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LEGAL SCHOLARSHIP AND DISABILITY IN ITALY: RECENT DEVELOPMENTS AND NEW PERSPECTIVES

Delia Ferri¹

1. INTRODUCTION

Italy signed the UN Convention on the Rights of Persons with Disabilities (hereinafter 'CRPD', or simply 'the Convention')² on 30 March 2007, and ratified it in 2009, by Law 18/2009.³

After the entry into force of the CRPD the Italian legal framework, founded on 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

¹ LL.M., Ph.D., Attorney at Law (Verona Bar). This article has been subject to independent and anonymous peer review. This paper takes into account the legal and academic developments up to December 2013. All translations from an original Italian legal text, other than the Italian Constitution (including judicial decisions) are mine. 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: <www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> (accessed 10 September 2014). The decisions of Italian courts cited in this article can all be found in *Pluris-CEDAM*. The decisions of administrative courts cited in this article can also be found in the official website at: <www.giustizia-amministrativa.it/> (accessed 10 September 2014). My special thanks go to Paolo Addis and Anna Zago for their valuable bibliographic support. I am indebted to Professor Lisa Waddington and to Professor Francesco Palermo for their comments on a first draft. All errors and opinions remain my own.

² The CRPD text, along with its drafting history, resolutions, and updated list of signatories and States Parties, is available at <www.un.org/esa/socdev/enable/rights/conytexte.htm> (accessed 10 May 2014).

³ 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 *Gazzetta Ufficiale (G.U.)* No. 61 of 14 March 2009.

with disabilities’),⁴ did not undergo substantive change.⁵ According to the Italian Report recently submitted to the UN Committee on the Rights of Persons with Disabilities, the conceptual, ethical and normative vision of disability and persons with disabilities espoused by the CRPD was already reflected in Italian law.⁶ This somewhat ‘limited’ legislative implementation has been counterbalanced, on the one hand, by wide-ranging policy-making and, on the other hand, by intense ‘judicial activism’.

The National Observatory on the Condition of Persons with Disabilities (hereinafter ‘the Observatory’), a new body provided for in Article 3 of Law No. 18/2009 and further regulated by the Inter-Ministerial decree of 6 July 2010, No. 167,⁷ in line with Article 33(2) CRPD,⁸ is tasked with collecting data on disability, and monitoring disability policies in Italy. In February 2013, the Observatory released the Biennial Action Programme on Disability,⁹ which sets forth an extensive action to foster full equality, inclusion and participation of people with disabilities in compliance with the CRPD.¹⁰ ‘Judicial activism’ is embodied by a growing body of judicial decisions in which the Constitutional Court, or lower administrative and civil law courts, have used the Convention as an interpretative tool, i.e., interpreted Italian law in light of the principles enshrined in the CRPD.

In this context, the emergence of a stronger and cross-cutting¹¹ academic ‘legal discourse’ on disability, unprecedented in Italy, can be seen.

⁴ Law of 5 February 1992 No. 104, ‘*Legge-quadro per l’assistenza, l’integrazione sociale e i diritti delle persone handicappate*’ in G.U. No. 39 of 17 February 1992.

⁵ D. Ferri, ‘Italy’, in H. Reifeld and M. Michalk (eds.), *Auf dem Weg zur Inklusion (KAS-Berlin, 2012)*, 165. See also ANED country reports at: <www.disability-europe.net/> (accessed 10 May 2014); See also: *infra* at Section 4.

⁶ The Italian version of the report can be found at: <www.lavoro.gov.it/AreaSociale/Disabilita/Documents/TREATYversione_DEF_persito.pdf> (accessed 10 May 2014). The English version can be downloaded at: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=29> (accessed 10 May 2014).

⁷ Available at: <[Www.osservatoriodisabilita.it/index.php?lang=en](http://www.osservatoriodisabilita.it/index.php?lang=en)> (accessed 10 May 2014).

⁸ For a general overview on the implementation of Article 33 CRPD in Italy, see D. Ferri, ‘Implementation of Art. 33 UNCRPD in Italy: *Magna Pars est profectus velle proficere*’, in G. De Becco (ed.), *Article 33 of the UN Convention on the Rights of Persons with Disabilities: Structural Foundations for the Implementation and Monitoring of the Convention*, (Martinus Nijhoff, 2013), 119.

⁹ Decree of President of the Republic, 4 October 2013 – ‘Adozione del programma di azione biennale per la promozione dei diritti e l’integrazione delle persone con disabilità’. (13A10469); See at: <www.lavoro.gov.it/Notizie/Documents/Notizie/RapportoOnudisabilita_2013.pdf> (accessed 10 May, 2014).

¹⁰ D. Ferri and P. Addis, ‘The Role of the Judiciary in the Implementation of the UN Convention on the Rights of Persons With Disabilities: A Case-Study from Italy’, (forthcoming, 2014).

¹¹ In this essay the word ‘cross-cutting’ is used as a synonym for ‘cross-disciplinary’, to designate a legal discourse which embraces different legal disciplines and approaches (i.e., civil law, constitutional law, labour law...). By contrast, the word

This essay gives an overview of the evolving academic legal discourse on disability which is taking place in Italy. It attempts to show that the ratification of the CRPD contributed to making ‘disability law’ an autonomous and comprehensive area of legal studies, and to overcome (at least partially) the rigid fragmentation of the *settori scientifico-disciplinari* (scientific-disciplinary sectors, i.e., constitutional law, comparative law, civil law...), which is a distinctive feature of Italian academia.¹²

In particular, this article aims to illustrate to non-Italian speakers the richness and creativity of Italian legal scholarship in the field of disability. Notably, a very superficial examination of the major European legal literature in the field of disability of the last five years, whether in English, French, German or even Spanish, reveals an astonishing scarcity of references to Italian scholarship. In part, the barrier is linguistic: if Italian scholars do not publish in English or French or German, they simply cannot be read. In part, in spite of the fact that Italian legal scholarship owes a great debt to the comparative method, and has a long-standing comparative law tradition, the barrier seems to consist of a perceived distance from other European experiences and from European disability studies. Moreover, Italian legal scholars have long been detached from established disability networks, traditionally monopolized by advocates and by scholars from other disciplines such as sociology, educational science or psychology. Another reason which might possibly explain the dearth of references to Italian legal scholarship, is the abovementioned academic fragmentation. This essay tries to present to European scholars who do not speak Italian or do not have access to Italian law journals, the main features of the most recent Italian legal scholarship on disability, and to illustrate the topics that have attracted attention among Italian academics. All in all, this essay aspires to encourage future comparative analysis that includes Italian literature on disability as a point of reference amongst European scholarship.

This contribution cannot cover all the relevant publications, and does not aim to provide a complete and exhaustive literature review. Given the high number of law journals, books and other publications released every year by the legal academic community, this task would be impossible. More modestly, this essay discusses selected literature to reveal trends in Italian legal scholarship on disability. Wider bibliographic references in relation to distinct topics are provided in the footnotes.

Acknowledging the seminal role played by publications of social scientists, psychologists, organizations of people with disabilities (DPOs) and advocates, and recognizing the informative value of websites such as ‘Superando.it’,¹³ ‘HandyLex’,¹⁴ ‘Superabile’,¹⁵ ‘Disabili.com’,¹⁶ or the most recent and very complete

‘interdisciplinary’ is used to denominate studies or books which combine two or more academic disciplines (law and psychology, law and economics...).

¹² Available at: <www.miur.it/0002Univer/0021Offert/0092Settor/index_cf2.htm> (accessed 10 May 2014).

¹³ Available at: <www.superando.it/> (accessed 10 May 2014).

¹⁴ Available at: <www.handylex.org/> (accessed 10 May 2014).

¹⁵ Available at: <www.superabile.it/web/it/Home/> (accessed 10 May 2014).

¹⁶ Available at: <www.disabili.com/> (accessed 10 May 2014).

'Jusabili',¹⁷ this article deliberately focuses on a selection of legal contributions published in edited volumes or in peer-reviewed law journals. References to publications directed at practitioners (attorneys-at-law, judges, legal clerks, etc.) are provided only where relevant. Limited references to case notes are provided, and this is done mainly in relation to judicial decisions which have followed the ratification of the CRPD.

This analysis is framed within the context of CRPD implementation, but that is not the direct subject of this contribution and remains in the background. Therefore, this article is neither on the implementation of the CRPD, nor is it devoted to explaining Italian legislation governing disability issues. In addition, this article does not provide any review of the legislative or judicial implementation of the CRPD in Italy.

Following these introductory remarks, this contribution is structured into three main sections. Section 2 provides a brief and selective overview of the Italian legal scholarship *ante* CRPD. The analysis is framed within a concise discussion of the Italian legal framework (which is still in place). Section 3 provides a critical overview of the main trends in legal scholarship, focusing on the years after Italy signed the CRPD. It is divided into two sub-sections. The first sub-section discusses the attempts undertaken by lawyers to place their work within the more general stream of research on the CRPD. Then, the development of academic literature in response to the 'judicial activism' mentioned above is briefly discussed. This second sub-section does not aim to provide a complete record of Italian case-law, but rather aims to highlight, through a few examples, how judicial decisions which refer to the CRPD have nurtured and fostered a legal discourse on disability. Even if EU antidiscrimination law and EU disability policy have undoubtedly contributed to shape the legal scholarship on disability, in particular with regard to non-discrimination legislation, and although there is a lively debate among Italian scholars on the role of the EU in promoting and protecting the rights of people with disabilities,¹⁸ this essay deliberately focuses only on the role of the CRPD in changing the approach to relevant domestic issues. Section 4 provides concluding remarks.

2. A FRAGMENTED LEGAL DISCOURSE IN EVOLUTION

Originally, academic scholarship on disability in Italy was a monopoly of social scientists, psychologists, and experts in education, while lawyers limited themselves to investigating individual aspects or niche areas.

Since the protection of persons with disabilities drew inspiration from the fundamental values of the Italian Constitution, constitutional lawyers considered disability in a general manner when commenting on Article 2 of the Italian Constitution (IC), which recognizes and guarantees 'the inviolable rights of the

¹⁷ Available at: <www.jusabili.org/> (accessed 28 February 2014).

¹⁸ Among many others, on EU and Italian antidiscrimination law, see M. Barbera, *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, [The new Antidiscriminatory Law. The Community and National Framework], (Giuffrè, 2007).

person', and Article 3 IC, which provides for the principles of non-discrimination and equality. Attention to disability and rights of people with disabilities was paid in relation to Article 32 IC, which 'safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent'; and in Article 38 IC, which establishes that 'every citizen unable to work and without the necessary means of subsistence is entitled to welfare support', specifies that 'workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment', and affirms that 'disabled and handicapped persons are entitled to receive education and vocational training'. All the IC commentaries, such as the contribution edited by Crisafulli and Paladin, to name but one, included some brief references to disability (or handicap), equality of opportunities, and welfare support.¹⁹ In most cases, disability is associated with the concept of protection of different vulnerable subjects.²⁰ Civil lawyers had initially focused their attention on guardianship mechanisms, tutorship and curatorship, through single *ouvrages*, or commentaries on the Italian Civil Code²¹ or on relevant case law in specialist law journals.²²

¹⁹ V. Crisafulli and L. Paladin, *Commentario Breve alla Costituzione*, [Brief Commentary to the Constitution], (CEDAM, 1990). Another recent IC commentary, edited by Bifulco, Celotto and Olivetti, published in 2006, mentions the word 'disability' in reference to the principle of equality (Article 3 IC), the freedom of expression and communication (Article 21 IC), the protection of family life (Article 31 IC), the right to education (Article 34 IC), working conditions (Article 37 IC), the right to access the welfare system (Article 38 IC) and the right to vote (Article 48 IC); See also: R. Bifulco, A. Celotto and M. Olivetti, *Commentario alla Costituzione*, [Commentary to the Constitution], (UTET, 2006); On welfare contribution see also: G. Arnone, 'Integrazione sociale dei disabili e contributi economici: un percorso a ostacoli', [Social Integration of people with disabilities and economic contributions], 1 *Giurisprudenza Italiana*, (1995), 217.

²⁰ M. Ainis, *I soggetti deboli nella giurisprudenza costituzionale*, [Vulnerable Subjects in Constitutional Case-Law], in A. Pace, *Studi in onore di Leopoldo Elia*, [Studies in Honour of Leopoldo Elia] Vol. I, (Giuffrè, 1999), 11.

²¹ L. Brusciuglia, *L'interdizione per infermità di mente*, [Legal Interdiction due to Mental Illness], (Giuffrè, 1983); G. Lisella, *Interdizione giudiziale e tutela della persona*, [Judicial Interdiction and Personal Guardianship], (ESI, 1984); P. Forchielli, *Sub art. 414, Infermità di mente, interdizione, inabilitazione*, [Mental Infirmity, Interdiction, Inability], in Comm. Scialoja – Branca, (Zanichelli, 1988); E. V. Napoli, *L'infermità di mente, l'interdizione, l'inabilitazione*, [Mental Infirmity, Interdiction, Inability] in Comm. Schlesinger, II ed., (Giuffrè, 1995); A. Venchiarutti, *La protezione giuridica dell'incapace*, [The Legal Protection of Incapable Adult], (Giuffrè, 1995); R. Pescara, *Lo statuto privatistico dei disabili psichici tra obiettivi di salvaguardia e modello dell'incapacità legale*, [The Private Law Condition of Persons with Mental Disabilities between the Aim of Protection and Legal Incapacity Model], in *Tratt. Rescigno*, II ed. (UTET, 1999); G. Lisella, 'Interdizione e inabilitazione' [Interdiction and Inability], in P. Cendon (ed.), *Il diritto privato nella giurisprudenza*, (UTET, 2006); C. M. Bianca, *Diritto civile*, [Civil Law], I, II ed. (Giuffrè, 2005).

²² See law journals such as *Giurisprudenza Italiana*, *Studium Iuris*, *La Nuova Giurisprudenza Civile Commentata*.

A more comprehensive legal discourse on disability began to appear after the adoption of Law No. 104/1992 ('Framework law for care, social integration and rights of persons with disabilities').²³ The adoption of this law stimulated a debate amongst legal scholars, who acknowledged specifically its innovative focus 'on the person', rather than on impairment, and its innovative approach in considering people with disabilities within the course of their lives.²⁴ The adoption of Law No. 68/1999 ('Provisions on the right to work of persons with disabilities'),²⁵ aimed at promoting job placement and integration of disabled people in the labour market, with the purpose of exploiting the specific working ability of disabled persons. Framework Law No. 328/2000 on social services addressed to individuals and households ('Framework Law to create an integrated system of interventions and social services')²⁶ also enhanced the debate, especially in the field of labour law.²⁷ Because of these advancements, towards the end of the 1990s and around the year 2000, a gradual move towards a comprehensive legal discourse on disability can be detected. This is well represented by the collection of essays, *Handicap and Law*, edited by Cendon,²⁸ by the collection of law and bylaws on disability,²⁹ edited by Bartolini, and by the monograph authored by Venchiarutti, *Persone disabili e tutela privatistica: profili di diritto comparato e linee di riforma*, (Persons with Disabilities and private law protection: comparative law perspectives and reforms streamlined),³⁰ which provides a comparative legal analysis, mainly focusing on

²³ In *G.U. No. 39 of 17 February 1992*, (See footnote 4).

²⁴ See M. Dogliotti, 'La legge quadro sull'handicap: un'occasione perduta', [The framework Law on Handicap: a lost opportunity], *Diritto di Famiglia*, (1993), 371; See also: C. Hanau, 'Più propositiva che vincolante la legge quadro sull'handicap', [The Handicap Framework Law: More provocative than binding], *L'assistenza sociale*, (1992), 409.

²⁵ Law of 12 March 1999 No. 68, 'Norme per il diritto al lavoro dei disabili', in *G.U. No. 57 of 23 March 1999*.

²⁶ Law of 8 November 2000 No. 328, *Legge quadro per la realizzazione del sistema integrato di interventi e servizi sociali*, in *G.U. No. 265 of 13 November 2000*. Specific measures aimed at promoting the integration of disabled persons within the society and to support the families of persons with disabilities are provided for in Articles 14 of Law No. 328; however, it is up to the Regions to programme and coordinate the social interventions and to watch over the structures and services both public and private.

²⁷ Among the commentaries on Law No. 68/1999, see: M. De Luca, 'Norme per il diritto al lavoro dei disabili' [Legal Provisions for disabled people's right to work], *Foro Italiano*, (V), (2000), 293; G. Santoro Passarelli-Lambertucci (eds.), 'Norme per il diritto al lavoro dei disabili', [Legal Provisions for disabled people's right to work], *Leggi Civili Commentate*, (2000), 1351; P. Sciortino, 'Disabili e diritto al lavoro', [Disabled and right to work], *6 Il Lavoro nella giurisprudenza*, (2004), 545.

²⁸ P. Cendon, *Handicap e Diritto*, [Handicap and Law], (Giuffrè, 1997).

²⁹ F. Bartolini and M. Bartolini, *Il codice per i disabili. Illustrato con il commento, la giurisprudenza e le circolari* [The code for persons with disabilities. With annotations, Case law and Ministerial circulars], (La Tribuna, 2001).

³⁰ A. Venchiarutti, *Persone disabili e tutela privatistica: profili di diritto comparato e linee di riforma* [Persons with disabilities and private law protection: comparative law outline and reforms streamline], (Edizioni Università di Trieste, 1999).

systems of protection and on guardianship. These *ouvrages* adopt a civil law approach, but show a first attempt to provide for an academic discourse on the legal dimension of disability. These works are however still centred on concepts of vulnerability and assistance. Though more nuanced than before, the vision of persons with disabilities as people 'in need' persists, which is conceptually very far from the value of autonomy embedded in the CRPD.

The collection of essays edited by Belli, *Libertà Inviolabili e persone con disabilità* (Fundamental Freedoms and Persons with Disabilities), includes several contributions from constitutional lawyers such as De Siervo and Pace, administrative lawyers such as Sorace, as well as practitioners and policy makers.³¹ This is probably one of the first Italian books that approaches disability from a 'rights' perspective.³² In the 1970s and the '80s, the rights of people with disabilities in constitutional law analysis were considered only marginally, while the emphasis was on single regulatory aspects in connection with the concepts of care, social provisions and assistance. As well shown by Belli's book, the legal scholarship in the 1990s started to shift the perspective, and the legal dimension of disability begins to be discussed in light of the principles of dignity, equality and independence.

Additionally, after the enactment of Law No. 104/1992, an evolution of legal terminology also took place: terms such as 'handicapped', 'infirm', and 'invalid', which had been commonly used in legislation and in academic texts in the '80s,³³ became outdated and were slowly replaced by 'disabled', and more recently by 'people with disabilities'.

Around 2000, the increasingly evident signs of the direct influence of EU law and international soft law (e.g., the 1993 Standard Rules on the Equalization of Opportunities for Persons with Disabilities) on domestic law were either underestimated, or left to the discretion of international law scholars.

The adoption of Law No. 6/2004 was probably the most important step, before the ratification of the CRPD, in the process of the emergence of a far-reaching legal discourse on disability. This act introduced a new institution named '*amministrazione di sostegno*' (supportive administration) in the Italian Civil Code, the purpose of which was to safeguard, to the greatest extent possible,

³¹ R. Belli, *Libertà inviolabili e persone con disabilità*, [Fundamental freedoms and persons with disabilities], (Franco Angeli, 2000).

³² See also: F. Furlan, 'La tutela costituzionale del cittadino portatore di handicap', [The constitutional protection of handicapped citizens], in C. Cattaneo (ed.), *Terzo settore, nuova statualità e solidarietà sociale* [Third Sector, new state character and social solidarity], (Giuffrè, 2001), 251.

³³ P. Perlingieri, 'Gli istituti di protezione e di promozione dell' 'infermo di mente'. A proposito dell'handicappato psichico permanente', [The institutes of protection and promotion of mentally infirmed. With regard to the permanent mentally handicapped], *Rassegna di Diritto Civile*, (1985), 46.

the rights of persons while offering them protection.³⁴ The *amministrazione di sostegno* allows for temporary and flexible supported decision-making frameworks, and seeks to place a limitation on the denial or restrictions of a person's legal capacity (Articles 404 Italian Civil Code *et seq.*). The *amministrazione di sostegno* supplements the traditional institutions of full incapacitation (Article 414 Italian Civil Code) and partial incapacitation (Article 415 Italian Civil Code), which have not been repealed. As highlighted by several judicial decisions, *amministrazione di sostegno* is a broad form of assistance (not merely patrimonial, but also encompassing personal care), it is intended to be proactive rather than inhibitory, personalized and non-standardized, dedicated to ensuring dignity and the full development of the human person,³⁵ which can now be considered largely in line with Article 12 CRPD (Equal recognition before the law). The *amministrazione di sostegno per se* attracted significant attention: several articles³⁶ and collective works examined its substantive features, effects, drawbacks, as well as coexistence with full and partial guardianship.³⁷ Worth mentioning here are two collective volumes, one edited by Ferrando in 2005,³⁸ and the other by Patti in the same year, as well as the monograph published by

³⁴ Supportive administration was introduced in the Italian Civil Code, Title XII, after a long legislative process and as a product of lengthy academic discussion. During the 1980s, a research team led by Paolo Cendon had already developed a draft reform of institutions to protect the people with mental health problems and, amongst other things, proposed the introduction of supportive administration. In the so-called 'Cendon's Draft' deep criticism was raised on institutions of full and partial incapacitation, and on the lack of a system that did not infringe human rights while offering support.

³⁵ Among many others: 'Tribunale di Pinerolo', 4 November 2004, in *Pluris-CEDAM*.

³⁶ S. Dellemonache, 'Prime note sulla figura dell'amministratore di sostegno', [First Annotations on the Support Administrator], 2 *La nuova giurisprudenza civile commentata*, (2004), 29; S. Chiarloni, 'Prime riflessioni su alcuni aspetti della disciplina processuale dell'amministrazione di sostegno', [First Reflections about some aspects of the Supportive Administration's Judicial Regulation], *Giurisprudenza Italiana* (2004), 2433; U. Roma, 'L'amministrazione di sostegno: i presupposti applicativi e i difficili rapporti con l'interdizione (L. 9 gennaio 2004, n. 6) – Commento alla l. 9 gennaio 2004 n. 6', [Supportive Administration: Applicability and difficult relationship with full guardianship regime – Commentary to Law No. 6 of 9 January 2004], 5 *Le Nuove leggi civili commentate*, (2004), 993; G. Savorani, 'Le mobili frontiere dell'amministrazione di sostegno: spunti per una revisione del sistema di protezione della persona', [The moving boundaries of supportive administration: Reflections for a revision of the protection system of person], 1 *Politica del diritto* (2006), 129.

³⁷ A. Venchiarutti, 'Il discrimentra di sostegno, interdizione e inabilitazione al vaglio della corte costituzionale', [The difference between supportive administration, full guardianship and inhabilitation under the Constitutional Court's review], 11 *La nuova giurisprudenza civile commentata*, (2006), 1105.

³⁸ See: F. Ruscello, "'Amministrazione di sostegno" e tutela dei "disabili". Impressioni estemporanee su una recente legge', [Supportive administration and protection of people with disabilities. Extemporaneous impressions on a recent law], 2 *Studium iuris*, (2004), 155.

Napoli in 2009.³⁹ These contributions are distinctive in their intention to raise new awareness of the need to respect legal capacity, and to limit, as far as possible, its diminution in full respect with the principle of non-discrimination purported by the Italian Constitution. In addition, some journal articles also attempted to analyse supportive administration within broader discourses on disability.⁴⁰

This rich, sometimes critical and often thought-provoking literature on *amministrazione di sostegno* has however been of little consequence beyond Italy's national borders. In this case the barrier seems to be mainly linguistic. However, it is somewhat astonishing that merely a few experts on legal capacity around Europe have paid attention to *amministrazione di sostegno* which, despite some drawbacks, is a very interesting legal institution of potential consequence for capacity law reform or simply as an example worthy of discussion.

Finally, two other laws merit attention in this section due to their role in sparking the debates around rights of people with disabilities. First, Law No. 4/2004,⁴¹ also known as '*Legge Stanca*', which aims to improve access to the information technologies of public administration and services for disabled people, in compliance with the equality principle, has prompted a broad discussion on web-accessibility and e-equality. This is exemplified by the collection of essays, *Accesso alla Rete e Uguaglianza Digitale* (Access to the Net and Digital Equality) edited by De Marco.⁴² Secondly, Law No. 67/2006,⁴³ which sets out specific

³⁹ G. Bonilini and A. Ghizzini, *L'amministrazione di sostegno*, [Supportive Administration], (CEDAM, 2007); G. Bonilini and F. Tommaseo, *Dell'amministrazione di sostegno*, [On Supportive Administration], (Giuffrè, 2008); E.V. Napoli, *L'amministrazione di sostegno*, [Supportive Administration], (CEDAM, 2009); G. Ferrando (ed.), *L'amministrazione di sostegno. Una nuova forma di protezione dei soggetti deboli*, [Supportive Administration. A new form of protection for vulnerable subjects], (Giuffrè, 2005).

⁴⁰ Among others: F. Ruscello, "'Amministrazione di sostegno" e tutela dei "disabili". Impressioni estemporanee su una recente legge', [Supportive administration and protection of people with disabilities. Extemporaneous impressions on a recent law], 2 *Studium iuris*, (2004), 155; G. Lisella, 'Questioni tendenzialmente definite e questioni ancora aperte in tema di amministrazione di sostegno,' [Defined issues and open questions on supportive administration], 5 *La nuova giurisprudenza civile commentata*, (2013), 284.

⁴¹ Law of 9 January 2004, No. 4, *Disposizioni per favorire l'accesso dei soggetti disabili agli strumenti informatici*, in *G.U.* of 17 January 2004, 13.

⁴² E. De Marco (ed.), *Accesso alla Rete e Uguaglianza Digitale*, [Access to the Net and Digital Equality], (Giuffrè, 2008).

⁴³ '*Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni*', in *G.U.* No. 54 of 6 March 2006, n. 54. Together with providing a definition of direct and indirect discrimination and harassment against disabled persons, this law provides for victims of discrimination and authorized associations representing them. Article 4 states that associations could be authorized by a joint decree of the Ministries of Labour and Equal Opportunities to plead the cause of disabled persons. The Ministerial Decree of 30 April 2008, (*G.U.* of 27 June 2008, n. 149) provides a list of associations and institutions having *locus standi*; See at:

measures for the judicial protection of persons with disabilities who are victims of discrimination, and is devoted to implementing the equality principle set out in the IC, and to give practical effect to Law No. 104/1992 (Article 1), also gathered a lot of consideration. Several articles in law journals⁴⁴ as well as commentaries were published examining this law, including its consequences and drawbacks.⁴⁵

3. THE CRPD AS ‘ACADEMIC’ CATALYST: FROM FRAGMENTATION TO CROSS-FERTILIZATION

3.1. A METHODOLOGICAL AND CONCEPTUAL SHIFT

The CRPD has attracted a lot of attention in Italian legal scholarship.⁴⁶ Across the globe, the Convention is acknowledged as the first human rights treaty of the 21st century. The paradigm shift purported by the Convention, as well as the

www.lavoro.gov.it/AreaSociale/Disabilita/Tutela_giudiziaria/Pages/default.aspx (accessed 10 March 2014).

⁴⁴ P. Virgadamo, ‘Tutela risarcitoria del danno non patrimoniale patito dai disabili: dalle barriere architettoniche alla L. n. 67 del 2006’, [Protection and compensation of non-patrimonial damage suffered by people with disabilities: From architectural barriers to Law 67 of 2006], *Giustizia Civile*, (2007), 263; R. Maruffi, ‘Le nuove norme sulla tutela giudiziaria delle persone con disabilità vittime di discriminazioni’, [New provisions on judicial protection of persons with disabilities victim of discrimination], *I Rivista di Diritto Processuale* (2007), 123; A.D. Marra, ‘La tutela contro la discriminazione dei disabili in Italia: la l. 67 del 2006’, [The protection against discrimination of people with disabilities], *Diritti Persone e Famiglia* (2008), 2162; G. De Marzo, ‘La nuova disciplina contro le discriminazioni in danno dei disabili’, [The new legislation against disability discrimination], *4 Foro italiano* (2006), 1206. More recently and with a broader perspective on disability discrimination, see: G. Tucci, ‘La discriminazione contro il disabile: i rimedi giuridici’, [Discrimination on the ground of disability: the legal remedies], 129 *Giornale di diritto del lavoro e di relazioni industriali*, (2011), 1.

⁴⁵ C. Crapanzano, *La tutela giudiziaria dei disabili. La difesa contro le discriminazioni prevista dalla legge 67/2006*, [Judicial protection of People with Disabilities. The defence against discrimination provided for in Law No. 67/2006], (Halley, 2006); R. Belli, *La non-discriminazione dei disabili e la legge 67/2006*, [The Non-Discrimination of Persons with Disabilities and the Law No. 67/2006], (Franco Angeli, 2007).

⁴⁶ *Ex multis* F. Seatzu, ‘La convenzione delle Nazioni Unite sui diritti delle persone disabili: diritti garantiti, cooperazione, procedure di controllo’, [The UN CRPD: Protected rights, cooperation, enforcement procedures], *2 Diritti umani e diritto internazionale*, (2009), 259. More interdisciplinary approaches have been adopted by other scholars; see for example: P. Baratella and E. Littamè, *I diritti delle persone con disabilità: dalla Convenzione Internazionale ONU alle buone pratiche*, [Rights of people with disabilities: From the UN CRPD to good practices], (Erickson, 2009); I. Alves, L. Bosisio Fazzi, and G. Griffo, *Human Rights, Persons with Disabilities, ICF and the UN Convention on the rights of persons with disabilities*, (Edizioni Comunità, 2010); G. Griffo, ‘Persone con disabilità e diritti umani’, [Persons with disabilities and human rights], in T. Casadei, *Diritti umani e soggetti vulnerabili*.

fact that it adopts a human rights approach to disability, and affirms the social model⁴⁷ (as opposed to the ‘medical’ model of disability), were highlighted by Italian legal scholars. In 2010, a complete commentary on the Convention and its Optional Protocol, edited by Marchisio, Cera and Della Fina was published.⁴⁸ Their commentary analyses the content of each provision, and its rationale, taking into account the *travaux préparatoires*, and includes references to relevant Italian and EU legislation on disability.

In addition, and most significantly for the purpose of this analysis, the CRPD has become a sort of academic catalyst, boosting the emergence of ‘disability law’ as an autonomous area of legal research. After 2009, several academic *ouvrages* and other papers or books aimed at practitioners (judges, attorneys at law and employees) began adopting a sectorial perspective (i.e., a civil law, labour law, or constitutional law perspective), or focused on specific issues, such as *inter alia* disability allowances,⁴⁹ trusts,⁵⁰ or systems of guardianship and supportive

Violazioni, trasformazioni, aporie, [Human rights and vulnerable subjects. Violations, transformations, aporias], (Giappicchelli, 2012).

⁴⁷ C. Barnes, *Capire il modello sociale della disabilità*, [Understanding the Social Model of Disability], A. Marra, (translation of), *Persona e danno*, at: <www.personaedanno.it/cms/data/articoli/005201.aspx> (accessed 10 May 2014).

⁴⁸ S. Marchisio, R. Cera and V. Della Fina (eds.), *La Convenzione delle Nazioni unite sui diritti delle persone con disabilità: commentario*, [The UN Convention on the rights of people with disabilities: A commentary], (Aracne, 2010).

⁴⁹ *Inter alia*, G. Icone and G. Buccelli, *L'invalidità civile. Aspetti sostanziali, processuali, medico legali*, [Civil Invalidity: Substantive, Procedural and Legal-medical aspects], (Kluwer, 2008); V. Micela, *Manuale pratico dell'invalidità civile e della disabilità*, [Practical Handbook on Civil Invalidity and Disability], (Maggioli, 2006); F. Buffa, *La disciplina lavorativa e previdenziale per i diversamente abili*, [Labour and Social security regulation for people with diverse abilities (n.d.t. people with disabilities)], (Giuffrè, 2009); R. Staiano, *L'Invalidità civile*, [Civil Invalidity], (CEDAM, 2011); D. Papa, ‘Assistenza disabili: collegato lavoro e indicazioni operative’, [Assistance to people with disabilities: Labour Decree and operational aspects], 3 *Diritto delle relazioni industriali*, (2011), 837; S. Cassar, ‘Permessi per l’assistenza alle persone con disabilità. Riflessioni a margine del c.d. collegato lavoro’, [Leave to assist persons with disabilities. Reflections on the Labour Decree], *Lavoro e previdenza oggi*, (2011), 415; A. Di Stasi, ‘Il diritto al lavoro dei disabili e le aspettative tradite del “collocamento mirato”’, [The right to work of people with disabilities and the betrayed expectations of “targeted job placement”], *Argomenti di Diritto del Lavoro* (2013), 880; D. Mesiti, *L'Invalidità civile*, [Civil Invalidity], (Giuffrè, 2012); R. Staiano, *Invalidità civile, Disabilità ed Handicap*, [Civil Invalidity, Disability and Handicap] (Maggioli, 2012); D. Mesiti, *Handicap, Cecità e Sordità* [Handicap, Blindness and Deafness], (Giuffrè, 2013); See also: G. Ferrari, *L'invalidità per causa di servizio e l'equo indennizzo nel pubblico impiego*, [Invalidity as consequence of public service, and fair compensation in public employment], (Giuffrè, 2007).

⁵⁰ R. Riccio, ‘Trust a vantaggio di un soggetto sottoposto ad amministrazione di sostegno: il cammino del professionista’, [Trust in favour of a person under supportive administration: The path of the professional], 6 *Trusts e attività fiduciarie*, (2009), 676; G. Tucci, ‘La tutela del figlio disabile tra nuove ‘fiducie’ e/o ‘affidamenti

administration,⁵¹ carer's leave,⁵² or dismissal of employees with disabilities.⁵³ However, even books adopting a sectorial approach did not exclude a more cross-cutting⁵⁴ legal discourse on disability. This is exemplified by the book *L'invalidità civile e la tutela della disabilità*, (Civil invalidity and protection of disability), authored by Cimaglia and Covatta. Even though the title alludes to the outdated medical model and to the concept of invalidity (still used in Italian legislation and endorsed by a few works for attorneys),⁵⁵ this book, targeted at practitioners, offers a comprehensive overview of the legal discipline of disability in Italy, including wide references to the CRPD.⁵⁶ A similar approach is adopted by *Handicap e diritto all'assistenza. Analisi e strumenti di tutela*, (Handicap and right to assistance. Analysis and instruments for protection).⁵⁷ Despite using outdated terms, the book attempts to offer a wide-ranging discussion of the legal dimension of disability, including a brief overview of the CRPD.

Two interesting collective volumes published in 2013 represent the emergence of disability law as an area of research, in dialogue with other non-legal disciplines. Both of them collect papers presented at two different conferences hosted to discuss the positive effects and the challenges related to the implementation of Law No. 104/1992, twenty years after its enactment.

fiduciari', trust e clausole testamentarie tradizionali', [The protection of the son with disabilities between new *fiduciae* and/or *fiduciae* custody, trust and traditional will clauses], *Rivista di diritto privato* (2011), 7; A. Fusaro, 'Gli atti di destinazione nell'interesse della famiglia e dei disabili', I *Rivista di diritto privato*, (2011), 33.

⁵¹ *Ex pluribus* G. Campese, *Il giudice tutelare e la protezione dei soggetti deboli*, [The Judge and the Protection of Vulnerable Subjects], (Giuffrè, 2008); AA. VV., *Tutela ed Amministrazione di Sostegno* [Guardianship and Supportive Administration], (CEDAM, 2012); F. De Stefano *et al.*, *Il procedimento di interdizione, inabilitazione e amministrazione di sostegno*, [Procedure of Full Incapacitation, Partial Incapacitation and Supportive Administration], (Giuffrè, 2011).

⁵² E. Rocchini, 'Disabilità e diritto del lavoro. I congedi per i portatori di handicap ed i loro familiari alla luce degli ultimi interventi normative', [Disability and right to work. Leaves for people with disabilities and their relatives in light of the latest legislative interventions], 9–10 *Lavoro e previdenza oggi*, (2011), 950.

⁵³ *Ex pluribus* see the recent article of A. Topo, 'Il licenziamento del lavoratore malato e del lavoratore disabile', [Termination of sick workers and of workers with disabilities], 2 *Giurisprudenza Italiana* (2014) and bibliography cited there.

⁵⁴ See footnote 10.

⁵⁵ Among others: R. Staiano, *Invalidità Civile*, [Civil Invalidity], (CEDAM, 2011); N. Foggetti, 'Diritti umani e tutela delle persone con disabilità: la convenzione delle Nazioni Unite del 13 dicembre 2006', [Human rights and people with disabilities' protection: The UN Convention of 13 December 2006], 33 *Rivista della cooperazione giuridica internazionale*, (2009), 98.

⁵⁶ G. Cimaglia and A. Covatta, *L'invalidità civile e la tutela della disabilità*, [Civil Invalidity and Disability Protection], (Giuffrè, 2009).

⁵⁷ A. Buzzanca, *Handicap e diritto all'assistenza. Analisi e strumenti di tutela*, [Handicap and right to assistance. Analysis and instruments for protection], (Giuffrè, 2009).

The first book, entitled *Università e persone con disabilità. Percorsi di ricerca applicati all'inclusione a vent'anni dalla legge n. 104 del 1992*, (Universities and persons with disabilities. Paths applied towards inclusion twenty years after the law No. 104 of 1992), is edited by two constitutional scholars and collects different cross-cutting legal essays and more interdisciplinary contributions on the inclusion of people with disabilities in Italian universities.⁵⁸ The volume is divided into three main parts. The first part focuses on disability research in Italian universities, and includes different legal contributions which together provide a bigger picture of 'disability law' as a cross-cutting area. The second part focuses on the role played by universities, NGOs, and DPOs in promoting and protecting the rights of people with disabilities in the grim context of the economic crisis. Interestingly, the third part, titled 'Testimonianze' (Testimonies), gathers different contributions which reflect personal stories of the lives and experiences of people with disabilities.

The second volume, entitled *Assistenza, inclusione sociale e diritto delle persone con disabilità*, (Assistance, social inclusion and rights of people with disabilities), edited by Colapietro and Salvia, gathers contributions which derive from a conference held in Rome in June 2012.⁵⁹ The first part of the book explains the role of social and health services in providing targeted assistance (including assistive devices) and rehabilitation. The second part of the book includes miscellaneous and interdisciplinary chapters that address topics such as: assistive devices (prosthesis), universal design as a means to foster accessibility, the role of families in empowering people with disabilities, and the role of DPOs in promoting the rights of people with disabilities in light of the principle of horizontal subsidiarity envisaged in Article 118 IC.⁶⁰ One of these chapters focuses on inclusion in times of economic crises and on the need to remove barriers to allow people with disabilities to enjoy their rights on an equal footing with others. The third and fourth sections of the book contain essays on the rights of people with disabilities. Attention is paid to the legal definition of disability, on legislation and on the role of the Constitutional Court in ensuring the rights to education, to work, and to social services. Among others, Colapietro and Granaglia highlight that

⁵⁸ G. Arconzo and M. D'Amico, *Università e persone con disabilità. Percorsi di ricerca applicati all'inclusione a vent'anni dalla legge n. 104 del 1992*, [University and people with disabilities. Research agendas applied to inclusion 20 years after the Law No. 104/1992], (Franco Angeli, 2013).

⁵⁹ See C. Colapietro and A. Salvia (eds.), *Assistenza, inclusione sociale e diritto delle persone con disabilità*, [Care, social inclusion and rights of people with disabilities], (Editoriale scientifica, 2013). This book also includes the opening speech of the former president of the Italian Constitutional Court, which was also published in the review by G.M. Flick, 'Diritto e disabilità o "diritto alla disabilità"?' [Law and Disability or "right to disability"?], available at <www.federalismi.it> (accessed 10 May 2014).

⁶⁰ Article 118(4) IC reads as follows: 'The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity'.

the Italian legal framework, despite its undoubted merits,⁶¹ still falls behind in meeting all obligations under the CRPD. In this respect, Granaglia underlines that while the Convention defines disability as ‘the interactions between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others’, the definition provided by Law No. 104/1992 still reflects the medical model and focuses on impairment, rather than on the disabling environment. Other scholars, such as Violini, underline that the CRPD has forced both policy makers and legal scholars to pay attention to the need to mainstream the rights of people with disabilities. Attention is also paid to the CRPD, as well as to other international sources of law such as the European Convention of Human Rights and the European Social Charter. In addition, Bianchi’s essay introduces a comparative analysis and discusses different systems of protection and promotion of the rights of people with disabilities around the world.

All these different *ouvrages* turn to the CRPD (and the principles contained in it) adopting and referencing its conceptual and legal principles, whether implicitly or explicitly. They reveal that the ratification of the CRPD has brought about a significant move from a national, if not ‘parochial’ legal discourse, towards a broader vision that embraces the interaction between international (as well as supranational) and national legal sources. It has forced Italian legal scholars to abandon a sort of ‘nationalist syndrome’ rooted in the belief that the specificity of national experience was the central element of legal analysis, and has rather demanded the framing of their discourses on disability within a broader international context.

Another book that particularly exemplifies this trend is Vadalà’s *ouvrage* on the protection of persons with disabilities (*La tutela delle disabilità*).⁶² This author framed the discussion of Law No. 104/1992 within an international context, including references to the CRPD, and examined the rights of people with disabilities through a cross-sectorial approach. Vadalà combines the analysis of national experiences and the emphasis on the specificity of the Italian legislation within a multi-level legal system. A similar approach, although addressed from a more sectorial (i.e., private law) perspective, was adopted by Marra in a chapter which focuses on how the CRPD affects the traditional civil law liability system, with particular regard to compensation.⁶³ The essay ‘I diritti delle persone disabili’, (Rights of people with Disabilities) in *Trattato di Biodiritto. Il governo del Corpo*,

⁶¹ For example, with regard to the right to education, already in 2000 the Italian Constitutional Court had clearly affirmed that compulsory education for people with disabilities must no longer be provided in segregated classes, but in regular classes of the public school (Decision 52/2000); See also ‘Article 38’, in R. Bin and S. Bartole (eds.), *Commentario breve alla Costituzione*, [Brief Commentary to the Constitution], (CEDAM, 2008).

⁶² V. Vadalà, *La tutela della disabilità*, [The protection of Disability], (Giuffrè, 2009).

⁶³ A.D. Marra, ‘La Convenzione ONU sui diritti delle persone con disabilità: profili di responsabilità civile’, [The UN Convention on the rights of persons with disabilities: Features of civil liability], in P. Ceddon (ed.) *Il risarcimento del danno non patrimoniale*, Vol. II, Tomo primo, (UTET Giuridica, 2009), 849.

(Biolaw Fundamentals. The Government of Body),⁶⁴ written by Venchiarutti, also frames the analysis of Law No. 104/1992 within an international and EU context. An overview of the CRPD is followed by the dichotomous outline of the main EU policies and law on disability. Then the author examines the rights of people with disabilities stemming from Law No. 104/1992 and Law No. 67/2006, and acknowledges the interaction between different legal sources. Likewise, in an interesting article published in 2011, Bongiovanni analyses the principles on the protection of persons with disabilities in the EU Charter of Human Rights and the CRPD, as a setting for national law.⁶⁵ A similar approach is adopted by Camarda in an article discussing the right to accessible transportation, and by Bruzzone in an essay on workers with disabilities.⁶⁶ Camarda sets the discussion of national and relevant EU provisions within the framework of the CRPD, and refers to the concept of disability purported by the Convention.⁶⁷ Bruzzone discusses the Italian legislation applicable to workers with disabilities in light of the CRPD and in light of EU disability policies (with particular emphasis on the European Disability Strategy).

The abovementioned books, articles and essays also make evident the move of the most recent Italian legal scholarship towards a different understanding of disability, in line with the social model, envisaged in the CRPD.

It seems safe to assert that the ratification of the CRPD has brought about a significant conceptual shift in the academic discourse in Italy, making the principles of autonomy, dignity, equality, and more generally human rights the inescapable term of reference for legal analysis on disability. In this respect, three other books (two monographs and a collective volume) deserve attention. The first one is the legal guide to social inclusion of people with disabilities, *I diritti esigibili: guida normativa all'integrazione sociale delle persone con disabilità* (The claimable rights: A normative roadmap to persons with disabilities' social

⁶⁴ A. Venchiarutti, 'I diritti delle persone disabili', [The right of persons with disabilities], in S. Canestrari, G. Ferrando, C.M. Mazzoni, S. Rodotà, and P. Zatti (eds.), *Il governo del corpo. Trattato di biodiritto*, [The government of body. Biolaw Fundamentals], (Giuffrè, 2011), 173.

⁶⁵ V. Bongiovanni, 'La tutela dei disabili fra Carta di Nizza e Convenzione delle Nazioni Unite', [Protection of Persons with Disabilities between the Nice Charter and the UN CRPD], 3 *Famiglia e diritto*, (2011), 310. A similar approach is adopted by Serrao in analysing the Italian legal framework on the protection of minors with disabilities: E. Serrao, 'I diritti del minore con disabilità', [The rights of minors with disabilities], 3 *Giurisprudenza di merito*, (2012), 757. See also: A. Marra, 'La protezione dei minori con disabilità in Italia dopo la convenzione delle nazioni unite del 2006', [The protection of children with disabilities in Italy after the UN Convention of 2006], 3 *Minorigiustizia*, (2010), 25.

⁶⁶ S. Bruzzone, 'Lavoratori disabili e affetti da gravi patologie', [Workers with disabilities and serious illnesses], *Diritto delle relazioni industriali*, (2011), 240.

⁶⁷ G. Camarda, 'Il trasporto dei disabili. Profili giuridici pluriordinamentali', [Transportation of people with disabilities. Legal aspects of different legal orders], *Il Diritto marittimo*, (2011), 749.

integration), authored by Latti.⁶⁸ Although mainly directed at practitioners, the book clearly signals the move away from a purely services and assistance based approach toward targeted social inclusion. The second book, published in 2011 and written by Colapietro, on the rights of people with disabilities, while adopting a constitutional law approach,⁶⁹ clearly demonstrates that ‘assistance’ cannot be the focus anymore. National constitutional values and principles are ‘reread’ in light of the social model of disability.

The third, most recent volume edited by Vivaldi, *Disabilità e sussidiarietà. Il dopo di noi tra regole e buone prassi*, (Disability and subsidiarity: ‘After us’ between rules and good practices) collects several essays that discuss the legal dimension of disability in Italy from different angles. The volume is divided into four main parts. The first part provides the theoretical framework of the book and examines the role of subsidiarity in the protection of rights within a multi-level system, focusing on the need to ensure autonomy and inclusion and to provide people with disabilities with effective community-based services. Notably, Rossi discusses the transition from a system in which public entities were the unique service providers for people with disabilities, to a system in which private actors, including people with disabilities themselves, play a seminal role. Tondi Della Mura explores the protection of the rights of persons with disabilities within the Italian legal system, with particular attention to the challenges linked to the shift from an outdated legal system based on assistance to a truly inclusive regime. Cuzzola maps regional legislation and policy arrangements in the field of disability in his article. The second part of the volume focuses on the ‘after us’: this is the formula used to describe legal tools which support and protect the autonomy of people with disabilities once the ‘us’ (the family of the person with disabilities) is no longer present. The analysis carried out by Castegnaro and Cicoletti illustrates the role of the family in creating a ‘path of autonomy’ for people with disabilities. The essay written by Carrozza and Biondi Dal Monte examines the role of local authorities in building this ‘after us’, while Frediani analyses the intersection between social rights and the market, in the organization of social services. The third part of the book is devoted to the civil law tools aimed at ensuring rights of people with disabilities while supporting them (e.g., supportive administration), economic allowances and measures to ensure dignity and ‘quality of life’. Interestingly, Vitullo analyses the role of trust (a common law concept ‘transplanted’ into the Italian legal system) in safeguarding people with disabilities.⁷⁰ The final part of the volumes gathers different essays that describe best practices and experiences. While the CRPD is not directly discussed, it features in the background of many of the essays and constitutes the legal benchmark against which national and regional disability law and policy are evaluated.

⁶⁸ G. Latti, *I diritti esigibili: guida normativa all’integrazione sociale delle persone con disabilità*, [The enforceable rights: A normative guide to social intergration of persons with disabilities], (Franco Angeli, 2010).

⁶⁹ C. Colapietro and A. Salvia (eds.), *Assistenza, inclusione sociale e diritto delle persone con disabilità*, [Caregiving, social inclusion and people with disabilities’ rights], (Editoriale scientifica, 2013).

⁷⁰ On this topic see also footnote 48.

The shift of the most recent Italian legal scholarship towards a human rights paradigm of disability, in compliance with the CRPD, is also well exemplified by a few articles published in the journal *Non profit*, which focus on protecting the dignity of people with disabilities as a starting point to ensure social inclusion,⁷¹ and by a few essays on self-determination in medical treatment.⁷²

The ratification of the CRPD has also prompted legal scholars to enter into an open and intense dialogue with the global scientific community. The chapter 'Disability', included in the *Digesto* (a legal encyclopaedia),⁷³ written by Marra, updates (and replaces) the former chapters on handicap.⁷⁴ Notably, before discussing the Italian legal framework (and in particular Law No. 104/1992 and Law No. 67/2006), Marra examines the meaning of disability, presents disability as a legal phenomenon, and includes a succinct overview of the CRPD. In doing so, the author makes a sophisticated attempt to connect disability studies, European legal research on disability and Italian legal scholarship. The trends taking place in European disability studies and their relevance for legal scholars were also explored by Marra in his monograph *Diritto e Disability Studies*, (Law and Disability Studies),⁷⁵ which amounts to a sort of methodological manifesto. Overall, Marra's contributions represent an attempt at re-positioning Italian legal scholarship in a space 'without national borders' which goes hand in hand with the attempt to foster an Italian reflection on Disability Studies through a devoted journal (*Italian Journal of Disability Studies*) officially launched in 2013.⁷⁶

3.2. THE CRPD AS ACADEMIC CATALYST VIA JUDICIAL DECISIONS

The centrality of the CRPD in the Italian academic legal discourse, as well as the attention to the legal dimension of disability, are also due to the fact that Italian

⁷¹ C. Colapietro, 'L'inclusione sociale delle persone con disabilità: un imperativo costituzionale', [Social Inclusion of people with disabilities: A constitutional imperative], 2 *Non profit*, (2011), 11; E. Longo, 'Unitarietà del bisogno di cura. Riflessioni sugli effetti giuridici conseguenti al passaggio dal modello medico al modello sociale di disabilità', [Unity of care needs. Reflections on the legal effects of the shift from the medical to the social model of disability], 2 *Non profit* (2011), 35; L. Degani and R. Mozzanica, 'Integrazione socio-sanitaria e disabilità', [Socio-health integration and disability], 2 *Non profit*, (2011), 51.

⁷² Among others: A. Scalera, 'Direttive anticipate di trattamento e disabilità', [Anticipated Directive on Treatment and Disability], 4 *Famiglia e diritto*, (2013), 413.

⁷³ A.D. Marra, 'Disabilità', in *Digesto delle Discipline Privatistiche – Sez. Civ. – IV Ed. Agg.*, (UTET, 2010), 555.

⁷⁴ C. Hanau, 'Handicap', in *Digesto delle Discipline Pubblicistiche*, vol. VIII, (UTET, 1993), 67; C. Hanau and S. Nocera, 'Handicap', in *Digesto delle Discipline Pubblicistiche Aggiornamento* (UTET, 2000), 305.

⁷⁵ A.D. Marra, *Diritto e Disability Studies*, [Law and Disability Studies], (Falzea, 2010).

⁷⁶ Available at: <www.edizionianicia.it/store/content/35-numero-1-settembre-2013> (accessed 30 January 2014).

judges have extensively referred to the CRPD as an interpretative tool in their decisions.

The limited legislative activity to implement the CRPD did not prevent the Convention itself becoming a cornerstone in the Italian legal system and a point of reference in the academic legal discourse. Quite a few lower and higher courts attempted to grasp and overcome the gap between Italian law and the CRPD via consistent interpretation. After the ratification of the CRPD, several court decisions on various aspects related to the accessibility of private and public buildings,⁷⁷ accessible transportation,⁷⁸ disability allowances and pensions, carer's leave,⁷⁹ living arrangements in apartments in a block,⁸⁰ and non-discrimination⁸¹ have been released by district (civil and administrative) courts as well as by the Supreme Court (*Corte di Cassazione*) and the Constitutional Court. This judicial activism compelled Italian scholars to rethink and rework the language and categories of Italian law in light of the CRPD.

This section is not intended to illustrate Italian case law on disability or the judicial implementation of the CRPD. Rather, it discusses several decisions on the right of education of students with disability and on supportive administration, respectively, which have generated a broad range of commentaries and a wider academic debate on the rights of people with disabilities. These cases are suitable for discussion, as they best highlight how judicial decisions have encouraged a

⁷⁷ For a review of judicial decisions see: G. Ferrari, 'Superamento ed eliminazione delle barriere architettoniche negli edifici privati, pubblici e aperti al pubblico nella giurisprudenza del giudice delle leggi, amministrativo e ordinario', [Overcoming and eliminating architectural barriers in private, public, and open to public buildings in civil and administrative case law], *Giurisprudenza amministrativa*, (2012), 1410.

⁷⁸ Among many others see: *Tribunale di Roma*, Order of 11 October 2011, (precautionary injunction to a transport company that failed to provide accessible transport services).

⁷⁹ Among many others *Cassazione, sez. lavoro*, Decision of 25 February 2010, No. 4623 annotated by Pietrogiovanni and Fontana: V. Pietrogiovanni, 'La tutela del bambino disabile e gli interessi del datore di lavoro e dell'ente previdenziale: il bilanciamento della cassazione tra diritto ad assistere e diritto all'assistenza', [The protection of the child with disabilities and the employer's and social security provider's interests: the Supreme Court balancing between the right to assist and the right to be assisted], 3 *Rivista italiana di diritto del lavoro*, (2010), 710; A. Fontana, 'Durata dei permessi giornalieri per l'assistenza ai figli portatori di handicap', [Duration of daily leave to assist children with disabilities], *Famiglia e diritto* (2010), 669.

⁸⁰ Among the most recent cases, see: *Cassazione Civile*, Decision of 25 October 2012, No. 18334, with commentary by G. Tucci in 2 *Giurisprudenza Italiana*, 2 (2013); See also: G. Tucci, 'Disabili e condomini: un conflitto dei nostri tempi', [Persons with disabilities and Condominium: a contemporary conflict], 8–9 *Giurisprudenza Italiana*, (2013), 1962.

⁸¹ *Tribunale Catanzaro*, Decision of 15 January 2013, commented by N. Bruzzi, 'La discriminazione fondata sulla disabilità: il principio di dignità come lente trifocale', [Discrimination based on disability: The principle of dignity as a trifocal lens], *Responsabilità civile e previdenza* (2013), 931.

cross-cutting legal discourse on disability, and offer the best example of how judicial activism nurtures legal scholarship in a virtuous circle.

Case law on the right to education is plentiful. The first case which should be mentioned in this respect is certainly the Constitutional Court's decision No. 80/2010⁸² which declared as unconstitutional a provision of the Budget Law 2008, which set a maximum limit on the number of support teachers for children with disabilities (*insegnanti di sostegno*) attending classes in public schools and capping the option of hiring additional support teachers (provided for in Article 40 Law No. 104/1992) to provide specific educational assistance to children with more profound support needs. The Italian Constitutional Court declared that Article 2 of the Budget Law infringed the right of education of children with disabilities, set forth in Article 38(3)(4) IC, and violated the principle of equality (Article 3 IC). The Court used the CRPD as an interpretative tool in defining the 'content' of the fundamental right to education for persons with disabilities, and as part of its *ratio decidendi*, the Court referred to Article 24 CRPD. This decision generated a great deal of commentary,⁸³ and has become the point of reference for lower administrative and civil courts.

Further to this Constitutional Court decision, administrative judges adopted several decisions⁸⁴ in which they clearly affirmed the right of the disabled student to a proper education, even if the administration in charge is working with a reduced budget.⁸⁵ In light of the Constitutional Court's judgment, and often citing the CRPD, administrative courts consistently held that the 'quantum' of the teaching support essential to enjoy that right has to be determined exclusively in relation to the need of the student with disabilities, and no other interest can be taken into consideration, not even in case of understaffed administrations.

⁸² The Italian Constitutional Court has used the Convention as an interpretative tool, but not consistently. For example, no reference to the Convention was made in Decision 19/2009. Here, the Court declared Unconstitutional Article 42(5) of legislative Decree No. 151/2001 as regards that subjects are granted leave to assist persons with severe disabilities. All Constitutional Court decisions available at: <www.cortecostituzionale.it> (accessed 10 May 2014).

⁸³ F. Madeo, 'Insegnante di sostegno: possibile la presenza per tutte le ore di frequenza dello studente disabile grave', [Assistant teacher: Possible full-time presence for a student with severe disability], 2 *Giurisprudenza costituzionale*, (2010), 1831. For a critical and more general overview see A. Pirozzoli, 'La discrezionalità del legislatore nel diritto all'istruzione del disabile', [Legislators' discretion on the right to education of people with disabilities], *Rivista AIC* (2010), available at: <www.associazionedeicostituzionalisti.it/sites/default/files/tmp/Pirozzoli01.pdf> (accessed 11 March 2014).

⁸⁴ See for example, among many others: TAR Sardegna Decisions of 14 December 2012, No. 1150 and 1152, Decision of 3 October 2012, No. 676; TAR Veneto Decision of 8 June 2011, No. 1017; TAR Puglia Decision of 31 July 2012, No. 1423.

⁸⁵ M. Lottini, 'Scuola e disabilità. I riflessi della sentenza 80 del 2010 della Corte costituzionale sulla giurisprudenza del giudice amministrativo', [School and disability. The effects of the judgment 80 of 2010 of the Constitutional Court on the case law of the Administrative Courts], 7–8 *Foro amministrativo TAR*, (2011), 2403.

Analogously, civil courts followed the reasoning of the Constitutional Court and affirmed the right of pupils with disabilities to receive an appropriate and inclusive education. A case that received a lot of attention among scholars is the decision of *Tribunale di Milano*, released on 4 January 2011 and deposited on 10 January 2011. The case was initiated by Ledha, an organization representing people with disabilities, alongside parents of children with disabilities attending public schools in the city of Milan. The applicants filed a complaint in line with Law No. 67/2006. They stated that students with disabilities had their hours with their support teachers significantly reduced due to budgetary reasons, and maintained that this was unlawful discrimination and an infringement of the fundamental right to education. The Milan civil court embraced the applicants' view and held that the reduction of support teachers was indirectly discriminatory and ordered the hours of support to be restored.⁸⁶ All these decisions stimulated a wider reflection on the right to education of pupils with disabilities, and particularly on the meaning of inclusive education.⁸⁷

The second strand of decisions which further shed light on to the rights of people with disabilities, and which have generated an interesting debate, concerns the role and the limits of supportive administration. Case law that particularly attracted the attention of scholars consisted of cases that directly cited the CRPD, adopted a wide definition of disability, and consequently applied supportive

⁸⁶ A. Enrichens and C. Manassero, 'Discriminazione per disabilità vs. diritto umano allo studio', [Disability discrimination vs. Right to education], 6 *Giurisprudenza di Merito*, (2011), 1530; E. Ceccarelli, 'Disabilità, sostegno, giurisdizione', [Disability, Support and Jurisdiction], *Questione Giustizia* (2011), 161; A. Costanzo, '(in tema di) atti e comportamenti discriminatori nei confronti di studenti disabili', [On discriminatory acts and behaviors towards students with disabilities], *Famiglia, Persone e Successioni*, (2011), 153.

⁸⁷ C. S. Vigilanti, 'Il diritto all'istruzione dei disabili come paradigma della tutela dei diritti sociali', [The people with disabilities' right to education as paradigm for social rights protection], *Forum di Quaderni Costituzionali*, (2012), available at: <www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0306_vigilanti.pdf> (accessed 15 March 2014); L. Nannipieri, 'Il diritto all'istruzione del disabile nelle fonti nazionali tra problemi definitivi, giurisprudenza costituzionale e giudici di merito', [The right of education of disabled pupils in national sources of law between problems of definitions, constitutional case law, and lower courts], 3 *Rivista AIC*, (2012), available at: <www.rivistaaic.it/sites/default/files/rivista/articoli/allegati/Nannipieri_0.pdf> (accessed 15 March 2014). For a reflection on the Constitutional court case law on the right of education of people with disabilities and for a comment on this decision see: S. Troilo, 'I "nuovi" diritti sociali: la parabola dell'integrazione scolastica dei disabili', [The new social rights: the trajectory of school integration of people with disabilities], Speech at the Conference held in Trapani on 7–8 June 2012, available at: <www.gruppodipisa.it/wp-content/uploads/2012/08/Troilo.DEF_.pdf> (accessed 5 February 2014). On this issue see also other more general papers on social rights published on 'Gruppo di Pisa' website, available at: <www.gruppodipisa.it> (accessed 10 May 2014); S. Presutti, 'Il diritto del disabile all'istruzione', [The right of disabled people to education], *Minorigiustizia*, (2010) 153.

administration to new understanding of ‘psychosocial disabilities’ that included experiences of mental illnesses such as addictions or compulsive behaviours. One of the most recent decisions commented on by different scholars was the decree of *Tribunale di Varese* of 3 October 2012 which required supportive administration for a person who had a compulsive buying disorder.⁸⁸ The most infamous decision, and one that caught particular attention, was certainly the decree issued by *Tribunale di Varese* on 6 October 2009, in which the Court stated that the pragmatic features (modalities) of ‘supportive administration’ provided for in Articles 405 *et seq.* of the Italian Civil Code must be determined in light of the CRPD.⁸⁹ In that case, the mother of a girl with a disability asked the Court of Varese to be appointed (in compliance with Articles 405 of the Italian Civil Code) as ‘supporting administrator’ for her daughter and to assist her in all relevant legal relationships and activities, including marriage. The Court concluded that supportive administration is not permitted in respect of marriage, taking into account *inter alia* Articles 5 and 23 of the CRPD, and that persons with disabilities have the exclusive right to decide whether and whom to marry. Commentaries on this case can hardly be counted.⁹⁰ This decision was confirmed by a recent decree adopted by *Tribunale di Modena* on 18 December 2013 which held that the beneficiary of supportive administration retains the capacity to act with respect to all acts which do not require the exclusive representation or assistance of the administrator, and keeps the capacity to enter into marriage. The latter may be limited only in exceptional situations.⁹¹

Another interesting decision that attracted attention among scholars and practitioners is the decree issued by *Tribunale di Varese* allowing people with amyotrophic lateral sclerosis (ALS) to make their will by dictating it to their supporting administrator using a communication tool that is operated with eye movements. The judge, though recognizing that a last will and testament is a strictly personal act, affirmed that denying the possibility for people with disabilities to be supported in actually making a will is a form of discrimination. Indeed, this decision has been severely criticized.⁹² Quite a few scholars argued that the reasoning of the court is questionable both in terms of the admissibility of

⁸⁸ Among others see: E. De Roma, ‘Shopping compulsivo (c.d. onimania) e amministrazione di sostegno in funzione rieducativa’, [Compulsive buying and supportive administration and rehabilitative function], *Famiglia e diritto* (2013), 1023.

⁸⁹ Available at: <www.altalex.com/index.php?idstr=127&idnot=47673> (accessed 1 March 2014).

⁹⁰ *Ex pluribus* E. Falletti, ‘Il matrimonio della disabile sofferente della sindrome di Down’, [the marriage of a person with Down Syndrome], 4 *Giurisprudenza Italiana*, (2010), 846.

⁹¹ See: G. Bonilini, ‘Amministrazione di sostegno, e capacità matrimoniale’, [Supportive administration and capacity to marry], *Famiglia e diritto*, (2014), 579.

⁹² Among others: D. Achille, ‘Autonomia privata e amministrazione di sostegno, ovvero il testamento del beneficiario dell’amministrazione di sostegno (affetto da Sla)’, [Private Autonomy and supportive administration, i.e., the will of a person under supportive administration], *Giustizia civile* (2012), 1868; M. Mattioni, ‘Il testamento eterografo o per rappresentanza: un nuovo ritrovato giurisprudenziale’,

the so-called substitute representation for a strictly personal act, such as making a will, and in terms of non-compliance with the formalities set out in Article 602 of the Italian Civil Code. It has been noted that in this case the denial of the will would not have constituted any unjustified unequal treatment: the practical inability to write simply determines the absence of one of the essential requirements for having a valid testamentary declaration. It has also been observed that the inability for a person with disabilities to draw up a holographic will does not exclude other forms of wills allowed under the Civil Code.

These decisions, though constituting a limited sample, exemplify how the judiciary has contributed to widening the legal scholar's traditional field of observation, especially on issues such as legal capacity, which had been traditionally considered 'purely internal'. Ultimately, courts have reinvigorated the legal discourse on disability, making lawyers embrace the language of rights.

4. TENTATIVE CONCLUSIONS

Traditionally, in Italian scholarship, the legal discourse on disability was confined to niche areas and anchored in concepts such as 'incapacity', 'need' and 'assistance'. After the enactment of Law No. 104/1992 twenty years ago, fundamental rights started to form the backdrop to a wider legal discourse. Further to the ratification of the CRPD, they have become the normative and unavoidable premise of any academic discourse on disability.

Not unlike Anglo-Saxon scholarship, Italian legal scholarship has engaged in a process of making 'disability law' an autonomous area of legal research. In this respect, this essay has attempted to show how the CRPD somewhat forced all legal disciplines, such as labour law, civil law, and administrative law, to 'reprocess' themselves, and, at least to a certain extent, to flow together into a mainstream area of 'disability law'.

The qualitative and quantitative change in Italian scholarship has been deeply nurtured by a remarkable judicial activism.

What cannot be condensed in a short essay is the plural nature and the abundance of Italian legal discourse. Italian legal academia can now engage in a fruitful dialogue with some of the most significant academic schools that have long shaped disability research. Italian scholars can provide interesting insights, cherish diversity, and stimulate the debate on disability matters which involve an often delicate and risky balancing of rights, in need of a constant dialogue.

[The hetero-will or will by representation: A new judicial finding], *Famiglia, persone e successioni*, (2012), 597.