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Disability and Federalism. A Rejoinder

by

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Abstract

The aim of this article is to allow the editors of the volume to respond to the generous comments that contributors to the Symposium made to. *Federalism and the Rights of Persons with Disabilities. The Implementation of the CRPD in Federal Systems and Its Implications*

Key-words

Disability, Federalism, Convention on the Rights of Persons with Disabilities (CRPD), Comparative Law



1. Rights and Federalism

We are very happy and honoured to have received such interesting comments, and we want to thank - also on behalf of all the contributors - Maria Giulia Bernardini and Nico Steytler for devoting so much attention to our book.

Indeed, as Steytler mentions in his contribution, the study of the impact of such complex policies related to the protection of rights on the architecture of federal-regional systems is certainly central to the contemporary research agenda of scholars interested in comparative federalism. To analyze the federal operation of individual policy fields or, like in this case, the implementation of specific fundamental rights, is the future of federal studies, which has so far been largely dominated by institutional considerations (by constitutional lawyers) and by attention to actors (by political scientists), let alone economic investigations and political philosophy. In fact, looking at relevant policy fields, both related to the constitutional division of powers and to the political processes, can illustrate the trends and suggest solutions for the governance of complex and transversal areas involving a plurality of actors, forcing them to develop effective forms and procedures for cooperation. The purpose of this short rejoinder is to merely select and address some of the points raised by our commentators and our rejoinder will inevitably be incomplete. Given the high-quality comments it is indeed impossible to do justice to the richness of their critical points, and the aim of this written debate is to foster a broader exchange on a quite new field of study and to raise questions rather than providing answers.

Steytler rightly underlines the inextricable relationship between rights and federalising dynamics. As he points out:

“[It] is evident that a measure of centralisation took place in most of the federations covered, through federal governments assuming functions formerly allocated to subnational governments, or prescribing to the latter on how to execute their functions [...] This comes as no surprise as the very presence of a bill of rights in a constitution, protecting and promoting a range of human rights, results in a centralising process” (Steytler 2023).

As to how this overall centralization effect has occurred, in our comparative remarks we stressed that the CRPD has determined a push - albeit uneven across the material fields considered - towards ‘centralisation’ of disability issues or, at least, towards a certain



'harmonisation'. There are of course many reasons other than the anti-discrimination policies that explain such a trend, including the role of the judiciary, which has de facto adapted the formal distribution of powers to the impact of the Convention by relying on interpretative doctrines. On the whole, however, the 'harmonization' effect of the combination between international obligations and fundamental rights protection is powerful and likely to be irreversible, and the dynamics regarding the implementation of the CRPD are no exception to the general rule.

While the centripetal dynamic of fundamental rights protection is undeniable, our book tries to further develop on this by trying to make an additional and slightly different point, suggesting that this de facto centralisation effect occurs in those federal arrangements that are more inclined to that, but are partly spared where asymmetry is stronger built in in the federal system and there is no prejudiced suspicion that this might lead to the violation of the principle of equality. The study seems indeed to prove that the existence of a bill rights acts as a facilitator, by accelerating already existing centripetal dynamics. Indeed, there are also cases that depart from this trend. Partial exceptions to these centralising patterns seem to be represented by Belgium and the UK - respectively a monist country and a dualist one when it comes to the reception of international law and obligations. In other words, it is not only the guarantee of fundamental rights per se that produce an overall centralizing effect in the implementation of the CRPD, but also the general attitude of each individual legal system towards a more or less symmetric (or even homogenous) implementation of fundamental rights. In this respect, it is regrettable that the system in which the link between fundamental rights protection and federalism has probably been more problematic, the United States of America, have not yet ratified the CRPD, as they would provide an especially interesting test case in this regard.

2. The Issue of Competences: How to Turn Federalism From an Obstacle into an Opportunity.

A second critical point raised by Steytler regards the relationship between fundamental rights and the division of competences in federal systems. While a bill of rights does not per se limit the division of powers laid down in the constitution, positive rights create obligations on the duty bearer. Therefore, implementing rights inevitably limits the discretion of



subnational units in exercising their competences. The point here is that implementing a right does not have to constitute a limitation of discretion but should rather be something the subnational governments commit themselves to.

This can only be achieved where there is sufficient involvement of the subnational governments in designing the international obligations and the very scope of rights as well as in coordinating the action of different layers of government in their implementation. When a decision is made without the involvement of subnational units and its implementation is dictated without prior coordination of the actions to be taken, it is likely that they feel limited in their role and reluctantly execute orders rather than contributing to shape policies. This way, also their potential as laboratories for more proactive and creative implementation of certain policies or rights is inevitably limited.

The response lays in more effective coordination, at the earliest possible stage. This limits opposition and increases cooperation, which is what changes a federal structure from a stumbling block and an obstacle into an opportunity. In other words, where federalism simply means multiplying the actors, it is likely to become a useless burden that hinders efficiency; when, instead, it multiplies the subjects that design a policy and positively contribute to its more effective implementation, including by tailoring to specific needs of certain territories where appropriate (one may think of the sign languages in minority territories, by way of example), it becomes a factor that increases efficiency and deploys the potential of fundamental rights. This can be achieved by providing constant channels of inclusion and communication, in simple words effective intergovernmental relations both in the phase of designing (ascendent phase) and in that of implementing (descendent phase) fundamental rights and human rights treaties such as the CRPD.

3. A Human Rights Approach to Disability

Bernardini's critical overview raises several conceptual points concerning the approach to disability that underpins the volume, and indeed the CRPD.

Notably Bernardini argues that 'the CRPD translates into legal terms the relational or intermediate model, to which the biopsychosocial model can also be related' and does not embed the social model of disability. She also argues against a 'human rights model' as such, preferring to conceptualise human rights as a lens or approach to disability issues. The



volume recognises that both legal scholars and disability studies academics have adopted different, sometimes even contrasting, perspectives on the models of disability and that terminology is not used consistently. While navigating a liminal space, the volume does refer to the human rights model of disability as it has been articulated by Degener (2017) and, most importantly, by the CRPD Committee in 2018I. It does so to offer contributing authors with a prescriptive bedrock for the analysis conducted and a common framework.

The volume also recognises that, as Bernardini argues, the CRPD goes beyond the traditional social model rooted in UK activism and in Mike Oliver's (1996) work especially. It further acknowledges that the Convention the CRPD encapsulates the social-contextual model of disability, a term that has been used particularly by Broderick (2015) and Broderick and Ferri (2019). In doing so, it aims to reflect on the legal challenges brought by Article 1(2) of the CRPD and on the way States Parties have implemented this provision, rather engaging theoretically than on the thorny issues related to the role of barriers in creating disability. In fact, the volume shows that the social-contextual notion of disability is probably the area where centralisation or harmonisation dynamics are most visible in federal states.

Bernardini further focuses on the concept of equality elaborated by the CRPD Committee. This concept encompasses 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. Bernardini looks at the roots of the CRPD Committee's elaboration, recognising that the Committee is indebted to a wealth of scholarship, including Fredman (2016). While the book refers to inclusive equality at various junctures, it focuses on its pragmatic implementation rather than its intellectual ramifications. Further, the volume is underpinned by the idea that accessibility, while being somewhat inherent to all dimensions of inclusive equality, it is a distinct principle that complements and supports the realisation of equality. Every chapter looks at accessibility as distinct, yet connected, area of implementation.

The volume and all chapters embrace the idea that reasonable accommodation, and hence the accommodating dimension of equality, goes beyond accessibility in that it is meant to provide individuals with disabilities with tailored adjustments recognising the uniqueness



of each person. In this respect, the volume firmly locates reasonable accommodation in the remit of equality, consistently with the CRPD Committee's understanding^{II}. In that connection, Bernardini further contends that the four-dimensional model of equality does not encompass 'oppression', i.e., the historical and systemic form of discrimination that affects persons with disabilities. In reality, the recognition dimension of equality does address (or aims to address) such systemic inequality and recognises stigma as form of social oppression. The volume, again, is not concerned with the conceptual meaning of oppression. However, all contributions to varying degree do recognise that persons with disabilities have faced for long systemic discrimination, which is rooted in medicalised and charity approaches. In doing so, they do gauge the progresses that have been made in redressing disadvantage since the entry into force of the CRPD.

Bernardini then reflects on legal capacity and the right to live independently as areas of key concern for States Parties. While the volume does not specifically focus on Article 12 and 19 of the CRPD, some of the chapters do discuss their implementation recognising their factual and conceptual link with equality and participation (which are the broad areas selected for the analysis). In this respect, contributors signalled the challenges in the implementation of the universal legal capacity principle that underpins the CRPD, and its key 'transformative' importance.

On the whole, Bernardini's reflections do confirm that the CRPD is a very complex and multi-textured treaty whose implementation is difficult and must be conceived of as long-term endeavour. Conceptual nuances match pragmatic challenges and do require further scholarly engagement. Bernardini suggests to further focus on the case law 'since judges, because of their function, are usually more inclined to be ... engines of change'. In fact, bringing further the analysis that Waddington and Lawson (2018) have commenced and combining together comparative international law approaches with comparative federalism might be the next challenge to take on.

More in general, the book intends to cast light on an intersection that is not immediately obvious, to neither federal nor disability scholars, but it raises a number of questions and calls for further research, on this issue as well as on related ones. The triangle between federalism, international obligations and fundamental rights, particularly new ones, deserves new and clearer contours.



^I 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

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