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Introduction

Gauthier de Beco, Shivaun Quinlivan and Janet E. Lord

The title of this volume – *The Right to Inclusive Education in International Human Rights Law* – suggests an underlying normative perspective. It seeks to improve the understanding and application of the notion of inclusive education within the field of law and, in addition, to define inclusive education as a human rights issue under international human rights law.

The volume proceeds from the following three bases. First, we understand that inclusive education is rule bound since it found its way into Article 24 of the Convention on the Rights of Persons with Disabilities (CRPD). Second, we acknowledge that there is no consensus around the precise contours of inclusive education as an institutionalised norm in the international human rights system, although many of its elements are settled. Third, we can say definitively that its inclusive and participatory character as a legal standard places conditions on education. Furthermore, we can now speak of the right to inclusive education as a part of international human rights law; it is not a separate, marginal topic untethered to the larger international legal framework of human rights, as disability rights for so long tended to be in practice, if not in theory. The contributions in this volume reflect the insight that international human rights law, on the one hand, and its subfield of disability rights, on the other, are mutually constitutive, even if that project is incomplete and still emerging.

Having said this, it is worth recalling that the right to education is a fundamental human right and its realisation is essential for the exercise of all human rights, including economic, social and cultural rights, such as the right to work and the right to food, and civil and political rights, such as the right to vote and the right to free speech. Access to education is very often a vehicle for, among other things, access to information critical for the exercise of health rights, democratic participation and cultural engagement, to name a few. Education is therefore a powerful facilitator, one that can ensure that

those who are marginalised in society, including but not only disabled people, can lift themselves out of poverty and participate as citizens.¹ In that sense, education is most elementally about inclusion and full participation in all facets of life.

1.1 INCLUSIVE EDUCATION AS A HUMAN RIGHTS ISSUE

As the US Supreme Court famously stated in the seminal 1954 decision of *Brown v. Board of Education*: ‘Separate educational facilities are inherently unequal.’ In the context of disability, disabled children are still segregated and separated from their peers or are excluded from education altogether. Inclusive education challenges the view that it is acceptable to segregate and to exclude some children on the basis of their disability.

Thus, the achievement of inclusive education is a vital yet unrealised goal for many disabled people. Inclusive education has gradually received recognition as a human rights issue at the international level, resulting, at the first instance, in the adoption of several non-binding international instruments. The accretion of the idea of inclusion in the area of education in these soft law documents, however, has some normative impact, as several chapters in this volume plainly disclose.

The World Declaration on Education for All: Meeting Basic Learning Needs (Jomtien Declaration), adopted in 1990, and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules), adopted in 1993, recommended that disabled people be able to attend regular schools and that measures be taken in order to support them within mainstream settings. In 1994, inclusive education was, for the first time, explicitly declared in the UNESCO World Conference on Special Needs Education: Access and Equality. The ensuing Salamanca Statement requested states ‘to adopt as a matter of law or policy the principle of inclusive education, enrolling all children in regular schools, unless there are compelling reasons for doing otherwise’.² Again, the aforementioned international instruments were not legally binding and instead reflected international consensus in the form of a soft law instrument. Furthermore, even with the nominal monitoring associated with the Standard Rules, no effective

¹ Although the CRPD uses the term ‘persons with disabilities’, this introduction opts for the term ‘disabled people’. In contrast to the former term which reflects the ‘people first’ language, the latter term stresses that it is society that creates barriers to their participation.

² World Conference on Special Needs Education: Access and Equality, Salamanca Statement and Framework for Action on Special Needs Education, Salamanca, 7–10 June 1994 <http://unesdoc.unesco.org/images/0009/000984/098427eo.pdf>.

monitoring was undertaken of achievements in providing an inclusive education to disabled children.

In contrast, the right to education more generally has been protected by several legally binding international instruments. Beginning with the adoption of the Universal Declaration on Human Rights (UDHR) in 1948 and continuing with the adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966 and the Convention on the Rights of the Child (CRC) in 1989, international human rights law recognises education as a human right.³ While neither the ICESCR nor the CRC explicitly provides for the right to inclusive education, the CRC prohibits discrimination on the basis of disability and includes a stand-alone provision on the rights of disabled children.⁴ The UNESCO Convention against Discrimination in Education, enacted in 1960, also sought to prohibit discrimination in the context of education, but failed to include disability as one of the protected grounds. As a result, there was no legal basis for the goal of inclusive education under international human rights law. The seminal statement that '[s]eparate educational facilities are inherently unequal' was not applied to disabled children in international human rights law. Only in 2006 did the Committee on the Rights of the Child (CRC Committee) declare that inclusive education must be the objective for disabled children, although it allowed for exceptions to the rule and gave States Parties certain leeway in its educational policies.⁵ Meanwhile, in 2001, the UN General Assembly created an Ad Hoc Committee that paved the way for a human rights treaty for disabled people.

Adopted by the UN General Assembly in 2006, the CRPD aims to protect the rights of disabled people and to eliminate the discriminatory barriers that exclude these people from society. Article 24 of the CRPD recognises, for the very first time in a human rights treaty, a right to inclusive education. It provides that disabled children have the right to participate in the general education system, that States Parties must adopt a series of measures to allow these children to be educated with their non-disabled peers, and that the failure to accommodate them in regular schools amounts to a form of discrimination.

It should be noted at the outset, though, that the drafting history of Article 24 was not an easy matter. There was significant disagreement among the

³ Articles 13 and 14, ICESCR; Articles 28 and 29, CRC.

⁴ Articles 2 and 23, CRC.

⁵ Committee on the Rights of the Child, 'General Comment No. 9: The Rights of Children with Disabilities' (2006) UN Doc. CRC/C/GC/9, para. 66.

drafters about education for disabled people and whether and how segregated education ought to be retained as a choice for parents of disabled children.⁶ After considerable debate, the drafters eventually decided in favour of the goal of inclusive education. Article 24(1) of the CRPD provides that ‘States Parties shall ensure an inclusive education system at all levels and lifelong learning.’ The Convention thereby legally anchored the goal of inclusive education in international human rights law. While there was evidence of a growing consensus on inclusive education, the CRPD established that it is a human rights issue. The right to inclusive education has been further embedded in international human rights law with the introduction of General Comment No. 4 on the Right to Inclusive Education in 2016 by the Committee on the Rights of Persons with Disabilities (CRPD Committee) (adopted during the writing of this volume).⁷ In addition to accelerating the need for inquiry in legal scholarship on this topic, this attention has made the examination of the different issues of concern relating to the right to inclusive education more compelling and urgent. This is what the volume aims to achieve by relying on the expertise of the most prominent scholars working in this new field.

1.2 MAJOR ISSUES OF CONCERN RELATING TO THE RIGHT TO INCLUSIVE EDUCATION

This volume sets out the primary conceptual and practical aspects of the right to inclusive education in international human rights law. Further, it tackles some of the primary challenges in analysing the content of this right from a legal perspective, how the law may best be used as an instrument for combatting barriers to the inclusion of disabled people in education and the complexities of translating this objective into reality. Although inclusive education was recognised prior to the adoption of the CRPD, it remains a new and unfamiliar concept in international human rights law. Inclusive education has been addressed principally by scholars in the fields of education, disability studies and, more recently, moral philosophy. The engagement of legal academics and lawyers with this topic is fairly recent, which explains why legal scholarship on the topic is still scarce, and it is also the rationale for this volume.

⁶ G. de Beco, ‘The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements and (Remaining) Questions’ (2014) 32 (3) *Netherlands Quarterly of Human Rights* 263, 272–274.

⁷ Committee on the Rights of Persons with Disabilities, ‘General Comment No. 4. Article 24: Right to Inclusive Education’ (2016) UN Doc. CRPD/C/GC/4.

Given that the goal of inclusive education is legally anchored in Article 24 of the Convention, it follows that its analysis must be informed by the various legal standards and principles of international human rights law. The right to inclusive education must be interpreted and applied with specific reference to international human rights law and its mechanisms. The CRPD is part of that context and must be seen in the continuity of other human rights treaties. At the same time, the CRPD provides the specific context for understanding the right to inclusive education for disabled people. In so doing, it gives international human rights law a new direction with regard to the education of disabled children and, indeed, of other marginalised groups.

The right to inclusive education reflects the perils of negotiating group-specific human rights treaties, which were readily apparent to the drafters of the CRPD. On the one hand, a human rights treaty for disabled people could confer legitimacy on disability as a human rights issue, place disability rights squarely on the human rights agenda, and lend conceptual clarity to international human rights law. On the other hand, there was the risk that adopting a separate human rights treaty for disabled people could further marginalise disability rights within the international human rights system, undercut existing human rights protections as they apply to disabled people, and provide a basis for their marginal status in domestic law and policy. This would be the case especially if great care was not taken to draw out the specific context of discrimination on the basis of disability and to integrate that along with core disability rights concepts into existing human rights protection in a way that gradually developed international human rights law. Nowhere was this peril greater, perhaps, than in the negotiation of the right to inclusive education.

While it is important to study the right to inclusive education from a legal perspective, the realisation of inclusive education is an interdisciplinary project. Work across disciplines and areas of study informs the content of the legal standards. In this sense, the present volume should be considered as part of the broader, interdisciplinary endeavour to draw greater attention to the educational needs of disabled people, and, indeed, to inclusive education for all people generally. It aims to fill a gap in the literature and does so principally through the following inquiry: what norms and duties does the right to inclusive education impose upon States Parties and what can be done to ensure this right is being properly implemented and monitored in the future?

This volume seeks to resolve a number of issues. It provides an insight into the understanding and application of inclusive education as a human rights issue, offering an examination of this principle from a legal perspective in light of the development of international human rights law and in particular the CRPD. Further, it analyses the range of legal obligations for the right to

inclusive education, including the duty to provide reasonable accommodation and the obligation to take steps towards the full realisation of the right in question. This volume further examines the various ways of implementing and monitoring progress in realising this right with a particular focus on the role both of the CRPD Committee and of disabled peoples' organisations (DPOs). It studies the potential avenues for the adjudication of the right to inclusive education, both before domestic and before regional courts, and looks into the practical implementation of this right in particular jurisdictions around the world, taking into account their historical development, constitutional structure, level of development and education systems.

In sum, the contributions in this volume shed light on the role of international human rights law in advancing the right to inclusive education and provide insight on how to bring about the realisation of that right in practice.

1.3 CONCEPTUALISING THE RIGHT TO INCLUSIVE EDUCATION

The volume takes due account of the fact that the CRPD has found inspiration in the social model of disability.⁸ According to this model, disability connotes the social oppression of disabled people that results from the way in which society is organised and structured.⁹ In contrast, the medical model of disability assumes that any reduction in the ability to participate in society is due to a medical condition intrinsic to an individual with impairment and requires medical intervention and remediation. The social model is reflected in Article 1 of the Convention, which states that disabled people include 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. As a result, in the context of education, the focus should be on barriers to a child's participation in education, not on requiring all children to fit a certain standard curriculum.¹⁰ The contributions to the present volume all emphasise the need to work on

⁸ R. Kayess and P. French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1, 21; P. Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75 (5) *Modern Law Review* 752, 758–761; R. Traustadóttir, 'Disability Studies, the Social Model and Legal Developments' in O. Arnardóttir and G. Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (London/Boston, MA: Martinus Nijhoff Publishers, 2009) 3, 16.

⁹ M. Oliver, *Understanding Disability: From Theory to Practice*, 2nd edn (New York, NY: Palgrave Macmillan, 2009) 42–48.

¹⁰ de Beco, 'The Right to Inclusive Education', 286.

the creation of enabling educational systems, rather than dwelling on the alleged shortcoming of pupils with different kinds of impairments.

This volume adopts a human rights approach to inclusive education. Participation in the general education system is a right, not a form of welfare. As such, the right to inclusive education triggers a series of legal obligations for States Parties. As inclusive education is a human rights issue, the right to inclusive education has the purpose of protecting the dignity of disabled children and of preventing their further marginalisation. Recognising that the full realisation of this right is a process and will take time in accordance with the differing capacities of States Parties, the volume draws particular attention to the duty to provide reasonable accommodation along with mandates to ensure the accessibility of education systems. At the same time, it fully acknowledges that States Parties must with alacrity use their available resources to make immediate progress towards the achievement of inclusive education. These legal obligations are to be fulfilled together if the objectives of the CRPD are to be met. In this way, the Convention bridges the divide between civil, political and economic and social and cultural rights,¹¹ and demonstrates that the historical dichotomy between categories of human rights does not work for disabled people (nor indeed for any group facing discrimination of any kind). In order to make the whole of education inclusive, meeting the educational needs of disabled children and remedying the failures of education systems to eliminate exclusionary practices and dismantle persistent barriers is required.

The CRPD Committee has signalled its prioritisation of the right to inclusive education, and its work serves as a barometer of where we are now – in the second decade of CRPD implementation in attaining the goal of inclusive education for disabled children. Gleaning from the concluding observations of the CRPD Committee and its General Comment No. 4, it is apparent that many barriers remain entrenched in practice and very often in law and policy.

This lack of implementation cannot be ignored. The challenges are widespread and are evident in all the regions of the world albeit in different ways. These challenges are far-reaching for education systems in developing countries, where ongoing challenges of resource limitations, underdeveloped legal and regulatory frameworks and data gaps persist. They are likewise particularly affecting displaced persons, whether those living in refugee camp settings or, increasingly, the growing population of urban refugees who have limited access to education. This does not mean that high-income countries always fare better, as despite the resources at their disposal many of them continue to

¹¹ T. Degener, '10 Years of Convention on the Rights of Persons with Disabilities' (2017) 35 (3) *Netherlands Quarterly of Human Rights* 152, 153–154.

deny disabled people education or to refer them to ‘special’ (that is, segregated) schools. The barriers are not only physical in nature as is sometimes suggested. Indeed, as the chapters in this volume bear out, the barriers are often multi-faceted and overwhelmingly the result of social attitudes. This is evident as the arrival of disabled children in mainstream schools is regarded with apprehension because it is thought to bring overall performance down or simply because of strong prejudice against disabled children. The volume acknowledges the challenges that persist in ensuring that educational programmes, facilities and services are inclusive and does so by addressing the conceptual and practical aspects of the right to inclusive education.

1.4 THE WAY FORWARD AND AN AGENDA FOR FUTURE RESEARCH

The volume provides an in-depth examination of the most relevant issues pertaining to the right to inclusive education in international human rights law, and yet it is by no means exhaustive. It aims to chart out an agenda for continued research on a dynamic area of international human rights law. The most important message conveyed, perhaps, is that this is new terrain on which more research is needed. While inclusive education has been the subject of inquiry in the fields of education and, subsequently, disability studies, it is not yet well established in legal scholarship. The volume hopes to remedy this lack of attention, while encouraging continued academic work on inclusive education as a human rights issue in the field of law. Given the many conceptual and practical questions raised by the right to inclusive education,¹² it is again important that legal academics and lawyers do so, or continue to do so, in collaboration with those of other disciplines across the board.

As is clear throughout the volume, a number of issues require further examination if the right to inclusive education is to be better understood and, eventually, practically implemented. Such issues include: inclusive education within the context of emergencies; accessible information and communication technologies (ICTs) in the general education system; support for children with different forms of impairment (including those with intensive support needs); the meaning of reasonable accommodation and progressive realisation in current political environments where shrinking budgets undercut the very aims of education; the incorporation of monitoring the

¹² G. de Beco, ‘The Right to Inclusive Education: Why Is There So Much Opposition to Its Implementation?’ (2018) 14(3) *International Journal of Law in Context* 396, 404–407.

implementation of the right to inclusive education into the international legal framework of human rights; and the issue of data gathering in order to facilitate the full realisation of inclusive education over time. Of particular relevance in the field of law will be the design of domestic legal frameworks that incorporate the duty to provide reasonable accommodation in education and that can offer supports for education that is available, accessible, acceptable and adaptable to disabled people.

Finally, insofar as inclusive education features as a core right of disabled people and, increasingly, as a right for all and in particular those groups so often left behind, what then are the implications of Article 24 for international human rights law? It stands to reason that the international legal framework developed by the CRPD for understanding and applying the notion of inclusive education represents an important and progressive development of international human rights law, not only for disabled people but equally for all groups that so often experience exclusion and discrimination in education, whether on the basis of gender, race, language, religion, ethnicity, indigeneity, sexual orientation and gender identity, health status, geographical location, refugee or migrant status, socioeconomic status, age, emergency and conflict, among others. Inclusive education directs attention to those students who are at high risk or on those who may be at risk of marginalisation, whatever the basis for that marginalisation; it seeks to ensure that, where necessary, proactive steps are taken to ensure and affirm their presence, participation and achievement in the education system.¹³ There is therefore much to learn from the right to inclusive education beyond the issue of disability itself. It is about education and the way it can either alleviate or exacerbate various kinds of marginalisation and close, or open, the doors of opportunities for those regarded as falling outside the (imagined) educational norm.

1.5 PRESENTATION OF THE VOLUME: CHAPTER BY CHAPTER

This volume provides a comprehensive analysis of the various aspects of the right to inclusive education under international human rights law. It does so by exploring the core content of the right to inclusive education, the methods currently used to advance this right at the regional and international levels and the challenges related to its implementation at the domestic level. In addition

¹³ S. Quinlivan, 'The Right to Inclusive Education for Children with Psychosocial Disability', 9th International Summer School on Disability Law and Policy, Centre for Disability Law and Policy, NUI Galway, June 2017.

to focussing on the theoretical foundation for the right to education, it examines practical and legal tools that can be used to further the right to inclusive education within the UN as well as the European, African and Inter-American human rights systems. Thereafter, it provides a number of case studies to inform how the right to inclusive education is being implemented in a diverse range of country contexts.

Following this introduction, Part I of the volume examines the background of the right to inclusive education under international human rights law. Arlene Kanter's chapter (Chapter 2) canvasses the historical and conceptual development of the right to inclusive education. She painstakingly traces the gradual convergence of human rights and disability within the context of education, following the development of international human rights law to its final proclamation in the CRPD. Gauthier de Beco's chapter (Chapter 3) subsequently offers a comprehensive legal analysis of Article 24 of the Convention in light of the recommendations of UN treaty bodies as well as the jurisprudence on the topic. He thoughtfully examines the various questions raised by a reading of the right to inclusive education, in the order of the different paragraphs, as well as any issues of contention that remain.

Part II of the volume addresses the theoretical foundations for the right to inclusive education, including conceptual and substantive issues. Starting with the conceptual issues, Michael Shevlin (Chapter 4) examines the topic from the perspective of education in order to give a good grasp of the concept of inclusive education, both looking at its origins and undertaking its evaluation. Rosemary Kayess (Chapter 5) examines the links between disability, equality and education leading to the enactment of the right to inclusive education and discusses certain ambiguities around a number of different interpretations. Sarah Arduin (Chapter 6) goes on to examine what information is conveyed by Article 24 of the CRPD, using expressivism as a methodology, and what understanding of this right emerges from the national legislations of five European states, namely England, Finland, France, Ireland and Norway. Moving to the substantive issues, Shivaun Quinlivan (Chapter 7) explores the core content of the CRPD's most significant contribution to equality under international human rights law, namely the concept of reasonable accommodation. In so doing, she contextualises reasonable accommodation within education. Gauthier de Beco (Chapter 8) follows by analysing the notion of progressive realisation with regard to Article 24 of the Convention. After examining the concept of inclusive education according to the CRPD, he provides a detailed overview of the measures to be taken with a view to realising the right to inclusive education by States Parties.