



*Comments on Federalism and the Rights of Persons
with Disabilities*

**‘The intersection of International Law and the
competences relating of PWD in federal systems’**

by
Nico Steytler¹



Abstract

The aim of this article is to comment on *Federalism and the Rights of Persons with Disabilities. The Implementation of the CRPD in Federal Systems and Its Implications* edited by Delia Ferri, Francesco Palermo and Giuseppe Martinico and published by Hart Publishing in 2023.

Key-words

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



1. Introduction

Federalism and Rights of Persons with Disabilities: The Implementation of the CRPD in Federal Systems and its Implications is an important contribution to federalism scholarship focusing on the dynamic between international obligations in the shape of the Convention on the Rights of Persons with Disabilities (CRPD) and the very foundation of federal systems – the scope and import of subnational autonomy. Given that the detailed provisions of the CRPD, it brings this federal dynamic sharply into focus.

This dynamic is explored with references to 14 carefully selected federations (broadly understood to include the European Union), which display the full range of federal arrangements – from decentralised federations (Canada, Belgium, Brazil, United Kingdom) to more centralised ones (Germany, Austria, Spain, Italy, India, Ethiopia, South Africa, Argentina, and Mexico). Adhering to a well-developed template, the excellent country studies allow for comparative research, showing the diversity but also similarities among this range of federal systems.

In view of the forthcoming symposium on the book, the aim of these brief remarks is to highlight, from a federal perspective, certain aspects of this dynamic between the CRPD and subnational autonomy, where, as the editors conclude, the former constrains the latter. Why is that so and what can be done to manage this dynamic?

2. The impact of international human rights treaties

The restraining impact of international treaties, concluded by federal governments, on subnational autonomy is not a new phenomenon. There is some literature on how in the field of environmental protections (particularly climate change) international treaties impinge on subnational autonomy. Even in the field of international trade agreements (World Trade Organisation), not much leeway (if at all) is given to sub-national governments when it comes to protecting their own economies from foreign competition. No exceptions are made for federations; uniform rules apply nationally. The narrowing of subnational autonomy has become an acceptable reality, and the implementation of CRPD through a human rights model of protecting and promoting the rights of people with disabilities, would be no exception. As the editors show, 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.



3. The limitations on subnational autonomy imposed by rights

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. In the literature it has been noted that a bill of rights transfers some decision-making power from subnational governments and locates it in federal courts. Where social and economic rights are entrenched, this justifies federal intervention to ensure uniformity of services: national social solidarity is preferred over the protection of subnational autonomy. A bill of rights also standardises subnational conduct; by virtue of being fundamental and universal, rights do not admit local exceptions. Further, where a constitutional court invalidates a law of one subnational government, the same rule applies to all subnational governments; it sets a single standard.

As the case studies show, rights accruing to persons with disabilities (PWDs) are encountered mostly indirectly; there are no rights dedicated to PWDs. Protection is afforded through the expansion of existing rights, principally to substantive equality and non-discrimination. Some equality clauses proscribe discrimination on the ground of disability (for example in South Africa). In more progressive bills of rights, the social and economic rights of health care and social security are included, imposing positive obligations on the state to fulfil the promise of those rights. The CRPD follows in this track by also imposing positive obligations on signatory states particularly as far as access and participation are concerned.

4. Overlap between rights and competences

In the case of negative rights they apply with equal force to all levels of government, restraining government in the way they perform their allocated functions. Very different, however, is when positive obligations are imposed. The fulfilment of rights is dependent on there being some overlap between the right in question and the subnational powers in that area. A bill of rights does not obliterate the division of powers in a constitution. However, where there is an overlap, the positive rights transform a competence into an obligation. The question is then whether, in a constitutional division of powers, subnational governments are constitutionally enabled to fulfil positively imposed obligations.

Does the division of powers pose a problem? Does the CRPD, whether directly or indirectly through domesticated national legislation, disturb such an allocation of competences? In federations the usual allocation of competences between two orders of government – federal and state - or even three when local government is added, takes the following forms: fully exclusive federal powers; standards and frameworks on exclusive subnational powers; concurrent federal



and state powers; exclusive state powers; and concurrent local government powers with the other two orders. Focusing on health care, in a minority of the sample federations the subnational governments have exclusive powers (Belgium, Canada, Germany (implementation of national laws), and the United Kingdom). Even in these countries certain aspects of health care fall under the federal jurisdiction, such as regulating the health professions. In the rest of the federations, health care is a concurrent competence of federal and state governments, with local government also sharing in the functional area in Argentina, Brazil, Mexico, and South Africa. The same patterns are also present in respect of social welfare and education. In the cases of concurrent functions covering the various aspect of disability, the federal government is constitutionally permitted to be active in the field, but, as the case studies clearly illustrate, there is a shift in the ‘material constitution’ – the usual practice of concurrency which allowed subnational governments their fair share of governance.

5. Intergovernmental relations

Given the noticeable shift of action towards the centre within the parameters of the constitution, the notion of intergovernmental relations should come strongly to the fore. The centralising features of a bill of rights is but a product of an inclusive process of the drafting of a constitution. Very different are rights and obligations imposed through an international treaty; they are the product of a federal executive that negotiates and signs a treaty, which is then ratified by the federal legislature before it becomes binding on the entire country. There is, of course, great variety in this process. Depending on whether a federation belongs to monoist, dualist, or intermediate approach to international law obligations, further national legislation is required to domesticate the treaty. As the concluding chapter found, the variation in approach did not really matter when it came to the application of the CRPD – national will was imposed.

This one-sided ‘change’ of the constitution, contrary to federal orthodoxy, can, however, be legitimate if the process is embedded in sound intergovernmental relations. This would entail:

(a) where the interests of subnational governments are involved, the latter has a say in the negotiations conducted by the federal government regarding provisions that will affect them directly.

(b) Where ratification by the federal parliament is required, the second chamber, when it represents subnational governments, has a meaningful say or even veto in the process.



(c) Where CRPD is domesticated into binding national law, the second chamber participates in the formulation and adoption of such law when subnational governments are mandated to implement (Germany being the obvious example).

(d) There are sufficient and effective intergovernmental structures or processes that could harmonise implementation by the different levels of government.

(e) Where federal legislation imposes duties on subnational governments (implementing the CRPD's positive obligations with regard to access and participation), the issue of costs come to the fore. To avoid unfunded mandates (and the failure to fulfil the obligation) there are sound intergovernmental fiscal relations.

In short, what self-government subnational governments may lose, they may regain through shared rule structures and processes. It is thus a pity that the volume did not pay more attention to the various aspects of intergovernmental relations, and, in particular, cooperative government obligations. In the chapter on Germany - the best example of an integrated federal system - Felix Welti describes in abstract the elements of German federalism – the role of the Bundesrat, presenting land executives, in treaty-making and adopting such treaties, and the passing of legislation domesticating treaties that affect Länder as implementing agents. Yet, no examination is provided how this integrative process proceeded with regard to CRPD. He mentions, almost as an aside, that the 'focal points' at federal and land level coordinate and meet regularly. He thus exhorts students of cooperative federalism 'to unfold' such constitutional principles to the benefit of disability policy.

As the editors of the book rightly claim, federal systems per se are not an obstacle to the proper implementation of the obligations under the CRPD; it is the 'unsatisfactory functioning of the multi-layered governance as a whole' that could be such a barrier. When federations faced the Covid-19 pandemic, the same conclusion was reached; where a federal country performed poorly in meeting the challenges of the pandemic, it was not federalism per se to blame but its poor functioning. The key contributing factor for this outcome was poor or non-existent intergovernmental relations and a lack of cooperative government. The same is most likely true with regard to the implementation of the CRPD.

6. Conclusion

In conclusion, this book explores an old theme but with new vigour - the impact of international treaty obligations on federal systems, sparked by the far reaching and comprehensive nature of the CRPD. The issue will become increasingly important in an ever-globalising world.



International treaties on climate change, for example, are likely to become more intrusive at all levels of government as the challenges of climate change accelerate. It is thus vital for federal scholarship to further explore this dynamic in the exemplary way it has been done in this book.

¹ Nico Steytler is Professor Emeritus, Dullah Omar Institute for Constitutional Law, Governance and Human Rights, University of Western Cape, South Africa. Email: nsteytler@uwc.ac.za.

References

- Ferri Delia, Palermo Francesco, Martinico Giuseppe, 2023, *Federalism and the Rights of Persons with Disabilities. The Implementation of the CRPD in Federal Systems and Its Implications*, Hart Publishing, Oxford