It also acknowledges the persons contribution to decision making concerning him.⁷⁹

The social model theory is applicable to the study because access to UE for PWDs depends on how well the institutions are modified and adapted to the needs of PWDs. No student needs to be excluded from UE as a result of barriers. Inclusion in UE requires removal of barriers that may exclude a PWD from accessing education. The study argues for restructuring of Universities to accommodate PWDs. Removal of barriers will increase enrolment levels. It will as well improve the participation and achievement of existing PWDs in Universities. The study argues for a rights based approach to UE where PWDs as recipients of rights have a mechanism to claim those rights. Universities and other players in the education centre should also take their duty to fulfill the rights of PWDs by providing appropriate accommodation seriously.

The study is also based on the theory of justice which was put forward by John Rawls, in his book, a theory of Justice.⁸⁰ Rawls argues that the way to think about justice is to ask what principles we would agree to if we did not know our place in society, our class, or social status and in this particular case impairment. If we thought about justice without knowing whether we would be frail or healthy, disabled or able bodied, we would adopt a system of equal basic liberties for all citizens. We would then according to Rawls accept only those inequalities in income and wealth that work to the advantage of the least well off members of society, in this case PWDs. The veil of ignorance is especially important to this study because if everyone including decision makers in the UE sector and peers of PWDs were to think of themselves for one minute in a wheel chair, or visually or hearing impaired, then the rights of PWDs would be protected by all. Ramps would be built, libraries would be adapted to the visually impaired,

⁷⁸Hernandez (n9) 500.

⁷⁹Japhet Biegon, 'The Promotion and Protection of Disability Rights in the African Human Rights System' in Lize De Plessis and Tobias Reenen (eds), *Aspects of Disability Law in Africa* (Pretoria University Law Press 2011) 165.

⁸⁰ John Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press Cambridge Massachusetts 1999). <Economia.uniandes.edu.co/content/download/41151/.../file/Rawls99.pdf > accessed 21 August 2013.

assistive devices would be provided and everyone would want to learn sign language. This is especially relevant as most impairments are caused by accidents to which everyone is at risk.

Rawls advanced 2 principles of Justice.⁸¹ The First principle argues that each person is to have an equal right to the most extensive system of equal basic liberties compatible with a similar system of liberties for others. The second principle states that social and economic inequalities are arranged so that they are both reasonably expected to be of greatest benefit to the least advantaged members of society. The second part of the second principle states that offices and positions must be open to everyone under conditions of fair equality of opportunity.

In the first principle the basic liberties of citizens are political liberty i.e. to vote and run for office, freedom of speech and assembly, liberty of conscience and freedom from arbitrary arrest. This principle is more or less absolute. This principle is especially relevant as it emphasizes the right of freedom of speech for the hearing impaired. This is their right to a sign language as a main form of communication and is absolute.

An important consequence of the second principle is that inequalities can actually be just in Rawls view, as long as they are to benefit the least well off. His argument rests heavily on the claim that morally arbitrary factors for example the family we are born into and in the case of the current study, impairment, should not determine our life chances or opportunities. He argues that the difference principle would allocate resources in education so as to improve the long term expectation of the least favored, which in this case is PWDs.⁸² The importance of education according to Rawls should therefore not be accessed only in terms of economic efficiency and social welfare. His view is that it should also play its role in enabling a person to enjoy the culture and participate in the affairs of the society. It should provide to the least well off, in this case PWDs a secure sense of their own worth.

Rawls fair equality of opportunity requires not merely that offices and positions are distributed on the basis of merit. It also provides that all have reasonable opportunity to acquire the skills on

⁸¹ *ibid* 53.

⁸² *ibid* 87-88.

which merit is assessed. Baker interprets that this principle as not being only anti-discriminatory; it also recognizes the necessity of leveling the playing field.⁸³ He argues that blanket non discrimination clause is a weak form of equal opportunity. It does not consider for example what PWDs have gone through to attain education. His view is that Rawls fair equality of opportunity implies that the education system should consider what PWDs have to go through compared to able bodied persons. This would therefore necessitate for example flexible entry requirements. Another implication of the principle according to Baker is development of reasonable accommodation to enable PWDS compete for and obtain education. Where PWDs are underrepresented in Universities it means they have not had fair equality of opportunity. The study agrees with Bakers interpretation of Rawls fair equality of opportunity principle.

6.0 Objectives of the Research

1. To investigate exclusionary practices faced by persons with physical, visual and hearing impairments in Universities.
2. To investigate why there is a big gap between the law and its implementation in the area of inclusive UE for persons with visual, physical and hearing impairments.
3. To propose measures that need to be taken in order to ensure access to inclusive University education for PWDs.

7.0 Hypothesis

There is a failure by Universities to comply with the law on implementation of inclusive education for PWDs. PWDs therefore face many barriers and are excluded from Universities.

8.0 Research Questions

1. What barriers do persons with visual, hearing and physical disabilities face in access to inclusive UE?
2. Are Universities in compliance with the law on access to inclusive education for persons with visual, hearing and physical impairments?

⁸³ John Baker, 'Equality' (Oak Tree Press 2006) <[researchrepository.ucd.ie/bitstream/handle/10197/2039/Baker\(2006\) Equality \(pre-int\).pdf?sequence=1](http://researchrepository.ucd.ie/bitstream/handle/10197/2039/Baker(2006)Equality(pre-int).pdf?sequence=1) > accessed 21 August 2013.

3. Is the legal framework on inclusive education inadequate or is it the implementation thereof that lacks serious attention?
4. What measures should be put in place to ensure compliance with the law in the implementation of access to inclusive UE for PWDs?

9.0 Methodology

a) Primary Data

The research was conducted in two private Universities: Catholic University of East Africa (CUEA) and United States International University (USIU) and two public Universities being University of Nairobi (UON) and Kenyatta University (KU). The Universities were chosen due to a number of factors including being on the list of 10 best performing Universities,⁸⁴ being fully accredited by the Commission for University Education (CUE),⁸⁵ and accessibility in terms of distance in regard to the researcher.

Before embarking on the research, a research permit was obtained from the Ministry of Education through the National Council for Science and Technology.⁸⁶ Authorization was also sought and obtained from the Deputy Vice Chancellors of Academics and Research in KU, CUEA and USIU.⁸⁷ A letter of introduction from the Dean, School of law was used for identification purposes in UON where the researcher was studying at the time of the study.⁸⁸

Research was conducted using researcher administered,⁸⁹ open ended,⁹⁰ and structured questionnaires.⁹¹ Open ended questionnaires are free response questions that permit an individual to respond in his/her own words.⁹² Self administered respondents are asked to complete the

⁸⁴ 4 International Colleges and Universities 'Universities in Kenya by 2013 University Web Ranking' <www.4icu.org/ke> accessed 30th March 2013.

⁸⁵ Commission for University Education 'Status of Universities' <www.cue.or.ke/services/accreditation/status-of-Universities> accessed 30th March 2013

⁸⁶ See Appendix three.

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ Olive Mugenda and Abel Mubenda, *Research Methods: Quantitative and Qualitative Approaches* (Acts Press 1999) 80.

⁹⁰ *ibid.*, 72-73.

⁹¹ Donald Kombo and Delvo Tromp, *Proposal and Thesis Writing: An Introduction* (Paulines Publications Africa 2006) 94.

⁹² Mugenda and Mubenda (n89) 72-73.

questionnaires themselves while researcher administered means that the researcher uses the questionnaire to interview the respondents.⁹³ Structured questions involve subjecting each informant with similar questions.⁹⁴

During the study 25 students, 13 University officials, and an officer from JAB, HELB and University of Sydney were interviewed. The Students included 10 students with physical impairments, 12 visually impaired students and 3 students with hearing impairments. The structured questionnaires offered a guided plan for order in order to ask similar questions to the students. Room was left for the participants to discuss their experiences in their own way. More information was sought whenever participants raised useful points that needed further elaboration. Students with hearing disabilities were directed to the questions in the questionnaires that related to them. Clarifications were done in writing.

University officials concerned with disability policies, Joint Admission Board and Higher Education Loans Board were also interviewed using self administered or research administered questionnaires depending on each particular circumstances. Pseudo names of all those who were interviewed have been used to keep their identities confidential. Observation checklists⁹⁵ were also used to observe facilities in Universities such as libraries, classrooms and offices.

b) Secondary data⁹⁶

Secondary sources included the Constitution and other statutes, international and regional instruments, the internet, newspapers and other media reports, journals and books.

c) Sample

The sample was drawn from two public Universities UON and KU and two Private Universities, CUEA and USIU. KU has the highest number of students with disabilities. The students who had so far registered with the director of disability services were 64 visually impaired students, 26

⁹³ibid 80.

⁹⁴Kombo and Tromp (n91) 94.

⁹⁵Mugenda and Mubenda (n89) 92.

⁹⁶Kombo and Tromp (n91)100.

with physical impairments and 16 with hearing impairments.⁹⁷ Out of these the researcher interviewed 4 students with physical impairments, 7 students with visual impairments and two students with hearing impairments. Nairobi University has 12 students with mobility impairments, 9 students with visual impairments and 3 students with hearing impairments.⁹⁸ The researcher was able to interview 1 student with hearing impairments, 4 students with visual impairments and 2 students with physical impairments. The researcher also interviewed 1 former student with visual impairments and 1 former student of UON with physical disabilities. USIU has ten students with physical impairments,⁹⁹ two were interviewed. There were no students with either hearing or visual disabilities.¹⁰⁰ CUEA had 3 students with physical disabilities and 2 students with visual disabilities,¹⁰¹ the researcher interviewed a student from each of the two categories. There were no students with hearing impairments.¹⁰² Out of the students interviewed, 8 were female while 17 were male.

d) The Sampling Method

The students were selected using purposive sampling.¹⁰³ In this method students were picked because they had the required characteristics i.e. they had physical, visual or hearing impairments.¹⁰⁴ Other students' were selected using snowballing method of sampling.¹⁰⁵ Using this method, the selected students then introduced the researcher to other students with the required characteristics.

e) Limitations of the Study

Some students were out of session at the time of the research and could not be interviewed. The study was limited to 2 public Universities and 2 private Universities in Nairobi County only. The research has also restricted itself to three categories of biological disabilities namely, visual

⁹⁷ Interview with Walter, University official, 4 July 2013.

⁹⁸ Interview with Roselyn, University official, 7 August 2013.

⁹⁹ Interview with Wilson, University official, 25 July 2013.

¹⁰⁰ *ibid.*

¹⁰¹ Interview with Simon, University official, 5 July 2013.

¹⁰² *ibid.*

¹⁰³ Mugenda and Mubenda (89) 50.

¹⁰⁴ *ibid.* 51.

¹⁰⁵ *ibid.*

disabilities, hearing disabilities and physical/mobility disabilities. The study only looks at the school based factors aspect of inclusion.

10.0 Chapter Breakdown

1. Chapter One

This chapter contains an introduction, background to the problem, statement of the problem, literature review and theoretical framework. The chapter also contains research objectives, questions, hypothesis methodology and chapter breakdown.

2. Chapter Two

This chapter starts with a review of the legal framework on University education. It starts with the framework on the legal recognition of the right to inclusive HE for PWDs. It defines non discrimination, inclusion and equality in education for PWDs and the right to reasonable accommodation. It reports on non compliance of national law with international conventions in this regard. The chapter proceeds to report on the experiences of students with physical disabilities in Universities Vis a Vis the law on inclusive education for PWDs. A summary of the findings on experiences of students are reported in regard to physical facilities, choice of subjects and exam arrangements. The chapter reports on issues such as allocation of finances by Universities for inclusion, measures that cause students to spend extra finances and spend more time on tasks, awareness of the whole University on inclusion, what should constitute reasonable accommodation in Universities, a rights based approach to inclusion, need for disability statements and policies, representation of PWDs in student organizations and University management and the role of Ministry of Education in ensuring inclusion.

3. Chapter Three

This chapter reports on the experiences of students with visual impairments in Universities. The chapter also accesses whether Universities are in compliance with the law on inclusive education for persons with visual impairments. Areas covered in this chapter include entry requirements, assistive devices, libraries, barriers that cause students to spend more time on tasks and incur extra finances and academic assessment and testing. Other areas are attitudes of lecturers, access

to information, accessibility of the environment, restriction on degree courses, representation in student organizations, availability of recourses and awareness.

4. Chapter Four

The chapter gives a summary of the findings from the interviews of students with hearing impairments in Universities and gives an indication of the magnitude of the challenges they face and whether or not they face exclusion against the law in access to UE. The topics covered include the number of students, whether inclusion of students with disabilities is possible, the right to sign language, assistive devices for the students, access to libraries and offices, barriers causing the students to incur extra finances and spend more time on tasks, lecturers' awareness and role models.

5. Chapter Five

This is the conclusion and will sum up the entire study and review whether the hypothesis have been proved or disproved. The chapter also includes recommendations based on the findings.

CHAPTER TWO:

INCLUSION OF STUDENTS WITH PHYSICAL DISABILITIES WITHIN UNIVERSITIES IN KENYA

1.0 Introduction

I cannot access the basement and the first floor of the library. This is because there are no ramps or lifts. There are also no ramps at the entrance of the library. I have to rely on the assistance of other students to help me up the stairs. I cannot access most offices as there are no ramps and no lifts. The ramps which are present are very steep. I take too much time to access the library and classes and this is very depressing especially during exam time.¹⁰⁶

This is an account of one student with a physical impairment in the UON. This shows the extent of barriers that students with physical disabilities face once they join Universities. The current chapter aims to identify the extent of these barriers with a view of making recommendations for inclusion. PWDs played an integral role in the formulation and negotiation of the CRPD under the slogan, ‘nothing about us without us’. Under Article 4 (3) of the CRPD state parties must closely connect with and actively involve PWDs in decision making processes that relate to them. This chapter summarizes the findings from the interviews of persons with physical disabilities in four Universities in order to make recommendations for inclusion. Universities need to consult PWDs while designing inclusion measures; otherwise they will remain ignorant of the exclusion practices facing PWDs. This will present PWDs with an opportunity to become self sufficient and contribute to the community.

According to Samaha, it’s not possible to make those who cannot walk because of physical disabilities walk.¹⁰⁷ He is also of the view that it’s also not necessary to walk to have a worthwhile life. Ramps can however be built and the non disabled can learn to change their attitudes towards PWDs. Samaha summarizes the objective of this chapter. The chapter argues for the adoption of the social model of disability, which argues for the removal of the barriers that disable people.

¹⁰⁶ Interview with Gilbert, student, 16 May 2013.

¹⁰⁷Samaha (n72) 11.

The chapter also assesses whether Universities are in compliance with the existing national and international instruments on the rights of PWDs. Instruments in this case refers to both treaties which as international or regional instruments legally bind states.¹⁰⁸ Soft law documents such as declarations resolutions or standard rules, adopted by international bodies will also be considered. These documents do not bind in a legal sense often bind in a moral and political sense. Legislation alone will not be sufficient to bring about inclusion in education for PWDs.¹⁰⁹ The experience of treaty bodies with state reporting procedures show that, despite legislation there still exists non compliance with laws.¹¹⁰ In this regard the research seeks to assess whether the situation on the ground in Universities is in compliance with the law on inclusive education for PWDs. The adequacy of municipal law will also be considered. Where laws are found to be inadequate suggestions will be made on how these instruments may be amended to effectively provide for the rights of PWDs. Recommendations will then be suggested on ways in which compliance with the law can be guaranteed.

The chapter will include the legal recognition of the right to UE for PWDs. It will then look at inclusion, non discrimination and equality as provided by international and national laws. It will also point out instances of noncompliance of national law with international law. The chapter then reports on whether Universities are in compliance with the law in areas such as admission requirements, choice of subjects, exam arrangements, and physical facilities. The chapter also addresses issues such as whether students with disabilities incur extra finances and spend more time on tasks, awareness creation, financial resources and immediate realization of the right to non discrimination, reasonable accommodation, a rights based approach to education for PWDs, disability policies and statements, representation of PWDs in University Management and student councils and the role of Ministry of Education

¹⁰⁸Klaus Beiter, *The Protection of the Right to Education by International Law* (Martinus Nishoft Publishers 2006) 85.

¹⁰⁹Nazila Ghanea, *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nishoft Publishers 2002)18.

¹¹⁰ *ibid.*

2.0 Legal Recognition of the Right to inclusive UE For PWDs

The right of everyone to education was articulated for the first time in an international instrument in the UDHR.¹¹¹ Article 26 (1) of the UDHR recognizes the right of everyone to education. This right of everyone to education is also recognized in the ICESCR, the African Charter on Human and Peoples Rights and the Constitution.¹¹² Article 26 (1) of the UDHR states that HE must be equally accessible to all on the basis of merit. Merit emphasizes past academic achievements.¹¹³ The Right to HE for all is also recognized in the ICESCR, CRC, and ACRWC.¹¹⁴ All human rights instruments apply to PWDs by virtue of their non discrimination clause.¹¹⁵ Article 24 (1) of the CRPD mandates that PWDs should have full rights to education in inclusive settings.

3.0 Non- Discrimination, Inclusion and Equality in Education for PWDs

It's not possible to discuss inclusive education without defining discrimination on the basis of disability. Most measures that exclude PWDs in the education sector, also amount to discrimination on the basis of disability and inequality. The CRPD acknowledges the interrelatedness of these rights in education. Article 24 (1) of the CRPD provides that state parties recognize the right to an inclusive education, with a view to realizing this right without discrimination on the basis of equal opportunity. In addition states parties are required ensure an inclusive education system at all levels and lifelong development. Article 24 (2) (c) of the CRPD provides that the provision of reasonable accommodation is necessary in realizing the rights to inclusion, non discrimination and equality for PWDs. The principle of non discrimination and equality is essential in the exercise of all human rights.¹¹⁶ This includes the right to inclusive education for PWDs.¹¹⁷

¹¹¹Beiter (n108) 90.

¹¹² ICESCR, Article 13(1): The African Charter, Article 17(1): The Constitution Of Kenya Article 43(1)(f).

¹¹³Beiter (n108) 96.

¹¹⁴ ICESCR, Article 13(2) (c): CRC Article 28(c): ACRWC Article 11(3).

¹¹⁵ Isaac Mwaura, *Human Rights, Disability and Development in Kenya: A Discourse* (Konrad Adenauer Stiftung 2009)54.

¹¹⁶Kristine Hauler, Nicole Urban, Robert McCorquodale, *Protecting Education in Insecurity and Armed Conflict: An International Law Handbook* (British Institute of International Law & Education 2012) 91.

¹¹⁷ibid.

In the education sector, discrimination against persons with physical impairments includes denial of admission and inaccessibility of the physical environment.¹¹⁸ Discrimination on the basis of disability is any distinction, exclusion, restriction or preference or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition enjoyment or exercise of SECRs.¹¹⁹ A similar definition exists in Article 2 of the CRPD. Reasonable accommodation is defined in Article 2 of the CRPD to mean necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case, to ensure PWDs the enjoyment or exercise on an equal basis with others of all human rights and freedoms.¹²⁰

Article 27 (1) of the Constitution provides that every person is equal before the law and has the right to equal benefit of the law. The Non discrimination clause in Article 27 (4) of the Constitution outlaws discrimination on the basis of disability. It is important to note at this point that the Constitution of Kenya 2010 does not define discrimination on the basis of disability. It does not include the denial of reasonable accommodation as a prohibited form of discrimination, as recommended under ICESCR, and CRPD.¹²¹ The PDA definition of discrimination does not also comply with the CRPD. It does not include denial of reasonable accommodation as a prohibited form of discrimination against PWDs.¹²² This is an instance of non compliance of domestic law to international standards.¹²³ Reasonable accommodation has a defense of a disproportionate and undue burden which any institution can use based on a cost benefit analysis and whether the measures required will pose risks to safety, health and well being of others.¹²⁴ University recourses will also be a factor in deciding whether a measure is reasonable.¹²⁵

¹¹⁸ Ruth Bukola , ‘The Right to Inclusive Education in Nigeria: Meeting the Needs and Challenges of Children with Disabilities’ (2010) 10 (2) Africa Human Rights Journal, 457, 459.

¹¹⁹ CESCR , Comment No. 20. Non Discrimination in Economic, Social and Cultural Rights Art 2 Para 2 of the ICESCR, 2nd July 2009 (Contained in Document EC.12,G C/20) Para 15.

¹²⁰ *ibid.*

¹²¹ See CESCR, Comment No. 20, para 28.

¹²² The PDA Section 2 defines to discriminate as to accord different treatment to different persons solely or mainly as a result of their disabilities and includes using words, gestures or caricatures that demean scandalize or embarrass a person with a disability.

¹²³ Tesemma (n51) 5.

¹²⁴ Martel (n48) 104.

¹²⁵ Crock, Ernest & McCallum (n49) 749

The PDA was drafted before the ratification and adoption of the CRPD. The Act does not therefore fully domesticate the CRPD.¹²⁶ The necessity of defining discrimination on the basis of disability arises from the fact that disability differs from other possible factors of discrimination such as sex, race or nationality.¹²⁷ For these categories of discrimination simple anti discrimination laws can suffice.¹²⁸ For PWDs the personal struggle related to impairments remains despite legal provisions.¹²⁹ This necessitates reasonable accommodation to bring PWDs at the same level with others.¹³⁰

Article 2 of the UDHR states that everyone is entitled to all the rights set forth in the UDHR without distinction of any kind such as race, color, sex, language, religion, political or other opinion national or social origin, property, birth or other status. A similar non discrimination clause is also contained in the ICESCR, ICCPR, and African Charter.¹³¹ The concept of other status clearly applies to discrimination on the grounds of disability both physical and mental.¹³² At a minimum this entails that nobody should be discriminated in as far as access to the rights in the covenants, including the right to education are concerned.¹³³ Any discrimination of a PWD is therefore a violation of his or her rights.¹³⁴ The Commission on the African Charter on Peoples and Human Rights in the case of *Purohit and Others vs. the Gambia*,¹³⁵ laid a principle that is necessary in eradicating discrimination. In this case it was held that PWDs have the same hopes and dreams and goals just like any other human being. This right lies at the heart of the right to human dignity. It was held that this is in accordance with the established principle that all human beings are born free and equal in dignity and rights. Decisions of the Commission are not legally binding but bind in a political and moral sense.

¹²⁶Ngulu (n52).

¹²⁷Heinz Dietrich Steinmeyer, Legislation to Counter Discrimination Against Persons with Disabilities (Council of Europe Publishing 2003) <www.coe.int/t/e/social-cohesion/soc-sp/discrimination_e_in_color.pdf> 25 accessed 16 June 2013.

¹²⁸Liz Crow, 'Including all our Lives: Renewing the Social Model of Disability' in Barnes C and Mercer G (eds), *Exploring the Divide* (The Disability Press 1996) <www.leeds.ac.uk/disability-studies/archiveuk/3> accessed 20 February 2013.

¹²⁹ ibid.

¹³⁰ ibid.

¹³¹ See African Charter, Article 2; ICCPR, Article 2(2); ICESCR, Article 2(2).

¹³² CESCR Comment No. 20, Para 15.

¹³³ CESCR Comment No. 5, para 5.

¹³⁴Beiter (n108) 93.

¹³⁵Comm. No. 241/2001 ACPHR.

Section 26 of the PDA recognizes discrimination of PWDs as an offence. The Minister may according to Section 44 of the PDA make regulations specifying and describing the nature of acts of discrimination against PWDs. Section 3 of the PDA establishes the National Council for Persons with Disabilities (NCWPD). According to Section 7 (b) (IV) of the PDA, one of the functions of NCPWD is to recommend measures to prevent discrimination against PWDs. It is very important that there be clear and specific institutional measures and regulations as to what amounts to discrimination and denial of reasonable accommodation within Universities. The Persons with Disabilities regulations 2009,¹³⁶ which contain some specific regulations on education for PWDs is not adequate. Like the rest of the PDA, the provisions fail to confer PWDs enforceable provisions against discrimination.

Article 3 (2) (b) (f) of the Universities Act provides that in the discharge of their functions Universities shall be guided by national values and principles of governance set out in Article 10 of the Constitution. In that regard Universities shall enhance equity and accessibility of its services and institutionalize non discriminatory practices. This provision needs to be implemented in so far as PWDs are concerned.

The emphasis in the case of PWDs is on substantive rather than formal equality. Formal equality means sameness of treatment regardless of circumstances, and can lead to substantive inequality.¹³⁷ Substantive equality on the other hand, would take the circumstances of PWDs into account when determining whether the Constitutional commitment to equality was achieved.¹³⁸ This is in line with the fair equality of opportunity principle in the theory of Justice.¹³⁹ In the South African case of *President of South Africa vs. Hugo*, which related to gender discrimination, the court stated that the goal of equality cannot be achieved by insisting on formal equality.¹⁴⁰ It was held that each case requires a careful and thorough understanding of its circumstances. Substantive equality is in line with the social model of disability, within the human rights approach.¹⁴¹

¹³⁶Persons with Disabilities (Access to Employment, Services and Facilities) Regulations 2009.

¹³⁷ De Plessis and Van Eck (n173) 232.

¹³⁸ *ibid.*

¹³⁹ Rawls (n80) 53.

¹⁴⁰ 1997 USA I (CC) P.

¹⁴¹ Du Plessis and van Eck (n73)240.

The aim of inclusive education is to change the environment to accommodate the needs of the student.¹⁴² As will be seen later in the chapter, most Universities have assimilated PWDs into an unchanged system.¹⁴³ This is against the social model of disability and constitutes integration which still allows discrimination.¹⁴⁴

4.0 Admission Requirements

The study sought to establish whether Universities had flexible entry requirements in regard to students with physical disabilities. For students with physical disabilities the entry point is 2 points below that set for other students.¹⁴⁵ This is consistent with the fair equality of opportunity principle in the theory of justice which allows some form of preferential treatment.¹⁴⁶ The number of students with physical disabilities in the Universities is as reflected in the table below:-

INSTITUTION	NUMBER OF STUDENTS
UON	9
KU	26
CUEA	3
USIU	10
TOTAL	48

In KU 26 students with physical disabilities are registered with the directorate of disability services, but there may be more who have not registered,¹⁴⁷ CUEA has three students in this category.¹⁴⁸ UON has 12 students who are distributed in the various campuses.¹⁴⁹ USIU has 10 students.¹⁵⁰

¹⁴²Chimedza (n10) 5.

¹⁴³Allan Hodkinson, Philip Vickerman, *Key Issues in Special Educational Needs and Inclusion* (Sage Publications 2009)77.

¹⁴⁴ ibid.

¹⁴⁵Interview with Morrison, JAB, 11 July 2013.

¹⁴⁶Rawls (n80) 53.

¹⁴⁷Interview with Walter, student, 4July 2013.

¹⁴⁸Interview with Simon, University official, 5, July 2013.a

¹⁴⁹Interview with Roselyn, University official, 7 August 2013.

¹⁵⁰ Interview with Wilson, University official, 25 July 2013.

Findings indicated that the underrepresentation in some of the Universities is as a result of physical barriers within institutions which bar students from participating.¹⁵¹ According to Christopher from CUEA, 'I am only able to survive in the University because my disability is not so severe. Any other student with severe disability would not survive at all'.¹⁵² Students either have accounts of inaccessibility from their peers or when they visit the Universities, they see for themselves how inaccessible the Universities are. These experiences of students are similar to the experiences faced by students in a UK University in the study by Tinklin and Hall.¹⁵³ Students were excluded from their first choice University. This was due to the fact that the Universities were inaccessible to anyone using a wheel chair. Restrictions were therefore for reasons other than students' academic ability.

The study adopts the view that this is discriminatory as other students are open to a wide range of choices. Maria from KU had this kind of experience, 'My first choice was UON because my big brother is there and would be able to assist me. When I visited the school, my wheel chair could not fit in the lifts and office doors. There were no disability compliant toilets'.¹⁵⁴ It is the Universities who are failing to create the right environment for PWDs. This is not only unjust. It is against the social model of disability which requires that the environment be rearranged to accommodate everyone.¹⁵⁵ Christopher of CUEA's choice is also restricted by cases of inaccessibility. 'I would want to do my Masters at UON but the University is even more inaccessible'.¹⁵⁶

This is reflected by the numbers. Of the two private Universities, USIU which is more accessible to students with physical disabilities has more students than CUEA. Of the two public Universities, KU is more accessible to students with physical disabilities and has more students than UON. Students consider accessibility before making an application, Henry from UON confirms this, 'I had applied to go to KU since I know the University is accessible but the JAB admitted me to UON'.¹⁵⁷ The study therefore agrees with Woodward and Ross's view that the

¹⁵¹ Joan Hanafin, Michael Sherlin, MairinKenya, Eileen Mc. Neela, 'Including Young People with Disabilities: Assessment Challenges in Higher Education' (2007) 54 Higher Education Journal 435,436.

¹⁵² Interview with Christopher, student, 5 July 2013.

¹⁵³ Tinklin and Hall (n57) 187.

¹⁵⁴ Interview with Maria, student, 19 July 2013.

¹⁵⁵ Harris (n29) 229.

¹⁵⁶ Interview from Christopher, student, 5 July 2013.

¹⁵⁷ Interview with Henry, student, 18 August 2013.

physical environment therefore in most cases restricts the choice for persons with physical disabilities and therefore quality of learning opportunities.¹⁵⁸

5.0 Physical Facilities

The study sought to establish whether the physical environment including offices, classes, hostels, pavements and libraries was a factor in restricting student choice of University. Article 54 (1) (b) of the Constitution provides that PWDs are entitled to access educational institutions and facilities for PWDs that are integrated into society, to the extent compatible with the interests of society, and to the extent compatible with the rights of the person. The right of reasonable access to all places and public transport is also recognized at Article 54 (1) (c). An accessible environment, is one in which any person with impairment can function independently with minimum or no assistance.¹⁵⁹ Article 2 of the CRPD advocates for universal design: this means the design of products, environments, programmes and services to be usable by all people to the greatest extent possible without need for adaptation or specialized design.

The CRPD in its definition of disability at Article 2 no longer focuses on a person's impairment. It adopts the social model of disability by viewing disability to be a result of failure by societies to be inclusive. The definitions of disability in Article 260 of the Constitution and Section 11 of the PDA focus on the person's impairments rather than social factors. The definitions should adopt the medical model of disability and there is need for an amendment in this regard.¹⁶⁰ The study looks at the physical environment of the Universities and how it excludes PWDs and results in a denial of their rights.

The main barrier to access to inclusive education for PWDs is the physical environment. The findings confirmed the position that most Universities were constructed with able bodied students in mind.¹⁶¹ Buildings have no ramps and have doors in lifts which are too narrow for wheelchair users. Article 9 (1) of the CRPD provides that to enable PWDs to live independently and participate fully in all aspects of life, state parties shall take appropriate measures to ensure to PWDs access on an equal basis with others, to the physical environment by removing barriers

¹⁵⁸ Diana Woodward and Karen Ross, *Managing Equal Opportunities in Higher Education: A Guide to Understanding and Action* (The Society for Research Into Higher Education and Open University Press 2000)87.

¹⁵⁹ Chalwe and Desleighde (n55) 921.

¹⁶⁰ Onyango (n50) 21.

¹⁶¹ Chimedza (n10) 130.

in buildings including schools. In addition the state is also required to ensure that private entities and other facilities and services which are open or provided to the public take into account all aspects of accessibility for PWDS.

Section 22 of the PDA requires proprietors of all buildings to adapt them to suit PWDs. The PDA came into effect in June 2004; this provision came into effect five years later and requires compliance within five years after coming into effect. According to section 24 of the PDA if the Council considers that any premises, services or amenities are inaccessible to PWDs by reasons of any structural, physical, administrative or other impediments to such access, the council may serve upon the owner of the premises or provider of the services concerned an adjustment order. Under Section 27 (b) (1) the council shall not serve adjustment upon any school or education training institution controlled or managed by the Government or registered under the Education Act, except with the consent of the Minister responsible for the administration of the institution or Act concerned. If however the consent or refusal is not given within 60 days, Section 27 (b) (2) states that the council may proceed to serve the adjustment order as though the minister had consented. Like other provisions of the PDA, these rights however exist only in paper and have not been enforced. The study agrees with the view that non enforcement of the provisions of the PDA stagnates the rights of PWDs to inclusion and non discrimination in so far as access to places is concerned.¹⁶²

5.1 Offices, Classes, Pathways and Hostels

All the Universities in the current study are accredited by the Commission for University Education (CUE) which is established under Section 4 of the Universities Act. Accreditation therefore is not pegged on accessibility. The Draft Commission for University Education Standards and Guidelines 2013, now provides that all buildings used for University activities should have adequate provisions to cater for the physically challenged.¹⁶³ The CUE has thus recognized the role bestowed on it by the Constitution. Article 21 (3) of the Constitution requires all state organs and all public officers have a duty to address the needs of vulnerable groups within society including PWDs. The draft standards provide that Universities should provide a

¹⁶²Kamundia (n53) 73.

¹⁶³ Commission for University Education, Draft Commission for University Education Standards and Guidelines 2013, <www.cue.or.ke/news-and-events/78-draft-commission-for-university-standards-and-guidelines-2013> accessed 30 August 2013.

ramp, lift or other means to enable access to facilities for the physically challenged. In addition they should provide modified toilets for the physically challenged. Once the rules are passed, it means that the Universities will have no option but to be compliant in order to be accredited. The Standards however need to be more detailed so that Universities are aware of exactly what is required of them is so far as provisions to cater for the physically challenged are concerned.

The study agrees that a denial of access to education includes physical barriers such as staircases to classrooms, offices and hostels and these amounts to exclusion and discrimination on the basis of disability.¹⁶⁴ Christopher from CUEA has experienced these barriers, 'Most offices do not have ramps, the pathways also have stairs, and it's a case of inaccessibility in the whole University'.¹⁶⁵ The study adopts the view that it's one thing to be unable to walk, but it's more frustrating to be unable to enter a building unassisted because the architect preferred stairs to ramps.¹⁶⁶ The social model of disability advocates for removal of such barriers as staircases.

Two Universities involved in the research i.e. USIU and KU had a policy that in offices where there are no ramps or lifts, the students be served from down stairs. The practice is that once a student reports downstairs, then the relevant office is notified and the concerned officer comes downstairs to serve the student. This is however only in theory. Walter from KU finds himself solving issues of non compliance, 'I am now from solving an issue where the student was kept downstairs for too long before being served'.¹⁶⁷ The study adopts the view that such practices are also a form of exclusion.¹⁶⁸ As Edgar from KU points, 'That policy does not work; I cannot access the offices of the dean of my school. It's on 1st floor and there are no ramps or lifts. I have to send other students'.¹⁶⁹ This also wastes time for the students. According to Isabella from KU, 'Where the policy is you be served from downstairs, it usually takes a lot of time'.¹⁷⁰ According to Lucy, the same policy exists in USIU, 'The same policy exists here, the office of the registrar

¹⁶⁴Bukola (n118) 459.

¹⁶⁵ Interview with Christopher, student, 5 July 2013.

¹⁶⁶Samaha (n72) 12.

¹⁶⁷ Interview with Walter, University official, 4 July 2013.

¹⁶⁸ Diane Schwartz, *Including Children with Special Needs: A Hand Book for Educators and Parents* (Greenword Press 2005) 5.

¹⁶⁹ Interview with Edgar, student, 7 August 2013.

¹⁷⁰ Interview with Isabella, student, 4 July 2013.

is inaccessible and we are served from downstairs, it takes time though'.¹⁷¹ Barriers should be removed rather than finding ways of going round them.

According to Gilbert, these policies of serving students from downstairs where there are physical barriers are non-existent in UON. 'I cannot access most offices as they are upstairs'.¹⁷² In CUEA, Christopher confirms that students also have to find their ways around the barriers 'It's a problem for me to access most offices; I have to get assistance from friends to go up the stairs.'¹⁷³

In some other cases lecture halls are changed for more compliant ones, As Gabriele from KU confirmed, 'Where classes are in an inaccessible building we complain and the classes are moved to an accessible place'.¹⁷⁴ This practice may not be possible in UON main campus which has older buildings and where most lecture halls either have staircases at the entrance or lifts which are too narrow for wheelchair users. This may explain the few numbers of students with physical disabilities in the campus.

The PDA specifically provides that the relevant ministries, departments of Government and the local authorities shall from such date as the Minister may by notice in the gazette, ensure provisions of suitable ramps in all buildings and adaptation of all public toilets to wheelchair users and other PWDs.¹⁷⁵ It is notable that again this provision does not take place immediately. This provides a situation where rights only exist in paper.

All students of KU interviewed had no issues with transport from one place to another. According to Isabella, KU provides transport within campus for PWDs, 'There are always tuk tuks to pick us and take us to class or library'.¹⁷⁶ Lack of transport is an inconvenience for most students with physical disabilities in other Universities. All students from the UON complained about transport. According to Henry this restricted his movement, 'If I have a class in the morning, I wait in main campus for the other class in the late afternoon, the distance to the hostels and back is too much for me. I haven't spotted anyone in a wheelchair here, it would be

¹⁷¹ Interview with Lucy, student, 26 July 2013.

¹⁷² Interview with Gilbert, student, 16 May 2013.

¹⁷³ Interview with Christopher, student, Nairobi, 5 July 2013.

¹⁷⁴ Interview with Gabrielle, student, 26 July 2013.

¹⁷⁵ Persons with Disabilities, (Access to Employment Services and Facilities) Regulations 2009, para15.

¹⁷⁶ Interview with Isabella, student, 4 July 2013.

too much for them as the place is not conducive'.¹⁷⁷ All Universities should provide transport within campus as a matter of right for all PWDs. According to Henry of UON, the distance from classes and hostels is an issue, 'My Problems is distance from the halls to class, it's too far and there are stairs everywhere. At the end of the day I am too exhausted. The University needs to invest in a Tuck Tuk for the sake of all PWDs'.¹⁷⁸

In UON's Kikuyu campus there has been an attempt to improvise ramps where there are stairs, but ramps are too steep, this may explain the absence of persons with physical disabilities in the campus. The same case applies to UON Parklands Campus. According to Gilbert, 'The ramps which are present are very steep; The University should contract with professionals especially architects who know how to design a standard ramp for wheel chair and caliper users'.¹⁷⁹ Rule 5 of the Standard Rules underline this fact very well; the Rules provide that measures to improve physical accessibility include measures to ensure architects have access to adequate information on disability policies and measures to ensure accessibility.

According to Gilbert of UON the inaccessibility is a great inconvenience for all students with physical disabilities, 'I face many challenges as a result of accessing all places in the environment as it is'.¹⁸⁰ Universities with older buildings on their campus have problems making them accessible. According to Isabella, 'At UON, the compound has stairs everywhere, all hostels have stairs, and consideration should be given to converting one side of the stairs to ramps'.¹⁸¹ This findings reinforce the position that having buildings that are only accessible to able bodied people is a discriminatory practice.¹⁸² Universities that have had the advantage of having recent buildings have a large number of accessible buildings, these include USIU and KU.

In regard to hostels, KU provides non storied hostels for its students, 'I am comfortable in the hostel, there are disability compliant toilets, I cannot complain'.¹⁸³ However 25% of the students interviewed still had issues. Edgar stated 'The doors to the hostels are not wide enough for my

¹⁷⁷ Interview with Henry, Student, 18 August 2013.

¹⁷⁸ *ibid.*

¹⁷⁹ Interview with Gilbert, student, 16 May 2013.

¹⁸⁰ Interview with Gilbert, student, 16 May 2013.

¹⁸¹ Interview with Isabella, student, 4 July 2013.

¹⁸² Harris (n79) 77.

¹⁸³ Interview with Maria, student, 19 July 2013.

wheel chair to pass through. The beds are too high. The room is too narrow for me to turn with my wheelchair. The tank outside is cemented and the clothing line is inaccessible'.¹⁸⁴ In UON there were complains also from students. 'The hall where I am housed does not have a ground floor; it's a pain for me to go up the stairs every time'.¹⁸⁵ CUEA has no hostels within its campus. 'There are no hostels within campus, they are a distance away and quite expensive for my case. I commute everyday from a nearby town. I have raised an issue with the management on the need to have hostels within campus for PWDs. However nothing has been done'.¹⁸⁶ In USIU hostels are within a reasonable distance. 'We accommodate students with disabilities on the ground floor'.¹⁸⁷

For Carlos of KU, facilities such as desks were also an issue. 'The desks are too narrow and were designed for students with both hands; there is no space for me to write'.¹⁸⁸ These sentiments were also shared by Pauline of UON, 'The desks were all left handed and I struggled a lot to find a desk that I could use'.¹⁸⁹

Students of KU expressed a level of satisfaction. 'Apart from a few issues of access, I am comfortable at KU'.¹⁹⁰ The same case applied to students of USIU, 'I have no complains that arise from the school environment'.¹⁹¹ The two Universities have had the advantage of having new buildings which are compliant with lifts, ramps and wide doors and disability compliant toilets.

5.2 Libraries

The CESCRC provides that access to education requires availability of facilities such as libraries.¹⁹² The Preamble to the CRPD provides that accessibility of the physical environment including libraries is important in enabling PWDs realize their right to education. Access to the library is very important for any student. However persons with physical disabilities had several

¹⁸⁴ Interview with Edgar, student, 7 August 2013.

¹⁸⁵ Interview with Henry, student, 18 August 2013.

¹⁸⁶ Interview with Christopher, student, 5 July 2013.

¹⁸⁷ Interview with Wilson, University official, 26 July 2013.

¹⁸⁸ Interview with Carlos, student, 12 July 2013.

¹⁸⁹ Interview with Pauline, student, 9 September 2013.

¹⁹⁰ Interview with Maria, student, 19 July 2013.

¹⁹¹ Interview with Lucy, student, 25 July 2013.

¹⁹² CESCRC, Comment No. 13, para 6a.

complains about inaccessibility. For Christopher of CUEA, an inaccessible library affected his school work and performance,

The library was constructed one year ago; the lifts are still not functional. The important books are on 1st floor. I have not been able to access the library for one year. The problem is that when the library was built, we were there they could see us. We have complained about it and still it's like no one cares. I am now doing my project but I cannot access materials in the library and can only rely on the internet. This will affect the quality of my work. My assignments have to be given on time as those of other students. Yet I cannot access the first floor of the library where commerce books are. I can send the staff for the books but when I look at the content they are not relevant. I need to be present at the shelf to choose the books that I want.¹⁹³

According to Hanafin this partial inclusion constitutes exclusion.¹⁹⁴ The study agrees with his view that these barriers have a negative effect on the achievement of students with physical disabilities. He argues that since students are assessed under pressurized and demanding examination conditions, barriers get in the way of their performance.¹⁹⁵ It's notable that in this case the lift has been constructed but has not been functional for over a year. According to Wallace, 'It's the commissioning that has delayed the processes'.¹⁹⁶ UON's Parklands School of Law library is also inaccessible. According to Gilbert,

I cannot access the basement and 1st floor of the library. There are no ramps at the entrance. I have to rely on the assistance of other students to get to the library as there is no ramp at the entrance. The library staff convinced me that plans were underway to install a ramp and lift in the library. Two years down the line; this is yet to be done.¹⁹⁷

This statement reinforces the position that physical barriers make students dependent on others; limit opportunities for experience and lower self esteem.¹⁹⁸ This is a violation of the right to dignity of PWDs which is provided for in the Article 28 and 54 (1) (a) of the Constitution. Such

¹⁹³ Interview with Christopher, student, 5 July 2013.

¹⁹⁴ Hanafin (151) 440.

¹⁹⁵ *ibid.*

¹⁹⁶ Interview with Wallace, University official, 23 August 2013.

¹⁹⁷ Interview with Gilbert, student, 16 May 2013.

¹⁹⁸ Ngundo (n70) 20.

cases of inaccessibility of important buildings for some students are exclusionary. It is also against the social model of disability which calls for removal of barriers. This shows the Universities reluctance to recognize the urgency of implementing inclusive measures

The findings indicate that students are being offered a model of assisted access to a system that includes barriers to their participation which should instead be removed.¹⁹⁹ This amounts to discrimination on the basis of disability. It is a violation of the inherent dignity and worth of every human person. In the Australian case of *Grahil vs. State of New South Wales*,²⁰⁰ a student was in a wheelchair. Her mother would walk with her to school every day and access the school through a side entrance. Once the sidewalk was closed the two had to travel for a longer distance to the front gate to gain access. The court held that this was discrimination. It treated the student less favorably than the able bodied students. Other students had a variety of alternatives to use to access the school. Minor repairs could have remedied the situation.

According to Maria, the library at KU is accessible to persons with physical disabilities. ‘I have no issue with the library. There are ramps at the entrance. The lifts are wide enough for my wheel chair to pass and turn. There is space for me to pass between the book shelves’.²⁰¹ Gabrielle is also comfortable with the library at USIU. ‘The library entrance has ramps. The lifts are wide enough for users with wheelchairs to enter and turn. There are disability compliant toilets. The distance between the bookshelves is wide enough for wheelchair users’.²⁰² The CUEA library only exclusion is that the lift is not working. The three Universities have the advantage of having new libraries which have been constructed in the past two years. UON library is also compliant as it has a ramp at the entrance, however disability compliant toilets are missing and the lift is too narrow for wheel chair users. UON does not have the benefit of having a new building.

Article 20 of the CRPD requires states to facilitate the personal mobility of PWDs in the manner and at the time of their choice and at an affordable cost. For Christopher from CUEA the distance to the library was an issue for access. ‘The library is about 800m away from the classes.

¹⁹⁹Tinkin and Hall (n57) 183.

²⁰⁰Marita Murphy and Burkhand Grahil on behalf of themselves and Sigh Grahil vs State of New South Wales ,2000 HREOC 27 March 2000

²⁰¹Interview with Maria, Student, 19 July 2013.

²⁰² Interview with Gabrielle, student, 26 July 2013.

The pathways have stair cases and are uneven. It's a pain to get to the library'.²⁰³ The area occupied by some Universities is quite large. This makes distance to places is an issue for persons with physical disabilities. Maria confirms that KU provides transport for its students. 'I only need to call a driver of a Tuk Tuk. He will then drop me at the entrance of the library'. Transport within the campus is a necessary measure that every University that has admitted PWDs needs to take seriously. Distance to places is an inconvenience for physically disabled students. For Henry of UON lack of transport limits his mobility. 'I cannot leave the hostels just to go to the library; the distance is too much for me'.²⁰⁴ The USIU library is within a reasonably short distance from classes and hostels.

The Draft Commission for University Education Standards and Guidelines 2013 provides now that library building shall be convenient for all users including users with special needs.²⁰⁵ Once the rules are passed, accessibility of libraries may no longer be an issue. Universities will have to ensure all their libraries are accessible in order to be accredited. The guidelines however are not clear on what constitutes access for persons with physical disabilities at a minimum.

6.0 Choice of Subjects

The interviews also sought to establish whether student choice of courses was restricted by the Universities. States are urged to respect their obligations to respect the rights of PWDs to education.²⁰⁶ One way of respecting this obligation is to ensure student's choices of subjects are not restricted on the basis of their disability.²⁰⁷ The CRPD Preamble recognizes the importance for PWDs of their individual autonomy and independence. This includes the freedom to make their own choices. According to Isabella of KU, there were restrictions on the choice of subjects, 'The JAB always restricts students with disabilities to do special needs education. Interfaculty transfers take a lifetime.'²⁰⁸ 90% of all students interviewed by the researcher in KU were in the school of education, and particularly special needs education. When consulted about this issue, the JAB stated that the issue is now being addressed. 'We refer the students to the school in

²⁰³ Interview with Christopher, student, 5 July 2013.

²⁰⁴ Interview with Henry, student, 18 August 2013.

²⁰⁵ Commission for University Education, Draft Commission for University Education Guidelines 2013. (n163) para 6.

²⁰⁶ Monitoring the Convention on the Rights of Persons with Disabilities (n68).

²⁰⁷ *ibid.*

²⁰⁸ Interview with Isabella, student, 4 July 2013.

which they want to do their course, and they then have a chance to decide whether it is possible for them to do the particular course that they have chosen'.²⁰⁹ Students' choice of subjects should not be restricted. According to the social model of disability, it is the barriers that hinder students from taking one particular course or another that should be removed.

7.0 Exam Arrangements

The questionnaire also sought to establish whether the needs of students in examinations were being taken into account. Section 18 (2) of the PDA requires learning institutions to take into account the special needs of PWDs with respect to examinations. The study adopts the view that Universities can be measured on compliance with inclusion by having arrangements in place for addressing PWDs needs in examinations.²¹⁰ This is however not the case for all students. Gilbert of UON needs in examinations are not addressed. 'If you have a disability that affects your speed, you are not given extra time during examinations. I personally have bladder problems but I am not given extra time'.²¹¹

Findings reinforced the position that PWDs often have to spend unnecessary time and energy in accessing inaccessible buildings.²¹² Christopher of CUEA experience sheds more light on this. 'This consideration is not given during exams, If I need to go to the compliant restroom, it is a distance away and there are staircases on the way, yet I do not get more time.'²¹³ This is against the theory of justice which allows inequalities as long as they seek to benefit the least well off.²¹⁴ According to Walter, KU has put measures to ensure that students are given more time, 'Any student with physical disabilities who needs extra time makes an application. The registrar then refers him to the University physiotherapist. The physiotherapist decides the extent of the disability and how much more time they require. This is because unlike students with visual or hearing disabilities who can be given a blanket time, some students with physical disabilities do not need extra time.'²¹⁵ In USIU this consideration is granted upon request. Lucy confirms this.

²⁰⁹Interview with Morrison, JAB, 11 July 2013.

²¹⁰Tinklin, Riddell and Wilson (n30).

²¹¹ Interview with Christopher, student, 16 May 2013.

²¹²Hanafin, Sherlin, Kery, and MC Neela (n151) 440.

²¹³ Interview with Christopher, student, 5 July 2013.

²¹⁴Rawls (n80) 53.

²¹⁵ Interview with Walter, University official, 4 July 2013.

'I am always given extra time as I am slower than other students'.²¹⁶ All Universities should have a procedure in place for students to request for extra time.

8.0 Incurring Extra Finances and Spending More Time on Tasks

The interviews sought to establish whether students incurred extra finances and spent more time on tasks. The failure to comply with the social model of disability means that PWDs are faced with an environment which is not easy for them. Experiences of students confirmed the view that PWDs generally spend more money than their counterparts and face general frustrations.²¹⁷ Christopher of CUEA spends extra finance because of barriers, 'Some environments may look normal to other people, but that uneven pavement, and that one step at the entrance to class causes a lot of damage to the wheel chair. I have to replace my wheel chair every year'.²¹⁸ Maria of KU has a similar experience, 'The pathways are bumpy and have spaces; I have to take my wheel chair for service often because of this'.²¹⁹ Other costs arise due to lack of differential instruction by lecturers such as not giving handouts or soft copies, 'I am slow in writing and I have to photocopy most papers'.²²⁰ HELB does not give students with disabilities extra financing in the area of assistive devices.²²¹

The findings confirmed the view that environmental barriers may mean that persons with physical disabilities will get poor grades.²²² This is because they have to spend more time on simple tasks such as going up the stairs and using restrooms. Gilbert of UON, confirms that this fact is depressing, 'I take too much time to access the library and classes; this is so depressing especially during exam time'.²²³ The view that these issues of restricted access amount to exclusion and discrimination as the majority of students are not affected is very relevant to this study.²²⁴ A denial of access to education by placing physical barriers such as staircases to classrooms and library is discriminatory.

²¹⁶ Interview with Lucy, student, 26 July 2013.

²¹⁷ Fuller (n12) 455.

²¹⁸ Interview with Christopher, student, 5 July 2013.

²¹⁹ Interview with Maria, student, 19 July 2013.

²²⁰ Interview with Christopher, student, 5 July 2013.

²²¹ Interview with Silas, HELB, 20 July 2013.

²²² Fuller (n12) 455.

²²³ Interview with Gilbert, student, 16 May 2013.

²²⁴ Bukola (n118) 459.

Desleighde identifies five important criteria which the study agrees with to enhance accessibility.²²⁵ Laws; standards and regulations that detail the whole process of construction and assembly of buildings; monitoring process to ensure that action is taken; a process of making complaints against discrimination post construction thus monitoring inaccessibility; and lastly a process of legal action to caution the society on the consequences of violation of the rights of PWDs.²²⁶

9.0 Financial Resources and Immediate Realization

The law is crucial in achieving inclusive education. It must however be combined with other strategies including appropriate and adequate funding.²²⁷ The study adopts the view that lack of financial commitment to support PWDs is a major challenge to inclusion.²²⁸ The CESCR interprets Article 2 (2) of the ICESCR to mean that ‘States have immediate obligation in relation to the right to education such as the ‘guarantee’ that the right, ‘will be exercised without discrimination of any kind’.²²⁹ The minimum core obligation that must be ensured at the very least in regard to education is the right of access to public educational institutions and programmes on a non discriminatory basis.²³⁰

According to the CESCR, ‘The prohibition of discrimination enshrined in Article 2(2) of the Covenant is subject neither to progressive realization nor the availability of resources. It applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.’²³¹ Students’ complains are met with responses on budgetary constraints, ‘Anytime I raise an issue of inaccessibility of the school environment, I am informed that the budget is closed’.²³² This is against the law. Discrimination against PWDs should be eliminated immediately; the word guarantee draws the conclusion that discrimination should be eliminated immediately.²³³ The Limburg principles state that article 2(2) of the ICESCR calls for

²²⁵ Chalwe and Desleighde (n53) 920.

²²⁶ *ibid.*

²²⁷ Ann Basser, ‘Justice for All: The Challenge of Realizing the Right to Education for Children with Disabilities’ (2004) 8 *Gender Race and Justice* 531.

²²⁸ Kochung (n63) 148.

²²⁹ CESCR, Comment No.13 para 43.

²³⁰ *ibid* Para 57.

²³¹ CESCR, General Comment No 13, para 31.

²³² Interview with Christopher, student, 5 July 2013.

²³³ Mathew Craven, *The International Covenant on Economic Social and Cultural Rights: A perspective of its Development* (Clarendon Press Oxford 1995) 181.

immediate application and involves explicit guarantee on behalf of the state parties.²³⁴ There is no justification for introducing new legislation or administrative practices that are discriminatory.²³⁵

It's worthwhile to note that the Article 21(3) of the Constitution holds that all SECRs are progressive and subject to availability of resources. The minimum core content for enforcement is not also provided for.²³⁶ Section 11 of the PDA provides that the Government shall take steps to the maximum of its available resources with a view to achieving the full realization of the rights set out in the Act. This has led to issues of non discrimination of PWDs in provision of a right or benefit being treated as provision of a SECRs. In *Kenya Society for the Mentally Handicapped vs. Attorney General and others*,²³⁷ the petitioner brought a case alleging that SECRs of persons with mental disabilities had been violated by failure to make policies by the second respondent, NCWPD and the third respondent, the Minister for Education. This is a clear case of discrimination on the basis of disability in provision of rights. It was treated by the petitioners and the courts as a claim for provision of SECRs. Realization of these rights is dependent on availability of recourses. The Court therefore failed to grant a remedy.

One therefore has to fall back to the ICESCR, where measures that constitute discrimination and provision of reasonable accommodation are realizable immediately.²³⁸ The study agrees with the view that obligations that are immediate in international law should also be held to be so under domestic law.²³⁹ In *Supreme Court of Kenya Reference No. 2 of 2012*,²⁴⁰ The Attorney General sought an advisory opinion on whether the requirements of Article 81 (b) of the Constitution required to be implemented before the General election of March 2013. The Article provides that not more than two thirds of members of elective public bodies shall be of the same gender. The majority of the judges of the Supreme Court held that it's not only SECRs that require progressive implementation. They held that it is the inherent nature of the right that determines its mode of realization. In this case the state had to introduce a wide range of measures and affirmative

²³⁴The Limburg Principles on the Implementation of the International Covenant on Social Economic and Cultural Rights, para 35.

²³⁵Craven (n233).

²³⁶Basser (n227) 559.

²³⁷Nairobi Petition No. 155A of 2011 (unreported).

²³⁸ CESCR, General Comment No. 13, para 37.

²³⁹Kamundia (n53) 73.

²⁴⁰Supreme Court of Kenya, Reference No. 2 of 2012.

action programmes to realize this right. Further it was observed that immediate realization would lead to a situation where the organs of the National Assembly and the Senate would be declared unconstitutional in the next parliament.

Justice Mutunga in his dissenting opinion noted that there is no reason why a Constitution that decrees non discrimination would allow progressive realization of this right. He went further went on to state that immediate realization of non discrimination is reinforced by the values of patriotism, equity, social justice, human rights, inclusiveness and equality. The case is distinguishable from the case of discrimination of PWDs. The inherent nature of the two rights is different and the study adopts Justice Mutunga's dissenting opinion for the current case of discrimination against PWDs. The reason is that the requirement herein is for provision of reasonable accommodation which the study agrees requires measures that are 'reasonable' and that will not impose an 'undue and disproportionate burden' according to section 2 of the CRPD. It is then clear that in the elimination of discrimination against PWDs in Universities, Universities recourses will be taken into account and they will not be required to undertake measures that are beyond their resources.²⁴¹ A cost benefit analysis will be necessary which will take all circumstances into account.²⁴² The Court will need to satisfy itself that the inaction in a particular case is not due to negative attitudes.²⁴³

In so far as some measures such as adapting buildings to the physically challenged require time and resources. These timelines should be specific and time bound to prevent a situation where rights exist in paper. This is due to the fact that since the PDA was enacted in 2003, no significant change has been seen in most University buildings. Even as the NCWPD is encouraged to take its enforcement role seriously, CUE should also come up with agreeable timelines in consultation with the Universities.

Public Universities are semi autonomous while private Universities are completely autonomous is so far as finance is concerned. According to Walter of KU, 'The University does have a wide range of choice on how the money allocated as capitation by the Government and what is

²⁴¹ Crook, Ernest & McCallum (n49) 749.

²⁴² Martel (n48) 106.

²⁴³ Crook, Ernest & McCallum (n49) 743.

collected in terms of fees in the University is used'.²⁴⁴ Private Universities also have a wide choice on how to spend resources. Simon of CUEA confirms this, 'The budget is deliberated by the budget committee before being forwarded to the University Council for approval'.²⁴⁵

The PDA provides for a Fund which shall provide financial assistance to Universities, incentives to other institutions of higher learning, professional bodies and non-governmental research units or institutions for undertaking research for special education, rehabilitation and manpower development.²⁴⁶ This again like other provisions of the PDA exists only in paper.

Section 54 of the Universities Act establishes the Universities Fund. The objects and purpose of the fund shall be to provide funds for financing Universities. According to Section 54 (1) (d), the Board of Trustees for the fund is comprised of nine members including six persons who have proven knowledge and experience in financial matters. According to Section 54 (2) (2), in choosing the six persons the cabinet shall have regard to inclusion of PWDs, minorities and other marginalized groups. The fund according to section 54 (4) (a) shall advise the Cabinet Secretary in matters of University education, funding and related policy issues. The recommendation is that the members of the Board of Trustees include a PWD who is aware of the plight of PWDs in the Universities. This will ensure allocations towards inclusive education are well taken care of.

10.0 Awareness Raising

The study sought to establish the levels of awareness with regards to disability within the four Universities. Article 8 of the CRPD provides that state parties undertake to adopt immediate, effective and appropriate measures to raise awareness. In addition Article 8 (2) (b) provides that measures to this end include fostering at all levels of the education system, including all PWDs from an early age an attitude of respect for the rights of PWDs. Awareness raising is one form of enhancing rights of PWDs.²⁴⁷

According to Harris, barriers to access to education may also include barriers such as stigma, fear, disgust, disregard and assumptions about an impaired person's inability to succeed.²⁴⁸ The

²⁴⁴Interview with Walter, University official, 4 July 2013.

²⁴⁵ Interview with Simon, University official, 5 July 2013.

²⁴⁶Persons with Disabilities (Access to Employment, Services and Facilities) Regulations 2009,Rule 9 (1).

²⁴⁷Kamundia (n53) 73.

²⁴⁸ Harris (n29) 11.

study agrees with his view that before any legal rule can result to inclusive education, the whole community needs to be educated about PWDs including their right to be treated with dignity. He also rightly argues that the main way of changing attitudes is awareness training. Isabella a student at KU confirmed that attitude was an issue, ‘There is still so much to do regarding attitudes, everyone needs to treat us like human beings’.²⁴⁹ KU has especially made progress in awareness creation. ‘The University has a disability day in which the whole University community is sensitized on disability issues. Able bodied students are asked to use wheelchairs or blind folded in order to understand the situation of PWDs’.²⁵⁰

Harris sheds more light on what disability awareness should entail.²⁵¹ He rightly states that disability awareness trainings helps everyone to review their attitudes towards PWDs. It also brings awareness to what changes they each need to make to overcome barriers that exclude PWDs from participation in the school environment. He states that it’s about starting with what is possible in terms of attitudes. His view is that training and awareness should include PWDs and non disabled people to find workable ways of putting principles into action. He reiterates that awareness helps in identifying ways for non disabled people to support PWDs not just because it is the right thing to do but because it’s the human right of PWDs to be included in the school environment.

According to Maria of KU, ‘A lot is needed in the area of awareness. Most people treat me like someone who always needs help and assistance even when this is not the case’.²⁵² The Australian case of *Hoggan vs. the State of New Wales*²⁵³ case emphasizes the importance of disability awareness in a school setting. In this case the education authority was fined for the suspension and exclusion of a student with a disability. An important component of the decision in this case was that the principal and or the education authority had failed to provide teachers with disability awareness programmes to avoid stereotyping and assumptions.

The study adopts Onyango’s view that one way of implementing the rights of PWDs is by sensitizing the whole University community into taking responsibility for and owning the

²⁴⁹Interview with Isabella, student, 4 July 2013.

²⁵⁰Interview with Anthony, University official, 19 July 2013.

²⁵¹Harris (n29) 28.

²⁵² Interview with Maria, student, 19 July 2013.

²⁵³ 2000 HREOC.

process of ensuring full inclusion of PWDs into all aspects of the school community.²⁵⁴ He adds that the important step in realizing rights lies in expanding peoples understanding of the rights of PWDs.

Rule 19 of the Standard Rules encourages states to develop training programmes in consultation with organizations of PWDs. PWDs should be involved as teachers, instructors or advisers in staff training programmes.²⁵⁵

11.0 Reasonable Accommodation within Universities

Article 24 of the CRPD recognizes that reasonable accommodation is necessary to eliminate discrimination and ensure equality against PWDs and also ensure inclusion. Reasonable accommodation for PWDs requires the state to directly remove barriers to education as not doing so amounts to discrimination on the basis of disability.²⁵⁶ Reasonable accommodation of PWDs ensures equality, non discrimination and inclusion of PWDs in society.

It is worth noting that although the right to inclusion, non discrimination and equality is protected in international, regional and municipal level. There is no specific legislation that protects the rights of PWDs in Universities.²⁵⁷ The first step is to have a comprehensive legal framework on what constitutes reasonable accommodation in Universities. The standards should cover at a minimum physical access, communication access (sign language & Braille) and social access (to peers) and economic access (affordability). Legislation should expressly forbid discrimination against PWDs in Universities.²⁵⁸

Reasonable accommodation presupposes provision of what is practicably achievable within educational institutions. This is based upon the recourses available, not changes that are impracticable.²⁵⁹ In the Australian case of *Finney vs. the Hills Grammar School*²⁶⁰ the school claimed that they would not be able to accommodate a student with physical disabilities. This

²⁵⁴Onyango (n50) 19.

²⁵⁵ Standard Rules, Rule 19.

²⁵⁶Biegon (n79) 18.

²⁵⁷Belank Bernarn, Bekink Mildred, 'Children with Disabilities and the Right to Education: A Call for Action' (2005) 16 Stellenbosch Law Review 125.

²⁵⁸ Heinz Dietrich Steinmeyer, Legislation to Counter Discrimination Against Persons with Disabilities (n127)

²⁵⁹Hodkinson and Vickerman (n143) 130.

²⁶⁰Finney vs the Hills Grammar School (1999) AREOC 20 July 1999.

would include extensive renovations to the school buildings and pathways. The issues raised by the school were cost, alternate schools would admit the student and the admission to the school was not in the student's best interests. It was held that borders between reasonable accommodation and an unjustified hardship were not clear. The process required a comprehensive process of weighing indeterminate and largely independent factors and making value judgments which requires a balancing exercise between the benefits and detriment to all parties.

In the Australian case of *Hoggan vs. the State of South Wales Department of Education*,²⁶¹ it was held that in all cases, the educational experience of the student with a disability is highly valued. It is the most important consideration in determining whether the costs of any accommodation are reasonable or whether it may cause unjustified hardship. Reasonable accommodation depends on each particular case. The United States case of *US Airways Inc vs. Bartlett* is particularly relevant in this regard.²⁶² It was held that a modification or adjustment is reasonable if it seems reasonable on the face of it. Further it must also meet the needs of the individual. Reasonable accommodation allows a person with disability equal opportunity to enjoy the benefits and privileges of education that those without disability enjoy. The South African case of *Government of South Africa vs. Grootboom*, related to housing. The plaintiff sought that the state ought to provide housing as per the Constitution. It was held that the principle of reasonableness requires that consideration be given to the needs of the most disadvantaged in the fulfillment of SECRs.²⁶³ Measures though successful fail the test of reasonableness if they fail to respond to the needs of those most desperate.

12.0 A Rights Based Approach to Inclusion

The main principles of a rights based approach are participation, accountability, non discrimination, empowerment and linkages to human rights standards.

Accountability as one of the principles requires a mechanism for PWDs to hold duty bearers accountable for the realization of their rights.²⁶⁴ The Human Rights Council urges that legislation

²⁶¹ Alex Purvis on behalf of Daniel Hoggan vs The State of South Wales Department of Education 2000 HREOC.

²⁶² 535 US 391 2002.

²⁶³ 2000 ZACC 19.

²⁶⁴ Onyango (n50) 18.

should, identify duty bearers, confer rights on individuals and groups to raise allegations of discrimination on the basis of disability, have those claims investigated and have access to appropriate remedies.²⁶⁵

Onyango advocates that in a University situation, there needs to be an established Individual complaints mechanism for PWDs to claim their rights.²⁶⁶ The study adopts his view that ownership of the problem is left to the empowered individual to claim their rights. It's worth noting that in the three Universities, CUEA, UON and USIU, disability is dealt with by the dean of students. KU has separated the Directorate of Disability Services from the Dean of Student's offices. According to Walter of KU, 'The Dean of Students has too many issues. It's an academic department that handles the issues of all students and this slows down things. I am now from solving an issue where the student was kept downstairs for too long before being served'.²⁶⁷

In cases where the students have taken it upon themselves to raise issues of discrimination or inaccessibility, this has largely failed. Christopher of CUEA's experience demonstrates this, 'Most offices do not have ramps, since my impairment is not so severe, I have gone to the offices of the Dean and the Vice Chancellor Academics. I asked my friends to help me up the stairs just to complain about the state of inaccessibility in the whole University. That was two years ago but nothing has been done'.²⁶⁸ Having a PWD to champion the cause of PWDs is recommended. According to Sarah of UON, 'In my view, PWDs in the Universities need one of them to fight for them'.²⁶⁹ The Directorate of Disability Services in KU deals with cases of accommodation, linking up students with organizations that could help them and generally all issues of welfare of PWDs. Other students in the Universities do not know who to turn to enforce their rights. Christopher of CUEA confirms this, 'On the issue of extra time during exams, I have even gone to the dean and he just referred me to higher offices'.²⁷⁰

The study agrees with Onyango that another method which would ensure PWDs fight for their rights is that the Universities play an ongoing role by addressing discrimination which cannot be

²⁶⁵United Nations Human Rights, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities. (n70).

²⁶⁶Onyango (n50) 18.

²⁶⁷ Interview with Walter, University official, 4 July 2013.

²⁶⁸ Interview with Christopher, student, 5 July 2013.

²⁶⁹ Interview with Sarah, University official, 21 August 2013.

²⁷⁰ Interview with Christopher, student, 5 July 2013.

addressed simply through antidiscrimination processes.²⁷¹ He advocates for a partnership between the Universities and PWDs where guidelines are made for enquiries into the problem areas of discrimination. In this case all interests and needs of all stakeholders will be taken into account in finding a solution for the protection of rights of PWDs. This will involve active free and meaningful participation.

A rights based approach integrates the standards and principles of international human rights system into plans, policies, procedures and processes of Government.²⁷² The standards should inform education programmes. Disability policies and plans should align themselves with international law.

Empowerment requires that PWDs know, claim and defend their rights.²⁷³ In this case there is a requirement for PWDs to lobby through their student organizations or form themselves into organizations for PWDs to fight for their rights. It is also necessary to lobby through already registered national organizations for PWDs for the enforcement of their rights. The last alternative is for PWDs to seek legal redress through the courts for the violation of their rights to inclusion, non discrimination and equality. This could be done through organizations for PWDs. Non discrimination recognizes the importance of ensuring protection of vulnerable groups in society including PWDs. It promotes inclusive education.

13.0 Disability Policies and Statements

The study sought to establish whether Universities had clearly stated disability policies and plans. The Standard Rules clearly underscore this point, by providing that to accommodate education for PWDs in the mainstream states should have a clearly stated policy, understood and accepted at the school level and by the wider community: Allows for curriculum flexibility, addition and adaptation and provides for quality materials, ongoing teacher training and support services.²⁷⁴ The study reinforces the view that Universities can be measured on compliance by having a disability policy and statement.²⁷⁵

²⁷¹Onyango (n50) 19.

²⁷²Sandkull (n46) 105.

²⁷³ *ibid.*

²⁷⁴The Standard Rules on Equalization of Opportunities for Persons with Disabilities, Rule 6(6).

²⁷⁵Tinklin, Riddell and Wilson (n57).

At present the four Universities included in the research do not have disability policies. CUEA does not have a disability policy.²⁷⁶ The UON Policy is still work in progress and is being used internally only.²⁷⁷ KU is in the process of finalizing the final draft.²⁷⁸ There is no disability policy in USIU.²⁷⁹ According to Wilson, ‘The reasons cited for not launching the disability policy is finance’.²⁸⁰

The study is in agreement with the view that lack of policy means that Universities cannot invest in the elimination of existing barriers such as inaccessible buildings and resource barriers.²⁸¹ The University of Sydney for example has a Disability Action Plan as the major measure of ensuring inclusion.²⁸² In this plan, the key strategies are put down including the responsible persons for each strategy, the cost burden and timelines for a period of five years is also clearly set out.²⁸³ This enhances ownership and accountability for the process of inclusion. There is need for every University to have a disability policy.

13.0 Representation of PWDs

The Preamble to the CRPD provides that PWDs should have the opportunity to be actively involved in decision making processes about policies and programmes including those directly concerning them. One way of championing PWDs rights is by representation in student organizations and University Management Councils which according to Section 2 of the University Act are the governing bodies of Universities.²⁸⁴ Gilbert is of the view that representation is important, ‘We need representation in Student Organization of Nairobi University to champion our rights’.²⁸⁵ Representations of PWDs who are aware of the situation of PWDs in University Management Councils would help emphasize the urgency and preference of issues requiring resource allocation. Representation in students organizations will enable PWDs have a way of representing their rights to the duty bearers.

²⁷⁶ Interview with Simon, University official, 5 July 2013.

²⁷⁷ Interview with Roselyn, University official, 7 August 2013.

²⁷⁸ Interview with Walter, University official, 4 July 2013.

²⁷⁹ Interview with Wilson, University official, 25 July 2013.

²⁸⁰ Interview with Mark, University official, 20 September 2013.

²⁸¹ Kochung (n90)146.

²⁸² Interview with Allan, University of Sydney, 15 July 2013.

²⁸³ University of Sydney, Disability Action Plan, <Sydney.edu.au/eeo/disability_access/dap/implementation_plan.shtml> accessed 9 August 2013.

²⁸⁴ Kochung (n63) 146.

²⁸⁵ Interview with Gilbert, student, 16 May 2013.

14.0 Role of Ministry of Education

The success of inclusive education will largely depend on aggressive sensitization campaigns. These should be done with a view of enabling all stakeholders in the education sector understand their roles in the provision of inclusive education as it's not the responsibility of the Government.²⁸⁶ Within this Ministry there should be a separate administrative agency responsible for inclusive education within Universities. The study agrees with the view that a separate agency would be very effective at defending specific interests of PWDs.²⁸⁷

Government performance contracting should stress on disability mainstreaming as one aspect of measuring performance. Specific targets need to be set in this area to ensure compliance. In UON, there is a disability mainstreaming committee in every college set up due to requirement of disability mainstreaming as part of performance contracts.²⁸⁸ This team however has clearly not done much considering the case of inaccessibility of the University.

15.0 Conclusion

The level of inclusion depends on the particular University that PWDs attend. Findings indicate that KU and USIU have commendably included persons with physical disabilities in their campuses. These institutions have also had the advantage of new buildings. Students expressed a high level of satisfaction with their school environments. Few aspects of exclusion still existed as some buildings, hostel and pavements were inaccessible. CUEA and UON have been left behind in this area as they have most old buildings in their campuses which were largely inaccessible. More so at UON as USIU has a number of new and compliant buildings. UON had no disability compliant toilets in its buildings. Lifts were too narrow for wheel chair users. There were no ramps to entrances of almost all buildings and classes. Pavements were largely inaccessible as there were stairs all over. In some cases there were no exam arrangements for the students, no enforcement mechanisms for right of PWDs and restriction on choice of subjects. All the Universities involved in the research had not launched their disability plans and statements. There was violation of the law on non discrimination and inclusion creating an environment

²⁸⁶ Lucy Akinyi, 'An Assessment of the Efficiency in the Provision of Inclusive Education in Public Secondary Schools in Rongo District, Migori County Kenya' (MED 2012, Kenyatta University)

²⁸⁷ Hernandez (n9) 508.

²⁸⁸ Interview with Mark, University official, 20 September 2013.

where students were excluded and faced many obstacles in access to education. Chapter three concerns itself with students with visual disabilities.

CHAPTER THREE

INCLUSIVE EDUCATION FOR STUDENTS WITH VISUAL IMPAIRMENTS

1.0 Introduction

We believe that it is never okay to segregate; we don't care if it is complicated, confusing, and expensive or takes a lot of work. It is what we must do for the students that we serve.²⁸⁹

Two and a half months down the line, we are waiting for assistive devices to be procured by the University. When we reported to UON in August 2012, one year ago, we were informed that we had been admitted to study in May 2013 and that the University would prepare for us. The Brochures given to us sometimes in February 2013 also stated that the University would have the assistive devices by the time we reported. It was only after admission in May 2012 when we went to ask for assistive devices that the process of obtaining funds and procurement was started.²⁹⁰

This is an account of a student with visual disability in the UON. This chapter focuses on experiences of persons with visual disabilities and the law. Inclusion of persons with visual impairments requires investments in software, human recourse and assistive devices which can be expensive and which an institution can consider as not bringing a return on investment.²⁹¹ Universities should not focus only on economic progress. The study adopts the view that excluding PWDs because their learning does not give a return on investment challenges their human rights.²⁹² Solomon's account is an example of integration practices being faced by students in place of inclusion. According to the difference principle in a theory of justice, it is just to allocate recourses to favor PWDs not on the basis of economic efficiency, but to ensure a

²⁸⁹ Carolyn Teigland, What Inclusive Education Means for Overall Student Achievement. <[www.edlawcentre.org/assets/files/pdf/issue-special-education/Inclusive Education and Implications for Policy.pdf](http://www.edlawcentre.org/assets/files/pdf/issue-special-education/Inclusive%20Education%20and%20Implications%20for%20Policy.pdf)> accessed 9 August 2013.

²⁹⁰ Interview with Solomon, student, 8th August 2013.

²⁹¹ Harris and Oppenheim (n61) 243.

²⁹² Tesemma (n51) 43.

person's sense of his own self worth.²⁹³ A lot of work is required at the beginning; however Universities do not have a choice but to comply with the law on inclusive education as this is a human right of all PWDs. The study agrees with Holloway's view that not affording PWDs full equality of opportunity is to deny them their rights.²⁹⁴ She goes on to state that implementing inclusive education is also a measure of good practice. She argues that it should be in the interests of a University seeking recognition for good practice to be inclusive. The study adopts her argument that inclusion shifts from seeing impairment as a problem to seeing the education environment as a problem.

According to Wentholt a visually impaired person as per the law has a right to UE.²⁹⁵ He rightly states that an institution that denies him admission is in violation the right to education. He also argues that if however only visual material is used in that University, the law will be of no use in ensuring inclusion for the person. Wentholt's view emphasizes the need for reasonable accommodation measures. It calls for adoption of the social model of disability which argues for the removal of barriers by Universities in order to ensure equality and quality education for persons with visual disabilities. While it's not possible to give the visually impaired sight, the students may be given the ability to enable them do what they want.²⁹⁶

This chapter reports on the experiences of students with visual impairments in four Universities. The chapter also accesses whether Universities are in compliance with the law on inclusive education for persons with visual impairments. The topics to be covered in this chapter are access to assistive devices, libraries, academic assessment and testing, attitude of lecturers, access to information, accessibility of the environment, barriers that cause students to incur extra expenses and spend more time on tasks, restriction on degree courses, representation in organizations for PWDs, recourse allocation and awareness. As will be seen in this chapter once PWDs leave high school and join Universities, their experiences depend on the particular

²⁹³Rawls (n80) 88.

²⁹⁴Holloway (n58) 614.

²⁹⁵KlaartjeWentholt, 'Formal and Substantive Equal Treatment: the Limitations and the potential of the legal concept of Equality' in Titia Loeren& Peter R. Rodrigues (eds), *Non Discrimination Law: Comparative Perspectives.*(Martinus Nishoft Publishers 2001) 49-52.

²⁹⁶Harris (n29) 17.

institution they attend.²⁹⁷ International, regional and municipal obligations have not helped much in inclusion. Recommendations are also given on the way forward.

2.0 Number of Students

UNIVERSITY	NUMBER OF STUDENTS
UON	9
KU	64
CUEA	2
USIU	NONE
TOTAL	75

USIU has no student in this category.²⁹⁸ CUEA has two.²⁹⁹ KU has 64.³⁰⁰ UON has nine.³⁰¹ From the research it emerged that word spreads round among students as to the accessibility or otherwise of the Universities. Miriam of KU, for example based her choice on accessibility. ‘I had to choose KU as I knew the University was accessible for PWDs’.³⁰²

The main practice in most institutions has been that of integration which is to admit students in an unchanged system. This is against the social model of disability and inclusion which require that schools seek to restructure to provide for a wide range of needs and eliminate or reduce barriers to a minimum.³⁰³ UON admitted 5 students with visual impairments in the May 2013 intake. But there are no support services available for the students. USIU on the other hand has not yet admitted this category of students. ‘Our admission form only asks students whether they have physical disabilities; this is because we do not have the required resources yet to be able to serve the other categories of PWDs. The University has not refused to admit anyone though’.³⁰⁴

²⁹⁷ Denise Powell, Merv Hyde, Renee Punch, ‘Inclusion in Post Secondary Institutions with Small Numbers of Deaf and Hard of Hearing Students: Highlights and Challenges’ (2013) *Journal of Deaf Studies and Deaf Education* 1, 8.

²⁹⁸ Interview with Wilson, University official, 25 July 2013.

²⁹⁹ Interview with Simon, University official, 5 July 2013.

³⁰⁰ Interview with Walter, University official, 4 July 2013.

³⁰¹ Interview with Roselyn, University official, 7 August 2013.

³⁰² Interview with Miriam, student, 10 July 2013.

³⁰³ Elias Arramidis, Phil Bayliss, Robert Burden, ‘Inclusion in Action: An In-depth Case Study of an Effective Inclusive Secondary School in the South West of England’ in Peter Hicks and Gary Thomas (eds), *Inclusion Diversity and Education*. (Sage Publications Ltd 2009) 130.

³⁰⁴ Interview with Wilson, University official, Nairobi 25 July 2013.

This is also a form of exclusion which the University is aware of and working towards its responsibility. ‘We are in the process of investing in materials for visually impaired students in the library’.³⁰⁵ Section 18 (1) of the PDA provides that no person or learning institution shall deny admission to a PWD to any course or study by reason only of such disability if the person has the ability to acquire substantial learning in that course. However inclusion is not about the admission of individuals into an unchanged system of educational without extra provision.³⁰⁶ In CUEA for example, the two students admitted came with their assistive devices. Linda came with her own device, ‘I came with my Braille note taker; my colleague has a Braille machine. The University is yet to invest in any supportive devices’.³⁰⁷ This means the students adapt themselves to the system; students who cannot afford assistive devices are therefore excluded. While integration is about whether PWDs are attending school, inclusion ensures they are learning.³⁰⁸ Integration without reasonable accommodation practices has largely failed.³⁰⁹

Some scholars have argued that integration is a pathway to inclusion.³¹⁰ The question then is whether systems need to be changed first and then students admitted or to admit students first and then change the system.³¹¹ Patrick sought admission in the UON with the knowledge of its accessibility, ‘I knew UON did not have the assistive devices but they have to start from somewhere. It is only once students are admitted that they fight for their rights. KU started in the same way’.³¹² There is however agreement that any inaccessible environment is part of exclusion in a mainstream setting. The University should provide essential devices at a minimum before admitting students. To do otherwise is a violation of their right to inclusion and non discrimination.

³⁰⁵ Interview with Vickie, University official, 25 July 2013.

³⁰⁶ Hodkinson and Vickerman (n143) 100.

³⁰⁷ Interview with Linda, student, 23 August 2013.

³⁰⁸ Carolyn Terkland, What Inclusive Education means for overall student achievement (n289).

³⁰⁹ Loper Kelly, ‘Equality and Inclusion in Education for Persons with Disabilities: Article 24 of the Convention on the Rights of Persons with Disabilities and its Implementation in Hong Kong’ (2010) 40 Hong Kong Law Journal 419.

³¹⁰ Jane Mary Tarr, Diana Tsokova, Ulla-Maya Takkunen, ‘Insights into Inclusive Education Through a Small Finnish Case Study of an Inclusive School Context’ 2010 16 (7) International Journal of Inclusive Education 691,701.

³¹¹ *ibid.*

³¹² Interview with Patrick, student, 8 August 2013.

3.0 Entry Requirements

The study sought to establish whether Universities had flexible entry requirements for the visually impaired.

JAB has reviewed the entry requirement for visually impaired students to C plus.³¹³ Some schools have however not relaxed their rules to provide flexible entry requirements for PWDs with disabilities. Solomon of UON lost the opportunity to do his dream course due to this. 'I wanted to do law but the required grade for English is still B plain for all students. I obtained a B minus and lost the opportunity'.³¹⁴ The Council of Legal Education rules provide that for a student to do law, he/she must have attained an overall grade of C plus and a B plain in English.³¹⁵ This requirement locks out a lot of students with visual impairments. 'This is not fair as we write in Braille. The English papers are then transcribed before marking and errors are often made. We do not also have access to most written material like other students. The English grade should be lowered to C plus'.³¹⁶ Jack confirmed this fact, 'I obtained a grade of D plus in mathematics, but after remarking this was raised to B minus. A lot of errors are made when the papers are being transcribed. Last year no student with visual disability made a B plain in English'.³¹⁷

This provision locks out students from one important course in their limited number of choices. 'Our choices are limited as our preference is courses that do not involve calculations and diagrams. The Council of Legal Education needs to consider revising this requirement'.³¹⁸ The World Programme of Action against Disabled Persons is especially relevant in this regard. It provides for increased flexibility in the application to PWDs of any regulation concerning admission.³¹⁹ It would however be important to note that with the grade lowered to C plus, many students will now be able to join the Universities. It is necessary that the Universities be prepared for the numbers.

³¹³ Interview with Morrison, JAB, 11 July 2013.

³¹⁴ Interview with Solomon, student, 8 August 2013.

³¹⁵ The Council of Legal Education Act, Chapter 16A, First Schedule (Postgraduate Diploma, General Provisions)b (ii)

³¹⁶ Interview with Solomon, student, 8 August 2013.

³¹⁷ Interview with Jack, student, 16 June 2013.

³¹⁸ Interview with Solomon, student, 8 August 2013.

³¹⁹ World Programme of Action against Disabled Persons, Adopted by the United Nations General Assembly at its 37th Regular Session on 3rd December 1982, Res/37/52:1 Para 121.

4.0 Access to Assistive Devices

The questionnaires also sought to establish whether Universities provided assistive devices to students with visual disabilities. Article 7 of the Constitution provides that the state shall promote the development and use of indigenous languages, Braille and other communication formats and technology accessible to PWDs. In addition Article 54 provides that PWDs are also entitled to Braille or other appropriate means of communication and to access materials and devices to overcome constraints arising from the person's disability.

The term assistive technology refers to a range of devices designed to increase, maintain or impose the functional capabilities of PWDs.³²⁰ The devices give PWDs the chance to compete on an equal footing with others.³²¹ It is necessary to ensure that support services including assistive devices are available for PWDs to assist them to increase their level of independence in their daily living and to exercise their rights.³²² The CESCR provides that necessary equipment and support should be available to bring PWDs up to the same level of education as their non disabled peers.³²³ The findings established that as a result of the limited if not unavailable material recourses, PWDs are being included in regular schools without support. In most cases the inclusion programmes fail to take place because of lack of the required support that makes inclusion successful. This is against Rawls principle of fair equality of opportunity that argues for substantive rather than formal equality.³²⁴

The study adopts the findings that most Universities seem to be more involved in income generation than provision of inclusive education and equality in education.³²⁵ This means that students with visual impairments who join Universities on merit face a lot of barriers. The students pay the same fees as other students but their education is of poor quality. The findings indicated that most Universities had not invested in assistive devices to enable the visually impaired compete on an equal basis with others.

³²⁰ Schwartz (n 168) 294.

³²¹ *ibid.*

³²² Standard Rules, Para 35.

³²³ CESCR Comment No. 5 para 9.

³²⁴ Rawls (n80) 53.

³²⁵ Opini (n4) 284.

The study adopts the view that the process of increasing PWDs within mainstream schools without decreasing exclusionary measures is discriminating and exclusionary.³²⁶ Jack of UON confirmed this, 'I have been here for two weeks; I have been waiting for the procurement department to procure the software that I need to use'.³²⁷ Inclusion is more than access to education; it involves the removal of practices of exclusion. The PDA provides that every institution of education shall ensure that students with disabilities are reasonably accommodated within that institution.³²⁸ In addition every institution of education shall provide students with disabilities with the appropriate core services or services necessary to ensure equal access. This includes textbooks and other educational materials in alternative media, including but not limited to large print, Braille, electronic format and audiotape.³²⁹ This has however not been the case in most institutions. Lawrence from UON experience demonstrates this;

I reported to school at the end of May. Three months down the line, I have no Braille machine and no laptop. I have to listen to the teacher and then organize with my friends to read for me their notes.³³⁰

This is not only discriminative but also exclusionary as other students are able to continue learning normally. It is also against Rawls principle of fair equality of opportunity which argues for substantive equality.³³¹ Findings confirmed the view that there is lack of transitional systems in place for PWDs when they move from high school to UE.³³² Lawrence from UON confirms this,

The administration had not planned for us. When we went for devices we were asked how we did our exams in high school. We informed them that we used Braille machines provided for by the school. Our work would then be Brailled by Braille transcribers for marking.³³³

³²⁶ Len Barton, 'Inclusive Education; Romantic, Subversive or Realistic' (1997) 1 (3) International Journal of Inclusive Education 231, 252.

³²⁷ Interview with Jack, student, 16 June 2013.

³²⁸ Persons with Disabilities (Access to Employment, Services and Facilities Regulations 2009, Rule 9 (2).

³²⁹ *ibid* Rule 9 (3) (c).

³³⁰ Interview with Lawrence, student, 8 August 2013.

³³¹ Rawls (n80) 53.

³³² Kochung (n63) 144.

³³³ Interview with Lawrence, Student, 8 August 2013.

The fundamental principle of the inclusive school is that all should learn together.³³⁴ Schools must recognize the diverse needs of students by having support services to match their needs.³³⁵ The fact that students go on for a whole semester without assistive devices is discriminating and exclusionary. This is because; other students are able to go on with their studies. Most students therefore have to find their own way through. Thomas from UON demonstrates this ‘I bought myself a laptop as that was the only way I could survive.’³³⁶ CUEA has two students with visual disabilities. Linda explains, ‘I was the first student to apply and I could see it caused such a commotion. I told them it was something that can be done and that they should give me a chance. The University does not however have assistive technology. I have a Braille note taker that takes notes when the lecturer is teaching. My colleague who is a master’s student only has a Braille Machine’.³³⁷

Schwartz rightly argues that inclusion means making a commitment to do whatever it takes to enable every child to belong and achieve.³³⁸ KU has especially shown commitment in this regard. Miriam from KU stated, ‘I wanted to do Braille music. I put my request to the Director of Disability Services. The University brought a teacher from outside who is trained in Braille Music for my case’.³³⁹ This practice has been reinforced elsewhere, In the Argentina’s *R.C.S* case; a Tucuman appellate court ordered the Government to provide the plaintiff, an elementary school student with cerebral palsy with an integrative teacher to ensure full integration in his class.³⁴⁰

The PDA provides that there shall be provided to learners with disabilities by every institution of higher learning, computer files or electronic versions of printed instructional materials and video materials that are captioned or accompanied by transcription of spoken text.³⁴¹ This provision like other provisions of the PDA has not been enforced.

KU has major strides in the area of inclusive education for persons with visual disabilities. ‘Every visually impaired student is provided with a Braille machine on admission to KU. There

³³⁴Hodgikson and Vickerman (n143) 100.

³³⁵ibid.

³³⁶ Interview with Thomas, student, 20 June 2013.

³³⁷ Interview with Linda, student, 23 August 2013.

³³⁸ Schwartz (n168) 4.

³³⁹ Interview with Miriam, student, 10 July 2013.

³⁴⁰ Tucuman Administrative Court of Appeals, Chamber I, R.C.S. Y otro I.P.S.S.T. Y otro s/amparo 3/25/2005.

³⁴¹ Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, Rule 6.

are also technicians to repair the machines'.³⁴² According to Thomas, There is a need to however move to technology.

The important thing is technology. You cannot convert every text book to Braille. It's bulky and expensive and not necessary as there is technology. The materials can however be available in soft copy. Adapted computers with voice software can read for the students. The laptop allows you to type in Braille and the software converts your writing into word. This simplifies work for everyone as there is no need to employ Braille transcribers.³⁴³

The findings indicated that 80% of the students with visual disabilities did not have information technology skills. According to Linda from CUEA, 'The University can consider a partnership with Kenya Society for the Blind to teach the students information technology skills'.³⁴⁴ The computers with software can also be reserved for the students at a central place. Solomon of UON proposed 'The computer lab should reserve a few computers for us'.³⁴⁵ If students do not have information technology skills they cannot compete for jobs. Employers and other people with whom they need to interact with in the job market do not know how to read Braille.

CUE should include in its standard guidelines what resources each University should have at a minimum for visually impaired students. This at a minimum would include personnel who can train students on IT skills and repair computers with adapted software, computers with adapted software, scanners. The software should include, Job Access with Speech (JAWS) which converts text in the computer into speech and Magic which makes the letters in the computer bigger and magnifies the screen.³⁴⁶

³⁴² Interview with Walter, University official, 4 July 2013.

³⁴³ Interview with Thomas, student, 20 June 2013.

³⁴⁴ Interview with Linda, Student, 23 August 2013.

³⁴⁵ Interview with Solomon, student, 8 August 2013.

³⁴⁶ Interview with Mark, University official, 20 September 2013.

5.0 Libraries

The study also sought to establish whether libraries were accessible to students with visual disabilities. This included whether there were assistive devices in the library, materials in Braille and whether there were staff trained to assist the students.

Availability of education will require facilities such as library, computer facilities and trained staff.³⁴⁷ Article 24 (1) (d) of the CRPD provides that PWDs should receive the support required within the general education system to facilitate their effective education. Accessibility of the library is especially important to any student. If students are denied access to libraries the University is far from accommodative.³⁴⁸ Rachael who is a student of both UON and KU compared the two Universities in terms of library facilities as follows:-

I am a student of psychology at UON and Bachelor of Arts at KU. There are no computers in the library with adapted software for visually impaired students at UON. No one is available to attend to us and it is impossible to see the books. I have only used the library once and now am in 3rd year final semester; my main advantage is that I am a student of KU. I always have to come to KU to use the library and the books.³⁴⁹

Of the libraries in the four Institutions in the research, KU was most accommodative for persons with visual disabilities. The library in KU has a recourse room for the visually impaired. The computers are fitted with adaptive software; there are scanners and an embosser for turning documents into Braille. The lifts have buttons in Braille, speech inside the lift and the alarm is brailled. There are talking books in the library, an embosser to convert materials to Braille and a scanner to convert text to soft copy so students can read using the computer. According to Anthony, 'The software is expensive but the management is committed to this cause'.³⁵⁰

UON has no such facilities. As Thomas points out, students are completely excluded from the library. 'In my four years at the University, I did not use the library; there are no materials in

³⁴⁷ CESCR, Comment No. 13, para 6a.

³⁴⁸ Arefaine Yared, 'Policy and Provision for Students with Disabilities in Higher Education: The Ethiopian Case' (Med thesis University of Oslo 2007) 94.

³⁴⁹ Interview with Racheal, student, 10 July 2013.

³⁵⁰ Interview with Anthony, University official, 18 July 2013.

Braille or adapted computers’.³⁵¹ Lawrence of UON confirms this fact. ‘I cannot go to the library as there are no materials in Braille or assistive technology. I would have to go with someone to read for me and I would be making noise’.³⁵² This is against Rawls fair equality of opportunity principle.³⁵³ It is discriminatory as other students can access materials in the library. This results in substantive inequality.

The same case applies to CUEA. As Linda reported, ‘I do not use the library; there are no computers with adapted software, nothing in Braille. There are no systems in place to cater for students with visual disabilities’.³⁵⁴ In USIU while the modern library is physically accessible, it has no computers adapted for students with visual disabilities. Vickie confirmed that action was being taken. ‘We are in the process of ensuring this category of students is accommodated’.³⁵⁵

Even with the strides made for inclusion by KU, elements of exclusionary practice are seen in a number of respects. As Robert points out, ‘Sometimes the computers have broken down and particularly during exam time. All the computers that are working are always in use as there are less than twelve computers in the resource room’.³⁵⁶ The inadequacy of resources is also an issue for Juma. ‘The screen reader which converts written material to large print is only one. I cannot access it during exam time’.³⁵⁷ The recourses are inadequate considering that the University has over 64 students with visual impairments. Robert of KU had a similar complaint, ‘Most times the computers are not working and in any case there are too few. We have to depend on readers to read for us but they are not available during exam time’.³⁵⁸ The findings indicate that efforts made by KU are however commendable, no other University has made such great strides in the area of students with visual impairments.

Section 19 of the PDA provides that the council shall where possible establish Braille and recorded libraries for persons with visual impairments. This like other provisions of the PDA has not been enforced.

³⁵¹ Interview with Thomas, student, 20 July 2013.

³⁵² Interview with Lawrence, student, 8 August 2013.

³⁵³ Rawls (n80) 53.

³⁵⁴ Interview with Linda, student, 23 August 2013.

³⁵⁵ Interview with Vickie, University official, 26 August 2013.

³⁵⁶ Interview with Robert, student, 7 August 2013.

³⁵⁷ Interview with Juma, student, 19 July 2013.

³⁵⁸ Interview with Robert, student, 7 August 2013.

According to Harris most people associate human rights violations with issues such as causing death or injury.³⁵⁹ He goes on to state that the fact that the rights of PWDs to access to issues such as education are violated every day is not taken into account. He goes on to outline the reasons given for exclusion of PWDs. They include the fact that PWDs are few, modifications for removal of barriers are costly and the fact that inclusion measures are viewed as a luxury rather than as a necessity. These views are not only against the social model of disability but also against the difference principle in the theory of justice.³⁶⁰

The Draft Commission for University Education Standards and Guidelines 2013 provides that information resources within libraries shall include those that cater for users with special needs.³⁶¹ The study adopts the findings that guidelines should provide what recourses libraries should have as support for visually impaired students at a bare minimum.³⁶² The study proposes based on the findings that these should include guides and induction, training of staff, scanners, computers with software and technicians to teach repair the computers and teach the students how to use the software.³⁶³

6.0 Spending More Time on Tasks and Incurring Extra Finances

The study sought to establish whether the barriers faced by students inconvenienced them in terms of time and finances. Accessibility to education includes economic accessibility.³⁶⁴ PWDs enter UE to get an opportunity to increase their knowledge, to develop their skills, to obtain good qualifications and get employment.³⁶⁵ PWDs have to fight harder than their counterparts to succeed and attain their ambitions.³⁶⁶ Universities should therefore ensure that PWDs get financial and other support necessary to succeed.³⁶⁷

³⁵⁹ *ibid.*

³⁶⁰ Rawls (n80) 53.

³⁶¹ Commission for University Education, Draft Commission for University Education Standards and Guidelines 2013 (n163).

³⁶² Harris and Oppenheim (n61) 252.

³⁶³ *ibid.*

³⁶⁴ CESCR Comment No. 13 para 6b.

³⁶⁵ Fuller (n12) 456.

³⁶⁶ Opini (n54) 88.

³⁶⁷ *ibid.*

Though HELB gives students with disabilities full loan, it does not consider the cost of support services.³⁶⁸ According to Solomon of UON, this is not adequate, 'I cannot afford to buy for myself a laptop with the finance from HELB; it is only enough for my expenses'.³⁶⁹ These findings reinforce the view that HELB should consider giving students with disabilities a disabled students allowance which they can use to buy laptops and adaptive software.³⁷⁰

Section 3 of the PDA establishes the NCWPD. Section 7 (d) (f) of the PDA provides that the NCWPD is supposed to make provision for assistance to students with disabilities in the form of scholarships, loan, programmes, fee subsidies and other similar forms of assistance in both public and private institutions. However like other provisions of the PDA this remains in paper. Christopher of CUEA confirms this, 'I have applied severally but I have not received any support in form of fees'.³⁷¹ The directorate of disability services In KU links up students with organizations for PWDs for financial and other support.³⁷² It is necessary that there be a department whose only responsibility is the needs of PWDs to ensure follow up.

Most students have to acquire assistive devices for themselves, Thomas a student of UON's experience demonstrates this, 'I had to buy a laptop and software. The laptop cost me Kshs 50,000/00 and the software cost about KShs 100,000.00. This software has the ability convert Braille into word and vice versa. The voice software can read documents which are in soft. I also had to scan the handouts myself'.³⁷³ The Standard Rules provide that states should recognize that all PWDs who need assistive devices should have access to them as appropriate including financial accessibility.³⁷⁴ This may mean that assistive devices should be provided free of charge or at such low prices that PWDs or their families can afford to buy them.³⁷⁵ When this task is left to the students those from poor backgrounds are left out. As Patrick of UON confesses, 'Of the four of us who joined UON in May, only two of us can afford the laptops, we have to share our notes with the rest'.³⁷⁶ According to Lawrence, this inconveniences students. 'Sometimes I have

³⁶⁸ Interview with Lawrence, HELB, 20 July 2013.

³⁶⁹ Interview with Solomon, student, 8 August 2013.

³⁷⁰ Bishop and Rhind (n62).

³⁷¹ Interview with Christopher, student, Nairobi, 5 July 2013.

³⁷² Interview with Walter, University official, 4 July 2013.

³⁷³ Interview with Thomas, student, 20 June 2013.

³⁷⁴ Standard Rules, Rule 4 (4).

³⁷⁵ *ibid.*

³⁷⁶ Interview with Patrick, student, 8 August 2013.

to borrow a laptop from my friends. I have to wait for the time they are not using them. Other students can only lend me theirs at a fee'.³⁷⁷

Other frustrations of students include getting a reader to read for them essential materials in the course list. 'I have to get a reader to read for me some handouts and books but they are not always available'.³⁷⁸ Article 8 (1) (e) of the CRPD provides for forms of live assistance and intermediaries including guides and readers. The HELB should consider giving students a reader's allowance. Some employers provide a readers allowance to employees who have visual impairments who are pursuing UE. As Linda from CUEA confesses 'My employer gives me a reader's allowance. I can therefore afford to pay someone anytime to read for me'.³⁷⁹

The findings reinforce the view that PWDs in Universities may therefore achieve poorer outcomes despite having similar grades with other students while joining the University because they generally have to spend more time on tasks, and more on expenses.³⁸⁰

7.0 Academic Assessment and Testing

The study sought to establish whether the needs of persons with visual impairments were taken into account in regard to exams. This includes extra time, alternative formats like soft copies, Braille and large print.

Section 18 (2) of the PDA requires learning institutions to take into account the special needs of PWDs with respect to curriculum, examinations and other similar considerations. The UNESCO urges that PWDs should receive additional instructional support in the context of the regular curriculum not a different curriculum.³⁸¹ In addition all PWDs should be provided with the same education and be provided with additional assistance and support when they require it.

The study agrees with the view that the most important issue in relation to the assessment of the academic performance of PWDs is that they should as far as possible be tested in the same

³⁷⁷ Interview with Lawrence, student, 8 August 2013.

³⁷⁸ Interview with Lawrence, student, 8 August 2013.

³⁷⁹ Interview with Linda, student, 23 August 2013.

³⁸⁰ Fuller (n12) 456.

³⁸¹ Salamanca UNESCO 1994 (n23) Para 22.

manner as their non disabled counterparts.³⁸² PWDs should not be put at a disadvantage by way of compromising their grade to grade progression and adversely affecting their self esteem. Proper accommodations should be made when administering tests. KU provides its exams in different formats. Rachael who is a student of both UON and KU states, ‘I get large print exams in KU and I am given 30 minutes more time, on the other hand there is no enough lighting at the examination hall at UON, exams are not provided in large print and there is no provision for extra time’.³⁸³ Different methods of assessment for students with visual disabilities are not necessary. As Linda notes, ‘CUEA had given me the option of oral testing, but I informed them that if they put the exam in a flash disk, my Braille note taker can read for me and can convert my writings into word. Services for Braille transcribers are also absent. My colleague uses a Braille machine, he is then given time to go and have his work deBrailled at his expense’.³⁸⁴

The position of students admitted to public Universities is even more critical as these students have no source of finance apart from HELB and parents contribution. Different method of testing is not justified as alternatives are available. Lawrence from UON demonstrates this, ‘The exams are two weeks away. We have not even done the continuous assessment tests. Since we do not have the assistive devices yet, the lecturers promised to give us an oral exam. This is truly isolating and discriminating’.³⁸⁵ This is against inclusive education which according to Article 24 (1) (a) of the CRPD should be directed to the full development of human potential and sense of dignity and self worth and strengthening of respect to human rights fundamental freedoms and human diversity.

In KU every student with visual disability is given a Braille machine on admission. Their exam is available in Braille and they write in Braille. Their work is then transcribed for marking. This process according to Robert has its disadvantages, ‘Our exams are always delayed while some go missing, a lot of errors occur in the process, the papers also get lost’.³⁸⁶ According to Thomas of UON, ‘The important alternative is technology, laptops allow you to type in Braille while software converts your writings to word, and errors of debrailing are therefore avoided’.³⁸⁷ The

³⁸²Tesemma (n51) 68.

³⁸³ Interview with Rachael, student, 10 July 2013.

³⁸⁴ Interview with Linda, student, 23 August 2013.

³⁸⁵ Interview with Lawrence, student, 8 August 2013.

³⁸⁶ Interview with Robert, student, 7 August 2013.

³⁸⁷ Interview with Thomas, student, 20 June 2013.

Universities need to invest in computers with software for these students. Linda of CUEA states, 'The Universities should consider a partnership with Kenya Society for the Blind to teach the students information technology skills'.³⁸⁸ In house training is also an option; Anthony states that KU has this option. 'KU does have trained technicians who teach the students how to use computers with adaptive technology and assist in case of any problems'.³⁸⁹

Complains on the state of machines in KU was an issue. 75% of the students interviewed complained about this. Salim stated, 'While I was doing the exam last week, my Braille machine broke down; it was repaired but then broke down again. I had to borrow from another student'.³⁹⁰ The study proposes the adoption of Ngundo's proposal for maintenance and increase of all support services.³⁹¹ This will also include increase in computers with software and access to materials in softcopy to bring students with disabilities at the same level as their counterparts. Robert of KU felt discriminated, 'We are still at a disadvantage, others spend the whole day in the library, and we can only depend on them to read for us'.³⁹² It is however important to note that inclusion is not a one off affair, it is a continuing process against the practices and barriers in schools that hinder participation of PWDs.³⁹³

8.0 Lecturers Awareness

The study sought to establish the awareness of the lecturers on differentiated instruction. Article 4 of the CRPD provides that in order to help ensure the realization of inclusion, state parties shall take appropriate measures to employ teachers, including teachers with disabilities who are qualified in Braille and to train professionals and staff who work at all levels of education. According to the CESCRCR acceptability of education includes the acceptability of teaching methods.³⁹⁴

The study adopts the view that Universities should also encourage and train staff to change and become aware of valuing difference which may involve them putting a lot more effort in

³⁸⁸ Interview with Linda, student, 23 August 2013.

³⁸⁹ Interview with Anthony, University official, 25 July 2013.

³⁹⁰ Interview with Salim, student, 7 August 2013.

³⁹¹ Ngundo (n70) 77.

³⁹² Interview with Robert, student, 7 August 2013.

³⁹³ Roger Sue and Julie Allan, 'Excluding the Included: A Reconsideration of Inclusive Education' in Peter Hicks and Gary Thomas (eds), *Inclusion and Diversity in Education* (Sage Publications Ltd 2009) 370.

³⁹⁴ CESCRCR, Comment No. 13 para 6(c).

providing materials in accessible formats for visually impaired students e.g. soft copies, large print, avoid writing on the board and spell words orally, this will maximize inclusivity.³⁹⁵ According to Solomon of UON most lecturers do not practice differentiated instruction, 'Most lecturers come with projectors; they also do not provide for us soft copies'.³⁹⁶

Section 2 of the PDA provides that assistive devices include qualified teachers for the blind provided for PWDs to assist them in education, employment and other activities. The CESCR provides that teachers need to be trained to educate children with disabilities within regular schools.³⁹⁷ Teacher training can be embedded in the regular curriculum or in seminars and training, which teachers must attend.

80% of the students interviewed complained about lecturers' awareness on differential instruction. Lecturers need to learn to modify instructional behaviors, implementing learning strategies, adapt materials and designing alternate assessment tools.³⁹⁸ According to Robert of KU, 'The lecturers' only need to take a bit of their time to have the materials embossed in Braille, hard copies do not help us.'³⁹⁹ The study agrees with the view that inclusion requires a change in roles and openness to collaboration that may prove to be challenging and difficult for those involved.⁴⁰⁰ Lecturers trained for general education may not feel prepared as inclusive lecturers who need to provide accommodation and adaptation for learners with disabilities within their classrooms.⁴⁰¹ This calls for regular trainings for teachers on inclusion.

The experiences of students' call on Universities to encourage staff to change and adapt and hence become aware of valuing differences and respecting student choices, this will be worth the additional effort to create inclusivity.⁴⁰² Most of the complains from students in the case of lecturer's awareness and willingness to adapt instruction techniques were negative. According to Solomon from UON, 'Some teachers use a projector in class, others write on the blackboard and

³⁹⁵ Karen Ross, 'Disability' in Diana Woodward and Karen Ross (eds), *Managing Equal Opportunities in Higher Education: A Guide to Understanding and Action* (Open University Press 2000)85

³⁹⁶ Interview with Solomon, student, 8 August 2013.

³⁹⁷ CESCR Comment No. 5, para 9.

³⁹⁸ Schwartz (n168) 209.

³⁹⁹ Interview with Robert, student, 7 August 2013.

⁴⁰⁰ Schwartz (n168) 207.

⁴⁰¹ *ibid.*

⁴⁰² Ross (395) 85.

do not give us any soft copies we even specifically ask for them but they are not given'.⁴⁰³ The study agrees that success of inclusion depends on lecturers' recognition of human differences and that learning must be modified to meet the needs of PWDs rather than PWDs fitting into existing processes.⁴⁰⁴ Solomon of UON proposes transmission of materials in soft copies, 'Soft copies can be of great help. We can read from our mail if our computers are fitted with software'.⁴⁰⁵ The administration should also alert lecturers on the composition of their class as this does not sometimes happen. Lawrence of UON stated, 'Lecturers were also not alerted about us'.⁴⁰⁶ This was confirmed by some of the lecturers; Mark from UON stated 'I am not informed about the composition of my classes; it is the students who follow me after class to inform me of their impairments'.⁴⁰⁷ Lecturers should also take time to learn about the composition of their class.

9.0 Access to Information

The questionnaires sought to establish whether information was provided to students in accessible formats. 100 % of all students with visual disabilities in the Universities confessed that access to information was an issue. The PDA provides for release of syllabus study guides and other appropriate instruction produced materials in advance of general distribution and access beyond the regular classroom session to slides, films, over boards and other media and taping of lectures.⁴⁰⁸ Article 21 of the CRPD provides that one of the ways to enhance access to information and communication is by providing information intended for the general public to PWDs in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional costs.

This has however not been the case for students. According to Lawrence from UON, 'The timetables and course outlines are in hard copy, any changes to the timetables or any notices are not given to us in an accessible format'.⁴⁰⁹ Important information always by passes the students, Salim of KU confirms this, 'Notices put on the notice board always by pass us including changes

⁴⁰³ Interview with Solomon, student, 8 August 2013.

⁴⁰⁴ Hodgikson and Vickerman (n 143) 100.

⁴⁰⁵ Interview with Solomon, student, 8 August 2013.

⁴⁰⁶ Interview with Lawrence, student, 8 August 2013.

⁴⁰⁷ Interview with Mark, University official, 20 September 2013.

⁴⁰⁸ Persons with Disabilities (Access to Employment, Services and Facilities) Regulations 2009.

⁴⁰⁹ Interview with Lawrence, student, 8 August 2013.

in class and exam timetables and bursary application notices'.⁴¹⁰ Induction is also lacking in a majority of cases. Lawrence of UON stated, 'There was no orientation, no timetable and no information on when classes would begin'.⁴¹¹ The students could also not access essential readings. Solomon of UON proposed, 'Essential readings and cause lists need to be provided to us in an essential format'.⁴¹²

10.0 Accessibility of the Environment

The study sought to establish whether students with visual disabilities had problems accessing the University environment. Article 20 of the CRPD provides that personal mobility be ensured with the greatest possible independence for PWDs including by; facilitating the personal mobility of PWDs in the manner and the time of their choice at an affordable cost. In regard to accessibility the main issue for students is distance to places. Lawrence of UON confessed, 'The class is too far, we asked the student reader to assist us with transport, the van only came only for a day and we were then informed that it broke down'.⁴¹³ The physical environment itself according to Lawrence of UON is also a barrier for students, 'There are too many stairs, trenches and metals along the way'.⁴¹⁴ According to Juma students of KU did not have an issue with this, 'This is not an issue in KU as the Tuk Tuks are available to take you to the library and classes'.⁴¹⁵ CUEA does not also provide transport within campus. As Linda pointed, 'I find my own way to places within the University'.⁴¹⁶

11.0 Restriction on Degree Courses.

Questionnaires also sought to establish whether students' choice of subjects was restricted. The Preamble to the CRPD recognizes the importance for PWDs of their individual autonomy and independence including the freedom to make their own choices. This was dealt with in chapter two. Majority of students feel that they are restricted on choice of degree courses. Isabella of KU

⁴¹⁰ Interview with Salim, student, 7 August 2013.

⁴¹¹ Interview with Lawrence, student, 8 August 2013.

⁴¹² Interview with Solomon, student, 8 August 2013.

⁴¹³ Interview with Lawrence, student, 8 August 2013.

⁴¹⁴ Interview with Solomon, student, 8 August 2013.

⁴¹⁵ Interview with Juma, student, 25 August 2013.

⁴¹⁶ Interview with Linda, student, 23 August 2013.

stated, ‘Once JAB realizes you have any impairment, they put you to take special needs education. You can later do an inter faculty transfer but it is difficult and takes time’.⁴¹⁷

12.0 Organization for Disabled Students

The study adopted the view that a major barrier to participation of PWDs is lack of representation in student organizations and University Management Councils.⁴¹⁸ This was also dealt with in chapter two. The students felt that having one of them to speak for them would speed up issues that were barring them from participating in school. According to Solomon of UON, ‘We need to form an organization for disabled students and we have informed the dean of students and we are waiting for his response’.⁴¹⁹

13.0 Availability of Recourses

This was also covered in chapter two. The study agrees with the view that cost is a major factor as assistive devices for the visually impaired are costly and would benefit only a small number of students.⁴²⁰ The UON released KShs 3.6 m to cater for visually impaired students in its campuses.⁴²¹ Universities are required to do much more than merely abstain from taking measures which might have a negative impact on PWDs.⁴²² The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give preferential treatment to PWDs in order to achieve the objectives of full participation and equality within society for all PWDs.⁴²³ This almost invariably means that additional recourses will need to be made available for this purpose and that a wide range of specially tailored measures will be required.⁴²⁴ The duty of state parties to protect the vulnerable members of their society assumes greater than less importance in times of severe recourse constraints.⁴²⁵ The Universities have a defense of scarcity of resources in eliminating discrimination on the

⁴¹⁷ Interview with Isabella, student, 4 July 2013.

⁴¹⁸ Kochung (n63) 146.

⁴¹⁹ Interview with Solomon, student, 8 August 2013.

⁴²⁰ Harris and Oppenheim (n61)252.

⁴²¹ Interview with Morrison, JAB, 11 July 2013.

⁴²² CESCR Comment No. 5, para 9.

⁴²³ *ibid.*

⁴²⁴ *ibid.*

⁴²⁵ CESCR, General Comment No.3, the Nature of State Parties Obligations, Art2, Para 1 of the Covenant. Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights on 14th December 1990, Contained in Document E/1991/23) Para 12.

basis of disability. They can claim that required modifications impose an undue and disproportionate burden according to Article 2 of the CRPD. The financial resources of Universities would also be considered in deciding whether there is a disproportionate and undue burden as they do have a choice on how to spend their resources. As Morrison confirmed, ‘The University Management decides what a priority in terms of infrastructure is’.⁴²⁶ The fact that KU has made such great strides in inclusion means this is possible.

The study adopts the view that economic progress should not be solely important to education.⁴²⁷ Exclusion of PWDs merely because their learning is not deemed to provide a return on investment is against a rights based approach to education as advocated by the social model of disability.⁴²⁸

14.0 Awareness for the Education Sector

The study sought to establish whether the Universities were sensitized on inclusion. The issue of awareness was discussed in-depth in the previous chapter. All students of UON and CUEA stated that this was an issue. It is more serious in the area of visually impaired students. As Linda from CUEA states, ‘I find that I have to create awareness myself; I personally had to inform the librarian about computer adapted software, they are not aware of anything’.⁴²⁹ This means they cannot input this in their budgets and therefore necessary inclusion measures have never been canvassed by the budget committee. Mark of UON confessed, ‘The University does not even know what devices to purchase for persons with visual disabilities’.⁴³⁰ Such levels of lack of awareness especially by people who deal with PWDs is not acceptable.

⁴²⁶ Interview with Morrison, JAB, 11 July 2013.

⁴²⁷ Tesemma (n51) 43.

⁴²⁸ *ibid.*

⁴²⁹ Interview with Linda, student, 23 August 2013.

⁴³⁰ Interview with Mark, University Official, 20 September 2013.

15.0 Conclusion

The law on inclusive education for persons with visual impairments is good on paper. Findings indicate that only KU has made significant steps in inclusion. There are elements of exclusionary practices which the University should consider removing as inclusion is not a onetime affair but is a process. Other Universities have not invested in assistive devices for persons with visual impairments. Lecturers are not trained in differentiated instruction and still use projectors in class and do not provide soft copies for students. Important information such as cause lists, reading list and other notices are not provided in an accessible format. Students spend more time and money on tasks due to barriers that should instead be removed. The physical environment is not accessible; there is lack of awareness, restriction on courses and lack of financial commitment. Chapter four concerns itself with students with hearing disabilities

CHAPTER FOUR:

INCLUSION OF STUDENTS WITH HEARING IMPAIRMENTS IN HIGHER EDUCATION,

1.0 Introduction

When we started inclusive practices project, a teacher who had previously been resistant stated ‘I never would have believed it could work, but I am amazed by how much growth the students that I am working with have made being in an inclusive setting’ she added ‘it takes a lot of work though’. I replied, I never said that it was easy or that it would not take work. All I said was that it is possible and it is the right thing to do for our students.⁴³¹

Inclusion does not just happen; it requires a lot of thought, preparation and recourses.⁴³² The major barrier for students with hearing impairments is access to oral communication.⁴³³ This chapter reports summarizes the findings from the interviews of persons with hearing impairments in Universities. As will be seen despite legislation, practices in schools have exclusion practices and show significant delays in implementation.⁴³⁴ PWDs face barriers in accessing Universities because they are negotiating an environment which was not designed for them.⁴³⁵ In order for them to enjoy equal rights; it is the environment that must be changed to include their needs.⁴³⁶ Inclusion is not a one off affair; it’s a never ending search to find better ways of responding to diversity.⁴³⁷ It takes time and recourses to provide inclusive education.⁴³⁸

This chapter contains the following subtopics: number of students, inclusion of persons with hearing impairments, interaction with peers, assistive devices, access to libraries and offices,

⁴³¹ Carolyn Teigland, What Inclusive Education Means for Overall Student Achievement (n289).

⁴³²Merv Hyde, Stein Eric Ohna, Oddvar Hjulstadt, ‘Education of the Deaf in Australia and Norway: A Comparative Study of the Interpretations and Application of Inclusion’ (2005) 150 (5) American Annals of the Deaf 426.

⁴³³ ibid.

⁴³⁴ ibid

⁴³⁵Tinklin (n30) 642.

⁴³⁶ ibid.

⁴³⁷ UNESCO (n15) para 21.

⁴³⁸Kassah Bente & Kassah Alexander, ‘Implementing Inclusive Education: A Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities’ (2013) 28 Disability & Society 291.

cases of students incurring extra finances and spending more time on tasks, lecturers' awareness and role models.

2.0 Number of Students

The study sought to establish whether Universities had flexible entry requirements in regard to students with visual disabilities. The CESCR provides that education in all its forms and at all levels shall exhibit the subsequent interrelated and essential features, availability, accessibility, acceptability and adaptability.⁴³⁹ Accessibility has three overlapping dimensions, non discrimination, physical accessibility and economic accessibility. Non discrimination means education must be accessible to all especially the most vulnerable groups in law and fact without discrimination. It means that Universities must maximize marginalized group's chances of being admitted to UE by removing obstacles to admission.⁴⁴⁰ The Number of students with hearing impairments in the Universities as follows:-

UNIVERSITY	NUMBER OF STUDENTS
UON	3
KU	16
CUEA	NIL
USIU	NIL
TOTAL	19

USIU does not have students with hearing impairments; this is because we do not yet have the recourses for this category of students, but no student has been refused admission.⁴⁴¹ UON has 3 students in this category.⁴⁴² KU has 16 students but at the time of research only 3 were in session.⁴⁴³ According to Anthony, 'The students are usually admitted but keep dropping out as they are not easily noticeable and there is a shortage of sign language interpreter's'.⁴⁴⁴ CUEA has

⁴³⁹CESCR, Comment No.13 para 6(a).

⁴⁴⁰Beiter (n108) 96.

⁴⁴¹ Interview with Wilson, University official, 25 July 2013.

⁴⁴² Interview with Roselyn, University official, 7 August 2013.

⁴⁴³ Interview with Walter, University official, 4 July 2013.

⁴⁴⁴ Interview with Anthony, University official, 19 July 2013.

no students with hearing impairments.⁴⁴⁵ Accessibility also addresses the content of education.⁴⁴⁶ Failure to provide appropriate support services or sign language instruction for deaf students for instance, excludes them from Universities.⁴⁴⁷ On the other hand admission of PWDs without accompanying reasonable accommodation may simply lead to exclusion in the mainstream.⁴⁴⁸

The JAB has reviewed the cutoff point of students with hearing impairments to C+ (plus).⁴⁴⁹ This is one way of enhancing access to education for this group. Section 18 (2) of the PDA is especially relevant in this regard as it requires that learning institutions take into account the special needs of PWDs in among other areas, entry requirements. This will increase the number of students. Universities need to adopt reasonable accommodation measures in order to avoid discriminating against the students with hearing impairments once they are admitted.

The PDA provides that every institution of education shall ensure that students with disabilities are reasonably accommodated within that institution.⁴⁵⁰ Appropriate core service that are required to be provided by every institution of education, include sign language and oral and tactile interpreter services or other technological alternates.⁴⁵¹

3.0 Inclusion for Persons with Hearing Impairments

Inclusive education involves two processes. Increasing the participation of PWDs in mainstream schools, and removing exclusionary measures.⁴⁵² To attempt to increase numbers without adopting inclusive measures is self defeating.⁴⁵³ What the JAB is doing by lowering the entry points for persons with hearing impairments is increasing access. Inclusion however involves removal of measures that exclude the students and increase participation.⁴⁵⁴ Inclusion is also

⁴⁴⁵Interview with Simon, University official, Nairobi 5 July 2013.

⁴⁴⁶Lucyline Murungi, 'The Right to Education Under the Constitution of Kenya: Scope and Prospects for Enforcement' in Japhet Biegon and Godfrey Musila (eds), *Judicial Enforcement of Socio- economic Rights Under the New Constitution, Challenges and Opportunities for Kenya* (Judiciary Watch Report Vol. 10 Kenya Section of the International Commission of Jurists 2011) 238.

⁴⁴⁷ibid.

⁴⁴⁸ Human Rights Council, Implementation of General Assembly Resolution 60/25 of 15th March 2006, The Right to Education for Persons with Disabilities (n11).

⁴⁴⁹ Interview with Walter, University official, 11 July 2013.

⁴⁵⁰ Persons with Disabilities (Act Access to Employment, Services and Facilities) Regulations Rule 9 (2)

⁴⁵¹ibid 3(a) (b).

⁴⁵²Barton (n326)232.

⁴⁵³ Ibid.

⁴⁵⁴ibid 234.

about methods of communication, and therefore shifting the focus on the school in dismantling communication barriers.⁴⁵⁵

Angelides and Aravi have contributed to the arguments that special schools are the best alternative for students with hearing impairments.⁴⁵⁶ They expound on the argument that admission to the mainstream does not lead to inclusion. This is because students are set apart by their difficulties in communicating and accessing the spoken language. This in turn results in limited participation in classroom discussion. It also leads to experiences of loneliness, and social isolation.

On the other hand, Angelides and Aravi argue that special schools have a lower level curriculum. The students are not exposed to the environment in which they will work as adults. The most important issue is that of integration with other students as they will not live in isolation beyond the school gates. The study agrees with Angelides and Aravi that the problem is the practice of integration in institutions. As will be seen in this chapter persons with hearing impairments are admitted without removing exclusionary barriers. With integration the aim is admit someone to a mainstream school. Inclusion is about a right to belong to the mainstream, eliminating discrimination and working towards equality for all.⁴⁵⁷

The major difficulty faced by students with hearing impairments is that they will completely not understand or will have difficulty understanding spoken language.⁴⁵⁸ Moses from KU admitted having difficulties communicating with other students and staff. 'My main problem here is the communication barrier'.⁴⁵⁹ The study argues that this is due to integration where students are admitted into the mainstream without adopting reasonable accommodation measures.

4.0 Right to Sign Language

The study sought to establish whether peers and other persons whom the persons with visual disabilities interacted with had any knowledge of sign language and whether this was a barrier for the students.

⁴⁵⁵ *ibid.*

⁴⁵⁶ Angelides and Aravi (n66) 487.

⁴⁵⁷ *ibid* 484.

⁴⁵⁸ Hyde, Ohna and Hjulstad (n432).

⁴⁵⁹ Interview with Moses, student, 10 July 2013.

All students with hearing impairments interviewed stated that they faced difficulties communicating with their fellow students due to language barriers. The study agrees with the view that whether the person with hearing impairment is at a disadvantage depends on the dominant mode of communication in the relevant context.⁴⁶⁰ For example spoken, written, or sign language. Accessibility of education relates to the states duty to maximize the individual chances of gaining admission to one or more other schools.⁴⁶¹ It is improved by removing obstacles impeding admission. The CESCO provides that In case of deaf children, sign language should be recognized as a separate language to which children should have access.⁴⁶² The importance of sign language should be acknowledged in their overall social environment.⁴⁶³

The study adopts Magongwa's view that hearing impairments become a disability when sign language is not recognized.⁴⁶⁴ He rightly argues that the society regards the hearing impaired as disabled while the problem is failure of the society to recognize that they have an impairment that requires use of a different language. This view corresponds with the social model of disability. Article 2 of the CRPD provides that language includes signed language and other forms of non spoken languages.

As Ngundo argues, Universities should have a common course on inclusive education.⁴⁶⁵ One of the subjects in that course must be sign language. Most students with hearing impairments face poor interaction with peers. Moses from KU has experienced this barrier, 'I face poor interaction with other students due to language barrier'.⁴⁶⁶ The study is in agreement that inclusive classes demand that hearing students should also learn sign language.⁴⁶⁷ The sense of acceptance for students with hearing impairments depends on whether they feel that their peers regard them favorably.⁴⁶⁸ Learning how to interact with others is crucial to inclusion.⁴⁶⁹ This is only possible

⁴⁶⁰Samaha (n72).12.

⁴⁶¹Murungi (n446) 238.

⁴⁶²CESCO, Comment No.5para 9.

⁴⁶³ibid.

⁴⁶⁴Magongwa (n68) 494.

⁴⁶⁵Ngundo (n70) 77.

⁴⁶⁶ Interview with Moses, student, 10 July 2013.

⁴⁶⁷Celeste Kelman, Angela Branco, 'Meta Communication Strategies in Inclusive Classes for Deaf Students' (2004) 154 (4) American Annals of the Deaf 379.

⁴⁶⁸Christina Cambra, 'Acceptance of Deaf Students by Hearing Students in Regular Classrooms' (2002) 147 (1) American Annals of the Deaf 38.

if hearing students can learn sign language.⁴⁷⁰ Article 2 of the Constitution is very relevant in this regard as it provides that the state shall promote the development and use of Kenyan sign language. Noel of UON explained why the hearing should learn sign language. ‘Since the hearing impaired do not have the capacity to learn the spoken language, but the hearing do have the capacity to learn sign language, it’s only fair that the hearing learn sign language’.⁴⁷¹ UON has a sign language research project within its campus. ‘We have trained two groups of staff in sign language as a result of disability mainstreaming if the University orders we can also train the students’.⁴⁷²

According to Trovato,⁴⁷³ the right to sign language for the hearing impaired has been identified as a right to psychophysical integrity, by this is meant ‘one’s right to develop one’s cognitive faculties and one’s right to experience appropriate social interaction’.⁴⁷⁴ She argues that the right is fundamental and inviolable. The study agrees with Trovato that this right is an absolute universal right and must include everyone whether hearing impaired or not. Currently students have to find a way of going round obstacles to communication barriers. According to Samuel from UON, ‘Since I can talk I usually talk then other students write down’.⁴⁷⁵ Article 44 of the Constitution provides that every person has the right to use the language and to participate in the cultural life of the person’s choice. Further Article 41 (b) of the CRPD provides that one way of enhancing freedom of expression and access to information, is by recognizing and promoting the use of sign languages.

UON has trained staff on sign language to enhance access. ‘University staff and especially receptionists have been trained in sign language as a way of disability mainstreaming’.⁴⁷⁶ This should also be extended to students. The study adopts Magongwa’s view that knowledge of sign language by all can enhance access by increasing hearing impaired students chances of joining University.⁴⁷⁷ Further it would enhance equal treatment and non discrimination would also be enhanced. Article 24 3 (b) of the CRPD provides that state parties shall take appropriate

⁴⁶⁹ *ibid.*

⁴⁷⁰ Carolyn Teigland (n289).

⁴⁷¹ Interview with Noel, University official, 23 Sept 2013.

⁴⁷² *ibid.*

⁴⁷³ Trovato (n67) 412.

⁴⁷⁴ *ibid.*

⁴⁷⁵ Interview with Samuel, student, 7 August 2013.

⁴⁷⁶ Interview with Roselyn, University official, 7 August 2013.

⁴⁷⁷ Magongwa (n68) 495.

measures including facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community.

3.0 Assistive Devices

The research sought to establish whether the Universities provided assistive devices for students with hearing impairments. Interpreters and hearing aids are minimal admission requirements for admission of students with hearing impairments.⁴⁷⁸ Section 2 of the PDA defines assistive devices and services to mean implements tools and specialized services including the services of qualified interpreters for the deaf provided by PWDs to assist them in education, employment or other activities. Article 8 (2) of the CRPD recognizes that one form of assistance for the visually impaired includes professional sign language interpreters.

Yet these are lacking in the two Universities which have admitted students with hearing impairments. Moses from UON states, ‘The main barrier I face is lack of sign language interpreters during lectures and tutorial hence poor grasping of content delivered during the course’.⁴⁷⁹ The CDESCR provides that teachers be trained to educate children with disabilities in regular schools.⁴⁸⁰ Samuel from UON admits, ‘There are no sign language interpreters in classes’.⁴⁸¹ This is not only a problem for UON; according to Stanley, KU also faces the same problem ‘I have now gone through a whole semester without sign language interpreters’.⁴⁸² The study agrees with the view of the practice of co teaching where two teachers are assigned to work together in an inclusive class, a regular teacher and a teacher trained in sign language interpretation.⁴⁸³

Lack of interpreters explains the limited number of students with hearing disabilities in Universities. According to Anthony from KU, ‘The students are usually admitted but keep dropping out as they are not easily noticeable and there is a shortage of sign language interpreters’.⁴⁸⁴ Induction procedures are also absent, Stanley from UON confirms this, ‘there

⁴⁷⁸Ngundo (n70) 45.

⁴⁷⁹ Interview with Moses, student, 10 July 2013.

⁴⁸⁰CDESCR, General Comment no 5 para 9.

⁴⁸¹ Interview with Samuel, Student, 7 August 2013.

⁴⁸² Interview with Stanley, student, 7 August 2013.

⁴⁸³Kelman and Branco (n467) 371.

⁴⁸⁴ Interview with Anthony, University official, 19 July 2013.

were no interpreters to guide in orientation upon admission'.⁴⁸⁵ A student would then have a lot of difficulties knowing where to find offices and services. This is because most Universities are vast and the students and employees do not understand sign language. In the Canadian Case of *Eldridge vs. British Columbia*, It was held that failure to provide sign language interpreters constitute discrimination in the provision of a right to a benefit.⁴⁸⁶ None of the Universities had assistive devices for the students. Stanley from KU stated, 'The University should provide us with assistive devices, hearing aids are not provided for'.⁴⁸⁷

CUE should include in its standard guidelines the minimum number of interpreters each University should have. It has been recommended that where possible and as a long term measure, interpreters who would interpret technical and science subjects have a University degree and knowledge of the subject they are interpreting.⁴⁸⁸ This is because often interpreters may not be qualified enough to pass on the content of lectures effectively. The study however advocates for beginning with what is possible; a minimum number of interpreters. As a long term measure Universities should strive to employ interpreters with knowledge in the subject which they are interpreting.

4.0 Access to Libraries and Offices

The study sought to establish whether the students had difficulties accessing the library. If students with hearing impairments have difficulties accessing the library, the University is far from accommodative. Samuel from UON confirms this, 'I had difficulties accessing materials in the library as there are no sign language interpreters'.⁴⁸⁹ Stanley of KU experiences the same problem, 'There are no sign language interpreters in the library'.⁴⁹⁰ KU however is taking steps to remedy the situation. 'Currently fifteen of the library staff who includes at least two staff in every floor of the library is being trained in sign language'.⁴⁹¹ The CUE should include in its guidelines the minimum number of librarians who should be trained in sign language in each University.

⁴⁸⁵ Interview with Stanley, student, 7 August 2013.

⁴⁸⁶ 1997 3 SCR 624.

⁴⁸⁷ Interview with Stanley, student, 7 August 2013.

⁴⁸⁸ Powell, Hyde, and Punch (n297).

⁴⁸⁹ Interview with Samuel, Student, 7 August 2013.

⁴⁹⁰ Interview with Stanley, student, 7 August 2013.

⁴⁹¹ Interview with Betty, University official, 4 July 2013.

5.0 Extra Finances and Spending More Time on Tasks

The study sought to establish whether barriers caused students to spend more time on tasks and spend extra finances. Accessibility requires that the form and substance of education and teaching materials be made acceptable.⁴⁹² Students with hearing impairments will not be able to write notes in oral class. As Samuel of UON states, 'I find myself spending more money to photocopy other people's notes'.⁴⁹³ This according to Moses of KU involves students taking more time to do tasks. 'I have to copy more notes after class resulting in time wastage since other students will have moved to other tasks'.⁴⁹⁴ This also necessitates extra finance. Putting the responsibility for students with disabilities in a single department would also give the department more time to solve issues of PWDs. In KU the Directorate of Disability Services is also tasked to link students to bodies which can give finance and assistive devices.⁴⁹⁵

8.0 Lecturers' Awareness

100 % of the students interviewed felt that lecturers did not apply differentiated instruction in so far as they were concerned. Article 4 (1) of the CRPD provides for the training of professionals and staff working with PWDs in the rights recognized in this Convention. This is to better provide the assistance and services guaranteed by these rights. The Standard Rules provides that awareness raising be part of education for all and be a component of teacher training courses and training for all professionals.⁴⁹⁶

The research adopted the view that teachers should learn about modifying curriculum, learning instructional behaviors, implementing learning strategies, adapting materials and designing alternate assessment tools.⁴⁹⁷ Unlike visually impaired students who would not benefit from projectors, the hearing impaired students will prefer this mode of instruction as compared to narration. Samuel from UON stated, 'Some lecturers don't have projectors during lectures'.⁴⁹⁸ Furthermore students would prefer handouts before or after lectures. Samuel of UON confirmed

⁴⁹² CESCR. Comment No. 13, Para 6(c).

⁴⁹³ Interview with Samuel, student, 7 August 2013.

⁴⁹⁴ Interview with Moses, student, 10 August 2013.

⁴⁹⁵ Interview with Walter, University official, 4 July 2013.

⁴⁹⁶ Standard Rules, Rule 1 (9).

⁴⁹⁷ Schwartz (n168) 209.

⁴⁹⁸ Interview with Samuel, student, 7 August 2013.

that these are lacking, 'There are no handouts from lecturers'.⁴⁹⁹ From these complains lecturers are clearly not trained on differentiated instruction. The Human Rights Council is especially relevant in this regard as it proposes that teachers be trained in classroom techniques such as differentiated instruction and use of pyramid training techniques where teachers once trained in inclusive education methodologies train others.⁵⁰⁰ Samuel of UON experience demonstrates the need for lecturers training, 'Sometimes when I ask a question the lecturer replies without writing on the board and without facing me so I cannot read his lips'.⁵⁰¹

Lecturers also need to make sure important communication is in hard copy. Samuel of UON confesses, 'I sometimes misunderstand assignments and I have to rely on other students to know what needs to be done'.⁵⁰² Samuel also expresses the importance of lecturers enquiring whether there are students with disabilities in class, 'Lecturers take time to find out the composition of the class'.⁵⁰³ It is proposed that, co teaching be used in the Universities.⁵⁰⁴ This is a method of teaching which involves a sign language interpreter and a regular lecturer in the same class.⁵⁰⁵

9.0 Role Models

The study agrees with the view that lack of positive models can limit peoples understanding of what is possible when it comes to giving PWDs an equal opportunity in education.⁵⁰⁶ Due to poor education and exclusion from UE hearing impaired students do not have a chance to come back to act as role models for other students.⁵⁰⁷ It is very important that students with hearing impairments who join UE be encouraged to read by way of scholarships. This will encourage other students that it is possible to achieve despite the impairments.

⁴⁹⁹ Interview with Samuel, student, 7 August 2013.

⁵⁰⁰ Human Rights Council, Implementation of General Assembly Resolution 60/25 of 15th March 2006, The Right to Education for Persons with Disabilities (n11) 24.

⁵⁰¹ Interview with Samuel, student, 7 August 2013.

⁵⁰² Interview with Samuel, student, 7 August 2013.

⁵⁰³ Interview with Moses, student, 10 August 2013.

⁵⁰⁴ Kelman and Branco (n467769)371.

⁵⁰⁵ *ibid.*

⁵⁰⁶ Harris (n29) 226.

⁵⁰⁷ Magongwa (n68) 493.

10.0 Conclusion

The number of students with hearing disabilities in Universities is an indication that persons with hearing disabilities are excluded from University education. Students with hearing impairments are the fewest in the Universities. Only two Universities KU and UON have admitted this category of students. The students once in Universities however face many barriers to education. Students and staff are not trained in sign language. This leads to communication barriers leading to exclusion of the students in the mainstream. There are no sign language interpreters and there is lack of assistive devices. Other barriers include limited access to libraries, spending more time on tasks and incurring extra finances and the fact that lecturers are not trained in differentiated instruction.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This research set out to answer the four questions; what barriers students with physical, hearing or visual disabilities face in access to inclusive UE. Whether Universities are in compliance with the law, on access to inclusive UE for persons with visual hearing or physical impairments. Whether the law on inclusive education is inadequate or its implementation that lacks serious attention and what measures need to be put in place to ensure compliance with the law on implementation of access to inclusive UE for PWDs.

5.1 Conclusion

In answering the first question, interviews were conducted in four Universities. The research established that students face many barriers in access to University education. The findings confirmed the view that the extent of exclusionary measures depends on the particular University that the PWD attends.⁵⁰⁸ Even in Universities which were found to be very inclusive, exclusionary practices existed alongside the inclusive practices.

KU and USIU have made significant steps to make their environments accessible to students with physical disabilities. A few buildings were not however compliant and there was still so much to be done in terms of making pavements accessible. Inclusion is however not a onetime affair but a process of continuing to remove barriers to inclusion.⁵⁰⁹ The Universities should therefore continue decreasing exclusionary measures. Students of CUEA and UON faced inaccessibility of the physical environment including unavailability of ramps to classes, libraries, hostels and offices, lack of transport facilities and limited access to finance. From the interviews it was clear that inaccessibility restricted student's choices and they had to apply for admission in accessible Universities. This was also reflected by the numbers of students in each University.

⁵⁰⁸ Powell, Hyde, and Punch (n297) 8.

⁵⁰⁹ Bente and Alexander (n438)291.

Exclusion for PWDs was mainly as a result of a number of factors. Doors were too narrow for wheel chair users. There were no disability compliant toilets. Ramps were absent in offices, classrooms libraries and hostels. Pathways had stairs. Desks were not disability compliant. Pathways were bumpy and had stairs. There were restrictions on choice of subjects. There was lack of exam arrangements for PWDs. Students also had to incur extra finances due to these barriers such as replacing wheelchairs. Other barriers included lack of disability awareness of the whole University community, lack of a complaints and enforcement mechanisms, lack of financial commitment to support PWD initiatives, lack of transport and lack of representation of PWDs in student organizations and University management.

Students with visual disabilities faced exclusion due to lack of assistive devices including Braille machines, computers with adapted software, scanners and embossers. Other barriers included lack of transport facilities, inaccessibility of the environment, lecturers' attitudes, lack of awareness and inadequate finances. In some Universities there were no transitional systems in place for PWDs moving from high school to Universities. Findings indicated that KU has particularly made significant steps in ensuring inclusion of students with visual disabilities. The University provided a resource room for its students in the library. Transport within the University was also available for the students. They further were provided with a Braille machine on admission and there were Braille transcribers in the University. More still needs to be done including adopting technology and ensuring adequacy of resources. UON and CUEA had admitted students with visual disabilities without accompanied assistive devices. This led to exclusion, discrimination and inequities for PWDs. USIU had not yet admitted persons with visual disabilities. The University was however in the process of ensuring that the library could accommodate this category of students.

Students with hearing disabilities were the fewest in the Universities. Only KU and UON had admitted students with hearing disabilities. The students faced difficulties in communication. This was because other students and staff were not trained in sign language. There was lack of sign language interpreters in tutorials and classes. Lecturers were also not trained in differentiated instruction. Only KU and UON had admitted students with hearing impairments.

Instances of inadequacy of the law included the fact that the definition of disability in the Constitution and the PDA did not reflect the social model of disability. The definitions leaned

more towards the medical model of disability.⁵¹⁰ The PDA and the Constitution also provide that SECRs and rights provided in the PDA are subject to progressive realization. There is no provision that measures to eliminate discrimination on the basis of disability are immediately realizable and not subject to availability of recourses. The Constitution and the PDA do not include denial of reasonable accommodation as a prohibited form of discrimination on the basis of disability.⁵¹¹ Further the provisions of the PDA are provided for in such a way that there are no sanctions for infringement and penalties are too low.⁵¹² A part from these the law provided for clear provisions which Universities had not complied with. These include requirements for provision of assistive devices, adjustment of the physical environment and right to non discrimination.

The hypothesis was therefore proved in that there was a failure by Universities to comply with the law on access to inclusive education for PWDs. PWDs also face many barriers and are excluded from Universities. Though there were inadequacies in the law, a large part of the law that had clear provisions that had not been complied with. The extent of noncompliance with laws and consequently exclusion varied from one University to another.

Below are the recommendations made by this study.

5.2 Recommendations

5.2.1 Legal Framework

5.2.1.1 Towards the Social Model of Disability

The study agrees with the view that the extent to which the rights of PWDs are protected in any Country depends on whether the country concerned adopts the medical or the social model of disability.⁵¹³ The Constitution and PDA definition of disability adopts the medical rather than the social model of disability.⁵¹⁴ The definitions focus more on the person's impairment and leads to exclusion and isolation. The definitions should therefore be amended to reflect the definition found in the CRPD. Article 2 of the CRPD recognizes the extent to which disability is socially

⁵¹⁰ See Article 260 of the Constitution of Kenya and the PDA Section 2.

⁵¹¹ See CESCR, Comment No. 20 para 28.

⁵¹² Onyango (n50) 18.

⁵¹³ De Plessis and Van Eck (n73) 232.

⁵¹⁴ See the Constitution of Kenya 2010, Article 260 and the PDA, Section 2.

constructed. The social model recognizes the extent to which disability is caused by how the physical and social environment has been arranged, to favour the needs of the nondisabled majority creating obstacles for the minority.⁵¹⁵ The model argues for the environment to be rearranged to accommodate everyone.

5.2.1.2 Definition of Discrimination on the Basis of Disability

Article 27 (4) of the Constitution outlaws discrimination on the basis of disability. Section 2 of the PDA defines to discriminate as to accord different treatment to different persons solely or mainly as a result of their disabilities and includes using words, gestures or caricatures that demean scandalize or embarrass a person with disability. The ICESCR and CRPD recommend that denial of reasonable accommodation be included in the definition of discrimination on the basis of disability.⁵¹⁶ Reasonable accommodation calls for appropriate and necessary modifications and adjustments, not imposing a disproportionate and undue burden, where needed in a particular case to ensure, PWDs the enjoyment or exercise on an equal basis with others of all human rights and freedoms.⁵¹⁷

The importance of defining discrimination on the basis of disability arises from the fact that disability is different from other factors of distinction. For categories such as race and sex, simple discrimination clauses can suffice. But for disability, there is always a need to adjust the environment. Failure to include reasonable accommodation would result to substantive inequality.⁵¹⁸ Substantive equality calls for the removal of barriers that hinder equality between PWDs and the nondisabled.⁵¹⁹

The definition of discrimination on the basis of disability should be included in the PDA or in a legal framework on equality and non discrimination. The framework should also define what adjustments are reasonable in a particular case, and what constitutes disproportionate or undue burden according to the definition of reasonable accommodation. The decision on whether the adjustments required in a particular case are reasonable or require a disproportionate and undue burden will depend on a case by case basis. Issues such as whether an accommodation

⁵¹⁵ De Plessis and Van Eck (n73) 233.

⁵¹⁶ See CESCR, Comment No. 20 Para 28.

⁵¹⁷ CRPD, Section 2.

⁵¹⁸ De Plessis and Van Eck (n73) 239

⁵¹⁹ *ibid.*

excessively undermines the purpose of the general measure, posing risks to safety, health and well being will also be taken into account. A cost benefit analysis which takes all issues into account would also be undertaken in order to decide whether required measures are reasonable.

5.2.1.3 Immediate Realization of Rights

The Constitution and the PDA provide for progressive realization of rights.⁵²⁰ The CESCR provides that ‘the prohibition of discrimination enshrined in Article 2(2) of the ICESCR is subject neither to progressive realization or availability of resources’.⁵²¹ Further states have immediate obligation in relation to the right to education such as the guarantee that the right will be exercised without discrimination of any kind.⁵²² The minimum core obligation in regard to education involves the obligation to ensure that the right of access to public educational institutions and programmes on a non discriminatory basis.⁵²³ There is a need to be clear on national laws that elimination of discrimination against PWDs is immediate. This is however to the point on undue and disproportionate burden as provided in section 2 of the CRPD. This will prevent situations where non discrimination in provision of a SECR is treated as provision of a SECR itself, and is then subject to progressive realization and availability of recourses.

In so far as measures to eliminate discrimination require resources, CUE should in consultation with Universities set timelines for minimum accessibility measures. The findings indicated that KU has made great strides in inclusion. This means that inclusion is possible if Universities are committed to the cause.

5.2.1.4 Implementation of the Rights in the PDA

Most of the rights in the PDA have not been realized. One reason is that some of the important provisions of the PDA did not come into effect immediately. This includes the provision requiring proprietors of buildings to adapt them to suit PWDs and accessibility to transport.⁵²⁴ The provisions concerning inclusion of PWDs are good on paper but have not been

⁵²⁰ See PDA, Section 11 and Constitution of Kenya, Article 21(2).

⁵²¹ CESCR, Comment No. 13, Para 31.

⁵²² CESCR, Comment No. 13, Para 43.

⁵²³ CESCR, Comment No. 13, Para 57.

⁵²⁴ See Section 22 and 23 of the PDA.

implemented. This includes provision of assistive devices like sign language interpreters.⁵²⁵ The PDA should be amended in order to identify duty bearers, confer rights on individuals and groups to raise allegations of discrimination on the basis of disability and have those claims investigated and access to appropriate remedies.⁵²⁶

5.2.1.5 Legislation for Universities

The Universities Act provides that one of the objectives of University education is to promote equalization of PWDs.⁵²⁷ There needs to be clear and specific provisions on what amount to discrimination on the basis of disability in Universities. Standards should cover at a minimum physical access, communication access, social access and economic accessibility.⁵²⁸ Reasonable accommodation should also be defined in the Universities context so as to outlaw discrimination. The criteria should be that measures should ensure at a minimum that PWDs have the benefits and privileges of education that those without disabilities enjoy.⁵²⁹

5.2.2 University in Provision of Inclusive Education

5.2.2.1 Awareness and Training

The major barrier to inclusion is negative attitudes. The study agrees with the view that the whole University should be sensitized about the rights of PWDs.⁵³⁰ This can be done in consultation with organizations of PWDs. PWDs should be involved as teachers instructors or advisers in staff training programmes.⁵³¹ The training should include the law on inclusion and non discrimination. Policy makers should especially be targeted. The decision makers such as University Management Councils especially need training in this area. Training should include laws, and general disability awareness. Sensitization should focus on instilling responsibility on the whole University community to inclusion of PWDs. Trainings and awareness should include both PWDs and the non disabled. The training should focus on all aspects including the law on non discrimination in national and international instruments.

⁵²⁵ PDA, Section 2.

⁵²⁶ Human Rights Council (n11).

⁵²⁷ Universities Act, Section 10 (d).

⁵²⁸ Human Rights Council (n11).

⁵²⁹ US Airways Inc vs Bartlett 535 US 391 2002.

⁵³⁰ Onyango (n50)19.

⁵³¹ Standard Rules, Rule 19.

5.2.2.2. Disability Policies and Statements

The Universities that were involved in the study had not launched their disability policies. The study adopts the view that lack of disability policies and statements means that Universities cannot invest in the elimination of existing barriers such as inaccessible buildings and resource barriers.⁵³² One way of ensuring commitment to inclusion is by having a disability plan. The University of Sydney Disability plans can act as a guide where the key strategies are put down including the responsible persons for each strategy, the cost burden and timelines for a period of years.⁵³³ This in turn means that the University will in turn allocate resources and invest in inclusive measures. It also instills responsibility on the key persons.

5.2.2.3 Representation of PWDs

The Preamble to the CRPD requires PWDs to have an opportunity to be actively involved in decision making processes about policies and programmes, including those that directly concern them. One of the ways to ensure championing of the rights of PWDs is by representation in student organizations and University Management Councils.⁵³⁴ Representation of PWDs who are aware of the situation of PWDs in University Management Councils will surely go a long way in ensuring their voice is heard during allocation of finances and other decision making processes.

The University fund created under Section 54 of the University Act advises the Cabinet Secretary in matters of University education, funding and related policy issues. The Board of the Fund should include a PWD who is aware of the plight of PWDs in the Universities as a member of trustees in order to champion the needs of PWDs.

⁵³²Kochung (n90)146.

⁵³³University of Sydney Disability Plan (n545).

⁵³⁴Kochung (n63)146.

5.2.2.4 Academic Assessment and Testing

All Universities should have arrangements in place for addressing PWDs needs in exams. PWDs should be tested as much as possible in the same way as other persons.⁵³⁵ Exams should be provided in soft copies, Braille and large print for the visually impaired as needed. Extra time should be provided where necessary.

5.2.2.5 Access to Information and Materials

Article 21 of the CRPD provides that important information and materials should be given to PWDs in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional costs Timetables, course lists, exam timetables and any other important information should be given in accessible formats to PWDs. For persons with visual impairments in soft or spoken form and for persons with hearing impairments in written or soft copy form rather than spoken form.

5.2.2.6 Lecturer Training

The law requires that teachers be trained to educate students with disabilities within regular schools.⁵³⁶ Success of inclusion depends on lecturer's recognition of human difference, and that learning must be modified to meet the needs of PWDs rather than PWDs fitting into existing practice.⁵³⁷ The training should include provision of materials in accessible formats e.g. large print. Differentiated instruction for persons with different impairments should also be adopted. The study recommends that the training: be embedded in the curriculum and in seminars and trainings which lecturers must attend. The training should include modifying instructional behavior according to the needs of the student, adapting materials and designing alternate assessment tools.

⁵³⁵Tesemma (n51) 68.

⁵³⁶CESCR, Comment No. 5, Para 9.

⁵³⁷Hodginkson and Vickerman (n143).

5.2.2.7 A rights Based Approach to Inclusion

A Rights based approach requires a mechanism for PWDs to hold duty bearers accountable for the realization of their rights.⁵³⁸ This mechanism should be provided within a University environment. Universities should follow KUs example of separating disability services from the Dean of student's office. The reason being the office of the Dean is an academic department which has too many issues hence the issues of students with disabilities are kept pending. The PWDs should be aware that they can channel their complaints through an office set up for that purpose. The office should have access to the management to ensure the issues are addressed. This office would also have time to link up PWDs with organizations that support PWDs for assistance on issues to do with finance and lack of devices. The person in charge should preferably be a PWD or a person who is aware of the plight of PWDs in Universities.

Universities should have a partnership with PWDs where guidelines are made for the problem areas of discrimination and the needs of all stakeholders taken into account in finding a solution for the protection of rights of PWDs. The person who is chosen to advocate for PWDs should preferably be a PWD. This will include active and free participation of PWDs.

Knowledge of international human rights standards should inform educational programmes. Human rights principles should be integrated into the plans, policies and procedures of Universities.

5.2.3 Empowerment of Students with Disabilities

A Rights based approach includes empowerment of right bearers to know, claim and defend their rights and know their responsibility. It shifts focus from the fact that people have needs to the fact that people have rights. The PWDs in Universities can form organizations for PWDs to fight for their rights. They should then lobby as a group for their rights. Should this fail they can lobby through registered organizations for PWDs such as Association for the Physically Disabled. Should these fail, they should seek redress through courts of law. Litigation can be brought under Article 22 of the Consultation for violation of Constitutional rights. The litigation according to

⁵³⁸Onyango (n50) 18.

Article 20 can be instituted by, any person including a person acting as a member of or in the interest of a group, a person acting in public interest and association acting in the interest of one or more of its members.

5.2.4 Role of Commission for University Education

The greatest role to inclusion lies with the CUE. It's the only body that accredits both private and public Universities. CUE has included measures that University needs to take in its Standard Draft Guidelines and Regulations. The guidelines provide that information recourses within libraries shall include those that cater for users with special needs. Library buildings shall also be convenient for all users including users with special needs. This standards and guidelines however are very sketchy. CUE should include in its guidelines the minimum recourses and measures that each University should have for each category of PWDs.

For the visually impaired this would include guides, computers with adapted software, scanners and embossers. For the hearing impaired this would include a minimum number of interpreters. CUE should play its role bestowed on it by the Constitution where all state organs and all public officers have a role to address the needs of vulnerable groups in society including PWDs.⁵³⁹

The CUE should in consultation with the Universities agree on timelines for measures that require time and allocation of recourses. In this case the concept of reasonable accommodation should be used in that the adjustments should be 'necessary and appropriate' and not imposing 'a disproportionate and undue burden' with the aim of 'ensuring the enjoyment or exercise on an equal basis with others' as provided by Article 2 of the CRPD. The Universities resources will of course be a major consideration in the cost benefit analysis. CUE should take into account CESCR's interpretation that the duty of state parties to protect the vulnerable members of society assumes greater than less responsibility in times of severe recourse constraints.⁵⁴⁰

⁵³⁹The Constitution of Kenya, Article 21(3).

⁵⁴⁰ CESCR, General Comment No. 3, The Nature of State Parties Obligations, Art. 2 Para 1 of the Covenant. Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights on 14th December 1990, Contained in Document E/1991/23) Para 12.

5.2.5 Role of the Government through the Ministry of Education

The Standard Rules provide that the ultimate responsibility of states for the situation of PWDs does not relieve others of their responsibility. Any one in charge of services and activities or the provision of information in society should be encouraged to accept responsibility for making such programmes available to PWDs.⁵⁴¹ The Ministry of education needs to sensitize others on this role. A separate administrative agency needs to be established for the purpose only of inclusive education. Government performance contracting which the government has established should ensure targets set will lead to inclusion and that targets are met.

5.2.6 Role of Joint Admission Board in student choices

The Preamble to the CRPD requires that PWDs have the freedom to make their own choices.⁵⁴² JAB should not restrict student choice on the basis of disability. Experiences of students showed that the JAB restricted student choices by admitting all students with disabilities to special education. Almost all students admitted to KU were undertaking a degree in education and specifically, special needs education. It's the barriers that restrict PWDs from taking certain choices that should be removed.

JAB may also need to recommend that schools that also have restrictions on admission separate from JAB, relax those requirements in regard to students with disability. An example is the Council of Legal Education which requires that students attain a Grade of B plain in order to study law.⁵⁴³

5.2.7 Role of HELB

Economic accessibility is especially very important for PWDs. HELB also needs to take the role bestowed on it by the Article 21 (3) of the Constitution of addressing the needs of vulnerable groups within society including PWDs. The study agrees with the position that HELB should consider in addition to giving each student with disability full loan; each student should get a disability allowance. PWDs can use the allowance to purchase and replace devices such as

⁵⁴¹ Standard Rules, Rule 14.

⁵⁴² CRPD, Preamble.

⁵⁴³ Council of Legal Education Act, Chapter 16 A. First Schedule (Post Graduate Diploma General Provisions).

wheelchairs hearing aids and computers.⁵⁴⁴ Visually impaired students should also get a readers allowance. This is because it will not always be possible to convert all books into soft copies or Braille.⁵⁴⁵

5.2.8 Persons with Physical Impairments

5.2.8.1 Buildings Hostels and Offices

Universities should have an environment in which any person with impairment can function independently with minimum or no assistance.⁵⁴⁶ CUE provides in its guidelines that Universities should provide modified toilets for the physically challenged, a ramp, lift or other means to enable access to facilities for the physically challenged.⁵⁴⁷ The study recommends that no University should be accredited where these are missing. These services should be provided in libraries, offices, classes and hostels. The NCWPD should also enforce Section 22 and 24 of the PDA and serve adjustment orders on Universities with non compliant buildings. In order to ensure compliance, there should be: laws, regulation and standards, monitoring to ensure action is taken, process of monitoring complains on non compliance post construction and legal action to caution the society on the consequences of violation of the right of PWDs.⁵⁴⁸

5.2.8.2 Transport

In order to ensure accessibility and non discrimination, Universities should provide transport to PWDs within the campus.

5.2.8.2 Down Stairs Policy

In Buildings which are inaccessible and before issues of inaccessibility are addressed the policy of serving PWDs from downstairs should be adopted. However an officer should be placed downstairs who will serve as a link between the PWD and the officers concerned. The officer should be available at all times and should serve the students without delay. This can however

⁵⁴⁴ Bishop and Rhind (62) 186.

⁵⁴⁵ CRPD, Article 8 (1) (e).

⁵⁴⁶ Chalwe and Desleighde (n55) 921.

⁵⁴⁷ Commission for University Education, Draft Commission for University Education Standards and Guidelines 2013 (n163).

⁵⁴⁸ Chalwe and Desleighde (n55) 920.

only be a short term measure as Universities strive to create a Universal design where everybody should operate with minimal or no assistance.

5.2.9 Persons with Visual Impairments

5.2.9.1 Provision of assistive devices

Universities need to move from using Braille Machines to computers with assistive technology. Software in computers enable students to type in Braille and their work is converted into word. The software also translates soft copies in the computers into speech. This will ensure students with visual disabilities fit into the work environment after school. This way no transcribers are needed by the Universities, only technicians to repair the machines and train student in IT. The Universities should also partner with institutions such as Kenya Institute for the Blind to teach the students how to use technology.

5.2.9.2 Libraries

The Draft University education Standards and Guidelines 2013 provides that information recourses within libraries shall include those that cater for users with special needs.⁵⁴⁹ The guidelines should include at a minimum what recourses Universities need to have to include PWDs. The study proposes at a minimum there should be, computers with adapted software, a recourse room for PWDs, technicians to repair the computers and train students on how to use the technology, scanners, and guides.

5.2.10 Persons with hearing Impairments

5.2.10.1 Sign Language

The Universities should have a common course on inclusive education and one of the subjects in that course should be sign language.⁵⁵⁰ The course can be taught in the first year of the University when students do not have a heavy work load to deal with. The Right to language is fundamental and inviolable, it's an absolute universal right and should include everyone whether

⁵⁴⁹Commission for University Education, Draft Commission for University Education Standards and Guidelines 2013 (n163).

⁵⁵⁰Ngundo (n50) 77.

hearing impaired or not.⁵⁵¹ This may appear as a lot of work but this is crucial to inclusion. It is what must be done if hearing impaired students are to be fully included. Interaction with peers is a major aim of inclusion. This can only happen if hearing students learn sign language. This is because they have the capacity to do so while students with hearing disabilities do not have capacity to learn the spoken language. Other staff should also be trained in sign language; this should be done in seminars and trainings for staff.

5.2.10.2 Provision of Assistive devices

PWDs need sign language interpreters to assist them in education.⁵⁵² This is necessary during lectures to ensure grasping of the content. Interpreters should if possible and as a long term measure have a degree. They should also preferably and in the long term have knowledge of the language they are interpreting. This is especially important in very technical subjects such as engineering. This will ensure interpreters pass on the content of the lectures effectively.⁵⁵³ The process of co teaching should be adopted which includes a regular lecturer and an interpreter who are assigned to work together in a regular class. The CUE guidelines should provide at a minimum the number of interpreters each University should have.

⁵⁵¹Trovato (n67) 412.

⁵⁵² PDA, Section 2.

⁵⁵³ Powell, Hyde and Punch (n296) 8.

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