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The Right to Education: Article 24 of the CRPD

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1.1 Introduction

The right to education has been described as “a pre-requisite to the exercise of many other rights.”² This statement is fitting in terms of the educational rights of disabled people, which are intrinsically linked with empowerment and integration. Article 24 of the recently enacted United Nations Convention on the Rights of Persons with Disabilities (CRPD) contains the cornerstone principle of inclusive education.³ It has been stated that “Article 24 arguably provides [a stronger] mandate for states to provide inclusive education than any previous human rights document.”⁴

The right to education is variously described as falling within the category of rights known as economic, social and cultural rights. As such, it is subject to progressive realisation.⁵ It is proposed to provide a brief overview of the meaning of this concept, before analysing the interpretation which has been accorded to the obligation to progressively realise the right to education by various treaty bodies. This paper will then consider the elements of Article 24 of the CRPD which are immediately realisable. Finally, the authors will analyse the extent to which State Parties to the CRPD are living up to their commitments in respect of the right to education under the CRPD.

1.2 The Concept of Progressive Realisation

Article 4(2) of the CRPD contains a clause on progressive realisation.⁶ This concept of progressive realisation is enshrined in numerous international treaties. In a similar vein, Article 2

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² O’Mahony, C, *Education Rights in Irish Law* (Thomson Roundhall Dublin 2006) 18.

³ *Guidelines for Inclusion; Ensuring Access to Education for All*: UNESCO 2005, provides the following definition of inclusion: “Inclusion is seen as a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities and reducing exclusion within and from education. It involves changes and modifications in content, approaches, structures and strategies, with a common vision which covers all children of the appropriate age range and a conviction that it is the responsibility of the regular system to education all children [...] Inclusion is concerned with the identification and removal of barriers.” At pp 13 and 15. Available at: <http://unesdoc.unesco.org/images/0014/001402/140224e.pdf>

⁴ School of Oriental and African Studies, ‘The Convention on the Rights of Persons with Disabilities: The Right to Education and the Obligations of States’ (2011) 44, *SOAS International Human Rights Clinic Project – Research Paper No. 06/2011* 23.

⁵ This contrasts with the category of rights which are termed civil and political rights. Such rights are not subject to progressive realisation and, therefore, State Parties must protect and promote these rights immediately. Beiter asserts that the notion of “progressive realisation” in Article 2(1) of the ICESCR is often contrasted with the notion of immediacy in Article 2(1) of the ICCPR, which uncompromisingly provides that State Parties must “respect and ensure” the rights of the Covenant. Beiter, K. D., *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers Netherlands 2006) 386.

⁶ Article 4(2) CRPD provides: “With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.”

of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷ and Article 4 of the Convention on the Rights of the Child (CRC) require State Parties to progressively realise the rights contained therein.⁸ Article 23(2) of the CRC makes specific reference to the progressive realisation of rights relating to children with disabilities.⁹ In essence, progressive realisation amounts to the recognition in international law that State Parties require sufficient time to fully realise certain composite rights. The Office of the High Commissioner for Human Rights (OHCHR) has stated that progressive realisation is “a practical device that acknowledge(s) the real world challenges” and helps to avoid overburdening states, employers and other duty-bearers.¹⁰

In light of the hierarchical distinction which has been carved out between civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand, several states have interpreted progressive realisation to mean that the latter category of rights are not of immediate concern.¹¹ The Committee on the Rights of the Child has highlighted this fact in its observation that “the principle of progressive realization is often misunderstood and interpreted to mean that those rights are not immediately applicable and are merely of aspirational character.”¹² As a result of this misconception, the Committee on Economic, Social and Cultural Rights (CESCR) has explained that while the full realisation of rights may be achieved progressively, “steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the Member States concerned. Such steps should be deliberate, concrete and targeted as clearly as possibly towards meeting the obligations recognised in the Covenant.”¹³ In addition, the CESCR emphasises the fact that State Parties have certain obligations which require immediate implementation, irrespective of the level of available resources.¹⁴ The principal obligation which has been stated to take effect immediately is the guarantee of non-discrimination in the exercise of rights. Indeed, Article 4(2) of the CRPD explicitly states that the progressive realisation of economic, social and cultural rights is “without prejudice to those obligations contained in the present Convention that are immediately applicable to international law.” The Committee on the Rights of the Child also highlights the

⁷ Article 2 ICESCR provides: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

⁸ Article 4 CRC provides: “... With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”

⁹ Article 23(2) CRC provides: “State Parties recognise the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child’s condition and to the circumstances of the parents or others caring for the child.”

¹⁰ OHCHR, *From Vision to Action: The Road to Implementation of the Convention* (2007) 5.

¹¹ This distinction has been described as a “historical fallacy” (see Workshop 3 CRC): “based partially on a historical fallacy of a hierarchical distinction between civil and political rights on one hand and economic, social and cultural rights on the other, some States have unfortunately understood progressive realization to mean that their obligations to implement economic, social and cultural rights are of a less urgent nature and can be postponed until a more economically prosperous time.”

¹² Committee on the Rights of the Child, Day of General Discussion, ‘Resources for the Rights of the Child: Obligations for States’ (21st September 2007) at paragraph 46, available at: <http://www2.ohchr.org/english/bodies/crc/discussion2012.htm>

¹³ The Committee on Economic, Social and Cultural Rights, General Comment No. 3, ‘The nature of state parties obligations’ (1990) at paragraph 2, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En)

¹⁴ The Committee on Economic, Social and Cultural Rights, General Comment No. 4 “The right to adequate housing” (1991) at paragraph 10; The Committee on Economic, Social and Cultural Rights, General Comment No. 11 “Plans of action for primary education” (1999) at paragraph 11. Available at: [http://www.unhcr.org/refworld/publisher,CESCR,GENERAL,,,10.html](http://www.unhcr.org/refworld/publisher/CESCR,GENERAL,,,10.html)

principle of non-retrogression as another core element of progressive realisation. This principle is defined by the Committee as “the obligation not to take any retrogressive steps that could hamper the enjoyment of economic, social and cultural rights.”¹⁵

In a General Comment which is particularly apt in light of the current precarious economic climate, the CESCR has stated that “even in times of severe resources constraint [...] the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.”¹⁶ In terms of what measures must be taken to progressively realise rights, both the CESCR and the Committee on the Rights of the Child have stressed that “governments have to be able to demonstrate that they have done everything they can and diverted all possible resources.”¹⁷ The Committee on the Rights of the Child has emphasized that States parties should look beyond monetary units to any resources that can contribute to the implementation of children's economic, social and cultural rights, including human, technical, organizational, natural and information resources, all of which should be periodically assessed in qualitative and quantitative terms.¹⁸

1.3 Progressive Realisation of the Right to Education: Interpretation by Committee on the Rights of the Child and Committee on Economic Social and Cultural Rights

Many commentators have highlighted the fact that the CRPD does not create new rights.¹⁹ It merely codifies existing human rights norms in the specific context of disability. Accordingly, the observations of various treaty bodies on the right to education are of interpretative assistance, as it is likely that the Committee tasked with monitoring compliance with the CRPD will follow the approach taken by other treaty bodies. Therefore, it is proposed to draw on these observations.

In its General Comment 3, the Committee on the Rights of the Child confirmed that State Parties have “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [enunciated in the Covenant].”²⁰ In the context of education, this has been interpreted to mean “the most basic forms of education.”²¹ Coomans contends

¹⁵ Committee on the Rights of the Child, Day of General Discussion, ‘Resources for the Rights of the Child: Obligations for States’ (21st September 2007) at paragraph 13, available at: <http://www2.ohchr.org/english/bodies/crc/discussion2012.htm>

¹⁶ The Committee on Economic, Social and Cultural Rights, General Comment No. 3, ‘The nature of state parties obligations’ (1990) at paragraph 12, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En)

¹⁷ School of Oriental and African Studies, ‘The Convention on the Rights of Persons with Disabilities: The Right to Education and the Obligations of States’ (2011) 44, *SOAS International Human Rights Clinic Project – Research Paper No. 06/2011*, citing Roth, ‘Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organisation’ (2004) 26 *Human Rights Quarterly* 69.

¹⁸ See also *Autism Europe v France*, Complaint 13/2002 European Committee of Social Rights, for a discussion of the concept of progressive realisation and education under the Revised European Social Charter. Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC13Merits_en.pdf

¹⁹ For example, see Quinlivan, S, ‘The United Nations Convention on the Rights of Persons with Disabilities: An Introduction’ ERA-*Forum*, Volume 13, No. 1, 2012 <http://www.springerlink.com/content/74541066131743p/>; see Quinn, G., ‘The United Nations Convention on the Rights of Persons with Disabilities: Towards a New International Politics of Disability’ (2009) 15 *Texas Journal on Civil Liberties & Civil Rights*, 33, 42; Trömel, S., ‘A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities’ *European Yearbook of Disability Law*, Vol. 1 2009 at 115.

²⁰ The Committee on Economic, Social and Cultural Rights, General Comment No. 3, ‘The nature of state parties obligations’ (1990) at paragraph 10, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En)

²¹ Beiter, K.D., *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers Netherlands 2006) 384.

that the core content of education must include free and compulsory primary education.²² The CESCR has differentiated, in its General Comment 13, between the obligations of State Parties in relation to primary, secondary, higher and fundamental education, highlighting the fact that the obligations in respect of the various categories of education are “not identical.”²³ The Committee affirms that States parties are “obliged to prioritise the introduction of compulsory, free primary education.” In other words, the obligation to provide primary education for all must be addressed as a matter of pressing concern, as it is “an immediate duty of all State Parties.”²⁴ However, as Beiter acknowledges, “the notion of progressiveness is not entirely absent from Article 13(2)(a) [of the ICSECR]”²⁵ which concerns the right to primary education. That subsection must be read in conjunction with Article 14 of the ICSECR, which provides for “the progressive implementation within a reasonable number of years of compulsory and free primary education.” General Comment 11 of the CESCR elaborates on this by asserting that “the state party is required to adopt a plan of action within two years.”²⁶ Furthermore, the Committee states that “the plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan.”²⁷

In relation to secondary, higher and fundamental education, the CESCR emphasises that State Parties have an immediate obligation “to take steps” towards the realisation of these forms of education for all those within its jurisdiction.²⁸ The Committee outlines that:

“at a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.”²⁹

General Comment 9 of the Committee on the Rights of the Child is directly relevant to the education of disabled children. The Committee states therein that “inclusive education should be the goal of educating children with disabilities.”³⁰ It further acknowledges that “the extent of inclusion within the general education system may vary.”³¹ However, the Committee affirms its position on progressive realisation in the assertion that “a continuum of services and programme options must be maintained in circumstances where fully inclusive education is not feasible to achieve in the immediate future.”³²

²² Beiter, K.D., *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers Netherlands 2006) at Note 25, Page 643-644, citing Fons Coomans, ‘Clarifying the Core Elements of the Right to Education’ in Coomans et al (eds), *The Right to Complain about Economic, Social and Cultural Rights* (Utrecht University 1995)

²³ Beiter, K.D., *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers Netherlands 2006).

²⁴ The Committee on Economic, Social and Cultural Rights, General Comment No. 13, ‘The right to education’ (1999) at paragraph 51, available at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

²⁵ Beiter, K.D., *The Protection of the Right to Education by International Law* (Martinus Nijhoff Publishers Netherlands 2006) at 390.

²⁶ The Committee on Economic, Social and Cultural Rights, General Comment No. 11, ‘Plans of action for primary education’ (1999) at paragraph 8, available at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

²⁷ Ibid, Paragraph 10.

²⁸ Ibid, Paragraph 52.

²⁹ Ibid, Paragraph 52.

³⁰ Ibid, Paragraph 66.

³¹ Ibid.

³² Ibid, Paragraph 66.

The case of *Autism Europe v France*,³³ which was decided by the European Committee on Social Rights in 2003, provides an example of how the notion of progressive realisation has been interpreted in the context of the right to education. It also serves as an example of a blatant failure by a State Party to progressively realise the right to education. In that case, it was held that France had not made sufficient provision for the education of autistic children. The Committee found, inter alia, that the proportion of autistic children being educated in either general or specialist schools was disproportionately low in comparison to non-disabled children. The State Party had, in fact, passed relevant legislation in this area as far back as 1975.³⁴ However, it had failed to enforce the legislation in the interim. As a result, a high proportion of autistic children were deemed not to have received an appropriate education.³⁵

The Committee ruled that the State Party was in breach of Article 15(1) and Article 17(1) of the Revised European Social Charter. These Articles relate to the right of persons with disabilities to education and the general right of children and young people to education, respectively. The Committee also found that France had violated the non-discrimination principle in the enjoyment of Charter rights.³⁶ In relation to the progressive realisation of rights such as the right to education, the Committee asserted that when the achievement of a right is exceptionally complex and particularly expensive to resolve, State Parties must take measures to do so “within a reasonable time with measurable progress and to an extent consistent with the maximum use of available resources.”³⁷

1.4 The Right to Education in Article 24 of the CRPD

Article 24 of the CRPD is subject to the progressive realisation clause, which is contained in Article 4(2) of the Convention. However, it is evident that Article 4(2) is not intended to provide national governments with a comforting escape clause, to be invoked at will. It has already been outlined that certain elements of the right to education are immediately realisable.³⁸ In this section, it is proposed to discern what obligations in Article 24 can be described as being of immediate effect. These will be juxtaposed with the obligations of progressive achievement relating to the right to education under the CRPD.

In terms of the immediacy of obligations imposed on State Parties, it is clear from the observations of the treaty bodies outlined above³⁹ that the non-discrimination principle in Article 24⁴⁰ is not subject to the overall concept of progressive achievement. In this regard, the interpretation given to Article 24 in the drafting sessions of the CRPD is paramount. There was general consensus in the drafting sessions that a new standard and obligation was not being created by the CRPD to create free and compulsory primary education as this obligation had already been created by the ICESCR and CRC.⁴¹ Rather the immediate obligation being made on State Parties in Article 24 was clarified in the following terms: “if free and compulsory primary

³³ *Autism Europe v France*, Complaint No. 13/2002, European Committee on Social Rights (7th November 2003), available at: http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC13Merits_en.pdf

³⁴ The right to education of persons with disabilities is enshrined in two Acts: Act no. 75/534 of 30 June 1975, People with disabilities (policy) act, and Act no. 75/535 of 30 June 1975 on social and medico-social institutions.

³⁵ 80-90% of autistic children did not receive an adequate education.

³⁶ Article E of the European Social Charter.

³⁷ *Autism Europe v France*, Complaint No. 13/2002, European Committee on Social Rights (7th November 2003), available at: http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC13Merits_en.pdf

³⁸ See Paragraph 1.2 and 1.3 above.

³⁹ See Paragraph 1.2

⁴⁰ The non-discrimination principle is contained in Article 24(1) and Article 24(2)(a).

⁴¹ See Articles 13 and 14 of the ICESCR and Article 28 of the CRC.

education is available to children in the community, it should also be made available to children with disabilities without discrimination.”⁴² A similar observation was made in respect of secondary and tertiary education.⁴³ State Parties must continue to fulfil their specific obligations under the ICESCR and the CRC. However, the immediate obligation being imposed on State Parties by the CRPD is to ensure that where primary, secondary or tertiary education are already available, that they are accessible to persons with disabilities without discrimination. Kayess argues that the right to non-interference is also immediately realisable by State Parties to the CRPD, who must not interfere with the right of disabled children to education.⁴⁴ Therefore, all legal impediments must be removed to ensure that people with disabilities can exercise the right to education without discrimination and on an equal basis with others.

In light of the priority which has been accorded to the right to primary education in previous human rights treaties, it is likely that the Committee on the Rights of Persons with Disabilities may place particular emphasis on this most basic form of education. Unfortunately, it appears that major anomalies still exist in the provision of free and compulsory primary education to children with disabilities. It is disconcerting to note that while approximately 80% of pupils with disabilities are educated in mainstream schools in Spain,⁴⁵ 11.55% of the population with disabilities have not completed primary education, compared to 2.15% of the population in general.⁴⁶ In China, the proportion of disabled children entering compulsory education is increasing, reaching 71.4% in 2010, as a result of the implementation of education aid policies.⁴⁷ However, it has been highlighted that “there is still a clear gap compared with the national level of school-age children in compulsory education.”⁴⁸ Additionally, in Peru, 87.1% of school-age children with disabilities remain outside the education system.⁴⁹

The principle of reasonable accommodation, as contained in Article 24(2)(c) of the CRPD, forms an inherent part of disability discrimination. Article 2 of the CRPD provides that the denial of reasonable accommodation amounts to discrimination on the basis of equality. As a result, Article 24(c) falls within the category of obligations of immediate effect. In terms of the countries which have been noted as falling down on these requirements, the shadow report submitted by Spain criticises the legislative framework in that country, which it purports “discriminates on the grounds of disability.”⁵⁰ The report claims that the relevant legislation, although based on inclusive education and equal opportunities, allows pupils with certain disabilities or high support needs to be referred to special education centres.⁵¹ In its concluding

⁴² UN Convention on the Human Rights of People with Disabilities^[1]Ad Hoc Committee - Daily Summaries sixth session 03 August 2005; Available at: <http://www.un.org/esa/socdev/enable/rights/ahc6sum3aug.htm>

⁴³ Ibid: The obligation was stated as being “where secondary education is free and compulsory then no child or [person with a disability] is excluded from that on the basis of their disability.”

⁴⁴ Kayess, R., ‘Slippery Obligations – What is Progressive Achievement for Social Rights?’ (Disability Summer School, National University of Ireland Galway 19th June 2012).

⁴⁵ CERMI Shadow Report, available at: <http://www.cermi.es/en-US/Pages/Buscar.aspx>

⁴⁶ Ibid.

⁴⁷ For an example of such policies, see the “two exemptions and one subsidy policy.”

⁴⁸ Seventh Session of the Committee on the Rights of Persons with Disabilities (Geneva 16th-20th April 2012), Report of One Plus One Beijing (March 2012), available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session7.aspx>

⁴⁹ Sixth Session of the Committee on the Rights of Persons with Disabilities, available at: Shadow Report of the Peruvian National Confederation of People with Disabilities (Geneva 19th- 23rd September 2011) available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx>

⁵⁰ Sixth Session of the Committee on the Rights of Persons with Disabilities, Shadow Report of the Comité Español de Representantes de Personas Con Discapacidad (CERMI State Delegation) (Geneva 19th- 23rd September 2011), available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx>

⁵¹ Organisation of Education Act (at Note 48, Paragraph 98).

observations to Spain, the Committee on the Rights of Persons with Disabilities expressed its disconcertion:

in view of reported cases of failure to provide reasonable accommodation, of continued segregation and exclusion, of financial arguments used as justification for discrimination and of the cases of children enrolled in special education against their parents' will.⁵²

In light of the foregoing, the Committee reiterated that

the denial of reasonable accommodation constitutes discrimination and that the duty to provide reasonable accommodation is immediately applicable and not subject to progressive realisation.⁵³

For that reason, the Committee recommended that the State Party

increase its efforts to provide reasonable accommodation in education by allocating sufficient financial and human resources to implement the right to inclusive education.⁵⁴

In relation to obligations of progressive achievement, Article 24(e) is a clear enunciation of the concept of progressive realisation of the right to education. The insertion of the phrase "with the goal of full inclusion" in that subsection evidences the intention of the drafters that the provision of fully inclusive education can be achieved in a gradual manner, where the resources of a given state are constrained. However, it does not mean that State Parties can delay in the implementation of inclusive education. Unfortunately, this appears to be what is happening in practice in some cases.

It has been noted that in Hungary, only a minimal number of persons with disabilities are being educated in inclusive settings and the state report makes no reference to a current or planned inclusive education policy.⁵⁵ In addition, the report submitted by the Tunisian Government to the Committee on the Rights of Persons with Disabilities states that the country is in the process of implementing a phased integration policy for students with certain disabilities but it also outlines the planned construction and extension of alternative education centres.⁵⁶ The List of Issues drafted by the Committee in respect of Tunisia includes a request for "information about the progress achieved toward ensuring full scholastic inclusion of children with disabilities."⁵⁷ It is contended that "this makes it very clear that the Committee expects full inclusion of persons with disabilities in the general education system to be the ultimate goal of states parties."⁵⁸

⁵² Committee on the Rights of Persons with Disabilities, Concluding Observations to Spain, Geneva 19th -23rd September 2011, CRPD/C/ESP/CO/1, available at:

<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx>

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ School of Oriental and African Studies, 'The Convention on the Rights of Persons with Disabilities: The Right to Education and the Obligations of States' (2011) 27, *SOAS International Human Rights Clinic Project – Research Paper No. 06/2011*, citing Hungary, *National Report on the Basis of Article 35(1) of the Convention on the Rights of Persons with Disabilities* (2010).

⁵⁶ Ibid at Note 73, citing Fifth Session of the Committee on the Rights of Persons with Disabilities, Tunisia, *Implementation of the Convention on the Rights of Persons with Disabilities: Initial Report of State Parties Submitted Under Article 35 of the CRPD* (July 2010).

⁵⁷ Committee on the Rights of Persons with Disabilities, *List of Issues to be Taken up in Consideration of the Initial Report of Tunisia* (October 2010), Paragraph 20, available at:

<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session4.aspx>

⁵⁸ School of Oriental and African Studies, 'The Convention on the Rights of Persons with Disabilities: The Right to Education and the Obligations of States' (2011) 27, *SOAS International Human Rights Clinic Project – Research Paper No. 06/2011*

In its concluding observations to Tunisia, the Committee on the Rights of Persons with Disabilities commended Tunisia for its drafting of the national programme of inclusive education for children with disabilities. However, the Committee also noted “with deep concern”⁵⁹ that, in practice, the inclusion strategy was not equally implemented in schools and, furthermore, that rules relating to the number of children in mainstream schools and to the management of inclusive classes are commonly breached.⁶⁰ The Committee, therefore, recommended that Tunisia should allocate sufficient financial and human resources to implement the national programme of inclusive education for children with disabilities and that it should also increase its efforts to enforce inclusive education for children with disabilities in all schools.⁶¹ This provides a clear example of the steps required to be taken under the obligation to progressively realise the right to education. As Kayess has rightly pointed out, progressive realisation requires more than just a policy of inclusion.⁶² It requires State Parties to take steps towards a budgetary framework to enable implementation of inclusive law and policy.⁶³

Another requirement which falls under the obligation of progressive realisation is the requirement contained in Article 24(d) to provide support to persons with disabilities “to ensure their effective education.”⁶⁴ This is due to the fact that the implementation of adequate supports to ensure the effective education of people with disabilities may require significant resources. The Shadow Report of the Democratic Party of Hong Kong⁶⁵ highlights the fact that “students with disabilities studying in mainstream settings do not receive the support they require.”⁶⁶ Furthermore, the Shadow Report of the Hong Kong Joint Council states that training for teachers is inadequate and that there is a lack of relevant professionals in mainstream schools.⁶⁷ The Committee on the Rights of Persons with Disabilities has not yet issued its concluding observations in respect of the progressive realisation of this aspect of the right to education by China. However, it is submitted that China will be required, in the words of the CESCR, to fulfil the overarching obligation of progressive realisation to take steps which are deliberate, concrete and targeted. Such steps should be taken within a measurable framework.

An examination of the various state reports and shadow reports submitted to the Committee on the Rights of Persons with Disabilities makes it clear that some progress has been made. In China, for example, the Law on the Protection of Persons with Disabilities has been amended to provide that schools shall not refuse to enrol students because of their disabilities.⁶⁸ Rieser contends that “the Cypriot experience demonstrates positive ways of implementing Article 24 of

⁵⁹ Fifth Session of the Committee on the Rights of Persons with Disabilities, Concluding Observations of the Committee (Tunisia), Paragraph 30, (Geneva, 11th-15th April 2011), available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session5.aspx>

⁶⁰ Fifth Session of the Committee on the Rights of Persons with Disabilities, Concluding Observations of the Committee (Tunisia), Paragraph 30, (Geneva, 11th-15th April 2011), available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session5.aspx>

⁶¹ Ibid, Paragraph 32.

⁶² Kayess, R., ‘Slippery Obligations – What is Progressive Achievement for Social Rights?’ (Disability Summer School, National University of Ireland Galway 19th June 2012).

⁶³ Ibid.

⁶⁴ Article 24(d)

⁶⁵ Seventh Session of the Committee on the Rights of Persons with Disabilities, Shadow Report of the Democratic Party of Hong Kong (September 2011) available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session8.aspx>

⁶⁶ Ibid.

⁶⁷ Seventh Session of the Committee on the Rights of Persons with Disabilities, Shadow Report of the Democratic Party of Hong Kong (March 2011), available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session8.aspx>

⁶⁸ The Committee on Economic, Social and Cultural Rights, General Comment 3, ‘The Nature of State Parties Obligations’ (1990), available at: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En)

the UNCRPD and should be considered as good practice.”⁶⁹ He goes on to state that Cyprus has made considerable progress on “integrating disabled children into a common learning environment.”⁷⁰ This is primarily as a result of the 1999 Act of Parliament on the Education and Training of Children with Special Needs,⁷¹ which assigns responsibility to the state for “safeguarding the right of disabled children to an inclusive education at all levels of the education system.”⁷² The aforementioned legislation is directed towards early identification of children with special educational needs. It also requires the implementation of a robust support system, whereby local district committees for special education and training are required to provide “all necessary measures in terms of curriculum adaptation, technical and staffing support for the effective education of the child in an ordinary school.”⁷³ In addition, the law requires evaluation of a child’s progress at least once every year. Notwithstanding this, it is obvious in light of the deficiencies highlighted above that there is a long road ahead if State Parties to the CRPD are to meet the implicit tripartite obligation in all human rights treaties to respect, protect and fulfil the right to education.

1.5 Conclusion

The obligations of State Parties with regard to economic social and cultural rights, and in particular with regard to the right to education, have been clearly laid out by the Committee on the Rights of the Child and the CESCR.⁷⁴ The CESCR has stated, in its General Comment 13, that the realization of the right to education progressively should not be interpreted as depriving States Parties’ obligations of all meaningful content.⁷⁵ It is clear that State Parties to the CRPD must ensure constant progress in the realisation of the right to education and not regression. In addition, certain aspects of the right to education, such as the right to non-discrimination, are not subject to progressive realization. Such obligations take effect immediately.

During the drafting of the CRPD, the concept of progressive realisation was deemed “particularly contentious with regard to the right to education, for fear that it may be invoked by states, particularly developing states, as an ‘escape clause’ from the obligations of the CRPD.”⁷⁶ This fear is a valid one, in light of the resource constraints encountered by State Parties. However, it is countered by Rieser’s assertion that “states must plan and develop their capacity in line with the [CRPD] from the moment of adoption.”⁷⁷ In the context of the right to education, this has been interpreted as examining current legislation, practices and procedures to ensure the continuing development of education systems so that all disabled children have access to education within an inclusive education system.⁷⁸ It remains to be seen whether State Parties will

⁶⁹ Rieser, R., *Implementing Inclusive Education: A Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities* (Commonwealth Secretariat Second Edition 2012) 134.

⁷⁰ Ibid.

⁷¹ Act of Parliament on the Education and Training of Children with Special Needs 113(1)/1999, available at <[www.moec.gov.cy/eidiki/nomothesia/Number_113\(1\)_1999.pdf](http://www.moec.gov.cy/eidiki/nomothesia/Number_113(1)_1999.pdf)

⁷² Rieser, R., *Implementing Inclusive Education: A Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities* (Commonwealth Secretariat Second Edition 2012) 134.

⁷³ Ibid.

⁷⁴ See Paragraphs 1.2 and 1.3 above.

⁷⁵ General Comment 13, Committee on Economic, Cultural and Social Rights, Paragraph 44.

⁷⁶ School of Oriental and African Studies, ‘The Convention on the Rights of Persons with Disabilities: The Right to Education and the Obligations of States’ (2011) 6, *SOAS International Human Rights Clinic Project – Research Paper No. 06/2011*.

⁷⁷ Rieser, R., *Implementing Inclusive Education: A Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities* (Commonwealth Secretariat Second Edition 2012) 4.

⁷⁸ Rieser, R., *Implementing Inclusive Education: A Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities* (Commonwealth Secretariat Second Edition 2012) 4, citing Bengt Lindqvist, Marcia

endeavour to use the progressive realisation clause to evade their obligations with respect to the right to education under Article 24. However, it is contended that “it is unlikely that significant digression from the economic, social and cultural rights already established would be possible if similar standards of progressive realisation are followed as stipulated with regard to prior international human rights documents.”⁷⁹

General Comment 11 of the CESCR highlights the fact that the right to education can be seen, on the one hand, as an economic, social and cultural right but, on the other hand, as a civil and political right.⁸⁰ This is due to the fact that the right to education is vital to the exercise of numerous civil and political rights. The CESCR asserts that “in this respect, the right to education epitomises the indivisibility and interdependence of all human rights.”⁸¹ Arguably a key indicator of the CRPD’s effectiveness will be the extent to which state parties realise such a fundamental right as the right to education. As outlined above, this realisation should be both immediate and progressive, in respect of the differing aspects of the right to education enunciated in the CRPD. This point is neatly captured in the assertion that although the right to education in Article 24 “is a social right that must be realised progressively, elements of that right are immediately realisable and it is within this context that the right must be monitored.”⁸²

Rioux and Rita Samson, *Moving Forward – Progress in Global Disability Rights Monitoring* (Disability Rights Promotion International, York University, Canada 2007), 1.

⁷⁹ School of Oriental and African Studies, ‘The Convention on the Rights of Persons with Disabilities: The Right to Education and the Obligations of States’ (2011) 44, *SOAS International Human Rights Clinic Project – Research Paper No. 06/2011*.

⁸⁰ Committee on Economic, Social and Cultural Rights, General Comment 11, Paragraph 2 states that the right to education “has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realisation of these rights as well. Available at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

⁸¹ Committee on Economic, Social and Cultural Rights, General Comment 11, Paragraph 2, available at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

⁸² Mohitu, A., National Human Rights Commission of India in IHCHR, *From Vision to Action: the Road to Implementation of the Convention* (2007) 10.