

Monitoring the Implementation of the Convention on the Rights  
for Persons with Disabilities: A Comparative Analysis of Judicial  
Decisions in the European Union, Colombia and Mexico

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## INTRODUCTION

In 2008, the first international binding document specifically intended for the protection and promotion of the rights of persons with disabilities entered into force: the *Convention on the Rights of Persons with Disabilities* [CRPD]. It is not a treaty that creates new rights, but rather recognizes disability as a human rights issue and the importance of the role of governments and society in eliminating the long practice of social oppression, and the removal of physical and attitudinal barriers faced by people with impairments. The adoption of the CRPD in 2006<sup>1</sup>, was the culmination of a long world wide self-advocacy movement that pushed “from below” (Sabetello, 2014: 14) towards the recognition of persons with disabilities as subjects of the law and right-holders, as the means to achieve equality and full participation in society.

The CRPD obliges party States to “recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, party States shall ensure an inclusive education system at all levels and life long learning” (Art. 24.1)<sup>2</sup>. Therefore, the international human rights community recognizes inclusive education as the most appropriate system under which universal and nondiscriminatory education can be achieved.

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<sup>1</sup> The CRPD was adopted in 2006, during the sixty-first session of the General Assembly by resolution A/RES/61/106. In accordance with its article 42, the Convention was opened for signature as of 30 March 2007, entering into force “after the deposit of the twentieth instrument of ratification or accession” (CRPD, article 45), which was on May 3<sup>rd</sup>, 2008. For more information on the status of signatories: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=iv-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en)

<sup>2</sup> This applies for elderly persons as well as children.

In an attempt to answer the research question: to what extent has the adoption of the Convention on the Rights of Persons with Disabilities [CRPD] impacted judicial decisions on inclusive education in Mexico, Colombia and the European Union?, this study adopts a comparative perspective of judiciary decisions in order to explore the impact of the ratification of the CRPD in the advancement of the right to inclusive education in the selected party States Mexico and Colombia, and region, the European Union.

For that purpose, the thesis is divided in six sections –the Introduction and five Chapters-. On this section, the following paragraphs will cover first the scope of the problem, which explores the status of persons with disabilities in relation to their right to education, and the role of the judges as political actors that actively participate in decision making and standard setting that affect the every-day life of millions of persons; second, the justification and methodology followed by the study are presented. The first chapter introduces the conceptual framework of the indicators used as the analysis tool. Chapter II refers to the analysis of the judicial decisions of the European Court of Human Rights; Chapter III does it for the rulings of the Constitutional Court of Colombia; while the fourth Chapter presents the results found within the sentences of the Supreme Court of Mexico. Concluding, Chapter V discusses the comparisons of the contributions of three judicial systems in the protection of the right to education for persons with disabilities.

### **Scope of the Problem**

It is estimated that around one billion people, or 15% of the world’s population, are living with disabilities (World Bank, 2016). By far and large, persons with disabilities are “invisible” in most societies; they are in little or no ways integrated into community life, often discriminated and stigmatized, seen as a mere object of charity and benevolence.

According to UNICEF persons with disabilities are among the world's most marginalized groups, "often caught in a cycle of poverty and exclusion" (UNICEF, 2013: 29; World Bank, 2016). The consequences of being segregated from society are broad. Persons with disabilities are largely denied access to the general school system, which means they will likely be denied other rights as they grow older such as the right to employment, live independently in community, access to justice, to choose medical treatments, and to fully participate in society (OHCHR, "Human Rights of persons with disabilities"; WHO, 2011: 205).

The human right to education is pivotal in advancing all disability rights. As recognized by the United Nations Committee on Economic, Social and Cultural Rights "education is both a human right in itself and an indispensable means of realizing other human rights" (CESCR, 1999: 1). It is considered an empowerment right by which adults and children can overcome poverty and participate in every aspect of society; indeed, there is a close relationship between a person's level of education and his or her integration into society. According to the United Nations, "[t]he right to education is a universal right recognized by international human rights law and, as such, applies to all persons, including persons with disabilities" (UN, 2013).

It is estimated that one third of the 58 million out-of-school children are children with disabilities (Saebone, 2015), and that the mean years of education of an adult person with disabilities is 3.89 years (WHO 2011: 231). These statistics are a confirmation that people with disabilities have historically been excluded from educational opportunities, which, as stated before, has hindered their participation in many aspects of life. Therefore, guaranteeing access to education for persons with disabilities is their "gateway to full

participation in society” (UNICEF 2013: 27). It will secure them a livelihood and apart them from risks like exploitation and abuse. Yet, as of today, children with disabilities are less likely to start, continue and finish school, compared to children without disabilities; although the gap is more pronounced in poorer countries, developed countries and those where the general enrollment rate is high, show the same pattern (WHO 2011: 205-9).<sup>3</sup>

Monitoring the implementation of Article 24 of the CRPD is not something done only in response of the obligation established in Article 35 of the Convention<sup>4</sup>, but it needs to be done in order to support States “to effectively implement the [CRPD] at national level and in empowering persons with disabilities to become increasingly aware of their rights” (UNOHCHR, 2010: 5). According to the UN, monitors should consider a variety of sources while collecting information, such as laws, State policies and programs related to the implementation of legislation, as well as decisions of judicial and quasi-judicial bodies (Ibid, 40).

Studying legal cases not only provides evidence of how the judiciaries are applying and interpreting rights, but can also give information as to whether or not they are actively participating in advancing those rights. Specially, because when a State’s legislator or executive fails to take the required measures by, in this case, the CRPD, or falls short in guaranteeing any right, the courts may not only directly apply the international legal

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<sup>3</sup> The data is based on the *World Health Survey*, which had a participation of 51 countries of the world.

<sup>4</sup> In accordance with article 35, paragraph 1, of the CRPD, each State Party undertakes to submit to the Secretary-General of the United Nations, for consideration by the Committee on the Rights of Persons with Disabilities, a report on measures taken to give effect to its obligations under the CRPD, specifically to Monitor progress made in promoting the enjoyment of the rights set forth in the treaties in the context of the promotion of human rights in general

provision but actually set standards and criterion that must be abided by. By doing so, courts are reinforcing their role as protectors of human rights (COE, 2014: 34) and consolidating themselves as the means to affirm, consolidate and expand fundamental rights (Sieder, et.al. 2011).

Moreover, due to the ‘legal globalization’<sup>5</sup> and ‘judicialization of politics’ the judges have now, more than ever, a very active role in decision making for the protection of human rights. Best said, judges and courts are now molding –and even sometimes elaborating- public policies by creating, interpreting and expanding the rights conferred in certain laws (Cepeda, 2011; Couso 2011; Epp, 1998). Therefore, monitoring the judicial decisions of the European Union, Colombia and Mexico and comparing them would contribute to assess, in a way in which no other monitoring process does, the impact of a specific international human rights norm in different regions of the world. That is to say, examining the decisions of three different judiciary systems would provide us with much more information of the extent of compliance than just an analysis of the incorporation of international law into national law.

## **Methodology**

The research uses a qualitative approach. Within this methodology, this research includes the analysis of the local and international human rights framework, including reports, documents and general comments of UN Organs. These human rights documents were closely read and analyzed with respect to the right to education and disability rights,

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<sup>5</sup> Term used to refer to the transnational dissemination of rules, institutions and legal practices. On the matter, See Santos, B. *La globalización del derecho: Los nuevos caminos de la regulación y la emancipación*, Instituto Latinoamericano para una Sociedad y un Derecho Alternativos, Bogotá (1998)



in order to identify the most important indicators related to the right to education for people with disabilities and create a ‘measurement tool’ that was used to analyze the judicial decisions and compare the outcomes. The indicators identified were: non-discrimination principle, reasonable accommodations, equality and equity, accessibility, other inclusive education principles –such as ‘no one-size fits all’ doctrine, participation in society, and inclusive education as a right of everyone-, and other barriers –such as the use of discriminatory language in decisions-.

The study takes two countries –Colombia and Mexico- and a region –the European Union- as analysis units. Choosing those units responded first, to the need of having two countries with enough social, cultural and economic similarities to draw a comparison from (Mexico and Colombia); and second, having an internationally recognized judicial leader in the advancement of human rights (European Union) to compare with. As to the similarities between Mexico and Colombia, first both countries are considered to be “developing countries”; second, they have a monist legal tradition; and third, despite the significant difference on their population, both countries allocate a very similar percentage of their budget to educational purposes.

Specifically, the investigation focuses on how judicial decisions of the highest court of each country/region<sup>6</sup> have changed before and after the ratification of the CRPD. For this purpose, the time frame established for the review of the judicial decisions is five years before and five years after each country/region ratified the Convention. Being for Mexico 2003-2007 and 2008-2012; Colombia 2006-2010 and 2011-2015; and the European Union 2006-2010 and 2011-2015. Nonetheless, the time frame for the Mexican case had to be

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<sup>6</sup> Mexico: National Supreme Court of Justice; Colombia: Constitutional Court; EU: European Court of Human Rights.

amplified as it ratified the CRPD very early on, which did not coincide with the exact time of adopting a national law; also, because the 2008-2012 period was pretty new for everyone working on disability rights, which would make it impossible to compare it with Colombia and the EU due to their more recent time frames.

## **CHAPTER I:** **CONCEPTUAL FRAMEWORK**

As part of the methodology, it was necessary to establish a conceptual framework that allowed the identification of the international standards on the matter of study, which was used to orientate the qualitative analysis of the available judicial decisions. Best said, the conceptual framework is the guide that was used to set the standards of each indicator to be found on the decisions that will allow the final analysis to study the extent to which the national and regional courts are incorporating these identified standards into their rulings and conclude whether or not the ratification of the CRPD has had any impact at all.

According to the United Nations, “[t]he right to education is a universal right recognized by international human rights law and, as such, applies to all persons, including persons with disabilities” (UN, 2013). These core principles of universalism and non discrimination of the right of persons with disabilities to education are present across several international documents, starting with Article 26.1 of the *Universal Declaration of Human Rights* (1948), which states, “everyone has the right to education”, and later strengthened by the legally binding *International Covenant on Economic, Social and Cultural Rights* (1976) and the *International Convention on the Rights of the Child*, which mandates States to achieve this right “on the basis of equal opportunity” (1990: Article 28.1) and without “discrimination of any kind, irrespective of the child’s...disability” (Article 2.1). In the regional scope, obligations are stipulated in the *Protocol of San*

*Salvador* (1999: Article 13)<sup>7</sup> and the *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities* (2001: Article III)<sup>8</sup>.

These international documents along with others such as the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (1994)<sup>9</sup> set the ground for the development of the *Convention on the Rights of Persons with Disability* (CRPD), which obliges party States “to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children” (Art. 7.1) and to “recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, party States shall ensure an inclusive education system at all levels and life long learning” (Art. 24.1). Therefore, the international human rights community recognizes inclusive education, with special support in mainstream settings (Shaw, 2014: 58), as the most appropriate system under which universal and nondiscriminatory education can be achieved, and most importantly, as the means to achieve full development of human potential and sense of dignity and self-worth, and to enable persons with disabilities to participate effectively in a free society (CRPD: article 24.1.b).

Once set the generalities of what Article 24 of the CRPD guarantees, the following indicators were chosen for the analysis: i) Non-discrimination clause; ii) Equity; iii)

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<sup>7</sup> Article 13.3(e) “Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies”.

<sup>8</sup> Article III.1(a) The states parties should undertake “Measures to eliminate discrimination gradually and to promote integration...in making available goods, services, facilities, programs, and activities such as...education”

<sup>9</sup>Specifically, Rule 6 is about education and mandates: “States should recognized the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings. They should ensure the education of persons with disabilities is an integral part of the educational system”.

Reasonable accommodation; iv) Accessibility, Availability, Adaptability and Acceptability; v) General principles of inclusive education; and, vi) Other barriers.

### **1. Non-discrimination clause**

The non-discrimination principle is the cornerstone of human rights law and it is considered *jus cogens*. In educational matters, the prohibition of discrimination is not subject to either progressive realization or availability of resources, but States have the immediate obligation to guarantee the access and exercise of the right to education without discrimination (CmESCR 1999: para. 31 & 43; CmRPD 2016: para. 40). Additionally, the principle of non-discrimination entails the immediate obligation to ensure non-exclusion of anyone from the educational system (CmRPD 2016, para. 13).

The non-exclusion or non-rejection clause urges States to take steps to remove all barriers and any form of discrimination that impede people with disabilities the right of access to education (Ibid, para. 40). On this matter, it is advised that education laws should explicitly forbid the denial of admission into mainstream schools- which includes discontinuing impairment-based assignment policies- and guarantee continuity in education, all reinforced by reasonable accommodation (HRC 2013: para. 26).

Article 24 of the CRPD recognizes the right of persons with disabilities to education, “[w]ith a view to realizing this right without discrimination” (CRPD: Article 24.1), which means that the States must ensure that they “are not excluded from the general education system on the basis of disability” (CRPD: Article 24. 2.a). For *discrimination on the basis of disability*, the CRPD understands:

“any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It

includes all forms of discrimination, including denial of reasonable accommodation”

Moreover, Article 5 of the CRPD prohibits discrimination and states that specific measures aimed to achieve real equality should not be considered discrimination under the Convention’s purposes. That is, States may discriminate in favor of persons with disabilities when it is necessary and justifiable to achieve equality. These types of measures are known as ‘positive discrimination’ or ‘affirmative actions’. On the matter, the Committee on the Rights of Persons with Disabilities (CmRPD) has stated that the CRPD can be breached when the State has failed, without objective and reasonable justification, to give differentiated treatment to persons whose situations differ significantly from others (2011, para. 8.3).

As to whether there has been an objective and reasonable discrimination or not, the Committee on Economic, Social and Cultural Rights (CmESCR) in its General Comment No. 20 states that the aim and effect of the measure or omission must be legitimate, compatible with the Covenant- in this case, the CRPD- and with the purpose of promoting welfare in a democratic society; additionally, the effects of the measure or omission must be proportionate to the aim sought (2009, para. 13).

The CmRPD also claims that, in order to ensure the right to education of people with disabilities, all forms of discrimination, direct and indirect, should be recognized and addressed by the Member States to identify and remove all “legal, physical, communication, social, financial and attitudinal barriers” (2006, para. 13) within the community and educational institutions. On indirect discrimination, the CmRPD observes that any measure that is applied in a natural manner “may have a discriminatory effect

when the particular circumstances of the individual to whom it is applied are not taken” (2011, para. 8.3).

Consequently, the indicators of non-discrimination I will be looking for in the judicial decisions are:

- Definition: whether the Court gives a definition at all or not, and if it gives its own or follows the CRPD’s.
- Prohibition of exclusion: whether the Court specifically states or not that exclusion is prohibited, as it is a form of discrimination.
- Immediate obligation of the State: whether the Court recognizes or not the immediate effect of the non-discrimination clause.
- Indirect discrimination: whether the Court recognizes or not different forms of discrimination, specifically measures that might constitute indirect discrimination.
- Justified discrimination: whether the Court considers or not that there has been an objective and reasonable differentiation between persons with disabilities and others that is proportional and pursues a legitimate aim. The measure can be either in favor or against persons with disabilities.

## **2. Equity and equality**

The definition of equitable education has shifted over the years and is often confused with educational equality. Equality is a principle that goes hand in hand with the non-discrimination clause and seeks to achieve an equal state of status and rights; it connotes sameness. On the other hand, to achieve equity a person’s context and background, opportunities and needs, should be considered. According to Green, a person

can be treated unequally, but justly, while “inequity always implies injustice” (1983: 324).

In the context of education,

“equity means that each student can benefit from the opportunities offered by the system. Education systems must therefore provide for substantive equality linked to outcomes. Equity needs to be ensured in access, process and results” (HRC 2013: para. 30).

While States should always aim for educational equality, when talking about traditionally discriminated groups, such as persons with disabilities, equality measures are not enough; hence, governments should take actions to guarantee an equitable education. Equity requires implementing and institutionalizing measures that help secure all children’s right to education to realize their potential and aspirations (UNICEF, 2010).

Ensuring equal opportunities is essential to increase access to education, improve its quality, and guarantee equity. To do so, States should promote actions that compensate for inequalities (HRC, 2011). Article 24 of the CRPD enshrines the right to education for people with disabilities on the basis of equal opportunities with others in the community. According to Kishore Singh, Special Rapporteur on the right to education, persons with disabilities are a group vulnerable to limited opportunities in education due to different types of barriers that need to be understood and challenged in order to develop effective education policies to guarantee equal opportunities in education (HRC, 2011). Equal opportunities should be granted in access, permanence, quality and advancement to higher education.

Another element to achieve educational equity and guaranteeing equality of opportunity is ensuring persons with disabilities the access to a judicial or administrative recourse. To do so, States must grant equality before the law to everyone, which means



that legal capacity must not be denied only on a personal trait such as disability (CmRPD 2014: para. 32), but on the contrary, persons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals (Ibid, para. 38).

Safeguarding equality before the law for persons with disabilities has two effects on the right to education. First, in case of a breach to the right, equal recognition before the law grants access to justice on an equal basis with others, which is essential for persons with disabilities to claim their rights. Second, the CmRPD affirms that inclusive education provides persons with disabilities- especially those with psychosocial and intellectual impairments- with the opportunity to develop the expression of will (2014, para. 49), which is very important to exercise their legal capacity, access to justice and claim their rights.

Furthermore, for rights to have real purpose, appropriate reparations must be available to redress violations (HRC 2013: para. 24). Appropriate reparations are those adequate, effective and prompt measures (GA, 2005) capable of terminating an arbitrary, unnecessary, or unjustified action or omission of the State that has resulted in the breach of a fundamental right; and those who are capable of preventing any further violation of the same nature (Despouy 1998: para. 260).

Consequently, the indicators on equity I will be looking for in the judicial decisions are:

- Equality of Opportunity: whether the Court recognizes or not equality of opportunity in education for people with disabilities. If that recognition translates into the protection of the petitioner's rights, or the Court just mentions it rhetorically failing to protect human rights.

- Equality before the law: whether the Court recognizes or not that people with disabilities are equal before the law, have legal capacity and access to justice.
- Reparations: whether the Court mandates or not appropriate reparations to redress violations.

### **3. Reasonable Accommodation**

Reasonable Accommodation is defined by the CRPD as:

“necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms” (Article 2, para. 4).

Any legislative definition of ‘reasonable accommodation’ should refer to the one that appears in the CRPD, and include its denial as an act of discrimination (UN 2007: 60). The modifications and adjustments, as enshrined in the CRPD and in terms of ensuring education for persons with disabilities, must be provided in order to promote equality and eliminate discrimination (Article 5.3), and in accordance with every individual’s requirements (Article 24.2.c). Any failure to provide them or the denial of this provision constitutes discrimination (Article 2, para. 3).

States are required to deliver these accommodations free of cost for people with disabilities and their families, as it has been recognized by the Committee that no parents should be obligated to pay for their children’s education nor for any reasonable accommodations that might be needed (CmRPD, 2011: para. 444). Moreover, the CmRPD has pointed out in some concluding observations to different countries that the “duty to provide reasonable accommodation is of immediate character and is not subject to progressive realization” (2011: para. 44; 2012: para. 41).

On *reasonableness*, the General Assembly established that is the “result of an objective test that involves an analysis of the availability of resources, as well as the relevance of the accommodation, and the expected goal of countering discrimination” (HRC 2013: para. 43). Nonetheless the Committee still needs to develop jurisprudence on the testing standards; it is inclining towards recognizing the necessity of making a balancing test that assesses the specific context of the child, the characteristics of the school, and whether or not the measure would represent an undue burden (CmRPD 2016) for the education provider.

Although reasonable accommodation is a duty of immediate character, it has been stressed that *undue burden* implies some degree of progressive realization (Arnardóttir, and Quinn 2009: 104). The standard of *progressive realization* indicates that obligations should be subject to the “maximum availability of resources” which according to the CmDESC, should be assessed by taking into consideration a number of elements, such as the intention to fulfill rights by the measures taken, the particular context, the non-discrimination clause and the overall obligation to develop an inclusive education system (HRC 2013, para. 44). However, lack of resources and high cost cannot be used as justification by the State to evade its obligations (CmRPD 2016, para. 28), which intensifies the need of a balancing test.

Additionally, according to the CmRPD any specific accommodation should be taken alongside, and not instead, of general accessibility and adaptability measures to guarantee inclusion in the schools, and through discussions between the school, the student with a disability, and, when needed, their family members (2016, para. 29).

Consequently, the indicators on reasonable accommodation I will be looking for in the judicial decisions are:

- Definition: whether the Court gives a definition at all or not, and if it gives its own or follows the CRPD's.
- Balancing test: whether the Court makes a balancing test to determine a reasonable accommodation; or, to assess if the measure provided follows the international standards.
- Specific and general accommodations: whether the Court recognizes and/or mandates specific alongside general accommodations.
- Undue Burden: whether the Court makes an analysis or not to assess if the measure taken represents or not an undue burden.

#### **4. The Four A's**

The "Four A's" were adopted by the CmDESC as universal categories to establish the State's obligations regarding the right to education<sup>10</sup>. They were introduced by Katarina Tomasevski, former Special Rapporteur on the right to education from 1998 to 2004<sup>11</sup>, and have been recognized by the CmRPD as four interrelated features that are essential to fulfill the right to an inclusive education. The "Four A's" are: accessibility, availability, adaptability and acceptability.

- a. Availability: demands that the States provide enough educational institutions for everyone. In other words, education must be generally available, and must be free and compulsory (Tomasevski 2004). Institutions should have all elements to

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<sup>10</sup> See generally, CmESCR OG 13

<sup>11</sup> See, Human Rights Commission Reports, Katarina Tomasevski: E/CN.4/1999/49, párrafos 51-74; E/CN.4/2000/6 y E/CN.4/2001/52, párrafos 64-65.

function, such as: a building, sanitation facilities, trained teachers with competitive salaries, teaching materials, libraries, and technology, among others (CmDESC 1999: para. 6). The CmRPD adds to these requirements to have “accurate data on persons with disabilities, in order to guarantee the necessary number of available educational places, and teaching staff at all levels” (CmRPD 2016: para. 20).

- b. **Accessibility:** at its core, this feature requires that educational institutions are accessible- physically and economically- to everyone without discrimination. According to Tomasevski (2004), the minimal international standard is access to free compulsory primary and secondary inclusive education. Additionally, States have to facilitate access to post-secondary compulsory education and eliminate –at all levels- exclusions based on discriminatory traits, including disability. Accessibility has three dimensions: 1) non-discrimination, which means that education must be accessible to all, specially to vulnerable groups without discrimination; 2) physical accessibility, concerning safe and reasonably convenient geographic location, or access through technology in “distance learning” programs; 3) economic accessibility, meaning it has to be affordable (CmESCR 1999, para. 6). Furthermore, former Special Rapporteur Vernon Muñoz Villalobos stated that the minimum standards on accessibility should also cover communication access- in form of sign language and Braille- and social access to peers (HRC 2007: para. 29).

All of these foster an inclusive environment. The CmRPD has expand on accessibility with regards to persons with disability on its General Comment no. 2 and affirmed:

“Without accessible transport to schools, accessible school buildings, and accessible information and communication, persons with disabilities would not have the opportunity to exercise their right to education (art. 24 of the Convention). Thus schools have to be accessible, as is explicitly indicated in article 9, paragraph 1 (a), of the Convention. However, it is the entire process of inclusive education that must be accessible, not just buildings, but all information and communication, including ambient or FM assistive systems, support services and reasonable accommodation in schools. In order to foster accessibility, education as well as the content of school curricula should promote and be conducted in sign language, Braille, alternative script, and augmentative and alternative modes, means and formats of communication and orientation (art. 24, para. 3 (a)), with special attention to the appropriate languages and modes and means of communication used by blind, deaf and deaf-blind students. Modes and means of teaching should be accessible and should be conducted in accessible environments. The whole environment of students with disabilities must be designed in a way that fosters inclusion and guarantees their equality in the entire process of their education.” (CmRPD 2014: para. 39)

- c. **Acceptability:** This concept entails a set of criteria about educational quality (Tomasevski 2004). The CmRPD defines acceptability as the obligation to design and implement all education-related elements –buildings, programs, goods, services, curricula and teaching methods- in a way that respects and protects different needs, cultures, languages and views, including those of persons with disabilities (2016: para. 24; CmESCR 1999, para. 6).
- d. **Adaptability:** this feature requires that schools adapt to children in accordance with the principle of best interest of the child and in recognition of the importance of the right to education in the fulfillment of other rights (Tomasevski 2004). It has to be flexible and adapt to the needs of students with different social and cultural settings (CmESCR 1999, para. 6). The CmRPD proposes States to adopt the Universal Design for Learning (UDL) approach, which recognizes that every student has a unique way of learning for which institutions must provide teachers with the structure to create adaptable learning environments. Also, curricula must be designed to meet the needs of every student (CmRPD 2016, para. 25). Additionally,

there is a international tendency to move away from standardized testing as a way to assess or measure intelligence and/or academic performance, hence the CmRPD encourages States recognize individual progress with broader goals that “provide alternative routes for learning, flexible instruction, and multiple forms of student assessment” (ibid).

Consequently, the indicators on the four A’s I will be looking for in the judicial decisions are:

- Access to education for all: whether the Court establishes or not, explicitly, the right of every person to access education and the obligation of the State to provide access for all, meeting the standards of the accessibility principle.
- Universal Design: if the Court mentions, at all, universal design as a way to achieve inclusive education.
- Availability of materials: if the Court recognizes the importance of the availability of materials for students with different needs, i.e. books in Braille, multiple media options to present content, speech-to-text options, and others.
- Adaptability of curricula: whether the Court recognizes the importance of adapting programs to the needs of every child.
- Elimination of standardized testing: whether the Court inclines towards the elimination of standardized testing, or gives any criteria on this regard.

## **5. Inclusive Education**

It is important to note that *inclusive education* is the alternative found to previous educational models that are considered to be discriminatory: special education and integrated schools (HRC 2007). On the one hand, special education perpetuates segregation

by placing students in separate environments design to respond or ‘deal’ with different impairments, which enhances a deficit approach and limits the students’ opportunities to predefined and negative assumptions of potential (CmRPD 2016, para. 11 and 16). On the other hand, integration, often confused with inclusion, is the process by which students with disabilities “are merely placed in mainstream schools without the additional support required to accommodate their individual needs” (HRC 2007, para. 40), compelling them to adapt to the existing program and system (CmRPD 2016: para. 11).

Inclusive education advocates for persons with disabilities to have access to equal developmental opportunities as everyone else. This includes access to education. Hence, inclusion is not placing students without adequate support in an unchanged and static mainstream setting- that would be integration-, but rather involves transforming the general system to accommodate the needs of all learners (Shaw, 2014: 64).

The aim of this model is to enroll people with disabilities in regular classrooms, where the general –but already adapted- curricula must be specifically accommodated by teachers to meet every child’s needs in order to facilitate achievement of fullest potential and development, and promote their participation in society (Huerta 1991: 13). Therefore, an inclusive model must enable students with disabilities to exercise their right to participation through any form of communication<sup>12</sup> they need, without any restrictions to their language<sup>13</sup>, and encouraging them to express themselves in the most autonomous way.

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<sup>12</sup> Article 2 of the CRPD states that “‘Communication’ includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology”

<sup>13</sup> Article 2 of the CRPD states that “‘Language’ includes spoken and signed languages and other forms of non-spoken languages”



The Salamanca Statement defines inclusive education as the “recognition of the need to work towards 'schools for all' - institutions that include everybody, celebrate differences, support learning, and respond to individual needs” (UNICEF, “Inclusive Education”). Moreover, the Office of the High Commissioner for Human Rights (UNGA, 2013: para. 7-8) states:

“Inclusion is a process that recognizes: (a) the obligation to eliminate barriers that restrict or ban participation, and (b) the need to change culture, policy and practice of the mainstream schools to accommodate the needs of all students, including those with impairments. An inclusive education implies transforming the school system and ensuring interpersonal interactions based upon core values which allow for the full learning potential of every person to emerge...The inclusive approach values students as persons, respects their inherent dignity and acknowledges their needs and their ability to make a contribution to society...Inclusive education is socially important because it provides a sound platform for countering stigmatization and discrimination... [and] introduces new perspectives for achieving objectives and self-esteem, and empowering individuals to build a society based on mutual respect and rights.

It is important to emphasize that *inclusive education* is a right of everyone, with special attention to those who are in a vulnerable situation – including racial or ethnic diversity, religion, gender, sexual orientation, disability, or other status- for which is essential to guarantee equality of opportunity, non-exclusion and educational quality (Echeita and Ainscow 2010). Schools, then, should overcome the idea of ‘standard student’ and address specifically every child’s needs. In this sense, the concepts studied above such as “reasonable accommodation”, “accessibility”, and “universal design” are fundamental in the advancement of an inclusive educational system that promote mutual respect and value for all people.

According to Article 24 of the CRPD, inclusive education is the means to achieve the “full development of human potential and sense of dignity”; the “development by people with disabilities of their personality, talents...creativity...mental and physical abilities, to their fullest potential”; and, enable them to “participate effectively in a free

society”. To do so, international consensus suggests that schools, in their efforts to achieve these objectives, should adopt a whole person approach. This recognizes that there is no “one size fits all” educational system (HRC 2007: para 41), but the obligation is of the institution to provide personalized education, rather than expecting the student to fit the system (CmRPD 2016: para. 12).

Moreover, research shows that children with disabilities that are enrolled in the general education system –i.e. regular classrooms-, are more likely to “finish school, go onto post-secondary education and training, get jobs, earn good incomes and become active members of their communities” (UN 2007: 82). All of which allows them to achieve the goals of full inclusion described in the paragraph above.

In spite there are many indicators on inclusive education that could be used to in the present study, many of which have been categorized under the topics above, the concepts I will be looking for in the judicial decisions are:

- Personalized education: whether the Court recognizes or not that there is no “one-size-fits-all” formula, which implicates that besides the general –already adapted curricula- every child needs a personalized education.
- Development to fullest potential and participation in society: whether the Court recognizes or not that access to education is key for people with disabilities to achieve their fullest potential and participation in society. Especially if they note that the only way of guaranteeing this is through an inclusive educational system.
- Access, permanence and progress to high education: whether the Court recognizes or not the importance of this principle, especially for vulnerable groups such as persons with disabilities.

- Inclusive education as a right for every person: whether the Court recognizes or not the universality aspect of inclusive education.

## **6. Other barriers**

While the concepts and indicators expressed in this section enshrine the core principles of the right to an inclusive education as cherished in Article 24 of the CRPD, there are other aspects that are included in this study to evaluate a more ‘general’ scenario of inclusion that influence directly access to education. These elements are:

- a) Attitudinal barriers (stigma): as stated before, people with disabilities face many barriers, from physical obstacles in buildings to systemic barriers such as indirect discrimination. Often, the most difficult barriers to overcome are attitudes others carry towards people with disabilities, which keep them from achieving the development to their fullest potential and participation. One of these attitudes is defining a person by their impairment. Camilla Croso (2010) has argued that the most common structural barriers to the full realization of the right to education of people with disabilities are the prevalence and perpetuation of stereotypes and attitudinal barriers. She claims that the stereotypes surrounding persons with disabilities are present in every teacher, student, school authority, and parents, which reinforces their exclusion and strengthens the policies that support it. Goffman (1963) explored stereotyped beliefs and their consequences establishing that stigma is a discrediting attribution that reduces a “whole and usual person to a tainted, discounted one” (p. 3). Later, Link and Phelan (2001) took Goffman’s observation to conceptualize stigma as the result of interrelated components converging, which include labeling; linking labels to negative dominant cultural

beliefs (stereotypes); and, separation of “us” from “them” (pg. 367).

The importance of analyzing how Courts approach this topic relies on the fact that the educational model promoted by the CRPD is based on growing evidence that shows that inclusive education “not only provides the best educational environment...but also helps to break down barriers and challenge stereotypes” (UN 2007: 82-83).

- b) Use of human rights paradigm of disability: A rights-based, and specially a human rights-based approach have, to some extent, contributed in advancing the inclusion of persons with disabilities. For example, the CRPD understands education not as skills, accomplishments o qualifications people should acquire, but as the means to enable the development of self-worth and dignity of individuals and respect for the worth and dignity of others (Shaw, 2014: 59). It has also nurtured legislation aimed to end the historical oppression and segregation that people with disabilities have been objects of (Young & Quibell, 2000: 748-9); and, among other things, it has fortified the shift from the medical to the social model of disability.

On the one hand, the medical model, predominant during the nineteenth and most of the twentieth century, focuses on functionality of the body. It sees disability as an intrinsically bad state and a form of biological determinism (Shakespeare, 1996: 95), in which any deficit- physical or functional- of the individual is seen as a deviation of the norm (Davis, 1995). The public policies drafted under this model suggest segregation and institutionalization as best practices. On the other, the social model differentiates between impairment and disability, and argues that disabilities are socially constructed and the barriers socially imposed (Shakespeare,

1996). While not losing attention on the impairment, it focuses on removing disabilities' social barriers, such as discrimination and negative attitudes, and promoting inclusion and equality.

Built upon the social model and its critics, the human rights approach to disability is to consider it as an evolving concept that “results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on a equal basis with others”<sup>14</sup>. This approach views persons with disabilities as right-holders. The analysis will look into how the Court understands disability and whether or not it is moving towards –or adopting- the human rights paradigm of disability.

c) Use of discriminatory language: despite the change of paradigms and the advancement on the understanding of disability there are still some antiquated practices that, directly or indirectly, continue to promote discrimination. Such is the case of the use of outdated language on the matters of disability. If we consider that “[l]anguage is instrumental in demonstrating the attitudes and beliefs of human beings” (Myers, 2013: 3), then terms such as “handicapped”, “feeble-minded”, “retarded”, “abnormal”, among others -that are commonly found throughout different documents, from scientific findings to public policy, and in everyday conversations- indicates how a culture perceives its members with disabilities (Linton, 1998; Tregoning, 2009).

Such perceptions are then carried out through behaviors; therefore, it is essential that those words and labels be eliminated from common vocabulary, but especially

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<sup>14</sup> This is the concept of disability drawn in the Convention on the Rights of Persons with Disabilities.

from official documents and discourse. Consequently, this study will look into whether or not the Courts separate themselves from the use of discriminatory language and chooses to use a more inclusive one like the one adopted by the CRPD.

## **CHAPTER II:** **THE EUROPEAN UNION**

On rare occasions, the European Union signs international human rights treaties as the regional integration organization it is. The reasons for not signing as a community but rather as each Member State are many, but mostly because most instruments are open for ratification only for States<sup>15</sup>; and, second because the European Union has its own policies, treaties, laws, bodies, and institutional framework that recognize a range of human rights standards of its own.

On this regard, critics have risen from scholars who consider that EU's legal human rights framework is not as wide as those guaranteed within the United Nations system. Moreover, it's been said that the EU's practice and discourse of human rights is a paradox.<sup>16</sup> To explain the paradox, Philip Alston and J. Weiler (1998, 661) expressed that on the one hand, the EU is a strongly committed defender and promoter of human rights – both to the inside and the outside of its borders-; but on the other, it lacks a coherent, balanced and “fully-fledged” human rights policy.

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<sup>15</sup> For example, provision for the accession of the European Union to the European Convention of Human Rights was only granted through the Lisbon Treaty.

<sup>16</sup>For more information on the matter, See generally: Alston, Philip, and J.H.H. Weiler. 1998. "An 'ever closer union' in need of a human rights policy." *European Journal Of International Law* 9, no. 4: 658; Ahmed, Tawhida, and Israel de Jesús Butler. 2006. "The European Union and Human Rights: An International Law Perspective." *European Journal of International Law* 14, no. 4: 771; Butler, Israel de Jesús. 2011. *The European Union and International Human Rights Law*. OHCHR Regional Office for Europe. Available on: [http://www.europe.ohchr.org/Documents/Publications/EU\\_and\\_International\\_Law.pdf](http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf); Koutrakou, V. 2004. *Contemporary issues and debates in EU policy: the European Union and International Relations*. Manchester: Manchester University Press; Williams, A. 2004. *EU Human Rights Policies*. Oxford: Oxford University Press; Williams, J. 2013. "The Failure of the EU's Human Rights Policies". *E-International Relations Students*, April 12. <http://www.e-ir.info/2013/04/12/the-failure-of-the-european-unions-external-human-rights-policy/>

Nonetheless, the most important jurisdictional body in human rights in the EU is the European Court of Human Rights [ECtHR]<sup>17</sup>, which enforces the European Convention on Human Rights<sup>18</sup>. Additionally, since December 23<sup>rd</sup> 2010 the European Union is party to the Convention on the Rights of Persons with Disabilities, [CRPD], bounding every Member State in the European Union to comply with the instrument and ensuring their citizens the rights it guards<sup>19</sup>, which in many ways enlarges the EU's policies on disability (Waddington, 2009).

Although the European Convention sets the minimum standard for its interpretation, and the ECtHR has no jurisdiction over the CRPD, it can, and has, used other international instruments to which the European Union is party to interpret and apply a certain right enshrined in the Convention. The ECtHR has specifically done so with Article 2 of Protocol No. 1 (Council of Europe, 1952), which establishes the right to education, stating that:

“[i]n interpreting and applying this provision, account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.” (Catan and Others v. The Republic of Moldova and Russia 2012, § 136)<sup>20</sup>

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<sup>17</sup> Hereinafter I will use “ECtHR” to refer to the European Court of Human Rights

<sup>18</sup> Formerly known as European Convention for the Protection of Human Rights and Fundamental Freedoms. I will use term “European Convention” to refer to the European Convention on Human Rights.

<sup>19</sup> According to Lisa Waddington, the CRPD was the first international instrument that was negotiated and signed by Europe as a Community. For more on the matter and its implications, see Waddington, L. 2009. “Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community”. In Arnardttir, Oddny Mjall, Quinn, G (eds.) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*. Leiden, NL: Martinus Nijhoff, ProQuest ebrary.

<sup>20</sup> This has been stated in vast jurisprudence. See *Al-Adsani v. the United Kingdom* [GC], no. [35763/97](#), § 55, ECTHR 2001-XI; *Demir and Baykara v. Turkey* [GC], no. [34503/97](#), § 67, ECTHR 2008; *Saadi v. the United Kingdom* [GC], no. [13229/03](#), § 62, ECTHR 2008-...; *Rantsev v. Cyprus and Russia*, no. [25965/04](#), §§ 273-274, ECTHR 2010 (extracts); *Çam v. Turkey*, no. 51500/08, § 53, ECTHR 2016.



That being said, this chapter presents the analysis of the judicial decisions of the ECtHR from 2006 to date in which it is ruled on the right to education of persons with disability. First, it is determined the framework of the right to education for persons with disabilities to which the European Union must abide; second, based on the conceptual framework, an analysis of the decisions is presented by topic in order to explain the Court's tendency, regression or advancement on the protection and promotion of the mentioned right; third, some general conclusions are drawn from the analysis.

### **1. Regional framework**

The European Convention is the main regional framework on human rights. Although the provision on right to education is not explicitly included in the body of the treaty it is recognized in Article 2 of Protocol No. 1<sup>21</sup>. Additionally, this article is often interpreted in light of Article 14 of the European Convention that proclaims the prohibition of discrimination<sup>22</sup>. The reading of both articles guaranties the right of every person to access education without discrimination.

Even when Article 14 does not explicitly state 'disability' as a protected ground under the European Convention, the expression "other status", considered among the grounds for discrimination on Article 14, has allowed the ECtHR to broaden the categories and include disability, among others characteristics to the catalogue of non-discrimination

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<sup>21</sup> The Convention was drafted in broad terms, and is extended with protocols that have been adopted in the following years of its ratification. Article 2, Protocol No. 1.- "Right to Education: No person shall be denied the right to education. In the exercise of any functions, which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

<sup>22</sup> Article 14.- "Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

directives (European Union Agency for Fundamental Rights 2011, 100-102)<sup>23</sup>. Apart from these documents, there is no specific binding regional document regarding the right to education; therefore, its regulation is left to local authorities of each Member State and to the interpretation of their national courts.

Nonetheless, the role of the ECtHR is to analyze whether national laws and interpretations comply with the standards set by the European Union, and to determine if there has been any breach of States' obligations. After the accession of the EU to the CRPD, the obligations imposed by that treaty have become part of these standards that must be complied by the 28 members of the Union. In sum, Article 24 of the CRPD should be a reference point or the ECtHR for interpreting regional law relating the right to education of people with disabilities, and the actions and omissions of its members in this regard.

## **2. Analysis of the judicial decisions of the European Court of Human Rights**

For the period established between 2006 and 2016 only four decisions were found that serve the purpose of this investigation<sup>24</sup>. Before the ratification of the CRPD, the ECtHR ruled on one case, twice<sup>25</sup>, which gives us a total of two decisions that were analyzed: Case of D.H. and Others v. Czech Republic (2006)<sup>26</sup>, and Case of D.H. and

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<sup>23</sup> See also *Glor v. Switzerland*, no. 13444/04, § 80, ECTHR 2009; *Çam v. Turkey*, *Op. Cit.* 10.

<sup>24</sup>To narrow down the decisions of the ECtHR to the topic of interest, different combination of search terms were used to make sure no case was left out. 'Inclusive education' and 'disability' was the first try with only one result obtained; 'inclusive', 'education' AND 'disability' threw out 8 matches; 'right to education' AND 'disability' had 9 cases; 'special education' AND 'disability' cast out five decisions; other combinations including the words 'education', 'disability', 'article 2, protocol 1', 'discrimination on the basis of disability', among other terms, were also used in the research tool.

<sup>25</sup> Due to the rules of procedure, a ruling of a Chamber can be referred, on petition of the parties, to the Great Chamber, who analyzes the facts and evidence again to give its own decision whereas to confirm the previous one or change it. See Council of Europe, Rules of Court, new edition January 2016. Available on: [http://www.ECtHR.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.ECtHR.coe.int/Documents/Rules_Court_ENG.pdf) (specifically Chapter VII).

<sup>26</sup> From now on D.H. and Others

Others v. Czech Republic (2007)<sup>27</sup>. In addition, after accession the Court delivered two more: Case of Horváth and Kiss v. Hungary (2013)<sup>28</sup>, and Case of Çam v. Turkey (2016)<sup>29</sup>.

For a better understanding, brief descriptions of the facts of each case are presented:

- D.H. and Others (2006 and 2007): the eighteen Roma applicants were placed in special schools intended for children with disabilities; while they alleged discrimination in the enjoyment of their right to education on account of their race, colour, association with a national minority and ethnic origin, the government asserted that each placement was preceded by an assessment of the child's intellectual capacity. The applicants presented evidence of a systematic practice of diagnosing Roma children with disabilities to place them in segregated schools.
- Horváth and Kiss: the Court ruled on the alleged violation of the right to education of the two Hungarian applicants, who after being diagnosed as mentally disabled were placed in a special school. They claim that this was discriminatory on the basis of their Roma origin, that they had been stigmatized in consequence, that their schooling assessments had been culturally biased, and that the school's curriculum was limited, which hindered their access to higher education and employment. The applicants presented evidence of a systematic practice of diagnosing Roma children with disabilities to place them in segregated schools. The Government argued that the differentiation had had an objective and reasonable justification based on the intelligence and psychometric tests applied to the applicants, and denied a systematic practice to discriminate against Roma children.

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<sup>27</sup> From now on D.H. and Others [GC]

<sup>28</sup> From now on Horváth and Kiss

<sup>29</sup> From now on Çam

- Case of Çam: the Court reviewed the refusal by the Turkish National Music Academy to enroll a student who was blind, despite having passed the entrance examination. The applicant claimed discrimination in her right to education based solely on account of her visual disability. The Academy argued that rules of procedure did not allowed her enrollment without considering reasonable accommodation, even when this was stated on a medical report, which confirmed she could attend lessons in the sections of the Conservatory where eyesight was not required.

The results of the analysis were systematized by topic as further explained.

*A. Conventional control*

The tendency on this topic is very clear. Before ratification the ECtHR did not even mention the CRPD, although by the time the Great Chamber was reviewing *D.H. and Others* (2007) it was already open for signature and the Czech Republic had manifested willingness by signing it in March 2007.<sup>30</sup> Nonetheless, ECtHR took into consideration several UN instruments that were relevant to the case, such as the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, among others<sup>31</sup>.

In contrast, after ratification the ECtHR refers to the CRPD and analyzes the facts of at least one case, *Çam v. Turkey* (2016), considering Article 24. The reasons for the ECtHR's failure to do so in the case of *Horváth and Kiss* (2013) are unclear, although this omission might be due to the facts of the case. Specifically, the plaintiffs were diagnosed

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<sup>30</sup> Ratification came later, the 28<sup>th</sup> of September 2009. For complete status of signatures and ratifications, see [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-15&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-15&chapter=4&lang=en)

<sup>31</sup> See paragraphs 92-102 of *D.H. and Others v. Czech Republic* [GC], no. 57325/00, ECTHR 2007.

with a disability and therefore placed in ‘special schools’, but the discussion was centered on the alleged systemic misdiagnosis of Roma children as mentally disabled as a tool to segregate them from non-Roma children in the public school system. That is, the argument and discussion was guided by discrimination on the grounds of ethnic origin rather than on disability.

### *B. Non-discrimination*

Three out of the four decisions of the ECtHR deal with Roma children placed in ‘special schools’ after being diagnosed with a disability, centering the discussion on racial segregation, a battle that has been long fought in national and international courts, rather than disability. Nonetheless, some general statements were made by the ECtHR about non-discrimination and schooling that apply in the context of disability. Moreover, the recent decision in *Çam* (2016) suggests a change in trends.

In every case the ECtHR uses the same definition for ‘discrimination’, which is drawn from its own case law, and means “treating differently, without an objective and reasonable justification, persons in relevantly similar situations.” It also recognizes that States have a certain margin of appreciation to assess whether the situation justifies or not a different treatment. This margin of appreciation is what the ECtHR observes and rules about in every judgment.

In *D.H. and Others* (2006), the ECtHR concluded that the applicants were treated differently, namely by placing the students in segregated schools (“special schools”), because of the diagnosis of their mental disability, which was considered by the Court to be a reasonable measure taken in pursue of a legitimate aim that justified the differentiation in treatment, thus it did not constitute a violation of Article 14 taken together with Article

2 of Protocol 1 of the European Convention. Specifically, the ECtHR established that “States cannot be prohibited from setting up different types of school for children with difficulties or implementing special educational programs to respond to special needs” (§ 47), because it pursues “the legitimate aim of adapting the education system to the needs and aptitudes or disabilities of the children” (§ 49). These statements are not only contrary to the principle of inclusive education as enshrined in Article 24.2(a) of the CRPD, but also are an example of the failure to advance a human rights approach to disability.

The Great Chamber reversed the ruling and declared a violation of the applicants’ rights. This was mainly because the argument of the Government of explaining “the difference in treatment between Roma children and non-Roma children by the need to adapt the education system to the capacity of children with special needs” (*D.H. and Others v. Czech Republic* [GC] 2007, §197) was not considered satisfactory to justify the measure. Nonetheless, the decision revolved, like in the 2006 decision, primarily on the discrimination on the basis of the ethnic origin of Roma children rather than on the basis of disability; and, just like the in previous ruling, the ECtHR approved the Government’s decision to retain a special-school system for children with ‘special educational needs’.

This attitude changed drastically after the ratification of the CRPD. On the one hand, both decisions rule in favor of the plaintiffs declaring a violation of their right to non-discrimination in educational settings, although only one of them was based on disability grounds. On the other hand, the Court gave more weight, compared to previous cases, to the disability topic in *Horváth and Kiss* (2013) in spite the allegation of the plaintiffs of being discriminated on the grounds of ethnical origin like in the cases analyzed before the ratification of the CRPD.

In Horváth and Kiss (2013) the ECtHR goes further than in the D.H. and Others cases and expresses that while it accepts the position of the State to continue with special schools and classes for children with disabilities, it is concerned about the segregation the system causes (§ 113), and calls for an elimination of all discriminatory practices disguised in neutral situations (§115-117). The latter statement, though, lacks a disability emphasis. However, the Court continues to say that:

“[I]f a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question....[T]he treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny.” (§128)

This statement is positive in two ways. One, the Court is recognizing persons with disabilities -in particular those with a mental disability- as a group that has been historically discriminated against. Second, even when States have a margin of appreciation to decide which educational system is better, the Court recognizes that on disability matters a high level of scrutiny must be applied in order to determine if the practice is discriminatory, that is, that a practice is only justifiable with “very weighty reasons”<sup>32</sup>. That is, the existence of impairment is not a justifiable reason to discriminate on the grounds of disability.

The Court had a special opportunity in *Çam v. Turkey* (2016) to extend its criteria on discrimination on the grounds of disability in educational settings and to set standards for the obligations of the contracting States, which sets a difference with the cases before the ratification of the CRPD. The ECtHR affirmed that States’ obligation to guarantee access to education for all exceeds mere prohibition of discrimination and that States have

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<sup>32</sup> See *Mifobova v. Russia*, no. 5525/11, § 54, ECTHR 2015; *Alajos Kiss v. Hungary*, no. 38832/06, § 42, ECTHR 2010.

the positive obligation to provide effective access to existing educational institutions (Çam 2016, § 43-47).

Moreover, contrary to the previous three cases, the Court concluded that discrimination on the basis of disability might not always be on the act itself but on some regulations of the school that obstructs or impedes the effective access to education (Çam 2016, § 56-57). In other words, while denial of registration in an institution due to non-comply of administrative requirements might be considered a justified non-discriminatory measure, a closer review of the facts could indicate that the differentiation in treatment was based solely on the disability of the applicant, just like in the Çam case.

Unlike any other of the analyzed cases, the ECtHR specifically upheld in Çam (2016) the importance of the fundamental principles of universality and non-discrimination in the exercise of the right to education (§64). Moreover, the ECtHR recognizes that inclusive education is the most appropriate means to guarantee these fundamental principles.

Indirect discrimination is a part of the non-discrimination principle that is often analyzed by the ECtHR and it refers to the effects of a general policy, measure or provision that is expressed in apparent neutral terms, but in practice places a person in a unjustified disadvantage compared to others. The ECtHR recognized indirect discriminatory practices in three of the four analyzed cases<sup>33</sup> allowing less strict evidential rules and shifting the burden of proof shifts to the State (Horváth and Kiss 2013, §105-108; D.H. and Others 2006, §182-189; D.H. and Others 2007, §184-186). Nonetheless, in D.H. and Others (2006) the Court concluded that there was insufficient evidence to prove indirect discrimination (§46). An important shift came after the EU ratification of the CRPD when in Horváth and

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<sup>33</sup> In Çam v. Turkey there were no allegations of indirect discrimination, therefore the Court did not discussed the topic at all.



Kiss (2013) the Court specified that in cases in the educational sphere it is not necessary to prove any discriminatory intent (§106), thus narrowing down the possibility of justifying indirect discrimination.

What particularly stands out in these four cases is the lack of discussion, not even mention, about the prohibition of exclusion from the general education system. This takes on special relevance given that it is a principle enshrined in the CRPD (Article 24, paragraph 2.a), and recognized by the Committee on the Rights of Persons with Disability (CmRPD 2016) on the “Draft for General Comment No. 4: Article 24, the right to inclusive education” as an important clause to be specifically included in national policies. Moreover, the Court could have gave some criteria on the matter as different arguments were used by member States to justify their discriminatory acts against students, like some non-direct exclusion practices such as standardized test requirements to enter school. While in Çam (2016) the Court did established that discrimination might not be based on the act itself but on some regulations of the school, it failed to recognize that the requirement of the medical certificate was an act of non-direct exclusion of students with disabilities. The opportunity was clear and the ECtHR did not take it.

### *C. Reasonable accommodation*

On this topic the results were very poor, mainly because three of four cases focused their discussion on ethnical origin rather than on disability. The case of Çam (2016) is the only one where the ECtHR has had a clear opportunity to set standards on reasonable accommodation, but according to this analysis has failed to do so.

The Court cites the definition of ‘reasonable accommodation’ as stated in the CRPD, and argues that Article 14 of the European Convention<sup>34</sup> should be read in the light of this obligation to correct inequalities created by unjustified discrimination (Çam 2016, §65). It goes on to recognize that reasonable accommodation, which can take different forms, should be granted in the general system as well as for specific needs (§66), and considers that any refusal of reasonable accommodation constitute discrimination (§67), all of which are settled standards in international law<sup>35</sup>.

However, the Court failed to analyze the accommodation suggested by the medical report, which stated that the student was fit to study at the Conservatory in sections where eyesight was not required. In response the Conservatory argued that there were no sections with such characteristic and that due to failed previous integration attempts in the 1970’s<sup>36</sup> they were no longer accepting students with disabilities. The Court limited to state that it had observed that the national authorities did not sought to consider any ‘adjustments’ the student might require and had made no attempts since 1976 to adapt to the needs of students with disabilities (§68). The ECtHR made no mention at all of the reasonableness of the required accommodation, made no balancing test or analyzed if the suggestion of changing

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<sup>34</sup> Article 14 of the European Convention on Human Rights establishes the prohibition of discrimination

<sup>35</sup> See generally: Martel, Leticia de Campos Velho. 2011. "Reasonable Accommodation: The New Concept From An Inclusive Constitutional Perspective." *Sur International Journal on Human Rights* 8, no. 14: 85-111,84; Cera, R. 2015. National Legislations on Inclusive Education and Special Educational Needs of People with Autism in the Perspective of Article 24 of the CRPD. In V. Della Fina (Ed.), *Protecting the Rights of People with Autism in the Fields of Education and Employment [electronic resource]: International, European and National Perspective* (pp. 79–108). Springer International Publishers; UNDESA, et. al. 2007. From exclusion to equality. Realizing the rights of persons with disabilities. Handbook for parliamentarians on the Convention on the rights of persons with disabilities and its optional protocol. United Nations, Geneva. [http:// www. un. org/ disabilities/ documents/ toolaction/ ipuhb. pdf](http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf).

<sup>36</sup>The music academy had not made any attempt to adjust its educational approach in order to make it accessible to students with disabilities since 1976, when it tried to accommodate a blind student but, in the absence of teachers knowing Braille, it waived these attempts.

some infrastructure to include blind students represented an undue burden for the State that justified the rejection of the student.

*D. Accessibility (and the other 3 A's: Availability, Adaptability, and Acceptability)*

Only a few judicial statements on accessibility, availability, adaptability and acceptability show a shift in attitude since the ratification of the CRPD. Although the ECtHR analyzed the right to education in the D.H. and Others cases (2006 and 2007), it did not mention States' obligation to provide universal access to the education system. Rather, the discussion centered only on whether the applicants were discriminated against under Article 14 of the European Convention in conjunction with Article 2 of Protocol 1.

Similarly, in neither of the post-CRPD ratification cases has the Court addressed this issue. In Horváth and Kiss (2013) although the petitioners made complaints under Article 2 of Protocol 1 read in conjunction with Article 14 of the European Convention, the Court examined the case under non-discrimination and overlooked the right to education. Hence, there is no discussion whatsoever about the obligation of the State to provide access to school for all and what it entails, for example universal design. Moreover, the plaintiff's allegation in Çam (2016) of violations of both her right to education and non-discrimination on the basis of her disability, was ultimately resolved only on the latter. The Court ruled only under the analysis of Article 14 in conjunction with Article 2 of Protocol 1, concluding that it was not necessary to do a separate examination of the case under the right to education (§ 70). Nonetheless, the Court provided some guidance on the matter, which might be due to the fact that for the first time the Court relied on Article 24 of the CRPD as one of the international applicable laws.

Specifically, the ECtHR affirmed the obligation of the State to guarantee access to education for all and that the government has the positive obligation to provide effective access to the existing educational institutions (Çam 2016, § 43-47). For effective access the Court interpreted access to existing educational institutions that are available at the time, which would call for reasonable accommodation; and stated that even when the school in question provides education under the artistic sphere and is out of the primary, secondary and higher education fields, access must still be granted and its conditions can be examined under the scope of Article 2 of Protocol 1 (§ 43).

Adaptability of curricula was something found across the four cases under study. It is addressed as something that falls only in the scope of national authorities and therefore there is no room for the Court to rule on the matter or even set any standards (D.H. and Others 2006, §47-49; D.H. and Others 2007, §205; Horváth and Kiss 2013, §125-127; Çam 2016, §66). Nonetheless, the judges expanded their arguments to what appears to be a path for setting some standards; though it is unclear whether it responds to the ratification of the CRPD or to the facts of the cases. What is clear is a tendency to accept that “special school’s” curricula is often less competitive, which hinders the students’ future possibilities. Still, the ECtHR fails to set any standard regarding the adaptability of curricula, but leaves it completely open for the State’s margin of appreciation (D.H. and Others 2006, §47).

In D.H. and Others [GC] (2007) the ECtHR maintains the same argument (§205), but goes further to recognize that schools for children with disabilities often have a more basic curriculum than regular schools which compromise their development and even limit their job opportunities (§207). It also “notes with interest” the abolishment of special

schools in the Czech Republic (§208). Nonetheless, it again fails to provide concrete guidance on the obligation to adapt the curriculum to everyone's needs.

In Horváth and Kiss (2013), the ECtHR retained the same approach. In this case, it recognized that the State can use its discretion in adapting the curricula and define the manner and means of meeting the educational needs of children with disabilities; but, at the possibility of interfering with the enjoyment of a right, then the State must attend adequate safeguards to remain within the scope of its margin of appreciation (§126-127) and protect human rights. In that sense, the ECtHR resolved that the basic curriculum followed in 'special schools' resulted in the hindering of the development of the pupil's skills and the isolation from the wider population, which was considered by the Court "did not offer the necessary guarantees stemming from the positive obligations of the State (...)" (§127). The latest contribution was made in Çam (2016), where the ECtHR recognized that the adaptability of curricula is a form of reasonable accommodation that falls under the obligations of the State (§66).

The ECtHR had only one opportunity to pronounce on availability of materials. In Çam (2016) the Court observed that the attempts to register students with disabilities were no longer pursued after 1976 due to lack of teacher training and availability of adaptable materials, especially on Braille. Even though the situation prevailed and the applicant was rejected from registration to school for the same reasons, the Court did not made any assertions as to the obligation of the State on the matter as it is established in the CRPD.

Last but not least, the Court addressed the issue of standardized testing in three out of four cases under study. In the D.H. and Others cases the applicants claimed a discriminatory use of standardized test that send them to 'special schools', but only the

Great Chamber in 2007 acknowledged “that the tests used to assess the children’s learning abilities or difficulties have given rise to controversy and continue to be the subject of scientific debate and research” (§199). Nonetheless, the Court affirmed that it was not its role to judge the validity of such tests. After ratification, the Court remained doubtful to encourage moving away from standardized testing. In Horváth and Kiss (2013) stated that it could not take a position as to the acceptability of such tests (§118), but could assess if any good faith efforts have been made to avoid discriminatory testing (§119).

#### *E. Equity and Equality*

The only clear shift on this topic that can be related to the ratification of the CRPD is the recognition of the obligation of the States to ensure equality of opportunity in education. The first two decisions ruled before the accession of the European Union to the CRPD make no mention of the importance of safeguarding the principle of equity with respect to the right to education. In Horváth and Kiss (2013) the ECtHR recognizes that to guarantee equality of opportunity at schools the authorities should set up appropriate support structures to benefit everyone (§104). It went on to determine that the failure to specify the applicant’s “special educational needs” violated its rights to equal opportunity (§122).

In Çam, the Court declared that States have to comply with their positive obligation to provide education in equal opportunities to all members of society by creating the necessary conditions for people with disabilities to access the educational system (§47). It specifically mentioned that the Turkish government had ignored the essence of the right to education by not creating opportunities for blind people from 1976 to 2004; the period

covered between the times a person with disability was accepted in the Arts Institute and the rejection of Mrs. Ceyda Çam (§47).

What particularly stands out in this context is the lack of recognition of the Court of the principle of equality before the law, enshrined in Article 12 of the CRPD<sup>37</sup>. Although none of the analyzed cases deals specifically with facts that prohibited or hindered the applicant's equal recognition, the Court could have acknowledged that such principle is essential for persons with disabilities to claim their right to inclusive education, as enshrined in Article 24 of the CRPD.

Moreover, the recognition of this right opens the door for people with disabilities to access the justice system, claim their rights and, in case of violations, obtain proper reparations. On the matter, it is surprising that the ECtHR did not order reparations in all decisions analyzed. Although the Court mandated a declaratory judgment establishing a breach of the European Convention<sup>38</sup> and a monetary compensation, it did not go further to order specific non-monetary relief for violations of the European Convention. For example, the ECtHR could have ordered the immediate enrollment of Ms. Çam in the

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<sup>37</sup> Article 12 - Equal recognition before the law: “ 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. 5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”

<sup>38</sup> Only in three out of four cases. In *D.H. and Others v. Czech Republic* (2006), the Court found no violation of the claimed rights.

school of music accompanied by the proper identification of her needs and tailor its lessons to blind students; in *D.H. and Others*, where it was demonstrated that the Roma children were not mentally impaired, the Court could have order their immediate placement in regular schools; in *Horváth and Kiss*, the elimination of the intelligence test used to assess the child's abilities; among other forms of relieves.

Although such non-monetary compensations are not a common practice to the ECtHR (Nifosi-Sutton, 2010), they could have transferred a strong message about the critical role of inclusive education. If we consider, in general terms, that people with disabilities have been traditionally segregated from the educational system, a practice that prevent them from integrating to society and developing to their fullest potential, the ECtHR should be considering to extend its remedies to non-monetary forms of relief and contribute to the protection of human rights of persons with disabilities in the region. Not only this is a common practice of other Courts, like the Inter-American Human Rights Court, but also it would help to end the EU's paradox explained at the beginning of the Chapter.

#### *F. Other principles of Inclusive Education*

As stated at the beginning of this section, only one out of four cases refers to Article 24 of the CRPD, which translates into the fact that the same case, *Çam v. Turkey* (2016), is the only one to recognize inclusive education as the most appropriate means to ensure the right to education (§ 64). More specifically, the ECtHR recognizes that inclusive education is the only way to achieve universality and non-discrimination in the exercise of such right (§ 64). It also is the only case in which the Court makes a clear statement that in a democratic society access to education is essential to the realization of other rights and



one of the most important public services in the modern State (§ 52). These statements show a clear evolution of the Court's standards after the ratification of the CRPD. The following paragraphs strengthen this argument.

In *D.H. and Others* (2006), the oldest case in this study, the ECtHR was presented with evidence of 'early tracking', inferior curriculum of 'special schools', low opportunities to gain access to other levels of educations and use of standardized tests, all of which reduces chances of developing fullest potential and integration of people with disabilities into society, some of the cornerstones on inclusive education. Still, the judges found justification for the acts of the authorities and no breach of the European Convention. While the Great Chamber in 2007 found the same allegations to be contrary to the European Convention, it failed to provide standards on inclusive education. The judges merely affirmed that non-direct discriminatory practices against the Roma students were found, but no further analysis of those practices and their effect on the educational system were made.

With regards to the obligation to guarantee access, permanence and progress, in the cases of *D.H. and Others* (2006 and 2007) and *Horváth and Kiss* (2013), the applicants argued that the 'special education' system was preventing them to register in secondary and higher education, mainly because of the lower curricula that it followed. The ECtHR noted "[t]hese children are unlikely to break out of this system of inferior education, resulting in their lower educational achievement and poorer prospects of employment" (*Horváth and Kiss* 2013, §115). Despite the above-mentioned allegations, the Court failed to comment on the importance on guaranteeing permanence and progress on the general education system besides providing effective access.

Regarding the principle 'no one size fits all', in *Çam* (2016) the ECtHR acknowledged that each child has educational needs of their own (§ 66), but that States cannot be required to create individualized lessons for students with disabilities (§ 43). Although it looks like it opened the path to set a standard on the obligation of the States to adopt a 'whole person approach' (CmRPD 2016) and adapt the educational system to the child instead of forcing a child into the system, the Court remained itself from demanding members States to comply with such obligation.

### *G. Other barriers*

With regards to the three indicators used to identify "other barriers", the ECtHR did not mention anything about the role that attitudinal barriers play in access and permanence in the educational system for persons with disabilities. The Court missed the opportunity to set criteria on this matter, especially considering that doing so would amount to the recognition of the historical discrimination against people with disabilities, the status of vulnerable group and the ongoing segregational practices.

Additionally, not enough manifestations of the adoption of a human rights approach to disability were found in all cases. While there were no signs of retrogressions to a medical model, neither were there any suggestions of moving, at least, towards considering 'disability' as an evolving concept. Though, the ECtHR does recognize persons with disabilities as right-holders.

Lastly, no discriminatory language was found on any of the ECtHR's decisions that were analyzed for the purpose of this study. Therefore, there is no concluding evidence that would show any influence of the ratification of the CRPD in the language used in the

rulings. Further investigation in older cases would be needed in order to identify whether or not –and when- the Court has ever used discriminatory terms.

### **3. Conclusions**

It is difficult to conclude that there is enough evidence to state that the ratification of the CRPD represented a threshold in the ECtHR jurisprudence for the recognition of the right to education of persons with disabilities as it is enshrined in Article 24 of the CRPD and other international standards. First, because four cases are not enough to establish such conclusion; second, because three of those four rulings dealt, primarily, with discrimination on the basis of national origin rather than on disability.

Nonetheless, some interesting findings can be highlighted. With regards to the Roma children, the Court recognizes that special direct or indirect arrangements for a certain group of persons can constitute a differentiation in treatment subject to examination under Article 14 of the European Convention that prohibits discrimination. This issue was, at least in *Horváth and Kiss*, transferred to the problem of placing children with disabilities in segregated schools rather than in the ‘regular’ institutions, which was considered to be a violation of their rights.

In a more general aspect, while without a doubt the European Convention was never meant to advance on the protection of the rights of persons with disabilities, the ECtHR must rely on the CRPD to interpret and apply the provisions of Article 2, Protocol 1 of the Convention.

## **CHAPTER III:** **COLOMBIA**

This chapter presents the analysis of the judicial decisions of the Constitutional Court of Colombia [CCC] from 2006 to 2015 in which it is ruled on the right to education of persons with disabilities. First, it is determined the framework of the right to education for persons with disabilities to which Colombia must abide; second, based on the conceptual framework, an analysis of the decisions is presented by topic in order to explain the Constitutional Court's tendency, regression or advancement on the protection and promotion of the mentioned right; third, some general conclusions are drawn from the analysis.

### **1. National Framework**

As a monist country, international treaties and agreements ratified by Colombia have priority domestically. Additionally, every right and duties conferred at a national level must be interpreted in accordance with such international treaties and agreements. These provisions are enshrined in article 93 of the Political Constitution of Colombia [Const.] (Const. 1991), which was interpreted by the CCC in 2010 to affirm the supremacy of international human rights law in domestic jurisdiction<sup>39</sup>

Unlike other countries, Colombia guarantees a constitutional right to education preserved in Article 67 (Const. 1991). While the Colombian Constitution does not provide a specific model of education, the CCC through the interpretation of various articles of the National Constitution, laws and international instruments has inclined to establish that this right has the status of fundamental right and is ought to be *inclusive*.

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<sup>39</sup> Constitutional Court, April 21<sup>st</sup>, 2010, Decision C-293/10

Colombia signed the CRPD on September 11, 2008. Subsequently, the Senate enacted Law 1346 on July 31<sup>st</sup>, 2009 through which the CRPD was adopted at a national level. Then, in April 2010, the CCC approved both Law 1346 and the CRPD<sup>40</sup> in order for the Government to ratify the instrument -without putting any reserves- on May 10<sup>th</sup>, 2011. Thus, Colombia has an unquestionable obligation to abide by the CRPD and its national laws to protect and guarantee access to education for persons with disability.

Besides Law 1346, which reproduces in its entirety the CRPD, the most important legislation on education is in Law 115 of 1994 or “General Law of Education” (Congreso de Colombia 1994). Law 115 establishes the general principles and conditions under which the public service of education must be provided: State education is free of charge; equal opportunity in access and permanence; and, education as a public service with social purpose, for full development of the personality within a comprehensive physical, psychological, intellectual, ethical and emotional formation. Moreover, it sets the State’s obligation to provide education attending the specific needs of the population with disabilities, through the enactment of a public policy that ensures their integration within the official educational institutions, in order to eliminate all forms of discrimination and exclusion against people with disabilities, equalize opportunities and guarantee their right to education (Congreso de Colombia 1994, Article 46).

While Law 115 still focuses on an integration approach, a more recent Act –Law 1618 of 2013 (Congreso de Colombia 2013), establishes the provisions by which the rights of persons with disabilities must be guaranteed. Specifically, Law 1618 states that to ensure effective exercise of the rights of persons with disabilities all measures adopted by the

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<sup>40</sup> Through sentence C-293-10 on April 21<sup>st</sup>, 2010.

Colombian State –including public policy, laws, affirmative actions and reasonable accommodations- must be under an inclusive approach. Although it does not mandates to adopt inclusion as the national policy on education, the Law provides several obligations oriented to guarantee the right to education under inclusive principles, including: promote diversity; ensure educational quality oriented to reduce inequalities; guarantee access and permanence with inclusive approach; primary and secondary education must be free of charge and obligatory; access to high education and professional training in equality of opportunity; identify barriers that hinder access; prevent exclusionary practices; teacher training; among others (Congreso de Colombia 2013, Article 11).

In sum, Colombia is compelled to protect and guarantee the right to education for persons with disability exactly as it is cherished in Article 24 of the CRPD.

## **2. Analysis of the judicial decisions of the Colombian Constitutional Court**

For the period established between 2006 and 2015 seventeen decisions were found that serve the purpose of this investigation<sup>41</sup>. Before the ratification of the CRPD, the CCC ruled on nine cases<sup>42</sup>. In addition, after accession and until December 2015, the Court delivered eight more<sup>43</sup>. The results of the analysis were systematized by topic as further explained.

### *A. Conventional control*

The CCC has a long tradition of applying international law to interpret national provisions. Since 1992 the CCC has used the jurisprudential notion of “constitutionality

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<sup>41</sup>To narrow down the rulings of the CCC to the topic of interest, the search-term used was: ‘Inclusive education’ and ‘disability’, as well as “education” and “disability”

<sup>42</sup> T-884/06; T-170/07; T-454/07; T-282/08; T-022/09; T-560/10; T-899/10; T-974/10; and, T-994/10

<sup>43</sup> T-051/11; T-551/11; T-495/12; T-647/12; T-294/13; T-598/13; T-850/14; and, T-465/15

block”<sup>44</sup> to incorporate international human rights law as necessary premises of its reasoning in interpreting and applying national legislation (Cepeda 2008). Thus, the seventeen decisions included in this analysis incorporate many international instruments and documents, such as the Universal Declaration on Human Rights, the Inter-American Convention on the Elimination of all forms of Discrimination against Persons with Disabilities, American Declaration on Human Rights, San Salvador Protocol, General Comments, among others.

Nonetheless, what is very clear is that all sentences from 2010 to 2015 cite the CRPD and specially article 24. Moreover, the CCC takes the standards set in Article 24 as part of the “constitutionality block” and criteria the Court must abide by in its resolution. Since the CCC does not declares violation of specific instruments or laws –and their articles- but of a fundamental right, such as the right of education, that is part of the “constitutionality block”, there is no mention on any of the decisions to whether the CRPD, specifically Article 24, was breached or not. Instead, the CCC concludes that the right to education of the petitioners was infringed because actions or omissions were did not comply with the national and international standards. Although, in one sentence the Court found that the right to inclusive education of the petitioner had been violated because the

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<sup>44</sup> The “constitutionality block” is a concept used to refer to those norms and principles that are not formally contained in a Constitution, but are used as parameters of constitutional review. For more information on the use of the “constitutionality block” by the Constitutional Court of Colombia, *See* generally: Arango Olaya, M. 2004. “El bloque de constitucionalidad en la jurisprudencia de la Corte Constitucional Colombiana”. Pp. 79-102. Available: <http://www.icesi.edu.co/contenido/pdfs/C1C-marango-bloque.pdf>; Uprimy, R. 2005. “El Bloque de Constitucionalidad en Colombia: Un análisis jurisprudencial y un ensayo de sistematización doctrinal”. Red de Escuelas Sindicales. Universidad Nacional-ENS Colombia. Available: [http://redescuelascsa.com/sitio/repo/DJS-Bloque\\_Constitucionalidad\(Uprimny\).pdf](http://redescuelascsa.com/sitio/repo/DJS-Bloque_Constitucionalidad(Uprimny).pdf)

State failed to provide reasonable accommodations with the characteristics set by the CRPD<sup>45</sup>.

*B. Non-discrimination*

On the principle of non-discrimination, the ratification of the CRPD means no threshold in comparison with the rulings of the CCC before Colombia's accession to the treaty. In all seventeen decisions, the Court recognized non-discrimination as a fundamental principle of immediate application; specifically because of the historic discrimination people with disabilities in Colombia have been target of.

The CCC recognized in all seventeen judgments that discrimination on the basis of disability is not only prohibited, but the State has the immediate obligation to provide "special" constitutional protection to such groups in response to historic discrimination. Particularly, the Court makes emphasis on the fact that positive discrimination is allowed and that any omission to adopt such provisions constitutes a breach of the non-discrimination clause.

Although as part of the analysis of the "constitutionality block", the CCC takes the definition of discrimination against persons with disabilities from various international instruments, the Court gives its own definition in only in one sentence -delivered after ratification of the CRPD-, and it as follows:

"any behavior, attitude or treatment, conscious or unconscious, intended to annul or restrict their rights, freedoms and opportunities without objective and reasonable justification (...). [Also], the discriminatory act consisting of an unjustified omission in the special treatment persons with disabilities are entitled to, which brings as a direct effect their exclusion from a benefit, advantage or opportunity " (CCC 2013b, 17).<sup>46</sup>

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<sup>45</sup> T-598/13, p. 40

<sup>46</sup> Translation of my own



The CCC reiterates one ruling after another that positive discrimination, also called affirmative actions, not only is encouraged to remove all the obstacles that impede the social inclusion of people with disabilities, but it is also justified under international and national standards. On this particular matter, the only change that can be attributed to the ratification of the CRPD is that before the ratification the CCC made reference to “social integration”, notion that after ratification was changed to “social inclusion”. The change in the language used is a discussion that will be expanded further in the chapter. Also, the CCC echoes in the seventeen decisions the importance of positive discrimination in countering the negative effects of the continuing discrimination against people with disabilities and closing the inequality gap.

The CCC only develops on the possibility of a justified discrimination in one case, T-551/11, in which a University offers special admission quotas and financial aid for people who belong to vulnerable groups, except for the disabled community. In this case, while the Court recognized the competence of the University to implement affirmative actions to guarantee the right to education to everyone, it concluded that the incentives offered by the University couldn't be considered as justified discrimination and affirmative action because the measure adopted excluded a particular vulnerable group in violation of the principle of equality of opportunity. Moreover, the Court stated that in order to verify whether the difference in treatment could be justified or not, a proportionality test must be applied (CCC 2011b, 34). Also, in other case, T-051/11, the CCC stated that the State has burden of proof to show that the measure taken responds to reasonable and proportionate reasons, and that it was accompanied by other actions aimed at countering the adverse effect that the adopted measure might bring to a specific group (CCC 2011a, 47).

Additionally, the Court amounts to the non-discrimination arguments recognizing the existence of actions or omissions that indirectly constitutes discrimination. In the case T-022/09 –delivered before ratification- the CCC makes no explicit recognition of the existence of indirect discrimination, but concludes that the adoption of a new regulation in the school which requires students to change rooms for every course, was indeed discriminatory as it presents an obstacle for those students who have impairments that difficult their mobility, and due to the new requirement are always arriving late to course or even cannot access the room which is a violation of their right to education (CCC 2009, 20-21). The CCC defines indirect discrimination as “the one that derives from the application of apparently neutral norm, but in practice generate an adverse and disproportionate effect against a traditionally marginalized or discriminated group”<sup>47</sup> (CCC 2011a, 46). It is important to note that this recognition was only found in two cases, both after the ratification of the CRPD<sup>48</sup>. On the matter, the CCC stated:

“[T]he omission in providing a more favorable treatment is a form of discrimination, even when there is no intention to discriminate, it does not mean that the content of the norm is not exclusive (...) The violation of the non-discrimination clause may originate in a deliberate act or an unplanned output, which in any case involves the violation of the right to non-discrimination. Its constitutional prohibition is intended to prevent the abridgment, restriction or exclusion in the exercise of the rights and freedoms of one or more persons, the denial of access to a benefit or granting privilege only to some, without any objective and reasonable justification for doing so.” (CCC 2011b, 33)<sup>49</sup>

Furthermore, in T-051/11 the CCC ordered the non-application of a specific article of a national Law that conditioned the obligation to provide an interpreter of Colombian Sign Language [CSL], to a minimum number of students –ten- that must be enrolled in school. In that case, there was only three students who needed a CSL interpreter in the

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<sup>47</sup> Translation of my own

<sup>48</sup> T-051/11 (p. 46); T-551/11 (p.33)

<sup>49</sup> Translation of my own

school in question, thus the CCC considered that conditioning the provision of CSL interpreters for students constituted indirect discrimination as the Law, in a genuine attempt of countering discrimination, was in fact perpetuating exclusion (CCC 2011a, 46).

On the matter of exclusion, no change in criteria was found after ratification of the CRPD. Although the CCC makes reference to the prohibition of exclusion in cases before and after ratification, all statements are in the sense of recognizing exclusion as a form of discrimination. Before ratification of the CRPD, in 2006, the CCC recognized that exclusion of a child with disability from the educational system hinders their process of adaptability to society (CCC 2006, 20). Later, in a brief reckoning of inclusive educational systems around the world, the CCC recognized that inclusive education is the only system by which exclusion processes can be truly eradicated (CCC 2010c, 43).

After ratification, the CCC stated that financial planning, in terms or availability of resources, is of fundamental importance to guarantee that no student with disability is excluded from the general education system (CCC 2011a, 41-42). Also, the Court recognized that one of the conditions that foster exclusion of persons with disabilities from the educational system is the lack of physical accessibility of the environment, which hinders their possibility to achieve development to their fullest potential and pursue their aspirations (CCC 2011b, 31). Lastly, in 2013 the CCC ordered the Colombian State to adopt a public policy oriented to abolish all exclusionary practices and guarantee access to education in equality of opportunity to all (CCC 2013b, 39).

### *C. Reasonable Accommodation*

Before ratification of the CRPD, the CCC limits to mention that persons with disabilities have a right to reasonable accommodation, but makes no further analysis and,

in some cases, orders actions that constitute reasonable accommodations without acknowledging them as such. For example, in T-022/09 the ‘solutions’<sup>50</sup> provided by the school to a student with a mobility impairment who complained about the new regulation that required her to move from one room to another several times a day, were considered by the CCC to be unfit for her needs, thus it suggested other measures that would suit not only her but other students. Nonetheless, the CCC did not recognize these ‘solutions’ as reasonable accommodations that the school is obliged to provide (CCC 2009).

It is only after ratification of the CRPD that the CCC starts analyzing whether or not the school should have provided any reasonable accommodation –acknowledged as such-, and if so, whether the State abided or not by its international and national obligations on the matter. Although, in only one sentence the CCC gives a definition of reasonable accommodation, adopting the one enshrined in the CRPD (CCC 2013a, 16).

However, the Court only applies a balancing test in one case and fails to do so, as the opportunity presented, in one more. In T-051/11 school denied a fulltime SCL interpreter to a student who is deaf-mute and instead proposed having a part-time interpreter due to lack of resources. While the CCC concluded that the proposed alternative was not ‘reasonable’ according to the student’s needs, no balancing test was applied. Nonetheless, the Court did make an analysis of undue burden and established that considering the assigned resources to attend students with disabilities and the need to include in the educational system 104 hard of hearing students, the Stated could have hired enough interpreters to fulfill the students’ needs, hence it did not represent an undue burden (CCC 2011a, 45-46). In another case, the CCC established that in order to determine the

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<sup>50</sup> The school suggested the use of a wheelchair –although her impairment did not required one-, the aid of her friends while changing rooms, and the occasional aid of a ‘school guardian’.

reasonableness of a measure and whether it represents an undue burden for the State, the authority must compare such measure with other alternatives in order to guarantee that it is the less severe measure that guards balance between human rights and availability of resources (CCC 2013a, 40).

*D. Accessibility (and the other 3 A's: Availability, Adaptability, and Acceptability)*

All seventeen decisions have, at least, one of these four characteristics mentioned or analyzed. What is very clear is that only post-CRPD ratification the CCC makes constant reference to such features as the “4 A’s” and makes them part of the “constitutionality block”. Analysis of accessibility was made in sixteen of the cases, the one in which the Court did not discuss any aspect of this feature was because there was no need of doing so<sup>51</sup>.

The CCC always recognized the right of every person to access education and the obligation of the State to provide access for all without discrimination, especially to persons with disabilities. Pre-ratification, the CCC established that the obligation to secure educational access for everyone goes beyond guaranteeing children physical access to a school, but it is essential that the State assure every child retains the skills they are taught. This means that the State must undertake the appropriate measures in order to achieve real and effective access to education, including access to different forms of communication, such as providing an interpreter for persons who are hard of hearing (CCC 2007b, 9-10).

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<sup>51</sup> In T-647/12 the CCC did not analyze any of the 4 A’s because discussion was around whether or not the State should guarantee education for adults with disabilities, after the military forces of Colombia ceased payment of education for the daughter with disability of one of its retired members as soon as she turned eighteen. The CCC concluded that it is unconstitutional and discriminatory to establish an age limit for the obligation to guarantee the right to education for vulnerable groups. Thus, age cannot be a justification for exclusion

Also, the CCC acknowledged that accessibility is a fundamental condition of the right to education, thus denial of accessible transportation for considering that authorities are not obliged to provide that service when the educational institution is not public, infringes the full and effective enjoyment of this right (CCC 2008, 12). Additionally, in other case the CCC guaranteed accessibility, in equal conditions for everyone, to public spaces, facilities and buildings, including schools (CCC 2009, 13).

After ratification of the CRPD, the CCC continues to reiterate the above-mentioned criteria and expands in some cases its analysis. For example, the Court affirms that the right to education materializes, mainly, on the possibility of access to the public system; that such access must take into consideration the possibilities and needs of every individual; and, that public policy oriented to guarantee access for all must be developed around two main values: respect for diversity and the importance of an inclusive academic community (CCC 2011b, 19-26). Moreover, the CCC considers that the obligation of the State is not limited to ensure access in the “formal” sense, but in its “material” aspect, which includes making an analysis of the appropriate measures to guarantee effective exercise of the right to education for people with disabilities (Ibid, 41; CCC 2014, 20).

While there is no mention whatsoever pre and post CRPD about “Universal Design” as a means to achieve full accessibility, the CCC constantly asserts that in order to do so State is compelled to consider everyone’s special needs so the outcomes of the the processes of learning and socialization are as similar as possible (CCC 2008, 10; 2009, 14; 2010c, 28; 2010d, 13; 2012a, 22; 2013b, 31; 2015, 25). To do so, as stated before, schools must adapt to the needs of students with different social and cultural settings and make

available the necessary materials and properly trained teachers, in recognition that every child has a unique way of learning.

On the matter, the CCC refers to availability only in general a term, stating that education is a fundamental right that must be available to everyone. Nonetheless, there is no reference of specific traits of availability pre-CRPD. While there is one case where the CCC affirmed that the lack -for a period of time within the school cycle- of a trained teacher in CSL hampered a girl's right to education, it makes no reference to the obligation of the state to have available trained teachers (CCC 2007b). Nonetheless, post-CRPD the CCC deepens into the analysis of availability in almost every judicial decision. In T-051/11, the CCC establishes that the effectiveness of the right to education is subject to compliance with the conditions of availability, thus the State has the obligation to design, produce and disseminate specialized educational materials, and strategically train and update teachers (CCC 2011a, 28-34). Specifically on the importance of providing students with teachers or interpreters knowledgeable in CSL, the Court stated:

“The role of the Colombian Sign Language interpreter is fundamental for the educational process to be truly inclusive because that person plays the role of communicative mediator between the deaf and hearing communities, and facilitates access to information for deaf people in all educational spaces and linguistic modalities”<sup>52</sup> (CCC 2011a, 38).

Also, the CCC has emphasized on the importance of having, amongst the teaching staff, personnel with visual impairments:

In a context in which there are still great difficulties in implementing the inclusive education model, the presence in an educational institution of a teacher who, by his blindness and expertise in Tiphology<sup>53</sup>, is specifically trained to teach children with visual impairment, is an important step towards overcoming the gap between

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<sup>52</sup> Translation of my own

<sup>53</sup> According to the Merriam-Webster Dictionary, “typhology” is the scientific study of blindness, its causes, effects and control. <http://www.merriam-webster.com/dictionary/typhology>

the constitutional mandate to guarantee educational inclusion of children with disabilities and its effective implementation”<sup>54</sup> (CCC 2013a, 27).

On adaptability, before ratification of the CRPD the CCC only mentioned adaptability as one of the obligatory traits of education, but no analysis was made, situation that changed after 2010. The CCC recognized that the educational system must be in a permanent process of adaptation to diversity, specifically in the case of disability, and celebrates the initiative of the school to adapt curricula to a student with a mental impairment so she can advance in her education according to her potentialities (CCC 2001b). Additionally, the Court recognizes that without curricula adaptability is very difficult to close the gap of inequality and meet the challenges that inclusive education represent (CCC 2013a, 21). More generally, the CCC affirms that students have the right to be guaranteed access to effective education in terms of adaptability, for which States are not only required to provide simple access to an educational institution, but also take positive measures to ensure adaptability of materials, curricula, and other educational services (CCC 2014, 34).

Also on adaptability, the CCC has seldom analyzed the use of standardized test to assess abilities or intelligence. The Court had the opportunity to do so in one case pre-CRPD where an educational institution classified students by level of disability –those who were susceptible of receiving education, and those who were not-. While the CCC recognized the importance of providing inclusive education to persons with disabilities and prohibited their exclusion from the general educational system, it still acknowledged the validity of tests that assess the ‘limitations’ of the students and the viability of their integration to the education system (CCC 2010a, 26).

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<sup>54</sup> Translation of my own



This criterion does not change much after ratification of the CRPD. The CCC, in one occasion only, pronounced on standardized testing, concluding that their mere existence is not against the law. On this case, a student was denied accommodations to present the standardized test to enter the University of his choice and the CCC stated that while the examination is needed, the school should have take into consideration the specific needs of every applicant and provide them with the appropriate support. In sum, the Court affirmed:

“[T]he aim is not to change the technical conditions of standardized assessment tests, but the exceptional needs of people who are being examined are taken into account in order to provide appropriate support, in accordance with the general parameters set by the Ministry of Education, specially the guidelines for providing education to students with disabilities, which harmonizes the fundamental rights to equality and non-discrimination and the obligation of ICFES to assess the quality of education in Colombia.”<sup>55</sup> (CCC 2013b, 39)

This means, that up until the end of 2015, the CCC has not moved towards considering standardized testing as a barrier to access education for people with disabilities.

#### *E. Equity and Equality*

On this topic, there was no change of tendency on the CCC criteria or reasoning pre and post CRPD ratification, what it is observed is that the Court expands its standards on a more protective way. On the seventeen analyzed cases the Court recognized that education must be guaranteed in equality of opportunity, that everyone is equal before the law, and that persons with disabilities can access the judicial system in order to demand their rights and obtain reparations when they have been breached. The CCC develops its criterion on these matters based on the constitutional clause of equality, which guarantees special protection for children, protection that is reinforced when they have a disability.

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<sup>55</sup> Translation of my own

On equality of opportunity, before ratification of the CRPD the CCC recognizes, generally, that the State has the immediate obligation to guarantee access to education in equality of opportunity for everyone, beginning with the selection processes –specifically in superior education-, and in distribution of quotas (CCC 2006, 16-17; 2015, 14). That to promote such conditions there is a need to provide a ‘privileged’ and ‘qualified’ treatment, better said, to implement affirmative actions (CCC 2007b, 6; 2010b, 11; 2012a, 15; 2013b, 24). Moreover, equality of opportunity will ensure students with disabilities equal treatment and the provision of services that will allow them to achieve the maximum development of their skills and potential, which will facilitate their social integration (CCC 2009, 10). For this reason, a lack of properly trained teachers –in Braille, for example- in a school is a violation of the right to education for not providing equal opportunities for everyone (CCC 2010d, 2).

After ratification, some of the above-mentioned standards are emphasized by the CCC and expanded in other ways. For example, the Court recognizes equality of opportunity as a fundamental principle of the right to education, alongside with effectiveness, continuance, quality, and others (CCC 2011a, 17-18; 2013b, 12). Additionally, the CCC states that equality of opportunity entails the obligations for the State to provide educational services on an equal basis and under consideration of the ‘special conditions’ needed by students with impairments, so that their learning and socialization processes are as equally as possible as to those of students without impairments (CCC 2012a, 15). Also, for the first time, the CCC acknowledges that the way to ensure access to quality education in equality of opportunity is through the inclusive

approach (ibid, 16) and, at the same time, the means for persons with disabilities to achieve maximum enjoyment of other rights and full participation in society (CCC 2013b, 18).

In most of the analyzed decisions the facts of the case had to do with the lack of equality of opportunity provided to the students, for which the CCC made the corresponding analysis of equality before the law recognizing that everyone is equal before the law and has the right to access the judicial system to claim their rights. It is important to note that one of the main purposes of the CCC in reviewing *tutela* actions<sup>56</sup> is to achieve material justice through ordering reparations, and unify criterion on the interpretation of fundamental rights (CCC 2007, 8). Thus, in the seventeen sentences studied the CCC ordered reparations to redress violations of the right to inclusive education.

For example, regarding the non-discrimination clause, equality and accessibility, the CCC ordered the admittance of students that were excluded from the general educational system for not opening special quotas for students with disabilities (CCC 2006), for ending the program that provided the student with the necessary support (CCC 2008), and for not providing special financial aid for persons with disabilities (CCC 2011b). In a case where the CCC orders ‘special’ education after a thorough evaluation of the applicant’s disability, the Court states that in the circumstance that there is no space available in the public school, the State must pay for a private institution to provide education (CCC 2007a; 2015). Also, the Court orders the reinstatement of a professor with a visual impairment to both guarantee his rights and the rights of his students with disabilities to have a trained teacher (CCC 2013a).

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<sup>56</sup> Also known as: “writ of protection of constitutional rights”, “right of injunction”, “writ of injunction”, “writ of protection”, “tutelage action” or “acción de tutela” (in Spanish). It is the legal action that can be invoked to protect fundamental rights enshrined in the Colombian Constitution.

On reasonable accommodations, the CCC orders the State to hire a professor knowledgeable in CSL (CCC 2007b; 2014), to provide with accessible public transportation to a girl in order to attend school (CCC 2008), to hire professionals on psychology and physiotherapy as support or a student with disability (CCC 2010b), and to hire a teacher prepared in autism spectrum disorder to support a student inside the regular classroom (CCC 2012a).

More generally, before ratification of the CRPD, the CCC orders to adopt the necessary measures to guarantee educational policies in favor of people with disabilities (CCC 2010a), to harmonize all institutions that provide any kind of services to people with disabilities in order to ensure that education is delivered under an integral perspective (CCC 2010b), to provide information to all educational institutions and society about the importance of the principles of reasonable accommodation and participation of persons with disabilities (CCC 2010c). After ratification, the CCC mandates to adopt planning, programming, and budgetary measures to ensure real and effective access to education, as well as the modification of several articles of a Presidential Decree that promotes indirect discrimination in educational settings against persons with disabilities (CCC 2011a). The Court also emphasizes on the importance of creating public policy specifically to guarantee reasonable accommodations (CCC 2013b).

#### *F. Other Principles of Inclusive Education*

It is pretty identifiable the moment in which the CCC starts to guarantee inclusive education as the approach that best fulfills the right to education for people with disabilities. While Colombia ratified the CRPD on May 2011, changes on judicial decisions can be spotted since 2010, when the Law 1346 that harmonized national legislation with CRPD

was approved. From 2006 to 2009 the CCC did not recognize the right to have a personalized education fit for each student's needs, nor that inclusive education is the appropriate model. On the contrary, it emphasizes that persons with disabilities must be granted education in integrated spaces (CCC 2006, 18-19), and confuses and uses indistinctly the words 'inclusion' and 'integration' to refer to the latter (CCC 2007a, 14).

This began to change in 2010, after the harmonization of the CRPD into national Law. Although in 2011, the CCC determined that the "the shortcomings of the current policy on inclusive education, make insufficient the guarantee of the right to education of people with disabilities" (CCC 2011a, 48). Nonetheless, the shift in judicial criterion is pretty clear as the CCC started to recognize that education is indivisible from human dignity because of its quality depends the level of inclusion in society (CCC 2010a, 26; 2010d, 10; 2011b, 19). Also, the Court began to make reference to previous discriminatory approaches such as 'special education' and integration practices (CCC 2011b, 21-22; 2012a, 18-21; 2013a, 18-20; 2013b, 27-29).

Moreover, ever since decision T-899/10, the Court is very clear on the fact that 'special education' must be a last resource that shall be ordered through the *tutela* action only after medical and psychological valuations, and the family opinions, considers it as the best option for the child and the only way to guarantee its right to education (CCC 2010b, 11; 2010c, 38; 2010d, 14; 2011a, 32; 2012b, 24; 2015, 25). Additionally, the CCC established that the fundamental right to education means that the educational system must follow an inclusive model, thus inclusive education is a right of everyone, not just of person with disabilities (CCC 2011b, 21-22; 2012a, 16; 2013a, 19; 2013b, 25; 2014, 20; 2015, 23). Specifically, the Court expressed:

“As for the so-called inclusive education, the Court has indicated that it is the commitment of various international instruments -which has also been welcomed by the National Ministry of Education- and ‘seeks to broaden the spectrum of inclusion of people with special educational needs special, beyond access to regular school. Inclusive education seeks to abolish segregated environments, so all children, regardless of their educational needs, can study and learn together.’ [...] Inclusive education is set as the ideal mechanism to achieve transformation of the education system for it to respond to the diversity of students.”<sup>57</sup> (CCC 2013b, 25-26; 2015, 22-23).

Even in some decisions, the Court recounts inclusive educational policies and experiences of other countries such as Canada, Argentina and the European Union (CCC 2010c, 40-44; 2013b, 26).

Contrary to what the Court mandated in previous decisions and advancing in recognizing the importance of personalized education, the CCC specifically started to reject integration policies and established that education for persons with disabilities should be in regular classrooms with individualized plans (CCC 2010d, 13; 2011a, 26; 2011b, 38; 2012a, 17; 2013b, 26; 2015, 22). The CCC acknowledged that not all disabilities are equal, and even when they are the needs of every student are different, therefore adopting a “one size fits all” educational policy instead of a personalized education is discriminatory (CCC 2013b, 39). Additionally, the Court affirms that the educational system must adapt and be prepared to respond to every educational need of all learners, considering the particularities of each case and taking into account all of their capabilities and talents, so that the learning process suits their conditions and can be accessible to anyone (CCC 2014, 20-21).

What remains a constant in all seventeen sentences is the recognition of education as a fundamental right that must be aimed to develop fullest human potential, and enable people with disabilities to participate in society; as well as the obligation of the State to guarantee access, permanence and progress in the educational system. While pre-CRPD

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<sup>57</sup> Translation of my own

the CCC only refers to such obligations as general characteristics of the right to education, after ratification the Court recognizes that the only way to achieve those purposes is through inclusive education (CCC 2011a, 16; 2011b, 41-42; 2012a, 15; 2013b, 27; 2014, 21-22; 2015, 19-23). Additionally, the CCC affirmed that when permanence on the general system is not guaranteed due to lack of trained teachers or reasonable accommodations then implicitly the student has been excluded (CCC 2007, 9). In response, the State must avert these situations within its educational coverage plan and design a service that guarantee continuance and permanence in the system for persons with disabilities (CCC 2008, 12).

Also, the CCC established that public policy on how to ensure access, permanence and progress to higher education of persons with disabilities should develop within two lines of action: respect for diversity and the importance of an inclusive academic community (CCC 2011b, 26). The Court reinforces this criterion by sustaining that the effectiveness of the permanence principle can only be guarded by including students with disabilities in regular classrooms (CCC 2013, 27; 2014, 26; 2015, 23).

### *G. Other barriers*

With regards to the three indicators used to identify other barriers, the most identifiable change is in the use of discriminatory language in the judicial decisions. In the pre-CRPD sentences the CCC commonly uses outdated terms such as ‘disabled’, ‘handicapped’, ‘mental retardation’, ‘persons with limitations’, ‘normal schools’, and ‘normal students’. Nonetheless, this changes after judgment T-974/10 when the Court shifts the above-mentioned terms for ‘persons with disabilities’. In this decision, the Court dedicates an entire section to explain how a change of perspective on disability –going

from perceiving it as a disease to a condition that does not define the person, thus adopting the social model of disability- requires a change of language (CCC 2010c, 30).

Although no pre-CRPD decision fails to understand, in its generalities, the human rights model of disability as they all recall international instruments in the matter as part of the ‘constitutionality block’, judgment T-974/10 is the first one to mark the threshold of explicitly including an analysis of the social model on disability and the human rights paradigm as part of the decision. This opened the door for further criterion of the CCC on the matter. For example, the Court recognized that the effects of impairment in a person depends, on great scale, from the social environment, thus negative settings turn impairments into disabilities (CCC 2011b, 30-31; 2014, 14). The CCC further expands and explains that the change from a medical to a social model and human rights paradigm implies: (1) that disability is the result of the exclusion of the person from participation in society; and (2) exclusion is not impossible to eradicate (CCC 2013a, 16).

However, the CCC admits that in order to achieve full inclusion there are a lot of barriers that State and society need to overcome, one of which are attitudinal barriers. On the matter, there is no mention whatsoever of the role negative attitudes, stigmatization or stereotypes play in discrimination against people with disabilities and, more specifically, in their exclusion of the general educational system. It is only after 2010 that the CCC starts to recognize that there are still present some practices, obstacles and prejudices that impede persons with disabilities access to education (CCC 2011a, 41). Specifically, the Court acknowledged that people with disabilities have been invisible to the Government and society due to a high level of ignorance, prejudices, negligence and discomfort generated by disability (CCC 2015, 13). Therefore, violations to the right of equality and non-



discrimination in the context of education may originate in the use of language in norms and regulations, or in other practices adopted by the institutions and their communities that unjustifiably become a way of life and are naturally accepted, which perpetuates exclusion (CCC 2011b, 33).

The CCC admits that while there has been advancement in inclusive practices no educational institution has managed to eradicate pedagogic practices that still view disability as an ‘abnormality’, which has created a huge gap between what is said and done (CCC 2013a, 20). The Court strongly advises that in order to overcome attitudinal barriers it must be carried out awareness campaigns -about the living conditions and needs of people with disabilities- throughout the academic community (CCC 2011b, 25), as well as throughout the entire society and most relevantly amongst the competent authorities to make the process of inclusive education possible (CCC 2015, 14).

### **3. Conclusions**

In general, the CCC has advance in the recognition of inclusive education as a right for persons with disabilities, as well as in the establishment of standards that are pulled out but go beyond the national laws that regulate the educational system. What is very interesting from the Colombian case is that the process of harmonization of their national framework took place prior to the ratification of the CRPD. That is, after signing the Convention but before ratification, the government enacted a Law that adopted in its entirety the CRPD, which turned out to be the real threshold for the changes identified in the CCC’s rulings. Thus, at this point, whereas it was the act of ratification on itself which impacted the protection of the right to education or not, has little importance. What should be noted is that it was indeed the adoption of the CRPD –through a national law- that really

opened the door to the recognition of inclusive education as the appropriate model to fulfill such right.

## **CHAPTER IV:** **MEXICO**

This chapter presents the analysis of the judicial decisions of the National Supreme Court of Justice of Mexico (SCJN) from 2001 to 2015 in which it is ruled on the right to education of persons with disability. First, it is determined the framework of the right to education for persons with disabilities to which Mexico must abide; second, based on the conceptual framework, an analysis of the decisions is presented by topic in order to explain the Court's tendency, regression or advancement on the protection and promotion of the mentioned right; third, some general conclusions are drawn from the analysis.

### **1. National framework**

As opposed to many countries in the world, Mexico has a constitutional right to free and compulsory education. The Constituent Assembly of 1917 considered education a crucial and fundamental aspect of the supreme law (Sánchez and Cardona 2006, 73), therefore Article 3 of the Political Constitution of the United Mexican States [PCUMS] establishes the duty of the Federation and States to provide every individual with free pre-school, primary and secondary education. Additionally, Article 1 prohibits discrimination on the basis of disability.

Mexico has signed and ratified many human rights international treaties. Specifically, Mexico signed the CRPD on March 30<sup>th</sup>, 2007 –the same day it was opened for signature- after playing an important role pushing for its adoption. Later that year, on December 17<sup>th</sup>, 2007 the Mexican Government ratified the CRPD with an interpretative

declaration that was further withdrawn in 2012.<sup>58</sup> It is important to note that with the 2011 Human Rights Amendments to the Constitution, the rights established in every international treaty to which the Mexican State is party were incorporated to the Constitution<sup>59</sup>. Therefore, human rights were elevated to the highest level of protection, creating the obligation for every authority to adopt and enforce international human rights standards, always guided by the *pro homine* principle.

Although the PCUMS does not mandate a specific model of education, there are other national obligations created by its legislature that give elements as to how the right to education must be fulfilled. In 2003, the *Federal Act on the Prevention and Elimination of Discrimination* (Congreso de la Unión 2003) was adopted, prohibiting any distinction, exclusion or restriction based on disability. The *General Act on the Inclusion of Persons with Disabilities* (Congreso de la Unión 2011) and the *General Act of Education* (Congreso de la Unión, 1993) -last reformed in June 2016- envisions an educational system without

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<sup>58</sup> On January 3<sup>rd</sup>, 2012, the Government of the United Mexican States informed the Secretary-General that it had decided to withdraw the interpretative declaration made upon ratification to paragraph 2 of article 12 of the Convention.

<sup>59</sup> The reform was published in the Official National Gazette on June 10, 2011. The first three paragraphs read as follow:

“In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.

The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the broader protection of people at all times.

All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee Human Rights, in accordance with the principles of universality, interdependence, indivisibility and progressiveness. As a consequence, the State must prevent, investigate, penalize and rectify violations to Human Rights, according to the law.”

For English version of the PCUMS, see Constitute Project, “Mexico’s Constitution of 1917 with Amendments through 2015”, Available at:

[https://www.constituteproject.org/constitution/Mexico\\_2015.pdf?lang=en](https://www.constituteproject.org/constitution/Mexico_2015.pdf?lang=en)

For more information on the Constitutional Reform, see: Collí Ek, Víctor Manuel. "Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges." *Human Rights Brief*. Vol. 20, no. 1 (2012): 7-14. Available at:

<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1850&context=hrbrief>

discrimination. More recently, in April 2014, the *National Program on Development and Inclusion of Persons with Disabilities 2014-2018* was signed by the President to align the national strategies with the international commitments.

Although these acts and programs recognize a right to education for people with disabilities and establish a national system for their “development and integration into society” (CmRPD 2013, para. 11) they still acknowledge special education as the means towards an independent life and academic equality for people with disabilities. Nonetheless, a very recent reform to the *General Act of Education* was made in order to harmonize it with the CRPD and guarantee *inclusive education* (DOF 2016). Specifically, the Law was modified to guarantee equality of opportunity in the access, permanence and progress in the educational system; to recognize the value of diversity and a culture of inclusion; to order the elaboration and actualization of accessible materials; to order that any new school building must be physically accessible; and, to guarantee teacher training to promote inclusive environments. Nonetheless, it still affirms that education for people with disabilities must be “special” but in inclusive settings, failing to establish an obligation to guarantee *inclusive education* to everyone without distinction.

## **2. Analysis of the judicial decisions of the National Supreme Court of Justice of Mexico**

For the period established between 2001 and 2015 only three decisions were found that serve the purpose of this investigation<sup>60</sup>. What specifically stands out of the Mexican

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<sup>60</sup>To narrow down the decisions of the SCJN to the topic of interest, different combination of search terms were used to make sure no case was left out. ‘Inclusive education’ and ‘disability’ was the first try with No results found; ‘inclusive’, ‘education’ AND ‘disability’ threw out no matches; ‘right to education’ AND ‘disability’ had 3 cases; ‘special education’ AND ‘disability’ cast out no decisions at all; other combinations including the words ‘education’, ‘disability’, ‘CRPD’, ‘discrimination on the basis of disability’, among other terms, were also used in the research tool with no results whatsoever.

case is that no judicial decisions were found before the ratification of the CRPD. On the contrary, after accession the Court ruled in only three cases: AI 54/2009 (SCJN 2013), AI 86/2009 (SCJN 2015a), and AD 35/2014 (SCJN 2015b).

For a better understanding of the analysis, brief descriptions of the facts of each case are presented:

- AI 54/2009: the National Commission of Human Rights [CNDH] presented an Action of Unconstitutionality<sup>61</sup> against diverse local authorities of the State of Colima for the enactment of the *State Law that regulates Day Care Centers* [Colima Law], which allegedly violated the Constitution, the Inter-American Convention on the Elimination of All forms of Discrimination Against Persons with Disabilities [IACPD] and the then *General Act on Disability*<sup>62</sup>. Specifically, against the articles that discriminated against people with disabilities by excluding them of the right to access these Centers because of the differentiation made between ‘dependent disabled’ children from those who are not, breaching their right to education.
- AI 86/2009: the facts are similar to AI 54/2009 as the CNDH again presented an Action of Unconstitutionality against local authorities of the State of Baja California for the enactment of the *Act of Public Health of the State of Baja California* [Baja California Law] that establishes the requirements that the Day Care Centers must meet to operate, in violation of the Constitution and the IACPD. Similar to the case above, the Law catalogues disability into ‘dependent’ and ‘non-dependent’ disabled

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<sup>61</sup> A judicial proceeding that can be brought before the SCJN by which legislative minorities, the Federal Attorney General, political parties and the CNDH, can challenge the constitutionality of a statute law passed by federal and state legislatures, within 30 days of its ratification.

<sup>62</sup> Now, the General Act on the Inclusion of Persons with Disabilities (Congreso de la Unión 2011)

children, discriminating against persons with disabilities for allowing exclusion practices in educational settings.

- AD 35/2014: The mother of a child victim of scholar bullying sues the State in civil proceedings for monetary compensation for the psychological damage caused to her son by a teacher and other classmates by continuously assaulting him physical and psychologically. The child, who was 7 years old at the time of the harassment, had been diagnosed with Attention Deficit Hyperactivity Disorder [ADHD], which is not considered by the SCJN as a disability but, for analysis purposes, considers it as such in order to grant him protection under a protected category of discrimination.

The results of the analysis were systematized by topic as further explained. At this point is important to note, as mentioned above, that no judicial decisions were found prior to the ratification of the CRPD, thus the analysis is made based only on the rulings emitted post-2007 and it involves whether or not there have been any changes within those rulings.

#### *A. Conventional control*

The Human Rights Constitutional Reform of 2011 gave all judges the duty to apply a conventional and constitutional control in every decision that entails fundamental rights. Accordingly, since 2011 judges nationwide must cite and analyze the applicable international human rights treaties in order to guard the *pro homine* principle and apply the most favorable law in benefit of all the individuals. Nonetheless, from the three decisions studied only one -AI 86/2009- cites the CRPD, and specifically Article 24, but no further analysis of its implication on the case is made.

It is important to mention that the SCJN made an interest shift on this matter, if we look at the two similar cases reviewed within a timeframe of two years. On AI 54/2009,

ruled on the 21<sup>st</sup> of November 2013, the Court made no mention at all of the CRPD, although it did make a conventional control of the Law in question with the IACPD. But, on February 15<sup>th</sup>, 2015 when ruling on the Action of Unconstitutionality 86/2009, the SCJN uses the CRPD to interpret what it means discrimination on the basis of disability. It reproduces the CRPD text in relation to articles 1 to 7 and Article 24 in order to make a conventional control of the Baja California Law and decide whether or not the distinction between ‘dependent disabled’ and ‘non-dependent disabled’ was conventional and constitutional or not. While the SCJN did not declared a violation to the CRPD, it did affirm that the introduction of " non-dependent " qualifier is incompatible with the Constitution, in accordance with articles 1, 4, 5 and 7 of the CRPD (SCJN 2015a, para. 81). What stands out is that the SCJN leaves out of this declaration Article 24 of the CRPD.

### *B. Non-discrimination*

The SCJN used only in AI 86/2009 a definition of “discrimination on the basis of disability”. In that case, recognizing the recommendation made by the Inter-American Committee for the Elimination of all forms of Discrimination against People with Disabilities [IACmPD] of adopting into its national legislation the definitions on disability and discrimination on the basis of disability (SCJN 2015a, para. 70) IACmPD 2010, pg. 20), the SCJN uses the definition of “discrimination against persons with disabilities” as enshrined in Article 2 of the IACPD.

In AD 35/2014 the SCJN accepts that bullying can constitute a form of discrimination when it is perpetuated against someone who belongs to a group protected by the non-discrimination clause (SCJN 2015b, 31). While ADHD is not a disability, the Court decided to expand its protection and considered that the bullying occurred for a



reason related to disability as it was in response to some of the ADHD behaviors the child presented, thus the child was discriminated against by his teacher and classmates (Ibid, 36) which hindered his right to education as the child decided to skip school because of the harassment he suffered. Then, the SCJN established that schools are compelled to provide reinforced protection to students with disabilities in attention of their susceptibility to suffer from some kind of discrimination (Ibid, 42).

In the three decisions the SCJN recognizes non-discrimination as a fundamental principle of immediate application. Moreover, in both Actions of Unconstitutionality the Court affirms that exclusion is a form of discrimination, thus it is a practice that is prohibited by the PCUMS and international human rights instruments (SCJN 2013, 18; 2015, 91). The Court concludes that cataloguing disabilities in ‘dependent’ and ‘non-dependent’ impacts negatively in the access to education for people with disabilities by reinforcing exclusionary practices within a group that has been traditionally excluded from society (SCJN 2013, 8; 2015a, para. 50-51). In that sense, the use of the concept ‘dependent disability’ -to refer to those who cannot access to education- opens the door to the possibility to an arbitrary conduct from school authorities to deny access to anyone whom they consider needs additional support for learning (SCJN 2015a, 14).

Additionally, the Court acknowledges that not all distinction constitutes discrimination, and that governments must rely on affirmative actions and “treating unequal the unequals” (2015a, para. 58; 2015b, 62) to guarantee equality and non-discrimination on the educational system. In that sense, the SCJN argues that the differentiation of ‘dependent’ and ‘non-dependent’ disabilities is indeed a form of denial

of the right to education for people with disabilities that cannot be considered as justified discrimination. On the matter, the SCJN acknowledges that:

“[N]ot every unequal treatment violates guarantees, but only when it produces a distinction between objective and indeed equal situations, without it having an equally reasonable and objective justification; therefore, to equal factual circumstances correspond similar legal situations, because the legislator has no prohibition in law to establish unequal treatment, unless this is contrived or unjustified.”<sup>63</sup> (SCJN 2015a, para. 54)

In that sense, the Court applied a conventionality control in order to assess whether the distinction met the requirements of proportionality –between the unequal treatment given and the intended purpose- reasonableness and necessity. The SCJN concluded that the phrase ‘dependent disability’ is not a reasonable distinction because the disadvantages of excluding those who are classified as “dependable” outweigh the advantages of accepting those who are “non-dependable” (Ibid, para. 67). Also, the Court considered that given that the CRPD and other international instruments do not distinguish between types of disability, it would not be in accordance with the *pro homine* principle if the SCJN would do so (para. 68).

Another interesting finding between the Actions of Unconstitutionality is that only in AI 86/2009 the SCJN recognizes indirect forms of discrimination, while in the previous action it did not. The Court cites the CmRDP and recalls that “a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration” (SCJN 2015a, para 72), thus in its application the Baja California Law would be discriminatory as it allows all day care centers to deny access arguing that they are not equipped to provide service to anyone with “special needs”.

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<sup>63</sup> Translation of my own

### *C. Reasonable accommodation*

In none of the three judicial decisions reviewed was found any analysis of reasonable accommodation, even when the opportunity was presented. For example, in the Actions of Unconstitutionality where the Baja California Law and the Colima Law excluded ‘dependent disabilities’ from the day care centers because there are ‘specialized’ centers where they can receive the ‘special attention’ they need, the Court could have referred to the importance of providing reasonable accommodations that foster inclusive settings since early childhood, but did not. In AI 86/2009 the SCJN only referred to reasonable accommodation as it reproduced parts of the CRPD, such as articles 2, 5 and 24, but no analysis was made.

### *D. Accessibility (and the other 3 A’s: Availability, Adaptability, and Acceptability)*

There are very few criterion set by the SCJN on this matter. In AI 54/2009 the Court completely ignores the fact that the Colima Law denies access to education and makes no mention at all of the importance of guaranteeing accessibility. On the contrary, AI 86/2009 the SCJN affirms that local authorities must guarantee accessibility for all; in order to do so State is compelled to consider everyone’s special needs so the outcomes of the the processes of learning and socialization are as similar as possible, thus the State should provide the day care centers and their students with the necessary tools so everyone can attend to ‘regular’ classrooms (SCJN 2015a, 14).

Moreover, the SCJN, in attention to a recommendation made by the Committee on the Rights of the Child [CmRC], pointed out that all new public buildings –including schools and day care centers- should comply with international specifications for accessibility of persons with disabilities, and that existing public buildings should be

modified, to the extent it is feasible, to make them as accessible as possible (ibid, para. 71). Also, the SCJN cites the CRPD on the definition of ‘universal design’, and establishes that the social model of disability aims to social inclusion based on independent living, non-discrimination and universal accessibility in all activities, such as economy, politics and education (Ibid, para. 61).

#### *E. Equity and Equality*

The SCJN recognizes that education must be granted in equality of opportunity for everyone. In that sense, the Court asserts that the social model of disability has the aim to achieve not only formal equality –which concerns equal treatment and the absence of discrimination-, but also material equity that characterizes by the introduction of ‘inequalities’ –or positive discrimination- that acknowledge the different circumstances and context of every person (SCJN 2015a, 61; 2015b, 40). Therefore, to guarantee equality of opportunity, the Court proclaims that States need to generate spaces where openness, tolerance and equitable education are promoted (SCJN 2015b, 40).

Additionally, the SCJN cites the Constitutional Court of Colombia and recognizes that States are compelled to provide educational services on an equal basis and under consideration of the ‘special conditions’ needed by students with impairments, so that their learning and socialization processes are as equally as possible as to those of students without impairments (SCJN 2015a, 14) Nonetheless, the SCJN affirms that to protect the right to education governments must ensure that it is provided with equity but in integrated spaces (SCJN 2015b, 40), which is considered by the international community as a form of segregation.

None of the cases analyzed presented the Court with the opportunity to pronounce on equality before the law for people with disabilities, two of them because of the nature of the judicial proceeding, and the other one because the victim of bullying was underage. However, the SCJN did order reparations were breaches on fundamental rights were found<sup>64</sup>. For example, after declaring that the categorization of “dependent” and “non-dependent” disabilities was found unjustified, the Court declared the unconstitutionality of the article of the Baja California Law containing such concepts, and ordered the adoption of a new wording for that article that not only does not exclude, but explicitly include people with disabilities. This, argues the SCJN, generates an inclusive condition for people with disabilities in the day care centers, regardless of their disability (SCJN 2015a, para. 87).

In the bullying case, the SCJN ordered the school to pay five hundred thousand mexican pesos in compensation for moral damages caused to the child, after being harrassed by his teacher for being diagnosed with ADHD, as well as to absorb the cost of any number f psychological therapy the child might need. The Court recongnized that these types of reparations have a deterrent effect to future actions, therefore, the sum imposed should be reasonable enough to satisfy the purpose of repair but also to deter (SCJN 2015b, 91).

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<sup>64</sup> Only in AI 52/2009 the Court did not order reparations. Instead, it declared the definitive dismissal of the proceeding as the act that activated the action was already extinct. That is, months before the ruling the Colima Law was overturned by a new one.

### *F. Other principles of Inclusive Education*

The SCJN makes very reserved assertions on inclusive education. What it does is to recognize, generally, that the right to education entails the obligation to guarantee access, permanence and progress to high quality education, and that it is the means for a person to participate in society and achieve its fullest potential. On the matter, the SCJN acknowledges education as an indispensable right to realize other human rights (SCJN 2015b, 74), and, citing the CCC, recognizes that

“Thanks to the existence and protection of the right to education, other rights, values and principles, such as equality, dignity, good name, freedom to choose a profession or trade, the free development of personality, civic participation, work, the minimum vital, among others, can develop and coexist.” (Ibid, 33)

Moreover, the SCJN establishes that the purpose of education is to empower the person, develop his or her skills and capacity to the fullest potential, and boost their self-esteem and self-confidence (Ibid, 34).

The SCJN consents that inclusion is important at all ages, especially when it is fostered at a very early stage in people with disabilities, maximizing the benefits (SCJN 2015a, para. 75). Nonetheless, the SCJN avoids setting standards that promote inclusive settings and limits its affirmations to establish that education is the main means to achieve an effective and efficient integration of society (SCJN 2015b, 78); thus, people with disabilities must be provided equal education in integrated spaces so they can learn the values that would allow them to live in society (Ibid, 41).

### *G. Other barriers*

In regards to the elements identified in this study as ‘other barriers’, neither of the decisions analyzed used discriminatory language nor did recognize attitudinal barriers. At most, the SCJN acknowledged in AI 86/2009 that disability is the result of the interaction

between impairment and the existing social barriers (SCJN 2015a, para. 61), without any further information as to the different types of barriers that a person with disability can encounter in his or her daily life. Moreover, the SCJN could have expanded, at least on the bullying case, on the effect that attitudinal barriers have on the access to education. Specially, since the SCJN did acknowledge that scholar bullying is perpetuated more frequently and severely against persons with disabilities -making punctual reference to those who are diagnosed with ADHD-, often causing social exclusion and altering the conditions of their education to the point of hindering their access to educational opportunities (SCJN 2015b, 36-39 and 45).

Only in AI 86/2009 was found a description and analysis of what the social model of disability involves, recognizing that such approach is promoted by the CRPD. While only in that decision was found clear evidence suggesting that the SCJN is acknowledging and moving towards a human rights model, the other two rulings present no indications of going backwards; at least not in the respect of the interpretation of disability.

### **3. Conclusions**

It is difficult to conclude that there is enough evidence to state that the ratification of the CRPD represented a threshold in the SCJN jurisprudence for the recognition of the right to education of persons with disabilities as it is enshrined in Article 24 of the CRPD and other international standards. First, because there are not enough cases to establish such conclusion; second, because no judicial decisions were found prior to the ratification of the CRPD, which made impossible a before-after comparison. Thus the analysis concentrated on whether the SCJN has made any progress from the first case reviewed concerning education of people with disabilities in 2013 to the last one in 2015. Although

it is a very short period of time in which tendencies could be observed, some changes in specific indicators could actually be identified and some general conclusions may be drawn.

Overall, it seems that the SCJN is not yet ready to set criterion as to affirming that inclusive education must be the approach to follow in order to guarantee the right to education for everyone. New legislation and the SCJN still consider 'special education' not only viable but also appropriate. On the upside, the Court made important highlights on the importance of adopting a social model of disability; it made clear that no differentiation between types or degree of disabilities is allowed, especially when providing access to education; and, in just a lapse of two years between the decisions of two very similar cases, the SCJN recognized that legislation can have an indirect discriminatory effect on the right holders.



## **CHAPTER V:** **CONCLUSIONS**

The study was set up to explore the extent to which judiciary systems participate in the protection of the right to education for people with disabilities, specially under the considerations made in article 24 of the Convention on the Rights for Persons with Disabilities. It also has sought to compare the decisions of three Courts –the European Court of Human Rights, the Constitutional Court of Colombia, and the National Supreme Court of Mexico- to know the direction in which countries are moving in order to achieve inclusive education for all. Thus, the research pretended to answer the question: to what extent has the adoption of the Convention on the Rights of Persons with Disabilities [CRPD] has impacted judicial decisions on inclusive education in Mexico, Colombia and the European Union?

The main finding is that the ratification of the CRPD boosted the role of the judiciaries of all three parties to the CRPD in the protection and expansion of the rights of people with disabilities, especially the right to inclusive education. Yet, the extent of their general contributions has been somewhat similar but also different. For example, the CCC has had much more opportunities to review the characteristics of the right to an inclusive education, which has led to the establishment of more –and more progressive- criterion than the Mexican and European judges. On the contrary, the SCJN and ECtHR have been the more ‘conservative’ –so to put it out somehow- than Colombia, and also the ones with considerably less jurisprudence on the matter. The latter may be attributed to the nature of the judicial proceedings that can be brought before the courts, being the Colombian *tutela* action the most accessible.

Specific findings are summarized and compared, in the following paragraphs, within the respective indicators used for the analysis. First, on ‘conventional control’ the impact of the ratification of the CRPD is only clear in the Colombian case, where the CCC used Article 24 of the CRPD as part of the constitutionality block used to solve the *tutelas*. On the contrary, the SCJN and ECtHR failed to do so in a consistent form, which can only be interpreted that not all judges within the courts are willing to use the CRPD as the minimum standard of protection. Although the CCC and SCJN have the faculty to determine violations to a norm, none of the Courts have yet done so.

Second, one of the indicators in which the CRPD impacted the most on judicial decisions was on the ‘non-discrimination clause’. Although the three parties have disability as a protected category of discrimination, there is a tendency –though not much consolidated- on the three Courts to recognize the definition of ‘discrimination on the basis of disability’ as it is enshrined in the CRPD. Also, there is a clear shift since ratification, within the CCC and SCJN at least, on explicitly prohibiting exclusion of persons with disabilities of the educational system. What appears to have no connection at all with the endorsement of the CRPD are the Courts’ arguments on the possibility of a justified discrimination –as all three acknowledge the need for affirmative actions- and the existence of indirect discrimination.

Third, in my opinion, on the matter of ‘reasonable accommodation’ is were the three Courts fallen shortly on their criterion. Perhaps because some rulings did not directly needed any standards set, as the facts of the cases did not revolve on the matter; but maybe, also because the Courts are not ready yet to expand on a topic that, in most of the cases, require resources that might not always be available. On the specific cases of the ECtHR

and SCJN, the Courts limited to refer to the obligation of providing reasonable accommodation, but completely ignored the opportunities that were presented to them on setting standards as to how or when they should be provided, and even on ordering the respective local authorities to deliver specific modifications or adjustments.

Fourth, the ‘4 A’s’ of education –accessibility, adaptability, availability and acceptability- were the indicator most frequently found in all the judicial decisions that were analyzed, being ‘accessibility’ the one to which the Courts referred to in all of their rulings. On this matter, particularly stands out the case of the ECtHR who prior to the ratification of the CRPD did not recognize that education must be accessible to all, which changed later. Also, what is interesting to note is that none of the Courts made reference or analysis regarding ‘universal design’ as the means to fulfill the ‘4 A’s’ and the elimination of standardized tests to assess intelligence, in spite the strong endorsement of the international community to do so.

Fifth, as to the principles of “equity and equality”, the ratification of the CRPD had no significant impact on the rulings of the Courts, primarily because prior to the endorsement the Courts were already guaranteeing such principles as fundamental characteristics of the right to education. Perhaps the most important contribution on the matter was that due to recognition of equality before the law, the three Courts grant access to justice for persons wit disabilities, which led the judges to order some reparations. While there is no important difference to note comparing the judicial decisions before and after ratification, there is such in comparing the three Courts. By far and large, the CRPD has had much more impact on reparations order by the CCC than those ordered by the SCJN, not to say the ECtHR who does not usually provides redress.

Sixth, the ratification of the CRPD had a major impact on the ‘other principles of inclusive education’ indicator, at least on the ECtHR and CCC judicial decisions. Before ratification all judicial decisions recognized that the right to education is the means by which people can participate in society and achieve their fullest potential, also that the obligation of the state entails guaranteeing access, permanence and progress in the educational system. Nonetheless, these assertions were made in reference as benefits of education, regardless of the type or settings in which it is provided. After ratification of the CRPD, the ECtHR and the CCC showed, in many cases, their interest complying with the Convention as they specifically state that such benefits can only be achieved through an inclusive system in which personalized programs guarantee the right of education to all.

Seventh, in the ‘other barriers’ indicator the clearest impact of the ratification of the CRPD can be seen in the adopting of a human rights approach to disability. Such is the case, specifically, for the ECtHR and the SCJN –as the CCC adopted the approach in earlier decisions-. The shift that can be observed in the CCC is that prior to the ratification, some judicial decisions contained words that are considered discriminatory language, which were totally eliminated after 2009. The recognition of attitudinal barriers is something that was found very sporadically, but no light on how to address them was shed by any of the Courts.

The scale of this debate is therefore extensive and challenging as some Court might not actually want to assume active roles in the advancement of human rights. To generate enough information with regards to the impact of the ratification of the CRPD in judicial decisions on the right to inclusive education, there is need for more jurisprudence to be available, which probably means that a similar study should be conducted years ahead from

now, considering that the CRPD was ratified by the State parties of the research relatively recently. However, this study has offered an evaluative perspective on an important aspect to monitor in the implementation of the CRPD, which are judicial decisions often left out of reports submitted by the States to the CmRPD.

As a direct consequence of the methodology used, the analysis encountered a number of limitations, which need to be considered for any future references. For example, the ECtHR has many official languages different from English in which one might not be proficient and some decisions are only published in such other languages. Thus, there might have been other cases to which I had no access since the search in the database was conducted in English. Also, the indicators used might have been somewhat comprehensive, but perhaps too detailed. In result, not all of those measures were found across the available universe of decisions, which hindered to some point the comparison between them.

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