

Inclusive Education in Italy: A Legal Appraisal 10 Year after the Signature of the UN Convention on the Rights of Persons with Disabilities

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Abstract

Dieci anni dopo la firma della Convenzione ONU sui diritti delle persone con disabilità, e pochi mesi dopo l'uscita delle Osservazioni Conclusive del Comitato sui diritti delle persone con disabilità sul rapporto presentato dall'Italia, questo articolo mira a fornire una valutazione critica sulla protezione e la promozione del diritto ad una istruzione inclusiva in Italia. Facendo riferimento all'ampia dottrina in materia, il presente articolo esamina la legislazione italiana in materia, valutandone la conformità alla Convenzione ONU. Senza addentrarsi in un'analisi dei fondamenti teorici e pedagogici delle politiche di integrazione scolastica, questo scritto si sofferma sul quadro giuridico nazionale, al fine di individuarne i punti di forza e le carenze alla luce degli obblighi imposti dall'art. 24 CRPD. Quest'articolo cerca di mostrare come, pur in presenza di una legislazione che può definirsi avanzata e di un notevole impegno verso il raggiungimento dell'inclusione, l'obiettivo di un'istruzione inclusiva previsto dalla Convenzione ONU non è ancora stato raggiunto.

Ten years after the signature of the UN Convention on the Rights of Persons with Disabilities (CRPD), and few months after the release of the CRPD Committee's Concluding Observations on the Italian report, this article provides a critical appraisal on the protection and promotion of the right to an inclusive education in Italy. Building on the relevant interdisciplinary scholarship, it endeavours to analyse whether Italian law complies with the obligations laid down in the CRPD. It does not engage in an analysis of the theoretical and pedagogical foundations of the policy of *integrazione scolastica*. Rather, it discusses the national legal framework and relevant case law, in order to identify its strengths and shortcomings in light of Art. 24 CRPD. This article ultimately argues that Italy is committed towards the full inclusion of students with disabilities, but, so far, the implementation of a sub-

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stantially progressive legislation has fallen short the objective of inclusive education prescribed by the CRPD.

Parole chiave: alunni con disabilità, educazione inclusiva, Convenzione ONU sui diritti delle persone con disabilità

Keywords: students with disabilities, inclusive education, UN Convention on the Rights of Persons with Disabilities

Introduction

Italy signed the UN Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”, or simply “the Convention”), in 2007, and ratified it two years later, through Law 18/2009¹. With the ratification of the CRPD, Italy committed itself to ensuring the equal participation of persons with disabilities in political, economic, social, educational and cultural contexts by dismantling societal and environmental barriers, and to mainstreaming the rights of persons with disabilities in all fields of legislation.

Ten years after the signing of the Convention, the Italian legal framework on disability, rooted in the constitutional principles of equality and social solidarity and centred on Law No. 104/1992 (“Framework law for care, social integration and rights of persons with disabilities”)² has not undergone dramatic changes. The Convention has nonetheless stimulated some policy and legislative activity. A few amendments to align existing non-specialized legislation with the Convention and to mainstream disability rights were introduced (Ferri, 2012a). Some new pieces of legislation on disability were adopted.³ A monitoring structure, the “National Observatory on the Situation of Persons with Disabilities” (*Osservatorio Nazionale sulla condizione delle persone con disabilità*) (Ferri, 2012b) has been established and the first biannual disability action plan was approved in 2013,⁴ while the second one was completed in 2016⁵. Most evidently, the Convention has displayed a significant influence on Italian case law: civil and administrative courts, as well as the Constitutional Court have made reference to the Convention in several decisions.

If we look at the educational system, legal scholars largely agree that Italy, long before the adoption of the CRPD, was already characterized by a rather progressive legislative framework, based on a relatively high standard of protection with regard to the right to education of children and adolescents with disabilities (Rossi, Addis, Biondi dal Monte, 2016; Addis, 2016; Troilo, 2016; Busatta, 2016; Penasa,

2014; Troilo, 2012). Social sciences' and educational scholars have acknowledged that, since the '70s, Italy has undertaken a process of inclusion in mainstream schools and “despite the difficulties imposed by economic constraints, [...] has laid the foundations for implementing anti-discriminatory legislation known as school integration” (*inter alia* Caldin, 2013, p. 18). There is also a general acknowledgement that the Italian school system has somewhat granted students with disabilities inclusive school careers (Vianello and Lanfranchi, 2011). This long-standing commitment to implement an inclusive educational education, free of segregation was most recently commended by the UN Committee on the rights of persons with disabilities (hereafter simply “the CRPD Committee”) in its Concluding Observations to the Italian Report (CRPD Committee, 2016a). However, notwithstanding a domestic legal framework aimed at ensuring an effective education for all students and which is respectful of their diversity, the signature and, foremost, the ratification of the CRPD has brought to light some of the existing flaws, contradictions and gaps. The CRPD Committee itself, adopting a “carrot and stick” approach, has pointed out some gaps in Italian legislation and identified the practical challenges that must be addressed in order to realize a truly inclusive educational system. Some continuing challenges have also emerged, since 2007, in a flow of case law. Several complaints were brought to court (manly by parents of children with disabilities) seeking to enforce the right to education, to combat the alleged discrimination of disabled pupils at school and exclusionary practices, to challenge schools' decisions in relation to the levels of support provided to children, and ultimately to challenge the lack of implementation or the incorrect implementation of the legislation in place. In many instances, the complaints alleged the violation of Art. 24 CRPD on the right to inclusive education of persons with disabilities. Hence, ten years after the signature of the Convention, and a short time after the release of the above mentioned CRPD Committee's Concluding Observations, the need to provide a critical appraisal of the protection and promotion of the right to an inclusive education in Italy could rarely be more timely.

A small number of scholarly works on the extent to which the Italian legislation in place is actually applied in practice (Giangreco and Doyle, 2012; Ianes, Demo and Zambotti, 2014) currently exist. However, these have primarily been based on quantitative or qualitative methodologies. Often, studies tend to assess the effectiveness of integration in terms of reaching the learning objectives for students with disabilities (Ianes, Demo and Zambotti, 2014). While building on this literature and taking into account the critical discussion on the theoretical differences between integration and inclusion from an educational perspective, and on the pedagogical grounds of the *integrazione scolastica* (D'Alessio, 2013), this article mainly adopts a legal perspective and methodology. It endeavours to analyse to what extent the Italian law complies with the obligations laid down in the CRPD.

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It looks at the national legal framework and its implementation, in order to identify its strengths and shortcomings in light of Art. 24 CRPD and *vis a vis* the Committee's Concluding Observations. It also attempts to discuss the influence that the Convention has had on the Italian legal system thus far. This article begins with a short account of the Convention unique features and of the obligations laid down in Art. 24 CRPD, examining the normative meaning of the concept of "inclusive education" purported by this provision. It briefly presents the relevant Italian legislation, and critically discusses it with a view to determining the extent to which this is consistent with Article 24 CRPD. It then analyses the relevant case law on the right to education and tries to illustrate how the use of the CRPD as interpretative tool in domestic courts has helped to unveil and ultimately dismantle practical barriers in the implementation of the right to education. Finally, this article concludes by reflecting on the ways in which the Italian legislation and its implementation has fallen short of the objective of inclusive education prescribed by the CRPD.

The Right to Inclusive Education in the CRPD: A Brief Overview

Traditionally, both national and international norms have tended to explain the disadvantageous situation of people with disabilities⁶ in light of their physical or intellectual impairments. By contrast, the CRPD, approved by the UN General Assembly on December 13, 2006, recasts disability as a social construction and "brings a human rights dimension to disability issues" (De Beco, 2014, p. 269). The Convention does not however create new rights for disabled persons. Its innovative character arises from its elaboration of existing human rights within the disability context and in the explicit recognition of the inherent dignity and autonomy of people with disabilities and their diversity. The Convention aims to ensure the effective participation of persons with disabilities on an equal basis with others in all areas of life. It embraces the social model, i.e. the view that disability stems primarily from the failure of the social environment to meet the needs and aspirations of people with disabilities (*ex multis* Barnes and Mercer, 2010), and is underpinned by the principles of non-discrimination and equality, which encompass the right to reasonable accommodation (Seatzu, 2008; Kayess and French, 2008).

The CRPD consists of a Preamble and fifty Articles, and is complemented by an Optional Protocol.⁷ Its scope is extremely broad, as it does not simply prohibit discrimination on the grounds of disability, but also covers civil, political, economic, cultural and social rights. It includes an introductory set of articles outlining its purpose and key definitions (Arts. 1-2), and general provisions, to be applied throughout the treaty text (Arts. 3-9). Article 3 enunciates the Convention's gen-

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eral principles, which include: respect for individual dignity, autonomy, and independence; respect for difference and acceptance of disability as human diversity; non-discrimination; equal opportunity; complete and meaningful participation; accessibility; gender equality; and respect for children's rights and support for their evolving capabilities. These principles are benchmarks against which national (and European) law must be assessed in order to determine their overall compliance to the CRPD, and every provision of the CRPD itself must be read and interpreted in light of these principles. Article 4 enunciates the general obligations that State Parties undertake by ratifying the Convention. It requires Parties to align their action (political, legislative, administrative, and judicial) to the objectives of the Convention, and to consult with and involve persons with disabilities in all the decision-making processes concerning rights affirmed by the CRPD. Articles 10 through 30 CRPD enumerate specific rights that cover the whole range of life activities of persons with disabilities, while Articles 31–40 concern implementation and monitoring, and respond to the need to translate the Convention's provisions into hard domestic law, policies and good practices.

The Convention specifically proclaims the right to education in Art. 24 CRPD. This provision is very wide and must not be interpreted in isolation. Rather, it must be read in conjunction with other rights provided in the text and in light of the general principles of the Convention. The key obligation it purports is the realization of “an inclusive education system at all levels and lifelong learning”. In this respect, Art. 24 CRPD, which is the first international legally binding instrument to contain a reference to the concept of quality inclusive education (Broderick, 2014), builds on established soft law such as the Jomtien World Declaration on Education for All (1990), the United Nations Standard Rules on Equalization of Opportunities for Persons with Disabilities (1993), and the Salamanca Declaration and Framework for Action (1994) (Kuppies, 2014). However, Art. 24 CRPD does not give a normative definition of inclusive education. The lack of a definition and an extensive (and not always consistent) literature on inclusion in educational contexts have determined great uncertainty on the exact meaning of Art. 24 CRPD and, most notably, on the extent of the obligations laid down in it. In August, 2016, the UN Committee, with its general Comment No. 4,⁸ sought to trace the boundaries among the concepts of exclusion, segregation, integration and inclusion in education, and clarified which actions are needed to ensure that children with disabilities participate within the mainstream education system and to fully fulfil the obligation included in Art. 24. According to the Committee, exclusion “occurs when students are directly or indirectly prevented from or denied access to education in any form”, while segregated education is “provided in separate environments designed or used to respond to a particular or various impairments, in isolation from students without disabilities”. The Committee also contrasted inte-

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gration as a “process of placing persons with disabilities in existing mainstream educational institutions, as long as the former can adjust to the standardized requirements of such institutions”, with inclusion. The latter “involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and environment that best corresponds to their requirements and preferences”. The Convention seems to embrace the view of inclusion as “a dynamic approach of responding positively to pupil diversity and of seeing individual differences not as problems, but as opportunities for enriching learning” (UNESCO, 2005, p.12). The UN Committee also clarified that placing students with disabilities within mainstream schools, without accompanying support and structural changes to the curriculum and teaching and learning strategies, does not accomplish the obligation laid down in Art. 24 CRPD. In order to achieve an inclusive educational system States Parties must ensure that persons with disabilities can access an inclusive, quality and free primary and secondary education on an equal basis with others.

Art. 24(2)(b) CRPD, read in conjunction with the general principle of accessibility, prescribes that the entire education system is accessible, “including buildings, information and communication, comprising ambient or frequency modulation assistive systems, curriculum, education materials, teaching methods, assessment and language and support services”. Reasonable accommodation must be provided (Article 24 (2) (c) CRPD), together with “effective individualized support measures ... in environments that maximize academic and social development, consistent with the goal of full inclusion” (Art. 24(2) (e) CRPD). Reasonable accommodation measures are individualised solutions designed to meet the specific need of a person with a disability in a particular case, and are concerned with the removal of the disadvantage to which a disabled student would otherwise be subjected by standard educational practices or systems. In order to provide some clarification on what exactly reasonable accommodation might entail in an educational context, the UN Committee affirms in its General Comment that “[a]ccommodations may include changing the location of a class, providing different forms of in-class communication, enlarging print, materials and/or subjects in sign, or providing all handouts in an alternative format, providing students with a note-taker, or a language interpreter or allowing students to use assistive technology in learning and assessment situations” or “allowing a student more time, reducing levels of background noise”. By contrast, support measures appear to be methods that “supplement the reasonable accommodations and add a human rights dimension to the right to education of persons with disabilities” (De Beco, 2014). Examples of the latter according to the Committee are “the provision of

sufficient trained and supported teaching staff, school counsellors, psychologists, and other relevant health and social service professionals, as well as access to scholarships and financial resources”. In addition, the Convention requires State Parties to “enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education”, including Braille and sign-language, and to “train professionals and staff who work at all levels of education”. An inclusive system should reflect “Universal Design”, which is recognised by the CRPD, and should be accessible to all students, to the greatest extent possible, without the need for specific adaptation. Educational buildings should be fully accessible through the use of ramps, elevators and wider entrances. Curricula should include supporting communication tools, Braille and sign language, and should be flexible to enhance different learning styles. As highlighted by De Beco (2014, p. 287) Art. 24 closely follows the social model of disability, since it requires Parties to achieve a truly inclusive non-discriminatory educational system by removing all the barriers to participation. According to Anastasiou, Kauffman and Di Nuovo (2014), this provision reveals a tension between the “right to education” and the “right to inclusive education”, which arises “because the right to education is framed as inclusion, not effective or appropriate education” and there is no reference to alternative settings or services (e.g. special schools, special classes and related special services). However, it has been acknowledged that the CRPD allows for special educational systems in limited circumstances (Broderick, 2014). As noted by Oddný Mjöll Arnardottir (2011), Art. 24 CRPD confers the right to choose an inclusive education, thus attempting to strike a balance between the goal of full inclusion and the need, in very limited cases, of special education to meet specific needs of learners with disabilities.

All in all, Art. 24 CRPD adopts a holistic approach (Palmer, 2013). It places on State Parties various obligations, which require them to value the diversity of students with disabilities and to support different abilities in mainstream schools. While being subject to progressive realization within the maximum available resources, as stated by Art. 4(2) CRPD, the implementation of the right to education must in fact be assured through the effective allocation of adequate financial and human resources, and the establishment of monitoring mechanisms (Broderick, 2014).

The Right to Education of Children with Disabilities in Italy: A Critical Appraisal of the Legal Framework

The general principle of protection and promotion of the rights of persons with disabilities, and in particular of their right to education, is anchored to Art. 2

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of the Italian Const., which recognizes and guarantees “the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed”, to Art. 3(1), that provides for the principle of non-discrimination on the grounds of sex, race, language, religion, political opinion, and personal and social conditions (*eguaglianza formale*), and to Art. 3(2), which establishes the principle of substantive equality. According to the latter the State is called to remove the social and economic obstacles that limit the freedom and equality of the citizens and prevent the full development of the human being. Art. 38(3) affirms that “disabled and handicapped persons are entitled to receive education and vocational training” (Colapietro, 2011).⁹ A wide interpretation of these constitutional principles by the Constitutional Court has led to a paradigm shift, from a paternalistic-charitable model of care, to a social model based on dignity and equality.

Within this constitutional framework, the conditions and instruments necessary to ensure school integration of pupils with disabilities were first laid down in measures that date back to the '70s, in particular Art. 28 of Law 118/71, as interpreted by the Constitutional Court in its decision No. 215/1987, and Law 517/77 (Addis, 2015). The latter piece of legislation has been deemed to purport a change in society by stimulating acceptance of disability as part of human diversity (OECD, 2007). Law No. 104/1992, which aims to remove obstacles, improve access and make it possible for disabled people to enjoy mainstream services and facilities (Siclari, 2015), re-affirms the right to education and pursues “*integrazione scolastica*” in order to develop the abilities of person with disabilities. This piece of legislation also requires individualized plans for students with disabilities (*Piano educativo individualizzato - PEI*) and the supply of didactic tools and assistive technology to schools, as well as other forms of technical assistance, when needed. Inclusion is in practice ensured by support teachers who develop in collaboration with the school an individualized educational plan and provide additional individual instruction and educational support in order to meet the needs of each student with disabilities. Support teachers are qualified teachers who must also obtain further specialized postgraduate training, the requirements of which are established in various bylaws, mainly ministerial decrees. As national courts have affirmed at different occasions, the support teacher’s role is complementary to that of the classroom teacher (Manca, 2010, pp. 337-338). In its response to a questionnaire launched by the UN Special Rapporteur on the provision of support to persons with disabilities in October 2014, Italy once again clarified that support teachers are there to carry out “support activities assigned to the classes of the students with disabilities to facilitate their integration process”.¹⁰ Therefore, the support teacher is not “the teacher of the pupil with disabilities, but a professional resource assigned to the class to meet the major educational needs”. Law No. 104/1992 also recognizes homeschooling for those who are temporarily unable to attend

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school. In 2010, Law 170/2010 was passed in order to ensure the right to education to children with “specific learning difficulties” (*“Difficoltà Specifiche di Apprendimento – DSA”*), i.e. children with difficulties in reading (Dyslexia), writing (Graphic Dyslogia and Dysorthography), or in computing (Discalculia or numeracy problems). The general objective of this act is to give these children equal educational opportunities to successful and efficient education in accordance with their needs and abilities in mainstream schools, implementing teachers’ preparation, ensuring a collaboration among teachers, parents and experts of the health services, envisaging targeted flexible educational plans. This law affirms the need for specialized training for teachers in supporting learners with these disabilities, recognizing that it is one of the major challenges to the full and effective inclusion of persons with disabilities in the education system.

The new Law No. 107/2015 (*Riforma del sistema nazionale di istruzione e formazione e delega per il riordino delle disposizioni legislative vigenti*),¹¹ so called “*LaBuonaScuola*” reforms many aspects of the Italian educational system, including the education of students with disabilities, and empowers the Government to adopt legislative decrees *inter alia* to bring about the full inclusion of students with disabilities in school. This reform law sets forth the criteria and principles which the Government must follow when doing so, and is in line with the Law 104/1992. There are several innovations in this reform law, in terms of how the overall system will function and with regards to the training and number of support teachers. However, the full inclusion of students with disabilities through individualized support made possible by support teacher does not change. It is still the cornerstone of the Italian system. At this point in time, it is too early to provide a comprehensive assessment of this new law and of the legislative decree implementing it,¹² as the effects on the right to education of students with disabilities will only be seen when the implementing decree will enter into force.

This legislative framework per se can be considered largely in compliance with Art. 24 CRPD and the UN Committee itself did not express any specific criticism of the relevant Italian legislation (CRPD Committee, 2016a). In addition, Law 104/1992 is widely formulated and certainly capable of being interpreted in a manner consistent to the Convention. Anastasiou, Kauffman and Di Nuovo (2014), whilst heavily criticizing the concept of full inclusion and, ultimately, Italian educational policies, affirm that, if Art. 24 provides for full inclusion of all students with disabilities in general education, then “Italy represents the only national example of implementation of a nearly fully inclusive education system”. The shadow report of the Italian Disability Forum also acknowledged the advanced legislation and the financial commitment to ensure all students with disabilities have access to inclusive education, whilst highlighting serious gaps in its implementation (IDF, 2016a; 2016b). By contrast, a few legislative lacunae were high-

lighted by the *Coordinamento Nazionale Famiglie Disabili* (CSS, 2016), in its alternative report. The CSS claimed that, both at the educational and rehabilitative level, there is a lack of specialized approaches focused on expressing spontaneous communication or implementing other communication strategies. It underlined that alternative communication strategies, such as augmentative and alternative communication, are not legally recognized as forms of communication in exams. Students with severe disabilities are according to the CSS “positioned in a relationship where the aid process prevails and in which he is encouraged to remain in a state of passivity, prisoners of anomalies and behavioural stereotypes”. A lack of human resources was also highlighted, whereby the Italian National Health Service has few professionals specialized in communicative learning for people with cerebral palsy, and/or cognitive delays, or disabilities which fall within the autistic spectrum. The UN Committee however, did not follow up on the criticism expressed by the CSS. Rather, it expressed a general concern about the lack of acknowledgement of Braille and tactile communication as effective tools for the education of blind or deaf-blind persons (CRPD Committee, 2016a, para 49). Other than that, the shortcomings identified by the Committee – already evident in the List of Issues preceding the Concluding Observations (CRPD Committee, 2016b) - all concerned the practical realization of an inclusive educational system, and the lack of reliable data and indicators capable of monitoring the quality of education and the inclusion of students with disabilities in mainstream schools (CRPD Committee, 2016a, para 55). The Committee did not engage in any extensive criticism but recommended Italy set out “an action plan — with sufficient resources, timelines and specific goals — aimed at monitoring the implementation of laws, decrees and regulations to improve the quality of inclusive education in classrooms, support provisions and teacher training across all levels”. The Committee somewhat confirmed the analysis of a group of scholars who had claimed that “the Italian system often pays little attention to organisation, which should be not improvised but managed on a scientific basis” (Anastasiou, Kauffman and Di Nuovo, 2014, 436). The new Decree 66/2017 implementing Law No. 107/2015, among many other things, confirms the creation of Permanent Observatory on school inclusion that will conduct analysis and studies on inclusion of pupils and students with disabilities and closely monitor actions and policies for school inclusion. This observatory should, at least partially, meet the recommendations of CRPD Committee, although it remains to be seen how it will operate in reality.

Two particular implementation gaps were also identified. The Committee highlighted the lack of availability with regard to accessible learning materials and the lack of assistive technology. In addition, the Committee acknowledged that deaf children are not provided with sign language (LIS) interpreters in school, and recommended Italy “desist from recommending general communication assistants as

an exclusive alternative”. Statistics from the National Institute of Statistics (ISTAT) annual survey on first degree primary and secondary schools show for the academic year 2014-15 that around 3,000 deaf students (representing 2% of the total of students with disabilities) have an assistant for communication. However, it does not appear whether the assistant is in fact a LIS interpreter. The Committee therefore embraced the view that sign-language interpreters are not de facto guaranteed and the availability of them depends on the sensitivity of school directors and managers, in spite of the recognition and promotion of sign language in schools being provided for in the Framework Law No. 104/92. The Law No. 107/2015, art. 1 para 24, also affirms that teaching to students with disabilities will be ensured “through the recognition of different modes of communication”. Other regional pieces of legislation promote LIS as a tool for social inclusion (Weathley and Pabsch, 2012)¹³. However, Italy is non-compliant with the CRPD due to its lack of formal recognition of LIS. A bill is currently under examination, and following a long stalemate, at the end January 2017, the text was scheduled for further examination and discussion within the relevant parliamentary commission. However, it is not clear, in the current political turmoil that followed Renzi’s resignation, when it will be approved. In addition, in a time of ongoing and severe economic crisis, the fear of additional financial costs on the public budget (mainly unfunded) might stall the approval of this bill.

Interestingly, the Committee did not engage extensively with the criticism expressed by IDF on support teachers, in particular on their “excessive turn-over..., their approximate and often inadequate professional profile, as well as by lack of motivation, of specific competences and collaboration of curricular and support teachers” (IDF, 2016a, p. 64). IDF, in its shadow report, mentioned several episodes of abuse and ill-treatment of students with disabilities, which it attributes to the lack of preparation or inability of teachers. There is indeed an ongoing debate on the role played by, tasks assigned to and education of support teachers, as well as their interaction with curricular teachers. De Vecchi et al. (2012) affirmed that roughly 30% of support teachers ask for redeployment as main classroom teachers five years after obtaining their qualification. Their study highlights that working conditions with children, families, other teachers, and other professionals is often extremely draining. Confirming previous studies, Ianes et al. (2014) highlight the problems with the support teacher’s role and difficulties with working alongside regular class teachers. The new reform Law No. 107/2015 in conjunction with the implementing decree No. 66/2017 provides for a specific training and career path to be undertaken by prospective support teachers, in order to enhance an inclusive education and promote a better awareness of educational needs of students with disabilities.

The Influence of the CRPD on the Enforcement of the Right of Education

In order to ensure the full inclusion of pupils with disabilities, Italian legislation, as seen above, provides for a support teacher to be assigned to a class where one or more students have a disability, while the students' needs determine the number of hours the teacher spends in the class, supporting the student in the learning process. As mentioned above, support teachers should provide students with disabilities with additional and personalized educational strategies and specific methodological tools, with the aim of achieving the integration of disabled students, as required by Law 104/1992. In 2008, the Budget Law 2008,¹⁴ in the context of austerity measures and budget cuts, fixed a maximum number of support teachers for children with disabilities who attend classes in public schools. It also abolished the possibility (provided for in Art. 40 l. 104/1992) to hire under fixed-term contracts additional support teachers who would provide specific educational assistance to children with severe disabilities. These provisos were referred to the Italian Constitutional Court upon the request of the Sicilian Administrative Council. In its judgement, No. 80/2010, the Italian Constitutional Court declared them unconstitutional and affirmed that they infringed the right of education of children with disabilities, set forth in Art. 38(3)(4) IC, and violated the principle of equality (Art. 3 IC). Interestingly, the Constitutional Court in defining the "content" of the fundamental right to education for persons with disabilities referred to Art. 24 CRPD, in support of its reasoning.¹⁵ Overall, the Court argued that the core minimum guarantees to make effective the right to education of students with disabilities cannot be subject to financial conditions. The Court pointed out that it is for the legislature to set up appropriate tools to implement the right of education, but underlined that legislative provisions cannot undermine the realization of a fundamental right by making it conditional on the availability of financial resources.

This decision has subsequently become a core point of reference for lower administrative and civil courts confronted with cases on the right to education of pupils with disabilities, which primarily concern the number of hours worked by a support teacher. In almost all the cases that ended up in Italian courts, the applicants (in general parents of students with severe disabilities) asked for the annulment of the measures adopted by the public educational institution limiting the number of support teacher hours available to the relevant student. Usually, the applicants claimed their right to benefit from the support teacher for either a greater amount of time or for the entire time of school attendance. In some cases, the applicant alleged *inter alia* the violation of the CRPD as ratified by Law 18/2009 or only of Law 18/2009.¹⁶ In the majority of cases, administrative courts

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annulled the contested measures and held that the “*quantum*” of the teaching support essential to enjoying that right has to be determined exclusively in relation to the need of the student with disabilities, and no other interests can be taken in to consideration, not even in case of understaffed administrations.¹⁷ In many of these cases, the CRPD was cited by the court *motu proprio*, in conjunction with domestic provisions, and often alongside the Constitutional Court decision No. 80/2010,¹⁸ to reaffirm the right to education of students with disabilities. The annulment of measures adopted by the public schools is based not on the mere violation of the CRPD, but rather on the violation of the fundamental right to education which is provided for both in international law (i.e. the CRPD) and in the Constitution, as well as ensured by domestic legislation (namely Law 104/1992). However, it appears that the CRPD somewhat encouraged Italian courts to take a definitive stance in annulling decisions that might undermine the effective enjoyment of the right to education.

In the same vein, when confronted with some these cases, under appeal, the Council of State, the higher administrative court, has consistently held that the right to education of the disabled child “is a fundamental right that must be respected with rigor and effectiveness in fulfillment of international obligations [...] , and because of the absolute character of its protection provided by Articles 34 and 38(3) and (4) of the Constitution”. In particular, the Council of State acknowledges that “education is one of the factors that most affect the social relations of the individual and its possibilities of professional achievement, and the corresponding right [i.e. the right to education] is of both a social and individual nature, with the consequent need, with reference to people with disabilities, to ensure its full implementation through the provision of appropriate measures of support and integration”.¹⁹ Most recently, the Sicilian Administrative Tribunal has consistently held that the constitutional and legislative framework guarantee disabled students the support measures necessary to substantially enjoy the right to education and prevent the setting of a nominal and insufficient path of school education.²⁰ These decisions, to a different extent, and despite an often nuanced wording, seem to embody a judicial implementation of Article 24 CRPD. There is an evident willingness on the part of these courts to give effect to the right to education of persons with disabilities. However, these decisions make evident a failure to properly implement the legislative framework in force.

Similar to the administrative courts (although to a lesser extent) civil courts have also been confronted with different cases concerning the right to education of students with disabilities. In general, the ordinary courts were called to decide upon cases in which the applicants had filed a complaint outlining discrimination on the grounds of disability. Primarily, the applicants challenged decisions made by public schools to reduce the employment contract of a support teacher to a

limited number of hours due to budgetary concerns, and maintained that these constituted an unlawful discrimination and infringements of the fundamental right to education. In this respect, it is worth citing the judgement of the Court of Cassation of 18 November 2014 No. 25011.²¹ In this case, the parents of a child with disabilities had challenged the decision of the public school to reduce the employment of a support teacher for the child from 25 hours a week to 12 a week. According to the plaintiff, the decision by the school to reduce these hours had been adopted solely on economic grounds. The school attempted to challenge the jurisdiction of the ordinary courts. It argued that the case should have been brought in front of the administrative court, in compliance with the rules governing the jurisdiction of the administrative courts'. The Court of Cassation rejected this argument and affirmed that the right to education is one of the fundamental rights of persons with disabilities. The Court referred to the CRPD, alongside the provisions on equality and non-discrimination in the EU Treaties and in the Charter of Fundamental Rights of the EU. In the Court's estimation, the reduction made by the school of the hours taught by the support teacher can constitute an indirect discrimination on the ground of disability, and fall within the remit of its ordinary jurisdiction. Along these lines, the Council of State in its decision No. 3723/2016²² affirmed that disputes relating to the implementation phase of the individual educational plan for students with disabilities belong to the jurisdiction of ordinary courts, based on the dual ground that, after the definition of the plan and the determination of the number of hours, the school administration is devoid of any power to reduce the number of hours of support laid down therein and that any failure in the timely implementation of the plan constitutes an indirect discrimination on the grounds of disability.

A recent case, that was decided by the Constitutional Court, reaffirmed that the right to education of people with disabilities must be effectively ensured. Roughly speaking, the Court reiterated that a formal recognition is not sufficient if the right is not guaranteed in practice (Blando, 2017). The case concerned the transport of students with disabilities to school and their assistance. In a nutshell, the Abruzzo regional law provided for a grant to be given to local authorities so that they may ensure transport and assistance to students with disabilities only "within the limits of available funds determined by the annual budget law". In doing so, the law made the regional contribution aimed at implementing the right of students with disabilities to transport services conditional and subject to budget constraints (Rossi, 2017). The Constitutional court, with a *ratio decidendi* in line with its previous case law and, namely, decision No. 80/2010, held the regional provision to be unconstitutional. In particular, the Court believed that transportation services for students with disabilities are necessary to guarantee the right to inclusion for per-

sons with disabilities and are an essential element in ensuring the participation of these pupils within the educational process.

All in all, the case law on this issue illustrates that judicial decision-making has been enhanced by the CRPD where it relates to the right to education of students with disabilities. In the Constitutional Court's case law, the core of the right to education has been re-defined, by reading the Constitutional provision in conjunction with the CRPD. In addition, the constitutional judges have also laid bare the contradictions of a system that ensures the right to education on paper, but can be easily undermined by arguments based on financial constraints. Ordinary and administrative courts have underlined the challenges in the implementation process of the right to education, and (often) the failure of schools and institutions to correctly implement the right to education provided in the legislation. The CRPD, by stimulating this process, has given rise to a prominent number of cases. In addition, it is remarkable that courts have attempted to adopt an interpretation of domestic provisions consistent with the CRPD, allowing for a better protection of the rights of persons with disabilities, and by extension, promoting substantive equality.

Concluding Remarks

Even prior to the ratification of the CRPD, the Italian legal framework on the education of children with disabilities was considered rather progressive. Despite a number of critical voices on the policy of *integrazione scolastica*, which can be seen as “embedded in a conceptualization of disability as an individual deficit that needs to be adjusted and compensated for by the education system” (D'Alessio, 2013, p. 112), Italy is generally considered “a leader in the area of education for students with disabilities” (Kanter, Ferri, Damiani, 2014). From a legal perspective, Italy may be the closest in terms of meeting the obligations laid down in art. 24 CRPD, which aims to facilitate the full inclusion of students with disabilities within the educational system. Law No. 104/1992 is, broadly speaking, in compliance with the Convention. However, there are persistent gaps in the implementation of a truly inclusive system, which have been highlighted by the scholarship and, though in a general fashion, by the CRPD Committee. The ratification of the CRPD has also unveiled several practical challenges in relation to the implementation of the laws in place with regards to the number of support hours that students can avail of. Caps on the number of hours of support have in most instances been struck down by the courts or considered discriminatory, and Italian judges have often attempted to either use the CRPD in support of their reasoning or to interpret Italian law in light of Art. 24.

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The new Law 107/2015 and the recent Legislative Decree 66/2017 attempt, without questioning the system itself, to improve its functionality, and to ensure the right to education. These acts seem to meet (some of) the recommendation of the CRPD, and attempt to solve some of the problems highlighted by IDF with regards to the role played by support teachers. It remains to be seen, following the entry into force of the legislative decree, how effective these will be.

All in all, the quality of inclusive education remains a much debated issue at the international level and there is not any general agreement on how to achieve inclusion and to measure it. In this context, despite the gaps in the implementation and the challenges brought on by the economic crisis, Italy certainly continues to demonstrate its commitment to the full inclusion of students with disabilities. Italian courts have contributed to a vigorous enforcement of the right of education of students with disabilities. Even though the practice and outcomes of the Italian educational system are not yet in line with Article 24 CRPD, from a legal point of view, Italy seems still to provide a “robust example of best practice that is not typical in other countries” (Kanter, Ferri, Damiani, 2014, p. 27).

Note

¹ Law of 3 March 2009 No.18 “*Ratifica ed esecuzione della Convenzione delle Nazioni Unite sui diritti delle persone con disabilità, con Protocollo opzionale, fatta a New York il 13 dicembre 2006 e istituzione dell’Osservatorio nazionale sulla condizione delle persone con disabilità*”, in G.U. (Gazzetta Ufficiale) of 14 March 2009 No. 61.

² Law of 5 February 1992 No. 104, “*Legge-quadro per l’assistenza, l’integrazione sociale e i diritti delle persone handicappate*” in G.U. of 17 February 1992 No. 39.

³ The most recent is probably the Law of 22 June 2016, n. 112 (so called law on “After Us”) in G.U. n.146 of 24 June 2016.

⁴ D.P.R. 4 ottobre 2013 “*Adozione del programma di azione biennale per la promozione dei diritti e l’integrazione delle persone con disabilità*”.

⁵ The second biannual programme is available at:
http://www.osservatoriodisabilita.it/images/PDA_Disabilita_2016_DEF_-dopo-DG_dic2016.pdf.

⁶ In this article the terms “persons with disabilities” and “disabled people” are used interchangeably, in line with language commonly used by proponents of the social model of disability.

⁷ The Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD) allows for individual complaints to be submitted to the CRPD Committee by individuals and groups of individuals, or by a third party, on behalf of individuals and groups of individuals, alleging that their rights have been violated under the CRPD. In addition, if the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee can launch *ex officio* investigations.

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⁸ General Comment No 4 Article 24: Right to inclusive education (Adopted 26 August 2016), available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>.

⁹ The English translation of the Italian Constitution is published by the Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication and can be found at:

http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed 14 April 2014).

¹⁰ <http://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/Provisionofsupporttopersonswithdisabilities.aspx>.

¹¹ In G.U. No.162 of 15 July 2015.

¹² Legislative Decree 13 April 2017, No. 66 “*Norme per la promozione dell’inclusione scolastica degli studenti con disabilità, a norma dell’articolo 1, commi 180 e 181, lettera c), della legge 13 luglio 2015, n. 107. (17G00074)*”, in GU No.112 of 16 May 2017.

¹³ The latest is the Lombardia Law 20/2016 in BURL N. 32, of 08 August 2016.

¹⁴ Namely Art. 2, c. 413 and 414 of the Law 24 December 2007 No. 244.

¹⁵ Para 4 of the ‘Conclusions in Point of Law’.

¹⁶ E.g. TAR Lombardia No. 1895/2014 of 16 July 2014.

¹⁷ E.g. TAR Calabria No. 831/2011 of 7 June 2011.

¹⁸ E.g. TAR Lazio No. 12914/2014 of 18 February 2014.

¹⁹ *Inter alia* Council of State No. 5428/2015 of 1 December 2015 recalling Council of State No. 5317/2014 of 27 October 2014.

²⁰ T.A.R. Sicilia Palermo Sez. I, 16/03/2016, n. 715. See also T.A.R. Puglia Bari Sez. II, 02/02/2016, n. 119.

²¹ Among others see e.g. Cass civ., sez. un., of 18. November 2014, No. 25011.

²² Cons. Stato Sez. VI, 30/08/2016, No. 3723

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