Introduction

Conceptual and Methodological Approaches

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I. STATE OF THE ART AND CORE AIMS OF THE VOLUME

The year 2021, when this project started, marked the 15th anniversary of the adoption of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), together with its Optional Protocol (OP-CRPD), by the UN General Assembly in 2006. The CRPD, which entered into force in 2008, less than two years after its approval, is the first international human rights treaty that seeks to ensure the protection and promotion of the rights of persons with disabilities on an equal basis with others. It does not aim to create new rights, but it 'extends existing human rights to take into account the specific experience of persons with disabilit[ies]'.[1] Irrespective of the fact that it imposes onerous obligations on States Parties, requiring them to ensure equal participation of persons with disabilities in political, economic, social and cultural life by accommodating their difference, the CRPD enjoys a high number of ratifications at the global level. It has become a global normative standard and has sketched the roadmap of current disability policy worldwide.[2]

Much attention has been paid to the CRPD as a core human rights treaty[3] within the broader realm of international human rights law.[4] Disability law

[1] F Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 *Human Rights Quarterly* 494.

[2] A Broderick and D Ferri, *International and European Disability Law. Text, Cases and Materials* (Cambridge University Press, 2019).

[3] See commentary by I Bantekas, MA Stein and D Anastasiou, *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018).

[4] See eg G De Beco, *Disability in International Human Rights Law* (Oxford University Press, 2021); P Blanck and E Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Taylor & Francis Group, 2017); G de Beco, 'The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities' (2019) 68 *International & Comparative Law Quarterly* 141–60; EJ Kakoullis and K Johnson (eds), *Recognising Human Rights in Different Cultural Contexts: The United Nations Convention on the Right of Persons with Disabilities (CRPD)* (Palgrave Macmillan, 2020).

scholars have also investigated how the obligations set out in the CRPD have been fulfilled by selected States Parties in distinct domains, such as, inter alia, education[5] or mental health.[6] In that connection, several contributions have analysed changes in policymaking and legislative advancements driven by the Convention.[7] Other scholarly work has questioned the extent to which the CRPD can act as a driver to improve the lives of people with disabilities.[8] Comparative work on the implementation of the CRPD by domestic courts has been edited by Waddington and Lawson;[9] however, very little research has been undertaken on the impact that the CRPD has had on constitutional structures and, even less so regarding the division of powers in federal systems.[10]

The scant scholarship on the interrelation between federalism and disability law for the most part predates the CRPD and is characterised by the absence of a human-rights approach to disability.[11] In many instances, work related to federalism and the rights of persons with disabilities concerns the United States. In 1993, Percy published a piece on the Americans with Disabilities Act (ADA) and its pre-empting effects on states and local governments.[12] He explored the evolution of regulatory federalism through the lens of disability rights, suggesting that the federal level had, in substance, acquired a dominant

[5] G de Beco, J Lord and S Quinlivan (eds), *The Right to Inclusive Education in International Human Rights Law* (Cambridge University Press, 2019); J Biermann, *Translating Human Rights in Education: The Influence of Article 24 UN CRPD in Nigeria and Germany* (University of Michigan Press, 2022).

[6] P Weller, *New Law and Ethics in Mental Health Advance Directives: The Convention on the Rights of Persons with Disabilities and the Right to Choose* (Routledge, 2013).

[7] G de Beco (ed), *Article 33 of the UN Convention on the Rights of Persons with Disabilities: National Structures for the Implementation and Monitoring of the Convention* (Martinus Nijhoff Publishers, 2013). See also D Ferri and A Broderick (eds), *Research Handbook on EU Disability Law* (Edward Elgar, 2020).

[8] E Flynn, *From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities* (Cambridge University Press, 2011).

[9] L Waddington and A Lawson, *The UN Convention on the Rights of Persons with Disabilities in Practice. A Comparative Analysis of the Role of Courts* (Oxford University Press, 2018).

[10] Following a functional and non-formalistic approach to the ever-lasting issue of defining federalism (see F Palermo and K Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law* (Hart Publishing, 2017)), the term 'federal system' is used to indicate all those constitutional systems in which at least two political tiers of government exist, thereby combining self-rule and shared rule and thus making use (to a greater or lesser extent) of the federal toolkit. Accordingly, the term federal system (or federal state/country) is used not only to denominate fully fledged federal states, defined as such by the respective constitution, but also regional or devolved states or multi-level polities such as the European Union. What justifies the inclusion of such systems in the broader category is that, like fully fledged federations, they are constitutionally unitary states, subordinated to the national constitution and with constitutionally entrenched political autonomy of the subnational units. See also below, section III of this introduction.

[11] D Cameron and V Fraser (eds), *Disability and Federalism: Comparing Different Approaches to Full Participation* (Institute of Intergovernmental Relations, 2001). See also MJ Prince, 'Canadian Federalism and Disability Policy Making' (2001) 34 (4) *Canadian Journal of Political Science/Revue Canadienne De Science Politique* 791.

[12] S Percy, 'ADA, Disability Rights, and Evolving Regulatory Federalism' (1993) 23 *Publius: The Journal of Federalism* 87–106.

role in producing and enforcing norms on non-discrimination on the ground of disability, reducing the authority of state and local governments to create and implement their own disability rights measures. In 2001, Gottesman[13] focused on the Supreme Court's cases on the ADA and, in particular, on *University of Alabama Board of Trustees v Garret*, in which the Court declared the ADA unconstitutional insofar as it allowed private citizens to recover damages against the states in cases of discrimination on the ground of disability.[14] Alongside recent US scholarship that has commented on (and criticised) the failure to ratify the CRPD,[15] scholars have lately attempted to engage with federalist approaches. In particular, Barsky discussed the extent to which local and state governments have supported the CRPD and subtly 'implemented' it, even in absence of ratification.[16] He identified a form of 'an uncooperative' federalism whereby 'many cities and counties have denounced the Senate's refusal to ratify the CRPD through resolutions and other expressive policies' and states 'have also enacted measures to push the Senate in the direction of ratification'.[17] Further, he posits that several states have enacted legislation to support the exercise of legal capacity, signalling 'to the rest of the world that U.S. subnational entities are committed to the international causes of disability justice and human rights',[18] arguing that the CRPD exerted important influence on the United States' guardianship reforms and stimulating federal coordination.

The potential of the CRPD to impact on the federal structure, even in a country, such as the United States, that has not ratified it, emerges blatantly in Barsky's piece, and raises important research questions which have not yet been addressed. In that regard, this volume aims to fill an ostensible gap in literature. It investigates how the CRPD is implemented by different components of federal systems, in a selected number of federal or federal-like countries, by examining the role of the national vis-à-vis subnational entities in the implementation of the Convention, with the view of understanding whether the ratification of the CRPD has had an impact on federal governance and what such impact has been.

Comparative federal studies have consistently highlighted that, in federal systems, the autonomy of subnational entities is constrained (at least to a certain degree) by the protection of fundamental rights enshrined at the

[13] MH Gottesman, 'Disability, Federalism, and a Court with an Eccentric Mission' (2001) 89 *Georgetown Law Faculty Publications and Other Works* 31–107. For an analysis of previous case law, see also RC Hartley, 'The New Federalism and the ADA: State Sovereign Immunity from Private Damage Suits after Boerne' (1999) 24 *NYU Review of Law & Social Change* 67.

[14] *University of Alabama Board of Trustees v Garret* (99–1240) 531 US 356 (2001) 193 F3d 1214.

[15] AS Kanter, 'Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities' (2019) 35 *Touro Law Review*.

[16] BA Barsky, 'Dual Federalism, Constitutional Openings, and the Convention on the Rights of Persons with Disabilities' (2022) 24 *Journal of Constitutional Law* 345–411.

[17] Ibid 350.

[18] Ibid 351.

federal level.[19] It has also been observed that the respect of international obligations undertaken by federal governments can trigger a centralising dynamic in the exercise of legislative powers.[20] Palermo and Kössler also suggested that it is necessary for federal studies to look more carefully at *policies*, including how they are managed on the basis of legal norms and how they are interpreted by courts.[21] Along these lines, this volume looks at disability policies, and at their development further to the ratification of the CRPD. It, hence, engages with the way in which federal systems have managed the 'complexities' arising from the CRPD, with a view of understanding whether the protection and promotion of disability rights mandated by the Convention has increased the exercise of federal powers and provoked a sort of federal pre-emption, or whether the national and subnational entities have exercised their autonomous powers to the fullest extent. In that vein, the volume aims to explore whether national measures aimed to implement the CRPD have or have not abridged the powers of national and subnational entities.

After having highlighted the core aims of this volume and how they situate in current literature, this introductory chapter moves on to provide an overview of the core tenets of the CRPD. It does not aim to give a comprehensive overview of the Convention. Rather, it focuses on its most notable features and its inherent novelties. It then explains the concept of federalism embraced by the volume. Notably, the substantive understanding of federalism adopted by this volume allows for the inclusion of countries, and even supranational organisations such as the EU, that refrain from classic federal terminology in their constitutions, but work according to the federal principle by combining self-rule and shared rule.[22] Finally, the chapter presents the methodological approach and the overall structure adopted. Being premised on the idea of addressing a diverse readership, the volume blends constitutional theory, legal and policy analysis.

II. THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: NOVELTIES AND COMPLEXITIES

A. The Genesis of Disability Rights and the Long Road Towards the CRPD

Disability has traditionally been considered a mere individual deficit, deriving from a disease hampering physiological or cognitive functioning,[23] and conceived

[19] F Palermo and K Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law* (Hart Publishing, 2017) 321.

[20] Ibid.

[21] Ibid.

[22] DJ Elazar, *Exploring Federalism* (University of Alabama Press, 1987) 5.

[23] C Drum, 'Models and Approaches to Disability' in C Drum, G Krahn and H Bersani (eds), *Disability and Public Health* (American Public Health Association/American Association on Intellectual and Developmental Disabilities, 2009).

of as a personal tragic destiny. This 'medical model' of disability, which considered people with disabilities unable to participate in society as the result of their own impairments, began to be confronted by disability activists in the 1960s, both in the United States[24] and in the United Kingdom.[25] In the 1970s, the British Union of Physically Impaired Against Segregation (UPIAS) elaborated the idea that society disables people with impairments. UPIAS distinguished the 'impairment' itself from the social 'situation' of people with impairments,[26] the latter giving rise to a 'disability'. On the basis of UPIAS' manifesto, Michael Oliver, probably the best-known UK disabled academic, further expounded a conception of disability as a societal construction, currently termed the 'social model of disability'.[27]

The 'social model of disability' and its countless academic elaborations[28] and critical accounts[29] have stimulated the international development of disability rights as a key element of the UN's work.[30] From 1970 to 1980, according to Degener and Begg, persons with disabilities became recognised as 'subjects of rehabilitation',[31] while tentative signs of a rights-based approach to disability became evident, for example, in the Declaration on the Rights of Disabled Persons.[32] Degener and Begg note that, from 1980 to 2000, persons with disabilities became 'objects of human rights',[33] and the 1993 (non-binding) Standard Rules on the Equalization of Opportunities for Persons with Disabilities[34]

[24] For an historical account, see P Blanck et al., *Disability Civil Rights Law and Policy: Case and Materials*, 3rd edn (West Publishers, 2014) 4–8; F Pelka, *What We Have Done: An Oral History of the Disability Rights Movement* (University of Massachusetts Press, 2012); JI Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (University of California Press, 1998); I Zola, *Missing Pieces: A Chronicle of Living with a Disability* (Temple University Press, 1982); LJ Davis, *Enabling Acts: The Hidden Story of How the Americans with Disabilities Act Gave the Largest US Minority Its Rights* (Beacon Press, 2015).

[25] H Meekosha and A Jakubowicz, 'Disability, Political Activism, and Identity Making: A Critical Feminist Perspective on the Rise of Disability Movements in Australia, the USA and the UK' (1999) 19 *Disability Studies Quarterly* 393–404.

[26] Union of Physically Impaired Against Segregation (UPIAS), *Fundamental Principles of Disability* (The Disability Alliance, 1976) 4.

[27] Inter alia M Oliver, *Understanding Disability: from Theory to Practice* (Macmillan Education, 1996).

[28] Among many others, see E Barnes, 'Constructing Disability' in E Barnes (ed), *The Minority Body: A Theory of Disability* (Oxford University Press, 2016).

[29] For a critique of the social model, see T Shakespeare, *Disability Rights and Wrongs* (Routledge, 2006). See also J Morris, *Pride Against Prejudice: Transforming Attitudes to Disability: A Personal Politics of Disability* (Women's Press, 1991) 10.

[30] A Kanter, *The Development of Disability Rights under International Law: From Charity to Human Rights* (Routledge, 2017).

[31] T Degener and A Begg, 'From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations' in V Della Fina, R Cera and G Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017) 2.

[32] UN Declaration on the Rights of Disabled Persons, 09 December 1975, UN General Assembly (UNGA) Resolution 3447.

[33] Degener and Begg (n 31) 4.

[34] UNGA, 'UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities', Resolution 48/96, Annex of 20 December 1993.

represented a momentous political commitment to realising equality for persons with disabilities. The new millennium represented a crossroads, in that 'international disability policy became a rights-based policy',[35] and a binding treaty to ensure equal rights to persons with disabilities was indicated as the key objective to be achieved. An Ad Hoc Committee was set up in December 2001 by the UN with the mandate to draft a comprehensive international convention.[36] This Ad Hoc Committee released the text of the CRPD, which, as mentioned above, was formally adopted by the UN on 13 December 2006, entering into force on 3 May 2008.

B. The Transformative Potential of the CRPD

It is often highlighted that the CRPD ushered in a new era of disability rights. With its Preamble, which is quite long and detailed, and 50 articles, it '[forges] new ground and requires new thinking'.[37] The OP-CRPD, accompanying the Convention, enables any individual in a State Party to the Convention to bring a claim in respect of an alleged violation of his/her rights through submitting an individual communication to the UN Committee on the Rights of Persons with Disabilities (CRPD Committee), the treaty body attached to the CRPD. The OP-CRPD also entrusts the CRPD Committee with the power to launch *ex officio* inquiries into 'grave and systematic' violations of the rights provided for in the Convention.

The transformative potential of the CRPD is linked to the fact that it recasts disability as a social construct and abandons the outdated medical model of disability. In doing so, the Convention focuses on the removal of barriers to ensure the equal exercise and enjoyment of rights by persons with disabilities and their full participation in society. In this connection, the CRPD is said to encapsulate the social-contextual model of disability.[38] In fact, Article 1 CRPD acknowledges that 'disability results from the *interaction* between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others' (emphasis added).[39] Notably, Article 1 CRPD

[35] Degener and Begg (n 31) 4.

[36] The General Assembly renewed the mandate of the Ad Hoc Committee four times from 2002 to 2005 (Resolutions 57/229 of 18 December 2002, 58/246 of 23 December 2003, 59/198 of 20 December 2004 and 60/232 of 23 December 2005).

[37] N Pillay, *The Convention on the Rights of Persons with Disabilities* (Training Guide, Professional Training Series No 19, United Nations Publication, 2014).

[38] The term 'social-contextual model' was used by A Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities* (Intersentia, 2015) 77. Several authors still refer to the CRPD as embracing the social model of disability (inter alia, A Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities. Realizing the Right to Equal Recognition before the Law* (Cambridge University Press, 2017) 72).

[39] See also Preamble para (e) CRPD.

allows for a dynamic approach that can facilitate adaptations over time and in different socio-economic settings, and does not set forth any distinction between different categories of disability.

The novelty of the CRPD also arises from the embedment of the 'human rights model of disability', which has been elaborated by Degener.[40] Without engaging in a thorough discussion of this model, it suffices here to recall some of its core features. Degener argues that this model emphasises the human dignity of persons with disabilities, and 'encompasses both sets of human rights, civil and political as well as economic, social and cultural rights'. She suggests, inter alia, that the human rights model values impairments as part of human diversity, paying attention to intersectional discrimination. Further, the human rights model 'offers room for minority and cultural identification'.[41]

Skarstad and Stein contend that the CRPD embraces a human rights approach to disability and claim that the CRPD 'precipitated a dramatic sea change in the relative human rights empowerment of persons with disabilities by recognizing their equal dignity, autonomy, and worth, and by ensuring their equal enjoyment of all human rights and fundamental freedoms'.[42] In a similar vein, Celik suggests that 'the CRPD brings a new dimension to the perception of "human" in the legal arena, through challenging the very liberal notions attached to it; by bringing a solid insight into the concepts of dignity and traditional autonomy'.[43] In fact, the transformative potential and the innovative character of the CRPD is enshrined in its normative principles that include respect for human dignity, non-discrimination and equality, accessibility, and participation. The foregoing principles, read jointly, endeavour to ensure inclusion, redress disadvantage, and address stigma.

The principle of non-discrimination has been described as the 'leitmotif' of the CRPD,[44] as it cuts across both civil and political rights, such as the right to legal capacity, and economic, social and cultural rights, such as the right to education. Article 2 CRPD provides a broad definition of discrimination on the ground of disability, stating that such discrimination comprises the denial of reasonable accommodation, whereby reasonable accommodation is any 'necessary and appropriate modification and adjustments', '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

[40] T Degener, 'A New Human Rights Model of Disability' in V Della Fina, R Cera and G Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017) 41.

[41] Ibid.

[42] K Skarstad and MA Stein, 'Mainstreaming Disability in the United Nations Treaty Bodies' (2018) 17 *Journal of Human Rights* 1.

[43] E Celik, 'The Role of CRPD in Rethinking the Subject of Human Rights' (2017) 21 *The International Journal of Human Rights* 933–95.

[44] O Mjöll Arnardóttir, 'A Future of Multidimensional Disadvantage Equality' in O Mjöll Arnardóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 41.

freedoms'. The duty to provide reasonable accommodation must be distinguished from accessibility, which, as noted above, is another core principle of the Convention.

Article 9 CRPD requires States Parties to take appropriate measures to ensure that people with disabilities have access to environments, facilities, information and services on an equal basis with others. Accessibility duties are generalised and group-based, as well as anticipatory (*ex tunc*).[45] Moreover, Article 4(1) CRPD includes an array of obligations that are linked to the realisation of the principle of accessibility. These encompass the duty to engage in or promote the research and development of new technologies[46] and the requirement for States Parties to provide accessible information.[47] The CRPD Committee identifies accessibility as an essential 'precondition' for the enjoyment of other human rights and as 'a means to achieve *de facto* equality for all persons with disabilities'.[48] The principle of participation and inclusion of people with disabilities in society is also a core feature of the Convention. In fact, the CRPD requires the involvement of persons with disabilities in society, and in all spheres of policymaking.[49] Ensuring participation of persons with disabilities is particularly important for fostering awareness-raising and promoting respect for the rights and dignity of persons with disabilities.[50]

The normative principles of respect for human dignity, non-discrimination and equality, accessibility, and participation converge in the concept of inclusive equality, which is embodied in the CRPD. This concept, which is said to go beyond that of substantive equality,[51] embraces four intertwined dimensions: a fair *redistributive* dimension, which refers to the need to address socioeconomic disadvantages; a *recognition* dimension, which requires the combatting of stigma and recognition of dignity and intersectionality; a *participative* dimension, which necessitates the recognition of the social nature of people with disabilities as members of society; and an *accommodating* dimension, which entails making space for difference as a matter of human dignity.[52]

[45] CRPD Committee, 'General Comment No. 2 on accessibility' (2014) CRPD/C/GC/2; See also CRPD Committee, 'General Comment No. 6 on equality and non-discrimination' (2018) CRPD/C/GC/6, paras 23 *et seq*.

[46] Art 4(g) CRPD.

[47] Art 4(h) CRPD.

[48] CRPD Committee, 'General Comment No. 5 on living independently and being included in the community' (2017) CRPD/C/GC/5, para 40.

[49] CRPD Committee, 'General Comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention' (2018) CRPD/C/GC/7.

[50] Ibid para 76.

[51] CRPD Committee, 'General Comment No. 6' (n 45); See also T Degener and M Uldry, 'Towards inclusive equality: 10 years Committee of the Rights of Persons with Disabilities' (German Federal Ministry of Labour and Social Affairs, 2018).

[52] CRPD Committee, 'General Comment No. 6' (n 45), para 11.

Articles 10 to 30 CRPD enumerate specific rights that the Convention promotes and protects. These encompass civil, political, economic, social and cultural rights. Among these provisions, central to the CRPD is the right of persons with disabilities to legal capacity (ie, the capacity to be a holder of rights and the capacity to act under the law) enshrined in Article 12.[53] This Article also imposes on States Parties the obligation to provide persons with disabilities with adequate supports in the exercise of their legal capacity, in order to enable them to make decisions that have legal effect. Support provided in the exercise of legal capacity must respect the rights, will and preferences of a person with a disability, and it should never amount to substitute decision-making.[54] While Article 12 has been quite 'controversial',[55] it has also been deemed revolutionary in that it challenges the traditional approaches to legal capacity and guardianship systems.[56] Closely related to Article 12 is Article 19 CRPD, which contains the right to live independently and be included in the community, prohibiting institutionalisation and segregation of persons with disabilities.

In particular, although not exclusively, Article 24 on the right to education, Article 25 on the right to health, Article 27 on the right to work, Article 28 on the right to social protection and Article 30 CRPD on the right to participation in cultural life, place, to different degrees, a focus on the inclusion and participation of persons with disabilities in society. Kayess and French suggest that these provisions oblige States Parties to incorporate 'disability sensitive measures into mainstream service delivery' and to ensure 'the provision of necessary specialist services and special measures in a manner that facilitates the inclusion and participation of persons with disability within the general community'.[57]

Article 4(2) CRPD reiterates the traditional distinction between rights that are subject to immediate implementation (ie civil and political rights) and those that are to be realised progressively (ie economic, social and cultural rights). It recognises that States Parties are allowed to realise socio-economic rights progressively, with a view to achieving their full protection and promotion over time, because the realisation of such rights is often heavily dependent on the availability of resources. However, as argued by Stein,[58] the CRPD blurs the

[53] C de Bhailís and E Flynn, 'Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD' (2017) 13 *International Journal of Law in Context* 6.

[54] CRPD Committee, 'General Comment No. 1 Article 12: Equal recognition before the law' (2014) CRPD/C/GC/1, para 17.

[55] Among many others, see M Scholten and J Gather, 'Adverse Consequences of Article 12 of the UN Convention on the Rights of Persons with Disabilities for Persons with Mental Disabilities and an Alternative Way Forward' (2018) 44 *Journal of Medical Ethics* 226; and A Pearl, 'Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the Legal Capacity of Disabled People: The Way Forward?' (2013) 1 *Leeds Journal of Law and Criminology* 1, 7.

[56] P Cuenca Gómez et al., 'The Impact of Article 12 of the Convention on the Rights of Persons with Disabilities on Qatar's Private Law' (2017) 9 *The Age of Human Rights Journal* 81, 82.

[57] R Kayess and P French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities'(2008) 8 *Human Rights Law Review* 31.

[58] MA Stein, 'Disability Human Rights' (2007) 95 *California Law Review* 75.

distinction between these traditional categories of rights and has 'compounded the different categories of rights' throughout its provisions.[59] For example, several CRPD rights which fall under the traditional category of socio-economic rights (eg, the right to education) encompass reasonable accommodation obligations (which need to be immediately realised), while civil and political rights in the CRPD require positive measures and expenditure on the part of states. In doing so, the Convention emphasises the interconnectedness between civil and political rights and socio-economic rights.

C. The Implementation of the CRPD and its Complexities

Overall, the CRPD can be considered 'the single most exciting development in the disability field in decades'[60] and a 'catalyst for change'.[61] To effect that change, the CRPD itself recognises that implementation and monitoring are essential.

States Parties are required to adopt legislative, administrative, financial, judicial and all other necessary measures to ensure the realisation of the object and purpose of the CRPD. They must review and amend national laws and policies to ensure compliance with the CRPD. Article 4(1)(c) CRPD requires that States Parties mainstream disability in all their policies, and Article 4(1)(d) CRPD obliges States Parties to ensure that public authorities and institutions act in compliance with the Convention. As it is typical for international treaties, there are no specific references in these provisions to the role of the national and subnational levels of governments. Also, there is no definition of 'public authorities and institutions' in the CRPD itself, as these will be identified at the domestic level, in light of the constitutional arrangements of that country, following the still predominant 'federal blindness' approach of international law.[62] However, those provisions must be read in conjunction with Article 4(5) CRPD, which affirms that the obligations laid out in the Convention 'extend to all parts of federal States without any limitations or exceptions'. The latter norm is designed to ensure that both subnational and federal authorities fulfil their implementation obligations under the Convention.

[59] G de Beco, 'The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities' (2019) 68 *International and Comparative Law Quarterly* 141.

[60] de Bhailís and Flynn (n 53) 7, citing G Quinn, 'A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities' in G Quinn and L Waddington (eds), *European Yearbook on Disability Law: Volume 1* (Intersentia, 2009) 89.

[61] L Arbour, 'Statement by Louise Arbour UN High Commissioner for Human Rights on the Ad Hoc Committee's Adoption of the Convention on the Rights of Persons with Disabilities' (New York, 5 December 2006).

[62] *Föderalismusblindheit* – see HP Ipsen, 'Als Bundesstaat in der Gemeinschaft' in E von Caemmerer, HJ Schlochauer and E Steindorff, *Probleme des Europäischen Rechts. Festschrift für Walter Hallstein zu seinem* 65. *Geburtstag* (Klostermann, 1966) 248.

The CRPD, as with other international treaties, includes a specific Regional Integration Organisation clause (RIO clause) specifically aimed at accommodating the European Union's (EU) peculiar legal nature and allowing it to ratify the Convention. Article 44 CRPD defines a 'Regional integration organization' as 'an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention'. Interestingly, Article 44 also provides that the RIO must 'declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention'. While the division of powers which is internal to a federal state remains entirely a domestic matter, the sharing of competences between the EU and its Member States acquires relevance, but only in the context of international responsibility.[63]

Notably, the CRPD recognises that the full realisation of human rights depends on appropriate governance mechanisms. It obliges States Parties to put in place structures at the domestic level with a view to facilitating the implementation of the Convention and to monitor such implementation. Article 33 CRPD sets forth the obligations to: designate one or more focal points to implement the CRPD (Article 33(1) CRPD); give due consideration to the establishment of a mechanism to coordinate the implementation process (Article 33(1) CRPD); and put in place a structure to protect, promote and monitor the implementation of the Convention (Article 33(2) CRPD). In addition, Article 33(3) CRPD requires States Parties to involve civil society, in particular disabled people's organisations (DPOs) in monitoring processes. Quinn suggests that Article 33 in its entirety is a key innovation, with the potential to transform the 'majestic generalities' of the Convention into concrete reform at the domestic level.[64]

The focal point must be set up within the government for matters relating to the implementation of the Convention, and resources must be allocated to carry out its function and collaborate with persons with disabilities.[65] However, Article 33(1) CRPD leaves a margin of discretion to the State Party on whether to create a single focal point or multiple focal points (both horizontally – by creating multiple focal points in the national government, and vertically – by creating focal points at the subnational level), although Manca suggests that, during the negotiations on the CRPD, a strong preference for

[63] On RIO clauses and Declarations of Competence, see inter alia A Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17 *European Foreign Affairs Review* 491.

[64] G Quinn, 'Resisting the "Temptation of Elegance": Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?' in O Mjöll Arnardóttir and G Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, 2009) 215, 217.

[65] Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Thematic study by the Office of the United Nations High Commissioner for Human Rights on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities' (2009) A/HRC/13/29.

multiple focal points was expressed.[66] Aichele even maintains that Article 33 CRPD could be read as imposing an obligation on federal states for each of the governments to have a focal point.[67] In fact, during the drafting process, federal states had 'pointed out that it would be in the interests of their regions to be equipped with focal points that would enable them to ensure their inner sovereignty'.[68]

Article 33(1) CRPD also requires States Parties to 'give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels'. The establishment or designation of a coordination mechanism is not a legal obligation, however, and the distinction between the functions of the focal point and the coordination mechanism remains vague and blurred. Nonetheless, in decentralised states, the establishment of the coordination mechanism should be of vital importance to ensure the smooth implementation of the Convention across different levels of government. In that regard, taking into account previous research,[69] this volume investigates whether traditional institutional forms of territorial participation have been replicated into the focal point, and whether the coordination mechanism in Article 33 CRPD acts as a 'transmission belt' between the national and the subnational entities' governments.

It is evident that the CRPD necessitates States Parties to intervene on their governance structures. By including provisions such as Article 4(5) and Article 33(1), the drafters of the CRPD were somewhat mindful of the particular challenges that the implementation of the CRPD brings about in federal systems, where competences on pivotal areas, such as eg accessibility, are shared between national and subnational levels. However, these provisions have not prevented gaps in the implementation. Furthermore, a lack of coordination has progressively emerged in federal systems and has been highlighted by the CRPD Committee in its Concluding Observations on States Parties reports. A recent report, written by Wooding for the European Blind Union, indicates the lack of coordination as an issue in some of the federal countries examined. A shortage of coordination efforts between cantons was reported with regard to Switzerland, while in Belgium the 'complexity of governing arrangements made effective participation [of persons with disabilities] problematic'. In a more general fashion, '[l]ack of coordination was evident, where

[66] L Manca, 'Article 33: National Implementation and Monitoring' in V Della Fina, R Cera and G Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017) 591.

[67] Ibid 989.

[68] V Aichele, 'Article 33 National Implementation and Monitoring' in I Bantekas, MA Stein and D Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018) 985.

[69] de Beco (n 7).

not enough focal points were present at the various levels of government or across ministries'.[70]

Article 33(2) CRPD obliges States Parties to create 'a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation' of the Convention. What may constitute a framework is not defined in Article 33(2). Nevertheless, this provision requires States Parties to designate or establish one or more bodies as part of the framework.[71] The framework should include 'one or more independent mechanisms' that comply with the 'Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights (NHRIs)' (also known as the Paris Principles),[72] which sketch out the responsibilities, composition and working methods of NHRIs, placing emphasis on independence and pluralism. The responsibilities of the independent mechanisms within the framework include: awareness-raising activities to ensure that a human rights approach to disability is adopted; the power to deal with individual claims related to violations of the rights provided for in the CRPD; and the assessment of the extent to which the CRPD has been effectively implemented.

As noted above, Article 33(3) CRPD establishes that 'civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process'. This provision tallies with Article 4(3) CRPD which requires in a general fashion close consultation with, and active involvement of, disabled people, through their representative organisations, in the development and implementation of legislation and policies and in all decision-making processes concerning issues relating to persons with disabilities. These norms are considered to stem from the participatory process that characterised the negotiation of the CRPD and reflect the slogan of the disability rights movement 'Nothing About Us Without Us'. On the whole, the CRPD demonstrates that the full realisation of human rights of persons with disabilities only passes through a participatory approach to implementation and monitoring.

III. FEDERALISM AS A THEORETICAL FRAMEWORK

Federalism and related concepts are some of the most studied topics in social, political and legal sciences and beyond. In fact, federalism is at the heart of one

[70] S Woodin, 'Monitoring of the Rights of Blind and Partially-Sighted People in Europe: An Analysis of the European Blind Union CRPD Database – Article 33: National Implementation and Monitoring' (European Blind Union, 2019).

[71] Ibid.

[72] Annex to the UN General Assembly, 'National institutions for the promotion and protection of human rights' (1993) A/RES/48/134. The Paris Principles provide a short set of minimum standards for National Human Rights Institutions (NHRIs), organised under four headings: 1. Competence and responsibilities; 2. Composition and guarantees of independence and pluralism; 3. Methods of operation; 4. Additional principles concerning the status of commissions with quasi-[judicial] competence.

of the most pressing challenges in the history of mankind: how to order public life and how to limit, organise and regulate power in a way that guarantees freedom and efficiency, unity and plurality, autonomy and coordination. At the same time, defining federalism and classifying federal states has always been a matter of contention and is ultimately impossible.[73] In 1994, Elazar estimated that about half of around 180 sovereign states in the world were federal or had some form of federal arrangement,[74] whereas, just a few years later, another leading scholar in the field, Ronald Watts, determined that only 23 fully fledged federal states existed in the world.[75] As a matter of fact, federalism is deeply contextual about how to achieve the ideal goal of, as put by Wheare, 'dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent'.[76] What really matters from a legal perspective is the practical purpose of federalism as a set of measures and instruments that balance unity and diversity, autonomy and integration, self-rule and shared rule.[77]

The volume adopts a comparative federalism perspective. In line with the most recent studies,[78] we adopt a non-formalistic and functional approach to federalism. Rather than trying to define federal countries by identifying abstract markers of the federal idea, we look at when and how instruments of the federal toolkit[79] are used to address relevant constitutional issues: in our case, the protection of the rights of persons with disabilities and the implementation of the CRPD. This is why we generally speak of *federal systems*[80] (or federal countries/states) as institutional manifestations of federalism, and we do so irrespective of whether the very countries define themselves as federal, regional, devolved or otherwise. We are conscious of the slippery meaning of federalism or federalisation processes. In fact, they often have different – indeed the opposite – resonance in diverse political realms. In formerly unitary states like Italy, Spain, Belgium and the United Kingdom, the process of federalisation has implied surrendering some autonomy to certain minorities or groups, in order for them to achieve some sort of self-governing status within their own territorial subdivision. Federalisation is therefore increasingly used as an instrument for recognising and accommodating national diversity.[81] In the context of

[73] See A Gamper, 'A "Global Theory of Federalism": The Nature and Challenges of a Federal State' (2005) 6 *German Law Journal* 1297.

[74] See DJ Elazar, *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements* (Longman, 1994) XVI.

[75] See RL Watts, *Comparing Federal Systems*, 2nd edn (McGill-Queen's University Press, 1999); and RL Watts, 'Typologies of Federalism' in J Loughlin, J Kincaid and W Swenden (eds), *Routledge Handbook of Regionalism and Federalism* (Routledge, 2013) 19.

[76] See KC Wheare, *Federal Government* (Oxford University Press, 1947) 11.

[77] Elazar, *Exploring Federalism* (n 22) 5.

[78] Inter alia Palermo and Kössler (n 10); and P Popelier, *Dynamic Federalism. A New Theory for Cohesion and Regional Autonomy* (Routledge, 2021).

[79] Palermo and Kössler (n 10) 5.

[80] Following, inter alia, Elazar (n 74); Watts, *Comparing Federal Systems* (n 75); and M Burgess, *Comparative Federalism: Theory and Practice* (Routledge, 2006); Palermo and Kössler (n 10).

[81] E Cloots, G De Baere and S Sottiaux (eds), *Federalism in the European Union* (Hart Publishing, 2012).

multinational states, federalism hence refers to increased self-governing powers for subnational entities and, accordingly, more legal diversity. By contrast, the epithet 'federal' and the term federalisation when used in relation to the EU appear to indicate more unity, uniformity throughout the Union, at the expense of the autonomous powers of its Member States.

From a structural perspective, federal constitutions set out how the power between the subnational units and the centre is distributed. From a process perspective,[82] comparative federalism literature highlights the importance of horizontal and vertical coordination in policy areas like education, health, and, especially, welfare issues.[83] Both aspects are relevant in this volume. The question is thus not a definitional controversy on federalism as an abstract term, but rather a comparative analysis of how constitutional instruments taken from the federal toolkit are used in order to accommodate the rights of persons with disabilities in the interplay of different levels of government. While the (predominantly centralising) impact of fundamental rights guarantees on federal governance has been studied widely, the specific case of the rights of persons with disabilities has not. The book aims at casting light on the impact of the CRPD and of rights of persons with disabilities and the territorial setting, and its main research question is whether, and to what extent, such a centripetal dynamic is to be observed also with regard to the rights of persons with disabilities, whether the Convention has limited or enhanced the margin of manoeuvre of subnational entities, or whether the impact has not been relevant, and why.

Cognisant of the nuances accompanying federalism, this volume's quandaries revolve around how the distribution of powers responds, in different federal systems, to the common challenge of providing a legal framework for the co-management of the rights of people with disabilities, and to the obligations rising from the CRPD. The following chapters provide an analysis of intergovernmental relations in this area and, where appropriate, of constitutional adjudication. Both are, beyond the mere text of the constitution, decisive in defining the roles of national and subnational governments. Indeed, the analysis of broad subject matters regarding both their legal foundation in the distribution of powers and actual policy-making appears to emerge, in the context of an era of pluralism, as the most crucial challenge for research on federalism. As to the actual use of autonomous powers within the limits of national homogeneity, particular emphasis is placed on the potential of self-government, not only for single subnational entities, but also on potentially beneficial spill-over effects of policy innovation to other jurisdictions.

This presumed advantage of so-called competitive, experimental or laboratory federalism was emphasised with reference to the United States example by

[82] CJ Friedrich, *Trends of Federalism in Theory and Practice* (Praeger, 1968).
[83] TO Hueglin and A Fenna, *Comparative Federalism: A Systematic Inquiry* (University of Toronto Press, 2015).

James Bryce as early as the late nineteenth century.[84] Today, however, this rationale is even more associated with an often-quoted statement from a dissenting opinion by US Supreme Court Justice Louis Brandeis in 1932: 'It is one of the happy accidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country'.[85] Brandeis's laboratory argument boils down to the claim that multiple experiments at a smaller scale are more likely to produce good policies than one single nationwide effort. If such experiments fail, damage would be limited to a single jurisdiction. However, if they prove successful, they could be emulated by other jurisdictions.

Whether federal systems are able to fulfil this role seems to depend on certain practical preconditions. First, the rationale of experimental federalism presupposes substantial legislative autonomy because, otherwise, there is just no room for experimenting with policies that are genuinely a subnational entity's own to be then emulated by others. Administrative federalism in a very pure and extreme form, with subnational entities merely putting into practice nationally devised policies, seems therefore unlikely to make federal systems laboratories of innovation. Second, this rationale assumes that subnational entities are willing to bear the costs of inventing something new that others might then benefit from. Third, it presupposes that economic, social and political contexts are sufficiently similar to enable a transfer of innovation from one jurisdiction to another.[86]

Moreover, one should be cautious not to overestimate experimental federalism as the driving force behind a linear development towards more progressive societies. Just as subnational entities are not always the proponents of democratic reform but sometimes its opponents,[87] they have sometimes also inhibited more progressive policies in other areas. This is because federalism, while being an idea, is not ideological, but rather a set of instruments; therefore, it is neutral with regard to ideology in terms of policy-making at the various levels of government and just enables greater congruence of policies with subnational preferences. Therefore, it also provides opportunities for conservative forces in subnational entities to resist the progressive agenda of a national government. From a historical perspective, this arguably applied to the United States, Canada and Australia in the late nineteenth and early twentieth centuries, with national governments attempting to achieve quick countrywide adaption in response to

[84] Bryce suggests that: 'Federalism enables a people to try experiments in legislation and administration which could not be safely tried in a large centralized country. A comparatively small commonwealth like an American State easily makes and unmakes its laws; mistakes are not serious, for they are soon corrected; other States profit by the experience of a law or a method which has worked well or ill in the State that has tried it'. J Bryce, *The American Commonwealth* (Macmillan, 1893) 353.

[85] *New State Ice Co v Liebmann* 285 US 262 (1932).

[86] TO Hueglin and A Fenna, *Comparative Federalism: A Systematic Inquiry* (Broadview Press, 2006) 347.

[87] One may think, inter alia, of racial segregation in the US or of women's suffrage in Switzerland.

industrialisation-related social and economic change. At that time, 'it seemed that the judiciary, backed by conservative business interests, was intent on using the division of powers to create a governmental no-go area and thereby enforce a regime of laissez-faire'.[88] The flipside of the theory that subnational entities are laboratories facilitating innovation is also reflected in numerous examples, such as racial segregation in the United States.

This leads to the conclusion that federalism – rather, the federal toolkit – has the potential to both promote and limit the enjoyment of rights and the effectiveness of policies, depending on the use that is made of them. Taking the angle of a relatively recent area of study and of policy-making such as the rights of persons with disabilities, the book looks at how such potential is used in practice in a number of representative countries having faced particularly interesting challenges in this area.

IV. METHODOLOGY

The volume does not intend to replicate existing academic work on the implementation of the CRPD. Rather, it aims to focus on the effects of that implementation on federal structures and powers. With that in mind, along the conceptual lines indicated in the previous section, the volume includes a range of chapters on selected countries, which are considered as representative test studies.

A. The Selection of Case Studies

Those countries have been selected on the basis of three criteria, deploying what Hirsch defines 'inference-oriented research design and case selection'.[89] First, we looked at the ratification date of the CRPD, with the aim to include States Parties that ratified the CRPD at least 10 years ago, in order to be able to evaluate trends in the implementation of the CRPD across a relatively long timespan. Secondly, we included countries that can be qualified as federal systems as identified above, ie countries with at least two tiers of government, where division of legislative powers is constitutionally guaranteed. Finally, we included countries for which there is preliminary evidence of complexities in the implementation of the CRPD, signalled by the CRPD Committee in their Concluding Observations, by literature, as well as by DPOs' reports. Furthermore, the volume embraces a global approach by looking at countries from different geographical areas,

[88] Hueglin and Fenna (n 86) 342.

[89] R Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125–55.

including countries that belong to what is often termed the 'Global South',[90] even though it does not engage directly with the academic discourse related to development and disability. It also ensures a balance when it comes to the nature of the legal system: the volume in fact includes countries with a common law tradition, such as India and the United Kingdom, and states that are usually qualified as responding to a civil law tradition. Further, it encompasses jurisdictions with diverse approaches to international law, ie traditionally monist or dualist or characterised by a mixed approach.

On the basis of the criteria indicated, the federal systems selected are: Austria, Belgium, Germany, Italy, Spain, the United Kingdom, the EU, Canada, Mexico, Brazil, Argentina, India, South Africa and Ethiopia. Given that the CRPD has not yet been ratified by the United States, this country is not included in the analysis. Despite the global reach of the book, the somewhat predominant focus on European countries is justified due to their comparative relevance for the issue at stake. Not only is Europe a region with a high number of federal systems, but it has also dedicated significant attention to disability policies. Therefore, the interplay between federalism and disability law is of special evidence in the European continent.

Even though, as noted above, the peculiar and non-state legal nature of the EU is actually recognised by the CRPD, by virtue of the RIO clause, the volume deliberately chooses to include the EU as a case study. It does so on the basis of a wealth of literature that has analysed the process of European integration through the lens of federalism.[91] Furthermore, taking into consideration that several key principles of EU law are typically federal,[92] a chapter on the EU supports and enriches the comparative analysis, as well as the functional approach to federalism.

On foot of such comparative research design, the selected case studies have been grouped and presented in the book following both a geographic and a comparative logic. The first part is devoted to European cases, including the EU which, as a *sui generis* (federal) system, is placed in the beginning, for reasons of both content (its ratification of the CRPD) and method (it proves that the federal toolkit operates also in non-state organisations). After the chapter on the EU, authored by Ferri and Šubic, the other European examples are ordered by the historical duration of the federal experience. The chapter on Germany (authored by Welti), is followed by chapters on Austria (written by Bußjäger), Italy (authored by Addis and Monti), Spain (written by González Pascual), and Belgium (authored by Ghys, Louckx and Dumont). A chapter on the United Kingdom, by McCall-Smith, closes this initial part on European examples.

[90] The term 'Global South' is used to refer to post-colonial territories (R West-Pavlov, 'Toward the Global South' in R West-Pavlov (ed), *The Global South and Literature* (Cambridge University Press, 2018) 1.

[91] Among others Burgess (n 80).

[92] R Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (Oxford University Press, 2009).

Notably, the United Kingdom, while no longer a member of the EU, was part of it at the time of the ratification of the CRPD and has a long-standing disability policy revolving around the Equality Act 2010, and for this reason is included instead of Switzerland. The order also follows a historical evolution of the federal systems from traditional, coming-together federations to more recent, holding-together federal and regional systems, as well as from more symmetric to more asymmetric status and powers of the subnational units.

The second part looks at non-European federal countries, grouped along a scale based on the different legal traditions: from predominantly common law (Canada) to common law with elements of traditional law (India), common law with Roman-Dutch (*sui generis* civil law) elements (South Africa) and a mix of different legal traditions (Ethiopia). Those chapters (authored respectively by Beaudry, Dhanda, Chigwata and Nanima, and Fessha and Dessalegn) are followed by a final group that focuses on Latin American federal systems. In this part, Bariffi discusses the Argentinian experience, Rodrigues and Breit examine how Brazilian federalism dealt with the CRPD, while Spigno focuses on Mexico. Although the legal tradition does not seem to have played a significant role in determining the relationship between federalism and the rights of persons with disabilities, some pre-legal, predominantly cultural factors have, and this makes it useful to have a certain *fil rouge* in the presentation of the cases.

A comparative chapter elaborates on the findings of the case studies examined in the previous chapters. It explores trends and patterns in the implementation of the CRPD. In doing so, it endeavours to further clarify, by means of comparative analysis, the role of the CRPD in engendering, provoking dynamics of centralisation or decentralisation. It investigates the manner in which the general principles of the CRPD interact with federal arrangements. A short concluding chapter closes this edited collection with a brief discussion on the intersection between disability and federalism studies. It highlights likely future developments on the extent to which comparative federalism can enhance the promotion of the rights of persons with disabilities.

B. Doctrinal and Comparative Approaches

The volume adopts a doctrinal approach and is characterised by the use of traditional legal doctrinal methodology, which allows for an in-depth examination of legislative provisions, case law and academic scholarship.[93] Comparative approaches will emerge in the chapters, but they will feature, in particular, in the final chapter. Each chapter analyses the responsibility of different levels of government in the implementation of the CRPD. In doing so, they reflect on

[93] Authors did not use empirical research, and none of the chapters include data deriving from interviews or focus groups.

whether and to what extent the country considered complies with the CRPD, drawing conclusions on the functioning of federalism in relation to the rights of persons with disabilities. The country chapters serve as a basis to identify and illustrate in a comparative fashion the trends and recurring challenges in the implementation of the CRPD in federal systems.

In order to ensure a coherent approach, while acknowledging national peculiarities, different perspectives and styles, we asked each contributor to adopt a consistent structure. Each chapter provides at the outset contextual information on the ratification of the CRPD and its status in the domestic system, and includes a section discussing, in a general fashion, the division of legislative and administrative powers between the national and subnational levels of government. Then, the chapters examine how the CRPD has been implemented in domestic law, focusing on four broad areas: a) the concept of disability; b) non-discrimination and equality (with reference to reasonable accommodation); c) accessibility; and d) participation. Those areas have been selected because, as discussed earlier in section II, they broadly embody and reflect the transformative value of the CRPD. As noted above, the concept of disability envisaged by Article 1 CRPD is underpinned by the social-contextual model, rejecting a medicalised view of disability and triggering a paradigm shift in the way disability should be addressed. The emphasis on external barriers as a causation of disability in the interaction with the impairment, supports a capacious conception of inclusive equality, the realisation of which is linked to accessibility and participation. The selected areas are hence suited to well exemplify the way in which the federal system under consideration has managed the 'complexities' arising from the CRPD, identifying and critically discussing the role of the national and subnational levels. Further, being broad and open textured, those areas allow authors to bring a focus on national specificities, or recent reforms, or issues where the implementation of the CRPD has *de jure* or *de facto* affected federal structures or the sharing of competences. Given the importance of constitutional and supreme courts in the interpretation of the constitutional allocation of powers between the national government and subnational units, authors have also been asked to ascertain whether institutional conflicts have arisen in relation to disability laws, or on specific provisions directly or indirectly implementing the CRPD, and to highlight where appropriate the role of courts in enhancing the impact of the Convention on domestic legal orders. In addition, each chapter examines the interplay between national and subnational entities in governance mechanisms created to implement Article 33 CRPD. The concluding section of each chapter includes an appraisal of what impact (if any) the CRPD has displayed on power structures and federal institutional facets in the jurisdiction considered.

While the adopted structure ensures comparability amongst the chapters, we, as editors, acknowledge that each country presents specific features. For this reason, we supported a flexible approach to the chapter structure, and allowed authors to include or deal with topics of current interest in their respective

countries, on which legal debate has been topical, or on which recent reforms have been undertaken. In this respect, each chapter reflects the distinct expertise of the authors, but also the constitutional tradition of the country considered.

Furthermore, while the book, in overall terms, is informed by both a human-rights perspective on disability, each chapter embeds the perspective (which does not necessarily reflect that of the editors) of the author. This entails that, while the volume for the most part uses 'people-first language' (ie 'persons/people with disabilities') compliant with the terminology used in the CRPD, some authors refer to 'disabled persons/people' consistent with the terms adopted in national legislation. In addition, while the overall volume embeds a substantive, rather than formal, understanding of federalism, authors defined the country's federal arrangement according to their own appreciation of the system. As a consequence, chapters adopt a federal terminology which better reflects each country's characteristics and constitutional approach. For example, the German and Austrian chapters use the term *Land*/*Länder* to indicate the constituent sub-national units. More generally, each chapter adopts a terminology that best reflects the constitutional understanding of federalism of the country in question. Equally, chapters typically refer to legislation and other regulatory acts in a way that reflects the constitutional articulation of the sources of law in that country (law, statute, etc). Consistent with this, some chapters (eg Austria and Germany) use the wording 'Paragraph' or 'Section' (eg India and South Africa), instead of 'Article', where appropriate and when referring to national legislation in line with relevant national practice. Most authors refer to primary and secondary sources in the language of the country in question and, unless indicated otherwise, provided the translation for the quotations included in the chapter.

The chapters in this volume were finalised, for the most part, at the beginning of August 2022. Thus, the volume covers legal developments that occurred up until that time.