

**UNDERSTANDING INCLUSIVE EDUCATION: TAKING THE RIGHTS  
OF CHILDREN WITH PROFOUND AND MULTIPLE DISABILITIES  
SERIOUSLY**

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## EXECUTIVE SUMMARY

The legally binding right to inclusive education, as stipulated by the CRPD, is a recent development in the catalogue of human rights. The CRPD elaborates upon disability-specific hardships on the exercise of rights already protected by former human rights instruments. Following Article 26 of the UDHR, Article 24 of the CRPD explicitly brings persons with profound and multiple disabilities (PMD) within the scope of the right to inclusive education.

There is some clarity today on how the CRPD Committee envisages inclusive education systems (General Comment No. 4). Yet, for many governments such vision cannot be more than a flagship command. Is the standard of Article 24 unrealistically high then?

The central puzzle of my paper revolves around the tension of including children with PMD in the mainstream education system. Their right to inclusive education is understood in the context of domestic legal standards and their marginalized social status within the education system.

The point of departure for comparing domestic legal frameworks of Ireland, Hungary and South Africa is the CRPD Committee's understanding of inclusive education. The comparative analysis is conducted for two purposes: Firstly, taking account of the historical context current legislation and case law are analyzed to identify the aptitude of domestic legal systems with regards to the educational rights of children with PMD. Secondly, in light of the comparative analysis it is presented how the ambitious standard of Article 24 can be implemented for children with high support needs on the ground.

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# GLOSSARY

## **ADL functions**

Capabilities necessary to perform activities of daily living (ADL) such as walking, eating, cleaning oneself or social skills.

## **Basic Education**

This term was introduced by the 1990 Jomtien Conference. It is a broader concept than primary education. Primary education is the core of basic education. Basic education includes non-formal, early childhood as well as “second chance” primary education for youth and adults.<sup>1</sup>

## **Formal Education**

Structured training in educational establishments from pre-primary to university level leading to official certification.<sup>2</sup>

## **Inclusive Education**

Going beyond the original idea of fighting disability discrimination in education inclusive education is seen today as “a concept of the right to high-quality education for *all* learners, regardless of any individual or social characteristic”<sup>3</sup> promoting “active participation with optimal outcome for all pupils in the given learning community.”<sup>4</sup>

## **Individualized Education Plan (IEP)**

Educational document explicating the tasks and objectives of education for a disabled child based on individual assessment.<sup>5</sup>

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<sup>1</sup> UNICEF, *Strategies in Basic Education*, E/ICEF/1995/16, New York, 7 April 1995, at §6(1).

<sup>2</sup> Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education, adopted in the framework of Recommendation CM/Rec (2010) 7 of the Committee of Ministers, p. 6. Available at: <https://rm.coe.int/16803034e5>

<sup>3</sup> European Agency for Special Needs and Inclusive Education, *Inclusive education for learners with disabilities*, Policy Department for Citizens’ Rights and Constitutional Affairs, Brussels, 2017, p. 8. Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596807/IPOL\\_STU\(2017\)596807\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596807/IPOL_STU(2017)596807_EN.pdf)

<sup>4</sup> Camilla Brørup Dyssegaard and Michael Sogaard Larsen, *Evidence on Inclusion*, Danish Clearinghouse for Educational Research, Aarhus University, Copenhagen, 2013, p. 10. Available at: [http://edu.au.dk/fileadmin/edu/Udgivelser/Clearinghouse/Review/Evidence\\_on\\_Inclusion.pdf](http://edu.au.dk/fileadmin/edu/Udgivelser/Clearinghouse/Review/Evidence_on_Inclusion.pdf)

<sup>5</sup> “Equitable approaches [of state policies] must go beyond ensuring equal access for all to ensuring that individual learners receive the support they require to succeed, according to their individual circumstances.” See: Koumbou Boly Barry, *Report of the Special Rapporteur on the right to education*, A/72/496, 29 September 2017, at §19.

### **Reasonable Accommodation**

Necessary adjustments in a particular case that do not impose a disproportionate burden to ensure a disabled person the exercise of all human rights on an equal basis with others.”<sup>6</sup>

### **Rigid Integration**

The accommodation of children with SEN in a mainstream school without adequate systemic modifications of the school to meet their needs.

### **Profound and Multiple Disabilities (PMD) – High Support Needs<sup>7</sup>**

Anyone may need high support temporarily. However, these two terms refer to an irreversible condition. They are used interchangeably.<sup>8</sup> Persons with PMD usually have difficulties in communication and performing motor skills. Cognition and sensory functions may also be affected. Overcoming difficulties of diverse combination of impairments – which is usually caused by an injury to the central nervous system – requires high level of support throughout the lifespan. Succinctly put a person with PMD “needs help in different and complicated ways.”<sup>9</sup>

### **Special Educational Needs (SEN)**

Administrative categories entitling children with disabilities to receive extra educational support. These categories include physical and intellectual disability, autism spectrum disorder, sensory (auditory and visual) and speech impairments, and psychosocial disabilities (such as children with challenging behavior or ADHD).<sup>10</sup>

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<sup>6</sup> Article 2 of CRPD.

<sup>7</sup> See: Chapter I. 1.2.

<sup>8</sup> The term ‘high support need’ places emphasis on the necessary support for meeting SEN as opposed to highlighting the biological aspect of disability. ‘High support need’ encompasses a more social model-oriented attitude susceptible to the evolving capacities of children whereas profound and multiple disability denotes a more medicalized, individualistic approach. It is argued that modifications of a concept do not necessarily involve changing the underlying content, but it nevertheless supports progressive reflections. See further: György Könczei, Ilona Hernádi, Zsuzsanna Kunt and Anikó Sándor, *Magas támogatási szükséglettel élő személyek önrendelkezése, A fogyatékoságtudomány a mindennapi életben*. BME Tanárképző Központ, Budapest, 2015. Available at: [https://www.tankonyvtar.hu/hu/tartalom/tamop412b2/2013-0002\\_a\\_fogyatekosagtudomany\\_a\\_mindennapi\\_életben/FM/sfmjs63g.scorm](https://www.tankonyvtar.hu/hu/tartalom/tamop412b2/2013-0002_a_fogyatekosagtudomany_a_mindennapi_életben/FM/sfmjs63g.scorm)

<sup>9</sup> Easy-to-read definition on Complex Support Needs by Inclusion Europe. Available at: [http://inclusion-europe.eu/?page\\_id=2844#CSN](http://inclusion-europe.eu/?page_id=2844#CSN)

<sup>10</sup> For Hungarian legislation on the definition of SEN see: §4(25) of Act of CXCV of 2011 on National Education.

# LIST OF ACRONYMS

**CESCR** – Committee on Economic, Social and Cultural Rights

**CRC** – Convention on the Rights of the Child

**CRPD** – Convention on the Rights of Persons with Disabilities

**DPSP** – Directive Principles of Social Policy

**ECHR** – European Convention on Human Rights

**ECtHR** – European Court of Human Rights

**EFA** – Education for All

**ICCPR** – International Covenant on Civil and Political Rights

**ICESCR** – International Covenant on Economic, Social and Cultural Rights

**ICF** – International Classification of Functioning, Disability and Health

**SDG** – Sustainable Development Goal

**UDHR** – Universal Declaration of Human Rights

**UNESCO** – United Nations Educational, Scientific and Cultural Organization

**UNICEF** – United Nations International Children's Emergency Fund

**WHO** – World Health Organization

What is the difference between recognising that [an inchoate] right exists and cannot be fulfilled, and not recognising that any such right exists?<sup>11</sup>

The demands of justice must first of all be satisfied; that which is already due in justice is not to be offered as a gift of charity.<sup>12</sup>

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<sup>11</sup> David Bilchitz, Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence, *South African Journal on Human Rights*, 19, 1, p. 22.

<sup>12</sup> Section 8 of the Decree on the Apostolate of the Laity, *Apostolicam Actuositatem* promulgated by Pope Paul VI, 18 November 1965. Available at: [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decree\\_19651118\\_apostolicam-actuositatem\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651118_apostolicam-actuositatem_en.html)



# INTRODUCTION

The overrepresentation of Roma children in special schools is a well-known phenomenon in international human rights law. The discriminatory selective mechanisms of education systems filtering this minority from mainstream schools to special schools have successfully been litigated in Europe.<sup>13</sup> Because of a well-prepared line of strategic cases the international community is aware of the polarized education systems around Europe in relation to Roma children.

Mainstream human rights discourse has successfully framed the educational plight of these children. The inability of school systems to cope with different socio-cultural backgrounds has been identified as a human rights issue. However, the shortcomings of school systems in relation to children with PMD is almost unheard of.<sup>14</sup> The issue of denying education to children with PMD<sup>15</sup> has not been given due attention in the international community so far.<sup>16</sup>

As school education frames childhood decisively in modern societies,<sup>17</sup> exclusion from schools creates such disadvantage that even the best family cannot make up for.<sup>18</sup> If school

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<sup>13</sup> Cases before the European Court of Human Rights (ECtHR) include: *D.H. and Others v. the Czech Republic*, 57325/00, 13 November 2007; *Sampanis and Others v. Greece*, 32526/05, 5 September 2008; *Oršuš and Others v. Croatia*, 15766/03, 16 March 2010; *Horváth and Kiss v. Hungary*, 11146/11, 29 January 2013; *Lavida and Others v. Greece*, 7973/10, 30 August 2013.

<sup>14</sup> If the reader asks the question how many persons with PMD he or she has met in person, the answer may bear witness to the social and political invisibility of the target group of this paper.

<sup>15</sup> The terms children, pupils and students are used to refer to the youth attending school. Even though persons with PMD may attend school after the age of 18 these terms are used interchangeably as the majority of the target group is children.

<sup>16</sup> The right to compulsory primary education of children with PMD has not yet been successfully litigated before the ECtHR. See Chapter II. 2.5. for describing *André Simpson v. United Kingdom*, 14688/89, 4 December 1989; *Graeme v. United Kingdom*, 13887/88, 5 February 1990; *Klerks v Netherlands*, 25212/94, 4 July 1995; *McIntyre v. The United Kingdom*, 29046/95, 21 October 1998; *Kalkanli v Turkey*, 2600/04, 13 January 2009.

<sup>17</sup> Notably, opponents of proposed legislation regulating child labor and establishing compulsory education in the United States in the 1920s held that compulsory education laws would intrude on parents' childrearing prerogatives impermissibly. See: Martin Guggenheim, *What's Wrong with Children's Rights*, Harvard University Press, Cambridge, 2005, pp. 2-3.

<sup>18</sup> Ágnes Lányiné Engelmayer, *Intellektuális képességzavar és pszichés fejlődés*, Medicina Könyvkiadó, Budapest, 2017, p. 236.

education is so important why do governments fail to ensure access to education to children with PMD? We digress slightly to contextualize this question.

Children with PMD have been granted educational rights only in the second half of the XX. century. The reasons behind the late recognition of their educational entitlements go back to prejudice deeply rooted in history.<sup>19</sup> Since ancient times children with PMD have been considered to be the pariahs of disabled children. Writings by Aristotle (*Treatise on Government*) and Plato (*Republic*) called for murdering them.<sup>20</sup>

In the XX. century the concept of worthless life (*Lebensunwertes Leben*) emerged with the rise of extremist eugenics and social Darwinism. In Nazi Germany between 1939 and 1945 the concept of racial hygiene justified the tragedy of murdering at least 5000 children with PMD in special children's wards sometimes after having been force sterilized or used as objects for medical research.<sup>21</sup>

After World War II the marginalization of learners with PMD continued as the severity of their disability was perceived so extreme to justify their segregation from children who had 'less' disability. Since the 1970s the advocacy for the educational rights of children with PMD has slowly

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<sup>19</sup> "Disability is one of the least visible but most potent factors in educational marginalization. Beyond the immediate health-related effects, physical and mental impairment carries a stigma that is often a basis for exclusion from society and school." See: UNESCO, *EFA Global Monitoring Report*. 2010, Paris, p. 187.

<sup>20</sup> Emphasizing perfection of physical form and athletic prowess as developmental goals Aristotle suggested that Greek law should decree children with imperfections unacceptable for parenting. Plato's *Republic* reiterated the Spartan principle of disposing of 'deformed' children (abandoning disabled children on Mount Taygetus to die exposed to the elements). See: Endnotes of Conceptual Paper of World Bank Disability and Development Team, *The Education for All (EFA) Flagship: The right to Education for Persons with Disabilities: Towards Inclusion*, December 2004, p. 39. Available at: <http://unesdoc.unesco.org/images/0013/001378/137873e.pdf>; Susan Baglieri and Arthur Shapiro, *Disability Studies and the Inclusive Classroom. Critical Practices for Embracing Diversity in Education*, Routledge, 2017, p. 34.

<sup>21</sup> Ágnes Lányiné Engelmayer, A „T/4 akció” hatása az NSZK gyógypedagógiájára, *Gyógypedagógiai Szemle*, 20, 2, 1992, p. 109-115.

been gaining ground.<sup>22</sup> Against the backdrop of extreme neglect and even annihilation it comes as no surprise that governments keep forgetting about these children even today. Two explanations are flagged to frame the reasons behind their educational exclusion in the XXI. century.

From a legal perspective, wrong conceptions of equality maintain disablist practices. Lack of knowledge about their rights erroneously justifies their exclusion.

Because disabled people are different, in some respects, we have not seen it as discriminatory to treat them differently. We have overlooked the fact that, as in the examples given above, the disabled person's disability has been irrelevant to the different – and disadvantageous – treatment.<sup>23</sup>

From a political perspective, children with PMD and their families have little representation. They form a small minority within a marginalized and vulnerable group.<sup>24</sup> Notwithstanding almost all states in the world acknowledged the existence of the right to inclusive education<sup>25</sup> low priority for governments to ensure its effective exercise for children with PMD prevails.

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<sup>22</sup> For example, the Education (Handicapped Children) Act enacted on 1 April 1971 provided education for the first time to all children in England. In the US this was in 1974. See: Education of the Handicapped Amendments of 1974 in footnote 156.

<sup>23</sup> Peter Singer, *Practical Ethics*, Cambridge University Press, 1993, pp. 52-53. Available at: <http://www.stafforini.com/docs/Singer%20-%20Practical%20ethics.pdf>

<sup>24</sup> The invisibility of children with PMD in the political arena may be due to the fact that decision-makers lack quality contact with persons with PMD. If politicians are personally affected, they engage in making progressive policies more willingly. The administration of John F. Kennedy is a good example that brought the neglected issue of disability rights to the fore. President Kennedy had a sister who was born with intellectual disability and he signed into law the Mental Retardation and Community Mental Health Centers Construction Act in 1963 which provided federal funding for the construction of facilities for the prevention, care, and treatment of people with intellectual disabilities.

<sup>25</sup> There are 177 state parties to the CRPD. The last country to accede to the Convention was Ireland on 20 March 2018.

## WHY IS THE TOPIC IMPORTANT?

As disability is more and more understood as a human rights issue, awareness on the magnitude of inequality faced by disabled children is expanding in the education context. Economic, legal and education arguments follow.

There is a well-established link between disability and poverty.<sup>26</sup> Statistics in the field of education of children with disabilities are startling. In 2006 UNESCO estimated that less than 10% of disabled children went to school in Africa.<sup>27</sup> Drop-out rates – which are particularly high for disabled children – correlate with poverty. As economic cycles affect access to education, it is not a question anymore that disability is a development issue.<sup>28</sup>

In developed countries disabled people are also more prone to experience socioeconomic hardships than people without disabilities.<sup>29</sup> For example, in Hungary families raising a child with PMD are likely to get poor by the time the child reaches school age.<sup>30</sup> Providing education could be part of the solution for the economic hardships of these families.<sup>31</sup>

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<sup>26</sup> Anna Lawson, United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn, *Syracuse Journal of International Law and Commerce*, 34, 2, 2006, p. 563; Shaun Grech, Disability, Poverty and Development: Critical Reflections on the Majority World Debate, *Disability & Society*, 24, 6, 2009, pp. 771–784.

<sup>27</sup> Jill Balescut and Kenneth Eklindh, *Literacy for Life Literacy and persons with developmental disabilities: why and how? Background paper prepared for the Education for All Global Monitoring Report 2006*, 2006/ED/EFA/MRT/PI/9. Available at: <http://unesdoc.unesco.org/images/0014/001459/145940e.pdf>

<sup>28</sup> This statement calls for international cooperation. See: Articles 2(1) of ICESCR; 4 of CRC; and 32 of CRPD.

<sup>29</sup> World Health Organization and World Bank, *World Report on Disability*, 2011, p. 39; In Hungary at least two third of the families raising a child with intellectual disability, autism or PMD live in chronic poverty. See: Tamás Verdes, Ágota Scharle and Balázs Váradi, *Intézet helyett. A fogyatékos személyeket támogató szociálpolitika megújításának lehetséges irányairól*, Budapest Intézet, Budapest, 2012, p. 5. Available at: [https://tasz.hu/files/tasz/imce/2011/intezet\\_helyett\\_2012.pdf](https://tasz.hu/files/tasz/imce/2011/intezet_helyett_2012.pdf)

<sup>30</sup> Tamás Verdes, Súlyosan, halmozottan fogyatékos gyermekek és fiatalok a közoktatásban, De juRe and Kézenfogva Alapítvány, Budapest, 2005, In: György Könczei (ed.), *A súlyos és halmozott fogyatékossgal élő emberek helyzete Magyarországon – Első rész*, Eötvös Loránd Tudományegyetem. Bárczi Gusztáv Gyógypedagógiai Kar, 2009, p. 100.

<sup>31</sup> “Increasingly, education is recognized as one of the best financial investments States can make.” See: §1 of CESCR General Comment No. 13, *The Right to Education*, E/C.12/1999/10, 8 December 1999.

The right to education is central in the protection of other human rights of children with PMD. In adult years restricting legal capacity often leads to the infringement of other human rights (forced placement into a residential institution, exclusion from voting). Through the guardianship system the waning of social rights (right to independent living, right to vote) is made invisible by limiting civil and political rights of adults with disabilities.<sup>32</sup> However, all children have limited legal capacity, hence, disabled children's rights cannot be curtailed this way.

However, the denial or restriction of their right to education has a ripple effect on the enjoyment of other rights. Analogous with the central role of legal capacity in the protection of rights of adults with disabilities, the right to inclusive education is of crucial importance for disabled children. In this vein, the right to education is often referred to as an empowerment right<sup>33</sup> or as the precondition for the exercise of other human rights.<sup>34</sup>

Finally, disabled children are more dependent on educational intervention than their non-disabled peers.<sup>35</sup> This is particularly true for children with PMD as they are fully dependent on external stimuli to develop.<sup>36</sup> From a pedagogical perspective this is why it is of special importance to deal with the educational rights of children with PMD.

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<sup>32</sup> Tamás Verdes and Marcell Tóth, *A per tárgya*, ELTE Eötvös Kiadó, Budapest, 2010; Tamás Verdes Jogok a jóléti présben – a cselekvőképtelenség és értelmi fogyatékoság problematikájához a rendszerváltás utáni Magyarországon, In: László Bass (ed.), *Amit tudunk és amit nem...*, Kézenfogva Alapítvány, Budapest, 2008, pp. 133-156.

<sup>33</sup> "Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities." See: CESCR General Comment No. 13 in footnote 31.

<sup>34</sup> Manfred Nowak, The Right to Education, In: Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights. A Textbook*, Martinus Nijhoff Publishers, Dordrecht, 1995, p. 189.

<sup>35</sup> "Such children have needs which are much greater than those of children who do not have this degree of disability for the majority of the children have secondary disabilities such as epilepsy, visual and/or hearing impairment and cerebral palsy." See: Chapter III. 3.3: §3.10 of *Western Cape Forum judgement*.

<sup>36</sup> See: Chapter I. 1.3.

## CHOICE OF JURISDICTIONS AND THREE HYPOTHESES

Shifts in the perception of disability affects the way PMD is understood in legislation and its application. My presumption is that the way societies relate to “others” – in this case children with different bodies and minds – is reflected in domestic legislation and case-law.<sup>37</sup>

It would be far-fetched to pull the models of disability – which oversimplify and merely highlight certain aspects of the concept of disability – over different jurisdictions. Nevertheless, by way of inductive reasoning models borrowed from disability studies were roughly associated with jurisdictions.<sup>38</sup>

Hungarian law was selected which reflects the medical model of disability.<sup>39</sup> More than 800 children with PMD are educated in care homes.<sup>40</sup> These institutions formerly belonged to the public health care system. The task of caring was perceived to meet only basic health needs (changing nappies, turning people around to prevent bedsores). In such total institutions achieving educational objectives is not more than a mere illusion. Petra Bárd argues that the medical and social model trigger social legislation.<sup>41</sup> Therefore, I expect to find that disability rights in Hungary

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<sup>37</sup> No individual attribute is different in itself as it is social interaction which constructs difference. See: Ferenc Pálhegyi, A fogyatékoság bélyegének pszichodinamikája, *Gyógypedagógiai Szemle* 12, 1, 1984, pp. 21-29.

<sup>38</sup> Countries were selected to differ significantly in terms of historical, cultural, social and economic background so that their legal regimes prove to be informative about the nature of inclusive education.

<sup>39</sup> The medical model focuses on the impairment of the individual. Intervention is targeted to achieve correction of the functionality of the individual. The disabled individual is expected to adapt to prevailing social norms.

<sup>40</sup> According to the Yearbook of Welfare Statistics 2015 there were 5023 persons with multiple disabilities placed in care homes for persons with disabilities across Hungary. There were 826 (499 boys and 327 girls) minors – presumably many of them are children with PMD – who were placed in long-term residential social care institutions for disabled persons (there were 151 such care homes in total). See: Hungarian Central Statistical Office, *Yearbook of Welfare Statistics, 2015*, Budapest, 2016, p. 167, 172, 174.

<sup>41</sup> Petra Bárd, A fogyatékkal élő személyek jogai az *acquis communautaire* tükrében, *Fundamentum*, 4, 2006, pp. 103–114.

are guaranteed by social rights – which is constantly hedged around the good-will of Parliament – as opposed to being protected by fundamental rights.

Ireland was chosen whose legal system reflects the social model of disability.<sup>42</sup> The Irish Supreme Court's jurisdiction has a rich case-law on the right to education of children with (severe) disabilities.<sup>43</sup> At first sight ample national case-law could reflect a fundamental rights-based approach to education. However, in 2001 the Irish Supreme Court restricted adjudicative space for future socio-economic claims in two famous judgements.<sup>44</sup> Hence, I assume that Irish courts have endorsed the social model of disability.<sup>45</sup>

South Africa was selected whose legal regime reflects the human rights model of disability.<sup>46</sup> The 1996 South African Constitution is said to be a transformative document with the objective of creating an equitable, post-apartheid society. As Petra Bárd argues the human rights paradigm (she calls it the anti-discrimination model) fights for the fundamental rights of persons with disabilities. Hence, I assume that the South African legal order provides for a fundamental rights-based perspective on the education of children with PMD.

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<sup>42</sup> The social model focuses on disabling societal factors which limit individual functioning and restrict community participation.

<sup>43</sup> After a famous High Court judgement (see: *O'Donoghue* in Chapter III. 3.1.) asserting that all children are entitled to claim as of a fundamental right educational benefits under the Irish Constitution, a line of subsequent litigation limited the boundaries of the right to education as well as the powers of the judiciary to enforce it.

<sup>44</sup> Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, Routledge, New York, 2012, p. 162.

<sup>45</sup> Irish courts held that judicial enforcement of socio-economic rights was highly restricted. Courts are generally not allowed to embark upon the enforcement of the right to education as educational inequality stems from social (not legal) issues.

<sup>46</sup> The human rights model focuses on the protection of rights of persons with disabilities. It is based on the social model. However, the human rights model can only explain why fundamental rights do not require a certain health or body status. See: Theresia Degener, Disability in a Human Rights Context, In: Anna Arstein-Kerslake (ed.), *Disability Human Rights Law*, 5, 2016, pp. 3-4.

## RESEARCH QUESTION

Children with PMD are often considered too different to attend school. Persistent challenges to their inclusion call for further research.<sup>47</sup> Hence, in a broad sense I seek to answer the question: what does educational justice require for children with PMD?

My point of departure is the CRPD. Article 24 obliges states to create inclusive education systems for all children. It is not enough anymore to acknowledge that persons with PMD are able to learn, but more importantly, they ought to *be enabled* to learn. In a narrower sense, the comparative analysis attempts to answer the question: what are the understanding of domestic legal systems with respect to the educational rights of children with PMD?

## METHODOLOGY

As it would be narrow-minded to examine a socio-economic right through legal lens only<sup>48</sup> sociological, educational and policy aspects concerning the education of children with PMD are included along with the comparative legal analysis.

By adopting a multidisciplinary approach, I attempt to consolidate the top-down mode of implementation of international human rights law with the person-centered approach of education

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<sup>47</sup> “Unfortunately, in most schools and countries this flexibility and individualization [of curricula] happens in practice only for the main core of school children. Children who are too different, e.g. because of their ethnic origin, socio-economic status, very high or very low learning ability, or a disability still do not find optimal learning conditions in Europe and are often sidelined and excluded. The promise of “mainstream education for all” is thus often meaningless for these children.” See: Inclusion Europe, *Exploratory Study on the Inclusion of Pupils with Complex Support Needs in Mainstream Schools*. Brussels, 2018, p. 25; Anke de Boer and Vera Munde, Parental Attitudes Toward the Inclusion of Children with Profound Intellectual and Multiple Disabilities in General Primary Education in the Netherlands, *The Journal of Special Education*, 49, 3, 2015, pp. 179-187.

<sup>48</sup> Jeff Handmaker, Socio-Economic Rights in South Africa: Symbols or Substance?, *South African Journal on Human Rights*, 32, 2, 2016, p. 401.



science which focuses on the needs of individuals. Highlighting the relevance of educators' perspective, Robert L. Carter, leading attorney in *Brown v. Board of Education*<sup>49</sup> noted:

If I had to prepare for *Brown* today, instead of looking principally to the social scientists to demonstrate the adverse consequences of segregation, I would seek to recruit educators to formulate a concrete definition of the meaning of equality in education, and I would base my argument on that.<sup>50</sup>

My inquiry is based on desk research using primary and secondary sources. Key sources are domestic pieces of legislation and judgements on the right to equal education against the backdrop of international human rights standards. Secondary sources include scholarly articles from interdisciplinary sources of academia.

To understand substantive implementation of inclusive education examining empirical research is as much relevant as discussing application of judicial standards. Hence, results of empirical research about Hungary<sup>51</sup> and South Africa are included. Given ample case law in the Irish context I focused on judicial decisions.

## LIMITATIONS

Many facets of the right to education are beyond the scope of this paper. Taking cognizance of the fact that “this right also implies a number of bearers of rights and duties which may lead to complex legal relationships”<sup>52</sup> this paper primarily analyzes the nexus between the one who usually

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<sup>49</sup> 347 U.S. 483 (1954).

<sup>50</sup> Robert Lee Carter, A Reassessment of *Brown v. Board*, In: Derrick Bell (ed.), *Shades of Brown: New Perspectives on School Desegregation*, Teachers College Press, Columbia University, New York, 1980, p. 27.

<sup>51</sup> Also, I sent a freedom of information request to the Hungarian public education information system (KIR) to obtain up-to-date statistical data.

<sup>52</sup> Nowak in footnote 34, at p. 190.

provides education (the state) and the one who receives it (the child with PMD).<sup>53</sup> The perspectives of educational professionals<sup>54</sup> are included without leading focus.<sup>55</sup>

Furthermore, the practicalities how schools can be developed to be inclusive are not raised.<sup>56</sup> Pragmatic concerns of inclusion at local and wider community levels are not addressed.<sup>57</sup> Even though inclusive education is argued to help overcome prejudice<sup>58</sup> and misconceptions<sup>59</sup> against people with disabilities, the question how human rights education and the right to inclusive education are connected is not raised directly.<sup>60</sup>

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<sup>53</sup> It is to be noted that “[a]lthough the child is today treated as the principal subject of the right to education, the child is not party to decision-making on the realization of the right to education. International human rights law divides decision-making between the parents and the State. Each principal actor can - and routinely does - claim to represent the best interest of the child.” See: Katarina Tomaševski, §79 of *Preliminary report of the Special Rapporteur on the right to education, submitted in accordance with Commission on Human Rights resolution 1998/33, E/CN.4/1999/49*.

<sup>54</sup> The question is not raised why special educators are mostly women. For further literature on ethics of care see the works of Carol Gilligan and Nel Noddings.

<sup>55</sup> Ágota Szekeres, Andrea Perlusz, István Takács, „... egy ideális világban csak így szabadna tanítani...” Gyógypedagógusok véleménye az integrációval kapcsolatban, In: Péter Zászkaliczky (ed.), *A társadalmi és az iskolai integráció feltételrendszere és korlátai*. ELTE Eötvös Kiadó, Budapest, 2013, pp. 179-226; Markku Jahnukainen and Anu Korhonen, Integration of Students with Severe and Profound Intellectual Disabilities into the Comprehensive School System: Teachers' Perceptions of the Education Reform in Finland, *International Journal of Disability, Development and Education*, 50, 2010, pp. 169-180.

<sup>56</sup> Tony Booth and Mel Ainscow, *Index for Inclusion: Developing Learning and Participation in Schools*. Centre for Studies on Inclusive Education, London, 2002. Available at: <http://www.eenet.org.uk/resources/docs/Index%20English.pdf>

<sup>57</sup> See Roadmap below.

<sup>58</sup> See literature on stigma and social identity: Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*, Prentice Hall, Englewood Cliffs, New Jersey, 1963.

<sup>59</sup> Stella Young speaks about the widespread misconceptions concerning the abilities of people with disabilities. See: Stella Young, *I'm not your inspiration, thank you very much*, TEDxSydney, 26 April 2014. Available at: [https://www.ted.com/talks/stella\\_young\\_i\\_m\\_not\\_your\\_inspiration\\_thank\\_you\\_very\\_much/transcript?language=en](https://www.ted.com/talks/stella_young_i_m_not_your_inspiration_thank_you_very_much/transcript?language=en)

<sup>60</sup> §79 of Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993 calls on member states to “include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all learning institutions in formal and non-formal settings.” For a non-binding regional human rights document concerning this question see: Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education in footnote 2; For materials on human rights education see: Council of Europe's manuals Compass and Compasito. For teaching about human rights to children with disabilities see: the MONDO project. Available at: <http://mondo.tasz.hu/>

## ROADMAP

Let us now look at the structure of this paper from a bird's eye view. Donald's eco-systemic model is used to illustrate how the text is built up.



*Figure 1: Eco-systemic model developed by Donald et al.<sup>61</sup>*

Chapter I deals with the core of Donald's system. After a short explanation of the WHO's concept of disability the target group of this paper is introduced as well as the content of their curriculum and the organizing principles around their education. Chapter II presents the outer layer of Donald's model by discussing the development and enforcement of the right to inclusive education in the international arena.

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<sup>61</sup> Donald et al.'s model draws on Urie Bronfenbrenner's human ecology theory. See: David Donald, Sandy Lazarus and Peliwe Lolwana, *Educational Psychology in Social Context*, Oxford University Press, Cape Town, 2011, p. 55.

Going below the global level Chapter III discusses the domestic implications of the right to inclusive education. The main body of the thesis sheds light on the outer layer of the model from the perspective of national laws. The comparative analysis is presented in Discussion. In Conclusion, an answer is provided to the question: what does educational justice require for the very core of the model, for children with PMD?

# CHAPTER I. UNDERSTANDING PMD IN THE EDUCATION CONTEXT

After addressing the general layers of disability this chapter introduces persons with PMD. It is briefly shown what their educational needs entail. A short description of general principles of service provision follows. To conclude this chapter, four pathways are presented on how children with PMD can be included in school education.

## 1.1. CONCEPTUAL PILLARS OF DISABILITY

In 2001 the World Health Assembly endorsed the International Classification of Functioning, Disability and Health (ICF) calling on member states to use its understanding of disability.<sup>62</sup> The ICF framework conceptualizes the notion of disability in general. It is the basis on which this paper understands high support needs.

The ICF puts every person in context<sup>63</sup> by dissecting disability into three interrelated levels:

1. Impairment: alteration in anatomical body structures such as the brain, organs or limbs, problems in physiological functioning (eg. cerebral palsy, hearing loss, blindness).
2. Activity limitations: challenges of executing activities of daily living, problems in everyday functioning (eg. eating, walking).
3. Participation restrictions: challenges of being included in the community (inability to go to the theatre because of non-accessible public transportation, facing discrimination in employment).

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<sup>62</sup> Agenda item 13.9 of ninth plenary meeting of the Fifty-fourth World Health Assembly, *International Classification of Functioning, Disability and Health*, WHA54.21, 22 May 2001. Available at: [http://apps.who.int/gb/archive/pdf\\_files/WHA54/ea54r21.pdf?ua=1](http://apps.who.int/gb/archive/pdf_files/WHA54/ea54r21.pdf?ua=1)

<sup>63</sup> World Health Organization, *How to use the ICF: A practical manual for using the International Classification of Functioning, Disability and Health (ICF)*, Exposure draft for comment, 2013. Geneva, p. 7. Available at: <http://www.who.int/classifications/drafticfpracticalmanual2.pdf?ua=1>

Disability is an umbrella term used to encompass all three levels. It generally refers to difficulties in human functioning. The first level highlights biological and medical implications of disability. The second level looks at the ambit of individual abilities. The third focuses on disabling societal factors.

According to the ICF model disability arises from the interaction of a person's health condition and contextual factors.

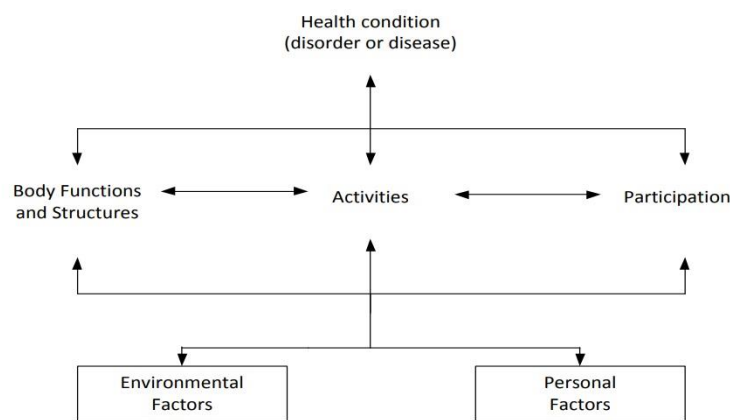


Figure 2: The ICF Model<sup>64</sup>

Health condition may refer to an acute injury or simply getting the flu. Contextual factors include environmental and personal dimensions. Environmental factors describe the impact of the surrounding world on the disabled person. They include the natural and built environment, the person's relationships (support network), societal attitudes, services and policies. Personal factors signify the individual's psychological attributes such as motivation or self-esteem.

The ICF is universal because it covers all human functioning and treats disability as a continuum rather than categorizing people with disabilities as a separate group: disability is a matter of more or less, not yes or no. However, policy-making and

<sup>64</sup> Ibid. at p. 7.

service delivery might require thresholds to be set for impairment severity, activity limitations, or participation restriction.<sup>65</sup>

The ICF understanding of disability analytically depicts that disability is an evolving concept. Even though disability is a lifelong condition (in contrast to a reversible health condition) internal and external factors affect functioning at individual and societal level. Law sets thresholds which supports or hinders access to services that may both respect or violate the dignity of a person with PMD.

## 1.2. DEFINING PROFOUND AND MULTIPLE DISABILITIES

According to the interests and competences of various disciplines, the categorization of different types of disabilities vary.<sup>66</sup> From a legal perspective, children with PMD form a sub-group of the disabled learners who are endowed with the same fundamental rights as other pupils.<sup>67</sup> Their needs require legislation which responds to their way of learning.

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<sup>65</sup> World Health Organization and World Bank, *World Report on Disability*, 2011. p. 5.

<sup>66</sup> Various categorizations of different types of disabilities are possible which cover differing groups varying both in number and in characteristics. See: Csaba Bánfalvy, *Gyógypedagógiai szociológia*, In: György, Könczei (ed.), *A háttérismeretek és a szemléletformálás szövegei. Szociológiai-szociálpolitikai gyűjtemény*, Eötvös Loránd Tudományegyetem, Bárczi Gusztáv Gyógypedagógiai Kar, Budapest, 2009, p. 25. Available at: <http://mek.oszk.hu/09500/09523/09523.pdf>

<sup>67</sup> Legal practitioners might encounter persons with PMD in their professional career in tort cases of medical malpractice. In *wrongful life* cases parents claim their harm is having a disabled child because they have been denied the opportunity to make an informed choice as to whether to conceive or to abort the fetus. In *wrongful birth* cases the disabled child is the plaintiff arguing that the doctor had the duty to the unborn child to inform the mother about the possibility of the child having a severe disability. If the doctor breaches this duty and the disabled child is born rather than being aborted (the mother could not exercise her choice to end the pregnancy) the child sues for damages. An example of a well-known wrongful birth case is the controversial *Perruche* judgment delivered by the Court of Cassation in 2000. The Supreme Court of France held that Nicholas Perruche, who was born with PMD, was entitled to compensation because of medical negligence resulting in the loss of his right to be aborted. Operationalizing the dignity of persons with PMD the French legislature reformed the system for compensating disability after the *Perruche* judgement. The French Parliament modified the existing system of medical liability and it passed Law of 4 March 2002 (anti-Perruche Law) precluding the possibility of obtaining compensation for special burdens arising from a child's disability. The idea is that the "wrong" is attributed to the birth itself in wrongful life cases implying that by being born the plaintiff's rights were violated. However, life cannot be a damage. In 2005 parents of children with PMD successfully litigated before the ECtHR that the anti-Perruche Law retrospectively infringed their right to the peaceful enjoyment of their possessions under Article 1 of Protocol No. 1. See: *Draon v. France* (no. 1513/03) and *Maurice v. France* (no. 11810/03). The ECtHR held that the French authorities did not strike a fair balance

There is a lack of consensus on the precise definition of PMD at the international level.<sup>68</sup>

Grouping is problematic as children with PMD have varied needs. However, certain criteria are accepted which delineate this group of learners:

1. They often have a combination of varying degrees of communicational, physical and intellectual disabilities.<sup>69</sup> They might have other disabilities, sensory or behavioral,<sup>70</sup> as well as chronic medical conditions (such as epilepsy).
2. They require multi-agency services (including health, social and educational provision).
3. They have higher support needs than other disabled children.
4. They may depend on a communicative partner and assistive technology to communicate.<sup>71</sup>

PMD is rooted in organic reasons and it is usually caused by a complex perinatal injury in the central nervous system.<sup>72</sup> Using the ICF framework PMD has a two-way relationship with individual and societal factors which leads to a certain degree of community participation. Such

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between the demands of the general interest and the protection of the right to peaceful enjoyment of possessions of the parents. The parents were awarded compensation covering non-pecuniary damage (disruption to their lives) but no compensation was awarded for special burdens that arose from their children's disability.

<sup>68</sup> The lack of consensus on the precise definition of PMD leads to the lack of accurate data on these persons hindering their visibility at the international level. See further: Representative Board Members and National Coordinators of the European Agency for Special Needs and Inclusive Education, *Thematic Session – Malta, Learners with Profound and Multiple Learning Disabilities (PMLD)*, 2011, p. 1. Available at: <https://www.european-agency.org/sites/default/files/Verity-thematic-session-intro.pdf>

<sup>69</sup> Summing up five pieces of research carried out between 2005-2017 in Hungary Eszter Márkus shows that the majority of persons with PMD have communicational, motor and cognitive disabilities with varying combinations of severity. See: Eszter Márkus, A fejlesztő nevelés-oktatás helyzete ma Magyarországon. Három kérdőíves felmérés eredményeinek tükrében, In: Eszter Márkus and Melinda Péntek-Dózsa (eds.), „30 múlt...” *A komplex szomatopedagógiai rehabilitáció lehetőségei és feladatai*, ELTE Bárczi Gusztáv Gyógypedagógiai Kar, Budapest, 2017, p. 60.

<sup>70</sup> The Committee of Ministers of the Council of Europe highlights that comorbidity and additional problems are common in autism spectrum disorders which must be taken into account in the assessment to meet the individual's educational needs. See §16 of Recommendation CM/Rec (2009) 9 of the Committee of Ministers to member states on the education and social inclusion of children and young people with autism spectrum disorders, 21 October 2009. Available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805d046f](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d046f)

<sup>71</sup> Disabled People's Association, *Assistive Technology – A Road to Inclusion*, Singapore, 2017, p. 18. Available at: [https://www.dpa.org.sg/wp-content/uploads/2018/07/AT-Final-27-Jun-2018\\_Final.pdf](https://www.dpa.org.sg/wp-content/uploads/2018/07/AT-Final-27-Jun-2018_Final.pdf)

<sup>72</sup> As opposed to mild intellectual disability which is overly used to denote socio-economic hardship. Hence, mild intellectual disability may be called 'familial disability' as in the ECtHR's judgement *Horváth and Kiss v. Hungary* (11146/11, 29 January 2013).



relations are underlined as people with PMD are dependent on external support. They are in need of care throughout their lives.<sup>73</sup>

To dispel misconceptions, unusual behavior or psychiatric symptoms (sometimes self-injurious) are not phenomena to be associated with PMD (or intellectual disability). Eszter Márkus shows that disruption in the communicational process and unmet needs are the primary reasons behind unusual behaviors.<sup>74</sup> These phenomena are usually secondary symptoms and they are not directly related to PMD.<sup>75</sup>

Also, apathy is not a peculiar characteristic of PMD. Learned helplessness is not a state into which one is born but the result of a learning process through. In this state one feels no power to avoid or control adverse situations even if one actually has the capability of changing unpleasant or harmful circumstances. Behavior based on perceived absence of control over one's life may lead to depression or other mental disorders.<sup>76</sup> To further explore the "life-worlds" of children with PMD, in which ambiguity is an essential feature when interpreting complex behaviors, Ben Simmons' and Debbie Watson's book is of an informative read.<sup>77</sup>

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<sup>73</sup> Eszter Márkus, *Theoretical and Empirical Questions of Education of Children with Profound and Multiple Disabilities*, Eötvös Lóránd Tudományegyetem Neveléstudományi Doktori Iskola, Budapest, 2005.

<sup>74</sup> Eszter Márkus, Súlyosan-halmozottan fogyatékos gyermekeknél gyakran tapasztalható feltűnő magatartásformák és azok értelmezése, In: György Könczei (ed.), *A súlyos és halmozott fogyatékossgal élő emberek helyzete Magyarországon. Tanulmánykötet – Második rész*, Eötvös Loránd Tudományegyetem, Bárczi Gusztáv Gyógypedagógiai Kar, 2009, p. 53-55.

<sup>75</sup> Therefore, interpersonal communication based on mutual trust and respect for personal autonomy is indispensable for any educational intervention which aims to understand the underlying intentions behind unusual behavior. See: Eszter Márkus, Individuális kommunikáció a súlyosan-halmozottan sérült gyermekek nevelésében, In: György Könczei (ed.), *A súlyos és halmozott fogyatékossgal élő emberek helyzete Magyarországon. Tanulmánykötet – Második rész*, Eötvös Loránd Tudományegyetem. Bárczi Gusztáv Gyógypedagógiai Kar, 2009, p. 58.

<sup>76</sup> Martin Seligman, *Helplessness: On Depression, Development, and Death*, W. H. Freeman and Company, San Francisco, 1975.

<sup>77</sup> Ben Simmons and Debbie Watson, *The PMLD Ambiguity. Articulating the Life-Worlds of Children with Profound and Multiple Learning Disabilities*, Karnac Books, London, 2014.

### 1.3. CURRICULUM FOR PERSONS WITH PMD

The principle of the true art of social intercourse consists in a ceaseless endeavour to grasp the innermost individuality of another, to avail oneself of it, and with the deepest respect for it as the individuality of another, to act upon it.<sup>78</sup>

Looking at history two major concerns characterize education:<sup>79</sup> the transmission of technical skills necessary for the young to master the tasks of daily life and the transmission of religious, cultural and social values.<sup>80</sup> These concerns are as valid for children with PMD as for any child. Even though legal analysis does not examine the expediency of curriculum or educational methods (pedagogy) a short description follows to complement the introduction of persons with PMD.<sup>81</sup>

With the development and differentiation of education sciences,<sup>82</sup> educational pessimism has been replaced by optimism in everyone's ability to develop. Against this backdrop the pedagogy for children with PMD started to unfold.<sup>83</sup> Its philosophy is based on the idea of universal educability: if there is possibility to improve one's relationship with the surrounding world or with other people, this learning capacity makes a human person human even if one lives with a severe condition.<sup>84</sup> Children with PMD do learn although in different ways than others.

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<sup>78</sup> Wilhelm von Humboldt, *The Limits of State Action*, John Wyon Burrow (ed.), Liberty Fund, Indianapolis, 1993, pp. 27-28.

<sup>79</sup> Aims and objectives of education are enlisted in Articles 13(1) of CESCR and 29(1) of CRC.

<sup>80</sup> Jost Delbrück, The Right to Education as an International Human Right, *German Yearbook of International Law*, 35, 1992, p. 94; Kate Halvorsen, Notes on the Realization of the Human Right to Education, *Human Rights Quarterly*, 12, 1990, p. 341.

<sup>81</sup> See: §28 of *Valsamis v. Greece*, 21787/93, 18 December 1996; §29 of *Efstathiou v. Greece*, 24095/94, 18 December 1996.

<sup>82</sup> Based on developments in other branches of science such as medicine (neonatology, neurology, orthopedy, medical rehabilitation) or psychology (developmental psychology, psycho-diagnostics).

<sup>83</sup> From the late 1970s theories were elaborated upon the subject of education for persons with PMD. These include the concept of basal stimulation developed by Andreas Fröhlich, the concept of basal communication developed by Winfried Mall and Franziska Schäffer's Arbeit-Spaß-Training concept.

<sup>84</sup> Sándor Illyés, A magyar gyógypedagógia hagyományai és alapfogalmai, In: Sándor Illyés (ed.), *Gyógypedagógiai alapismeretek*, Eötvös Loránd Tudományegyetem Bárczi Gusztáv Gyógypedagógiai Főiskola Kar, Budapest, 2000.

Their education entails a *sui generis* pedagogical work.<sup>85</sup> It is beyond the limits of this paper to address the content and organizational techniques of this field in detail.<sup>86</sup> However, it is important to underline that the fundamental content of their education is the same as that of other children. These include learning communication skills (children with PMD are often pre-intentional communicators who use basic ways of self-expression when naturalized forms of expression is not physically feasible),<sup>87</sup> motor skills (fine and gross motor skills to control their own bodies), and skills necessary for activities of daily living (ADL functions). They take cognitive possession of reality by developing perception (learn about the environment by being exposed to sensory experiences). Acquisition of social<sup>88</sup> and artistic skills are particularly important to learn to establish and maintain human relationships.<sup>89</sup>

## 1.4. PRINCIPLES OF SERVICE PROVISION

The formulation of principles necessary for more humanized services became due in the second half of the XX. century as more children with PMD stayed alive in the modern world due to medical advances. A very simple idea that disabled children of school age should go to school was expressed by Bengt Nirje in the 1960s through the normalization principle.<sup>90</sup>

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<sup>85</sup> Tamás Verdes, Állami Taigetosz - A súlyosan, halmozottan fogyatékos tanulók iskolai oktatásáról, *Magyar Narancs*, 47, 25 November 2010. Available at: [https://magyarnarancs.hu/publicisztika/allami\\_taigetosz\\_-\\_a\\_sulyosan\\_halmozottan\\_fogyatekos\\_tanulok\\_iskolai\\_oktatasarol-75070](https://magyarnarancs.hu/publicisztika/allami_taigetosz_-_a_sulyosan_halmozottan_fogyatekos_tanulok_iskolai_oktatasarol-75070)

<sup>86</sup> For more detail see: Annex No. 3 of 32/2012. (X. 8.) EMMI Decree. Guidelines for the Education of Students with PMD.

<sup>87</sup> Paul Watzlawick's famous axiom 'one cannot not communicate' is particularly relevant in the education of children with PMD.

<sup>88</sup> The acquisition of social skills is often implied in formal education (learning social skills are more explicit in non-formal and informal education). However, learning to interact with others forms an integral part of formal education, even if often invisibly. See: Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education in footnote 2.

<sup>89</sup> For an exemplary good practice on how persons with PMD can be included in dance performances see the work of the Artman Association for the Arts and Movement Therapy. Available at: <http://artman.hu/en/kik-vagyunk/rolunk/>

<sup>90</sup> Bengt Nirje, The Basis and Logic of the Normalization Principle, *Australia & New Zealand Journal of Developmental Disabilities*, 11, 2, 1985, pp. 65–68.

Endorsing the relative understanding of disability<sup>91</sup> the normalization principle holds that the life conditions of persons with disabilities should be organized in a way which are closest to those of a ‘normal’ life. It is not about making persons with disabilities or segregated large-scale institutions for the disabled look normal. An example of the normalization principle at work is access to education. Notably, if children with PMD go to school, not only the child’s life is ‘normalized’ but that of the entire family. Parents, who are not forced to take care of their child 24/7, can take up part-time work. This is in line with Amartya Sen’s capabilities approach. Sen’s theory revolves around the idea that it is central to promote individuals’ freedom to achieve the means that are considered valuable for a good human life.<sup>92</sup>

Based on the normalization principle, Wolf Wolfensberger held that one of the implications of the normalization principle was to make the role expectations of disabled persons more culturally normative.<sup>93</sup> His name is associated with coining the term ‘social role valorization.’<sup>94</sup> He thought that procuring normative life conditions for devalued people was possible by ensuring access to valued social roles.<sup>95</sup> In other words, persons ‘at value risk’ can be accorded good things in life

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<sup>91</sup> Disability may be construed by taking into account features of normality of a given time and place. The relative understanding of disability is applied if characteristics of disability are identified in relation to the socially average. In contrast, the absolute understanding of disability is applied if preliminary considerations define the concept and criteria of disability. Hence, categories of disability are first created and then filled with persons who fit into such categories. See: Bánfalvy in footnote 66, at p. 23-24.

<sup>92</sup> Judit Juhász, Zoltán Bajmócy, Judit Gébert and György Málovics, Szegénység, képességek, lehetőségek. Szegénységkezelési szempontok Amartya Sen elméletének tükrében, *Közgazdasági Szemle*, 62, 5, 2015, pp. 548-549. Available at: [http://epa.oszk.hu/00000/00017/00226/pdf/EPA00017\\_kozgazdasagi\\_szemle\\_2015\\_05\\_544-564.pdf](http://epa.oszk.hu/00000/00017/00226/pdf/EPA00017_kozgazdasagi_szemle_2015_05_544-564.pdf)

<sup>93</sup> Starting from the mid-1970s Wolf Wolfensberger made instruments to assess the quality of human services in order to quantitatively implement the normalization principle. See: Wolf Wolfensberger and Linda Glenn, *Program Analysis of Service Systems (PASS): A Method for the Quantitative Evaluation of Human Services*, Toronto, Canada: National Institute on Mental Retardation, 1975.

Later, PASS was developed into the PASSING instrument. See: Wolf Wolfensberger and Susan Thomas, *PASSING (Program Analysis of Service Systems' Implementation of Normalization Goals): Normalization Criteria and Ratings Manual*, Toronto: National Institute on Mental Retardation, 1983.

<sup>94</sup> Wolf Wolfensberger, Social Role Valorization: A Proposed New Term for the Principle of Normalization, *Mental Retardation*, 21, 6, 1983, pp. 234-239.

<sup>95</sup> Two tasks are necessary to achieve this goal: 1) supporting persons with disabilities to carry out such roles through personal competency enhancement and 2) creating a positive social image of persons with disabilities.

(and they are more likely to enjoy normative settings, activities, and routines) once they are perceived by others to hold valued roles.<sup>96</sup> Hence, normalization is connected to culturally valued social goods among which education is certainly one.

Finally, Universal Design for Learning is to be mentioned which is a key policy term in the contemporary pedagogical vernacular.<sup>97</sup> Under Article 2 of the CRPD this principle means the design of services so that they are “usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”

## 1.5. FOUR PATHWAYS TO SCHOOL INCLUSION

UNESCO proposed<sup>98</sup> four alternatives concerning the school education of children with PMD. Firstly, the Authentic Inclusion Pathway entails placement of students with PMD in regular classes with some individual or group withdrawal for focused teaching. This is the paradigm under which Scandinavian countries practice “full” educational inclusion. Secondly, the Strategic Inclusion Pathway envisions placing students with PMD into “base” special classes in mainstream schools with strategic engagement with students from regular classes.<sup>99</sup>

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<sup>96</sup> Wolf Wolfensberger, *A Brief Introduction to Social Role Valorization: A High-Order Concept for Addressing the Plight of Societally Devalued People and for Structuring Human Services*, Training Institute for Human Service Planning, Leadership and Change Agency, Syracuse University, New York, 1998.

<sup>97</sup> Tracey Hall, Anne Meyer, David Rose, *Universal Design for Learning in the Classroom; Practical Applications*, The Guilford Press, New York, 2012.

<sup>98</sup> Gordon Lyons and Michael Arthur-Kelly, UNESCO Inclusion Policy and the Education of School Students with Profound Intellectual and Multiple Disabilities: Where to Now?, *Creative Education*, 5, 2014, pp. 445-456.

<sup>99</sup> In this pathway curriculum and pedagogy are developed within a differentiated context. IEPs provide for modified assessment in line with the individual student’s performance who receive appropriate accommodations.

Thirdly, the Opportunistic Inclusion Pathway entails placement of students with PMD in segregated (residential) schools with the occasional engagement in activities of mainstream local schools. This pathway hardly aligns with UNESCO's interpretation of inclusion.

Finally, the Quality of Life Pathway, not very convincingly, stipulates that the overarching goal of educating children with PMD is to improve their current and future quality of life by providing them with educational experiences which enhance their ability to experience life satisfaction and happiness.<sup>100</sup> When parents of children with PMD are asked what they want for their children they often reply: "We just want him/her to be happy". Given that children with PMD grow up to be predominantly dependent on personal assistants, this pathway argues that appropriate emphasis should be placed on learning to be happy.<sup>101</sup>

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<sup>100</sup> The underlying attitude of this pathway concomitantly brings about an alternative approach to curriculum design and assessment criteria.

<sup>101</sup> See: Lyons and Kelly in footnote 98, at pp. 451.

## CHAPTER II. THE ROAD TO INCLUSIVE EDUCATION

The Education for All (EFA) movement has played an important role in making education a priority on the UN's development agenda. In 1990 the World Conference on Education in Jomtien adopted the World Declaration on Education for All.<sup>102</sup> Even though the 1990s were described as a time of crisis-driven change in education<sup>103</sup> the blueprint for global special educational reform took place around the middle of 1990. The Salamanca Statement was adopted in 1994 which was a principle policy document promoting the approach of inclusive education while giving guidelines for governmental action at national, regional and international levels.<sup>104</sup>

In 2000 the Dakar Framework for Action<sup>105</sup> reaffirmed the collective commitment of the international community to implement the World Declaration on Education for All.<sup>106</sup> The Dakar Framework for Action<sup>107</sup> included six regional frameworks to support governments to achieve EFA goals and targets no later than 2015. However, the 11<sup>th</sup> EFA Global Monitoring Report anticipated

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<sup>102</sup> Article 3(5) of the World Declaration on Education for All acknowledged that “[t]he learning needs of the disabled demand special attention. Steps need to be taken to provide equal access to education to every category of disabled persons as an integral part of the education system.”

<sup>103</sup> See: Tomaševski in footnote 53, at §80.

<sup>104</sup> UNESCO, *The Salamanca Statement and Framework for Action on Special Needs Education: Access and Quality*, Salamanca, 1994. Available at: [http://www.unesco.org/education/pdf/SALAMA\\_E.PDF](http://www.unesco.org/education/pdf/SALAMA_E.PDF)

<sup>105</sup> UNESCO, *Dakar Framework for Action, Education for All: Meeting our Collective Commitments*, Dakar, 2000. Available at: <http://unesdoc.unesco.org/images/0012/001211/121147e.pdf>

<sup>106</sup> Members of the International Working Group on Disability and Development were disappointed that inclusive education issues were sidelined at the 2000 Dakar World Education Forum. Consequently, in 2003 the EFA Flagship was formally established as an initiative formed by an alliance of global disability organizations. See: World Bank Disability and Development Team, *The Education for All (EFA) Flagship: The right to Education for Persons with Disabilities: Towards Inclusion*, 2004, p. 10 Available at: <http://unesdoc.unesco.org/images/0013/001378/137873e.pdf>

<sup>107</sup> Based on the EFA 2000 Assessment.

that the set agenda would not be met by 2015.<sup>108</sup> Progress was “painfully slow” and “at current rates Education for All will not be achieved in the next 100 – let alone by 2015.”<sup>109</sup>

In 2000 Millennium Development Goal (MDG) No. 2 set to achieve universal primary education.<sup>110</sup> In 2015 MDG No. 2 was replaced by Sustainable Development Goal (SDG) No. 4 which sets out to achieve inclusive and equitable quality education and promote lifelong learning opportunities for all.<sup>111</sup> In 2015 the Incheon Declaration reinforced the global commitment to realize SDG 4 by 2030.<sup>112</sup>

Today UNESCO and UNICEF gear their activities to achieve targets set out by SDG 4. UNESCO issued policy guidelines on ensuring inclusion in education.<sup>113</sup> UNICEF created a framework for monitoring out-of-school children<sup>114</sup> drawing on the Five Dimensions of Exclusion model.<sup>115</sup> These policy documents do not work with the notion of inclusive education which is exclusively related to disability but perceive inclusion as a concept which ensures high-quality

<sup>108</sup> UNESCO, *Teaching and learning: Achieving quality for all*, 11<sup>th</sup> EFA Global Monitoring Report, 2014. Available at: <http://unesdoc.unesco.org/images/0022/002256/225660e.pdf>

<sup>109</sup> Reasons behind slow progress were the lack of international donations from developed countries and the failure of many developing states to raise enough taxes and allocate a sufficient proportion of their GDP to education. See: Richard Rieser, *Implementing Inclusive Education. A Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities*, Commonwealth Secretariat, 2012, pp. 23-24.

<sup>110</sup> Following §19 of the UN General Assembly, *United Nations Millennium Declaration*, Resolution 55/2, 8 September 2000. Available at: <https://www.un.org/millennium/declaration/ares552e.htm>

<sup>111</sup> Target 4.1 sets out to ensure that “all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes.” Target 4.5 sets out to guarantee “equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities.” See: UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, Resolution 70/1, 21 October 2015, p. 17. Available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E)

<sup>112</sup> World Education Forum, *Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4*, Incheon, Republic of Korea, 19–22 May 2015. Available at: <http://unesdoc.unesco.org/images/0024/002456/245656e.pdf>

<sup>113</sup> UNESCO, *A Guide for Ensuring Inclusion and Equity in Education*, Paris, 2017. Available at: <http://unesdoc.unesco.org/images/0024/002482/248254e.pdf>

<sup>114</sup> UNICEF and UNESCO Institute for Statistics, *Monitoring Education Participation: Framework for Monitoring Children and Adolescents who are Out of School or at Risk of Dropping Out*, UNICEF Regional Office for Central and Eastern Europe and the Commonwealth of Independent States, Geneva, 2016. Available at: <http://unesdoc.unesco.org/images/0024/002478/247861e.pdf>

<sup>115</sup> UNICEF and UNESCO Institute for Statistics, *The Global Out-of-School Children Initiative Operational Manual*, New York, 2015. Available at: <http://unesdoc.unesco.org/images/0024/002475/247531e.pdf>



education for all regardless of any individual or social characteristics (including children from ethnic minorities, refugee, working or imprisoned children).<sup>116</sup>

After fleshing out global aspirations to achieve universal primary education this chapter follows with the nature and scope of the right to inclusive education. Criteria to assess implementation under international human rights law are also addressed. Furthermore, the legal basis of the right to education is analyzed focusing on the parameters of and challenges posed by Article 24 of the CRPD. Having been familiarized with the content of the right to inclusive education this chapter concludes by presenting some international case law on the educational rights of children with disabilities.

## 2.1. NATURE AND SCOPE OF THE RIGHT TO EDUCATION

Human rights standards are substantive and procedural in nature. They do not determine how much should be spent on a specific item from the public purse.<sup>117</sup> The dimensions of the right to education follow setting out certain criteria that states must comply with.

The negative dimension of the right to education operates as a civil and political right ensuring that no one is prevented from accessing educational resources. The negative dimension has horizontal application imposing obligation on the state to regulate access to private schools. The positive dimension operates as a socio-economic right obliging the state to provide access to education. Two erroneous ideas about the positive dimension are highlighted.

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<sup>116</sup> Including girls, migrant children and learners belonging to a minority. Supranational organizations, such as the European Union also publishes policy guidelines on inclusive education. See: European Agency for Special Needs and Inclusive Education in footnote 3.

<sup>117</sup> See: Tomaševski in footnote 53, at §37.

Firstly, compulsory education does not necessarily translate into the realization of the right to education.<sup>118</sup> Varying requirements in minimum duration of compulsory education lead to the unfortunate situation that children of primary school age can be found at work, in marriage or in prison rather than at school.<sup>119</sup> Secondly, the state obligation to provide primary education free of charge under international human rights law<sup>120</sup> does not mean direct provision by the state as implementation is possible through state subsidies.<sup>121</sup>

Education may be defined as a commodity which is traded against a price rather than a right.<sup>122</sup> If education is perceived as a means for increasing one's earning capability or for that sake "for lowering women's fertility rates" the underlying definition of human beings is that people are human capital rather than subjects of rights.<sup>123</sup> However, a human rights approach understands education as an end in itself rather than merely as a means to achieve other ends.

Katarina Tomaševski had a seminal role in bringing a human rights viewpoint to education.<sup>124</sup> She elucidated the full scope of the right to education from the angle of corresponding state obligations by constructing her 4-A scheme. The 4 A-s denote the four essential features that primary schools are expected to exhibit, namely *availability* (adequate funding),<sup>125</sup> *accessibility* (principle of non-discrimination, physical and financial accessibility), *acceptability* (quality of

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<sup>118</sup> Ibid. at §8.

<sup>119</sup> The original understanding of primary education in human rights instruments was the age range of 6-15. See: §16 of *ibid.*

<sup>120</sup> See Article 26 of UDHR; Article 13 of ICESCR; Article 28 of CRC; Article 24 of CRPD.

<sup>121</sup> See: Tomaševski in footnote 53, at §45.

<sup>122</sup> §14 of *ibid.*

<sup>123</sup> §13 of *ibid.*

<sup>124</sup> She was appointed as a Special Rapporteur on the right to education for a period of three years in 1998. See: Commission on Human Rights resolution 1998/33, p. 3.

<sup>125</sup> "While the State is not the only investor, international human rights law obliges it to be the investor of last resort so as to ensure that primary schools are available for all school-age children. In Africa children of primary-school age constitute close to half of the population and the majority is living in rural areas. Making primary schools available to dispersed rural communities, some of who may be nomadic, illustrates the scope of the challenge." See: Tomaševski in footnote 53, at §51.

education and respect for parental freedom) and *adaptability* (flexible review of content and process of learning to meet a range of educational needs).<sup>126</sup> Her conceptual framework serves as a monitoring scheme for assessing whether states comply with their obligations under international human rights law. In 2002 she elaborated her 4-A scheme and matched it with rights-based indicators.<sup>127</sup>

## 2.2. LEGAL BASIS OF THE RIGHT TO EDUCATION IN INTERNATIONAL HUMAN RIGHTS LAW

Article 26(1) of the Universal Declaration of Human Rights (UDHR) sets out that “[e]veryone has the right to education” and that “[e]lementary education shall be compulsory.” Paragraph 2 reinforces that “education shall be directed to the full development of the human personality.” Paragraph 3 gives parents “a prior right to choose the kind of education that shall be given to their children.” The UDHR – while implicitly including all persons within its sweep – makes no reference to disability.

Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) enshrine the right to education. The ICCPR defines the civil right to education in terms of the liberty of parents to “ensure the religious and moral education of their children in conformity with their own convictions.”<sup>128</sup> The social right to education is guaranteed under the longest article of the ICESCR.<sup>129</sup>

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<sup>126</sup> §51-§74 of *ibid.*

<sup>127</sup> See: Tomaševski in footnote 53, at p. 13.

<sup>128</sup> Article 18(4) of ICCPR.

<sup>129</sup> Article 13 of ICESCR.

Article 13 of the ICESCR elaborates on the content of Article 26 of the UDHR.<sup>130</sup> Without reference to progressiveness in Article 13(2)(a) the realization of free primary education is an imperative obligation that states must provide immediately. Consequently, they must allocate resources – as a matter of priority – to ensure free primary education. This is also reflected in Article 14 which provides for precise measures towards that goal.

Concerning Article 13(2) the Committee on Economic, Social and Cultural Rights (CESCR) held that “a State party in which any significant number of individuals is deprived of [...] the most basic forms of education is, *prima facie*, failing to discharge its [minimum core] obligation under the Covenant.”<sup>131</sup> Hence, systemic denial of access to primary education for children with disabilities constitutes a violation of the Covenant.<sup>132</sup>

It is to be noted that “[t]here is a risk that identification of core elements of a right and corresponding minimum obligations might lead to neglect of peripheral elements of the same right and to an undermining of the universal character of that right.”<sup>133</sup> Fons Coomans lists the right to non-discriminatory access to existing public educational institutions and respect for the free choice of education as generally accepted international norms that can be characterized as minimum core obligations.

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<sup>130</sup> Article 13(2) enshrines that “primary education shall be compulsory, available and free to all” and secondary education “shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.”

<sup>131</sup> §10 of CESCR General Comment No. 3, *The Nature of State Parties’ Obligations*, 14 December 1990.

<sup>132</sup> Programme on Women’s Economic, Social and Cultural Rights, *Human Rights for all. International Covenant on Economic, Social and Cultural Rights A Handbook*, Systems Vision, Heemstede, 2015. p. 36 and p. 40. Available at: [http://www.pwescr.org/PWESCR\\_Handbook\\_on\\_ESCR.pdf](http://www.pwescr.org/PWESCR_Handbook_on_ESCR.pdf)

Beside the reporting procedure individual redress is also possible. Since the entry into force of the ICESCR’s Optional Protocol in 2013 private individuals can make communications to the CESCR claiming to be victims of violations under Article 13 read in conjunction with Article 2. Litigation may be successful as ensuring non-discrimination is an immediate obligation of the state irrespective of resource availability.

<sup>133</sup> Fons Coomans, In Search of the Core Content of the Right to Education, In: Audrey R. Chapman, Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, 2002, p. 245.

However, he does not consider that access to special educational facilities or the guarantee of a certain quality level of education are part of international minimum standards. He holds that they only belong to the core content of the right to education.<sup>134</sup> Consequently, there are elements of the core content of the right to education which are not part of generally accepted international standards.

Article 2 is the non-discrimination clause of the ICESCR which does not explicitly contain disability as a protected ground but it is included as ‘other status.’<sup>135</sup> “The absence of an explicit, disability-related provision in the Covenant can be attributed to the lack of awareness of the importance of addressing this issue explicitly, rather than only by implication, at the time of the drafting of the Covenant.”<sup>136</sup>

The ESCR Committee’s General Comment No. 5 on persons with disabilities refers to the principle of equal opportunities in integrated settings based on the Standard Rules.<sup>137</sup> It is

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<sup>134</sup> Coomans notes that generally accepted international minimum standards usually involve negative state obligations (refraining from interference). They are not the same as elements of the core content of the right to education. “[T]he term ‘core content’ refer to another way of looking at rights: it focuses on the essence of each individual right, which may involve negative and/or positive obligations for the State.” See: *ibid*, at p. 237.

<sup>135</sup> Even though disability is not explicitly included in the list of protected grounds the CESCR recognized that persons with disabilities are entitled to the enjoyment of the full range of the Covenant rights. See: §6 of CESCR General Comment No. 5, *Persons with Disabilities*, 9 December 1994; and CESCR General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights*, 2 July 2009.

<sup>136</sup> Similarly, the UNESCO Convention against Discrimination in Education – adopted in 1960 – failed to mention disability in Article 1 as a protected ground for equal treatment in education. This omission highlights the fact that the disability discourse was missing during the negotiations for the codification of early international human rights instruments.

<sup>137</sup> §35 of CESCR General Comment No. 5.

In 1976 the United Nations General Assembly designated 1981 International Year of Disabled Persons (IYDP). The most important outcome of the IYDP was the adoption of the World Program of Action concerning Disabled Persons which proclaimed the United Nations Decade of Disabled Persons as a long-term plan to implement the World Program. Within the Program the Standard Rules on the Equalization of Opportunities for Persons with Disabilities was drafted.

The World Conference on Human Rights held in Vienna in June 1993 reaffirmed that “[...] all human rights and fundamental freedoms are universal and thus unreservedly include persons with disabilities. Every person is born equal and has the same right to [...] education and work [...]. Any [...] discriminatory treatment of a disabled person is therefore a violation of his or her rights.” See: §63 of the Programme of Action of the World Conference on Human Rights. The World Conference called on the UN General Assembly to adopt the drafted Standard Rules. In 1993 the General Assembly heeded the World Conference’s call.

noteworthy that the Committee's General Comment No. 13 on the right to education in general did not address the issue of inclusive education.<sup>138</sup>

The Convention on the Rights of the Child (CRC)<sup>139</sup> goes further in the protection of the educational rights of disabled children.<sup>140</sup> Article 28 imposes duties on member states to take measures to achieve the right to education on the basis of equal opportunity.<sup>141</sup> However, following the final session of CRPD negotiations the CRC Committee implied in its General Comment No. 9 that the CRPD went too far by pressuring educational systems to become fully inclusive.<sup>142</sup>

The CRC Committee highlights the entrenched disablist practices of regular schools to justify that “[a] continuum of services and programme options must be maintained in circumstances

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6(8)-(9) of the Standard Rules established integration as the rule rather than the exception. Special education became more and more perceived “as a temporary expedient pending economic and material restructuring; the trend is towards the gradual integration of special educational services into mainstream education.” See: Douglas Hodgson, *The Human Right to Education*, Ashgate, Aldershot, 1998. p. 164.

In 1998 the Declaration of Responsibilities and Human Duties (Valencia Declaration) also formulated the positive obligation of UN member states to create integrated schooling systems. According to Article 30(1)(b)(v) states should take positive measures “to ensure equality in education for persons with a disability in an integrated schooling system, unless their specific needs require special schools.”

<sup>138</sup> In 1999 §36 of CESCR General Comment No. 13 on the right to education only reaffirms §35 of CESCR General Comment No. 5 on persons with disabilities from 1994.

<sup>139</sup> The CRC is the most widely ratified international human rights treaty. It came into force in 1990. There are 196 state parties to it. The USA is the only signatory. See: <http://indicators.ohchr.org/>

<sup>140</sup> Article 2 of the CRC specifically enumerates disability as a protected ground against discrimination.

<sup>141</sup> The CRC Committee emphasizes the “indispensable interconnected nature of the Convention’s provisions” in relation to Article 29 on the aims of education. See: §6 of CRC Committee General Comment No. 1, *The Aims of Education*, 17 April 2001.

All measures must take into account the best interest of the child principle set out under Article 3. Paragraph 3 of Article 23 on the rights of disabled children provides for further protection for children with disabilities by “[r]ecognizing the special needs of a disabled child, assistance [...] shall be designed to ensure that the disabled child has effective access to and receives education [...] in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.”

The CRC Committee specifically highlighted the importance of early intervention services and multidisciplinary care in relation to disabled children. See: §56-58 of CRC Committee General Comment No. 9, *The Rights of Children with Disabilities*, 27 February 2007.

The CRC Committee also highlighted the need for cross-sectoral governmental coordination, cooperation between government and civil society including (disabled) children themselves. See: §27 and §56-59 of CRC Committee General Comment No. 5, *General Measures of Implementation of the Convention on the Rights of the Child*, 27 November 2003.

<sup>142</sup> [T]he explicit commitment towards the goal of inclusive education contained in the draft convention on the rights of persons with disabilities... However, the Committee *underlines* that the extent of inclusion within the general education system may vary.” [my emphasis]. See: §66 of CRC Committee General Comment No. 9.

where fully inclusive education is not feasible to achieve in the immediate future.” It notes that inclusive education should be the “goal” of educating children with disabilities.<sup>143</sup> These statements show that the CRC Committee endorsed the concept of integration (and not inclusion) by conceiving inclusive education as the goal of educating *disabled* children (and not all children) and by highlighting that regular schools may not readily accommodate children with disabilities.<sup>144</sup>

Such perspective takes inclusive education as a philosophy (values and principles) rather than a human right of all students (which would guarantee inclusive practices and not only values and principles). As noted by Bronagh Byrne the first human rights treaty of the XXI. century would have a role in persuading not only its state parties to refine their educational practices (vertical internalization of norms) but also other treaty monitoring bodies to facilitate the development of international educational norms (horizontal internalization of norms).<sup>145</sup>

## 2.3. CONTENT OF ARTICLE 24 OF THE CRPD

Recognizing the fact that the mere declaration of the principle of equality is useless if there are no rules to resolve objective restraints on the enjoyment of rights by a marginalized social group<sup>146</sup> the CRPD strives to provide for the legally binding substantive equality of persons with

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<sup>143</sup> “This goal [inclusive education] can be achieved by different organizational means which respect the diversity of children. Inclusion may range from full-time placement of all students with disabilities into one regular classroom or *placement into the regular class room with varying degree of inclusion, including a certain portion of special education.*” [my emphasis]. See: *ibid.* at §67.

<sup>144</sup> The CRC Committee is in contradiction with itself when it states – based on UNESCO’s *Guidelines for Inclusion: Ensuring Access to Education for All* – that inclusive education is “a set of values, principles and practices that seeks meaningful, effective, and quality education for all students, that does justice to the diversity of learning conditions and requirements not only of children with disabilities, but for all students.”

<sup>145</sup> Bronagh Byrne, *Hidden Contradictions and Conditionality: Conceptualisations of Inclusive Education in International Human Rights Law, Disability & Society*, 28, 2, 2013, pp. 232-244.

<sup>146</sup> János Sári and Bernadette Somody, *Alapjogok. Alkotmánytan II*, Osiris Kiadó, Budapest, 2008. p. 337.

disabilities.<sup>147</sup> It is clear from the *travaux préparatoires* that the intent of the Convention was not to create new rights but to ensure equal opportunity to exercise already existing rights.<sup>148</sup>

The Preamble makes explicit that the Convention protects the rights of persons with PMD.<sup>149</sup> Theresia Degener, who had a seminal role in preparing the CRPD,<sup>150</sup> notes that persons with higher support needs “must not be left behind and that the CRPD is meant to protect all disabled persons not only those who are “fit” for mainstreaming.”<sup>151</sup>

The CRPD is a comprehensive legal document which is to be taken as a whole. One of its cornerstones is the concept of reasonable accommodation.<sup>152</sup> Article 2 makes clear that the denial of reasonable accommodation constitutes discrimination.

The duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context.<sup>153</sup>

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<sup>147</sup> Theresia Degener argues that the human rights model of disability – spearheaded by the CRPD – can only explain why the enjoyment of human rights does not require a certain health or body status or the absence of impairment. Persons with disabilities are recognized as right-holders as opposed to being perceived as welfare recipients. See: Degener in footnote 46.

<sup>148</sup> See Chair’s final remarks in the discussions of the Ad Hoc Committee’s seventh session.

<sup>149</sup> The Preamble recognizes “the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support.”

<sup>150</sup> Gerard Quinn’s and Theresia Degener’s background study on the UN human rights instruments in the context of disability led to the adoption of the CRPD in 2006. See: Gerard Quinn and Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, United Nations, New York and Geneva, 2002. Available at: <http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf>

<sup>151</sup> See: Degener in footnote 46, at p. 7.

<sup>152</sup> See: Glossary.

Furthermore, the CRPD Committee held that “[s]tates parties must recognise that individual support and reasonable accommodation are priority matters and should be free of charge at all compulsory levels of education.” See: §17 of CRPD General Comment No. 4, *Right to Inclusive Education*, 2 September 2016.

<sup>153</sup> §26 of CRPD General Comment No. 2, *Accessibility*, 22 May 2014.



Gauthier de Beco argues that the concept and the practice of inclusive education is often conflated.<sup>154</sup> This confusion is argued to lead to the existence of a right that has little or no impact in practice.<sup>155</sup> Without clarification and well-defined contours the right to inclusive education is at risk of becoming useless. Hence, a detailed analysis of the content of Article 24 follows.

The legally binding right to inclusive education is a relatively recent development of international human rights law.<sup>156</sup> Consequently, the exact parameters of this right is not well-established. As of today the CRPD Committee has not issued a decision regarding its interpretation of an individual complaint under Article 24 yet.<sup>157</sup> Consequently, we turn to the drafting history and General Comment No. 4 to understand the content of Article 24.

Reading the Article gives the impression that the drafters were trying hard to tailor the text around the doctrine of inclusion. The direction was that “[a]lternative education should not be prohibited per se, but it should not be stimulated either.”<sup>158</sup> Hence, there is no reference in the text

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<sup>154</sup> Gauthier de Beco, The Right to Inclusive Education: Why is There so Much Opposition to its Implementation?, *International Journal of Law in Context*, 14, 3, 2018, pp. 396-415.

<sup>155</sup> Other authors also call into question whether the existence of the right to inclusive education has had any favorable influence at all or whether it led to a new direction in policy making at the domestic level. There is ample research claiming that changes are not sufficient on the ground. See: Michele Moore and Roger Slee, Disability Studies, Inclusive Education & Exclusion, In: Nick Watson, Alan Roulstone and Carol Thomas (eds.), *Routledge Handbook of Disability Studies*, London, Routledge, 2012, pp. 225-239; Fiona Smyth, Michael Shevlin et al., Inclusive education in progress: policy evolution in four European countries, *European Journal of Special Needs Education*, 29, 4, 2014, pp. 433-445; Angela Genova, Barriers to Inclusive Education in Greece, Spain and Lithuania: Results from Emancipatory Disability, *Disability & Society*, 30, 2015, pp. 1042-1054.

<sup>156</sup> The CRPD was adopted in 2006. It is noteworthy that as early as 1974 the concept of inclusive education started to develop through the principle of integration presumption and the least restrictive environment doctrine in the US. See: Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380.

However, Ruth Colker argues that the original mandate of the integration presumption was to close inhumane, disability-only residential (educational) institutions and not to create fully inclusive education for all disabled children. See: Ruth Colker, The Disability Integration Presumption: Thirty Years Later, *University of Pennsylvania Law Review*, 154, 4, 2006, pp. 789-862.

<sup>157</sup> In *D. L. v. Sweden* (CRPD/C/17/D/31/2015) the author, who has been diagnosed with autism, argued that the Swedish Schools Inspectorate’s prohibition on the use of facilitated communication in any of the operations of the municipality of Gothenburg amounted to a violation of his right to education. The Committee was not convinced that the author exhausted the domestic remedies, hence, it declared the communication inadmissible on 24 March 2017.

<sup>158</sup> Intervention of Brazil in the discussions of the Ad Hoc Committee’s seventh session. See: Daily summary of discussion at the seventh session, 24 January 2006. Available at: <https://www.un.org/esa/socdev/enable/rights/ahc7sum24jan.htm>

of the Convention that suggests a legal duty to provide segregated institutions<sup>159</sup> because states are not required to provide the whole range of educational choices within the public education system.<sup>160</sup>

According to Oddny Mjöll Arnardóttir, Article 24 has two elements.<sup>161</sup> The first is of systemic nature prescribing that education systems must be inclusive from design to implementation.<sup>162</sup> In this respect the right to inclusive education is subject to progressive realization.<sup>163</sup> The second element puts this requirement into an individual perspective by spelling out the individual right to inclusive education both in the negative and in the positive.<sup>164</sup>

Following Arnardóttir, the individual right to fully inclusive education<sup>165</sup> is qualified in two respects. Firstly, the language of Article 24(3)(c) allows for mixed alternative and segregated forms of education of blind, deaf and deaf-blind children “which maximize academic and social development.” Secondly, the final version of Article 24(2)(e)<sup>166</sup> allows for segregated settings as

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<sup>159</sup> There were members of the Working Group who thought that “specialist education services should be provided not only where the general education system was inadequate, but should rather be made available at all times without a presumption that one approach was more desirable than the other.” See: Footnote 61 in Report of the Working Group to the Ad Hoc Committee, A/AC.265/2004/WG.1. Available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/AC.265/2004/WG.1](http://www.un.org/ga/search/view_doc.asp?symbol=A/AC.265/2004/WG.1)

<sup>160</sup> Oddny Mjöll Arnardóttir, The Right to Inclusive Education for Children with Disabilities – Innovations in the CRPD, In: Asbjørn Eide, Jakob Möller and Ineta Ziemele (eds.), *Making Peoples Heard. Essays on Human Rights in Honour of Gudmundur Alfredsson*, Martinus Nijhoff Publishers, Leiden and Boston, 2011, p. 226.

<sup>161</sup> Ibid. at p. 224.

<sup>162</sup> The chapeau of Article 24(1) states that “States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels [...]”

<sup>163</sup> Article 4(2) formulates a similar clause to that of Article 2(1) of the ICESCR.

<sup>164</sup> Article 24(2)(a) states that “States Parties shall ensure that persons with disabilities are not excluded from the general education system [...]” Article 24(2)(b) further specifies that states shall ensure “persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.”

<sup>165</sup> Fully inclusive education is understood as education of children with disabilities in the general mainstream classroom.

<sup>166</sup> Article 24(2)(e) embodies the compromise between the fully inclusive and the “realism-based” positions during the drafting process. During the drafting process delegates supporting the fully inclusive position advocated that persons with disabilities should be educated within mainstream classes at all times while the latter group held that a certain amount of mixed alternative and segregated education may be chosen or required. The initial version of Article 24 provided for both inclusive and special education. Draft Article 17(3) stipulated that “where the general

exceptions from placement in mainstream classes.<sup>167</sup> Even though Article 24(2)(e) refers to persons with all kinds of disabilities – not only those with sensory disabilities – it provides for a narrower exception than Article 24(3)(c) as “environments that maximize academic and social development” must be “consistent with the goal of full inclusion.” Consequently, the threshold of the legitimacy of maintaining segregated classes and schools is hedged upon the intention of full inclusion (that is education in the mainstream class).

The CRPD Committee elaborated on Article 24 in its General Comment No. 4. It specified the difference between exclusion, segregation, integration and inclusion.

*Exclusion* occurs when students are directly or indirectly prevented from or denied access to education in any form. *Segregation* occurs when the education of students with disabilities is provided in separate environments designed or used to respond to a particular or various impairments, in isolation from students without disabilities.<sup>168</sup>

The difference between *integration* and *inclusion* is registered in the attitude of the school. If a child with disability adjusts to the standardized requirements of a mainstream school, integration occurs. In comparison, *inclusion* involves the process of systemic reform of mainstream schools to overcome learning barriers of all students through changes in infrastructure, modifications in curriculum, teaching methods and strategies.<sup>169</sup>

Five years after Arnardóttir’s paper the CRPD Committee held that “the right to non-discrimination includes the right not to be segregated” which “must be understood in the context

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education system does not adequately meet the needs of persons with disabilities special and alternative forms of learning should be made available.” See: Report of the Working Group to the Ad Hoc Committee in footnote 159.

<sup>167</sup> Article 24 (2)(d) refers to support within the general education system. In light of the *travaux* – the separation of the Chair’s draft into two items, namely into item (d) and (e) – the language of “environments that maximize academic and social development” in item (e) can only be interpreted as having the same meaning as that employed in the context of Article 24(3)(c), that is mixed alternative and segregated settings. See: Arnardóttir in footnote 160, at p. 225

<sup>168</sup> §11 of CRPD General Comment No. 4, *Right to Inclusive Education*, 2 September 2016.

<sup>169</sup> *Ibid.*

of the duty to provide accessible learning environments and reasonable accommodation.”<sup>170</sup> Therefore, in light of General Comment No. 4 education in special schools and separate classes constitutes discrimination under Article 24 if learning environments could be organized to be accessible to all.

The Committee underlines – similarly to the highly demanding standards on legal capacity<sup>171</sup> – that progressive realization of Article 24 “is not compatible with sustaining two systems of education: mainstream and special/segregated education systems.”<sup>172</sup> Therefore, it urges state parties to transfer resources from segregated to inclusive environments.<sup>173</sup>

## 2.4. THEORETICAL CHALLENGES OF IMPLEMENTING ARTICLE 24 OF THE CRPD

Byrne argues that the CRPD fails children with disabilities by making inclusion contingent upon the extent of individual rather than institutional deficits. “The rules on which the immanent structures of the game are based” have not been sufficiently challenged.<sup>174</sup> Byrne asserts that Article 24 makes extensive reference to individualized support without clearly enshrining the role of states in eradicating structural barriers that hinder the effective inclusion of children within the

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<sup>170</sup> Ibid. at §13.

<sup>171</sup> “The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.” See: §28 of CRPD General Comment No. 1, *Equal recognition before the law*, 19 May 2014.

<sup>172</sup> See: CRPD General Comment No. 4 in footnote 168, at §39.

<sup>173</sup> The Committee acknowledges that “[t]he determination of the most appropriate approach to funding will be informed to a significant degree by the existing educational environment and the requirements of potential learners with disabilities who are affected by it.” See: Ibid. at §68.

<sup>174</sup> See: Byrne in footnote 145, at p. 242.

mainstream education system. She argues that the language of individual support is ‘safe’ and ‘easy’ while legitimizing less than inclusive practices.<sup>175</sup>

As such, emphasis remains on the difficulties children themselves have with legitimized practices of teaching and learning and not on the difficulties that emanate directly from the construction and naturalization of such practices by and for a non-disabled majority.<sup>176</sup>

Byrne pinpoints the theoretical limitation of the CRPD’s inclusion doctrine by highlighting the relationship between the enjoyment of the right to inclusive education and the extent of individual impairment. She identifies the paradox inherent in the concept of reasonable accommodation and full inclusion. Only such adjustments can be claimed that do not impose a disproportionate or undue burden on others. This is how children with PMD are likely lose their entitlement to inclusive education because their needs are said to be too expensive or burdensome.

This form of domination becomes self-perpetuating and may create new patterns of participation by accepting only those children who have ‘right’ kinds of disability and are able to successfully become ‘one of us’ by conforming to normalized ideals.<sup>177</sup>

Shedding light on the relative nature of reasonable accommodation the umbrella term ‘disability’ falls into pieces. People with complex needs – constituting one piece of the broken term – potentially become victims of discrimination against which this very concept (reasonable accommodation) ought to protect them. Without enforcing a ‘one size fits all’ approach what are the avenues children with PMD can take in Europe to vindicate their right to (inclusive) education?

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<sup>175</sup> Even though Article 24 does not explicitly define what is meant by inclusion General Comment No. 4 fills this gap.

<sup>176</sup> See: Byrne in footnote 145, at p. 241.

<sup>177</sup> Ibid. at p. 243.

## 2.5. VINDICATING THE RIGHT TO INCLUSIVE EDUCATION IN EUROPE

Two European jurisdictions on the right to inclusive education are presented briefly, namely the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR). As it is shown below the ECSR developed a significantly more demanding standard in relation to the educational rights of persons with disabilities than the ECtHR.

As concerns the ECHR the negative formulation of the first sentence of Article 2 of Protocol No. 1 (P1A2)<sup>178</sup> implies the limited protection offered by the European Convention on Human Rights (ECHR). P1A2 is far from being an absolute right. In the *Belgian linguistic* case the Court's explicated its scope and content with corresponding state obligations.<sup>179</sup>

Firstly, there is no obligation on states to “establish at their own expense, or to subsidise, education of any particular type or at any particular level.”<sup>180</sup> In the absence of any state obligation to establish a general educational system, the requirement is to guarantee “persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time.”<sup>181</sup>

This leads us to the content of the right which ensures a right of access to already existing educational establishments.<sup>182</sup> Moreover, “[f]or the ‘right to education’ to be effective, it is further

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<sup>178</sup> “No person shall be denied the right to education.”

<sup>179</sup> *Relating to certain aspects of the laws on the use of languages in education in Belgium v. Belgium*, 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968.

<sup>180</sup> *Ibid.* at §3.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.* at §4.

necessary that, inter alia, the individual who is the beneficiary should have the possibility of drawing profit from the education received [...].<sup>183</sup>

The Court highlights that the nature of P1A2 presupposes education laws which “may vary in time and place according to the needs and resources of the community and of individuals.”<sup>184</sup> However, domestic legislation cannot injure the substance of the right. In conjunction with Article 14 such understanding of the right to education, that is a right to *equal*<sup>185</sup> access to existing educational facilities, presupposes that the state maintains a minimum level of educational services – otherwise the protection offered by P1A1 would be illusory – which are equally accessible.<sup>186</sup>

Even though in *André Simpson v. United Kingdom* P1A2 was held to guarantee “a right for children not to be denied an education appropriate to their needs and aptitudes”<sup>187</sup> the Commission found that

there must be a wide measure of discretion left to the appropriate authorities as to how to make the best use possible of the resources available to them in the interests of disabled children generally.<sup>188</sup>

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<sup>183</sup> Ibid.

<sup>184</sup> Ibid. at §5.

<sup>185</sup> The proportionality test of Article 14 stipulates that a distinction (differential treatment) is discriminatory if it has no objective and reasonable justification, that is to say, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized. See inter alia: §33 of *Marckx v. Belgium*, 6833/7413, June 1979.

<sup>186</sup> Pieter van Dijk and Fried van Hoof et al., *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, The Hague, 1998, p. 647.

<sup>187</sup> §1 of *André Simpson v. United Kingdom*, European Commission on Human Rights, 14688/89, 4 December 1989.

<sup>188</sup> Ibid. at §2.

Accordingly, the Commission held that the first sentence of P1A2 does not require the government to place a dyslexic child in a private specialized school with fees paid by the state “when a place is available in an ordinary State school which has special teaching facilities for disabled children.” (§2). Notably, the Commission was of the view that P1A2 is not of a civil nature for the purposes of Article 6(1) because the right not to be denied elementary education falls [...] squarely within the domain of public law, having no private law analogy and no repercussions on private rights or obligations.” (§1).

In *Graeme v. United Kingdom*<sup>189</sup> the Commission addressed the educational plight of a child with PMD. It observed that there was an “increasing body of opinion which holds that, whenever possible, disabled children should be brought up with normal children of their own age.”<sup>190</sup> However, the Commission was of the view that this policy cannot apply to all children with disabilities.<sup>191</sup> In the field of compulsory primary education the ECtHR declared further applications inadmissible challenging the lack of inclusion of children with disabilities within either special or mainstream schools.<sup>192</sup>

In relation to non-compulsory education two recent judgements are mentioned as they show a more progressive approach of the Court. In 2016 the ECtHR explicitly connected Article 14 with

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<sup>189</sup> *Graeme v. United Kingdom*, 13887/88, 5 February 1990.

<sup>190</sup> §1 of *Graeme v. United Kingdom*, 13887/88, 5 February 1990.

<sup>191</sup> Even though the authorities must place weight on parental convictions the second sentence of P1A2 was held not to require “the placing of a child with severe development delay in a private school for able children rather than in an available place in a special school for disabled children.” See: *ibid*.

<sup>192</sup> Legal reasoning in *Klerks v. Netherlands* (25212/94, 4 July 1995) is reminiscent of *Graeme*. In this case the Commission held that the second sentence of P1A2 does not require the placement of a child with a serious hearing impairment into a mainstream school when there is an available place in a special school. It was not disputed that Ruben, the applicant’s son, who was almost entirely deaf, functioned well in a regular primary school. Notwithstanding the Court held that the second sentence of P1A2 granted no right to inclusive education (entailing expenses of additional teaching staff).

In *McIntyre v. The United Kingdom* (29046/95, 21 October 1998) the Commission found that the refusal of a small primary school to install a lift for a girl with muscular dystrophy did not violate P1A2 in conjunction with Article 14. The applicant’s deteriorating mobility prevented her from reaching the science room and the library on the first floor. Consequently, she did not have full access to the national curriculum. As the school made alternative arrangements for her (eg. the school moved her class’s fixed classroom to the ground floor) and the decision on the refusal of installing a lift was based on a technical report assessing the costs of such an installation the Commission found – based on the proportionality test of Article 14 – that the local educational authority’s refusal to install the lift did not deny the applicant’s right to education. The denial on the installation of the lift was found to be proportionate to the legitimate aim of the government sought to be realized, namely the efficient use of resources.

In *Kalkanli v. Turkey* (2600/04, 13 January 2009) the Court held that the refusal of a private elementary school to enroll a blind boy to second grade did not constitute a breach of P1A2 as one school’s refusal was held not to be a systemic negation of the applicant’s right to education on the basis of his disability.

Furthermore, there is a relevant pending case against Romania before the ECtHR. The two applicants, a boy with spastic quadriplegia and his mother claim violations of inter alia P1A2 read separately and in conjunction with Article 14 because the “authorities failed to take the requisite measures in compliance with their obligations under national law and the Convention to ensure that he enjoyed the right to quality education without discrimination [...]” See: §56 of Statement of Facts communicated on 11 July 2014 for *Ştefan-Moshe Stoian and Luminița Stoian v. Romania*, 289/14, application lodged on 19 December 2013. See third party intervention by the Council of Europe

Commissioner for Human Rights at <https://rm.coe.int/third-party-intervention-on-case-stoian-v-romania-concerning-access-to-1680765dfb> Statement of facts and questions to the parties available at: [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-146059\"\]}](https://hudoc.echr.coe.int/eng#{\)



the concept of reasonable accommodation under the CRPD in *Çam v Turkey*.<sup>193</sup> In 2018 the Court held in *Enver Şahin v. Turkey*<sup>194</sup> that the denial of providing access to university buildings for a paraplegic student amounted to a violation of Article 14 read in conjunction with P1A2 as the national authorities had not reacted with due diligence which ‘disabled’ the applicant to enjoy his right to education on an equal basis with others.<sup>195</sup>

As matters stand currently the successful enforcement of P1A1 concerning children with PMD is unprecedented in the jurisprudence of the Court. Even though the ECtHR has recognized systematic disadvantages entrenched in education systems across Europe<sup>196</sup> concerning another minority, namely the Roma,<sup>197</sup> the denial of access to education of children with PMD has not yet been identified by the Court as a systemic human right violation deserving international attention.

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<sup>193</sup> §65 and §67 of *Çam v. Turkey*, 51500/08, 23 May 2016.

The Court held that the refusal to enroll the applicant – who was 15 at the time – at a music academy was based solely on the fact that she was blind and that the domestic authorities did not consider the possibility at any stage that reasonable accommodation might have enabled her to be educated in the academy.” (§69). Consequently, the Court found a violation of Article 14 taken in conjunction with P1A2.

<sup>194</sup> *Enver Şahin v. Turkey*, 23065/12, 30 January 2018.

<sup>195</sup> The proposal by the rector’s office to provide a personal assistant was neither based on an assessment of Mr. Şahin’s actual needs nor did it take into account the impact a personal assistance would have on his independence. Furthermore, the domestic courts did not look into alternative solutions that would have provided the applicant – without imposing an undue burden on the administration – conditions for studying similar to those for able-bodied students. Therefore, the state failed to strike a fair balance between the competing interests (educational needs) of the applicant and the society as a whole. However, the Court did not accept the applicant’s argument claiming that being assisted by and dependent on another person would have deprived the applicant of his privacy. Consequently, there was no violation under Article 8.

<sup>196</sup> In countries such as the Czech Republic, Hungary, Croatia and Greece.

<sup>197</sup> With regards to Roma students in *Horváth and Kiss v. Hungary* (11146/11, 29 January 2013) the Court’s emphasized the positive obligation of the state to dismantle structural deficiencies given the history of direct discrimination against the Roma. “In the context of the right to education of members of groups which suffered past discrimination in education with continuing effects, structural deficiencies call for the implementation of positive measures in order, inter alia, to assist the applicants with any difficulties they encountered in following the school curriculum. These obligations are particularly stringent where there is an actual history of direct discrimination. Therefore, some additional steps are needed in order to address these problems, such as active and structured involvement on the part of the relevant social services.” (§104).

Legislative stereotyping is relevant to the education of children with PMD, as well. Since the meaningful right to education entails the “right to an effective education” of which no person shall be denied it is impermissible for states to deny this right of equal access on the ground of disability. See: Conor O’Mahony, *National Mechanisms for Protecting the Right to Education*, IHRC/Law Society Annual Human Rights Conference, 2009, p. 5.

Beside challenging disablist state practices through individual applications before the ECtHR collective complaints can be lodged before the ECSR.<sup>198</sup> In 2003 the Committee held in *Autism-Europe v. France*<sup>199</sup> that Article 15 of the Revised Charter<sup>200</sup> is considered to reflect “a profound shift of values in all European countries over the past decade” to grant disabled people citizenship rights.<sup>201</sup> These citizenships rights are effectively advanced by securing the right to education for disabled persons “in the framework of general schemes, wherever possible.”<sup>202</sup>

Article 17<sup>203</sup> provides for the rights of the child more generally including the right to education for all. Articles 15 and 17 are buttressed by Article E which prohibits direct and indirect discrimination.<sup>204</sup> As the aim of the Charter is “to protect rights not merely theoretically, but also in fact”<sup>205</sup> the Committee held that France failed to achieve sufficient progress in advancing the provision of education for persons with autism.<sup>206</sup>

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<sup>198</sup> European social partners, international non-governmental organizations holding participatory status with the Council of Europe, employers’ organizations and trade unions may be entitled to lodge collective complaints before the ECSR.

<sup>199</sup> *International Association Autism-Europe v. France*, 13/2002, 4 November 2003.

<sup>200</sup> Notably, Article 15 (right of persons with disabilities to independence, social integration and participation in the life of the community) applies to all persons with disabilities irrespective of age or regardless of the nature and origin of disability.

<sup>201</sup> §48 of *Autism-Europe v. France*, 13/2002, 4 November 2003.

<sup>202</sup> Article 15(1) of Revised European Social Charter.

<sup>203</sup> The right of children and young persons to social, legal and economic protection.

<sup>204</sup> Referring to *Thlimmenos v. Greece* case decided by the ECtHR (34369/97, 6 April 2000) the Committee held that the principle of equality means treating equals equally and unequals unequally. If the state misses to treat differently people whose situations are significantly different indirect discrimination arises “by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.” §52 of *Autism-Europe v. France*.

Also, later the Committee held that “a person with a disability is more likely to be dependent on community care, funded through the State budget, in order to live independently and in dignity, as compared with other persons in receipt of community care. The Committee takes the view that budget restrictions in social policy matters are likely to place persons with disabilities at a disadvantage and thus result in a difference in treatment indirectly based on disability.” See: §144 of *European Action of the Disabled (AEH) v. France*, 81/2012, 11 September 2013.

<sup>205</sup> §32 of *International Commission of Jurists v. Portugal*, 1/1998, 9 September 1999.

<sup>206</sup> Notably, the separation of funding for establishments specializing in the education of disabled children from the mainstream education budget did not, in itself, amount to discrimination.

In 2008 the Committee addressed the education of children with moderate, severe and profound intellectual disabilities who were placed in social care institutions in Bulgaria.<sup>207</sup> Drawing on its jurisprudence<sup>208</sup> the Committee reiterated that “when it is exceptionally complex and expensive to secure one of the rights protected by the Revised Charter, the measures taken by the state to achieve the Revised Charter’s aims must fulfil the following three criteria:

1. a reasonable timeframe;
2. measurable progress; and
3. financing consistent with the maximum use of available resources.<sup>209</sup>

Having taken into account the state’s financial constraints the Committee was of the view that the Bulgarian government failed to comply with its obligations under Article 17(2) in conjunction with Article E.<sup>210</sup>

In 2012 the Committee set the standard of Article 15(1) high in *European Action of the Disabled (AEH) v. France*<sup>211</sup> by holding that children and adolescents with autism had the right to be educated primarily in mainstream schools.<sup>212</sup>

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<sup>207</sup> *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, 41/2007, 3 June 2008.

<sup>208</sup> See: §53 of *Autism-Europe v. France* and §37 of *European Roma Rights Centre v. Bulgaria*, 31/2005, 18 October 2006.

<sup>209</sup> See: footnote 207 at §39.

<sup>210</sup> “[A]ny progress that has been made has been very slow and mainly concerns the adoption of legislation and policies (or action plans), with little or no implementation. It would have been possible to take some specific steps at no excessive additional cost (for example directors of homes for mentally disabled children and municipal officials could have been informed about and given training on the new legislation and action plans).” (§47).

Furthermore, the Committee held that states must fulfil the criteria of the 4 A-s scheme in accordance with §6 of CESCR General Comment No. 13: availability, acceptability, accessibility and adaptability. The last two were relevant in the case. Firstly, the criterion of accessibility was not fulfilled as statistics showed that only 2.8% of the children with intellectual disabilities residing in care homes were integrated in mainstream primary schools and only 3.4% of them attended special classes. Secondly, the adaptability criterion was not satisfied because there was neither trained staff nor teaching material available in primary schools for children with intellectual disabilities.

<sup>211</sup> *European Action of the Disabled (AEH) v. France*, 81/2012, 11 September 2013.

<sup>212</sup> The Committee noted that the proportion of children and adolescents with autism in mainstream schools raised from 10% to 20% since *Autism-Europe v. France*. However, given the prolongation of the 3<sup>rd</sup> Autism Plan and the fact that France subsidized specialized education of autistic children and adolescents of French nationality in Belgium the measurable progress and maximum use of available resources criteria were unmet, respectively amounting to a violation of Article 15(1) in conjunction with Article E. Note dissenting opinion of Lauri Leppik joined by Monika Schlachter.

Article 15§1 of the Charter does not leave States Parties a wide margin of appreciation when it comes to choosing the type of school in which they will promote the independence, integration and participation of persons with disabilities, as this must clearly be a mainstream school.<sup>213</sup>

However, the integration presumption serves as a guiding rule and it is not absolute. The clause in Article 15 “in the framework of general schemes, wherever possible” is subject to a conditionality clause: where the education of disabled learner is not possible, the state may provide education “through specialised bodies, public or private.”<sup>214</sup> As the Committee describes the state has an obligation to provide education “in one or other of the pillars of the education system, in other words mainstream or special schools.”<sup>215</sup> The authorities must “take account of the type of disability concerned, how serious it is and a variety of individual circumstances to be examined on a case-by-case basis” when assessing whether priority to be given to education in mainstream schools.<sup>216</sup>

The conditionality of the integration presumption seems to cause an inner contradiction as the chapeau of Article 15 explicitly makes it clear that protection is granted irrespective of the nature and origin of disability. To reduce this inner tension the Committee identifies human assistance as a prerequisite to keep autistic children in mainstream schools and the “margin of appreciation applies only to the means that states deem most appropriate to ensure that this assistance is provided.”<sup>217</sup>

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<sup>213</sup> See: footnote 211 at §78.

<sup>214</sup> Article 15(1) of Revised European Social Charter.

<sup>215</sup> See: footnote 211 at §78.

<sup>216</sup> Ibid.

<sup>217</sup> See *ibid.* at §81.

In 2018 the Committee concluded in *Mental Disability Advocacy Center (MDAC) v. Belgium*<sup>218</sup> that right to an inclusive education of children with intellectual disabilities in the Flemish Community of Belgium was violated under Articles 15(1) and 17(2) of the Charter. MDAC challenged the smokescreen legislation “M-Decree” hindering access of children with intellectual disabilities to mainstream schools and barring some 1,000 children with PMD access to education.<sup>219</sup>

The government failed to provide information why out-of-school children (according to the government they take up only 0,1 % of the school age cohort) were exempted from compulsory schooling and whether children with PMD receive any education in day-care centers.<sup>220</sup> Moreover, M-Decree only provided budget transfers leaving mainstream schools unprepared to cater for the needs of those who cannot follow the core curriculum.<sup>221</sup> This may be the reason why 1,270 pupils left mainstream schools to enroll in segregated schools between 1 October 2016 and 1 February 2017.<sup>222</sup>

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<sup>218</sup> *Mental Disability Advocacy Center (MDAC) v. Belgium*, 109/2014, 29 March 2018.

<sup>219</sup> Gauthier de Beco, MDAC v Belgium before the European Committee of Social Rights: The Right to Inclusive Education Pushed by the UN Convention on the Rights of Persons with Disabilities, *Blog of the European Journal of International Law*, 1 June, 2018. Available at: <https://www.ejiltalk.org/author/gauthierdebeco/>

<sup>220</sup> See: footnote 218 at §68.

<sup>221</sup> See: *ibid.* at §75.

<sup>222</sup> See: *ibid.* at §49.

The lack of effective (judicial) remedy against refusals of enrolment in mainstream schools also contributed to the infringement of Article 15(1). As concerns Article 17(2) the Committee reiterated the integration presumption by stating that “the inclusion of children with disabilities into mainstream schools in which arrangements are made to cater for their special needs should be the norm and teaching in specialised schools must be the exception.” (§104). As mainstream schools and curricula were not accessible in practice to children with intellectual disabilities the Committee found that the state did not comply with its duty to fulfill the criterion of accessibility.

## CHAPTER III. ANALYSIS OF THREE NATIONAL LEGAL FRAMEWORKS

All children and young people of the world, with their individual strengths and weaknesses, with their hopes and expectations, have the right to education. It is not our education systems that have a right to certain types of children. Therefore, it is the school system of a country that must be adjusted to meet the needs of all children.<sup>223</sup>

The above citation puts forward a simple (and noble) message while hiding a difficult balancing exercise of the competing interests of all learners. Inclusive education systems require the legislature, courts, educational and administrative authorities to take into account a myriad of individual interests so that the educational rights of children with or without disabilities are respected, protected and fulfilled. The state has to determine resource allocation, define the content of the national curriculum and regulate placement procedure.<sup>224</sup>

Notably, the right to education cannot be seen in isolation. In this chapter three national legal landscapes are analyzed by looking at constitutional jurisprudences as well as relevant legislation and case law (including Ombudsman's reports) on rights which are related to the education of children with PMD. Consequently, relevant socio-economic rights are also addressed to provide for a wider context.

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<sup>223</sup> Quotation from Bengt Lindqvist, Former UN Special Rapporteur for Persons with Disabilities. See: UNESCO, *Guidelines for Inclusion: Ensuring Access to Education for All*, 2005, p. 13. Available at: [http://www.ibe.unesco.org/sites/default/files/Guidelines\\_for\\_Inclusion\\_UNESCO\\_2006.pdf](http://www.ibe.unesco.org/sites/default/files/Guidelines_for_Inclusion_UNESCO_2006.pdf)

<sup>224</sup> Where to allocate funds? To single schools where everyone learns together? To integrated structures with specialized sections for children with SEN? Or to highly specialized structures where children with SEN learn separately?

### 3.1. IRELAND

#### HISTORICAL CONSTITUTIONAL DEVELOPMENTS

Unlike the South African Constitution, the Irish Constitution is not widely regarded as a transformative document. However, it does entrench the role of the judiciary in vindicating fundamental rights while engraining some commitment to socio-economic rights.<sup>225</sup> At the time of its drafting – almost a decade before the Second World War – the 1937 Irish Constitution broke with the traditional British notion of parliamentary supremacy and it committed to a social vision informed by a mix of theocratic (Catholic) and liberal democratic view on the state.

The impact of Catholic social teaching can be revealed in the Preamble, in the fundamental rights provisions<sup>226</sup> and in the Directive Principles of Social Policy (DPSP) with the latter setting out to support the “infirm”.<sup>227</sup> The influence of liberal democracy is most evident in the institutional structure of the state.<sup>228</sup> Arguably, because of British colonial rule which gave the

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<sup>225</sup> Brian McCracken, *The Irish Constitution: An Overview*, In: Jeremy Sarkin and William Binchy (eds.), *Human Rights, the Citizen and the State: South African and Irish Perspectives*. Dublin, Round Hall, 2001; Gearóid Carey, *The Constitutional Dilemma of Article 45: An Avenue for Welfare and Social Rights?* *Irish Student Law Review*, 78, 1995.

<sup>226</sup> Particularly the right of the family described as “inalienable and imprescriptible rights, antecedent and superior to all positive law.” See Article 41(1).

<sup>227</sup> Provisions under Article 45 indicate that a “constitutional commitment that public policy should pursue a conception of social justice.” See: Rory O’Connell, *From Equality Before the Law to the Equal Benefit of the Law: Social and Economic Rights in the Irish Constitution*, In: Oran Doyle and Eoin Carolan (eds.), *The Irish Constitution: Governance and Values*, Dublin, Thomson Round Hall, 2008, p. 328.

In relation to disability Article 45(4)(1) state that the institutions of the state – guided by the explicitly non-enforceable directive principles of social policy – shall protect the social order in which “justice and charity” are to prevail, and safeguarding “with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm [...]”

<sup>228</sup> See: O’Connell in footnote 44, at pp. 139-140.

executive “wide reserves of prerogative power”,<sup>229</sup> the Irish Constitution became the guardian of fundamental rights with the courts empowered to enforce them.<sup>230</sup>

Notably, at the time of the drafting of the Constitution the primary concern was to reinforce the arrangement between the funders (state) and the providers of education (church).<sup>231</sup> This is in line with the view that the Irish Constitution represented “a self-conscious attempt to combine the liberal democratic tradition [...] with Catholic social teaching.”<sup>232</sup> The drafters’ intent was not to enshrine children’s substantive right to education. Nonetheless, its codification provided an explicit basis for claiming later. In light of the constitutional commitment to the egalitarian right to education –courts started to delimit the scope of this right specifying the state’s obligation with regards to the provision of compulsory education of certain quantity and quality.

## ENFORCEMENT OF FUNDAMENTAL SOCIO-ECONOMIC RIGHTS

Even though the Constitution did not explicitly enshrine a rigid separation of powers doctrine<sup>233</sup> the Irish experience represents an “archetypal example of a constitutional order”<sup>234</sup> in which the separation of powers argument proves to be a decisive watermark in the Supreme Court’s current jurisprudence on socio-economic rights.<sup>235</sup> As noted by Gerard Quinn the Irish Constitution

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<sup>229</sup> *Melling v. Ó Mathghamhna* [1962] IR 1, p. 39.

<sup>230</sup> Gerard Hogan, The Constitutional Review Committee of 1934, In: Fionan O’Muircheartaigh (ed.), *Ireland in the Coming Times: Essays to Celebrate TK Whitaker’s 80 Year*, Institute of Public Administration, Dublin, 1997, p. 361.

<sup>231</sup> Aoife Nolan, Ireland: The Separation of Powers Doctrine vs. Socio-Economic Rights, In: Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge, Cambridge University Press, 2009, p. 306.

<sup>232</sup> Basil Chubb, *The Government and Politics of Ireland*, London, Longman, 1997, pp. 15-16.

<sup>233</sup> “[T]he framers of the Constitution did not adopt a rigid separation between the legislative, executive and judicial powers.” See: *Abbey Films v. Attorney General* [1982] IR 158, p. 171.

<sup>234</sup> See: O’Connell in footnote 44, at pp. p. 138.

<sup>235</sup> Based primarily on Article 6(1). Concerning legislative and executive powers Articles 15(2) and 28(2) while regarding the power of courts Articles 26 and 34(3)(2) entrench the doctrine of separation of powers.



cleverly made a bow before socio-economic rights<sup>236</sup> but it made sure to insert them into a part of the text – under Article 45 enumerating the DPSP – that is non-cognizable by courts adding “rhetorical genuflections to egalitarian rights but little more.”<sup>237</sup>

Even though Article 45 has been described as a “veritable dead letter”<sup>238</sup> the doctrine of unenumerated personal rights under Article 40(3)(2) opened an avenue to claim rights not specifically adumbrated in the Constitution. In *Ryan v. Attorney General* the wording ‘in particular’ was held to indicate that “personal rights which may be invoked to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State.”<sup>239</sup> This doctrine led to the protection of several important individual rights.<sup>240</sup>

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<sup>236</sup> In the most thorough review of the Constitution to date the Constitution Review Group (CRG) rejected the entrenchment of socio-economic rights in the Constitution as it would distort the separation of powers. Ultimately, conferring economic and social entitlements to citizens is a political issue and if courts were to enforce such rights the executive would have “no discretion as to what amount of revenue could, or should, be raised from the public” to finance the realization of socio-economic rights. Furthermore, the CRG argued that going below a minimum level of subsistence one could still seek judicial protection though the vindication of the right to life and the right to bodily integrity. See: Constitution Review Group, *Report of the Constitution Review Group*, Stationery Office, Dublin, 1996, p. 235-236.

<sup>237</sup> Gerard Quinn, Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order, In: Cathryn Costello (ed.), *Fundamental Social Rights: Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights*, Trinity College, Dublin, 2001, p. 48.

<sup>238</sup> See: O'Connell in footnote 44, at p. 142.

<sup>239</sup> *Gladys Ryan v. Attorney General*, [1965] IR 294 p. 312.

In this application Mrs Ryan argued that as a parent she was safeguarded by Article 42 of the Constitution to refuse the decision of Dublin Corporation to introduce fluoride into the drinking water on the basis of the health and welfare of her children.

Having recourse to the Papal Encyclical *Pacem In Terris*, which recognized bodily integrity as a natural right of individuals, Kenny J. found that the Constitution protected such right. However, he eventually found against the applicant having considered scientific evidence presented on the social good the fluoridation program provided to society as a whole and held that that the program did not violate Mrs Ryan's family's constitutional 'right to bodily integrity.'

<sup>240</sup> The right to access to courts in *Macauley v. Minister for Posts and Telegraphs* [1966] IR 345; right to fair procedures in *Re Haughey* [1971] IR 217; right to marital privacy in *McGee v. Attorney General* [1974] IR 284; and the right to communicate in *Attorney General v. Paperlink* [1984] ILRM 373.

However, the protection of positive rights carrying resource implications – as apparent in *State (C) v. Frawley*<sup>241</sup> and in *TD v. Minister for Education* (see below) – was found to be fundamentally limited.<sup>242</sup> Furthermore, the application of the constitutional guarantee of equality also provides for a narrow avenue to achieve protection for socio-economic rights given its generally limited nature<sup>243</sup> and the conservatism of courts.<sup>244</sup> To some extent, there is, however, one exemption to the general judicial reluctance of engaging directly with socio-economic rights qua rights.

## JUDICIAL INTERPRETATIONS ON THE RIGHT TO EDUCATION

The only socio-economic right which managed to “escape into the hard text” of the Constitution is the right to free primary education.<sup>245</sup> Article 42(3)(2) provides for *compulsory* while the first clause of Article 42(4) guarantees *free* primary education. The state “as the the

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<sup>241</sup> In this case a prisoner with severe mental health problems argued that inadequate treatment violated his right to bodily integrity. While Finlay CJ accepted that in principle the right to bodily integrity can impose positive obligation on the state he ultimately found against the applicant as his treatment was held to be reasonable. In this vein, Finlay CJ held that “it is not the function of the Court to recommend to the Executive what is desirable or to fix the priorities of its health and welfare policy.” [1976] IR 365, p. 373.

<sup>242</sup> In the *Abortion Information* case the Supreme Court explicitly rejected the idea that the use of natural law as a method of constitutional interpretation was valid. *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1; Roderick O’Hanlon – a proponent of the natural law school – argued that people’s power was limited to amend the Constitution, namely the natural right to life of the unborn in the *Abortion Information* case, by the rules of the natural law. See: Roderick O’Hanlon, *Natural Rights and the Irish Constitution*, *Irish Law Times*, 11, 1993, p. 8; and Roderick O’Hanlon, *The Judiciary and the Moral Law*, *Irish Law Times*, 11, 1993, p. 129.

<sup>243</sup> Hogan and Whyte note that the “jurisprudence on the guarantee of equality in the Irish Constitution is remarkably underdeveloped.” See Gerald Hogan and Gerry Whyte, *J M Kelly: The Irish Constitution*, Butterworths, Dublin, 2003, p. 1324, at 7.2.05.

Furthermore, Oran Doyle observes that “Article 40.1 was meant to guarantee civil and political equality, not social equality [...] Although the Constitution did not preclude social equality, it contained no mandate to that effect.” See: Oran Doyle, *Constitutional Equality Law*, Dublin, Thomson Round Hall, 2004, p. 65.

<sup>244</sup> Tim Murphy, *Economic Inequality and the Constitution*, In: Tim Murphy and Patrick Twomey (eds.), *Ireland’s Evolving Constitution, 1937-1997: Collected Essays*, Hart Publishing, Oxford, 1998, p. 179.

<sup>245</sup> See: Quinn in footnote 237, at p. 49.

guardian of common good” – guided by the GPSP – must ensure that “children receive a certain minimum education.”<sup>246</sup>

While the right to education is explicitly protected there is another right which is of socio-economic in nature in the Constitution. Article 42(5) provides for the right of children to be cared for by the state if parents fail to do so.<sup>247</sup> Reading Article 42(1), which stipulates the freedom aspect of the right to education,<sup>248</sup> in conjunction with Article 42(5) is argued to establish the duty of the state to care for those children whose parents are unable to meet their rights.<sup>249</sup> In *G v. An Bord Uchtala*<sup>250</sup> the Supreme Court held that Article 42(5) established a right on behalf of “at risk” children requiring the state to make adequate provision for their needs.<sup>251</sup>

In *Crowley v Ireland v. Minister for Education*<sup>252</sup> Irish Supreme Court held that the state’s obligation to provide free primary education conferred the corresponding right of individuals to receive free primary education.

In the above-mentioned *Ryan* judgement according to the High Court judgement education referred to in Article 42 of the Constitution must be of a “scholastic” nature. However, the Supreme Court disagreed with this narrow approach. It found that “education essentially is the teaching and

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<sup>246</sup> Article 42(3)(2) of the Irish Constitution.

<sup>247</sup> “In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.”

<sup>248</sup> “The primary and natural educator of the child is the Family and [it] guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.”

<sup>249</sup> See: O’Connell in footnote 44, at p. 149.

<sup>250</sup> [1980] IR 32.

<sup>251</sup> O’Higgins held that “[t]he child [...] has natural rights [...] Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his/her full personality and dignity as a human being.” See: [1980] IR 32, pp. 55-56.

<sup>252</sup> The Court, however, dismissed the claim that the state had failed to provide for free primary education of the plaintiffs during a closure of a local school brought about by a teachers’ strike. See: [1980] IR 102.

training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.”<sup>253</sup>

In the landmark case *O'Donoghue v. Minister for Health & Others*<sup>254</sup> the issue was whether the applicant, a child with PMD,<sup>255</sup> and other children with similar degree of mental and physical disability were entitled to free primary education under Articles 40(1) (guarantee of equality) and Article 42(3)(2) and Article 42(4). Justice O'Hanlon found for Paul and held that he was entitled to claim as of a right educational benefits under Article 42. As this case is quintessential in understanding the starting point of the debate on educational rights in the Irish context it is described in detail.

Challenging the government's contention<sup>256</sup> experts refused to differentiate between training and education. They asserted that primary education includes the basic education of children with PMD. “A child learning to hold his head up is like another child trying to learn long division.”<sup>257</sup> Expert opinion also referred to the report of the Commission of Inquiry on Mental

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<sup>253</sup> *Gladys Ryan v. Attorney General* [1965] IR 294, at p. 350.

<sup>254</sup> *O'Donoghue v. Minister for Health & Others* [1993] IEHC 2, 27 May 1993. Available at: <http://www.bailii.org/ie/cases/IEHC/1993/2.htm>

<sup>255</sup> The applicant, Paul O'Donoghue was born in November 1984. He contracted a serious viral infection when he was eight months old. As a result, he became mentally and physically disabled. He was diagnosed with Reye syndrome. His mother, Marie O'Donoghue, paid for his treatment with the Pető technique (Hungarian educational method for children with cerebral palsy) for years. Later, Paul was not offered pre-school education as placements were very limited for children with PMD. In 1991 he received six hours of state education per week whereas children who had less severe disabilities, classified as mild or moderately mentally disabled, were receiving full-time education. See: Barry Roche, *Young man central to education rights for disabled dies*, The Irish Times, 24 January 2014. Available at: <https://www.irishtimes.com/news/education/young-man-central-to-education-rights-for-disabled-dies-1.1667468>

<sup>256</sup> In *O'Donoghue* the government claimed that the constitutional guarantee of free primary education only entailed a conventional (“scholastic”) type of education. The state considered Paul to be ineducable arguing that his training cannot be regarded as primary education under Article 42 of the Constitution.

<sup>257</sup> *O'Donoghue*, at p. 14.

Handicap from 1965,<sup>258</sup> the 1983 Blue Report<sup>259</sup> and the 1990 Lilac Report,<sup>260</sup> as well as other sources.<sup>261</sup>

Justice O'Hanlon concluded that the applicant was capable of being educated given the copious amount of global research done in relation to the educability of children with PMD. He held that education means "advice, instruction and teaching as will enable [all children] to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be." Hence, the education of children with PMD was regarded as "primary education" within the meaning of Article 42 of the Constitution.<sup>262</sup>

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<sup>258</sup> The Commission of Inquiry on Mental Handicap was set up by the Irish Minister for Health in 1961. The Commission's report deals with the education of mildly and moderately mentally handicapped children in detail. However, it was almost silent on the education of children with PMD. The report only stated that "[c]are units should be established to provide training and care, on a daily basis, for severely handicapped children [...]" (p. 94).

The Commission estimated that there were 2750 persons with severe intellectual disability in Ireland in total (0-7 years: 650, 7-17 years: 800, 16 and over: 1300). Available at: <https://www.lenus.ie/handle/10147/243761?show=full>

<sup>259</sup> Working Party to the Minister for Education and Minister for Health and Social Welfare, *The Education and Training of Severely and Profoundly Mentally Handicapped Children in Ireland*, January 1983.

<sup>260</sup> Review Group on Mental Handicap Services, Needs and Abilities – A Policy for the Intellectually Disabled, 1990.

<sup>261</sup> In addition to supplement witness evidence given orally and on affidavits extensive documentary evidence was made available to the Court. These included country specific policy papers (United Kingdom, Denmark, United States).

The Vatican II Declaration on Christian Education (*Gravissimum Educationis*) from 1965 was also attached. It stated that "[a]ll men of whatever race, condition or age in virtue of their dignity as human persons, have an inalienable right to education. [...] It is the duty of the State to ensure that all its citizens have access to an adequate education and are prepared for the proper exercise of their civic rights and duties. The State itself, therefore, should safeguard the rights of the children to an adequate education in schools."

Furthermore, international soft and hard laws were referred to. (UDHR, CRC, ECHR, General Assembly Resolution 3447 (XXX) of 9 December 1975 containing a "Declaration on the Rights of Disabled Persons").

<sup>262</sup> This reading clearly broadened the scope of the constitutional term 'education.' To justify reading in the education of severely disabled children into the Constitution O'Hanlon J. put forward the argument that at the time of the Ryan (in 1965) Chief Justice O'Dalaigh could have easily drawn the wrong conclusion from the report by the Commission of Inquiry on Mental Handicap that education for children with PMD was of no use. "Events have moved rapidly since that time, however, and on a world-wide scale, so that the weight of informed opinion has supported the contrary view for many years past."

Furthermore, Justice's argument was reinforced by the fact that state educational provision was already granted to children with mild and moderate intellectual disabilities. Justice O'Hanlon was of the view that the education of children with mild or moderate disabilities and that of children with PMD are dealing with the same issue but they differ only in degree. "This process will work differently for each child, according to the child's own natural gifts, or lack thereof. In the case of the child who is deaf, dumb, blind, or otherwise physically or mentally handicapped, a completely different programme of education has to be adopted and a completely different rate of progress has to be taken for granted, than would be regarded as appropriate for a child suffering from no such handicap." This fact was

The government also contended that “further debate as to the merits of [Paul’s] claim would amount to no more than a moot on which the Court should not embark” because an additional teacher was appointed to the Cope Foundation<sup>263</sup> which took care of the Paul at the time.<sup>264</sup> However, the court was not satisfied that the state had granted Paul a place on a concessionary basis (which could be easily withdrawn at any time). As the case involved the enforcement of a constitutional right it was not up to the government to grant it on a concessionary basis.

The judgment required greater deployment of resources from the state.<sup>265</sup> The court proposed the government three aspects to meet the rights of children with PMD in primary education: 1) age for starting school 2) duration of primary education and 3) continuity of education. These criteria formed the basis for subsequent litigation. *O’Donoghue* created a firm precedent for children with SEN and their families to require the state to live up to its positive constitutional duties in the field of education.<sup>266</sup>

The approach of universal education – no matter how extensive needs may be – was confirmed by McGuinness J. in *Comerford v Minister for Education*, where she held that “the right to free primary education extends to every child, although the education provided must vary in accordance with the child’s abilities and needs.”<sup>267</sup>

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also supported by the similarity of curricula of children with intellectual disabilities ranging from mild to severe degrees. See: Section V: Conclusions of *O’Donoghue*.

<sup>263</sup> The Cope Foundation is an NGO providing residential and daycare services for children with mild, moderate, severe, and profound mental and physical disabilities. It was the only institution in the Cork area, where children with PMD were provided educational services on a daily basis. The Foundation had limited resources and it was only able to cater for the needs of 12 children at the time.

<sup>264</sup> The Respondent’s fourth ground of opposition summarized in *O’Donoghue*.

<sup>265</sup> The court supported its ruling by showing that the achievement of more balanced child-teacher ratios were possible in other countries.

<sup>266</sup> Shivaun Quinlivan and Mary Keys, Official Indifference and Persistent Procrastination: An Analysis of Sinnott, *Judicial Studies Institute Journal*, 2,2, 2002, p. 163.

<sup>267</sup> *Comerford v. Minister for Education* [1997] 2 I.L.R.M. 134, p. 143.

In *FN v. Minister for Education*<sup>268</sup> the court rejected arguments that costs were too high to cater for the needs of children with SEN without parents. A declaratory order was issued obliging the state to provide facilities and treatment as far as it was reasonably practicable. However, the state failed to adhere to its undertakings and the applicants were left without sufficient provision. This led to the mandatory order issued in *DB v. Minister for Justice*<sup>269</sup> requiring the executive to establish and maintain facilities to meet the needs of the applicant and similarly situated children. This approach was considered as a “revolutionary step” vindicating the rights of children with PMD.<sup>270</sup>

At this point Quinn noted that the main question was how the Supreme Court would rule on the “raw jurisdiction” claimed by lower courts over education.<sup>271</sup> As we will see, the Supreme Court calibrated the separation of power doctrine to prevent itself from interfering with the educational policies of the legislature.

Drawing on *O’Reilly v. Limerick Corporation*<sup>272</sup> the Supreme Court adopted the traditional Aristotelian distinction between commutative and distributive justice. Accordingly, courts were competent in the former examining legal relationships between individuals and what they owe to one another (commutative justice) but they had no qualification to undertake the function of administering public resources (distributive justice).

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<sup>268</sup> [1995] 1 IR 409.

<sup>269</sup> [1999] 1 IR 29.

<sup>270</sup> See: Quinn in footnote 237, at p. 52.

<sup>271</sup> “The main question to be decided would be the calibration of the separation of powers with the raw jurisdiction claimed by the courts over education. The Supreme Court could either stick to the text (in which case the activism, though it carries the judiciary deeper into territory that is generally the prerogative of the Executive, is fully justified) or carve out some ‘political question’ exception based on a general theory of the separation of powers.” See: Quinn in footnote 237, at p. 53.

<sup>272</sup> [1989] ILRM 181.

In 2001 the Supreme Court sent out a clear message on how viewed its role in enforcing socio-economic rights. The majority of judges considered the Irish Constitution to be a charter of negative liberties, and “socio-economic rights, although laudable aspirations, were not a matter for the courts, but, rather, should be left to the elected branches of government.”<sup>273</sup>

In *Sinnott v. Minister for Education*<sup>274</sup> the High Court made an order requiring the state to provide adequate education to a young autistic man as long as he was capable of benefitting from it.<sup>275</sup> As the Constitution does not give an age-based definition of the ‘child’ the state appealed contending that it was not obliged under Article 42 to provide for Jamie’s education into adulthood. Ultimately, the Supreme Court considered Article 42 taken as a whole to be child-centered limiting the scope of the constitutional right to education to the age of 18. Also, the Supreme Court held that courts would enforce positive obligations of the state only in the most extreme cases.

In the subsequent case of *TD v. Minister for Education*<sup>276</sup> the state appealed Kelly J.’s mandatory injunction ordering the executive to build and maintain ten high support units to meet the needs of the applicants with challenging behavior and similarly situated minors. Without contesting its constitutional obligation to provide the applicants with special care and appropriate educational facilities the state argued that the High Court did not have the jurisdiction to issue such an injunction as such order violated the separation of powers (courts were not supposed to set policy).

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<sup>273</sup> See: O’Connell in footnote 44, at p. 151.

<sup>274</sup> [2001] 2 IR 505.

<sup>275</sup> Justice Barr was of the view that “the ultimate criterion in interpreting the State’s constitutional obligation to provide for primary education of the grievously disabled is ‘need’ and not ‘age’ [...]” See: *ibid.* at pp. 583-584.

<sup>276</sup> [2001] 4 IR 545.



The Supreme Court found that the High Court did not have the power to issue a mandatory order enforcing positive constitutional rights which extend beyond the right of the applicants. The claimed right<sup>277</sup> was considered to be an unenumerated personal right guaranteed under Article 40(3)(1). However, the majority of the judges criticized the *Ryan* judgment laying foundation for the unenumerated rights doctrine and rejected the idea that implied socio-economic rights should be granted constitutional status.<sup>278</sup>

The approach of the Supreme Court adopted in these two judgments was heatedly criticized by commentators. Paul O'Connell underlined that these two judgements effectively denied adjudicative space for future socio-economic rights claims.<sup>279</sup> Raymond Byrne and William Binchy highlighted that both *Sinnott* and *TD* failed to identify the constitutional status of the claimed rights.<sup>280</sup> Blathna Ruane agreed with the High Court's refusal in *TD* "to be detoured from its constitutional function of the enforcement of constitutional rights on the grounds that an issue of policy might be involved in its decisions."<sup>281</sup> Conor O'Mahony pointed out criticizing *O'Reilly* that

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<sup>277</sup> The claimed right was defined as "a right to be placed and maintained in secure residential accommodation so as to ensure, so far as practicable, his or her appropriate religious and moral, intellectual, physical and social education" See: *ibid.* at p. 279.

<sup>278</sup> The sole dissenter, Justice Denham, was of the view that *TD v. Minister for Education* did not deal with the assertion of a novel right under Article 40(3) but it sought to enforce a well-established right under Articles 42(1) and 42(5). Referring to *F.N. v. Minister for Education* Denham J. stated that "[i]n the situation of a child with very special needs, which could not be provided by his or her parents or guardian then there is a constitutional obligation on the State under Article 42.5 to make reasonable efforts to cater for those needs in order to vindicate the constitutional rights of the child. Secure accommodation, services and such arrangements as were necessary to meet the requirements of F.N. were held to be not so impractical or so prohibitively expensive as to come within any notional limitation of the State's constitutional obligations." See: *ibid.* at pp. 295-296. Furthermore, Denham J highlighted that *TD* embodied one of those rare occasions when a court could enforce explicit rights (education, protection of children by the state) through a mandatory order given the exceptional character of the applicants' cases.

<sup>279</sup> See: O'Connell in footnote 44, at p. 162.

<sup>280</sup> "[T]he error lies in the notion that the plaintiffs' case sought recognition for some new constitutional right or theory [of socio-economic rights] never previously recognized by the courts. On the contrary, in both cases, the plaintiffs argued that the right to education, and not some new, previously unacknowledged right, required the court to translate fine words into real protection." See: Raymond Byrne and William Binchy (eds.), *Annual Review of Irish Law 2001*, Dublin, Thompson Round Hall, 2002, p. 22.

<sup>281</sup> Blathna Ruane, *The Separation of Powers and the Grant of Mandatory Orders to Enforce Constitutional Rights*, *Bar Review*, 2000, p. 419.

the enforcement of civil and political rights has also financial implications.<sup>282</sup> Gerry Whyte was of the view that such narrow understanding of separation of powers was solely based on the liberal democratic tradition of the common law ignoring the fact that the Irish Constitution was strongly influenced by Christianity promoting values of social inclusion and recognizing “socio-economic rights as indispensable to the common good.”<sup>283</sup>

Around the 2000s hundreds of similar cases were taken to court. This deluge of litigation led to legislative reform. In 2004 the Education for Persons with Special Educational Needs Act 2004 provided for a comprehensive framework for assessment, preparation and reviews of education plans and appeal procedures. It also established executive agencies and statutory bodies (such as the National Council for Special Education).<sup>284</sup>

Cases started to enforce legislation. In *Cronin v. Minister for Education*<sup>285</sup> involved the enforcement of statutory obligations. The four-year old autistic applicant was granted an interlocutory mandatory injunction ordering the minister to provide educational facilities pending the hearing of the case. This case was argued to place a “new slant” on *TD* as it seemed to suggest

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<sup>282</sup> “[D]ifficulty with O’Reilly is not so much that Costello J’s analysis is flawed, but that it is unsuitable for application to cases where the State has failed to vindicate a citizen’s constitutional right to education. Such cases clearly fall to be classified as commutative/rectificatory justice as they involve a wrong in the form of a breach of a constitutional right of a citizen; any remedy granted is aimed towards rectifying the wrong committed by the State. Of course, such a remedy will usually involve, as a knock on effect, the distribution of public resources; it is, however, merely a secondary symptom of the case, as is the distribution of public resources stemming from an award of damages in a case where a servant of the State commits a tort.” See: Conor O’Mahony, Education, Remedies and the Separation of Powers, *Dublin University Law Journal*, 24, 57, 2002, p. 76.

<sup>283</sup> Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland*, Dublin, Institute of Public Administration, 2002, p. 361.

<sup>284</sup> §2 of the Act defines the right to inclusive education as follows: “A child with special educational needs shall be educated in an inclusive environment with children who do not have such needs unless the nature or degree of those needs of the child is such that to do so would be inconsistent with— (a) the best interests of the child as determined in accordance with any assessment carried out under this Act, or (b) the effective provision of education for children with whom the child is to be educated.”

<sup>285</sup> [2004] 3 IR 205.

– similarly to the ECtHR’s standard – that plaintiffs can be awarded judicial remedies as long as the facilities they require are already in place but have not been made available to them.<sup>286</sup>

Concerning quality of education, the applicable test in *O’Carolan v. Minister for Education*<sup>287</sup> was whether the provision on offer was “appropriate.”<sup>288</sup> Arguably, the “appropriate” test sets a lower standard than *O’Donoghue*.<sup>289</sup> This test was reaffirmed in *O’C v. Minister for Education*<sup>290</sup> where the court did not consider necessary to evaluate an alternative education model recommended by parents even though it had been demonstrated to be effective for the applicant. Consequently, constitutionally appropriate education did not entail a particular form of autism-specific education.<sup>291</sup>

Three relevant subsequent cases are mentioned. In *Doherty v. South Dublin County Council* the court affirmed in relation to housing rights that a breach of legislation generally calls for judicial intervention adding if

a plea is made that the court should declare the absence of welfare support to be wrong in a particular situation of itself, the applicant should show a complete inability to exercise a human right from his or her own means and a serious situation that has set the right at nought with the prospect of serious long term harm.<sup>292</sup>

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<sup>286</sup> Conor O’Mahony, A New Slant on Education Rights and Mandatory Injunctions, *Dublin University Law Journal*, 27, 2005, p. 365.

<sup>287</sup> [2005] IEHC 296.

<sup>288</sup> The test for determining whether the applicant’s constitutional right to education was being vindicated was not whether it was optimal or whether provision was provided in a facility desired by the plaintiffs (the applicants wanted the state to fund their child’s placement in an autism-specific center in Wales).

<sup>289</sup> Whereas the *O’Donoghue* test asserts that education as understood under Article 42(4) should enable a child “to make the best possible use of his or her inherent and potential capacities” the *O’Carolan* test only asks whether a particular placement was appropriate to the needs of the child. The question does not arise whether there is a better alternative placement. See: Conor O’Mahony, The Right to Education and “Constitutionally Appropriate” Provision’, *Dublin University Law Journal*, 28, 2006, p. 422.

<sup>290</sup> [2007] IEHC 170.

<sup>291</sup> See: Nolan in footnote 231.

<sup>292</sup> [2007] 2 IR 696, p. 723.

After the transposition of the ECHR into Irish law the court held in *O'Donnell v. South Dublin County Council*<sup>293</sup> that the state violated Article 8 of the Convention by not providing a traveler family a mobile home so that they could care for their severely disabled children. Without grounding a constitutional right to social services of a certain quality *O'Donnell* shows that Irish courts may enforce socio-economic rights if the case at issue is individuated.<sup>294</sup> Finally, the Supreme Court found in the *Health Amendment*<sup>295</sup> case the retrospective provisions of a health policy repugnant which required the imposition of charges for “those with exceptional needs” (in-patients in hospitals and nursing homes).<sup>296</sup> As the case had immense financial implications<sup>297</sup> the Supreme Court showed willingness to release its rigid application of the separation of powers to protect the rule of law.

## FUNDING

At the start of the 2017/18 school year a new resource allocation model was launched in Ireland supported by significant additional state funding.<sup>298</sup> The objective of the model is to ensure that no child is refused enrolment because schools do not have sufficient teaching resources to meet their needs.<sup>299</sup> Resources must be used to facilitate the development of truly inclusive schools.

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<sup>293</sup> [2007] IEHC 204.

<sup>294</sup> See: O'Connell in footnote 44, at p. 165.

<sup>295</sup> *Re Article 26 and the Health (Amendment) (No. 2) Bill*, 2004 [2005] 1 IR 105.

<sup>296</sup> “In a discrete case, in particular circumstances, an issue may well arise as to the extent of which the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs.” See: *ibid.* at p. 166.

<sup>297</sup> The Supreme Court’s decision meant that the state was potentially liable for about 500 million to 1.2 billion euros in claims.

<sup>298</sup> Under the new scheme 900 additional special education teaching posts were allocated to schools. See: European Agency for Special Needs and Inclusive Education, *Legislation Updates 2017*, p. 21. Available at: <https://www.european-agency.org/sites/default/files/Legislation%20Updates%202017.pdf>

<sup>299</sup> Department of Education and Skills, *Primary Circular 13/2017*, 7 March 2017, p.14.

The new model seeks to abrogate the practice of allocating the same level of support for learners within certain categories of SEN. As a learner may have greater support needs than another with the same disability the new scheme aims to ensure that learners with the greatest levels of need have access to the greatest levels of support.<sup>300</sup> Hence, “additional teaching supports are deployed according to identified needs, rather than being based on a diagnosis of disability.”<sup>301</sup> This new scheme is promising to achieve a more individualized educational support system offering children with PMD the chance that they will be beneficiaries of the changes in school financing.

### 3. 2. HUNGARY

#### THEORETICAL AND INSTITUTIONAL BACKGROUND OF SPECIAL EDUCATION IN HUNGARY

The philosophy behind the discipline of Hungarian special education (*gyógypedagógia*) – reflective of the German *Heilpädagogik* literature – is deeply rooted in the idea of human rights.<sup>302</sup> Because of its child-centered and interactional perspective its discourse usually calls rights as (special) needs in the context of altered learning abilities. Its universal humanist perspective stems

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<sup>300</sup> See: European Agency for Special Needs and Inclusive Education in footnote 298, at p. 23.

<sup>301</sup> The Continuum of Support Guidelines serve to help schools deploy their resources effectively. See: Department of Education and Skills, *Guidelines for Primary Schools Supporting Pupils with Special Educational Needs in Mainstream Schools*, p. 18. Available at: <https://www.education.ie/en/The-Education-System/Special-Education/Guidelines-for-Primary-Schools-Supporting-Pupils-with-Special-Educational-Needs-in-Mainstream-Schools.pdf>

<sup>302</sup> Zsuzsa Mesterházi, „...a mélyben folyamatosan ugyanaz a bűvópatak táplálta...” A gyógypedagógia elméletképzésének főbb irányai, In: Zászkaliczky Péter and Verdes Tamás (eds.), *Tágabb értelemben vett gyógypedagógia. A fogyatékoság jelensége a gyógypedagógia határtudományaiban* ELTE, Bárczi Gusztáv Gyógypedagógiai Főiskolai Kar és Kölcsény Ferenc Protestáns Szakkollégium, 2004, pp. 18-65.

from the fact that its horizons include those who are on the limits of human existence, namely persons with severe disabilities.<sup>303</sup>

The Hungarian special educational tradition stipulates that personhood is granted simply by having a human body. As human development does not start from a non-human stage the course of human life is peculiar to human existence from the very beginning. Its trajectory is defined by learning to reach human qualities.<sup>304</sup> Hence, one of the anthropological postulates of the theory of the Hungarian special education tradition is that personhood of people with disabilities cannot be questioned even for persons with PMD.<sup>305</sup>

Hungarian special education theorists repositioned disability parallel with or arguably even before the international human rights movement<sup>306</sup> “as an inclusive concept [which] embraces disability as a universal human variation rather than an aberration.”<sup>307</sup> Early examples include Pál Ranschburg (1870-1945) and Lipót Szondi (1893-1986) who highlighted the necessity of

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<sup>303</sup> As such, the theory of special education serves as the gatekeeper of philosophical anthropology. Its theory – a certain concept of what it means to be a person – is constantly informed by the practice of special educators. Hence, its theory is argued to be in the position to validate anthropological concepts by measuring their abilities to involve marginal groups into their reflection. See: Péter Zászkaliczky, *A megértő elem a gyógypedagógiai pszichológiában*, In: Péter Zászkaliczky (ed.), „...önmagában véve senki sem...” *Tanulmányok a gyógypedagógiai pszichológia és határtudományainak köréből*, Budapest, 2002.

<sup>304</sup> Péter Zászkaliczky, *Az antropológiai stúdiumok jelentősége a gyógypedagógusok képzésében*, *Gyógypedagógiai Szemle*, 34, 2, 2006, p. 101.

<sup>305</sup> There are opponents to this idea. Peter Singer famously questioned the personhood of infants by setting some empirical threshold criteria (such as rationality, autonomy and self-consciousness) to justify infanticide and non-voluntary euthanasia. “The fact that a being is a human being, in the sense of a member of the species *Homo sapiens*, is not relevant to the wrongness of killing it.” See: footnote 23 at p. 182.

However, such argumentation can be rebutted by the interpretation of the experience of those severely disabled infants and adults (persons with PMD) who – according to Singer – may be morally killed having been deprived of their person status. See: Péter Zászkaliczky, *A gyógypedagógia etikai problémáiról – a Peter Singer-vita tükrében*, *Gyógypedagógiai Szemle*, 2, 1992.

<sup>306</sup> See: Mesterházi in footnote 302.

<sup>307</sup> Michael Ashley Stein, *Disability Human Rights*, *California Law Review*, 95, 75, 2007, p. 121.

examining the totality of personality including the analysis of the effects of outside factors (social fate).<sup>308</sup>

But the theory of Hungarian special education is stubbornly flawed with its cemented segregating practice.<sup>309</sup> Today the Hungarian school system is still shackled with its deeply-rooted segregating practice.<sup>310</sup> Before turning to the analysis of the current Hungarian legal framework a short history on the development of educational entitlements for all is presented.

## HISTORICAL DEVELOPMENTS ON EDUCABILITY

From the XIX. century highly specialized educational establishments were established within the state school system using religious and private financing.<sup>311</sup> Lagging behind international trends the Hungarian Parliament abolished the term ‘ineducable’ only after the transition.<sup>312</sup> Until 1993 the total exclusion of children with PMD from education was legal.<sup>313</sup>

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<sup>308</sup> They were theorists of special educational psychology who had progressive ideas on the diagnostics of intellectual disability. See: Lányiné in footnote 18, at p. 58.

<sup>309</sup> Luca Vasas and Zsolt Bugarszki, Interview with Tamás Verdes, *Szimplacsoport*, 25 October 2010, Available at: [https://szimplacsoport.blog.hu/2010/10/25/interju\\_verdes\\_tamassal](https://szimplacsoport.blog.hu/2010/10/25/interju_verdes_tamassal)

<sup>310</sup> See: Lányiné in footnote 18 at p. 21.

<sup>311</sup> Special institutions were created not only for different type of disabilities but also for varying degrees of disabilities. The deaf were in a separate institution from the hard of hearing, the blind separate from the partially sighted. See: Anna Gordosné Szabó, *Gyógypedagógiai történet. I:II*, Tankönyvkiadó, Budapest, 1972.

<sup>312</sup> The first Hungarian special educational establishment, the Royal Hungarian Institute for the Deaf-Blind, opened its doors in Vác in 1802 after András Cházár, a Hungarian lawyer and chief notary, had visited a similar institute in Wien. Interestingly, this was 27 years before the oldest school for the blind was found in 1829 in the United States in Boston. The Perkins School for the Blind was founded by Samuel Gridley Howe who had visited the Institut National des Jeunes Aveugles in Paris and brought the idea of educating the disabled to the United States. However, the legal recognition of the educability of all children occurred much earlier in the US than in Hungary. The distinction between educable and ineducable was repealed with the Education of the Handicapped Amendments in 1974. However, it is to be noted that schools for children with sensory and physical disabilities started to open special classes for children with multiple disabilities in Hungary since the 1970. See: Márkus in footnote 73, at pp. 16-17.

<sup>313</sup> The abolition of the concept of ineducability was also due to the differentiation and development of several branches of science including medicine, juridicial and educational sciences. See: Eszter Márkus, *A fejlesztő nevelés-oktatás kialakulásának szakmai előzményei, folyamata, Tíz év a fejlesztő nevelés-oktatásban*, Fogyatékos Személyek Esélyegyenlőségéért Közhasznú Nonprofit Kft, Budapest, 2018, pp. 10-11.

The legislature created a separate educational category for children with PMD. They had no compulsory education. They fulfilled ‘training obligation’ (*képzési kötelezettség*) in the form of so-called ‘development training’ (*fejlesztő felkészítés*) typically receiving 3-5 hours of weekly education in pedagogical service centers<sup>314</sup> (*pedagógiai szakszolgálat*).<sup>315</sup>

The lawfulness of these separate educational categories was called into question in a paper lobbying for the equal educational rights of learners with PMD.<sup>316</sup> Three arguments were put forward. Firstly, it was argued that the mere existence of a different category (justifying education in pedagogical service centers) placed a substantial restriction on the core element of the right to education as compulsory education grants the right to participate in school education. Secondly, no compelling reason was found to justify the necessity and inevitability of the restriction. Neither the protection of the rights of other learners nor that of other constitutional objectives required the exclusion of children with PMD from schools. Lastly, no purpose was found based on which the proportionality test could be carried out to justify the restriction. As no purpose was found the balancing exercise between the weight of the restriction and its purpose could not be performed.<sup>317</sup>

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Law of LXXIX on Public Education acknowledged the educability of children with PMD. Before they were exempted from compulsory schooling and were cared for in the family or in health care homes (*egészségügyi gyermekotthonok*).

Law of LXXIX on Public Education recognized that supportive or impeding educational environmental factors influence each child’s development. However, Law of LXXIX on Public Education clearly endorsed the medical model of disability. The law justified the exclusion of these children from compulsory education by formulating that if students are unable to fulfill their compulsory education due to their disability, the expert opinion shall state, the manner by which the development of the child is ensured (training obligation). See: §30 (6) of Law of LXXIX on Public Education.

<sup>314</sup> Pedagogical service centers are executive educational agencies responsible for, inter alia, diagnosing SEN, providing early intervention services, speech therapy, career guidance, psychological services and care for highly talented children. See: 15/2013. (II. 26.) EMMI rendelet a pedagógiai szakszolgálati intézmények működéséről.

<sup>315</sup> See: Márkus *ibid.* at p. 10.

<sup>316</sup> Tamás Verdes’s comprehensive paper entitled ‘*Súlyosan, halmozottan fogyatékos gyermekek és fiatalok a közoktatásban*’ played an important role in the progressive 2005 amendment of the Law of LXXIX on Public Education. See: Verdes in footnote 30.

<sup>317</sup> *Ibid.* at pp. 109-110.



Due to lobbying ‘training obligation’ was abolished and children with PMD were placed under compulsory education. From 1 September 2006 so-called ‘developmental schooling’ (*fejlesztő iskolai oktatás*) was introduced for children with PMD aged 6-18<sup>318</sup> increasing their weekly hours of education from 3-5 to 20 hours.<sup>319</sup> The name ‘developmental schooling’ is misleading as this educational service could be provided in seven types of institutions out of which many were not educational establishments.<sup>320</sup> Nonetheless, this amendment created the possibility for children with PMD to legally step inside a special school for the first time.<sup>321</sup>

The amendment set the deadline to implement ‘developmental schooling’ in classes until 1 September 2010.<sup>322</sup> This provision was not implemented. This constituted a breach of law by omission (*mulasztásos törvénytértés*) which has never been addressed. By 2010 only an estimate of 25-30% of children with PMD received school education.<sup>323</sup>

## CURRENT LEGISLATION ON ‘DEVELOPMENTAL EDUCATION’

The Act of CXC of 2011 on National Education renamed the category ‘developmental education’ (*fejlesztő nevelés-oktatás*).<sup>324</sup> As sufficient school capacities were not created by 2010

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<sup>318</sup> ‘Developmental schooling’ could be extended until the age of 23.

<sup>319</sup> See: Márkus in footnote 313, at p. 11.

<sup>320</sup> These institutions included nursery schools, early intervention centers, special schools, conductive pedagogical schools, day-care centers for the disabled, rehabilitation homes for the disabled and caring and nursing homes for the disabled.

<sup>321</sup> In 2005 and 2006, the National Public Foundation for the Equal Opportunities of Disabled Children (*Fogyatékos Gyermek, Tanuló Felzárkóztatásáért Országos Közalapítvány*) supported 21 special schools to provide ‘developmental schooling.’ See: *Fogyatékos Személyek Esélyegyenlőségéért Közalapítvány, Járhat ő is iskolába! Nyertes pályázóink tapasztalatai a fejlesztő iskolai oktatás elindításáról (2005-2006)*, Budapest, 2008.

<sup>322</sup> ‘Developmental schooling’ in the form of individual education should have been eradicated by that date. See: §125(2)-(3) of Law of LXXIX on Public Education.

<sup>323</sup> See: Márkus in footnote 313, at p. 12.

<sup>324</sup> Today each child with PMD of age 6 must fulfill compulsory education under ‘developmental education.’ Their education can be extended until the age of 23. The number of learners in a ‘developmental education’ class cannot go above 6 persons. Each learner must receive an individualized education plan by the end of the 12<sup>th</sup> week of the school year. The development of each student is evaluated on a centrally issued form at the end of the school year. The assessment is in writing (and not by grades) which includes the student's achievements and difficulties in each

Act of CXC of 2011 on National Education continues to allow for educational provision at the home of the child (for those who are raised by their families) and in care homes (for those who are placed in so-called nursing homes for the disabled)<sup>325</sup> without setting any criteria why someone cannot participate in school education.<sup>326</sup> While the primary place for the education of children with PMD is implied to be special or conductive schools the alternatives of education at home and in care institutional settings create loopholes through which children with PMD flow out of the education system.<sup>327</sup>

Only those schools can accept children with PMD whose founding document (*alapító okirat*) contains the provision of ‘developmental education.’ This rule serves to ensure that reasonable accommodation is provided to enrolled learners. However, it also serves as an excuse for schools to refuse the enrollment of children with PMD. Today there is no statutory duty that all local schools must provide reasonable accommodation.<sup>328</sup>

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developmental area. It also includes suggestions for preparing the IEP for the next academic year. The education of children with PMD throughout the school year is based on schools’ rehabilitational pedagogical programs (*rehabilitációs pedagógiai program*) and their annual work plans (*éves munkaterv*). See: §140 of 20/2012. (VIII. 31.) EMMI rendelet a nevelési-oktatási intézmények működéséről és a köznevelési intézmények névhasználatáról

<sup>325</sup> §15 (2a) and (5) of Act of CXC of 2011 on National Education.

<sup>326</sup> The legislature perceives ‘developmental education’ as a block type of service which follows developmental stages until a person with PMD reaches age 23. The content of curriculum (development areas such as perception, communication, motor skills, ADL functions) is not divided into school years. The phasing of the educational work appears in a concentric expansion of the content of activities adapted to age-specific characteristics. See: §140(4) of 20/2012. (VIII. 31.) EMMI rendelet a nevelési-oktatási intézmények működéséről és a köznevelési intézmények névhasználatáról.

<sup>327</sup> The equal educational entitlements of children with PMD are reflected in further two rules. Firstly, children in ‘developmental education’ are also entitled to benefits based on a certificate of enrollment in education. Secondly, funds for worksheets and digital communication aids, which are not in the textbook list, can be claimed from the central budget allocated for the provision of textbooks. See: §96 of Act of CXC of 2011 on National Education.

<sup>328</sup> Judicial practice shows that courts are not willing to enforce the inclusive educational aspirations of parents who wish to enroll their child with SEN in a local mainstream pre-school. The court refused the argument that the local pre-school could have also met the needs of the child with hearing impairment with reasonable accommodation. The court was of the view that not all educational institutions are obliged to provide reasonable accommodation. It was only the school appointed in the expert committee’s opinion which had the duty to enroll the child. See: Supreme Court decision, Kfv.VI.39.299/2010/3, 17 October 2011.

Notably, the duty to provide ‘developmental education’ was transferred from pedagogical service centers to special and conductive pedagogical schools. Consequently, the school enrollment of children with PMD took place administratively.<sup>329</sup>

Today many special schools function as methodological service centers for integration (*egységes gyógypedagógiai módszertani intézmény*).<sup>330</sup> Such schools maintain so-called networks of ‘traveling special educators and conductors’ (*utazó gyógypedagógusi, konduktori hálózat*).<sup>331</sup> Traveling special educators and conductors generally support mainstream school teachers who have children with SEN in their classes. However, those traveling teachers who educate children with PMD work in care institutions or in the home of the child. Their integrative function is voided as they work hermetically sealed from schools.

## CURRENT STATE OF AFFAIRS

According to László Bass's statistics, 200 infants are estimated to be born in Hungary every year who will get a diagnosis of PMD later.<sup>332</sup> Similarly, Eszter Márkus found that there are 220-270 children with PMD who enter the school system each year. 3700-4500 capacities are

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<sup>329</sup> See: Márkus in footnote 313, at p. 12.

<sup>330</sup> Methodological service centers (in short EGYMIs) maintain segregated kindergartens, elementary/secondary schools or ‘developmental education’ while they must have an institutional unit which serves functions of pedagogical service centers (such as early intervention, speech therapy, SEN diagnostics, career counseling. See: 15/2013. (II. 26.) EMMI rendelet a pedagógiai szakszolgálati intézmények működéséről.

<sup>331</sup> 20§(9) of Act of CXC of 2011 on National Education.

<sup>332</sup> Bass’ research was the first representative research on the state of affairs of families raising a child with PMD in Hungary in 2004. Bass found that the estimated number of the persons with PMD is 11,500. See: László Bass, *Jelentés a súlyosan, halmozottan fogyatékos embereket nevelő családok életkörülményeiről*. Kézenfogva Alapítvány, Budapest, 2004.

required<sup>333</sup> to meet the rights of all children with PMD in the school system.<sup>334</sup> However, empirical research shows that two third of school-aged children with PMD still cannot go to school.

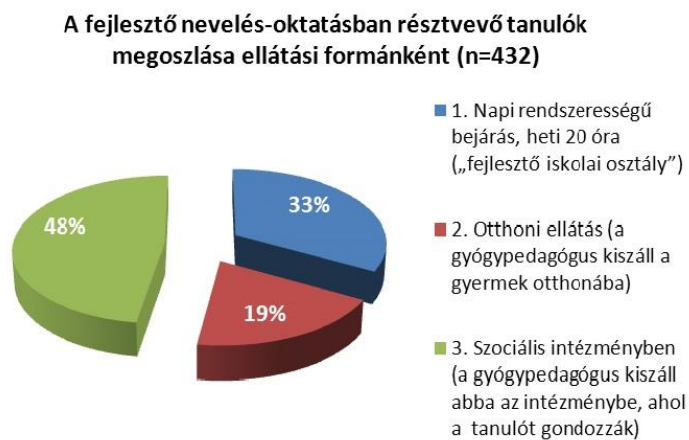


Figure 3: The proportion of students in ‘developmental education’ according to places of service provision in school year 2014/15<sup>335</sup>

<sup>333</sup> Counting in that the education of children with PMD can be extended until the age of 23. See: Eszter Márkus, PR6: Elemző tanulmány a súlyos és halmozottan sérült gyermekek, tanulók ellátása jellemzőiről és javaslatok megfogalmazása az ágazati irányítási, jogszabályi és a fejlesztési környezet számára, MENTOR Informatika Kft. és ERUDITIO Oktatási Szolgáltató Zrt, Budapest, 2015, p. 7.

<sup>334</sup> In the school year 2017/2018 there were 2412 students registered under ‘developmental education.’ There were 127 task locations (*feladatellátási hely*) assigned to do this educational service. However, task locations do not show the number of schools where children with PMD are educated but the number of administrative units (*székely, intézményegység or telephely*) of special schools which are responsible for the provision of ‘developmental education.’ There are task locations where children with PMD have never been to. How the administrative unit performs its task – whether in the home of the child or in a social care home – cannot be ascertained from official statistics. This is why empirical research is necessary to find out how many students with PMD are excluded from schools on the ground.

If the child with PMD cannot reach the school building, the special educator will reach (*‘kiszáll’*) the child (at home or in the social care institution). In those cases, the child fulfills his or her compulsory education in the form of individual education. If the social care home is an administrative unit of the special school (*intézményegység or telephely*) ‘developmental education’ can be provided in a group.

In principle, a mainstream school could also be the unit of a special school where developmental education is provided. Administratively, legislation already allows the possibility that segregated classes of children with PMD are organized inside mainstream schools. Special thanks to Eszter Márkus for explaining me these administrative regulations.

<sup>335</sup> Blue: school education, red: education in the home of the child, green: education in residential care home. See: Eszter Márkus, Andrea Jenei and Rita Révész, PR5: Elemzett/másodelemzett hazai kutatások és/vagy dolgozatok és/vagy helyzetfeltárások súlyos és halmozottan fogyatékos gyermekek, tanulók ellátásával összefüggésben, MENTOR Informatika Kft. és ERUDITIO Oktatási Szolgáltató Zrt, Budapest, 2015, p. 45.

It is crucial where educational service provision takes place as it affects the education of children with PMD not only qualitatively<sup>336</sup> but quantitatively. With regards to quantitative concerns, a nationwide survey showed based on responses by expert committees, who are responsible for diagnosing SEN,<sup>337</sup> that children with PMD raised by families who are educated at home receive on average 9 hours, those placed in residential social care institutions receive 10.7 hours of education per week.<sup>338</sup> Only those children with PMD who go to school receive 20 hours of education as prescribed by law.<sup>339</sup> Consequently, the educational prospects of children with

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<sup>336</sup> Effective education – that is achieving complex educational objectives – in total institutions or in the home of the child is not more than a mere illusion. See: Chapter I. 1.3 and 1.4.

<sup>337</sup> As concerns the diagnostic process of PMD expert committees (usually made up of a multidisciplinary team including a pediatrician, a psychologist and a special educator) are clamped in a vice as they have to establish the adequate diagnosis of SEN while also having to propose a specific school which will provide education for the child. Hardships of diagnosis and problems with appointing schools are addressed separately.

There is no diagnostic protocol for PMD to date. There is a core protocol for pedagogical service centers. There are diagnostic manuals for all categories of SEN under 4§ (25) of Act of CXC of 2011 on National Education except for one category: multiple disabilities. See: Diagnostic manuals developed in 2012 are available here:

[http://www.educatio.hu/hirfoiyam/tamop311\\_4piller](http://www.educatio.hu/hirfoiyam/tamop311_4piller)

This function of expert committees to appoint schools creates a mechanism under which available school options inform the child's needs. In other words the type of SEN diagnosis in expert opinions is influenced by the available services the school system can offer at a given time. Often it is not the SEN of the child that define school placement. Ad absurdum, a blind child will not get a diagnosis of visual impairment if there is no school in the district which educates blind children.

Also, expert committees are not autonomous organs of the school system. Administratively, they are under the same supervisory body as state-maintained schools (*Klebersberg Központ*). Hence, they are in no position to put pressure on the school district to create more school capacities for children with SEN.

If the expert committee cannot appoint a school because there is no school in the institution list which would enroll the child, the expert committee signals this to the director of the school district (*tankerületi igazgató*). The school district director has to take steps for the appointment of the school and inform the expert committee about the measures taken within 15 days.

However, when expert committees signal shortcomings of educational infrastructure or the lack of special teachers who are trained in educating children with a particular SEN to the administration of the school district, it may happen that directors of school district send back the signal to the expert committee saying that it is the duty of the expert committee to propose a school that will provide education for the child. See: §20(1) of 15/2013. (II. 26.) EMMI rendelet a pedagógiai szakszolgálati intézmények működéséről.

<sup>338</sup> Kristóf Környei, A súlyosan-halmozottan fogyatékos tanulók bemutatása, közoktatásbeli helyzetük emberi jogi szempontú vizsgálata a szakértői bizottsági tevékenység tükrében, ELTE Bárczi Gusztáv Gyógypedagógiai Kar, Budapest, 2017, p. 48.

<sup>339</sup> §15(3) of Act of CXC of 2011 on National Education.

PMD are determined by their socio-economic background (whether they live in an institution or with their families) and not by their diagnosis (educational entitlements reflecting actual needs).<sup>340</sup>

## CONSTITUTIONAL RIGHTS AND THEIR APPLICATION CONCERNING THE EDUCATION OF CHILDREN WITH PMD

As opposed to the formulation of other social rights – for example, the right to adequate housing and shelter<sup>341</sup> – the Fundamental Law stipulates that “[e]very Hungarian citizen shall have the right to education.”<sup>342</sup> It is the human right of every Hungarian citizen to have *access* to free and compulsory primary education and free and generally available secondary education. The state ensures this right by extending and generalizing public education.<sup>343</sup>

Access cannot be restricted on the basis of the child's disability. As all children of mandatory school age are equally entitled to free and accessible primary education, parents (or legal guardians) with PMD cannot be exempted from ensuring compliance with their child's educational obligations.<sup>344</sup> In other words: given children with PMD of mandatory school age must also fulfill their compulsory education just like any other children with or without disabilities the state must ensure access to primary and secondary education for them, as well. What is the constitutional basis of state obligations related to education?

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<sup>340</sup> This statement can be found in a book from 2003. Unfortunately, it is still true today. See: Eszter Márkus, *IME Ismerkedés – Megértés – Együttélés. Súlyos-halmozott fogyatékkal élő emberek életének kísérése*, Kézenfogva Alapítvány, Budapest, 2003, p. 175.

<sup>341</sup> According to Article XXII (1) “Hungary shall strive to ensure decent housing conditions and access to public services for everyone.”

<sup>342</sup> Article XI (1).

<sup>343</sup> Article XI (2).

<sup>344</sup> According to Article XVI (3) “Parents shall be obliged to take care of their minor children. This obligation shall include the provision of schooling for their children.”

According to Article XVI of the Fundamental Law children have the right to the protection and care which are necessary to their physical, intellectual and moral development. This ‘right to healthy development’ forms the basis of the constitutional obligation to protect the development of children. The main rule goes: children as subjects of fundamental rights, enjoy rights just like any other person, but in order for them to be able to exercise the full range of rights, age-adequate provision supported by the state is necessary so that children can avail themselves of their rights. Children may claim the above-mentioned care and protection vis-à-vis parents, family, the state and other members of society.

The right of the child to protection and care creates the duty of the state to protect the child's personal development institutionally.<sup>345</sup> The age-related disadvantages of the child are balanced by the institutional obligation on the side of the state (*intézményvédelmi kötelezettség*). Hence, the state is obliged to act to promote and protect the fundamental rights of the child. This imposes a positive obligation on the state to provide all children of mandatory school age with access to primary and secondary education.<sup>346</sup>

The state obligation to protect the development of children is the basis upon which the legislature and the judiciary can restrict – primarily in the public sphere – the exercise of other

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<sup>345</sup> The freedom aspect of the right to education – the right of parents to choose or establish a school– is closely related to freedom of religion. The HCC dealt with this issue. Parents may direct the exercise of religious rights of their child – respecting their views and taking into account their maturity. Hence, parents have the right to send their children to ecclesiastical school of their choice as well as not to send their children to a school endorsing views contrary to their religious or conscious beliefs. The parent's right to choose a school is in line with the state's institutional obligation (*intézményvédelmi kötelezettség*). Therefore, public schools are under the obligation of neutrality. In fact, the state implements the right to education by maintaining schools open to all and ensures the ideologically neutral conditions of schooling by providing a balanced and objective teaching of religion. However, this is not enough to enforce freedom of religion in the field of compulsory school education. The state cannot prohibit the creation of religious or atheistic schools. However, the state is not obliged to establish religiously non-neutral schools. See: 4/1993. (II. 12.) of Hungarian Constitutional Court decision.

<sup>346</sup> AJB-1672/2017 Report of Commissioner for Fundamental Rights, p. 38.

fundamental rights.<sup>347</sup> However, there is no fundamental right whose protection justifies denying children with PMD access to primary education.<sup>348</sup> Ensuring the healthy development of all children includes the establishment of a school system in which participation in school education is accessible to all. Partial or complete exclusion of children with PMD from primary and secondary educational establishments is therefore of particular concern to the exercise of their right to healthy development.<sup>349</sup>

According to Article XV Hungary guarantees fundamental rights to everyone without discrimination. Article XV specifies disability as a protected ground. According to the still valid decisions of the Hungarian Constitutional Court (HCC)<sup>350</sup> the requirement of equal treatment means that everyone should be treated as a person of equal dignity before the law. Individual considerations shall be taken into account on an equal basis when allocating the criteria for entitlements and benefits.<sup>351</sup>

However, it does not follow from the constitutional prohibition of discrimination that the legislature cannot take into account factual differences between people.<sup>352</sup> As concerns the definition of equal opportunities, the HCC held that the right to dignity may lead to the

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<sup>347</sup> Thus, freedom of assembly may be restricted in the name of protecting the moral development of the child. Consequently, membership of a child in an association related to homosexuality may be precluded or restricted by law or a court decision. See: 21/1996. (V. 17.) Hungarian Constitutional Court decision.

<sup>348</sup> See: Verdes in footnote 30, at pp. 109-110.

<sup>349</sup> The Hungarian Civil Liberties Union's (HCLU) complaint to the Ombudsman on the violation of the right to education of children with profound and multiple disabilities and the role of expert committees, Budapest, 16 February 2016, p. 10. Available: [https://tasz.hu/files/tasz/imce/2015/ombudsman\\_shf\\_anonim\\_-2-.pdf](https://tasz.hu/files/tasz/imce/2015/ombudsman_shf_anonim_-2-.pdf)

<sup>350</sup> According to (5) of Closing and Miscellaneous Provisions of Fundamental Law "[t]he decisions of the HCC taken prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions."

Comparing previous and current constitutional provisions on the principle of the rule of law, on the requirement of equal treatment and on the right to education the Commissioner found that the 4<sup>th</sup> revision of the Fundamental Law does not necessitate the rejection or the revaluation of the former practice of the HCC with regards to the constitutional provisions at issue. Hence, decisions of the HCC concerning these provisions were held to be valid. See: Commissioner for Fundamental Rights in footnote 346, at pp. 37-38.

<sup>351</sup> 9/1990 (IV. 25.) HCC decision.

<sup>352</sup> 10/1998 (IV.8) HCC decision.



quantitatively equal distribution of goods and opportunities (formal equality). But in case a social objective, which does not conflict with the Constitution, or if a fundamental right can only be enforced in a way that such narrow understanding of equality is not feasible, positive discrimination cannot be held unconstitutional.<sup>353</sup>

However, the prohibition of discrimination is not absolute. The qualified right to equality has two constitutional standards.<sup>354</sup> In case of unequal treatment with respect to *constitutional rights*, constitutionality may be judged on the basis of the necessity and proportionality test governing restriction of fundamental rights. Although the Fundamental Law prohibits discrimination treatment of fundamental rights, the HCC found that the prohibition of discrimination extends to the *whole legal system* if discrimination violates the fundamental right to human dignity.<sup>355</sup>

In such cases, the applicable standard is that non-equal treatment must be reasonable. If differential treatment is held to be arbitrary or unjustified – there is no reasonable justification to it – such difference in treatment violates the right to human dignity. The legislature does not treat the persons concerned as persons of equal dignity failing to evaluate their perspectives with the same weight. Consequently, arbitrary discrimination without reasonable justification is unconstitutional.<sup>356</sup>

Arguably, the category of ‘developmental education’ constitutes discrimination as it allows for the dominant scenes of education for children with PMD to be family households and residential

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<sup>353</sup> 238/B/1990. HCC decision.

<sup>354</sup> AJB-1672/2017 Report of Commissioner for Fundamental Rights, pp. 39; János Sári and Bernadette Somody, *Alapjogok. Alkotmánytan II.* Osiris Kiadó, Budapest, 2008. p. 73.

<sup>355</sup> 61/1992 (XI. 20.) HCC decision.

<sup>356</sup> See: Sári and Somody in footnote 354 at p. 37; §23 of 11/2018 (VII.18.) HHC decision.

social care institutions and not schools. It is of no dispute that the education of PMD raises other expectations from the school system than those created by the needs of other children. However, a different type of service does not justify legislation which keeps children out of schools while providing them less hours of education than other children.<sup>357</sup>

Notably, there is no constitutional right to enforce measures to promote equal opportunities.<sup>358</sup> The state must ensure that persons with disabilities can exercise their rights and that there is an institutional system compensating the disadvantages of disabled people *in line with the possibilities of the national economy*.<sup>359</sup> However, education is not a matter of social security. It is a fundamental right, whose protection has undeniably resource implications, which is rendered useless if there is no school system in place for children with PMD.

Beside the fundamental rights to education, healthy development and non-discrimination, there are two other constitutional provisions which can be invoked concerning the right to education of children with PMD. Firstly, Article VI enshrines the right to respect for private life.<sup>360</sup> This right is violated when a child with PMD has to be placed in a residential social care institution because he or she can only receive some education there.<sup>361</sup> Such practice is also contrary to the

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<sup>357</sup> See: HCLU in footnote 349 at p. 11.

<sup>358</sup> János Sári and Bernadette Somody, *Alapjogok. Alkotmánytan II.* Osiris Kiadó, Budapest, 2008. p. 338. See: *Ferenc Hajzók and others v. EMMI*, 2.P.24.990/2017/22, 13 December 2018, p. 17.

<sup>359</sup> §2(5) of Act XXVI of 1998 on the Rights and Equal Opportunities of Persons with Disabilities.

<sup>360</sup> See §6(1)-(2) of Act of XXXI of 1997 on the Protection of Children and Guardianship Administration which states that the child has the right to receive help in being able to be brought up in their family, in developing their personality, in warding off situations jeopardizing their development, in integrating into society and in becoming an independent, responsible adult.

<sup>361</sup> Tamás Verdes's article on the Fodor family who were forced to place their child with PMD in a residential care institution because they could not manage the transportation of their child to school. See: Tamás Verdes, *Törvénybe vésett trauma*, 9 October 2012. Available at: [http://ataszjelenti.blog.hu/2012/10/09/nagyon\\_sajnaljak\\_de\\_nem\\_tudjak\\_megoldani\\_hogy\\_eljusson\\_az\\_iskolaba](http://ataszjelenti.blog.hu/2012/10/09/nagyon_sajnaljak_de_nem_tudjak_megoldani_hogy_eljusson_az_iskolaba)

National Avowal<sup>362</sup> and Article L.<sup>363</sup> Secondly, Article V(5) of the Fundamental Law guarantees that “[b]y means of separate measures, Hungary shall protect families, children, women, the elderly and persons living with disabilities.”<sup>364</sup>

## EQUAL TREATMENT IN EDUCATION

Act CXXV of 2003 on the Equal Treatment and the Promotion of Equal Opportunities is a comprehensive non-discrimination law prohibiting various forms of discrimination on grounds including disability.<sup>365</sup> Breaches of the requirement of equal treatment include direct and indirect discrimination as well as unlawful segregation (*jogellenes elkülönítés*).<sup>366</sup> In particular, unlawful segregation of a group in an educational establishment or in a class constitutes a breach of the requirement of equal treatment.<sup>367</sup>

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<sup>362</sup> The National Avowal in the Fundamental Law holds that the family and the nation constitute the principal framework of the coexistence of the Hungarian people.

<sup>363</sup> According to Article L, the protection of families is regulated by a cardinal act. See: Act of CCXI of 2011 on the Protection of Families.

Notably, education plays a cohesive role in keeping families raising a child with PMD together (see: Article 23(3) of CRPD). However, if a family is forced to place their child in a social care institution because of the lack of available support (see: Article 23(4) of CRPD) not only the child’s right to family life is violated but many other rights are at risk of being infringed. To name a few human rights – enshrined in the CRPD – which can be potentially violated when placing a child in a social care institution: right to be free from torture or cruel, inhuman or degrading treatment or punishment; integrity of the person; right to independent living, right to respect for privacy; right to respect for home and the family; right to health, (re)habilitation, work and employment; right to participation in cultural life, recreation, leisure and sport.

<sup>364</sup> Relevant legislative measures are to be found in Act CXXV of 2003 on the Equal Treatment and the Promotion of Equal Opportunities and the Act XXVI of 1998 on the Rights and Equal Opportunities of Persons with Disabilities.

<sup>365</sup> The personal and material scope of Act CXXV of 2003 on the Equal Treatment and the Promotion of Equal Opportunities goes beyond the requirements of EU directives (Directive 2000/43/EC, Directive 2000/78/EC). Its non-exhaustive list names 19 grounds on which discrimination is prohibited.

<sup>366</sup> Unlawful segregation means any provision that separates individuals or groups of persons based on protected characteristics from comparable individuals or groups of persons who are comparable to them, without the law explicitly allowing it. See 10§(2) of Act CXXV of 2003 on the Equal Treatment and the Promotion of Equal Opportunities.

It is to be noted that local municipalities must pay particular attention to measures necessary to prevent and respond to unlawful segregation and guarantee equal access to education in the preparation of the local equal opportunities program. However, schools are maintained by a central governmental supervisory body (*Klebersberg Központ*) and not by local municipalities. See: §31(3)(b) of Act CXXV of 2003 on the Equal Treatment and the Promotion of Equal Opportunities.

<sup>367</sup> §27(3)(a) of Act CXXV of 2003 on the Equal Treatment and the Promotion of Equal Opportunities.

Furthermore, the restriction of a group to an education, or the establishment or maintenance of an educational institution or an educational system whose quality does not comply with professional standards constitute a violation of the requirement of equal treatment.<sup>368</sup> Arguably, Act of CXC of 2011 on National Education distinguishes children with PMD from other children by establishing the separate category of ‘developmental education’ to prevent accusations of unlawful segregation.

Act CXXV of 2003 on the Equal Treatment and the Promotion of Equal Opportunities enshrines the legal basis for preferential treatment (*előnyben részesítés*) which is defined as a measure aiming to eradicate unequal opportunities of an explicitly defined social group based on objective evaluation. Preferential treatment does not constitute a breach of equal treatment if

1. it does not violate a fundamental right;
2. it does not ensure unconditional advantage;
3. it cannot rule out individual considerations.<sup>369</sup>

However, the category of ‘developmental education’ cannot be considered as preferential treatment as its highly flexible regulations give rise to such practice which raise constitutional concerns as enumerated above.

The Act of CXC of 2011 on National Education uses the relative concept ‘disproportionate burden’ (*aránytalan teher*)<sup>370</sup> to describe hardships that children and their parents cannot be expected to take on themselves. Expert committees often appoint a school which is far from the child's place of residence. This imposes a disproportionate burden on parents of children with SEN

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<sup>368</sup> Ibid. at §27(3)(b).

<sup>369</sup> §11(1) of Act CXXV of 2003 on the Equal Treatment and the Promotion of Equal Opportunities.

<sup>370</sup> Circumstances of education compared to ‘average circumstances’ which cause – taking into account the age and SEN of the child – considerably more difficult hardships or significant financial costs for the child or his or her parent(s). See: §4(2) of Act of CXC of 2011 on National Education.

economically, psychologically and physically. An advocacy group lately recommended to parents to notify the maintaining authority of school districts (*Klebersberg Központ*) in writing to realize the educational entitlements of their children as set out in the expert committee's opinion.<sup>371</sup>

Finally, the vaguely defined term 'a learner requiring special treatment' (*különleges bánásmódot igénylő tanuló*).<sup>372</sup> Children with SEN have the right to receive special (or conductive) educational services that are appropriate to their condition once their educational entitlements were established by the expert committee.<sup>373</sup> However, regulations of 'developmental education' do not guarantee the adequate parameters of services for the education of children with PMD but they provide for less education in quantity and quality when compared to other children.

## VINDICATING THE EDUCATIONAL RIGHTS OF CHILDREN WITH SEN

In 2016 the Hungarian Civil Liberties Union (HCLU) lodged a complaint to the Office of the Commissioner for Fundamental Right concerning systemic human rights violations stemming from the lack of capacities of the 'developmental education' system.<sup>374</sup> Also, the complaint highlighted the role of expert committees in maintaining a deficient school system.

Even though the HCLU's complaint challenged the legal standing of the very category of 'developmental education' itself – arguing that the category itself constitutes discrimination – the Ombudsman did not directly address this contention. He circumvented the question by mapping

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<sup>371</sup> Csak Együtt Van Esély (CSEVE) Csoport, *Közoktatlanok, Javaslat az SNI/BTMN-es gyermekek ellátására és fejlesztésére*, Point 2 in Package of Proposals, 23 August 2018. Available at:

<https://csevecsoport.blogspot.com/2018/08/kozoktatlanok-javaslat-az-snibtmn-es-23.html?m=1>

<sup>372</sup> 'Students requiring special treatment' are students with SEN, students with social, learning and behavior difficulties (*beilleszkedési, tanulási, magatartási nehézséggel küzdő tanuló*) and highly talented children. See: §4(13)(a) of Act of CXC of 2011 on National Education.

<sup>373</sup> Ibid. at §47(1).

<sup>374</sup> See: HCLU in footnote 349.

out the deficiencies of the ‘developmental education’ system concluding that systemic shortcomings led to concerns regarding the state’s obligation of the protection of persons with disabilities, the requirement of equal treatment and the fulfillment of the right to education.<sup>375</sup>

The Ombudsman called on the Minister of Human Capacities to take measures to ensure the equal access of children with PMD to education.<sup>376</sup> The Secretary of State in his response did not agree that the conditions under which the expert committees work are insufficient<sup>377</sup> by referring to the special protocol of expert committees.<sup>378</sup> However, this protocol only guarantees procedural safeguards without any specifications on diagnostic tools and measures that could ensure consistency in diagnosing PMD.<sup>379</sup>

Furthermore, the Ombudsman dealt with the education of children with SEN in other reports. In 2017 he called on the Minister of Human Capacities to develop a strategy for the implementation of a CRPD compliant inclusive education system.<sup>380</sup> He also found concerns of legal certainty because children with SEN did not receive the educational services set out in the expert committees’ opinions.<sup>381</sup> He addressed the issues of lack of special educators and

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<sup>375</sup> Furthermore, he found that the revealed shortcomings did not comply with obligations under Article 4 of the CRPD and relevant provisions of the CRC. See: Commissioner for Fundamental Rights in footnote 346 at p. 52.

<sup>376</sup> Ibid.

<sup>377</sup> Alapvető Jogok Biztosának Hivatala, Beszámoló az alapvető jogok biztosának és helyetteseinek tevékenységéről, 2017, Budapest, 2018, p. 67.

<sup>378</sup> The special protocol for expert committees was developed under TÁMOP 3.4/B (Integration of children with SEN – developing pedagogical service centers) and it was published in 2015. Available at: [https://www.educatio.hu/pub\\_bin/download/tamop342b/protokoll\\_kiadvanyok/szakertoi\\_bizottsagi\\_tevekenysege.pdf](https://www.educatio.hu/pub_bin/download/tamop342b/protokoll_kiadvanyok/szakertoi_bizottsagi_tevekenysege.pdf) The absence of a diagnostic manual is of concern as expert opinions – along with the statement of SEN – must include specific proposals on the content of the examined child’s education as well as specific entitlements to extra educational services (type of educational service, qualification of professional, weekly hours).

<sup>379</sup> (5) of Annex No 3. of 15/2013. (II. 26.) EMMI decree.

<sup>380</sup> The complaint challenged the government office’s unlawful request claiming that a physically disabled learner was not entitled to have a personal assistant to help him with the school leaving exam. See: AJB-263/2017 Report of Commissioner for Fundamental Rights.

<sup>381</sup> In AJB-1837/2017 the Ombudsman also found that the practice of an expert committee to get parents to take the expert opinion to the school violated the principle of the rule of law because it was the duty of expert committees to send their opinion to the relevant school.

transportation.<sup>382</sup> Finally, he highlighted the importance of preventing school violence in a case which involved a Catholic school expelling a first grade child with challenging behavior (ADHD).<sup>383</sup>

## QUESTION OF INCLUSION

Both special and mainstream schools function by selective mechanisms influenced by politico-economic<sup>384</sup> and demographic<sup>385</sup> concerns. Csaba Bánfalvy argues that first and foremost demographic concerns define the capacity of school systems to accommodate children with SEN. Demographic reasons bring about the “integration tsunami” in Hungary.

Asking the question why the “integration wave” has reached Hungary around the mid-2000s,<sup>386</sup> Bánfalvy highlights the impact of demographic waving of the mandatory school age

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<sup>382</sup> In AJB-1837/2017 the Ombudsman addressed the issue of transportation. He held that it was the obligation of compulsory admission schools (schools which cannot refuse the enrollment of a particular child) to ensure the transportation of children to school. This case involved a child with PMD who had to wait for the ambulance regularly until after 19:00 in the school. The costs of the ambulance were ex gratia funded by the National Health Insurance Fund. The Ombudsman noted that the lack of funds in the central budget constituted serious concerns regarding the principles of equal opportunities and the best interests of the child. He underlined that involuntary boarding did not release compulsory admission schools from the duty to ensure transportation to the school (appointed by the expert committee in its opinion). Finally, he found no concern of fundamental rights in relation to the calibration of extra educational services of homeschooled pupils (*magántanuló*) as their status was remedied by legislative amendment. See: §27(7) of Act of CXC of 2011 on National Education.

In AJB 343/2015 the Ombudsman addressed several complaints of parents whose “integrable” children with SEN (mostly children with autism) did not receive the educational services as prescribed by the expert committee.

<sup>383</sup> The Ombudsman drew attention to the importance of finding out the causes of a violent act and the circumstances which lead to a particular act of violence. Also, he called on the school to observe procedural guarantees in the process of expelling a student. See: AJB-860/2017 Report of the Commissioner for Fundamental Rights.

<sup>384</sup> Mark Kelman and Gillian Lester, Ideology and Entitlement, In: Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique*, Duke University Press, Durham, 2002, pp. 134-177.

<sup>385</sup> Based on certain requirements the contraselective mechanisms of the Hungarian public education system in practice are manifested in the rejection or acceptance of disabled children into mainstream schools. See: Csaba Bánfalvy, A fogyatékos emberek iskolai integrációjáról (A magyarországi integrációs folyamat és helyzet), *Esély*, 2, 2009, pp. 3-16.

Notably, the incompetence of mainstream schools create a valve in the system through which Roma children are swept into special educational institutions after having been diagnosed with ‘familial disability.’ See ECHR case: *Horváth and Kiss v. Hungary*, 11146/11, 29 January 2013.

<sup>386</sup> The number of integrated children with special educational needs enrolled in primary schools in 2001/02 were 8,263. This number rocketed to 29,930 in school year 2005/06. See: Hungarian Central Statistical Office, *Statistical*

cohort on the distribution of students between mainstream and special schools. He argues that the selective mechanisms of schools leading to integration are defined by the cyclical waving of the school-age population.<sup>387</sup> Schools merely use inclusive ideologies to gain more number of children in times of a demographic low tide.

Mainstream schools recruit learners from special schools self-defensively when they are in need of more learners to avoid layoffs (demographic low tide). When there are too many learners mainstream schools try to get rid of surplus students discreetly by sending children with SEN to special schools (demographic high tide).<sup>388</sup>

How are children with PMD affected by the integration tsunami? In times of demographic low tide children with PMD are included in classes of special schools (usually for the intellectually disabled) from where children with moderate intellectual disabilities are “moved up” to classes for children with mild intellectual disabilities. This is the reason why special schools can enroll learners with more and more complex conditions.

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*Yearbook of Hungary*, 2014 p. 124. Available at:

[https://www.ksh.hu/docs/hun/xftp/idoszaki/evkonyv/evkonyv\\_2014.pdf](https://www.ksh.hu/docs/hun/xftp/idoszaki/evkonyv/evkonyv_2014.pdf)

<sup>387</sup> The “Ratkó-children” were born at the beginning of the 1950s. At the end of the 1970s their children were so great in number that mainstream schools could not accommodate them. This is when the network of special schools for children with mild intellectual disability (*kisegítő iskola*) was established and extended. As mainstream schools are more willing to accept “good” disabled children special schools have become schools for children from disadvantaged socio-economic backgrounds who are actually not mildly intellectually disabled. See: Csaba Bánfalvy, A mai integrációs folyamatok és azok előzményei, In: Csaba Bánfalvy (ed.), *Az integrációs cunami. Tanulmányok a fogyatékos emberek iskolai és társadalmi integrációjáról*, ELTE Eötvös Kiadó, Budapest, p. 31-32.

<sup>388</sup> In 2008 Bánfalvy writes: “Today we live in the era of integration tsunami. For years, the number of primary school children has dropped and the capacity of normal schools are being reduced. Schools are trying to protect themselves by opening their doors to children with SEN. If the interests of supporters for integration are stronger, integration will prevail. If those of separation are stronger, segregation will prevail. Both the integration or the segregation tsunami can occur. These waves of rearrangement are compared to tsunamis because of centrally launched campaigns’ unpredictable and tempestuous compromises pouring onto the education system.” See: Bánfalvy, *ibid.* at p. 34.



Notably, there is a filter in the education system which outflows children with PMD into total institutions even during a demographic low tide.<sup>389</sup> If parent cannot raise their child with PMD because of financial reasons (they cannot afford to transport the child to school because there is simply no school in the neighborhood which would enroll the child) the child may have to move to a social care institution far from the family to receive some education. Placement to a residential social care institution is a decisive life event<sup>390</sup> which is detrimental to the development of the child. Institutional placement not only deprives them of quality education but children with PMD are at much higher risk of becoming victims of abuse and ill-treatment (neglect is a form of abuse).<sup>391</sup>

## PARENTAL INITIATIVES

More and more parents of children with PMD are getting fed up with the lack of available school provision.<sup>392</sup> For them the dilemma does not arise that they would put their child in a care institution because education is only available there. They want to raise their child in their families.

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<sup>389</sup> Tamás Verdes, „A ház az intézet tulajdona” A totális intézmények lebontásáról, humanizálásáról és modernizálásáról, *Esély*, 4, 2009, pp. 108-109. Available at: [http://www.esely.org/kiadvanyok/2009\\_4/05verdes.pdf](http://www.esely.org/kiadvanyok/2009_4/05verdes.pdf) ; Erving Goffman, *Asylums: Essays on the Condition of the Social Situation of Mental Patients and Other Inmates*, Anchor Books, 1961.

<sup>390</sup> Using the lens of philosophical anthropology and phenomenology Péter Zászkaliczky and Tamás Verdes show in their study how placement of a child with PMD in a care institution can be interpreted to have detrimental effect on the development of a child with PMD. See: Tamás Verdes and Péter Zászkaliczky, „...a nevelés legáltalánosabb horizontján...” A fogyatékoság jelensége a filozófiai antropológiában, In: Tamás Verdes and Péter Zászkaliczky (eds), *Tágabb értelemben vett gyógypedagógia*, Budapest, ELTE Eötvös Kiadó, 2016.

<sup>391</sup> The lack of individualized support in social care institutions have detrimental effect on the development of the residents (hospitalization). The Mental Disability Advocacy Centre developed a human rights-based monitoring toolkit to identify and prevent abuse of children with mental disabilities in institutions. See: Mental Disability Advocacy Centre, *The CHARM Toolkit. The Child Human Rights Abuse Removal Monitoring Toolkit*, 2017. Available at: <http://mdac.org/en/charm-toolkit>

<sup>392</sup> The CSAFNA model was developed by the Völgyzugolyház Alapítvány a Kacifántosokért led by Zsuzsanna Somlai and Katalin Horváthné Borbély. Available at: <http://volgyzugolyhaz.wixsite.com/volgyzugoly> For similar initiatives see: László Gábor Varga's Fellegajtó Nyitogatók Alapítvány. Available at: <https://taltosvarazslo.blog.hu/> and Andrea Paku's Kacifántos Gyerekeink Mosolyáért Alapítvány. Available at: <http://kagyemo.blogspot.com/>

If they are not prescient, they often have two choices when their child reaches school age. Either they would have to travel hundred kilometers daily to get to a special school that would enrol their child or the child would receive a few hours of individualized education at home. The first option is both physically and financially draining for the family. With the second option the child misses out of being in peer community.

In light of the state's incompetence to fulfill the right to education of children with PMD bottom-up initiatives have emerged. Parents are taking the state's duty on themselves because they want to create real and effective solutions for their children. As it is the liberty of parents to choose the education of their child<sup>393</sup> they started to think in a new model to provide for greater variety of choices. Supplementing state-run special schools some parents have started to build special daycare centers (CSAFNA) which they envision to function as a kind of school in the future.

These grassroots initiatives are prime examples of civil courage. However, there is danger to the CSAFNA model. In the short term these centers serve as alternatives to provide education for the children of the parents. However, if legislation changes to include the CSAFNA idea – so that the sustainability of the CSAFNA model is ensured by state funding – it is of high concern that it will create a new filter in the system flowing children out of the school system into a new, segregated form of child care service.<sup>394</sup> The CSAFNA network would create a parallel system of segregated day care homes which is non-compliant with CRPD standards.<sup>395</sup>

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<sup>393</sup> Article XVI (2) of Fundamental Law states that "[p]arents shall have the right to choose the upbringing to be given to their children."

<sup>394</sup> There are informal proposal to bring the CSAFNA model under the child care service called 'daytime child care' (*napközbeni gyermekfelügyelet*). See: 44/B. § of Act of XXXI of 1997 on the Protection of Children and Guardianship Administration.

<sup>395</sup> Also, the CSAFNA idea goes against educators' struggle to close off all alternatives to school education under 'developmental education.' There is an unofficial proposal in the Ministry for amending the Act of CXC of 2011 on National Education to erase the possibility of home education under 'developmental education.' After eradicating the

Instead of putting pressure on the government to create capacities to include their children in the school system parents are releasing the pressure on the government. Understandably so, as they do not have time to fight for inclusive reforms that have long-term impact. They want education for their children now.

### 3. 3. SOUTH AFRICA

In the past the social good of education was a privilege and not a right for African people. But the South African public education system today is no longer the “product of a parlous, fragile state.”<sup>396</sup> Since 1994 it has been “the product of a government with a firm grip on the levers of power.”<sup>397</sup>

Statistics reinforce this statement. In 2016 70% of those aged 20–34 who completed secondary schooling were first generation high school graduates.<sup>398</sup> However, the rationalization of an equitable, post-apartheid school system is far from complete.<sup>399</sup>

## TRANSFORMATIVE CONSTITUTIONALISM AND ITS LIMITS

Karl Klare coined the term ‘transformative constitutionalism’ to capture the philosophical essence of South Africa’s post-apartheid constitutional order. In this order equality has a central

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possibility of home education the next step is to erase education in social care homes in order to terminate all – now still legal – alternatives legitimizing education outside educational establishments.

<sup>396</sup> Stu Woolman and Michael Bishop, *Constitutional Law of South Africa*, Juta & Company, Cape Town, in volume 4, chapter 57, 2013, p. 3.

<sup>397</sup> Ibid. at p. 4.

<sup>398</sup> Kate Paterson, Constitutional Adjudication on the Right to Basic Education: Are We Asking the State to Do the Impossible? *South African Journal on Human Rights*, 34, 1, 2018, p. 112, footnote 3.

<sup>399</sup> The apartheid state left thousands of schools that were community-built makeshift structures for black learners. The Department of Basic Education estimates that there are about 5,000 schools whose infrastructures are still considered to be unsafe. See: Department of Basic Education, Annexures to Parliamentary Question NA 122 of 2017. Available at: <https://www.education.gov.za/Newsroom/ParliamentaryQuestions/NA122Annexures.aspx>

place.<sup>400</sup> The constitutional goal to transform the South African community into “an open and democratic society based on human dignity, equality and freedom”<sup>401</sup> is informed by equal citizenship<sup>402</sup> Break the shackles of formal equality and systemic patterns of subordination of vulnerable social groups<sup>403</sup> requires a constitutional approach seeing difference with a new mindset.<sup>404</sup>

What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative.<sup>405</sup>

Breaking with the narrow-mindedness of formal equality, the affirmation of human beings in their socio-cultural and biological manifestations opens the door to a comprehensive novel legal framework. Such framework rules out differentiation that violates human dignity and stigmatizes social groups. Lack of legitimate differentiation cannot pass constitutional muster, either.<sup>406</sup>

The realization of socio-economic rights plays an important role in advancing the substantive vision of equality.<sup>407</sup> There is a reciprocal relationship between socio-economic rights

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<sup>400</sup> Karl Klare, Legal Culture and Transformative Constitutionalism, *South African Journal on Human Rights* 14, 1, 1998, pp. 146-188.

<sup>401</sup> Section 36(1) of the Constitution on limitations of the Bill of Rights.

<sup>402</sup> Charles Ngwenya and Loot Pretorius argue that substantive equality in relation to disability “necessarily opens itself to a transformative theory of difference that has inclusive citizenship as its organising principle and principal objective.” See: Charles Ngwenya and Loot Pretorius, Substantive Equality for Disabled Learners in State Provision of Basic Education: A Commentary on *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa*, *South African Journal on Human Rights*, 2012, 28, 1, p. 86.

<sup>403</sup> Catherine Albertyn and Beth Goldblatt, Towards a Substantive Right to Equality, In: Stu Woolman and Michael Bishop (eds.), *Constitutional Conversations*, Pretoria University Law Press, Cape Town, 2008, p. 231.

<sup>404</sup> See: Ngwenya and Loot Pretorius, in footnote 402, at p. 83.

<sup>405</sup> §134 of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (CC).

See also *Grootboom* in footnote 460. “If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.” See: §44 of *Grootboom*.

<sup>406</sup> See: Ngwenya and Loot Pretorius, in footnote 402, pp. 84-85.

<sup>407</sup> The codification and protection of socio-economic rights ensure that other rights in the Bill of Rights and particularly the constitutional guarantees of equality and human dignity are not rendered meaningless by material deprivation.

and equality. Not only does access to socio-economic goods underpin the realization of substantive equality, but conversely, substantive equality also informs constitutional norms concerning socio-economic rights.<sup>408</sup> This ‘interpretative interdependence’ “encourages courts to consider how one right (for example equality) may be relevant to the jurisprudential development of another right (for example education).”<sup>409</sup>

According to Liebenberg and Goldblatt, the integration of substantive equality into the reasonableness (rationality) review – the applicable constitutional test when adjudicating upon an alleged infringement of the right to equality – should incorporate two enquiries:

1. the historical and current social context in which the group is situated; and
2. the impact of the denial of access to the relevant socio-economic service on the group.<sup>410</sup>

There are limits to the judicial enforcement of substantive equality. Lucy Williams identified two arguments.<sup>411</sup> Firstly, the separation of powers argument that highlights the financial implications of enforcing socio-economic claims: courts should not order public expenditures that have not been legislated upon. Secondly, the institutional incompetence argument stipulates that courts are ill-placed to make informed judgements about the allocation of limited resources (as opposed to the elected branches of government who are in a better position to make trade-offs given

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<sup>408</sup> Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution*. Juta & Company, Claremont, 2010, p. 206.

<sup>409</sup> Sandra Liebenberg and Beth Goldblatt, The Interrelationship between Equality and Socio-Economic Rights under South Africa’s Transformative Constitution, 23, 2, *South African Journal on Human Rights*, 2007, p. 341.

<sup>410</sup> Ibid. at p. 357.

<sup>411</sup> Having examined several jurisdictions of apex courts in the Global South – including jurisdictions from developing countries with progressive constitutions such as Argentina, Colombia, India and Venezuela – the South African Constitutional Court showed the greatest reticence to enforce socio-economic rights. It is to be noted that the judgement presented in the case study below is a High Court judgement. See: Lucy Williams, Resource Questions in Social and Economic Rights Enforcement. A Preliminary View, In: Helena Alviar García, Karl Klare and Lucy Williams (eds.), *Social and Economic Rights in Theory and Practice. Critical Inquires*. Routledge, New York, 2015, p. 55.

their wider perspective on the public purse).<sup>412</sup> Both of these arguments appear in the case study below.

## RIGHT TO A BASIC EDUCATION

The constitutional duty to provide basic education under section 29(1) of the South African Constitution establishes the individual's corresponding right to a basic education. It is a "carefully crafted" right.<sup>413</sup> It is unequivocally granted to all in a textually unqualified manner – without standard socio-economic tropes such as 'available resources', 'progressive realization' or 'reasonable legislative measures.' The lack of qualifications elevates it above other socioeconomic rights.<sup>414</sup> Consequently, the Constitutional Court held that the right to a basic education is immediately realizable.<sup>415</sup>

Notably, section 29(1) does not indicate that this right means free education.<sup>416</sup> Given such requirement exists under international human rights law many cases fought for the gratuity of basic education. Notably, the Supreme Court of Appeal held in the *BEFA* judgement that every learner is entitled to a textbook in each subject at the beginning of the school year.<sup>417</sup> "The judgment

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<sup>412</sup> "Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation." See: §38 of *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC).

<sup>413</sup> The expression "carefully crafted" is borrowed from *Grootboom*. The famous *Grootboom* judgement raised questions concerning the state's obligation in respect of the right to adequate housing (section 26) and children's right to shelter (section 28(1)(c)). See: §21 of *Grootboom*.

<sup>414</sup> See: Paterson in footnote 398, at p. 115.

<sup>415</sup> "The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." See: §37 of *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC).

<sup>416</sup> See: Woolman and Bishop in footnote 396, at p. 5.

<sup>417</sup> *Minister of Basic Education v Basic Education for All (BEFA)* 2016 1 All SA 369 (SCA).

The *BEFA* judgement was preceded by three judgements referred to as the 'Limpopo textbook saga.' The reason behind the saga is that the National Department of Basic Education mismanaged textbook delivery to schools in

explicitly noted that the corollary to this entitlement is the duty of the government to provide these textbooks to each and every learner.”<sup>418</sup>

As visible from the ‘Limpopo textbook saga’<sup>419</sup> there are still multiple obstacles for non-disabled children to access education, particularly those living on commercial farms.<sup>420</sup> Acknowledging that the human rights imperative of bringing inclusive citizenship to the education system extends to all children we now turn to the educational rights of children with PMD in the South African context.

## HISTORICAL BACKGROUND

In 2001 White Paper 6 provided for South Africa’s flagship policy on inclusive education.<sup>421</sup> It identified the educational sector “where the ravages of apartheid remain most evident” with two axes along which segregation of school age children took place: race and disability.<sup>422</sup> It comes as no surprise that apartheid special schools accommodating white disabled

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2012. The cases challenged the state’s incompetence to fund textbooks of inter alia ‘no fee schools’ (about 60 % of schools in South Africa) in which materials are entirely subsidized by relevant provincial departments of education under the presumption that parents of ‘no fee schools’ cannot afford to purchase textbooks. See: Regulation 101 of the Norms and Standards for School Funding.

<sup>418</sup> Faranaaz Veriava, *The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism*, *South African Journal on Human Rights*, 32, 2, 2016, p. 321.

<sup>419</sup> See footnote 417.

<sup>420</sup> Human Rights Watch, *Forgotten Schools: Right to Basic Education for Children on Farms in South Africa*, 16, 7, 2004, p. 5. Available at: <https://www.hrw.org/reports/2004/southafrica0504/southafrica0504.pdf>

<sup>421</sup> Abdul Kader Ashmal, then Minister of Education, highlighted the potential of persuasion of public policies based on constitutional values to change disablist mainstream attitudes. He hoped that inclusive policies will help convince parents of out-of-school disabled children that their children’s place is “not one of isolation in dark backrooms and sheds” but it is with their peers in schools. See: Department of Education, *Education White Paper 6. Special Needs Education. Building an Inclusive Education and Training System*, Pretoria, July 2001, p. 4. Available at: [https://www.vvob.be/files/publicaties/rsa\\_education\\_white\\_paper\\_6.pdf](https://www.vvob.be/files/publicaties/rsa_education_white_paper_6.pdf)

<sup>422</sup> Ibid. at p. 9.

learners were well-resourced whilst the few schools for black disabled learners lacked money systemically.<sup>423</sup>

Beside discriminatory funding of special schools on the basis of race, geography also factored into the exclusion of disabled learners. There were vast geographical disparities in the number of special schools. They concentrated mostly in the Western Cape, Gauteng, and KwaZulu-Natal provinces.<sup>424</sup> White Paper 6 provides data on the striking mismatch of learner needs and provision. For example, the Western Cape province had less than 6% of the disabled population only but it possessed more than one fifth of all special schools in the country.<sup>425</sup>

The impact of apartheidization and centralized provision was devastating. Apartheid policies which allocated facilities on a racial and geographical basis led to the discrepancies of the current school system.<sup>426</sup> In 2001 only 20% of learners with disabilities were accommodated in special schools. 280,000 learners with disabilities were estimated to be unaccounted for and effectively pushed outside the school system.<sup>427</sup> The vast majority in the education system attended residential special schools in a province other than their own since there were no facilities available close to their residence.<sup>428</sup>

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<sup>423</sup> In the Western Cape the expenditure per learner was R28,635 whereas this amount barely reached R11,000 in the province of Gauteng. The discrepancy in financing is even more concerning if we look at the number of learners in special schools. In Gauteng there were 25,451 learners in special schools while this number was only 9,213 in the Western Cape. See: *ibid.* at p. 13.

<sup>424</sup> *Ibid.*

<sup>425</sup> 82 out of total 380 special schools. See: *ibid.* at p. 14.

<sup>426</sup> *Ibid.*

<sup>427</sup> Based on the statistics of the World Health Organization White Paper 6 calculated the percentage of disabled learners among the entire school age population to be 2.2 - 2.6 %. In the South African context this projects an upper limit of around 400,000 disabled learners in total. However, only around 64,200 learners with disabilities were accommodated in 380 special schools. Consequently, 280,000 learners with disabilities were unaccounted for and were effectively outside the school system in 2001. See: *ibid.* at p. 9.

<sup>428</sup> *Ibid.* at p. 14 and 17.



Even though the rigid categorization of the apartheid education system accommodated learners with organic disabilities, children with PMD were denied access because the state regarded them ineducable. This presumption – which goes against the very objectives of White Paper 6<sup>429</sup> was challenged in the case below.

## CASE STUDY

It is noted at the outset that the Western Cape is the most advantaged province in terms of per capita expenditure.<sup>430</sup> It is to be borne in mind that children with PMD in other provinces have even less chances to receive quality education.

In *Western Cape Forum*<sup>431</sup> the Western Cape High Court found that the national and provincial governments violated the rights of children with PMD to education,<sup>432</sup> equality,<sup>433</sup> human dignity<sup>434</sup> and protection from neglect and degradation because the state had failed to take reasonable measures to make provision for their educational needs.<sup>435</sup> The case was principally determined under the right to education and equality. But before turning to the merits the facts of the case are presented.

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<sup>429</sup> White Paper 6 proposed a time frame of 20 years for the attainment of the inclusive education system. Implementation plan comprises immediate to short term steps (2001-2003), medium term steps (2004-2008) and long term steps (2009-2021). The timeline is to be understood in the constraint of economic opportunities including funding from Nordic countries. See: §28 of *Western Cape Forum* judgement in footnote 431.

<sup>430</sup> See: footnote 423.

<sup>431</sup> *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa* (2011) 5 SA 87 (WCC).

<sup>432</sup> Section 29(1)(a): “Everyone has the right to a basic education [...]”

<sup>433</sup> Section 9(3): “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including [...] disability [...]”

<sup>434</sup> Section 10: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

<sup>435</sup> Section 28(1)(d): “Every child has the right to be protected from maltreatment, neglect, abuse or degradation.”

The applicant was a body corporate comprising of NGOs<sup>436</sup> which educated about 1000 children with PMD at special care centers in the Western Cape. In total there are approximately 1500 children with PMD in the province.<sup>437</sup> Hence, not all children with PMD had access to such centers.

Children with PMD were not admitted to state maintained special schools as they were only available for learners with ‘less’ disabilities. Special school only catered for the needs of children who were classified as having IQ levels of 70-30. As intellectual disability is a decisive element of the diagnosis of PMD in South Africa<sup>438</sup> all children with PMD were considered to be severely (IQ of 35-20) or profoundly (IQ level below 20) intellectually disabled.<sup>439</sup>

The government made no direct school provision for the education of children with PMD.<sup>440</sup> The only state contribution to the education of children with PMD was an indirect annual subsidy of R5,901 per child paid by the Department of Health to organizations – such as those under Western Cape Forum for Intellectual Disability – which maintained special care centers. In comparison, the government spent annually R6,632 on a child attending a mainstream school and R26,767 on a child with mild or moderate intellectual disability who attended special schools.<sup>441</sup>

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<sup>436</sup> The Western Cape Forum for Intellectual Disability was founded in 1971. See: [www.wcfid.co.za](http://www.wcfid.co.za)

<sup>437</sup> Notably, the number of children with PMD in the province can be twice as many. Based on the 2011 census of the Western Cape population (about 6 million) extrapolating the estimated prevalence of mental disorder in the province gives 3000 children with PMD in the Western Cape. See: Judith McKenzie, Savondarie Pillay et al., Implementation of Educational Provision for Children with Severe to Profound Intellectual Disability in the Western Cape: From Rights to Reality, *International Journal of Disability, Development and Education*, 64, 6, 2017, p.598.

<sup>438</sup> Accordingly, the term used to denote PMD in the South African context is Severe to Profound Intellectual Disability which – in the majority of cases – is associated with secondary disabilities such as cerebral palsy (40%), visual impairment (9%), hearing impairment (3,3%), autism (7%) and global developmental delay (11%). See: §3.10 of *Western Cape Forum*; *ibid.* at p. 603.

<sup>439</sup> Even though the objective measurement of intellectual capacity at such low level is questionable while impaired motor skills make IQ diagnostics even less feasible.

<sup>440</sup> §3 of Western Cape Forum.

<sup>441</sup> §48 of Western Cape Forum.

Hence, the state showed great disparities in funding the education of children with different abilities.

#### *Arguments Put Forward by the Government*

The government argued that prioritization of interests was inevitable as it had to balance competing educational and other socio-economic demands. The right to education of children with PMD could not trump other constitutional rights such as the rights to housing, water, health care or social security.<sup>442</sup> It referred to the legacy of the apartheid era which neglected disabled learners and left an inequitable and underdeveloped education system.<sup>443</sup> The state acknowledged that children with PMD were left out of school provision at the time of the litigation.<sup>444</sup>

The state argued that the rights of children with PMD would be met without specifying a specific point in the foreseeable future.<sup>445</sup> Paradoxically, the state also argued that “no amount of education will be beneficial for [children with PMD] and they will dependent on the imparting of life skills to them by their parents.”<sup>446</sup> Moreover, the government was of the view that only those

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<sup>442</sup> §17 of *Western Cape Forum*.

<sup>443</sup> “A substantive portion of the answering affidavits is taken up with an explanation of the steps taken by the government to transform the 14 race based departments of education which it inherited from the pre-1994 government.” See: §8 of *Western Cape Forum*.

<sup>444</sup> But how were these children left out of school provision administratively? In 2005 The Screening, Identification, Assessment and Support (SIAS) Strategy was developed by the Department of Education to implement the government’s main policy on inclusive education as laid down in White Paper 6. It served to determine the nature of disability and the level of support children with SEN require. To be eligible for admission into a special school, a learner’s educational needs had to fall within Levels 4 and 5 of the SIAS Strategy. But children with PMD could not meet the standards prescribed by Level 4 and 5. Therefore, the admission criteria of the SIAS Strategy in practice served as a tool for exclusion (preventing the admission of children with PMD into special schools) rather than identifying the parameters of individualized support. Paradoxically, the state sought to defend its education policy and practice by arguing that it was in fact implementing White Paper 6.

“Having regard to the scarceness of resources available to the respondents, there will be children who meet the SIAS criteria who will receive education and there will also be children who do not meet the criteria.” See: §17 of *Western Cape Forum*.

<sup>445</sup> “The furthest that the respondents go at this stage is to say that such children ‘*may be able to access support*’ at special schools. They do not indicate what form this support will take, when it will occur, where it will be provided and to what extent it will be provided.” See: §18 of *Western Cape Forum*.

<sup>446</sup> §17; This surprising submission was rebutted by the expert opinion in the papers by Christopher David Molteno, Emeritus Professor in the Department of Psychiatry and Mental Health at the University of Cape. “It is my

would be admitted to special schools who are able to “acquire sufficient skills” and “achieve the minimum outcome and standards linked to the grade of education.”

Furthermore, the state placed considerable reliance on the *Bel Porto*<sup>447</sup> judgement attempting to justify the reasons behind the differential treatment of children with PMD. Two arguments were put forward. Firstly, the court should be inclined to soften the budgetary impact of the right to education given the size of the problem the state faces.<sup>448</sup> Secondly, the separation of powers argument was put forward heeding the court to be deferential to decisions of the executive concerning allocation of public funds.<sup>449</sup>

#### *Merits of the Case*

The Court elaborated on why the state infringed section 9(3) of the Constitution and how the right to basic education of children with PMD under section 29(1) was violated. The legal reasoning for determining violations of section 9 and 29 are presented respectively.

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professional experience and opinion that children with profound and severe intellectual disability are able to benefit very substantially from appropriately designed and supported educational programmes. Their needs are substantially greater than those of children without these disabilities.” See: §19 of *Western Cape Forum*.

<sup>447</sup> The grossly unequal education system was also recognized in *Bel Porto*. Appellants of Elsen schools (special schools that provide education for disabled pupils), formerly established by the House of Assembly with the duty to meet the educational needs of white disabled children, asked for an order requiring the Western Cape Education Department (WCED) to employ their general assistants (who supported children in classrooms, hostels or on buses). The reason behind this case was that the WCED implemented a rationalization and redeployment scheme arguing that it had a surplus of general assistants in its establishment. Appellants claimed that the WCED infringed their constitutional rights to equality and to just administrative action because the WCED did not employ general assistants whose salaries the Elsen schools could not afford given the inadequate subsidies by the WCED. Chief Justice Chaskalson dismissed their appeal. See: *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 (3) SA 265 (CC).

<sup>448</sup> Ibid. at §17.

<sup>449</sup> “The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable.” See: *ibid* at §45.

As concerns the right to equality the Court found – referring to the *Harksen v Lane*<sup>450</sup> test – that there was no rational connection between a legitimate governmental purpose and the differential treatment of children with PMD. Cleaver J held that the state did not indicate “why the available funds are spread in such a manner that the affected children are cut out of the picture entirely.”<sup>451</sup> More precisely, the state did not put forward convincing arguments and evidence to relieve itself of the burden of proof in three aspects:

1. explaining why the budgetary shortfall should be carried by children with PMD only and not shared by all;
2. explaining why it is reasonable and justifiable that children with PMD should “pay the price” in contradiction to what the Constitutional Court held in *Grootboom*;
3. showing what resources were available and what would have been the additional costs of meeting the rights of children with PMD.<sup>452</sup>

The government contended that even if it infringed the rights of the affected children to equality, such infringement was justified under the limitation clause (section 36).<sup>453</sup> The state argued that White Paper 6 was authorized in terms of the National Education Policy Act 27 of 1996

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<sup>450</sup> In *Harksen v. Lane* the South African Constitutional Court set out the anti-discrimination test to determine whether section 9 of the Bill of Rights was violated. The Harksen analysis makes clear that there are two different tests to be applied –one in relation to s 9(1) and one in relation to s 9(3). The first question to be answered is whether legislation differentiates between people or categories of people? If yes, does the differential treatment bear a rational connection to a legitimate governmental purpose? If it does not, there is a violation of s 9(1) and the enquiry moves onto the prohibition of discrimination under s 9(3) of the Constitution. Here two questions are to be posed: Firstly, does the differentiation amount to discrimination? This is to be answered in the positive if the protected characteristic is included in the list of grounds under s 9(3). Secondly, the question is whether the discrimination is unfair. At this final point courts are required to assess three aspects of the issue: firstly, taking a historical approach (can vulnerability of the group be identified because of patterns of past discrimination?), secondly, taking a contextual approach (what did the purpose of the legislation seek to achieve?) and finally looking into the impact of the impugned measure on the individual(s) (what other rights are affected? whether the measure at issue leads to the impairment of dignity of the claimant or whether it constitutes an impairment of a comparably serious nature?). Lastly, if the discrimination is found to be unfair, it has to be determined whether the provision can be justified under the limitation clause (section 36). See: §51 and §53 of *Harksen v. Lane NO and Others* 1998 (1) SA 300 (CC).

<sup>451</sup> *Ibid.* at §30.

<sup>452</sup> *Ibid.* at §29.

<sup>453</sup> Even though Justice Cleaver could have ignored this contention because of a procedural error made by the state (the Section 36 argument was not raised in the pleadings, only in the respondent’s counsel’s heads of argument) he nevertheless dealt with the submission. See: §31 of *Western Cape Forum*.

which in effect (indirectly) discriminated against children with PMD.<sup>454</sup> Having regard to the nature and extent of the limitation under section 36(1)(c) – that is the benefits sought to be achieved by White Paper 6 outweighed the immediate needs of children with PMD – the education policy and practice in question was argued to be justified.<sup>455</sup> However, Justice Cleaver refused this argument – relying on *Hoffmann v. South African Airways*<sup>456</sup> – as the white paper on which the government relied was merely a document issued by the Department of Education and not a law of general application.<sup>457</sup>

The process of social transformation –as envisaged by the Constitution – weighs at times more heavily on some members of the community than others.<sup>458</sup> The constitutional norms on burden sharing were refined by the concept of reasonableness in *Grootboom*.<sup>459</sup>

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by measures aimed at achieving realization of the right.<sup>460</sup>

In respect of the educational challenge the Court also found for the applicant while acknowledging that the Constitutional Court will be “hesitant to read section 29(1)(a) in a full and unqualified manner.”<sup>461</sup> Drawing from *ex parte Gauteng Provincial Legislature*,<sup>462</sup> it found that

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<sup>454</sup> Ibid. at §34.

<sup>455</sup> Ibid. at §37.

<sup>456</sup> “The refusal by SAA to employ the appellant as a cabin attendant because he was HIV positive violated his right to equality guaranteed by s 9 of the Constitution. The third enquiry, namely whether this violation was justified, does not arise. We are not dealing with a law of general application.” See §41 of *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC).

<sup>457</sup> §40 of *Western Cape Forum*.

<sup>458</sup> §7 of *Bel Porto*.

<sup>459</sup> The rationality test as applied in the judgment emphasized the necessity of legislative responsiveness to differing degrees of deprivation when devising measures which intend to realize socio-economic rights.

<sup>460</sup> §44 of *Government of the Republic of South Africa v. Grootboom and Others* 2001 (1) SA 46 (CC).

<sup>461</sup> §29 of *Western Cape Forum*.

<sup>462</sup> With reference to the interim Constitution the Constitutional Court held that “[s]ection 32(a) creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.” See §9 of *Ex Parte Gauteng Provincial Legislature: In re*

the state had breached the right to basic education of children with PMD in two ways: in a negative sense as it excluded the affected children from admission into special schools as well as it violated the positive dimension of this right as it failed to provide children with PMD with school facilities to enable them to exercise their right to basic education. The Court also drew support from a decision of the Irish High Court in *O'Donoghue* in which it was stipulated that all children was entitled to a free education without discrimination through positive steps by the state.<sup>463</sup>

### *Remedy*

Not sufficing with a declaratory order<sup>464</sup> – drawing on *N and Others v. Government of Republic of South Africa and Others (No 1)*<sup>465</sup> – Cleaver J issued a structural interdict<sup>466</sup> ordering the national and provincial governments to take measures to give effect to the educational rights of all children with PMD in the Western Cape including affordable access to a basic education of an adequate quality, providing adequate funds to organizations involved in service provision (covering infrastructure and staff), providing transportation of the children to and from special care centers

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*dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC).

<sup>463</sup> The state's obligation entailed "giving each child such advice, instruction and teaching as will enable him or her to make best possible use of his or her inherent and potential capacities, physical, mental and moral, *however limited these capacities may be.*" [my emphasis]. See: Irish High Court decision *O'Donoghue* in footnote 262.

<sup>464</sup> In *Grootboom* the Constitutional Court denied relief of temporary housing to illegal land occupiers who became homeless through brutal eviction of the authorities holding that judicial role in socio-economic rights enforcement is limited to guaranteeing that the chosen measures are reasonable given "the precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive" See: §41 of *Grootboom*. Having found the municipal housing program incompatible with constitutional standards, the Court instead issued a declaratory order requesting the state to devise and implement a comprehensive housing program, which must include reasonable measures to provide relief for those who are in desperate need.

<sup>465</sup> §32 of 2006 (6) SA 543 (D).

<sup>466</sup> A court-monitored plan of action developed and implemented by the state to rectify a violation of a constitutional right. See: <https://www.escri-net.org/caselaw/2011/western-cape-forum-intellectual-disability-v-government-republic-south-africa>

and making provision for training staff. The respondents were to file a report to the court on the implementation process.<sup>467</sup>

### *Criticism of the judgement*

Charles Ngwena and Loot Pretorius expressed criticism about the standard used. The Court performed the rationality enquiry in this case. Instead of applying the analytic steps of *Harksen v. Lane* the Court implicitly assumed that a differentiation based on degrees of intellectual disability qualifies as “mere differentiation.”<sup>468</sup> Hence, the constitutionality of the differentiation was adjudged in terms of the rationality requirement as expounded in *Prinsloo v Van der Linde*<sup>469</sup> rather than taking a more thorough approach of the *Harksen* test.

[C]onfining the inquiry regarding the constitutionality of the breach of the right to basic education within the mould of a rationality analysis, conceptually restricts the possibility of enriching the norms for socioeconomic rights compliance in the light of the value of substantive equality.<sup>470</sup>

Furthermore, the authors contend that the court endorsed formal equality approach as no more than an equal sharing of the burden of resource shortage was demanded without appreciating the unique position of children with PMD.<sup>471</sup>

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<sup>467</sup> §52 of Western Cape Forum.

<sup>468</sup> See: Ngwena and Pretorius in footnote 402, at pp. 94-95.

<sup>469</sup> The case challenged the constitutionality of the presumption of negligence under the Forest Act 122 of 1984 on the ground that it inter alia violated the constitutional right to equality. “It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as “mere differentiation”. In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest “naked preferences” that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state.” See: §25 of *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC).

<sup>470</sup> See: Ngwena and Pretorius in footnote 402, pp. 95-96.

<sup>471</sup> Ibid. at p. 95.



### *Implementation of the judgement*

In August 2011 an inter-sectoral intergovernmental forum was formed<sup>472</sup> to meet the requirements set by the court.<sup>473</sup> In September 2011 – after a preliminary audit of 6 special care centers (SCCs) – a more extensive audit of 44 SCCs followed to provide for the assessment of the conditions in SCCs and to gather information on necessary intervention. Based on the results of the audit various governmental departments were assigned various roles and responsibilities.<sup>474</sup>

The Western Cape Education Department employed a multidisciplinary team<sup>475</sup> to work in 10 SCCs – reflecting a cross section of the 44 previously audited 44 SCCs<sup>476</sup> – for a period of almost one year.<sup>477</sup> Later, three additional teams were approved allowing work in further 36 metro SCCs and 9 rural SCCs.

The teams noted that 15% of children in SCCs could be accommodated in special schools.<sup>478</sup> However, local education districts did not count with the needs of these children. The teams, established by the province and not directly linked with the district system, reported difficulty and frustration when trying to establish connections between informal SCCs and the formal system of special schools. “The relationship between SCCs and special schools in terms of placement options needs to be further developed at the district level.”<sup>479</sup>

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<sup>472</sup> Comprising representatives from the departments of Social Development, Health, Education and Public Works and Transport.

<sup>473</sup> At about the same time the Western Cape Forum for Intellectual Disability issued a discussion document with recommendations for the implementation of the judgement including a coherent curriculum for learners with PMD.

<sup>474</sup> At this point the National Department for Basic Education (as first respondent) and the Western Cape Education Department (as second respondent) filed affidavits to the High Court pursuant to the court order.

<sup>475</sup> Consisting of occupational-, physio-, speech and language therapists, a learning support teacher and a psychologist.

<sup>476</sup> Being in the Cape Town metro as well as in rural areas 4 SSC were moderately resourced, 4 poorly resourced and 2 well-resourced out of which 2 were residential centers. See: McKenzie, Pillay et al. in footnote 437, at p. 601.

<sup>477</sup> From 1 December 2011 until 30 September 2012.

<sup>478</sup> This proportion reflects those who could already be integrated in classes of special schools.

<sup>479</sup> See: McKenzie, Pillay et al. in footnote 437, at p. 607.

The teams emphasized the role of civil society and particularly parents in setting up and maintaining the centers highlighting the active role of mothers (40% of staff had a disabled child).<sup>480</sup> As noted by Martha Geiger, a speech therapist involved in the training of carers on communication with non-verbal children, even care dependency grants<sup>481</sup> were used to maintain SCCs. Untrained carers including motivated mothers were in ‘survival mode’ trying to manage the care of children with PMD in difficult conditions.<sup>482</sup>

It is no surprise that intervention focused on care rather than education.<sup>483</sup> “The caregivers have not come to the job because of their expertise but rather out of necessity to meet the needs of their children.”<sup>484</sup> Hence, caregivers demonstrated low levels of skills for educating children with PMD who were enthusiastic to learn about new ways of teaching from the teams.<sup>485</sup>

The remedy granted in the judgement is a testimony to the power of collective civil action holding the executive accountable for neglecting a marginalized group of children. However, the ultimate question is how to bring all children with PMD into the education system. Certainly, community participation behind already existing SCCs play a crucial role in that process.<sup>486</sup>

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<sup>480</sup> The teams noted the unsupported emotional journey of parents which goes beyond the years of compulsory education. “Parents are dealing with the lifelong dependency of their children as the level of impairment is such that most of these children will not gain independence and will require high levels of care throughout the lifespan.” See: *ibid.* at p. 606.

<sup>481</sup> Governmental benefits for the primary carer of a severely disabled child under the age of 18 worth of \$150 in 2012.

<sup>482</sup> Martha Geiger, Communication Training for Centre-Based Carers of Children with Severe or Profound Disabilities in the Western Cape, South Africa, *African Journal of Disability*, 1, 1, 2012. Available at: <https://ajod.org/index.php/ajod>

<sup>483</sup> The teams noted that the adequate child to caregiver ratio should not exceed 8:1. See: McKenzie, Pillay et al. in footnote 437, at pp. 604-605.

<sup>484</sup> *Ibid.* at p. 608.

<sup>485</sup> Even though staff received basic training in areas such as first aid, seating and positioning, feeding, communication, stimulation and play.

<sup>486</sup> See: McKenzie, Pillay et al. in footnote 437, at pp. 600 and 608.

## DISCUSSION

Even though the right to education is the most widely recognized socio-economic right around the world, access to education varies greatly depending on economic, cultural, social and legal factors. Consequently, state parties' understanding of their obligations vary. Avenues to enforce the right to education are multifold but at the end of the day it is at the discretion of national parliaments to enact laws that provide for some access to some form of basic education.

Therefore, it is important to acculturate governments to support inclusive educational practices. The general standard set out by Article 24 of the CRPD serves as a benchmark for state parties to implement inclusive education systems. Today this standard is relatively clear to inform state parties of their duties to implement the right to inclusive education of children with PMD.<sup>487</sup> So how is the CRPD's inclusion paradigm to be understood?

### CRPD

Maintaining exclusively segregated schools does not pass the CRPD muster.<sup>488</sup> A variety of educational options are necessary to provide for the choices of children with disabilities on an equal basis with others. While Article 24 establishes the right to choose education in mainstream settings, segregation is often the only available option.

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<sup>487</sup> This statement goes against Eric Posner's argument that human rights law is hopelessly ambiguous (vaguely defined rights, poorly defined state obligations, no specific guidance on compliance). Conflicting interpretations of various human rights institutions on the right to inclusive education has been converged by the CRPD Committee giving less discretion to governments in implementing Article 24. See: Eric Posner, *The Case against Human Rights*, *The Guardian*, 4 December 2014.

<sup>488</sup> One may ask the question: is the right of children with PMD to inclusive education is violated if they are educated in special schools? Based on General Comment No. 4 the CRPD Committee's answer would likely to be in the affirmative.

The inclusion doctrine sets the direction states are required to take but its objective easily falls prey to practices of segregation in the face of challenges of inclusion on the ground. The concept of reasonable accommodation provides leeway for governments to justify segregation.<sup>489</sup>

Given the practical challenges of including children with PMD it may seem reasonable to conclude that the education of children with PMD is best suited in specialized settings. Teaching learners with PMD is still widely regarded to be “special education business” and their inclusion often seem insurmountable<sup>490</sup> or morally undesirable.<sup>491</sup>

There is no panacea for achieving equal education. Without prescribing a one-size-fits-all approach of full inclusion it is acknowledged that inclusion occurs along two axes: spatial (placement considerations) and content. Mere placement in mainstream settings does not do the trick.<sup>492</sup> Why would parents take their disabled child to a mainstream school if trained teachers and support materials are available in special schools? Provision of individualized support is therefore crucial to achieve effective education.

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<sup>489</sup> Irrespective of the nature of disability all children with disabilities have the right to inclusive education. However, it can be easily argued that children with PMD require accommodation which is unreasonable. This is how the exclusion and segregation of children with PMD are legitimized.

<sup>490</sup> Phyllis Jones, My Peers Have Also Been an Inspiration to Me: Developing Online Learning Opportunities to Support Teacher Engagement with Inclusive Pedagogy for Students with Severe/Profound Intellectual Developmental Disabilities, *International Journal of Inclusive Education*, 14, 7, 2010, pp. 681-696.

<sup>491</sup> It is of no dispute that legally speaking there is a right to inclusive education. However, it does not follow from the existence of a human right that it is morally justified. As concerns the theoretical legitimacy of the right to *inclusive* education John-Stewart Gordon argues that there is no moral justification to it. He contends that inclusive education is not a moral human right. The right to inclusive education cannot guarantee the core features of social inclusion because friendship and love cannot be legally demanded. Legal claims would destroy these very goods. In other words, law cannot require the decisive factor of inclusion, that is people to have the right motive to act. Law can only require people to pursue a specific conduct in accordance with legislation. Notwithstanding the absence of a coherent moral justification behind the theory of human rights the practical values of inclusion are acknowledged. See: John-Stewart Gordon, Is Inclusive Education a Human Right?, *Journal of Law, Medicine & Ethics*, 41, 4, 2013, p. 763.

<sup>492</sup> It is clear that these children require specialist support. Placing disabled children in mainstream settings without providing them adequate support leads to harm. See: *Stoian v. Romania*, 289/14, ECHR application lodged on 19 December 2013.

## THREE HYPOTHESES

As it was suspected a specific model of disability cannot be identified with a specific jurisdiction. Such association does not reflect the complexity of the issue. Also, law has different perspectives on education which do not follow concepts of disability studies rather borrows from them.<sup>493</sup>

The Irish jurisdiction was chosen to reflect the social model of disability. Interestingly, constitutional jurisprudence on education with disabilities is informed by a theocratic (Catholic) vision of the state rather than being connected to the social model. If this component of jurisprudential history were to be translated into a concept of disability studies, it would be identified as the moral model bringing the education of disabled children within the purview of the church.<sup>494</sup>

The Hungarian jurisdiction was selected to reflect the medical model of disability. It is true that more children with PMD are still educated in care homes than in schools. But it has to be acknowledged that one third of these children can go to school. Since 2006 the legislature has not established enough capacities to cater for the needs of these children in schools. Slow implementation implies that Parliament perceives the fulfillment of the right to education of children with PMD as a discretionary question subject to legislation rather than a question of fundamental right protection deserving more expeditious means to enforce it. From the perspective of parents the lack of judicial enforcement of the right to education bears witness to the view that

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<sup>493</sup> Education systems are informed by the moral and medical models of disability if human rights institutions are not prevalent in a particular country. See Donald's eco-systemic model in Roadmap.

<sup>494</sup> See for example: St.Paul's Special School in Cork. Available at: <http://stpaulsspecialschool.com/>

the right to education is non-enforceable.<sup>495</sup> These attitudes rather reflect the social model of disability.

The South African jurisprudence was chosen to reflect the human rights model of disability. This association has held sway so far. The implementation of *Western Cape Forum* proved to provide for provincial impetus to include children with PMD into the education system. However, ominously noted, the Irish context provides for the example where the apex court restricted judicial remedies enforcing the right to education. The apprehension is left hanging in midair: How would the Supreme Court rule if a similar judgement to *Western Cape Forum* were appealed?

## ANALYSIS OF DOMESTIC LEGAL STANDARDS

In line with the global consensus on the educability of children with PMD the validity of their education has been acknowledged in all three jurisdictions. The legal acknowledgement of their educability gives them explicit protection under national law.

The right to education is a peculiar socio-economic right. In all three countries its constitutional protection is higher than that of other social rights. In the Irish Constitution it is the only explicitly enumerated socio-economic right. In the South African Constitution the right to a basic education is worded in an unqualified manner making it immediately realizable. In the Hungarian Fundamental Law the right to education is stipulated as an individual right implying its heightened constitutional status.

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<sup>495</sup> Notably, there are enforcement mechanisms that make legal challenges on the right to education possible: the Office of the Commissioner for Fundamental Rights (Ombudsman), the Equal Treatment Authority and labor and administrative courts. However, these avenues to enforce the right to education are not widely used.

The Irish jurisprudence is informative about how the judicial role of enforcing the right to education can be curtailed by reference to the separation of powers argument. However, the separation of powers doctrine is not watertight. As Rory O’Connell notes: “the decisions in *Sinnott* and *TD* are ... decisions for a State appealing successfully against an order for the protection of socio-economic rights. They are not unqualified rejections of socio-economic rights.”<sup>496</sup> Hopefully, the CRPD will serve as a useful guide in repositioning the role of courts in protecting the rights of children with disabilities.<sup>497</sup>

Also, the Irish context is a good example of how the reallocation of public funds from special into mainstream schools (including transportation) is inevitable to implement Article 24.<sup>498</sup> In addition, Ireland allocated additional funds to implement inclusive education which is inevitable if the high support needs of children with PMD are factored into policies. Also, demographic aspects must be factored into the design of inclusive education as highlighted in the Hungarian and South African contexts.

Unlike the Irish Supreme Court, the Hungarian Constitutional Court has not delineated the limits of inclusion in the field of education.<sup>499</sup> Hence, the state obligations in relation to the inclusion of children with disabilities are not as clear as those imposed by the religious freedom aspect of education.<sup>500</sup>

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<sup>496</sup> Rory O’Connell, *From Equality Before the Law to the Equal Benefit of the Law: Social and Economic Rights in the Irish Constitution*, In: Oran Doyle and Eoin Carolan (eds.), *The Irish Constitution: Governance and Values*. Dublin, Thomson Round Hall, 2008, p. 333.

<sup>497</sup> Ireland ratified the CRPD on 20 March 2018.

<sup>498</sup> It is noted that the countries examined in Chapter III made no reservations on Article 24 of the CRPD.

<sup>499</sup> The Hungarian Constitutional Court (HCC) refused to look into the merits of a complaint challenging Roma segregation. In 3148/2016. (VII. 22.) HCC decision the constitutional complaint related to Roma segregation in public education was found inadmissible. Available at:

<http://public.mkab.hu/dev/dontesek.nsf/0/53370F64595DB2CBC1257F4F005E2A3F?OpenDocument>

<sup>500</sup> See: footnote 345.

The distinction between integrable and non-integrable students still exists. Expert committees place the ‘non-integrable’ label on students who cannot follow the core curriculum. Consequently, they are placed in special schools.

Children with PMD are ‘lucky’ if they have access to school education. Current legislation treats these children as a separate group of learners and puts them under a separate category whose rules are designed to keep them out of schools. Consequently, two third of children with PMD are still educated in care homes or at home.<sup>501</sup> The exclusion of this learner population to such degree constitutes a grave violation of the core content of the right to education.

The compartmentalization of the Hungarian education system<sup>502</sup> is convenient for the state to justify discrimination arguing that the treatment of ‘different’ persons differently serves the implementation of equality. However, categorization is a dangerous business as segregation is the hotbed of human rights violations. Categories can distort the inclusive design of education systems legitimizing forms of exclusion and such types of education which are inferior in quality and quantity when compared to the education of other learners. ‘Developmental education’ is such category.

To sum up, education outside schools constitutes a violation of the core element of the right to education. Hungary fails to meet its obligation under international human rights law to fulfill the

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<sup>501</sup> Access to education should be granted as a right not as a privilege. As a member state of the CRPD, Hungary is obliged to provide children with disabilities access to education within the general education system on an equal basis with others. However, the current Hungarian legislation does not ensure an inclusive education system for children with PMD. To date Hungary has failed to enact legislation to mainstream children with PMD into the education system. Consequently, fortunate children with PMD fulfill their compulsory education in special schools while less fortunate children are being educated outside the formal school system. This raises concerns of the quality and quantity of their education when compared to other children.

<sup>502</sup> The compartmentalization of the Hungarian education system is also reflected in the highly specialized university training of special educators. Special educationalism is a term I use to refer to the highly segregated teacher training which, on the one hand, ensures that special educators are well trained in the education of a specific type of disability but on the other hand it may reinforce existing forms of excessive segregation of children with SEN.



accessibility (principle of non-discrimination, physical and financial), acceptability (quality of education) and adaptability (flexible process of learning to meet varying educational needs) criteria of the right to education as ‘developmental education’ can still be organized outside schools. Sadly, today in Hungary children with PMD have a right to exclusive education.<sup>503</sup>

The South African constitutional jurisprudence highlights the importance of connecting equality and socio-economic rights in the face of resource scarcity. Even though the right to education of children with PMD came to the fore only in 2010 the implementation of the *Western Cape Forum* judgement shows the role of courts in vindicating the rights of a vulnerable group in the absence of legislative measures.

## UPHOLDING THE RIGHT TO INCLUSIVE EDUCATION IN EUROPE

The right to inclusive education of children with PMD was successfully litigated before the ECSR against Bulgaria, France and Belgium. However, Hungary only signed the Additional Protocol to the European Social Charter, hence, recourse to the ECSR is not possible under the Hungarian jurisdiction. On the other hand, Ireland ratified the Additional Protocol hence, the ECSR could signal systemic shortcomings of the Irish education system.<sup>504</sup>

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<sup>503</sup> To date there is only one mainstream school in Hungary which opened its door for children with PMD: Krisztus Király Római Katolikus Általános Iskola in Dunakeszi. It opened on 1 September 2018 with one segregated group where children with mild and moderate intellectual disability and children with PMD learn together. Furthermore, Gyermek Ház is to be mentioned which is an exemplary inclusive school in Hungary. However, Gyermek Ház does not include children with PMD. It includes children with mild intellectual disability, physical disability and sensory disabilities. Classes range from 22-24 pupils with 3 pupils with SEN. See: Gyermek Ház, *Pedagógiai Program*, 2018, p. 42. Available at: <https://gyermekhaz.hu/wp-content/uploads/2018/11/Pedag%C3%B3giai-program-2018..pdf>

<sup>504</sup> Chart of signatures and ratifications of European Treaty Series No. 158 (Additional Protocol to the European Social Charter Providing for a System of Collective Complaints). Available at: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p\\_auth=WxsHk5kO](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p_auth=WxsHk5kO)

The more authoritative judgements of the ECtHR show promising trends. However, the Court has not ruled on the structural discrimination of this particularly vulnerable group yet.<sup>505</sup> Similarly to Roma segregation the Court has a role in challenging the discriminatory *status quo* of state parties' practices by giving effect to the rights of children with PMD when they are denied access to compulsory primary education.

## ROLE OF INTERNATIONAL COOPERATION

The European Union ratified the CRPD in 2010. Hence, the commitment in Europe to implement inclusive education is an area of shared competence.<sup>506</sup> Governments need to increase the inclusive capacity of their education systems via “reflection on, re-definition and re-organisation of the existing and required human and financial resources.”<sup>507</sup> In Hungary the European Social Fund<sup>508</sup> and the European Regional Development Fund<sup>509</sup> provide financial resources for such reorganization.

In South Africa Nordic countries were cited as donors who provided large scale intervention to meet the needs of children with PMD.<sup>510</sup>

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<sup>505</sup> The impact of the denial of education of children with PMD is not comparable to the impact of the denial of education of children without disabilities. Hence, denial of access to education for children with PMD is of particular concern.

<sup>506</sup> See Articles on Equal Opportunities and Access to the Labour Market and Social Protection and Inclusion in the European Pillar of Social Rights.

<sup>507</sup> See: European Agency for Special Needs and Inclusive Education in footnote 3, at p. 6.

<sup>508</sup> Tender EFOP-3.1.6-16: A köznevelés esélyteremtő szerepének erősítése.

<sup>509</sup> Tender EFOP-4.1.6-16: A köznevelés támogató szerepének erősítése.

<sup>510</sup> See: §28 of *Western Cape Forum* in footnote 431.

## FUNDING PRIVATE INITIATIVES

States are not required to provide direct provision to realize the rights of children to education. They may provide funding to services which perform public functions. Such facilities are under state supervision and are entitled to receive governmental funding.<sup>511</sup> As we have seen from the cases challenging the lack of state provision to the education of children with PMD parents have a pivotal role in enforcing their children's right to education. In the absence of direct state provision such initiatives must be supported by the state to guarantee equal education.

## FURTHER RESEARCH

The intersectionality of PMD is under-researched.<sup>512</sup> As concerns gender a representative research found that the incidence of males in all age groups of persons with PMD is higher than women.<sup>513</sup> Interestingly, there is no indication that gender or ethnicity would be an exclusionary factor in the education of children with PMD. One would think that disability 'overwrites' gender and other axes of vulnerability in this respect.

Moreover, further research on the systemic implementation of inclusive education for children with PMD is greatly needed. As opposed to sporadic good practices<sup>514</sup> the ultimate

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<sup>511</sup> In 1988 the Human Rights Committee held that the state does not discriminate when subsidies for private schools, which are not subject to state supervision, are lower than those for public schools. The case challenged the Swedish government's lack of retroactive subsidization of educational programs of grades 10 and above in a Rudolf Steiner School. The Committee held that the Swedish government's failure to grant an education allowance to the school did not amount to discriminatory treatment under Articles 2 and 26 of the ICCPR. See: §10.3 of Human Rights Committee, *Carl Henrik Blom v. Sweden*, 191/1985, 4 April 1988.

<sup>512</sup> Orthodox ways cannot be used to prove unequal access to education. For example, illiteracy rates on the basis of gender cannot be used to show a heritage of inaccessibility to education because persons with PMD do not usually read or write.

<sup>513</sup> This may be due to the fact that the genetic makeup of men is more vulnerable than that of women. See: Bass in footnote 332, at p. 50.

<sup>514</sup> Ágota Szekeres reports that the most memorable experience during her study trip in Portugal visiting educational institutions integrating children with SEN was seeing children – including a child with PMD – work together at the Sousa Elementary School. The differentiation of education for each student within the classroom was an exemplary

question is how all children with PMD can be brought into the mainstream education system (meaning mainstream local schools).

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inclusive practice. See: Ágota Szekeres, Fogytékossággal élő tanulók integrált oktatása Portugáliában, In: *Így is lehet tanítani! Tolerancia és befogadás – Jó gyakorlatok az oktatásban Európa-szerte*, Tempus Közalapítvány, 2006, pp. 16-17. Available at: [https://issuu.com/tka\\_konyvtar/docs/igy-is-lehet-tanitani](https://issuu.com/tka_konyvtar/docs/igy-is-lehet-tanitani) issuu

## CONCLUSION

We have seen in Chapter I that the fundamental content of the education of children with PMD is not different from that of non-disabled children.<sup>515</sup> The question whether they should go to school is not contested anymore.<sup>516</sup> There is consensus on the educability of children with PMD.

How their right to inclusive education should be realized is a hotly debated topic, though. The normalization principle and the concept of social role valorization serve as doctrinal guidelines to implement the rights of children with PMD. Four pathways were identified to achieve this goal: full inclusion in mainstream classes, separate classed in mainstream schools, special schools and disregard for placement (overriding objective is attaining highest level of quality of life irrespective where education takes place).

Chapter II presented that realizing the education of marginalized groups is a global challenge. The codification of the right to inclusive education brought children with disabilities in the spotlight among those who are at risk of educational exclusion. The nature and scope of the right to inclusive education draws on the well-established legal parameters of the right to education under international human rights law.<sup>517</sup>

Since the CRPD governments have been required to reconceptualize inclusion and start thinking about what equal education entails. Systemic discrimination of children with PMD is

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<sup>515</sup> Even though their education includes rehabilitation hours for improving their communication and motor skills this does not change the fact that the fundamental content of their education is the same as for those without disabilities. Even though children with PMD learn differently the underlying pedagogical objectives of their education are identical with that of mainstream schools. That is to learn about the world and themselves by using their capacities to the full extent, however limited they may be, to achieve their full potentials.

<sup>516</sup> On the contrary, denying access to education for children with PMD is of particular concern as lack of educational input is more detrimental to their development than for non-disabled children.

<sup>517</sup> Thanks to the work of Katarina Tomasevski the 4-A scheme provides for well-established assessment criteria for measuring inclusiveness of education systems under international human rights law.

imprinted in today's education systems. Their access to special schools – not to speak of mainstream schools – are often denied even though the severity of disability cannot legitimize the refusal of inclusion.

Today school systems are required to have capacities with respect to children with PMD.<sup>518</sup> The question how inclusive these capacities are, is often sidetracked as education systems often struggle with eliminating the historically ingrained discriminatory mechanisms of school systems. To date there are barely any successful international cases vindicating the right of inclusive education.

However, the human dignity<sup>519</sup> of each child requires states to ensure equal access to education. The CRPD takes this requirement further from the perspective of placement considerations by obliging member states to create equal access to mainstream schools. This clearly places a substantial burden on school systems which have to adapt to the high support needs of children with PMD.

It is important to underline that a particular standard of education is not enforceable under international human rights law. However, the right to inclusive education entails certain requirements which have qualitative aspects. The choice to have equal access to mainstream

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<sup>518</sup> The CRPD abrogated the misconception that the education of children with PMD is merely infotainment. Quite the contrary, persons with PMD as rights holders are entitled to claim fundamental educational rights based on the fact that the impact of educational services are more closely connected to the protection of their human dignity. This underlines the importance of providing access to educational facilities without granting this group special rights.

<sup>519</sup> As concerns the target group of this paper the legitimacy of their right to education is anchored in the dignity argument. As opposed to other children, their education is more closely related to the protection of human dignity. Their curriculum does not involve classical subjects such as writing, reading or arithmetic but the acquisition of basic human functions such as communication, mobility skills, ADL functions (such as eating or self-care). These skills are essential to achieve the highest level of independence in vulnerable situations. If children with PMD do not have access to education, they will be more exposed in situations where their dignity may be violated. These include tasks related to care when intrusion to their privacy may happen (they are more vulnerable if they do not learn to have a sign for 'no' for example when they want to refuse certain food, treatment etc).

schools with provision of individualized support must be guaranteed by the state. Children with PMD cannot be deprived of this choice.

Inclusion is a process. Hence, the realization of the right to inclusive education must be constantly monitored<sup>520</sup> and evaluated as “integration does not automatically guarantee the transition from segregation to inclusion.”<sup>521</sup> The CRPD Committee particularly highlights that such monitoring should involve persons with intensive support requirements.<sup>522</sup> How is inclusion of children with PMD possible on the ground then?

Substantially varying needs impose an impossible task on teachers of large classes. The insurmountable differences in the way educational content can be imparted promote segregated educational options. Hence, effective educational management considerations necessitate the strategic inclusion pathway.<sup>523</sup>

Organizational considerations necessitate learning environments conducive to the achievement of the full potential of all learners.<sup>524</sup> Because of the differences in teaching methods (and not the fundamental content of education),<sup>525</sup> the possibility of including children with PMD into mainstream classes may be highly restricted.<sup>526</sup> The inclusion of children with PMD in

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<sup>520</sup> Articles 16(3) and 33 of CRPD.

<sup>521</sup> §11 of CRPD General Comment No. 4.

<sup>522</sup> Ibid. at §12(i).

<sup>523</sup> See: Chapter I. 1.5.

<sup>524</sup> Note that the CRPD Committee does not explicitly define educational inclusion as teaching children with disabilities in mainstream classes. It states that inclusion involves “a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and environment that best corresponds to their requirements and preferences.” See: *ibid.* at §11.

<sup>525</sup> It is important to highlight that it is not the high support needs of children that necessitate segregation. It is not the content of their education which is different from that of other children. It is the means through which effective education can be practically achieved. Pedagogical techniques and approaches differ substantially that are necessary to achieve the full potential of children with PMD.

<sup>526</sup> It is to be noted that from the perspective of professionals the question is not whether special schools are needed as inclusion is measured on individual success on the ground and not on systemic considerations. The question is rather how educators can meet the needs of children successfully who have complex needs. See: Gabriella Papp and Andrea Perlusz, „... mindenképpen figyelni kell a folyamatokat és reagálni kell...” Kooperáció- és

mainstream schools is achieved if the highest level of participation in curricular and extra-curricular activities with other children is guaranteed.<sup>527</sup>

Generally speaking differentiated pedagogy is beneficial to all students.<sup>528</sup> But individualized teaching methods are only achievable in small classes. Progressive systemic reform, which allows for the inclusion of children with PMD, focuses on individualization of education for all students. Hence, the vision for the inclusion of children with PMD necessitates the reorganization of mainstream classes into small groups of learners.<sup>529</sup>

The base for the inclusion of children with PMD into mainstream schools lies in macrosocial attitudes which respect and value diversity.<sup>530</sup> The right to inclusive education is a right of all. It is not a special right. A society, which refuses to accept that non-disabled children also have the right to learn with disabled children, will always exclude and segregate.

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konkurenciafolyamatok a sajátos nevelésű igényű tanulókat ellátó intézményekben, In: Péter Zászkaliczky (ed.), *A társadalmi és az iskolai integráció feltételrendszere és korlátai*, ELTE Eötvös Kiadó, Budapest, 2013, p. 196. There is a view that school integration, in itself, is not good or bad. As professional work can be done in both special and inclusive schools an inclusive setting in itself is not more valuable than its counterpart in specialized settings. Both special and inclusive education profess to teach student with SEN the requisite skills to lead a meaningful and independent life. If exclusion is regarded as an extreme form of integration (inclusion spectrum) some degree and type of integration is achieved in both settings. See: Bánfalvy in footnote 387, at p. 31.

<sup>527</sup> Occasional segregation is justified if it is not for the parochialism of educators to separate children with SEN but for the effective education for all. Only “realism-based” policies lead to inclusive education systems. Reckless inclusive educational policies can be counterproductive and reinforce attitudes of exclusion (backlash against inclusion among unprepared teachers). See: The Ad Hoc Committee’s seventh session. Chair’s final remarks on Article 24. Available at: <http://www.un.org/esa/socdev/enable/rights/ahc7sum24jan.htm>

<sup>528</sup> As opposed to whole class-oriented pedagogy there is growing professional awareness that differentiated instruction is beneficial for all students. See: Roselyn M. Dixon and Irina Verenikina, *Towards Inclusive Schools: An Examination of Socio-cultural Theory and Inclusive Practices and Policy in New South Wales DET Schools, Learning and Sociocultural Theory: Exploring Modern Vygotskian Perspectives International Workshop 2007*, 1, 1, 2007. Available at: <http://ro.uow.edu.au/llrg/vol1/iss1/13>

<sup>529</sup> That is a long-term goal. It entails a general reduction in the number of learners per class to achieve better teacher-learner ratios. Before such radical reforms take place special emphasis should be placed on transfer choices between mainstream and special schools (and other types of institutions providing education for children with PMD).

<sup>530</sup> In a fundamentally exclusive society only arguments change along which certain groups will always be excluded. See: Bánfalvy in footnote 387, at p. 12.



Notwithstanding, decision-makers have an important role in implementing inclusive education. Systemic reforms that oblige structural change of schools to modify infrastructure and curriculum are needed to include this group of learners in mainstream education. The implementation of Article 24 for children with PMD remains a pipe dream without central political will.

Reality is very far from inclusive education systems as envisioned by the CRPD. But the duty of progressive realization under Article 24 should not be taken lightly.<sup>531</sup> We cannot afford to forget a special source of human capital by letting people with PMD linger at home or perish in institutions. What would have humanity missed if we had let Steven Hawking be treated as an object of charity?

Of course, not everyone is a genius physicist. And this is right so. Human capital is manifold and we must learn to appreciate it in its different forms. The radical idea that it is the right of everyone to include children with PMD in mainstream schools is still lightyears away from being realized. What does educational justice demand for children with PMD then? This paper argued that at least children with PMD should be the benchmark when assessing to what extent a particular education system is inclusive.<sup>532</sup> We need to revalue knowledge and share our experiences to ensure that children with PMD are not left behind.

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<sup>531</sup> Article 4(2) of CRPD.

<sup>532</sup> This means that education systems should be designed taking into account the rights of children with the most complex educational needs.

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