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Redefining Inclusive Education for Autistic Children in International and European Law

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Abstract

This paper focuses on the legal concept of inclusive education, and the challenges that its current interpretation raises, especially for autistic children. Centring on European and international law, it first analyses the sources and genesis of the current interpretation of inclusive education as full mainstream inclusion. It then proceeds critically to examine the conceptual and legal limitations this interpretation involves, before developing arguments for a more neurodiverse and rights-based alternative. Under this new interpretation, states would be required not only to render mainstream education more inclusive, but also to provide alternative educational offers for when mainstream education is not able to provide a neurodiverse and rights-based inclusive education.

Keywords

children's rights – education – inclusive education – CRPD Art. 24 – disability – neurodiversity – autism – CRPD and CRC

1 Introduction

1.1 *Context and Aims*

International human rights law provides a strong recognition of the right to education (Lundy and O'Lynn, 2019). While being classified as an economic and social right, it carries crucial implications for the exercise of other civil and political rights due to its enabler effect (Courtis and Tobin, 2019). The extra importance of the right to education for disabled children, and among

them autistic children, is also commonly underlined in the literature (Cera, 2015). Despite this, studies regularly report the poor enjoyment of their right to education by autistic children (Merry, 2020; Goodall, 2021). Autistic children indeed suffer from poorest educational outcomes (Roberts and Simpson, 2016) and higher bullying instances (Mavropoulou *et al.*, 2020), even when compared with other disabled populations. While this situation is documented through a growing body of literature from the educational sciences, few legal papers have so far focused on the legal and conceptual questions raised by the right to education (McCowan, 2010; de Beco *et al.*, 2019), and even fewer have addressed the specific case of autistic children.

In international and European law, autistic children benefit from a triple protection of their right to education, through general, children-specific, and disability-specific texts and dispositions. Taken together, these texts provide for a right to availability and access to quality and inclusive education (Reyes, 2019). The present paper focuses on the legal concept of inclusive education, and the challenges that its current interpretation raises, especially for autistic children. As Goodman and Jinks (2004) developed, even when lacking direct coercive power, international human rights law can strongly influence states through persuasion and acculturation processes. As such, the interpretation given to inclusive education at the international or European level will impact the national laws and policies and will ultimately affect the daily lived experience of their right to education by autistic children.

It is acknowledged that the legal framework of autistic children's right to inclusive education is similar to that of other disabled children. As such, part of the reflections developed in this paper can apply to other disabled populations. However, as it will be further demonstrated throughout the paper, the specificities of autistic children allow better to highlight certain shortcomings within the current interpretation of inclusive education (Croydon *et al.*, 2019). In addition, autism also entails reconsidering notions such as normality, functionality, disability and intelligence (Barua *et al.*, 2019). Because of this, and as noted by Jordan (2008), 'getting it right for children with ASD [autism spectrum disorder] can be a way of getting it right for everyone' (14).

This paper therefore aims to provide a critical analysis of the current legal interpretation of inclusive education, as provided for in international and European law, by highlighting the conceptual and legal shortcomings it is faced with. To do so, it will use the specific case of autistic children and will adopt a neurodiverse and rights-based approach. After providing the necessary definitions, this paper will present the legal framework and current legal interpretation of inclusive education, before critically analysing the issues it raises, and examining the legal grounds and potential outlines of an alternative interpretation.

1.2 *Definitions and Terminologies*

While acknowledging that there is no consensus on the preferred terminology (Lorcan *et al.*, 2016), this paper will adopt an identity-first language (i.e., autistic children; disabled children) and will use the term “autism” to encompass all shades of the autism spectrum. Autism is a neurodevelopmental condition characterised by differences in communication, social interactions, sensory processing and cognitive functioning (APA, 2013; Runswick-Cole *et al.*, 2016; WHO, 2019). The manifestations of autism vary from one individual to another, also depending on potential co-occurring conditions, and can evolve over time (WHO, 2022). It is considered the most prevalent neurodevelopmental disorder (Goodall, 2021), with an estimated incidence rate ranging from 1 in 100 to 1 in 44 children (CDC, 2022; WHO, 2022).

Autism is also at the core of the neurodiversity theory and movement (Lollini, 2018). Neurodiversity theory can be broadly defined as acknowledging the existence of non-pathological, neuro-cognitive variations among the human species (Chapman, 2020a). In other words, the neurodiverse approach considers autism – and other conditions such as ADHD or Tourette syndrome – simply as different neurological functioning (Jaarsma and Welin, 2012). These neurological differences are also sometimes compared to those of gender or race (Singer, 2017). In addition, or sometimes instead of, being disabled, neurodivergent people are then considered as a type of minority, in opposition to the neurotypical majority (Milton, 2017; Chown, 2020). As such, they are marginalised by neurocentric or neuronormative structures and institutions (Chapman, 2020b; Huijg, 2020). As legal feminism has fostered the contestation of patriarchal structures and the production of feminist counter-narratives, neurodiversity allows us to challenge neurocentric assumptions and to provide neurodiverse interpretations (Bertilsson-Rosqvist *et al.*, 2020). In this paper, neurodiversity theory will therefore be used as an analytical and critical lens applied to the current interpretation of inclusive education.

Regarding the terminologies of the different forms of schools and education, this paper acknowledges the power that language has in shaping worldviews and understandings. It also recognises that terms such as *mainstream* or *special* can be problematic and contested (Runswick-Cole and Hodge, 2009; Graham 2020). However, both for intelligibility reasons and to facilitate the discussion with the current literature, the present paper will make use of these terminologies. For the purpose of the paper, mainstream education refers to the regular education provided to children by their state. It covers both notions of settings (e.g., mainstream schools and classrooms) and teaching (e.g., national curriculum, etc.). Special education refers to the education specially provided to some children by their state, whether based on their diagnostics, educational needs

or other criteria. It also covers both notions of settings (e.g., special schools and classrooms) and teaching (e.g., special curriculum, etc.).

2 Legal Framework and Current Interpretation of Inclusive Education

2.1 *Legal Texts and Mechanisms*

Several international institutions have contributed to develop the notion of inclusive education for disabled persons/children. This endeavour has been realised both through soft law (e.g., the UNESCO Salamanca statement [1994]) and hard law. For example, the European Social Charter (R) (1996) contains a specific disposition (Article 15 §1) recognising the right of persons with disabilities to education ‘in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private’. At the UN level, the Convention on the Rights of the Child ([CRC] 1989) also recognises the right of children with disabilities to special assistance, including for effectively accessing and receiving education (Article 23 §3).

However, the main explicit and legally binding requirement for inclusive education is found in the UN Convention on the Rights of Persons with Disabilities ([CRPD] 2006). Article 24 of the CRPD emphasises that the right to education of persons with disabilities should be realised, ‘without discrimination and on the basis of equal opportunity’ through ‘an inclusive education system’ (Article 24 §1). It is also the first legally binding text expressly to define the notion of discrimination on the basis of disability (Article 2).

In addition to formally recognising inclusive education, the CRPD has also been instrumental in enabling its realisation by expressly providing for the following legal mechanisms: support measures and reasonable accommodations. Support measures are general measures, that aim at adapting the education system so it can deliver substantial equality and inclusion. They can be very large (e.g., reorganisation of the whole educational system or curriculum) or focused (e.g., individual educational plans) in their target but apply to the whole of the system and therefore have a collective dimension (Cera, 2015). They can be viewed as a concrete translation and implementation of the right to inclusive education and are part of the accessibility requirement (de Beco, 2014). As such, they are subject to a progressive realisation obligation, which requires states to take all the measures necessary, to the maximum of their available resources, progressively to achieve the full realisation of the rights concerned (Article 4 §2 CRPD; CtRPD, 2016a, §29). As detailed by the

literature (de Beco, 2014; Cera, 2015), the Committee on the Rights of Persons with Disabilities¹ (CtRPD) in its General Comments Nos. 2 (2014) and 6 (2018) has indeed explained that the general principle of accessibility (Article 3 §6) is to be realised gradually within the maximum of available resources. It is, however, an *ex ante* duty and does not depend on the demand of any individual (Lawson, 2018).

The notion of reasonable accommodations is defined in Article 2 of the CRPD and is explicitly repeated in Article 24, which highlights its relevance to inclusive education (Quinlivan, 2019). Contrary to support measures, which can have an individualised target but operate on a systemic, organisational level, reasonable accommodations are directed to the individuals and their specific requirements in order to provide them with substantial equality (CtRPD, 2016a, §31; Equinet, 2021). They constitute an *ex nunc* duty (CtRPD, 2018, §24), existing upon the needs of an individual (de Beco, 2019b) and are of immediate application. Therefore, a denial of reasonable accommodations is constitutive of discrimination (CtRPD, 2018, §17–19). However, they are not unconditional.

Indeed, to be legally required, the accommodation has first to be reasonable. This characteristic is evaluated with regard to the relevance and effectiveness of the accommodation requested in ensuring substantive equality to the individual (*ibid.*, §25). In addition, the right to reasonable accommodations is legally limited by the notion of disproportionate or undue burden, and an accommodation that would create such a burden can therefore be legally denied (*ibid.*). On which basis to evaluate both the reasonableness and disproportionate or undue characteristics is not thoroughly detailed in the text of the CRPD, nor in its General Comments. Both the CtRPD and the European Court of Human Rights (ECtHR) have nonetheless started to provide additional precisions on this matter through their recent case law. For example, both have recognised the concept of indirect discrimination and the relevance of reasonable accommodations to combat those (*H.M. v. Sweden* no. 3/2011, §8.3 [CtRPD, 2012]; *G. L. v. Italy* no. 59751/15, §64–70 [ECtHR, 2020]). When evaluating a request for a reasonable accommodation, duty-bearers therefore have to take into account the particular circumstances and needs of the applicant in relation to the national legislation involved. However, states do enjoy a margin of appreciation in their evaluation (*Jungelin v. Sweden* no. 5/2011,

1 Both the Committee on the Rights of Persons with Disabilities, the Committee on the Rights of the Child and the European Committee of Social Rights are quasi-judicial bodies in charge of the interpretation and the monitoring of their respective conventions. They regularly review the national implementation of these conventions, provide general interpretation guidance, and receive individual communications or collective complaints.

§10.5 [CtRPD, 2014]; *Dupin v. France* no. 2282/17, §26 [ECtHR, 2019]) and, as expressly mentioned in the field of inclusive education (CtRPD, 2016a, §28), financial costs can justify a denial of reasonable accommodations. An undue or disproportionate burden can also stem from organisational or structural issues (Quinlivan, 2019), and the advantages or disadvantages that would be generated for third parties must also be considered in the evaluation (de Beco, 2019b). Thus, while reinforced by the CRPD, the legal mechanisms supporting inclusive education are nonetheless not illimited.

2.2 *Current Legal Interpretation of Inclusive Education*

While inclusive education has become a common concept in the education, disability and rights discourse over the last decades, there is yet no agreement on what it entails (Foreman, 2021; Winter, 2020). To date, debates are still ongoing both in social, educational and legal sciences mainly between the full inclusionists and the moderate inclusionists. Briefly described, the former defend the full-time inclusion of all children in the same settings, age-based peer groups and curriculum – for example based on universal design for learning (UDL) (Kauffman and Hornby, 2020; Boyle and Anderson, 2021), while the later advocate for the inclusion of disabled children in and within diverse settings, peer groups and curricula (Hyatt and Hornby, 2017; Boyle and Anderson, 2021; Goodall, 2021).

The drafting process of Article 24 already reflected these debates. Indeed, the original version of the text provided not only for a right to mainstream inclusion, but also required that:

Where the general education system does not adequately meet the needs of persons with disabilities, special and alternative forms of learning should be made available.

Working Group on the CRPD, 2004

This reflected the initial intention of offering the choice between mainstream and/or special education to children with disabilities and their parents. As the daily summaries of discussion and statements submitted by NGOs attest (see Ad Hoc Committee, 2005a, 2005b, 2006; Global Deaf Connection, 2006; Rescare, 2006), providing a possibility of choice was indeed strongly supported both by some state parties, deaf and/or blind people's organisations, and at least one association for autistic persons. However, throughout the sessions and discussions, other state parties and NGOs advocated for removing this possibility of choice and focusing only on inclusive education in mainstream settings (see Ad Hoc Committee, 2005a, 2005b, 2006; CSIE, 2006). Their argument

was that keeping a choice between special and mainstream education, even though intended for children and parents, would allow states to disengage from their commitment to render mainstream settings inclusive.

In the end, the article refrained from formulating a right to choose, anchoring inclusive education in an anti-discrimination and non-exclusion logic (Anastasiou *et al.*, 2018; de Beco, 2019b). It is to be noted that this final version of the article was reached with difficulty, only after private negotiations (Kanter, 2019), and that even proponents of a full inclusion, such as the Centre for Studies on Inclusive Education, had already identified that this approach would be more challenging for some disabled children, and especially for autistic children (Shaw, 2013).

While debates on the interpretation of inclusive education appear to have been going on since its first legal formulation, the current position of the CtRPD seems clearly in favour of full mainstream inclusion, as seen in its related General Comment No.4 (2016a). Indeed, although no mention of special or mainstream education is made when defining inclusion (§11), the comment still strongly supports full mainstream inclusion as shown through the definition of segregation (§11) or in the budgetary considerations (§40, §70). As noted by Byrne (2022), throughout its Concluding observations, the CtRPD has also retained mainstream inclusion as the only proper form of inclusive education. For example, in its last monitoring of the CRPD implementation by the UK, it criticised, ‘the persistence of a dual education system that segregates children with disabilities in special schools, including based on parental choice’ (CtRPD, 2017, §52 (a)). It also considered the establishment by Portugal of “model schools” for deaf, blind, deaf-blind and visually impaired students, as well as for students with autism [as] a form of segregation and discrimination’ (CtRPD, 2016b, §44). More recently, it has also urged both Spain and Albania to ‘grant all students with disabilities, regardless of their personal characteristics, the same right to access inclusive learning opportunities *in the mainstream education system ...*’ (CtRPD, 2019a, §46; CtRPD, 2019b, §40 – emphasis added). The current interpretation of the CRPD therefore clearly relates inclusive education to full mainstream inclusion. Availability and access to special education is at best not required, sometimes even considered as in contravention of inclusive education, this without consideration for the quality – or lack thereof – of the education provided. Similarly, the Committee on the Rights of the Child (CtRC), which was originally in favour of a moderate inclusion realised through a continuum of offers (CtRC, 2006, §66), seems to have recently aligned its interpretation with this of the CtRPD, now privileging full mainstream inclusion (Besson and Kleber, 2019; Veerman, 2022).

On the European front, the European Committee on Social Rights (ECSR) seems to follow a similar interpretation, although its formulation appears

rather confusing, or even contradictory (e.g., in *A.E.H. v. France* no. 81/2012 [2014]). Similarly, the ECtHR in turn has expressed a strong support to mainstream inclusion in the case *G.L. v. Italy* ([no. 59751/15] 2020) considering it as ‘the most appropriate way’ (§53 – author’s translation) to ensure the fundamental principles of non-discrimination and universality in the exercise of their right to education for children with disabilities. The Court interpretation was, however, strongly criticised in a concurring opinion of Judge Wojtyczek, as can be read below:

Mainstream inclusion² is without doubt the best solution for many disabilities. However, it does not always allow taking into account the specific needs of children with certain disabilities ... Some autistic children in particular have a specific need for safety, tranquillity and acceptance. Scientific studies show that for these children mainstream inclusion² can create heavy suffering and hinder their development and well-being, while special schools give way better results and allow a reduction of their suffering. Consequently, prescribing mainstream inclusion² by presenting it as the most appropriate education in general raises questions and reservations (§5 – author’s translation).

The interpretation of inclusive education only as full mainstream inclusion has also been highly criticised both by scholars (Hornby, 2015, 2021; Kauffman *et al.*, 2018; Chennat, 2019; Veerman, 2022) and organisations of persons with disabilities (WFD, 2018; National Autistic Society, 2021), particularly when concerning autistic children (Ravet, 2011; Goodall, 2018; Merry, 2020; Acevedo and Nussbaum, 2021). As it will be developed below, the full mainstream inclusion doctrine indeed appears to rely on a number of conceptual and legal shortcomings, rendered particularly apparent in the case of autistic children, and highlighting the need for a more neurodiverse and rights-based approach.

3 Critical Analysis of the Current Interpretation of Inclusive Education

3.1 *Conceptual Shortcomings and the Need for a Neurodiverse Approach*

3.1.1 Disability as a Homogenous Category

A first conceptual shortcoming found in the current interpretation of Article 24 is that it appears to rely on the conception of disability as a homogenous

² Here the literal translation would have been *inclusive education*, but *mainstream inclusion* was retained instead as it was more in line with the semantic translation.

category (Chennat, 2019). It is not a matter here to question the relevance of viewing disabled people as a specific marginalised and discriminated population, nor to question the adoption of a dedicated human rights convention. However, while a homogenous, categorial approach at the level of disability in general might be appropriate to conceptualise some human rights – such as the right to life or freedom from torture – it appears less founded when it comes to the right to education. Indeed, some disabilities – whether in their nature or severity – will have inherent bearings on education and learning, while others will not (Kauffman *et al.*, 2016).

The CRPD provides a rather incomplete recognition of this diversity. On one hand, it does acknowledge the diversity of persons with disabilities in its Preamble (i), leading scholars to conclude that, ‘identifying and dismantling barriers does not allow for a uniformity of approach’ (Lord, 2018: 18). However, when it comes to education, it currently fails fully to recognise and match this diversity of disabilities with a diversity of approaches (Anastasiou *et al.*, 2018). Indeed, with the exception of deaf and/or blind children, the current interpretation of Article 24 does not allow for this diversity to be fully considered. Instead, it relies on a homogenous approach to disability and thus a homogenous conception of disabled children’s right to inclusive education, largely based on a body-related disability model at the expense of mind-related disabilities (Anastasiou *et al.*, 2018). The lack of acknowledgement of (neuro-) diversity, and its bearing on education and learning, then leads to an interpretation that greatly fails children whose disabilities are not physical, such as autistic children (Anastasiou and Kauffman, 2011).

As Arduin (2019) explains, this is reinforced by the fact that, although Article 24 has been written as an anti-discrimination right, it is currently interpreted as a universal right. Indeed, contrary to other articles such as Article 4 or 5, Article 24 does not refer to *all* people with disabilities. An anti-discrimination right will by nature benefit some members of the population covered but not all. Thus, applying a universal interpretation to such an article appears inconsistent with its nature and aim. Article 24 should therefore not be interpreted as establishing a duty to educate all disabled children in mainstream schools (*ibid.*) but should allow for the diversity of disabilities to be matched with a diversity of educational alternatives (Low, 2006; Chennat, 2019).

3.1.2 *A Narrow and Neurocentric Conception of Inclusion*

Another conceptual shortcoming attached to the current interpretation of inclusive education is the narrow and neurocentric conception of inclusion that it implies. Indeed, overall, the CRPD emphasises the importance of disabled people’s inclusion in their community and in wider society (CRPD, Article

3 §3). This can be described as a holistic inclusion, both in different areas of life, and in present and future times (Friedel, 2015; Arduin, 2018). However, when it comes to education, this holistic understanding seems to be reduced to the narrow conception of inclusion as immediate inclusion in mainstream schools (Norwich and Koutsouris, 2021; Schwab, 2021). However, while sometimes supporting and allowing holistic inclusion, mainstream education can also hinder it. Indeed, for some disabled children, the best way to secure inclusion in the wider community after leaving school lies in receiving special education in separate settings (Hornby, 2011, 2015). Therefore, many scholars advocate for re-situating inclusion in a context of diversity (Chennat, 2019), underlining that inclusive education can and should be practised through a variety of educational settings and options (Winter, 2020; Boyle *et al.*, 2021; Forlin and Chambers, 2021).

On this note, it appears important to address the question of so-called segregated settings. Indeed, the current interpretation of Article 24 equals the education of disabled children in special settings to segregation (CtRPD, 2016a, §11). However, while there is no denying that special schools can be – and have been – vectors of poor-quality education and segregation, these characteristics should not be interpreted as inherent to those settings but rather as contextual (Cigman, 2007). It seems here necessary to clarify that the adage “separate is not equal” (derived from the US Supreme Court decision *Brown v. Board of Education* [1954]) does not apply similarly to the questions of race and of disability (Kauffman *et al.*, 2016). This is because, while race does not bear any direct implications on education and learning, as previously mentioned, disability can. Therefore, for some disabled children, being educated in separate settings might be the best option to be provided with an education of equivalent quality to that of non-disabled children, or of other disabled children (Slee, 2008; Byrne, 2022). What is more, as both disabled children and their families report, especially in the case of autistic or deaf and/or blind children, special schools can be experienced as the most inclusive option (Banks, 2021; Foreman, 2021; Byrne, 2022). Attributing an inherent segregationist characteristic to special settings then denies the experience of all these children (Cigman, 2007; Norwich and Koutsouris, 2021). This is not to say that systematic placements of disabled children – or children with a specific disability – in separate settings would not amount to segregation. However, a decision to educate a disabled child in separate settings, taken through the consideration of their disability, needs and interests in light of the current possibility of accommodations in mainstream schools (Chennat, 2019; Veerman, 2022), does not amount to segregation.

Over-focusing on full mainstream inclusion also carries the neurocentric assumption that inclusion and socialisation can only happen in contact with non-disabled children. However, as Kauffman and Badar (2016) explain, ‘children in special schools and classes can have an active, meaningful social life’ (56). Asserting otherwise is not only neurocentric but also at odds with some of the fundamental principles of the CRPD (e.g., Article 3 §4). In addition, as Hornby (2015) underlined, ‘for many children with SEND [special educational needs or disability] it may be more important to be with peers with shared interests and similar abilities or disabilities to themselves, than peers of the same chronological age’ (241). Regarding autistic children, studies of their lived experience report that they define inclusion as belonging and being accepted, rather than being included in any specific type of schools (Goodall 2021; Lüddeckens, 2021). They also express a marked preference for socialising with similar peers (e.g., autistic, SEND) rather than neurotypical peers (Rainsberry, 2017; Warren *et al.*, 2021), even when given equal opportunity to do so (Chen *et al.*, 2021).

Inclusive education should therefore focus on providing the best education possible to disabled children in order to foster their holistic inclusion. While not irrelevant, the questions of where and with whom this happens should not be determinant.

3.2 *Legal Shortcomings and The Need for a Rights-Based Approach*

3.2.1 Internal Dichotomy of Article 24

In parallel of conceptual issues, the current interpretation of inclusive education faces legal limitations that appear to hinder its relevance, especially when it comes to certain disabled children such as autistic children. Indeed, one of the issues with the current interpretation of inclusive education as full mainstream inclusion is that, while the inclusion required is absolute, the legal mechanisms allowing its realisation are not. As developed previously, both support measures and reasonable accommodations are limited, respectively by the notions of progressive realisation and of disproportionate or undue burden. This dichotomy between the current absolute goal and the limited means of inclusive education has been noted with concern by legal scholars. For example, Byrne and Lundy (2011) have described the mechanism of reasonable accommodations as a ‘double-edged sword’ (12) that could turn out to be the “Achilles” heel of the CRPD’ (16). This dichotomy between goal and means also underlines the failure of the current interpretation of inclusive education to recognise the diversity of and differences between and within disabilities. The risks and issues that it raises are especially marked for children

with mind-related disabilities, including autism, for whom accessibility and reasonable accommodations are harder to identify and provide (Anastasiou *et al.*, 2018). As developed below, this legal limitation is indeed highlighted by the case of autistic children and their sensory specificities.

A major and specific challenge for autistic children's inclusion, especially in mainstream settings, is linked to their sensory specificities. Sensory specificities are a common feature of autism, which is more and more described as a sensory disability (Donellan *et al.*, 2010; Bogdashina, 2016). Sensory related anxiety in (mainstream) school settings are commonly reported in studies of autistic children's lived experience. Noisy, crowded and chaotic spaces like corridors, cafeterias, playgrounds or even classrooms are often cited as triggering (Rainsberry, 2017; Goodall and MacKenzie, 2019; Aubineau and Blicharska, 2020; Tomlinson *et al.*, 2021). In response to these sensory specificities, autistic children are often left to resort to avoidance strategies, such as hiding in the toilets (Goodall, 2019), avoiding collective areas (Hill, 2014; Goodall and MacKenzie, 2019; Aubineau and Blicharska, 2020), or temporarily withdrawing from classrooms (Goodall, 2018; Tomlinson *et al.*, 2021; Warren *et al.*, 2021). However, answering autistic children's sensory specificities with reasonable accommodations is particularly difficult (Moore, 2007; Wing, 2007; Croydon *et al.*, 2019) since, as Symes and Humphrey (2010) explain, their 'preference for ... low sensory stimulation is at odd with the noisy, bustling and often chaotic environment of mainstream schools' (479). The few reasonable accommodations that have been developed so far, such as the use of noise cancelling headphones or withdrawal rooms, cannot be seen as inclusive, since they rely on autistic children coping with their environment rather than the environment adapting to their specificities (Graham, 2020). Contrariwise, special schools designed for autistic children primarily aim at providing a sensory-friendly educational environment (Merry, 2020). In this regard, the two main adjustments commonly identified as responding to autistic children's sensory specificities in school environment are class size reduction and sensory stimuli reduction (Goodall, 2021; Warren *et al.*, 2021). However, and while there has not been international jurisprudence on this yet, these adjustments seem unlikely to be granted as reasonable accommodations in mainstream settings. Indeed, it appears that they would qualify as creating an undue and disproportionate burden, either due to their financial and organisational costs – class size reduction – or due to their impact on other children's needs – sensory stimulation reduction. It could be argued that such adjustments represent systemic support measures rather than reasonable accommodations and could therefore still be granted through the legal framework of inclusive education and implemented through the concept of UDL (Article 2 CRPD; Alchin, 2014; Winter,

2020). However, support measures are covered by the principle of progressive realisation which, as its name implies, is not immediate and is dependent on available resources. In addition, UDL does not adequately answer a series of issues, including that of conflicting needs (de Beco, 2016; Ptacek, 2021). Therefore, even when applied to their full extent, the legal mechanisms of Article 24 might not allow realising the right to education of all autistic children in mainstream settings. As such, the dichotomy between the current goal and mechanisms of inclusive education leaves at least some autistic children with no solution.

3.2.2 Lack of a Rights-Based Approach

In addition to internal inconsistencies between its goal and means, the current interpretation of Article 24 also carries potential conflicts with other human rights, including the right to education itself. Indeed, inclusion is only one facet of the right to education. Whether in Article 24 itself or in other human rights provisions, such as Article 29 §1 of the CRC, the quality or aims of education are also an inherent component of the right to education (Reyes, 2019; Gillett-Swan *et al.*, 2022). However, by over-focusing on inclusive education, understood as full mainstream inclusion, the current interpretation of Article 24 leads to the undermining of the right to quality education (Anastasiou *et al.*, 2018; Foreman, 2021), especially for children for whom reasonable accommodations are not easily identifiable or implementable. That is why scholars have underlined the necessity to re-centre the focus from inclusion to quality, to make sure that the quality of the education provided to disabled children is prioritised over the questions of settings and location (Schwab, 2021; Hornby, 2011, 2015).

Human rights are also indivisible and interdependent (Cera, 2015; Tobin, 2019). Thus, besides its plural requirements, the right to education of autistic children has to be conceptualised and operated in accordance with their other rights. Which rights are involved and how will depend on each individual situation, and a full analysis of the interdependence of the right to education and other human rights would be out of the scope of this paper. Nonetheless, the following rights appear particularly important to consider in the case of autistic children.

First, education should concur to the realisation of the holistic development of children. In addition to being one of the aims of education (Article 29 §1 CRC; Article 24 §1 CRPD), the right to development is also one of the general principles of the CRC (Article 6 §2 CRC) and the interconnection between the right to education and the right to development is well established (Peleg, 2019; Peleg and Tobin, 2019). This also requires that children are protected from all

forms of violence, including bullying, harassment or the denial of their educational needs (Article 19 CRC; Tobin and Cashmore, 2019). Besides, when deciding on the educational placement of a child, their best interest should be a primary consideration. This is recognised both by the CRPD (Article 7 §2) and the CRC (Article 3 §1) and requires taking into account the individual developmental needs, and the social and cultural context of the child (Eekelaar and Tobin, 2019). To do so, any presumptions – such as the prioritisation of mainstream inclusion – should be examined against the specific situation of each child (*ibid.*). Both the CRPD (Article 7 §3) and the CRC (Article 12) also provide for children to be allowed and supported to express their opinion and have it duly taken into account during the decision process. This is indeed required not only as an independent right, but also as a contributing element of the realisation of their right to education (Lundy *et al.*, 2019). Finally, both conventions also protect the right of (disabled) children to preserve their identity (Article 8 §1 CRC; Article 3 §8 CRPD).

However, in the case of autistic children, it appears that full mainstream inclusion does not necessarily align with the respect of these rights. Indeed, there has been growing evidence that such inclusion does not represent the best option for all autistic children and can result in a denial of their rights (Low, 2006; Cigman, 2007; Merry, 2020; Goodall, 2021). The study of their lived educational experience consistently reports a lack of understanding and acceptance of autism, higher instances of bullying – both compared to other disabled populations and compared to special schools – and school-related anxiety (see for example Danker *et al.*, 2016; Williams *et al.*, 2019; Mavropoulou *et al.*, 2020; Lüddeckens, 2021) leading to poor participation and outcomes (Roberts and Simpson, 2016). Studies also show that mainstream inclusion often leads to autistic students being ostracised, which increases their risks of developing low self-esteem and mental health issues (Williams *et al.*, 2019; Foreman, 2021). Some authors also denounce the objectifying and normalising tendency of mainstream inclusion towards autistic children (Acevedo and Nusbaum, 2021). These accounts of mainstream educational experience therefore appear rather contradictory to an education that would allow autistic children to enjoy and exercise their rights and attain and benefit from a holistic inclusion.

On this note, it appears important to underline that it is not enough to answer that instances of failed mainstream inclusion are not real inclusion, but only integration (de Beco, 2016; CtrPD, 2016, §11; Graham, 2020). This is not to say that this assertion might not be founded in some cases, but it is not, and cannot be, systematically valid. First, because such an assertion would contradict a basic feature of scientific hypothesis, namely falsifiability (Low, 2006: 9). Secondly, and more importantly, because as developed in this paper, there

are limits to the reasonable accommodations that can be provided and to the extent to which support measures such as UDL can be applied in a single setting (de Beco, 2016). Therefore, even though mainstream education would be made inclusive to the full extent required by Article 24, full mainstream inclusion, in that it requires the sameness of settings, age-based peer groups and curriculum, might nonetheless remain a hindrance to the realisation of the right to education of at least some autistic children. As a result, many scholars have deplored that the current interpretation of inclusive education is neither evidence- nor rights-based but supported by philosophical constructions and dogma (Kauffman and Hornby, 2020; Foreman, 2021). Thus, an alternative interpretation of inclusive education which would adopt a neurodiverse and rights-based approach appears needed, and the sections below will present its legal grounds and possible outline.

4 Towards a Neurodiverse and Rights-Based Interpretation of Inclusive Education

4.1 *Legal Grounds for An Alternative Interpretation of Article 24*

As seen through the *travaux préparatoires*, the question of special educational alternatives was one of the most debated topics during the draft of Article 24 (Kanter, 2019). Starting from mentioning an express right to choose between mainstream and special education, the text of the article strenuously evolved towards a final version seemingly excluding alternative educational options. However, as de Beco (2019b) explains, while the goal of inclusion was agreed upon, neither its scope nor its location are specified in the article. In addition, the formulation of the text is actually less assertive than it first seems (Anastasiou *et al.*, 2018).

First, as regularly reaffirmed by scholars, while there is no express duty to provide special education, there is also nothing in Article 24 that would proscribe it (Shaw, 2013; Broderick, 2015; Friedel, 2015; de Beco, 2016; Arduin, 2019; Kanter, 2019). In addition, while prohibiting the exclusion of disabled persons from the ‘general education system’ based on their disability (§2 (a)), no mentions of mainstream or regular education are made in the text. Instead, the first paragraph refers to the notion of an ‘inclusive education system’ without defining any of these terms. As it was expressly noted during the daily discussions, a system does not have to be homogenous (Anastasiou *et al.*, 2018) and can therefore consist of diverse educational alternatives.

The article also refers twice to the notion of “environments that maximise academic and social development”, which has been described as a highly

confusing formulation and has given rise to diverse interpretations (de Beco, 2019a). The first mention of this notion is made in reference to the general disabled population (in §2 (e)) and is accompanied by the additional requirement that these environments are 'consistent with the goal of full inclusion'. However, as developed previously in this paper, full inclusion might refer to a holistic inclusion rather than inclusion in mainstream education. Authors have also pointed out that this mention appears as the replacement of a previous version providing for a right to alternative education, therefore interpreting it as an opening to a plurality of educational options, compatible with a holistic inclusion (de Beco, 2019a). Its second mention appears in a sub-paragraph (§3 (c)) dedicated to 'persons, and in particular children, who are blind, deaf or deafblind' and this time without the express requirement of consistency with full inclusion. Although debated, this has been interpreted as securing a right to special or alternative education for deaf and/or blind children, including in separate settings (de Beco, 2014). Some authors have also extended the covering of this paragraph to children with sensory or communication disabilities in general (de Beco, 2014; Cera, 2015). Autism has for long been formally recognised as, in part, a communication disability (APA, 2013; WHO, 2019), and has also progressively started to be acknowledged as a sensory disability (e.g., Bogdashina, 2016). Furthermore, the CtRPD itself does mention autistic persons in its interpretation of Article 24 §3 (2016a, §35), which could therefore indicate that they are covered by this disposition. Under such an interpretation, autistic children would then, as deaf and/or blind children, have a right to special or alternative education in separate settings. Thus, while Article 24 of the CRPD has been used as a reference to promote the full inclusion doctrine, it seems that a more nuanced reading could lead to a different interpretation.

It is apparent that the CtRPD has so far been prioritising the interpretation of inclusive education as full mainstream inclusion, partly joined in this by the CtRC, the ECSR and the ECtHR. However, as developed in this paper, dissident voices have also been raised, calling for a more cautious interpretation that would respect the diversity of disabled children and the limits of legal prescription on non-legal matters. In addition, these institutions have also acknowledged that the interpretation of their texts is evolutive and must be contextual and preserve their internal coherence (Broderick, 2015; Friedel, 2015; see also Articles 31 and 32 of the Vienna Convention [UN, 1969]). Indeed, although human rights determine universal standards and aims, their interpretation and application need to be contextualised (de Beco, 2016). As developed previously, human rights are also interdependent and indivisible, and the right to inclusive education must therefore be consistent with other children's rights. As such, there seems to be strong legal grounds for a more nuanced

interpretation of Article 24 that would focus on developing a neurodiverse and rights-based inclusive education system, rather than systematic full mainstream inclusion.

4.2 *A Neurodiverse and Rights-Based Inclusive Education System*

A more nuanced reading of Article 24 would indeed allow the development of an alternative conception of inclusive education that would rely on a diversity and continuity of educational alternatives throughout the national education system. Such a system would account for the previously identified conceptual and legal issues currently found with the full (mainstream) inclusion doctrine. By offering a variety of educational options in diverse settings, peer groups and curricula, it would address the question of diversity, holistic inclusion, (un)reasonable accommodations and conflicting needs. It would also integrate the need of a neurodiverse and rights-based approach within the conception and implementation of a quality inclusive education. In the case of autistic children, this would allow better consideration of their sensory, communication and social specificities, on an evolutive and case-by-case basis.

The concrete forms such an inclusive system could take are diverse and will depend on the national context. The social and educational sciences literature, however, provides some illustrations of what it could resemble. To bypass a binary opposition and to allow for consideration of budgetary constraints, special and mainstream education should first be conceived jointly rather than separately (Ravet, 2011; Veerman, 2022), thus becoming essential elements of a quality inclusive education system (Hornby, 2021). Special education could then be not only an alternative to, but a facilitator of mainstream inclusion (Ainscow, 2006; Cera, 2015). In addition, quality, diversity and rights should be primordial considerations and requirements in any educational alternatives (Kauffman *et al.*, 2018; Hornby, 2021; Veerman, 2022) which should also be child-centred (Goodall, 2018, 2021). As such, while the priority might be given to mainstream inclusion – and rendering mainstream education inclusive – states should still be required to provide alternative educational offers for when mainstream education is not able to support a neurodiverse and rights-based inclusive education.

5 Conclusion

The current interpretation of inclusive education as full mainstream inclusion is faced with serious conceptual and legal limitations, which turn out to be particularly acute in the case of autistic children. While this paper recognises

the value of mainstream inclusion, and the constant efforts needed in this direction, it however highlights the shortcomings found in the *full* mainstream inclusion doctrine, and advocates for alternative forms of inclusive education. Indeed, although Article 24 of the CRPD has been used to promote full mainstream inclusion, it seems that a more nuanced reading of its text allows – if not calls for – a different interpretation. Inclusive education could then be conceived as education in a neurodiverse and rights-based inclusive system that would cater for the diversity and complexity of disabilities by offering a range of diverse educational options with diverse settings, peer groups and curricula. Such a conception will, however, raise new questions, as it will necessarily imply judgment and decisions to be made (Kauffman *et al.*, 2016). It will also have to be consistent with quality education (Kauffman *et al.*, 2018) and with the wider environment of children’s rights (Veerman, 2022). Thus, further research and discussions appear to be needed on how to best conceive, develop and operationalise such neurodiverse and rights-based inclusive education systems.

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