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EDUCATION FOR LEARNERS WITH DISABILITIES AS A SOCIAL RIGHT

By Dimitris Anastasiou* and Ilias Bantekas**

Abstract

We locate the right to education in general international human rights law, addressing how the right to education in its disability-specific context has been considered an expression and continuation of the general right to education as enshrined in international human rights treaties. To do so, we set out to examine the fundamental ingredients of the right to education under the International Covenant on Economic Social and Cultural Rights (ICESCR) and further developments. In addition, we discuss fundamental aspects of the right to education as a social right, focusing on learners with disabilities. First, we examine whether education is a *public good* and analyze its dimensions within and beyond economic theory. Second, we discuss education as part of *the common good* in moral and political philosophy. We consider that both the concepts mentioned above — implicitly or explicitly— are the critical sources for the foundations of the right to education as a social right. Third, we explore the scope of the right to education as a social human right in the 21st century. Finally, we discuss in what form education is a human right for learners with disabilities (right to education or right to inclusive education) and the implications of these two different conceptualizations.

1 Introduction

Article 26(1) of the 1948 Universal Declaration of Human Rights (UDHR) declared that ‘Everyone has the right to an education’. Education and its availability raise two practical issues. First, while the provision of quality education can be expensive, no meaningful development can be achieved without it.¹ The US Supreme Court, in its landmark case of *Brown v Board of Education*, noted that ‘it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education’.² Today, the lack of education is a particular characteristic of those living in extreme or moderate poverty, which the coronavirus pandemic has further augmented.³ Without a quality education, most civil and political rights are meaningless. Freedom of expression, assembly, democratic governance, and others can be fully realized if the rights-holders are capable of understanding and pursuing their rights in the first place.

Two articles of the International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 13 and 14, concern the right to education. Article 13(1) of the ICESCR

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¹ See T McCowan and E Unterhalter, *Education and International Development* (Bloomsbury 2015).

² *Brown v Board of Education of Topeka*, 347 US (1954) 483, 493.

³ See UN, *The Sustainable Development Goals Report 2020* (2020) 3; Report of the Secretary-General, ‘Progress towards the Sustainable Development Goals’ (2020) UN Doc E/2020/57, 7 (noting that 90 percent of all school children were out of school, which will culminate in low retention and detrimental impacts on learning outcomes and behavioral growth).

enshrined the right to education as an individual right⁴ on the basis of human flourishing and civic grounds:

The States Parties... recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship...⁵

Since the drafting of article 13 of ICESCR on the right to education, several controversies have arisen. Chief among these is the spiraling cost of public education, particularly in an era of financial constraint, which has caused many nations to partially privatize elements of their educational system or otherwise introduce direct and indirect user fees. Regarding several heavily indebted poor countries and least developed countries, the privatization of primary and secondary education was suggested, or was otherwise a condition imposed by the World Bank as part of structural adjustment programs. Indeed, privatization was the mantra of the 1980s for the World Bank.⁶ Evidence suggests that the introduction of user fees (as a conditionality) for primary education impedes educational attainment for children and the protective effect of parents' education on their children's health.⁷ Furthermore, discrimination in the quality of education provided to vulnerable groups arguably leads to social exclusion.

Besides the ICESCR, the right to education is enshrined, among others, in article 17(1) of the African Convention on Human and Peoples' Rights (ACHPR), articles 3 and 13 of the San Salvador Protocol, article 2 of Protocol I to the European Convention on Human Rights (ECHR), Article 11(3) of the 1999 African Charter on the Rights and Welfare of the Child, Article 5(e)(v) of the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), article 28 of the Convention on the Rights of Children (CRC) and article 8(1) of the Declaration on the Right to Development.

Moreover, the preamble to the UNESCO Constitution elevates education to a sacred duty because it leads to the achievement of dignity, understanding of peoples, development, and the exchange of ideas and knowledge. To a large degree, these instruments converge on the projected aims and objectives of education. Thus, education must be directed towards the full development of human personality and human dignity, enabling persons to effectively participate in a democratic and just society that promotes active and democratic citizenship and understanding between groups and nations. The Committee on Economic, Social and Cultural Rights (CESCR) has recognized two further elements as inherent to this process: gender equality and respect for the environment.⁸ In more recent years, Article 24 of the UN Convention on the Rights of Persons with Disabilities (CRPD) recognizes the right of persons with disabilities to education and lifelong learning, determining obligations of states parties to realize this right.

Education is distinguished based on three layers, each corresponding to a more advanced level of study, namely primary, secondary and tertiary (or university) education. In between these, there are several sub-categories, particularly basic, technical, or vocational education. Article 13(2)(a) of ICESCR expressly stipulates that primary education should be universal, without discrimination, and provided free of charge irrespective of a country's financial situation. In *SERAC v Federal Republic of Nigeria and Universal Basic Education Commission*, the Nigerian

⁴ '[A]ll the rights in the Universal Declaration of Human Rights and the Covenants, with the exemption of the right to self-determination, are rights of individuals not corporate entities; see J Donnelly, *Universal Human Rights in Theory and Practice* (3rd ed., Cornell University Press 2013). 28.

⁵ ICESCR (16 December 1966, entry into force 3 January 1976) 999 UNTS 171, art 13(1).

⁶ SJ Klees, J, Samoff and NP Stromquist, *The World Bank and Education: Critiques and Alternatives* (Sense Publishers 12), 10-12

⁷ S Babb, 'The Social Consequences of Structural Adjustment: Recent Evidence and Current Debates' (2005) 31 *Annual Review of Sociology* 199, 204-06

⁸ CESCR, General Comment 13, UN Doc E/C12/1999/10 (8 December 1999) para 5.

government argued that because of corruption, funds destined for the realization of basic and primary education were no longer available. As a result, it was unable to fulfill its pertinent obligations. The ECOWAS Court held that the right to primary education is universal and not subject to any resource limitations and ordered Nigeria to rectify the situation.⁹ This is an immediate, not a progressive duty, despite the fact that public resources are required in the form of teachers' salaries, school buildings, and books.¹⁰ Yet, even if governments secure all the necessities for free education, several marginalized children may still be excluded through indirect costs.¹¹ For example, physical inaccessibility will naturally hinder children living in remote areas from traveling to school several miles away. The same is true of schools demanding specific uniforms and books, the cost of which burdens those families that cannot afford them. The CESCR noted in respect of Paraguay, for example, that because many rural schools do not have adequate, separate toilet facilities for each sex, this has a deterrent effect on school attendance among girls and teenagers.¹² Finally, the universality of primary education means that states must take appropriate measures to compel *all* children to attend primary school, despite the misgivings of their parents, whether because children are considered breadwinners or because of gender discrimination in addition to cultural practices and beliefs.

Although the CESCR has explained that primary education must 'take into account the culture, needs and opportunities of the community',¹³ this should not be used as a guise for social exclusion. Consider a situation where the children of a marginalized ethnic minority within country X are given free education only through their minority language, but not in the dominant language. Although this might seem to satisfy the cultural needs of the minority, it perpetuates the social exclusion of the group's new generation and its continued marginalization.¹⁴ This is why it is imperative that minority members receive a broad education equal to that of the majority,¹⁵ unless the difference in treatment is based on objective and reasonable justification.¹⁶

Article 24 CRPD was a watershed in fostering the right of disabled persons to education adjusted to their particular impairment. Despite its categorization as an "economic, social and cultural right," article 24 appears to operate in practice primarily as an anti-discrimination measure inhibiting its potential for securing *socio-economic justice* for all persons with disabilities (PWD).¹⁷ In

⁹ ECOWAS Court judgment, ECW/CCJ/APP/07/10, (6 December 2010),

¹⁰ See *Madzodzo and others v. Minister of Basic Education*, High Court of South Africa Order (20 February 2014), [2014] 2 All SA 339 (ECM).

¹¹ Although the ICESCR does not impose an obligation on parties to provide day-care and pre-school access, the Brazilian Federal Supreme Court has inferred such an obligation from the country's constitutional mandate regarding the right to education: case *RE 436996/SP*, (Brazil) (2005).

¹² CESCR, 'Concluding Observations on Paraguay', UN Doc E/C.12/PRY/CO/4 (20 March 2015) para 30.

¹³ *Ibid*, para 31, regarding the failure of Paraguay to promote the preservation and use of indigenous languages; CESCR, 'General Comment 13' (n 8) para 9. Culturally sensitive education was endorsed as far back as 1935 by the PCIJ in the case concerning *Minority Schools in Albania*, Advisory Opinion (1935) PCIJ Rep, Ser A/B No. 64, 3, 17.

¹⁴ The HRCtee in its concluding observations on Georgia pointed out that the lack of Georgian language skills 'could lead to marginalization and under-representation of minorities in different public and private spheres'. UN Doc CCPR/C/GEO/CO/3 (15 November 2007) para 17.

¹⁵ Art 4(4), 1992 UN Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities, UNGA Res 47/135 (18 December 1992).

¹⁶ In *D. H. and Others v Czech Republic*, (2008) 47 EHRR 3, para 196, the ECtHR held that where a difference in treatment is based on race or ethnicity, 'the notion of objective and reasonable justification must be interpreted as strictly as possible'.

¹⁷ Bagenstos has provided a detailed and empirical critique of the anti-discrimination paradigm with regard to the Americans with Disabilities Act (ADA) of 1990 and the ADA Amendments Act of 2008. As he put it "antidiscrimination law—even when the notion of reasonable accommodation is tacked onto it—is simply narrow tool to get at the deep-rooted structural barriers that keep too many people with disabilities from participating fully in the community. To attack those barriers requires something more—something that looks like social welfare. To move beyond antidiscrimination to social welfare ... raises all the movement's old concerns about paternalism and charity" (p. 149). But Bagenstos also notes that even an antidiscrimination/accommodation strategy can take slippery paternalistic paths. He further argues that an alternative is a renewed emphasis on universalist mechanisms as a key element of disability policy; a policy that embraces social welfare programs with an increased awareness of paternalistic

this regard, it diverges from the paradigm that has characterized other international statements on the right to education which for the most part have considered the right to education a *socio-economic right*,¹⁸ due to financial resources required for its realization as well as its social value, based on shared communal benefits¹⁹ that render it a semi-public good. The blind spots and tradeoffs of both paradigms have been long chronicled: a focus on antidiscrimination/equality/full inclusion can give rise to the risk that, even with accommodations to a mainstream environment, some students will go un- or under-served and be forced to accept outcomes that are not consistent with their individual educational potentials.²⁰ It can also serve as a refuge for political ideologies that simply want to reduce cost by treating everyone equally.²¹ An emphasis on socio-economic justice/special needs education, on the other hand, can risk the possibility that some students will be inappropriately separated from the mainstream and placed in classes that do not address their social needs while also minimizing their participation in school and maintaining paternalistic stereotypes about PWD.

This article is based on a simple yet elusive proposition, namely that the right to education for learners with disabilities is a social right. To cement this argument, we examine whether education is a *public good* and analyze its dimensions within and beyond economic theory. Second, we discuss education as part of *the common good* in moral and political philosophy. In this respect, the authors argue that the public good and common good dimension of the right to education constitute key dimensions for its characterization as a social right. In this regard, we discuss in what form education is a human right for learners with disabilities (right to education or right to inclusive education) and the implications of these two different conceptualizations.

2. Is Education a Public Good?

The Education 2030 Framework for Action (the Incheon Declaration for Education 2030),²² adopted at the World Education Forum in Incheon, South Korea, in May 2015, reaffirms that education is a public good. The Incheon Declaration, a continuation of the *Education For All* (EFA) movement and the *Millennium Development Goals* (MDG) on Education, was adopted by over 1,600 participants from 160 countries. It sets out a vision for education, implementing Sustainable Development Goal 4 to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all for the following years (2015—2030). In the preamble of the Incheon Declaration, UNESCO states: “We reaffirm that *education is a public good, a fundamental human right and a basis for guaranteeing the realization of other rights.*”²³

The notion of public good about education is central to this UNESCO conceptualization. However, it is unclear whether the concept of *education as a public good* in this context is drawn on

paths; see SR Bagenstos, *Law & the Contradictions of the Disability Rights Movement* (Yale University Press 2009) 148-150. This discussion is also found in D Anastasiou, M Gregory and JM Kauffman, ‘Article 24: Education’, in I Bantekas, MA Stein and D Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018), 656, 658-70.

¹⁸ Y Rabin, ‘The Many Faces of the Right to Education’ in D Barak-Erez and A Gross (eds), *Exploring Social Rights* (Hart 2007) 265-288; R Curren, ‘Education as a Social Right in a Diverse Society’ (2009) 43 *Journal of Philosophy of Education* 45.

¹⁹ M Walzer, *Spheres of Justice* (Basic Books 1983) 209, 226.

²⁰ D Anastasiou and JM Kauffman, ‘Disability as Cultural Difference’ (2012) 33 *Remedial and Special Education* 139

²¹ JM Kauffman, ‘The Regular Education Initiative as Reagan-Bush Education Policy: A Trickle-Down Theory of Education of the Hard-to-Teach’ (1989) 23 *The Journal of Special Education* 256; D Anastasiou, and JM Kauffman, ‘When Special Education Goes to the Marketplace: The Case of Vouchers’ (2009) 17 *Exceptionality* 205.

²² UNESCO (2015), Incheon Declaration, Education 2030: Towards inclusive and equitable quality education and lifelong learning for All. Available at: http://uis.unesco.org/sites/default/files/documents/education-2030-incheon-framework-for-action-implementation-of-sdg4-2016-en_2.pdf

²³ Incheon Declaration, *ibid*, at 7.

microeconomic theory or moral and political philosophy. We discuss here the concept of public good from the perspective of economic theory and then from a political philosophy perspective that considers education as part of the common good, a close concept to the public good.

The microeconomic perspective focuses narrowly on consumption; a good's consumption properties determine whether it is public or private.²⁴ Thus, a public good has typically two dimensions: the non-rivalry and non-excludability dimension. The meaning of a *non-rival good* is that its consumption by a certain person does not prevent someone else from enjoying that consumption. Most goods are rivalrous with regard to their consumption (e.g., bread, pizza, cake, bicycle, car); if only one piece of a cake is left, then we cannot all enjoy it.²⁵ Contrary to private goods, a public good (e.g., an outdoor circus or outdoor concert, a radio program, a city park, national defense) is *non-rivalrous*; once the good is provided, a person's use does not affect another's use of that same good, for instance, by reducing its utility for other persons.²⁶ If extra listeners are added to a radio program, this has no negative consequences for the opportunity of previous listeners to this radio program. As Samuelson put it: "each individual's consumption of such a good leads to no subtraction from any other individual's consumption of that good".²⁷

A public good also has a *non-excludable* dimension. Once the good is provided, anyone can use it since it is unlikely to exclude non-payers from consuming it (e.g., clean air, national defense, street lighting, a public show such as fireworks). That is, individuals cannot deny each other the opportunity to consume clean air or street lighting, which are non-excludable goods. Thus, the use of a public good (or service) by additional people does not diminish its benefit to others;²⁸ thus, discrimination against potential consumers of a public good is not possible. Contrary to non-excludable goods, goods such as bread, pizza, and cake, are excludable. An owner of a private good can easily prevent others from using that good. Relevant to the non-excludable dimension of a public good is the *free-rider* matter. Even if other persons have provided or paid for street lighting or a firework show, once a "free rider" cannot be prohibited from enjoying the good or service; this qualifies it as non-excludable. Economists tend to consider non-excludability as the most important dimension of a public good.²⁹ If a good (or service) can be excludable, private providers may try to create a quasi-market.³⁰

Perhaps, in the case of basic education, most people would agree in favor of its *non-rivalry dimension*. On the contrary, some people would say that *tertiary education* has a strong attribute of a *positional good*, given its connection to the job market and its additional benefits for its holders relative to the educational qualifications of others within a competitive capitalist society.³¹ People can derive well-being from higher education—and other positional goods, such as luxury goods—based not only on their absolute or intrinsic value but rather on whether they have more or less in relation to others.³² As Hirsch stated: "[t]he value to me of my education depends not only on how

²⁴ I Kaul, 'Private Provision and Global Public Goods: Do the Two Go Together?' (2005) 5 *Global Social Policy* 137, 137-140.

²⁵ JM Gowdy, *Microeconomic Theory Old and New* (Stanford University Press 2010) 42-56; DP Hallahan, JM Kauffman and PC Pullen, *Exceptional Learners: An Introduction to Special Education* (14th ed., Pearson, 2018) 82-83.

²⁶ PA Samuelson 'The Pure Theory of Public Expenditure' (1954) 36 *The Review of Economics and Statistics* 366, 387-389; A Samuelson, 'Diagrammatic Exposition of a Theory of Public Expenditure' (1955) 37 *The Review of Economics and Statistics* 350.

²⁷ Samuelson, *The Pure Theory*, *ibid*, at 387.

²⁸ Gowdy, n 25, at 45-50; Kaul, n 24, at 138.

²⁹ Gowdy, *ibid*, at 50-53.

³⁰ H Glennerster and J Le Grand, 'The Development of Quasi-Markets in Welfare Provision in the United Kingdom' (1995) 25 *International Journal of Health Service* 20.

³¹ F Hirsch, *Social Limits to Growth* (revised ed. Routledge 2015; originally published by Harvard University Press 1976, re-printed in 2015).

³² H Brighouse and HF Ladd, 'Educational Goods and Values: A Framework for Decision Makers' (2016) 14 *Theory and Research in Education* 3, 3-5; D Markovits, *The Meritocracy Trap: How America's Foundational Myth Feeds Inequality, Dismantles the Middle Class, and Devours the Elite* (Penguin 2019), 319.

much I have but also on how much the man ahead of me in the job line has.”³³ Nevertheless, pizza, as many other commonly purchased (private) goods, is not a positional good. Rather, the distinction here is between *ordinary goods* and *positional goods* and falls into a continuum, with coffee at one end and doctoral-level education at the other.³⁴ Which goods are positional is a matter of rank, or position and has to do with their scarcity and contingent social and economic factors, rather than with their importance to life.³⁵ In a competitive job market, where positions are partly allocated on the basis of one’s educational net value, what matters is not one’s own absolute level of education, but one’s educational level or educational qualifications relative to that of one’s competitors.³⁶

Even from the narrow perspective of microeconomic theory, the consumption of education by one—and learning as a produced result—does not affect another’s consumption of the educational good at the first level, that is, the absolute individual value of education as a *vehicle and access to knowledge*. A private good dimension may arise from the social context wherein education at certain levels (e.g., vocational education, higher education) can clearly operate as a positional good. However, Levin has argued that “the social-goods aspects of education are not merely the sum of the private benefits produced.”³⁷ Education contributes to active citizenship, social development, and vigorous democracy; general goods that today are at stake in many countries. In the following section, we will discuss this matter in detail.

Both *basic and secondary education would not be considered intrinsically rival goods* in many countries during the present era. To be familiar with Homer, Dante, Shakespeare, and Goethe, to understand Aristotle, Confucius, and David Hume, to know about the French and American revolutions, to gain an understanding of fascism in the inter-war period, to become competent in making calculations and solving mathematical problems, to understand Newton’s law of universal gravitation and the theory of relativity, as well as to learn about the germ theory of disease and DNA sequencing theory is good for someone irrespective of how many others can equally do so, or even better.³⁸ However, education in general, especially higher education, is still a bizarre good. On the one hand, it is intrinsically valuable and worthwhile for one’s *individual self-fulfillment* (e.g., intellectual curiosity, knowledge, skills, multifaceted personal development, intellectual autonomy), without reference to the amount of education that other people possess. On the other hand, when we introduce in the equation the parameter of the impact of education on the labor market, that is, its *instrumental use and value*, then “education acts as a way of ranking people in the queue for better-or worse-rewarded jobs.”³⁹

It is also helpful to clarify that the excludability or non-excludability condition of several goods is not binary or not contingent on circumstances; it comes to degrees and, therefore, can change over space and time. In the case of many goods, “privateness” or “publicness” is a matter of policy choice of consumption and not an innate property of a good.⁴⁰ For example, many *health services* in some countries are free, whereas the same health services can be very costly in other countries. A discussion about a potential vaccine against the coronavirus (COVID-19) is relevant in this context. A global control of a highly communicable disease requires many private-good inputs like

³³ Hirsch, n 31, at 3.

³⁴ Markovits, n 32, at 361.

³⁵ Hirsch, n 31, at 10-15; Markovits, n 32, at 361-63.

³⁶ Brighouse and Ladd, n 32, at 9-10; Markovits, n 32, at 365.

³⁷ HM Levin, ‘Education as a Public and Private Good’ (1987) 6 *Journal of Policy Analysis and Management* 628, at 629.

³⁸ A Swift, *Political Philosophy: A Beginners’ Guide for Students and Politicians* (3rd ed, Polity, 2014), 190-94; A Demetriou, ‘Bridging the Twenty-first Century Gap in Education – History, Causation, and Solutions’ (2020) 28 *European Review* S1, S7-S27.

³⁹ Swift, *ibid*, at 195-96.

⁴⁰ Kaul, n 24, at 140.

testing for the SARS-COV-2 virus available at no cost⁴¹ and may eventually include a free vaccine. Not accidentally, the UN Secretary-General Antonio Guterres recently stated that: “a COVID-19 vaccine must be considered a *global public good*. Not a vaccine for one country or one region—but a vaccine that is affordable, safe, effective, easily-administered and universally available—for everyone, everywhere.” (emphasis added).⁴²

Likewise, some countries (e.g., Greece, Finland) have only public universities, and there are several countries (e.g., Greece, France, Finland, Iceland, and Norway) with free or virtually free college tuition, at least for their citizens. Thus, it is problematic to put an absolute distinction between excludable and non-excludable poles of a good by attributing these to inherent qualities of goods without considering externalities. A pragmatic, non-abstract answer to whether education is an excludable or non-excludable good depends mainly on its availability or the degree of the availability of schools and other resources.⁴³ In brief, the collective responsibility for the provision of some common goods (e.g., health services in a pandemic time, the existence of free and public universities) may undermine the consumer-based or supposedly inherent dimensions of some goods, as those are emphasized in the microeconomic theory, and shift the discussion to provision-based conditions of a good and in a context of their public usefulness (see common good).⁴⁴

Drawing on the discussion of education as a public good, there are implications for the right to education for students with disabilities, which we discuss throughout this paper. For example, the excludable or non-excludable dimension of education, historically, does extend to persons with disabilities. Even in higher-income countries, such as the United States, before Public Law 94-142 in 1975, which later became the Individuals with Disabilities Education Act (IDEA), many children were excluded from appropriate public education.⁴⁵ In 1972, Weintraub and Abeson estimated that one million children with disabilities of school age were totally excluded from public education in the United States.⁴⁶ Despite compulsory attendance laws, students with blindness, deafness, intellectual disabilities, and students with emotional and behavioral disorders were excluded on the grounds that there were no educational programs to meet their needs.⁴⁷ Courts upheld legislation that excluded students deemed disruptive to others.⁴⁸ In some cases, students were admitted under behavioral or physical requirements, such as training “in toilet habits,” as was the case with a 1971 North Carolina regulation.⁴⁹

Even today, where places in education are limited, as happens in some developing countries without universal education, there are ways for the school system, through a variety of mechanisms (e.g., tuition or other fees, purchase of textbooks or other school materials), to deny the opportunity for education to learners with disabilities, as well as to certain learners from socially disadvantaged backgrounds. There is evidence that the limited places in schools affect disproportionately the exclusion of students with disabilities from any kind of educational setting in some developing countries.⁵⁰

⁴¹ E.g., The *Families First Coronavirus Response Act* ensures that COVID-19 testing is free to anyone in the United States, including the uninsured; 134 Stat. 178 Public Law 116–127—MAR. 18, 2020.

⁴² COVID-19 Vaccine must be Considered Public Good with Universal Availability: UN Chief. Available at: <https://in.news.yahoo.com/covid-19-vaccine-must-considered-public-good-universal-193107246.html>

⁴³ C Winch, J Gingell, *Philosophy of Education: The Key Concepts* (2nd ed, Routledge, 2008), 189-91.

⁴⁴ Kaul, n 24, at 141.

⁴⁵ E Martin, *Breakthrough: Federal Special Education Legislation 1965-1981* (Bardof 2013). 7-12.

⁴⁶ FJ Weintraub, AR Abeson, ‘Appropriate Education for All Handicapped Children: A Growing Issue’ (1972) 23 *Syracuse Law Review*, 1037, 1041.

⁴⁷ See generally, JB Crockett, JM Kauffman, *The Least Restrictive Environment: Its Origins and Interpretations in Special Education* (Lawrence Erlbaum 1999).

⁴⁸ ML Yell, *The Law and Special Education* (5th ed., Pearson 2018) 239-50

⁴⁹ Crockett and Kauffman, n 47, at 10-20.

⁵⁰ KL Ametepce and D Anastasiou, ‘Special and Inclusive Education in Ghana: Status and Progress, Challenges and Implications’ (2015) 41 *International Journal of Educational Development* 143; D Anastasiou, CE Keller, ‘Cross-national Differences in Special Education: A Typological Approach’ in JM Kauffman, DP Hallahan and PC Pullen (eds), *Handbook of Special Education* (2nd ed., Routledge, 2017) 897-910.

In brief, when schools, where the bulk of education takes place, are not available at a universal scale, this makes schooling a *conditional public good*, *quasi-public good*, or *semi-public good*. Instead, under circumstances of universal public schooling, the pre-elementary, elementary, secondary, and even certain forms of higher education can become public goods, thus assuming a non-rivalrous dimension and, to a great degree, a non-excludable dimension is in effect, and this can also include students with disabilities.⁵¹ Therefore, from a broader and philosophically realistic perspective, the answer to the question of whether education is a public good is that this is contingent on the wider social, cultural, and political environment and, more specifically, on the combination of socio-economic conditions with legal regimes and the political environment that determine the extent to which social rights are actualized or equalized.⁵² Empirical findings have shown that the degree of special education coverage and inclusiveness of students with disabilities in a national educational system is, for instance, determined by systemic socioeconomic and cultural factors,⁵³ and the contribution of special needs education to learning outcomes is also interrelated with the macro-socioeconomic environment.⁵⁴ Generally speaking, conceiving education as a public good raises two crucial issues for applying it to special needs education: (a) meaningful inclusiveness for learning (socialization and acquisition of knowledge and skills) and (b) private or public educational provision, which we further discuss in the following sections.

To conclude, the discussion as to whether education is a public good should not be exhausted at the consumer level of neoclassical economists. The economic sphere is not the only legitimate perspective in this discussion. As Hirschman observed:

a private citizen can ‘get out’ from public education by sending his children to private school, but at the same time he *cannot* get out, in the sense that his and his children's life will be affected by the quality of public education. There are many ostensibly private goods of this sort that one can buy or refrain from buying; but they have a ‘public-good dimension’ (often called ‘externalities’ by economists) so that their mere production and consumption by others affects, ennobles, or degrades the lives of all members of the community.⁵⁵

Thus, by producing significant positive societal externalities, education is part of the common good, fundamentally different from mere consumer goods, such as bread, pizza, cake, or cars.

2.1. Education as Part of the Common Good

The idea that there is a common or social good is based on the social roots of human behavior and the need for a certain social cohesion. It maintains that society is more than the sum of the individuals of which it is constituted, and that society has interests of its own.⁵⁶ The concepts of the *common good*, *social good*, and *public good* significantly overlap in their meaning within the public sphere, as exemplified in the frequent phrase “promoting the public good.” Indeed, many aspects of the concepts, common good, social good, and public good, not only possess similar resonance, but also similar domains of usage and utility. In the public sphere, a call to the “common good” refers to *material, cultural or institutional* facilities that meet a relational obligation of the members of

⁵¹ B Daviet, ‘Revisiting the Principle of Education as a Public Good’ *Education Research and Foresight Series, Working Paper 17* (UNESCO 2016).

⁵² M Langford, ‘Judicial Politics and Social Rights’ in KG. Young (ed.), *The Future of Economic and Social Rights* (Cambridge University Press, 2019), 66, 72-80.

⁵³ D Anastasiou, CE Keller, ‘Cross-National Differences in Special Education Coverage: An Empirical Analysis’ (2014) 80 *Exceptional Children* 353-367.

⁵⁴ D Anastasiou, G Sideridis and CE Keller, ‘The Relationships of Socio-Economic Factors and Special Education with Reading Outcomes Across PISA Countries.’ (2018) *Exceptionality* 1-15.

⁵⁵ AO Hirschman, *Exit, Voice, and Loyalty* (Harvard University Press, 1970), 102.

⁵⁶ Winch and Gingell, n 43, at 194-95.

a community to care for certain interests that the vast majority has in common.⁵⁷ That is, the terms common good and social good can refer either to the interests that members of a community (or an entire nation) have in common or to certain public facilities that serve common interests.⁵⁸ Examples of the common good include the road system, public parks, clean air, clean water, public schools, public safety, public transportation, and public libraries.

From this perspective, education and public schooling are *common or social goods*. First, they are collective endeavors based on transmission or diffusion of knowledge;⁵⁹ not accidentally, some economists have argued that knowledge is a *global public good*, extending beyond the national borders.⁶⁰ Second, education and schooling exist not only for the benefit of students (e.g., personal development, preparation for life) or parents but also for societal and civic development.⁶¹ A thriving society needs quality education and schooling. Third, the creation of informed citizens is for the benefit of society.⁶² Not a single contemporary society can be sustainable without educating its new members. The “private” consumption of education does not only produce an individual benefit but also provides positive benefits to the rest of the community and society as a whole; what is called a *positive externality*, an essential result of *public good and social good* as well.

Let us focus on citizenship, probably the least visible dimension of contemporary education, if not a contested one. Democratic citizenship requires a degree of insight, empathy, and kindness; this is a requirement for handling tensions created by living in a state with a multiple distribution of governance.⁶³ Democratic citizenship is also built upon civic education (either explicit or implicit) that involves some experience of governance, as well as knowledge and competencies for preparing young persons for their future roles as citizens. Furthermore, more robust versions of *active and democratic citizenship* would involve increasing some forms and levels of participation in social causes (e.g., peace, solidarity, environmental sustainability).⁶⁴

The idea that education, especially after a certain level, is a positional good, while at the same time constituting a social good, has disturbing effects on its conceptualization as a mere private good, in the same way as pizza. It actually backfires against the provision of private elementary and secondary education. Why is this? Because better education in an elite private school automatically renders other types of education worse off—in positional terms—than they would otherwise be.⁶⁵ When elementary and secondary education is treated as a private good, wealthy parents can buy an education that is positioned as being better because of its extravagant investments and expenditures, outstanding facilities and campuses, extensively educated teachers, better teacher-student ratio, and additional human resources.⁶⁶ When elite private schools can offer rich children a better education compared to that of state-school children, this offers them a

⁵⁷ W Hussain, ‘The Common Good’ *Stanford Encyclopedia of Philosophy* (2018), 1, available at: <https://plato.stanford.edu/entries/common-good/>

⁵⁸ M Bunge, *Political Philosophy: Fact, Fiction and Vision* (Transaction 2009).

⁵⁹ Daviet, n 51, at 4-11.

⁶⁰ J Stiglitz, ‘Knowledge as a Global Public Good’, in I Kaul, I Grunberg, and MA. Stern, *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press 1999) 308-325.

⁶¹ J Gingell, C Winch, *Philosophy & Educational Policy: A Critical Introduction* (Routledge 2004), 85-88; A Sen, *Development as Freedom* (Oxford University Press 1999).

⁶² Bunge, n 58, at 30-52.

⁶³ See generally, J Stanley, *How Fascism Works* (Random House 2018).

⁶⁴ Gingell and Winch, n 61, at 90; C Winch, *Quality and Education* (Blackwell 1996), 38.

⁶⁵ Swift, n 38, at 198.

⁶⁶ As of 2016, the pupil/teacher ratio at private schools were roughly 12:1, while the average pupil/teacher ratio at public schools nationwide were 16:1. See A Jackson, ‘The 25 Best Private High Schools in America’ (Business Insider, August 11, 2017) <https://www.businessinsider.com/best-private-high-schools-in-america-2017-8>; Laneri, R. (2010), ‘America’s Best Prep Schools’ (Forbes, April 29, 2010). <https://www.forbes.com/2010/04/29/best-prep-schools-2010-opinions-private-education.html#2934f9565027>; Niche, (2020), ‘2020 Best Private High Schools in America’ <https://www.niche.com/k12/search/best-private-high-schools/>; Markovits, n 32, at 332-50; TD Snyder, C de Brey, SA Dillow, *Digest of Education Statistics: 2018* (December 2019): Table 208.20, <https://nces.ed.gov/pubs2020/2020009.pdf>

positional advantage in the competition for university places and later for jobs.⁶⁷ Insofar as education has a positional dimension, the only way to ensure children from socially disadvantaged backgrounds, as well as students with disabilities, have real equality of opportunity is if the political system opts for material equality of school conditions as much as possible.⁶⁸

2.2. Public Good versus Private Provision and Benefit

Education can serve the common good because it goes beyond the private benefits for educated individuals and produces common goals and significant public benefits.⁶⁹ Instead, inadequate or a low-quality education “affects not only the poorly educated individual but also society because of lost productivity, lower tax revenues, and higher costs of public services.”⁷⁰ A greater investment in education and an increased duration of formal schooling produces: “(a) additional tax revenues, (b) reductions in the public costs of criminal justice, (c) reductions in the costs of public assistance, and (d) reductions in the costs of public health.”⁷¹ Similarly, educational investments in students at risk for academic failure, including students with disabilities, “provides an overall economic payoff to the public that exceeds the costs.”⁷² The US Supreme Court, in its landmark case of *Brown v Board of Education*, noted that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”⁷³

The status of education as a *conditional public good* is not just a theoretical issue. To the degree that education is a public good, private education is a privilege antagonistic to common or public interest. In practice, full governmental responsibility for education embodies a common good principle to ensure equitable education *for all*. However, full recognition of education as a public good goes against market forces.

Notably, a working document by Canada prepared in the context of the 48th session of the International Conference of Education (ICE) of UNESCO⁷⁴ stated that in a globalized world, ‘countries will face inclusive education issues created by the proliferation of private, for-profit and not-for-profit educational enterprises competing with the national/local authorities competent in the provision of public education.’⁷⁵ In the same conference titled *Inclusive Education: The Way of the Future*, there was “a debate about the contribution of private institutions to inclusive education”.⁷⁶ As it is officially stated in the Final Report of the ICE:

Many participants expressed dissatisfaction over the current trend to commercialize educational services, and stressed that education is a *public good* and therefore should not be considered as any other sector of the economy. It was also noted that education has a fundamental cultural role that helps shape national and local identities, and thus *cannot be regarded as a mere transactional good*.⁷⁷

⁶⁷ Swift, n 38, at 201.

⁶⁸ Swift, *ibid*.

⁶⁹ Bunge, n 58, at 50-58.

⁷⁰ Levin, n 37, at 5

⁷¹ Levin, *ibid*, at 11.

⁷² Levin, *ibid*, at 9.

⁷³ *Brown v Board of Education of Topeka*, 347 US (1954) 483, 493.

⁷⁴ UNESCO-IBE, ‘Final Report of 48th Session of the International Conference of Education (ICE), Inclusive Education: The Way of the Future’ (UNESCO 2009)

⁷⁵ Canada, *Inclusive education: Public policies* (UNESCO: Voluntary Contributions by Countries, 7 November 2008), 7, available at: <http://www.ibe.unesco.org/fileadmin/user_upload/Policy_Dialogue/48th_ICE/ICE_Voluntary_Contributions_Canada.pdf>

⁷⁶ R Operti, ‘48th Session of the International Conference of Education (ICE), Inclusive Education: The Way of the Future’ (UNESCO- International Bureau of Education (IBE) 2008), 10; UNESCO IBE Final Report, n 74, at 56-58.

⁷⁷ UNESCO IBE Final Report, n 74, at 58.

The specific measures taken to protect the public good from market forces in a globalized world are a matter of open discussion.⁷⁸ The World Bank has repeatedly suggested greater participation by the private sector in education.⁷⁹ For example, it recommended that “Support for strengthening prospects for private provision, in collaboration with the International Finance Corporation, where possible, will be important.”⁸⁰ Similarly, the World Bank recommended a bigger share of the private sector in primary education in low-income countries and higher education in other countries, as is apparent in the following statement:

Greater attention must also be given to the role of the private sector in education provision, given the large numbers of children in low-income countries without access to primary education and the significant unmet demand for higher education in many countries.⁸¹

In addition, the World Bank (2004) recommended greater participation by the private sector in the education of persons with disabilities to achieve inclusion. In a World Bank Working Paper, Wodon (2016) asserted that:

An inclusive education system should be able to provide choice for parents in terms of the schools to which they send their children. This simple principle suggests that *stronger public-private partnerships* with faith-inspired schools, as well as *private secular schools, can be beneficial*.⁸²

Oxfam’s research has shown that over a fifth of World Bank education projects between 2013 and 2018 involved support to governments for the private provision of education.⁸³ However, the public and private-for-profit relationship in education is competitive, very much a tug-of-war relationship. One side’s losses are the victories of the other side. Contrary to the World Bank’s stance,⁸⁴ at a regional preparatory conference of the 48th Session of the International Conference of Education (ICE), the regional government of the French-speaking community of Belgium emphasized the normative dimension of education as a public good, taking the initiative to mandate regulation of private education but unsuccessfully. Thus, the Final Report of UNESCO recommended that member states: “[p]ursue education in the public interest and strengthen the government’s capacity to orientate, promote and follow up on the development of equitable education of high quality in close partnership with civil society and the private sector”⁸⁵ without any reference to state regulation of private education.

As mentioned, UNESCO stipulated that education is a public good.⁸⁶ The issue of educational provision for students with disabilities as a social and public good is also central in legislation. The Individuals with Disabilities Education Act (IDEA) strongly prioritizes public education for students with disabilities, mandating *free appropriate public education* (FAPE) “to meet their unique needs and prepare them for further education, employment, and

⁷⁸ Canada, *Inclusive education: Public policies*, n 75, at 3.

⁷⁹ World Bank, *The Right to Education for Persons with Disabilities: Towards Inclusion* (World Bank, 2006); World Bank, *Education Sector Strategy Update: Achieving Education for All, Broadening our Perspective, Maximizing our Effectiveness* (World Bank, 2006).

⁸⁰ World Bank, *Education Sector Strategy Update*, *ibid*, at 18.

⁸¹ *Ibid*, at 33.

⁸² Q Wodon, ‘What Matters Most for Equity and Inclusion in Education Systems: A Framework Paper. Systems Approach for Better Education Results’ (Working Paper No. 10, World Bank, 2016), at 25. Available at: <https://openknowledge.worldbank.org/handle/10986/28094>

⁸³ KM Bous, ‘False Promises: How Delivering Education Through Public-Private Partnerships Risks Fueling Inequality Instead of Achieving Quality Education for All’ (Oxfam International 2019).

⁸⁴ See the reports in n 80 and Wodon, n 82.

⁸⁵ *Inclusive education*, n 75, at 19.

⁸⁶ See Incheon Declaration, n 22.

independent living.”⁸⁷ Instead, the UN Committee on the Rights of Persons with Disabilities refers to the access to education in both public and private academic institutions.⁸⁸ This view of the right to education as a joint venture serves to undermine the public good dimension of education for children with disabilities.⁸⁹ Furthermore, in its General Comment, the CRPD Committee does not strongly support the view that education is a public good.⁹⁰ It suggested that: “Public *and private educational institutions* and programmes *must be available in sufficient quantity and quality*” or “States parties must ensure that persons with disabilities are able to access education *in both public and private academic institutions on an equal basis with others*”⁹¹ or “States parties should also allocate budgets using mechanisms available under public procurement processes *and partnerships with the private sector*.”⁹²

However, one can wonder how the existence of private education can serve the purpose of inclusive education when implicitly recognizing the privilege of the most socioeconomically advantaged students to have a segregated quality education. Private schools tend to be more selective on the basis of wealth, which contributes to segregation in the school system and denotes unequal opportunity. In that way, the CRPD Committee, unfortunately, legitimized an education on an unequal economic basis. An Oxfam Report has summarized evidence indicating that education public-private partnerships (PPPs) by encouraging private schooling often fail to serve the most vulnerable children, including students with disabilities, and risk deepening inequality.⁹³

As Markovits has pointed out: “[s]chools constitute the most important site of the American elite’s exceptional investment in its children.”⁹⁴ Wealthy families give extraordinary investment in their children’s formal education in several ways: private schools, top-ranked boarding schools, “public privates” in rich neighborhoods, unequal local funding, unequal enrichment activities (e.g., science and math camps, coding and robotic clubs), academic tutoring, test preparation programs to influence college admissions and so on.⁹⁵ Although educational inequality has increased alongside rising wealth inequality, the CRPD Committee seemed unconcerned about the likelihood of unequal education across the spectrum of abilities and disabilities.

3. Education as a Social Right

Every conceptualization of a human right is a mental representation of the human relationships existing in a social system.⁹⁶ In complex societies with competing interests, not all representations coincide with each other. Even so, human rights are normative claims that reflect a combination of social interests with levels of economic, social, and cultural development over the course of history.

Contrary to the US Constitution, the right to education is included in all 50 state constitutions containing a specific education section.⁹⁷ Instead, other social rights are occasionally and randomly included in state constitutions. Between 1776 and 1834, roughly half the American states included general educational clauses in their constitutions, and the remainder adopted

⁸⁷ U.S. Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 (d)(1)(A).

⁸⁸ CRPD Committee, ‘General Comment No. 4’ UN Doc CRPD/C/GC/4 (2 September 2016), paras 20, 23, 38 and 67.

⁸⁹ JM Kauffman, DP Hallahan and PC Pullen (Eds.), *The handbook of special education* (2nd ed., Routledge 2019) 233, 239-48

⁹⁰ General Comment No 4, n 88, para 20.

⁹¹ *Ibid*, para 23.

⁹² *Ibid*, para 67 (emphasis added).

⁹³ Bous, n 83, at 9-14.

⁹⁴ Markovits, n 32, at 125.

⁹⁵ *Ibid*, at 125-33.

⁹⁶ In Karl Marx’s (1878) words “Every emancipation is a restoration of the human world and of human relationships to man himself” p. 46, in ‘On the Jewish Question’ in ‘Marx-Engels Reader’ (edited by Robert Tucker, Norton & Company 1978) 26 - 52.

⁹⁷ Langford, n 52, at 70-73.

explicit provisions between 1835 and 1912.⁹⁸ Given the fact that the quality of schooling in the United States has remained highly dependent on local taxes (especially local property taxes) and the average wealth in a municipality for almost two centuries, it is not accidental that the right to education emerged in the USA as largely a civil right in the state constitutions.⁹⁹ There is still an emphasis on the civil rights aspects of the right, especially regarding the education of people with disabilities, based on arguments about the importance of equal educational opportunity.¹⁰⁰ For historical reasons, including the fact that the preparatory works of PL 94-142 of 1975 coincided with the civil rights movement in the 1960s, free appropriate public education for each child with a disability has been primarily conceived as a civil right in the United States.¹⁰¹ This, however, can be viewed as part of the American legal and political exceptionalism. In Europe, from the inception of public education, national security or a comparative (military) advantage over rival countries — a perceived public and social good — stimulated mass education efforts in Prussia in 1807 and France in 1871.¹⁰² However, without neglecting the civil rights aspects of the right to education, a complete theoretical discussion goes beyond the paper's scope.

By and large, in modernity, there has been a deontological approach to political and legal issues behind human rights that goes back to Immanuel Kant and theorists of “natural rights.” In this deontological line of thinking, the general idea is that there exist *morally imperative demands* which are not subjected to the empirical or practical examination of specific situations.¹⁰³ Moral imperatives are not the only assumption incorporated into the human rights discourse. Widely accepted human rights convey templates for the regulation of human relationships, quasi-legal regulations, and an implicit political message that politics should be subordinated to moral imperatives.¹⁰⁴

Moral imperatives typically apply well to cases of *evil*, which have been molded in the course of history, protecting from murder, other crimes against human life, slavery, physical abuse, torture, cruel punishment, racial, religious, and ethnic discrimination, abuse of political or other power, violation of political freedoms (freedom of speech, freedom of the press, imprisonment or arrest without cause, right to assemble, protection from deprivation of liberty without due process of law, etc.), sexual exploitation, rape and sexual abuse, marital violence, discrimination based on gender, religion, sexual orientation, minority status, and disability. So, what is *evil*? In the case of civil and political rights (or negative rights), evil is the point from which the good is derived. To be conceived, there is not so much need for a great deal of empirical evidence.¹⁰⁵ Perhaps, for this reason, civil and political rights appeared earlier in human history, incorporated as commands in many religious texts and written legislative precursors of modern human rights such as Cyrus Cylinder (about 539–538 BC), Magna Carta (1215), Petition of Right (1628), the US Constitution (1787), the French Declaration of the Rights of Man and of the Citizen (1789), the US Bill of Rights (1791), 13th Amendment to the US Constitution: Abolition of Slavery (1865).¹⁰⁶ By and large, civil and political rights emerged to protect the life, integrity, and liberty of a person against an overbearing state or an oppressive society. The right to life, the right to be free from torture, the right to liberty and security, the right to fair trial, and qualified rights, with a particular focus on freedom of expression, have been classified as civil rights in international law.¹⁰⁷

⁹⁸ Langford, n 52, at 72.

⁹⁹ *Ibid.*, at 72-73.

¹⁰⁰ Weintraub and Abeson, n, 46 at 1042-45; Yell, n 48, at 245-47.

¹⁰¹ Weintraub and Abeson, *ibid.*, at 48-50.

¹⁰² J Boli, FO Ramirez, JW Mayer, ‘Explaining the Origins and Expansion of Mass Education’ (1985) 29 *Comparative Education Review* 14.

¹⁰³ A Badiou, *Ethics: An Essay on the Understanding of Evil* (Verso, 2011).

¹⁰⁴ *Ibid.*, at 20-31.

¹⁰⁵ *Ibid.*

¹⁰⁶ L Hunt, *Inventing Human Rights: A History* (W. W. Norton, 2007), 146-75.

¹⁰⁷ I Bantekas, and L Oette, L. (*International Human Rights Law and Practice* (3rd ed, Cambridge University Press, 2020), 350-53.

Instead, the right to health care, education, employment, social protection, and an adequate standard of living have been classified as social and economic rights and are protected under the ICESCR.¹⁰⁸ Whereas states are obliged to implement civil rights immediately, social and cultural rights, such as the right to education, are subjected to progressive realization because their implementation requires funds and social resources that parties may not be able to provide immediately.¹⁰⁹ Even so, several elements of most of the socio-economic rights are subject to immediate implementation, with budgetary constraints no longer constituting a viable excuse.

Contrary to civil rights, in the case of social rights, the *good* is the starting point from which the evil is typically derived.¹¹⁰ In the case of education, a big part of what is good is a matter of practical considerations rather than moral imperatives. These practical considerations in today's complex societies can be scrutinized by research, empirical evidence, careful logical analysis, and discussion. Why? Because from the good education (e.g., quality, effective, efficient, useful education) arises what is bad education. Similarly, from the good health care that meets health care-state-of-the-art arises what is bad health care, from the good working conditions and good wages emerge what are bad working conditions and poor-paid work, from the good standard of living emerges what constitutes bad standard of living, etc. *The comparative and relational nature of the social goods and services* is unavoidable. This fundamental difference between civil rights and social rights has important implications for the specific forms of the right to education for persons with disabilities discussed in the next section of the paper.

Social rights, having a comparative and relational nature, are basically relied *on the principle of distributive or redistributive justice* for the simple reason that they require adequate material resources. Resources are necessary to implement the right to education along with the pertinent commitment of states. If the material and economic aspects of the right to education are largely neglected, then the right to education only poorly can serve its holders. There are several ways that this can occur. One sophisticated way is an overemphasis on the non-discrimination aspects of education at the expense of redistributive justice necessary for compensating for unequal distribution of wealth, power, and status or different levels of human functioning, capabilities, and competence. Such non-discriminatory reduction of the social right to education (e.g., equality as inclusion) was conceived by Anthony Giddens in his famous Third Way.¹¹¹ In a more general sense, Giddens originated a reduction of the concept of equality to inclusion. In his own words:

The new politics defines *equality as inclusion and inequality as exclusion*... Inclusion refers in its broadest sense to citizenship, to the civil and political rights and obligations that all members of a society should have, not just formally, but as a reality of their lives. It also refers to opportunities and to involvement in public space.¹¹²

Similarly, education for students with disabilities has been attempted to be reduced in the single dimension of non-discrimination in a kind of procedural equality inspired by negative liberalism. However, education has “positive” and material aspects. For this reason, education is primarily a right to social justice (or distributive and proportional equality) to a much greater degree than a right to non-discrimination. Why? Because in the case of civil and political rights, the enemy is the “other” and the state; such rights can be achieved by restricting the power of authorities and the state. Instead, education is primarily a social right because it requires a willing society to spend on education and, to a certain extent, requires an underlying value of social solidarity; the “other,” the

¹⁰⁸ DJ Whelan, J Donnelly, ‘The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight’ (2007) 29 Human Rights Quarterly 908.

¹⁰⁹ Bantekas and Oette, n 107, at 416-21.

¹¹⁰ D Anastasiou, JM Kauffman, ‘The Right to Education: Analysis of Article 24 of the UN CRPD’. Lecture presentation at the Council for Exceptional Children (CEC) 2019 Annual Convention, Indianapolis, IN, January 31, 2019.

¹¹¹ A Giddens, *The Third Way: The Renewal of Social Democracy* (Blackwell, 1988), 70

¹¹² *Ibid*, at 102-03.

community, the city and/or state must be friendly to the request for the right to quality education for *all*.

In the contemporary free-market society, this is not an abstract discussion. Social demands for quality education constitute a vehicle for realizing these dimensions of the right to education. For example, in October 2019, Chicago teachers' 11-day strike demanded better quality of special education services (e.g., a larger number of social workers and paraprofessionals)—among other demands—and in the funding debate, they took aim at the dog parks in the affluent northern areas of the city and city's redevelopment policy. Teachers especially opposed a controversial development in Lincoln Yards that received more than \$1 billion in tax incentives (Tax increment financing—TIF), saying that it steers scarce economic resources to wealthy company developers. They argue that subsidizing companies by diverting a portion of their taxes to help finance development leaves schools without enough funding.¹¹³ In brief, education is funded by taxes; still, at the same time, other competing priorities are on the table for scarce resources—this underlines the crucial socio-economic dimension of the right to education.

Competitive priorities and competitive values can be seen in the case of academy schools in England. Academies were launched by Blair's New Labor government in the early 2000s and were subsequently rocketed by Conservative governments since 2010.¹¹⁴ The Labor government left around 200 academies in 2010, but there were more than 8,000 in 2019.¹¹⁵ As of January 2019, in England, 32% of primary schools with over 1.6 million students and 75% of secondary schools with nearly 2.5 million students had become academies and “free schools.”¹¹⁶ Academies are publicly funded schools directly by the Department for Education, independent of local education authorities, and under private management. There are different types of academies in operation run by charitable or private organizations. Among academy sponsors can be education charities, educational companies, further education colleges, universities, religion-affiliated bodies, private individuals, and business sponsors. Many sponsored academies operate under a shared or chain structure, a ‘multi-academy trust.’¹¹⁷ In a few words, in the academies, there is a transfer of the delivery of education and school ownership from the public to the private (i.e., not public) sector.¹¹⁸ A similar model with corporate-backed school chains operates in India, the Philippines, Ghana, Liberia, and other Sub-Saharan African countries oriented to profit and at odds with equitable, quality education.¹¹⁹ The rights of students with disabilities have been in jeopardy in this market-oriented values environment.¹²⁰ In England, perceived good academies tend to attract high-achieving students, and parents push for high standards that often end up expelling struggling students, including those with disabilities. For example, struggling students are off-rolled or stay

¹¹³ Hal Dardick, Mayor Lori Lightfoot and the CTU are battling over TIF money. Here's what you need to know' (Chicago Tribune, October 29, 2019) Retrieved from <https://www.chicagotribune.com/investigations/ct-chicago-teachers-union-tax-increment-financing-20191030-6cmvixmqfrdelnteo74f7uzdba-story.html>; Moriah Balingit, *Chicago Teachers Reach Deal with City to End 11-Day Strike* (The Washington Post, October 31, 2019). Retrieved from https://www.washingtonpost.com/education/2019/10/31/chicago-teachers-reach-deal-with-city-end-day-strike/?fbclid=IwAR0UmvzI5lboxU0OAO77BhQPtKN_2a5xnG1KCtUoHnkIhnIVlIvpmSILcKY#comments-wrapper

¹¹⁴ A Eyles, S Machin, S, ‘The Introduction of Academy Schools to England's Education’ (2019) 17 *Journal of the European Economic Association* 1107.

¹¹⁵ S Sodha, ‘The Academy Revolution Has Swept England. It Has Left Casualties in Its Wake’ (The Guardian, January 26, 2019). <https://www.theguardian.com/commentisfree/2019/jan/26/as-academies-become-the-norm-their-flaws-if-not-fixed-will-undo-their-strengths>

¹¹⁶ United Kingdom, Department of Education. *Schools, Pupils and their Characteristics* (National Statistics, January 2019).

¹¹⁷ United Kingdom, Department for Education, *Academy sponsor list* (Author, October 7, 2019); A Verger, C Fontdevila and A Zancajo, *The Privatization of Education: A Political Economy of Global Education Reform* (Teachers College Press, 2016); A West, ‘Academies in England and Independent Schools (fristående skolor) in Sweden: Policy, Privatisation, Access and Segregation’ (2015) 29 *Research Papers in Education* 330.

¹¹⁸ West, *ibid*, at 335-39

¹¹⁹ Bous, n 83, at 9, 14-16.

¹²⁰ West, n 117, at 337-40.

home during high-stakes exams.¹²¹ Some academies apply classroom retention practices.¹²² Students with an autism spectrum disorder spend days in isolation rooms because principals have imposed zero-tolerance rules for disturbing behavior.¹²³

Education as a “public good” expression of individual agency is aligned with the notion of *education as a social right*. Education is, of course, a crucial determinant of life chances, but “the economic benefits of reducing inadequate education exceed the costs, returning a healthy dividend to the taxpayer.”¹²⁴ The social and public aspects of education also relate to the specific purposes of schooling, which are *cognitive, social, political, and economical*.¹²⁵ To clarify, the cognitive purposes of schooling refer to skills such as reading, writing, and problem-solving in mathematics, domain-specific knowledge (e.g., science, history, geography), and higher-order thinking skills such as analysis, synthesis, application, creation, and evaluation.¹²⁶ The social purposes of schooling refer to socialization, that is, the process of internalizing society’s values and roles, and as such, it can promote social cohesion.¹²⁷ The political purposes of schooling include civic education (e.g., laws of society) and inculcation of political order (e.g., representative democracy and patriotism).¹²⁸ Economic purposes refer to the preparation of students for later occupational roles and their allocation into the division of labor.¹²⁹ Finally, education as social right has a socio-economic developmental aspect because it can transform entire communities and enrich societies, not just individuals living therein.

4. Two Diverging Views on the Right to Education for Persons with Disabilities

While there has been no dissent about whether the right to education extends to persons with disabilities, significant debate exists concerning the appropriate model of education for children with disabilities, which is often framed in binaries. Following a scientific realist approach, we focus here on the binary issue of our time: a continuum of placements or general education classrooms. Should students with disabilities receive educational services in *a continuum of placements* from the general classroom to partially separate settings (e.g., resource rooms) to special education classrooms and fully specialized schools? Or should they be included always and *without exceptions* within the general education classroom? The latter possibility has been codified as *full inclusion* (or “one school for all”).

In the special education and disability studies literature, *full inclusion* typically means that literally *all* students (each and everyone), regardless of their type or severity of a disability, must be in a general education classroom for full time. According to the full inclusion view, all teaching

¹²¹ S Weale ‘More Than 49,000 Pupils ‘Disappeared’ From English Schools – Study’ (The Guardian, April 17, 2019). Available at: https://www.theguardian.com/education/2019/apr/18/more-than-49000-pupils-disappeared-from-schools-study?CMP=share_btn_tw

¹²² W N McIntyre ‘Thousands of Children With Special Needs Excluded From Schools’ (The Guardian, October 23, 2018). Available at: <https://www.theguardian.com/education/2018/oct/23/send-special-educational-needs-children-excluded-from-schools>

¹²³ Frances Perraudin, “Legal Action Prompts Academy to Consider Isolation Unit Criticisms” (The Guardian, January 30, 2019). https://www.theguardian.com/education/2019/jan/30/legal-action-prompts-academy-to-consider-isolation-unit-criticisms?fbclid=IwAR0rvW3M_Lkmq64m8F0EzIrtbL-v-L7vAXu9dIyCutj-XEJr8SaISeRGk5w ; Charlie Haynes, ‘I Was Put in a School Isolation Booth More Than 240 Times’ (BBC, April 15, 2019). https://www.bbc.com/news/education-47898657?fbclid=IwAR0lApZreUK8Dq_3otD-xE0pfgguMj_jswla3HG1UDWutGr75L1dPd1XoN8

¹²⁴ Levin, n 37, at 5.

¹²⁵ AR Sadovnik, PW Cookson, SF Semel, RW Coughlan, *Exploring Education: An Introduction to the Foundations of Education* (5th ed., Routledge, 2018), 21.

¹²⁶ BS Bloom, MD Engelhart, EJ Furst, WH Hill, DR Krathwohl, *Taxonomy of Educational Objectives: The Classification of Educational Goals. Handbook I: Cognitive Domain* (Longmans, 1956), 18-20

¹²⁷ *Ibid*, at 21.

¹²⁸ *Ibid*, at 25-27.

¹²⁹ *Ibid*, at 30.

and services, if necessary, must be provided to the child in the same setting as it occurs with their peers.¹³⁰ No exceptions are acceptable.¹³¹ This signifies a specific policy and strategy entailing the elimination of all special education settings other than those of general/inclusive education classrooms, especially among those who view *inclusion* as a moral (*see* deontological) imperative.¹³²

There are many similar terms around the concept of inclusion (e.g., *inclusive education*, *inclusive practices*, *inclusive classroom*, *full inclusion*, *one school for all*), all of which convey similar or very different things. The meaning of the term inclusion is also constantly changing, and its definition is almost elusive.¹³³ Nevertheless, inclusion is widely perceived as an ideal, principle, and philosophy about social participation rather than a specific method for intervention and instruction of students with disabilities.¹³⁴ As Haug observed: inclusion is “a masterpiece of rhetoric, easy to accept and difficult to be against or even criticize.”¹³⁵ In essence, there is a little objection that our schools should become more inclusive by valuing equally all children, acknowledging their right to quality education, increasing social participation of students with disability, reducing barriers to participation in cultural activities and local communities, and restructuring school culture to be responsive to human diversity including disabilities and cultural differences. All these values and principles are precious and part of the broader ideal of an equal and inclusive society.

However, it is necessary here to clarify three critical points. First, despite almost thirty years of discussions about inclusion in academia, research evidence has shown that inclusive practices are not superior to alternatives. A recent examination of highly cited research on inclusive practices by Cook and Cook confirmed a previous observation that “evidence on whether students with disabilities learn more, academically or socially, and are happier in one school setting or another is at best inconclusive.”¹³⁶

Second, the concept of social justice historically goes beyond social participation and inclusion and typically involves material equality, redistribution of resources, and restructuring of power in the social, cultural, and political spheres.¹³⁷ Although social inclusion resembles social justice and is an integral part of it, it is not its substitute. Neither should it serve as an excuse to abandon material equality and tangible protection for people with disabilities and the weakest members of society (e.g., the elderly).¹³⁸

Third, high-sounding ideals, such as full inclusion, may hide political traps and be hijacked by dominant political forces (i.e., neoliberal fiscal austerity, privatization, marketization) with detrimental consequences if, on the one hand, the full inclusion movement cannot deliver a better alternative education and, on the other hand, if some zealots follow an abolitionist strategy to dismantle special education settings before they create better alternatives to the existing

¹³⁰ G de Beco, ‘Transition to Inclusive Education Systems According to the Convention on the Rights of Persons with Disabilities’ (2016) 34 *Nordic Journal of Human Rights*, 40, 40-59; G Hornby, ‘Inclusive Special Education: Development of a New Theory for the Education of Children with Special Educational Needs and Disabilities’, (2015) 42 *British Journal of Special Education* 256.

¹³¹ R Slee, *Inclusive Education Isn't Dead, it Just Smells Funny* (Routledge, 2018).

¹³² Kauffman et al, n 89, at 240-45.

¹³³ P Inray, A Colley, *Inclusion is Dead: Long Live Inclusion* (Routledge, 2017).

¹³⁴ P Haug, ‘Understanding Inclusive Education: Ideals and Reality’ (2017) 19 *Scandinavian Journal of Disability Research* 206; C Hyatt, G Hornby, ‘Will UN Article 24 Lead to the Demise of Special Education or to its Re-affirmation?’ (2017) 32 *Support for Learning* 288; Kauffman et al, n 89, at 242.

¹³⁵ Haug, *ibid*, at 207.

¹³⁶ BG Cook, L Cook, ‘An Examination of Highly Cited Research on Inclusion’, in JM Kauffman (ed.), *On Educational Inclusion: Meanings, History, Issues and International Perspectives* (Routledge, 2020), 130; see also N Zigmond, ‘Where Should Students with Disabilities Receive Special Education Services? Is One Place Better Than Another?’ (2003) 37 *The Journal of Special Education* 193, at 196.

¹³⁷ See generally, D Miller, *Principles of Social Justice* (Harvard University Press, 1999); M Walzer, *Spheres of Justice* (Basic Books, 1983).

¹³⁸ S Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press, 2018) 5-11.

institutions.¹³⁹ A cheap full inclusion is the preferred policy for fiscally conservative politicians, but it would lead to the exclusion of many students with disabilities from any substantial learning. An expensive full inclusion policy ought to present a clear strategy on how to overcome: (a) the fiscal austerity in the context of neoliberal capitalism, market-driven reforms that create a hostile atmosphere, structural inequalities (e.g., private education), antagonistic values such as meritocracy, or social forces (e.g., parents who feel that education is a positional good),¹⁴⁰ and (b) the barriers to educational attainment that are common among students with mind-related disabilities (e.g., severe intellectual disabilities, low-functioning autism, severe communication disorders, severe psychosocial disorders, learning disabilities, diagnoses related to symptoms of childhood trauma), as these are deeply intertwined with the neural architecture of learning mechanisms.¹⁴¹

An alternative view to full inclusion is based on the concept of the *continuum of alternative placements* (CAP) in the Individuals with Disabilities Education Act (IDEA) regulations¹⁴² in the United States (US), which requires that school districts have a range or a cascade system of alternative placements to meet the educational needs of children with disabilities for special education and related service.¹⁴³ The continuum includes alternative placements and supplementary services, including instruction in the regular classroom, regular classroom with itinerant teachers, a resource room, special classes, special schools, home instruction, and hospital instruction.¹⁴⁴ The continuum can allow school personnel to choose the best from several options in determining the most appropriate environment that maximizes learning and the *least restrictive environment* (LRE) to educate students with disabilities in more inclusive settings alongside students without disabilities to the maximum extent appropriate.¹⁴⁵ LRE is chosen from a continuum of alternative placements (CAP) and is not limited to general class or other placement.¹⁴⁶ Although the IDEA favors integration, it recognizes that more restrictive settings are sometimes required to provide an appropriate education for some students.¹⁴⁷

The CAP concept is driven by a bottom-up approach based on special educational needs as certified by a multidisciplinary team, including school professionals, the child's parents, and the child, when appropriate, which determine if the subject in question is a child with a disability making an eligibility decision for special education and related services based on evaluation data.¹⁴⁸ Once the student has been identified in need of special education, a multidisciplinary team makes educational programming by developing an Individualized Education Program (IEP)¹⁴⁹ and deciding on educational placement along the continuum in conformity with the least restrictive environment. Placement is reviewed at least annually.¹⁵⁰ Both the concepts of CAP and LRE are not only well defined in legal terms but also compatible with *educational inclusion*, meaning more inclusive schools increasingly, increased social participation of students with disability, and reduced barriers to participation in the community.¹⁵¹ In this view, inclusion is the energy that flows into

¹³⁹ D Anastasiou, JM Kauffman, 'When Special Education Goes to the Marketplace: The Case of Vouchers', (2009) 17 *Exceptionality* 205; D Anastasiou, JM Kauffman, 'Disability as cultural difference' (2012) 33 *Remedial and Special Education* 139.

¹⁴⁰ Markovits, n 32, at 130-39.

¹⁴¹ Anastasiou, Sideridis et, n 54, at 7-9.

¹⁴² IDEA Regulations, 34 C.F.R. § 300.115 (a-b).

¹⁴³ L Rothstein, SF Johnson, *Special Education Law* (5 ed., Sage, 2014); Yell, n 48, at 248-70.

¹⁴⁴ IDEA Regulations, 34 C.F.R. § 300.115 (a-b).

¹⁴⁵ IDEA, 20 U.S.C. § 1412(a)(5)(A).

¹⁴⁶ JM Kauffman, J Badar, 'Definitions and Other Issues' in JM Kauffman (ed.), *On Educational Inclusion: Meanings, History, Issues and International Perspectives* (Routledge, 2020), 1-2.

¹⁴⁷ Yell, n 48, at 255-61.

¹⁴⁸ IDEA Regulations, 34 C.F.R. § 300.306; IDEA Regulations, 34 C.F.R. § 300.308

¹⁴⁹ IDEA, 20 U.S.C. § 1401 (14).

¹⁵⁰ IDEA Regulations, 34 C.F.R. § 300.116.

¹⁵¹ M Farrell, 'Educational Inclusion and Raising Standards' (2000) 17 *British Journal of Special Education* 35; Hornby, n 130, at 258; Kauffman and Badar, n 146, at 5.

the educational system, including less or more separate settings; inclusion can make the system progressively more participatory, giving it time to change cultural attitudes and invent evidence-based practices, to self-correct ineffective strategies, methods, programs, products, or policies and to improve student academic and social outcomes.

Some authors have argued that grains of the *full inclusion* concept can be detected in Article 24 CRPD. Nevertheless, the concept of inclusive education has no clear definition in Article 24, leaving its meaning open to interpretation.¹⁵² Even sub-paragraph 2(e) of Article 24 CRPD, the most controversial clause of the entire article, refers to “effective individualized support,” “environments that maximize academic and social development” and at the same time views that these provisions could be “consistent with the goal of full inclusion.” At this point, the World Federation of the Deaf, throughout the preparatory works and negotiations of the drafting process and after the passage of the CRPD, advocated that “full inclusion” means *totally supportive environments*, even if they are not in general education.¹⁵³ The full inclusion phrase seemed to be vague to country delegates. Not accidentally, the official translation of the CRPD in Russian, considered as an authentic version of the CRPD (Article 50), does not refer to the goal of full inclusion but instead to the goal of *full coverage*.¹⁵⁴ In addition, the ratification law of the Republic of Cyprus refers to the goal of *full integration*.¹⁵⁵ These official translation incidents may indicate that subparagraph 2(e) was far from having a subtext such as eliminating special schools and any special unit within general education schools among state delegates in the preparatory works of the CRPD.

In addition, paragraph 1 refers to “an inclusive education *system*.” A system does not imply uniformity of its parts. Thailand, the International Disability Caucus (IDC), and others during the travaux préparatoires emphasized this point. UNESCO commented, “we also support the stance of Thailand indicating that inclusiveness does not mean supporting one model, but that the entire system be inclusive.”¹⁵⁶ In this view, inclusiveness can constitute a feature, a goal, and an open process of an education system. This does not necessarily mean that every unit of an inclusive education system (e.g., resource room, special unit) should operate the same way as a general class. Neither does mean that all the different units of the educational system should adopt exactly the same curriculum.¹⁵⁷ After all, an educational system does not consist of a single placement in many countries; there is technical education as part of the secondary education system, as well as private schools and religious-affiliated schools. The impression among delegates of countries seemed that the keyword “system” in paragraph 1 “imparts an openness to inclusive education, while at the same time emphasizing the intended goal for a more inclusive education.”¹⁵⁸ Nevertheless, the reinterpretation of Article 24 of the UN Convention on the Rights of Persons with Disabilities by the CRPD Committee in its General Comment No 4 seems to adopt a full inclusion view in the sense of eliminating every form of special education other than the general classroom.

Both the full inclusion and CAP plus LRE concepts specify the particular contours of disability-specific educational rights, and they set out further principles namely: accessibility, respect for dignity, autonomy, and evolving capabilities of children (and adults) with disabilities,

¹⁵² D Anastasiou, M Gregory, JM Kauffman ‘Article 24: Education’, in I Bantekas, MA. Stein and D Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2-18), 656-704.

¹⁵³ Seventh Session of the Ad Hoc Committee, Comments, Proposals and Amendments Submitted Electronically on Article 24 – Education. Available at:

<<http://www.un.org/esa/socdev/enable/rights/ahcstata24sevscomments.htm>>

¹⁵⁴ Aleksey Shemanov (personal communication October 20, 2019), Moscow State University of Psychology and Education, Institute of Inclusive Education Problems, Russia.

¹⁵⁵ Republic of Cyprus, Convention for the Rights of Persons with Disabilities and Other Related Matters (Ratification Law) [Law No. 8(III)/2011].

¹⁵⁶ Sixth Session of the Ad Hoc Committee, Background Documents of the CRPD, available at:

<<http://www.un.org/esa/socdev/enable/rights/ahcstata24sscomments.htm>>

¹⁵⁷ Anastasiou et al, Article 24, n 152, at 658-65; M Warnock, ‘Special Educational Needs: A New Look’, in L Terzi (ed), *Special Educational Needs: A New Look* (2nd ed., Continuum, 2010).

¹⁵⁸ Anastasiou et al, *ibid*, at 655-68

as well as full and effective realization of all rights. However, they constitute different paradigms. On the one hand, the CAP or special-educational-needs approach aims at maximizing learning. On this basis, the CAP constitutes a better preparation for life, building on learning and competencies to achieve the best possible social inclusion of students with disabilities. This is compatible with a multifaceted overarching principle of social justice that embodies a combination of *equality, fairness, proportionality, quality education, and social inclusion* in a way that responds to the tremendous range of human diversity, especially among persons with mind-related disabilities such as severe cognitive disabilities, severe autism, emotional and behavioral disorders, severe communication disorders, and learning disabilities. Flexible educational settings with more specialized teaching and related services attempt to meet the full range of capabilities and educational needs of students with disabilities.¹⁵⁹ In a landmark case, the US Supreme Court made a significant ruling in *Endrew F. v. Douglas County School District Re-1*,¹⁶⁰ requiring greater progress than the merely more than de minimis ‘benefit’ assumed in earlier courts’ rulings such as the *Board of Education v. Rowley*.¹⁶¹ *Endrew* determines that a free appropriate public education (FAPE), the fundamental principle of the IDEA, requires an individual education program (IEP) to produce appropriate progress taking individual students’ circumstances into consideration. *Endrew* is a small but significant *shift to learning outcomes*, perhaps for the first time in the legal history of education. In other words, *Endrew* goes beyond the procedural and substantial instructional provisions (e.g., specialized, individualized, intensive instruction) to determine the appropriateness of the FAPE.¹⁶²

On the other hand, the CRPD Committee’s recommendations operate within a deontological non-discrimination paradigm, prioritizing equal access to educational treatment for persons with disabilities (PWD) and the transfer of resources from special education to general education, which is somewhat compatible with the absolute non-discrimination spirit of the CRPD Committee, the body of experts which monitors implementation of the Convention by the States Parties. Noteworthy, non-discrimination in the CRPD is fortified by articles 7 and 24 of the CRPD, which in addition to specifying the particular contours of disability-specific educational rights, it sets out further principles alongside non-discrimination namely: accessibility, respect for dignity, and personal autonomy.¹⁶³ In general, Article 24 of the CRPD seems to conceive of the right to education for persons with disabilities as a civil right rather than as a socio-economic right.¹⁶⁴ From a global perspective, to educate people with disabilities is to create opportunities from scratch, not just to redistribute resources from special education schools to general education classrooms in the name of non-discrimination.¹⁶⁵

In the CRPD Committee’s view, equality alongside non-discrimination is rather conceived as education under the same roof. Reasonable accommodation of social and learning needs is the only additional mechanism to meet the educational needs of students with disabilities, but this has several limitations. But this mechanism is activated on an individual basis, not by design.¹⁶⁶ Under a CRPD Committee’s regime, States Parties, establishing and maintaining specialized schools is subjected to tough negotiations with the stakeholders. Emphasis on a single physical space (general

¹⁵⁹ Anastasiou et al, *ibid*.

¹⁶⁰ *Endrew F. v. Douglas County School District Re-1*, 580 U.S. 137 (2017).

¹⁶¹ *Board of Education v. Rowley*, 458 U.S. 176 (1982).

¹⁶² Kauffman et al, n 89, at 142-45; ML Yell, DF Bateman, ‘Free Appropriate Public Education and Endrew F. v. Douglas County School System: Implications for Personnel Preparation’ (2018) 42 *Teacher Education and Special Education*, 1, 2-3.

¹⁶³ I Bantekas, ‘The Rights of Children with Disabilities: The Need for a Sui Generis Regime under International Law’ (2022) 49 *Northern Kentucky L Rev* forthcoming; I Bantekas, ‘Reservations to the Disabilities Convention: Peer Engagement and the Value of a Clear Object and Purpose’, (2020) 33 *New York International Law Review* 61.

¹⁶⁴ Anastasiou et al, Article 24, n 152, at 665-67.

¹⁶⁵ The CRPD Committee has recommended that State parties should reallocate resources from the special education settings to promote inclusion in mainstream schools e.g., ‘Concluding Observations on the Initial Report of China’ CRPD/C/CHN/CO/1 (15 October 2012) para 36; CRPD Committee, ‘Concluding Observations on the Initial Report of Qatar’ UN Doc CRPD/C/QAT/CO/1 (2 October 2015) para 44.

¹⁶⁶ Anastasiou et al, Article 24, n 152, at 665-67.

education classroom) and with no clear procedural and substantial obligations (e.g., specially designed instruction) is not only an assumption of an a priori right to a classroom inclusion, but it also becomes the ultimate criterion for a successful education. Assumptions and results are becoming identical. This radical interpretation of Article 24 has raised concerns of disability organizations (e.g., the World Federation of the Deaf, World Blind Union, World Federation of the Deaf-Blind) and countries (e.g., Australia, Germany).¹⁶⁷ Educational inclusion seems to be viewed superficially; *co-teaching* is not mentioned, perhaps because its implementation involves an active role for special education teachers.¹⁶⁸ Co-teaching is a popular service delivery model involving special and general education teachers who deliver instruction to students with or without disabilities while attending an inclusive classroom.¹⁶⁹ Although the CRPD Committee mentioned *team teaching* (a specific form of co-teaching) just one time, it did not offer any clarification. Neither did it refer to special teachers' agency.¹⁷⁰

Both paradigms require some degree of re-thinking about the learning and socio-economic consequences entailed in the educational capabilities of children with disabilities and adults in tertiary education or even continuing education. While working for a just and inclusive society, we should keep this debate open in the light of the best corroborating scientific evidence. Scientific inquiry is, by nature, an open and self-correcting process. This call is also based on the recognition that a just and inclusive society has been threatened or undermined by authoritarian ideologies claiming to possess the ultimate truth. The border between international law and ultimate-truth practices is subtle. This is not a call to inaction but a call to a continuing dialogue.

Conclusion

This article examined the two dimensions of education, namely its human rights perspective as well as its developmental one.¹⁷¹ The two are complementary and inter-arching dimensions, and the latter is a natural progression of the right to education, both individually and collectively. Such right possesses *quantitative* (e.g., number of school enrolments) and *qualitative* (e.g., quality of education) dimensions that complement and reinforce each other.¹⁷² High enrolment rates are meaningless if the quality of education does not increase, if education is not appropriate, or is not linked to developmental goals. Research shows that well-planned and universally inclusive education policies empower children and youth.¹⁷³

The focus on inclusive education is nowhere more poignant than SDG4, which fosters states' commitment to "inclusion and equity in and through education."¹⁷⁴ This requires universal access to education, particularly in respect of marginalized persons.¹⁷⁵ It is essential that every learner feels "valued and respected, and... enjoys a clear sense of belonging."¹⁷⁶ Inclusiveness in

¹⁶⁷ Ibid.

¹⁶⁸ D Anastasiou, M Felder, L Correia, A Shemanov, I Zweers, B Ahrbeck, 'The Impact of Article 24 of the CRPD on Special and Inclusive Education in Germany, Portugal, the Russian Federation, and Netherlands', in JM Kauffman (ed.), *On Educational Inclusion: Meanings, History, Issues and International Perspectives* (Routledge, 2020) 236; DP Hallahan, JM Kauffman, PC Pullen, *Exceptional Learners: An Introduction to Special Education* (14th ed., Pearson, 2018).

¹⁶⁹ SC Cook, KA McDuffie-Landrum, L Oshita, BG Cook, 'Co-Teaching for Students with Disabilities: A Critical and Updated Analysis of the Empirical Literature', in JM Kauffman, DP Hallahan and P C Pullen (eds.), *The Handbook of Special Education* (2nd ed: Routledge, 2017), 233; M Friend, 'Welcome to Co-Teaching 2.0.' (2016) 73 *Educational Leadership* 16.

¹⁷⁰ CRPD Committee, General Comment No 4, n 88, para 70.

¹⁷¹ See T McCowan, *Education as a Human Right: Principles for a Universal Entitlement to Learning* (Bloomsbury 2014).

¹⁷² E Unterhalter, 'The Many Meanings of Quality Education: Politics of Targets and Indicators in SDG4' (2019) 10 *Global Policy* 39.

¹⁷³ See BB Swadener, L Lundy, J Habashi (eds), *Children's Rights and Education: International Perspectives* (Peter Lang, 2013); see UN Human Rights Council, 'The Right to Education', UN Doc A/HRC/32/L.33 (29 June 2016).

¹⁷⁴ Incheon Declaration, n 22, at 7.

¹⁷⁵ Ibid.

¹⁷⁶ UNESCO, *Global Education Monitoring Report 2020: Inclusion and Education: All Means All* (UNESCO 2020), at v.

this sense requires individual accommodations and adjustments to meet learners' personal needs.¹⁷⁷ There is an emerging body of cases that obliges states to respect the right to inclusive education for disabled learners, including *MDAC v Belgium*¹⁷⁸ and *International Federation for Human Rights (FIDH), and Inclusion Europe v Belgium*.¹⁷⁹ As part of the third wave of right to education litigation in the United States¹⁸⁰, the Supreme Court of Kentucky in *Rose v Council for Better Education* specified that the duty to provide an efficient system of education meant providing each and every child with at least seven particular capacities¹⁸¹ denoting a shift from equality (i.e., inequality in the financing and quality of education) to an *adequacy approach* to the right determining a threshold level of the right to education.

This approach to the right to education entails a focus on making educational opportunities available and accessible to PWD on an equal and just basis with persons without disabilities. Indeed, *availability* and *accessibility* are critically important;¹⁸² they have been identified as two of four key dimensions of the *right to receive education*¹⁸³ and constitute the core of the right to education under international human rights law.¹⁸⁴ Nevertheless, decoupled from the right to education's crucial socio-economic dimensions, availability, accessibility, and adaptability are insufficient dimensions to secure this right for PWD meaningfully. We need more ambitious ideals and movements focusing on redistributive justice to achieve a humane and equitable education in an unequal world dominated by market forces.¹⁸⁵ A mere focus on the civil aspects of the right to education (e.g., non-discrimination, accessibility, and adaptability) peripheralizes broader conceptions of social justice for persons with disabilities. If the material and economic aspects of the right to education, as well as the appropriateness aspect and learning outcomes, are overlooked, then a narrow right to education for persons with disabilities only poorly can serve its holders.¹⁸⁶

¹⁷⁷ Incheon Declaration, n 22, at 7.

¹⁷⁸ *Mental Disability Advocacy Centre (MDAC) v Belgium* (2018) 66 EHRR SE13.

¹⁷⁹ *International Federation for Human Rights (FIDH) and Inclusion Europe v Belgium* (no. 141 of 2017) [2021] European Committee of Social Rights. See J Kotzmann, M Stonebridge, JR Morss, 'SDG 4' in I Bantekas, F Seatzu (eds), *Commentary on the Sustainable Development Goals* (Oxford University Press, 2022, forthcoming).

¹⁸⁰ M Langford, 'Judicial Politics and Social Rights', in KG. Young (ed.), *The Future of Economic and Social Rights* (Cambridge University Press, 2019) 66ff, who explains the evolution of pertinent litigation.

¹⁸¹ *Rose v. Council for Better Education*, 790 S.W.2d 186 (1989) (Supreme Court of Kentucky, United States); These seven capacities included: (a) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (b) sufficient knowledge of economic, social and political systems to enable the student to make informed choices; (c) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state and nation; (d) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (e) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (f) sufficient training or preparation for advancing training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (g) sufficient levels of academic or vocational skills to enable public school students to compete favourably with their counterparts in surrounding states, in academics and the job market.

¹⁸² See further analysis on the four dimensions (availability, accessibility, acceptability, and adaptability) of the right to education by the UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 13' (1999) UN Doc CESCR E/C.12/1999/10, para. 6; CRPD Committee, 'General Comment No. 4', n 88, paras. 20, 21, 23, 24, 25. Acceptability refers to the form and substance of education, including curricula and teaching methods that may include affirmative action measures. Adaptability refers to a flexible and responsive education to the needs of students. The CRPD Committee relates accessibility and adaptability to *Universal Design for Learning*.

¹⁸³ These four dimensions are part of the 4-As Framework for conceptualizing the right to education suggested by Katarina Tomasevski, see UNCHR, 'Preliminary Report of the Special Rapporteur on the Right to Education' UN Doc E/CN.4/1999/49 (1999), paras 51–74.

¹⁸⁴ CESCR, 'General Comment No. 13', n 182, para 6.

¹⁸⁵ Moyn, n 138, at 5-11

¹⁸⁶ *Ibid.*