CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

VOLUME 14

ISSUE 3
2022

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

VOL. 14, ISSUE 3, 2022
TABLE OF CONTENTS

ESSAYS

SPECIAL SYMPOSIUM ON FEDERALISM AND THE RIGHTS OF PERSONS WITH DISABILITIES. THE IMPLEMENTATION OF THE CRPD IN FEDERAL SYSTEMS AND ITS IMPLICATIONS

REVIEW ARTICLES

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

EU law and *inter se* agreements in defence matters: Mapping the interplay

by

Alberto Miglio and Gabriella Perotto[I]

Perspectives on Federalism, Vol. 14, issue 3, 2022

Abstract

Historically, the EU Common Security and Defence Policy (CSDP) has not been the sole framework for defence cooperation between Member States. Indeed, several *ad hoc* multilateral agreements coexist with measures adopted in the CSDP framework. The *paper* maps the relevant practice, with a focus on command and control structures, and examines the relationship between these forms of cooperation and EU law. Based on a comparison with other policy areas, the paper argues that the incorporation of EUROCORPS and other intergovernmental defence cooperation initiatives within the EU legal order would not require Treaty amendment. In this regard, it considers whether Permanent Structured Cooperation (PESCO), thanks to its modular structure, could provide an adequate frame to absorb such projects into CSDP.

Key-words

Common Security and Defence Policy, CSDP, Permanent Structured Cooperation, PESCO, EUROCORPS, *inter se* agreements

1. Introduction

Since the outbreak of hostilities in Ukraine, security and defence are among the main concerns of policymakers in EU Member States. The Strategic Compass, adopted by the Council of the EU shortly after the Russian attack on Ukraine was launched, has pledged to strengthen defence cooperation at the EU level. Admittedly, the EU legal order offers a space for pursuing closer cooperation between Member States in this area, through its Common Security and Defence Policy (CSDP), which is an integral part of the Union's Common Foreign and Security Policy (CFSP), and through industrial policy (Vellano and Miglio). Long held back by a lack of political will, the implementation of CSDP took off since 2016 under the combined pressure of Brexit and growing external threats,[II] culminating in the launch of Permanent Structured Cooperation (PESCO) in December 2017[III] and the establishment of the European Defence Fund (EDF) in the context of EU industrial policy in 2021.[IV] More recently, the Commission and the High Representative for Foreign Affairs and Security Policy announced a set of further initiatives aimed at strengthening defence integration among Member States.[V]

However, the EU has never been the only framework for the coordination of the security and defence policies of the Member States. Despite the emphasis put on CSDP, especially on the part of European institutions, it should be borne in mind that the EU is only one of multiple fora for cooperation available to Member States in security and defence matters. In addition to traditional international organizations involving Member States and third countries alike (NATO, OSCE), there are numerous cooperation initiatives involving groups of Member States. A common feature of those projects is that they lie outside the EU legal and institutional framework, although they sometimes have very close links with CSDP and pursue similar goals.

The article provides an overview of the relationship between such forms of intergovernmental cooperation and the EU legal framework. Against this background, it will assess whether and in which manner some of those initiatives could be integrated into the CSDP framework, possibly in the form of new PESCO projects.

At the outset, the article offers a brief presentation of PESCO, which currently represents the most significant instrument for the joint development of Member States'

defence capabilities within CSDP. By allowing for different groupings of Member States in relation to specific projects, PESCO is the most obvious point of comparison with cooperation initiatives pursued by clusters of Member States outside the EU Treaties (2). Then, the focus will shift to the analysis of examples of international cooperation between Member States in the defence sector, having regard in particular to those establishing command and control structures. For its scope and depth, the Treaty establishing EUROCORPS stands out among them (3). Subsequently, the article explores the relationship between EU law and agreements between Member States. Based on previous cases of actual or proposed incorporation of *inter se* agreements into the EU legal order, it assesses possible paths for the integration of EUROCORPS into the CSDP framework (4). The concluding paragraph summarises the main findings and identifies legal and political obstacles to the outlined perspective (5).

2. Permanent Structured Cooperation (PESCO)

The most relevant instrument under EU law for the joint development of defence capabilities is PESCO, which today consists of 60 cooperative projects in various fields. The following paragraphs will briefly outline the specific features of this legal instrument, focusing on its purpose (2.1), the legal regime on which it is based, its governance and ongoing projects (2.2).

2.1. The purpose of PESCO

PESCO is rather densely regulated by primary law. It was introduced by the Lisbon Treaty in order to allow a group of Member States to develop closer cooperation in the framework of CSDP.[VI] Although the Treaty foreshadowed its immediate activation, PESCO was only established in December 2017. Nowadays, it involves all Member States, except for Denmark and Malta, but it has a highly modular structure at its core, as smaller and varying groups of Member States take part in individual projects (Fiott, Missiroli and Tardy 2017, Blockmans 2018, Blockmans and Crosson 2021, Martill and Gebhard 2022, Miglio 2023). It is a legal instrument that is intended to allow differentiated integration in the area of security and defence by those Member States that wish to cooperate more closely, "whose military

capabilities fulfil higher criteria" and "which have made commitments to one another in this area (…) with a view to the most demanding missions".[VII]

The objectives that PESCO aims to achieve are those set out in Article 1 of Protocol no. 10 on Permanent Structured Cooperation established by Article 42 of the Treaty on European Union (TEU) and relate to the development of defence and combat capabilities. In particular, the participating Member States undertake to: (a) cooperate to achieve approved objectives concerning the level of investment expenditure on defence equipment, (b) bring their defence apparatus into line with each other as far as possible, (c) enhance the availability, interoperability, flexibility and deployability of their forces, (d) cooperate to take the necessary measures to make good the shortfalls perceived in the framework of the Capability Development Mechanism and (e) take part, where appropriate, in the development of major joint or European equipment programmes in the framework of the European Defence Agency.[VIII]

The decision establishing PESCO of December 2017 specifies the "ambitious and more binding common commitments" that the participating Member States intended to undertake within these five areas. For example, they commit to: increase defence investment and joint and collaborative strategic defence capabilities projects (sub-paragraph a); develop harmonised requirements for all capability development projects agreed, consider the joint use of existing capabilities to optimise the available resources, and increase efforts in cyber defence cooperation (sub-paragraph b); develop a solid instrument accessible to participating Member States and contributing Countries only to record available and rapidly deployable capabilities in order to facilitate and accelerate the Force Generation Process; provide substantial support to CSDP operations and missions (personnel, equipment, training, exercise support, infrastructure, etc.) and to EU Battlegroups; to develop the interoperability of the respective forces through the identification of common evaluation and validation criteria for EU Battlegroups force package and common technical and operational standards for forces, as well as through optimisation and wider participation to existing multinational structures such as EUROCORPS, EUROMARFOR, EUROGENDFOR, MCCE/ATARES/SEOS (sub-paragraph c); contribute to overcoming capability shortcomings identified under the Capability Development Plan (CDP) and the Coordinated Annual Review on Defence (CARD) (sub-paragraph d); use the European Defence Agency (EDA) as the European forum for joint capability development and consider the

Organisation Conjointe de Coopération en matière d'Armement (OCCAR) as the preferred collaborative program managing organisation (sub-paragraph e). [IX]

Moreover, PESCO can be considered as complementary to two other important instruments already mentioned: the EDF and CARD. The former, governed by Regulation (EU) 2021/697, aims to "foster competitiveness, efficiency and innovation capacity of the European Defence Technological and Industrial Base (EDTIB) throughout the Union, which contributes to the Union strategic autonomy and its freedom of action, by supporting collaborative actions and cross-border cooperation between legal entities throughout the Union, in particular SMEs and mid-caps, as well as by strengthening and improving the agility of both defence supply and value chains, widening cross-border cooperation between legal entities and fostering the better exploitation of the industrial potential for innovation, research and technological development at each stage of the industrial life cycle of defence products and technologies".[X] Actions that are eligible for funding from the EDF include those developed in the context of PESCO projects that can also benefit from increased funding rates. [XI]

CARD, on the other hand, is an instrument that was adopted at the European Council in May 2017, whose function is to assist the efforts of Member States in identifying new areas of cooperation, especially in the framework of PESCO projects. Within CARD framework, EDA and EU Military Staff (EUMS) perform the secretariat function. The second cycle of the CARD was launched in December 2021 and saw the secretariat engaged in a series of bilateral meetings with Member States to collect relevant data for the formulation of appropriate recommendations. The final report was approved by Ministers of Defence on 15 November 2022 and it takes into account the Russia's war against Ukraine, considering it as the main challenge for EU defence.[XII]

Coherence between these initiatives and the activities carried out under PESCO is crucial to ensure the effectiveness and efficiency of the EU defence actions. Such objective does not seem to have been achieved so far, since in 2020 only 11 per cent of Member States' investments in this area involved transnational collaborative projects.[XIII] The percentage is slightly higher in the timeframe considered by the 2022 CARD cycle. However, it shows the tendency of Member States to implement their plans to a large extent at national level, with only 18 per cent of all investment in defence programmes conducted in cooperation.[XIV]

2.2 PESCO: legal framework, governance and projects

PESCO is established on the ground of Article 42(6) TEU providing that "Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework". Furthermore, Article 46 TEU specifies that States wishing to do so may participate in PESCO. In particular, they must notify their intention to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy.[XV] Within three months, the Council adopts a decision by qualified majority voting, after consulting the High Representative, establishing PESCO and indicating the list of participating Member States.[XVI] Thereafter, States wishing to join PESCO must notify their intention to the Council and the High Representative and the former must adopt a decision by a qualified majority vote of the members representing the participating States, after consulting the High Representative.[XVII] If a participating State no longer meets the criteria or can no longer fulfil the required commitments (Articles 1 and 2 of Protocol no. 10) its participation may be suspended by a decision of the Council[XVIII] while, in the event that a participating State wishes to withdraw from PESCO, it may notify its decision to the Council, which acknowledges it.[XIX]

Regarding the governance, the relevant provisions are Article 4 and Annex III to the Decision establishing PESCO. In particular, Article 4 of Decision 2017/2315 specifies that the governance of PESCO is structured in two levels: at Council level and within the framework of projects implemented by groups of participating Member States that have decided to carry out such projects. Concerning the first level, the Council is the political and strategic coordinating body for PESCO, responsible for ensuring that the activities conducted are coherent and in line with its objectives. Article 46(6) TEU states that it may adopt decisions and recommendations within the framework of PESCO by a unanimous vote of the representatives of the participating Member States, except when the relevant legal provisions state otherwise.[XX] The High Representative represents the link between PESCO and CSDP and ensures their coordination. On the other hand, secretariat functions are performed jointly by the European External Action Service (EEAS), including the EUMS, and the EDA. In particular, the EDA supports the High Representative on capacity-building aspects of PESCO, while the EEAS handles operational profiles, including through the

EUMS and other CSDP structures.[XXI] Participating States that wish to establish projects under PESCO must submit a request that, before the activation of the project, is examined by the High Representative together with the EEAS, including the EUMS, and the EDA. In addition, the list of PESCO projects, together with the list of participating States associated with each of them, must be approved by the Council by unanimous vote of the representatives of the participating Member States.

Governance over individual projects is attributed to the participating Member States of each project. They must unanimously agree on the modalities and scope of their cooperation.[XXII] However, Annex III to the Decision establishing PESCO provides for the development of a common set of governance rules which could be adapted within individual projects in order to ensure a certain degree of homogeneity and facilitate their establishment. For each project, one or more participating States are identified to act as coordinators. In addition, participating States may decide to allow other States to join the project as active participants or as observers.

Currently, 60 projects have been developed under PESCO covering various areas: training facilities, land formations systems, intelligence, surveillance and recognition services, advanced maritime systems, remotely piloted aircraft systems (Eurodrone), strategic airlift, cyber defence, multiple joint support services and space infrastructure (Twister). The decision on an initial list of 17 projects was adopted on 6 March 2018[XXIII] and one of them was later closed in 2020.[XXIV] Subsequently, the Council adopted a second group of projects on 19 November 2018[XXV] and on 12 November 2019.[XXVI] Finally, on 16 November 2021 the Council adopted the last group of PESCO projects.[XXVII]

3. Cooperation between Member States in defence matters

As mentioned above, CSDP is not the exclusive framework for defence cooperation between Member States. In fact, the EU initiatives in this field coexist with various forms of cooperations established between groups of Member States based on *ad hoc* agreements.

In particular, some forms of cooperation aim at creating command and control structures, which can also be used in the execution of CSDP missions and operations. Article 42(3) TEU provides that EU operational interventions may be supplemented by multinational forces established on the basis of cooperation initiatives of intergovernmental

nature between some Member States. When stating that the EU can use civilian and military capabilities made available by the Member States to contribute to the achievement of objectives defined by the Council, this article provides that "Member States which together establish multinational forces may also make them available to the common security and defence policy". It follows that, while remaining outside the EU legal order, such multinational forces may be made available to carry out EU missions, or to meet the operational needs of other international organisations such as the UN, NATO and OSCE.

There are various agreements between Member States involving the conferral of different types of forces. The most significant in terms of States involved and the most articulated in terms of organisational structure and operational capability is EUROCORPS (3.1). Other multinational forces that are active and bring together a good number of Member States are EUROMARFOR (3.2), EUROGENDFOR (3.3) and EATC.

3.1 EUROCORPS

EUROCORPS is a permanent multinational force governed by an international agreement and headquartered in Strasbourg.[XXVIII] It is a permanent command and control structure for the operational deployment of ground forces. However, it has no permanent forces at its disposal. The deployed capabilities are therefore conferred from time to time by the participating States. To date, there are six Framework Nations (France, Germany, Spain, Belgium, Luxembourg and Poland) and five Associated Nations (Italy, Greece, Romania, Turkey and Austria) participating to EUROCORPS. The former group takes the main decisions with respect to operations in which EUROCORPS is involved and confers the majority of personnel, funds and equipment. The second group holds a limited number of positions within the corps and have no decision-making power with respect to force deployment, although they are consulted on the matter. Given the large pool of personnel and assets EUROCORPS can dispose of, it can be activated for various purposes such as defence, humanitarian missions, *peace-keeping* operations*, crisis management* and *peace-making*. In addition, it can intervene in operations that make reference to the European Union, the UN, NATO or on the basis of a decision taken jointly by the participating States.

It is a force that has its roots in the heart of European geopolitical history, namely in the strategic partnership dynamics that were established between France and Germany after the end of World War II. In particular, already the Elysée Treaty of 1963, which aimed to

institutionalise cooperation between the two States, included defence and foreign policy among the sectors that fell within its scope.[XXIX] Cooperation between France and Germany in this area gradually intensified over time, culminating in 1989 with the creation of the Franco-German brigade based in Müllheim (Germany) and, in 1992, with the creation of the EUROCORPS at the La Rochelle summit. Other Countries participating as Framework Nations joined the EUROCORPS in the following years: Belgium in 1993, Spain in 1994, Luxembourg in 1996 and Poland in 2022 (after having been Associated Nation for 10 years).[XXX]

As mentioned, while maintaining its autonomy, EUROCORPS is a force that can be put at the disposal of the European Union. In particular, since the European Summit of Cologne (3-4 June 1999), EUROCORPS has developed increasingly close ties with European institutions, especially through the signing of a Letter of Intent with the EU Military Staff in 2016 and the participation to European Union Training Missions (EUTM) in third States. In relation to the latter, it is worth mentioning EUTM Mali[XXXI] and EUTM RCA,[XXXII] in which EUROCORPS provided personnel for two semesters from January and September 2021 respectively. Furthermore, with the Treaty of Strasbourg, which entered into force on 26 February 2009, progress was made with respect to the EUROCORPS status through the granting of operational autonomy and additional responsibilities to the General Commander, including in relation to equipment procurement and personnel organisation.[XXXIII] Finally, since July 2016, EUROCORPS has been appointed with the role of Deployable Force Headquarters for two successive rounds of EU Battlegroups,[XXXIV] (the second half of 2016 and the first half of 2017). The next round will be in 2025. The overall analysis of these elements shows that the relationship between the EU and EUROCORPS is very close and that the latter may represent a structure on which ambitions for the creation of a permanent European military force can be placed (Moro 2022/1).

As the European Union, NATO can request the intervention of EUROCORPS. In particular, the possibility to make the force available to NATO is laid down in the SACEUR Agreement concluded in 1993.[XXXV] Furthermore, EUROCORPS is qualified as NATO High Readiness Force and NATO Response Force (NRF). The latter is a multinational force whose distinguishing feature is its ability to be operational in a very short timeframe. In general, the NRF's high reactivity, together with being equipped with technologically advanced tools and components of various types (land, air, maritime and Special Operations

Forces), allows a rapid reaction in different contexts at NATO's request. The NRF is based on the conferral of military contingents by the Allied States following a rotation system. In particular, the EUROCOPRS was involved in 2006 as NRF 7 for six months, in 2010 as NRF 15 for six months and in 2020 as NRF 20 for twelve months. In addition, EUROCORPS has been involved in many NATO missions including NATO Stabilisation Force (SFOR) in Bosnia Herzegovina (1998-2000), NATO Kosovo Force (KFOR) in Kosovo (2000 - head of mission), NATO International Security and Assistance Force (ISAF) in Afghanistan (2004-2005 - head of mission) and NATO International Security and Assistance Force (ISAF) in Afghanistan (2012 - EUROCORPS personnel seconded to different headquarters in Kabul).

In order to fully understand the functioning and organisation of the EUROCORPS, it is necessary to provide some information on its command structure. The Commanding General of Headquarters EUROCORPS COMEC (NATO 3 star) is a Lieutenant General. The post of COMEC is held on a two-year rotating basis. He is responsible to the EUROCORPS Common Committee, the decisive political-military body representing the Framework Nations. As of 2 September 2021, the acting COMEC is Lieutenant General Peter Devogelaere (Belgium). The Deputy Commander (DCOM) and the the Chief of Staff (COS) are Major Generals (NATO 2 stars). The COS is supported by three Deputy Chiefs of Staff (DCOS) for Operations (DCOS OPS), Support (DCOS SPT) and Influence & Assistance (DCOS I&A) who are Brigadier Generals (NATO 1 star) and whoare members of the Command Group. The Commanding General is directly supported by a number of bodies: the legal office (LEGAD), the Public Affairs Office (PAO), a medical advisor (MEDAD), air force representation (AREC), navy representation (NAVREP) and, during operations, a political advisor (POLAD). The Command Group, advisors and staff together form the headquarters, whose main role is to plan and conduct operations. In operations, the COMEC commands major subordinate units and coordinates land operations supported by air and naval forces. EUROCORPS headquarters is supported by a multinational brigade (MNCS EDB).

From the description of the main features that characterise this corps it is clear that, at the moment, EUROCORPS cannot be considered a European Initial Entry Force. Although its close cooperation with the institutions, it is not formally integrated into the CSDP. Moreover, despite the involvement in various forms of EU Member States with more

significant military capabilities, their participation is still rather limited. The inclusion of EUROCORPS in the institutional framework of the European Union would certainly be a way forward for the creation of an EU Initial Entry Force. Indeed, this could be achieved by taking advantage of an instrument that already has its own organisational structure and that reflects the multinational nature of the corps (Miglio 2017, Perotto and Miglio 2021, Miglio and Perotto 2021, Moro 2022/1).

3.2 EUROMARFOR

EUROMARFOR is the European Maritime Force (EMF). It is a non-permanent but pre-structured multinational force created in 1995[XXXVI] for the purpose of carrying out Petersberg missions within the Western European Union,[XXXVII] with the involvement of four EU countries as founding members, namely France (*Marine Nationale*), Italy (Marina Militare), Portugal (*Marinha Portuguesa*) and Spain (*Armada Española*). To date, the members of this force continue to be the four founding States, but it is also open to other Member States. EUROMARFOR objective is to meet the EU security and defence needs in the maritime domain through different types of missions that include crisis management,[XXXVIII] cooperative security[XXXIX] and maritime security.[XL] This force is at the disposal of the European Union but can also be deployed under a mandate from NATO, the UN or any other international organisation. Furthermore, EUROMARFOR is also intended to strengthen cooperation with other States bordering the Mediterranean such as those belonging to the "5+5 Defence Initiative".[XLI]

A peculiar feature of EUROMARFOR, which is also its main limit, is that it has a pre-established but not permanent structure. This choice was motivated by the fact that, since it is a structure designed to take part in missions of different types, it would have been difficult to identify *ex ante* a fixed composition and the size of the contingents involved. Therefore, the actual composition is assessed according to the mission and the forces made available by the participating States. The size of this force is therefore variable according to the task assigned: in some cases, the deployment of a small Task Group will be sufficient, while in others, the involvement of a full Task Force with the deployment of various units such as, for instance, aircraft carriers, amphibious means, maritime patrol aircraft, demining units, submarines or other types of naval units will be necessary.

Since its establishment, EUROMARFOR has had to be called upon several times. More specifically, to date the activation procedure has been initiated 8 times for so-called real-world operations (RWO), the last of which concerned participation in NATO's SEA GUARDIAN operation that ended on 16 June 2020.[XLII] Most of the RWO activations concern the EU operation EUNAVFOR Atalanta aimed at countering piracy in the Indian Ocean, especially along the coast of Somalia. [XLIII]

The activation procedure is rapid: the force is operational on the assigned mission within five days from the receipt of the activation order. In order to proceed, the unanimous agreement of the four participating Nations is required, although, as already mentioned, the incorporation of units belonging to other States into operations is possible. The organisational structure consists of three hierarchical levels: the High Level Inter-Ministerial Committee (CIMIN), the Political-Military Working Group (POLMIL WG) and the EMF Sub-working Group (EMF SWG). The CIMIN, a body that meets at the request of one of the Member States and which has the role of political-military leadership of EUROMARFOR (for example, it sets the conditions of employment and issues directives to the Force Commander) is composed by Chiefs of Defence, Political Head Directorates of Defence, Foreign Affairs Ministers and representatives of the four Member States. The POLMIL WG, dealing mainly with the implementation of CIMIN decisions and the external relations of the force, is the executive component of EUROMARFOR and consists of representatives of the Chiefs of Defence and Ministers of Foreign Affairs of the participating Countries. For naval issues, the POLMIL WG is supported by the EMF SWG, a body formed by the representatives of the national Naval General Staffs, who can also express their views on specific issues of their competence. Moreover, at the operational level, at the head of the chain of command is the Commander of the European Maritime Force (COMEUROMARFOR) who is appointed every two years among the National Naval Authorities of the four Member States (*Commandant de la Force d'Action Navale* for France, *Comandante in Capo della Squadra Navale* for Italy, *Comandante Naval* for Portugal, *Almirante de la Flota* for Spain). The Commander's headquarters is activated in correspondence with its national one and the staff is integrated by the Permanent Force Cell (EMF PC).[XLIV] Finally, the Task Force Commander (COMGRUEUROMARFOR), directly subordinate to the Force Commander, is in charge of the operation at a tactical level, a function that is

complementary to the tasks performed by the CIMIN (political-military level) and COMEUROMARFOR (operational level).

3.3. EUROGENDFOR

EUROGENDFOR (or EGF), an acronym for European Gendarmerie Force, is a pre-organised multinational police force with military status[XLV] that can be rapidly deployed by the European Union and other international organisations to perform all police tasks within the framework of crisis management operations. Its Member States are France (*Gendarmerie Nationale Française*), Italy (*Arma dei Carabinieri*), the Netherlands (*Koninklijke Marechaussee*), Portugal (*Guarda Nacional Republicana*), Poland (*Zandarmeria Wojskowa*), Romania (*Jandarmeria Română*) and Spain (*Guardia Civil*). In addition, Turkey (*Jandarma Genel Komutanligi*) cooperates with observer status and Lithuania (*Viešojo Saugumo Tarnyba*) as a partner. The way in which a Country participates in EUROGENDFOR depends on its status, so it can be qualified as a member, observer or partner State. The criteria for the attribution of each status depend on technical and political requirements. In particular, membership of EUROGENDFOR is conditional on EU Member State status and the availability of a police force with military status.[XLVI] Candidate States for accession to the European Union - or Member States of the European Union as a first step for joining EUROGENDFOR - that have a police force with military status or a force with military status and some police powers may respectively apply for observer or partner status. [XLVII]

EUROGENDFOR was formally established by the Treaty of Velsen concluded in 2007 and entered into force in 2012. However, the intention to set up such a corps can be traced back to the initiative of five Member States (France, Italy, the Netherlands, Portugal and Spain) that, in accordance with the conclusions of the European Council of Nice (7-9 December 2000), which called for the European Union to become more operational in the field of security and defence, agreed to undertake this collaboration in order to contribute to the development of the CSDP.[XLVIII] In particular, already at the informal meeting of the European Union Defence Ministers held in Rome on 8 October 2003, which preceded the formalisation of the Declaration of Intent, the Heads of the French and Italian ministries, who were later joined by the representatives of the other founding States, agreed on the need to set up a European Gendarmerie Force aimed at enhancing the specific capabilities that police forces with military *status*.[XLIX]

In fact, EUROGENDFOR can be activated for: "(a) performing security and public order missions; (b) monitoring, advising, mentoring and supervising local police in their day-to-day work, including criminal investigation works; (c) conducting public surveillance, traffic regulations, border policing and general intelligence work (d) performing criminal investigation work, including detecting offences, tracing offenders and transferring them to the appropriate judicial authorities; (e) protecting people and property and keeping order in the event of public disturbances; (f) training police officers as regards international standards; (g) training instructors, particularly through cooperation programmes'.[L] Furthermore, EUROGENDFOR can be made available to the European Union UN, OSCE, NATO and other international organisations or specific coalitions.[LI]

Article 3 of the Treaty of Velsen establishes the composition of EUROGENDFOR, providing for a permanent Headquarters based in Italy (Caserma "Chinotto" in Vicenza). The latter is to be distinguished from the Force Headquarters, which is activated in the operation area to support the Force Commander in exercising command and control of the mission. The nodal points of the organisational structure of the force are the High Level Interdepartmental Committee (CIMIN) and the EUROGENDFOR Commander. The former is the decision-making body that governs EUROGENDFOR and is made up of representatives of the competent ministries of the States that are part of the Force, who take turns in chairing it on an annual rotation system. The functioning and organisation of CIMIN are governed by a special regulation but, in general, the tasks entrusted to this body are those relating to the political and strategic direction and control of EUROGENDFOR, military coordination, the appointment of the Commander and other senior figures, as well as the adoption of decisions concerning missions and requests for cooperation from third States or international organisations.[LII] The work of CIMIN is supported at the technical level by a Working Group that meets periodically. The Commander of EUROGENDFOR is the officer appointed by the CIMIN to command the Permanent HQ, who may, where applicable, also hold the position of EGF Force Commander in charge of a mission. The position is held on a two-year rotating basis among the member countries and its main function is to implement CIMIN directives.

3.4. EATC

Other defence-related cooperation agreements between Member States outside the Union's legal framework includes the European Air Transport Command (EATC), a multinational command structure in the field of military air mobility. In particular, the EATC scope of operations covers air transport, air-to-air refuelling and aeromedical evacuation. It is headquartered at the Eindhoven air base in the Netherlands and its fleet consists of more than 170 vehicles stationed at the national air bases of the Member States. The EATC air fleet is diverse, comprising 20 different types of aircraft. This allows a good degree of flexibility and optimisation of resources according to the type of mission.

The idea of creating a command structure that would enable greater cooperation in the field of strategic transport originated in 1999 by a Franco-German initiative. It evolved to involve other Member States with the creation of the European Airlift Coordination Cell (EACC) in February 2002, later transformed into the European Airlift Centre (EAC) in July 2004. The participating States of the EAC were Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, Spain and the United Kingdom. Finally, this form of cooperation arrived at its current conformation with the founding of the EATC in 2010 by France, Germany, the Netherlands and Belgium, which was joined by Luxembourg in 2012 and then Spain and Italy in 2014.

The EATC can be seen as a model of defence integration in which the decision-making authority of each participating State is retained despite an integrated command structure (Molenaar). In fact, Member States make their air capabilities available by transferring authority over them to the EATC as a unitary command but retaining the possibility of revoking this transfer. In this sense, the EATC cannot be regarded as an independent body that controls resources made available by the States, but rather as a command structure that integrates with the national ones, thus being able to manage missions from the planning and assignment of tasks to their control. Furthermore, States contribute differently with variable funding to the common budget. For example, for 2021, the largest contributors were Germany and France (25% and 23% respectively), followed by Italy (18%), Spain (14%), the Netherlands and Belgium (both 9%) and, finally, Luxembourg (1%).

The decision-making structure of the EATC is headed by the Multinational Air Transport Committee (MATraC) which is composed of the heads of the Member States' air forces, who appoint a chairman among themselves for a two-year term. Given the nature of

this command structure, all decisions are taken by consensus. There is also an advisory body and a Budget and Finance Committee, whose compositions allow for the representation of every State party to the EATC. They meet regularly and have the function of preparing MATraC meetings and supporting the work of the EATC commander.

With regard to the organisational structure, the commander (COM) and chief of staff (COS) are appointed on a three-year rotational basis between France and Germany,[LIII] while the Deputy Commander (DCOM) rotates on a three-year basis between Italy, Belgium, Spain and the Netherlands.[LIV] An important point of contact between the EATC and the Member States is the Senior National Representative (SNR), an individual who also acts as a superior to the national staff seconded to the EATC and who, on a rotating basis, occupies the position of head of division, deputy head of division or head of the Public Affairs and Protocol Office. The command group is supported by three divisions: the operational division, the functional division and the policy and support division. The operational division has the task of managing all processes (planning, assignment, control and reporting) related to the execution of EATC air mobility missions, both in peacetime and in crisis. The functional division, on the other hand, has the main objective of improving coordination and interoperability between the EATC participating States and it is structured into three main activity strands: deployment, training and exercises, technical and logistics. Finally, the policy and support division provides advice on the activities of the command group for political-military, legal, administrative or financial profiles.

In light of the sector in which the EATC operates, it is important to mention that all of its participating States are also parties to the multilateral agreements "Movement Coordination Centre Europe" (MCCE)[LV] and "Air Transport & Air-to-Air Refuelling and other Exchanges of Services" (ATARES). The former consists of 28 Member States and is aimed at rationalising and coordinating military logistical resources relating to air, sea, land transport and in-flight refuelling. Cooperation between the EATC and MCCE is constantly strengthened. In fact, in addition to sharing headquarters at the Eindhoven air base, they signed a Letter of Intent in 2016 with the aim of increasing synergies and mutual collaboration. As for ATARES, it is an exchange system for air transport services to which 28 States are part and which is based on the principle of "Equivalent Flying Hour" (EFH). This agreement facilitates mutual support through the exchange of services and is the "payment instrument" used between the EATC participating States.

4. The relationship between Member States' defence cooperation and the EU legal order

As the examples provided in the previous paragraph show, Member States have often resorted to international agreements between themselves to pursue closer integration in defence matters. This is partly due to the relatively recent establishment and hitherto slow development of CSDP, which has led Member States to seek alternative venues for cooperation, and partly to a preference for instruments offering maximum flexibility in the choice of strategic partners and governance rules.

4.1. Examples from other policy areas

The conclusion of international agreements between Member States outside the EU legal order is not limited to security and defence policy, but common to several other policy areas, more or less closely related to EU competences.

Such agreements can be classified in various ways (De Witte 2001, Heesen, Pistoia, Miglio 2020). First, it is possible to distinguish between bilateral agreements and multilateral agreements, which in turn may be distinguished depending on whether only EU Member States (*inter se* agreements) or also third States are parties (agreements *cum tertiis*) (De Witte 2001).

A different taxonomy emerges if one looks at the nature and intensity of the links existing between those agreements and the EU legal order. Bilateral agreements between Member States are mostly only incidentally connected with EU law, the foremost example being the vast network of double taxation conventions aimed at coordinating tax systems in cross-border situations. Some bilateral agreements, however, are specifically designed to facilitate the implementation of EU measures in the contracting States and may even be explicitly provided for in an EU legislative measure.[LVI] Other agreements, such as the Treaty of Aachen between France and Germany[LVII] or the more recent Quirinal Treaty between France and Italy,[LVIII] are more far-reaching, aiming at strengthening bilateral political relations and introducing concertation mechanisms in order to achieve closer coordination in the framework of EU decision-making procedures as well as in the implementation of EU law.[LIX]

Multilateral agreements may similarly pursue a variety of purposes. Some of them have strong links with EU policies and may be instrumental in pursuing goals that are not only

shared by the contracting Member States, but are also objectives of European integration. In the latter case, agreements between groups of Member States constitute a tool of differentiated integration*, i.e.* a means for some Member States to pursue closer integration between themselves in a particular area, possibly as an alternative to integration within the EU framework (De Witte 2000, Rossi, Thym). The Schengen Agreements, through which a group of Member States laid the foundations for the gradual abolition of internal border controls, are a paramount example. The 1985 Schengen Agreement[LX] and the 1990 implementing Convention[LXI] pursued a goal proper to the process of European integration, namely the facilitation of free movement of persons within the Community. Such objective, however, could not be achieved within the framework of the EEC Treaty because of the British veto. Another example is the Treaty of Prüm, concluded by seven Member States in 2005 in order to strengthen police cooperation in the fight against terrorism, cross-border crime and illegal migration.[LXII]

More recently, the use of intergovernmental agreements was an essential component of the response to the sovereign debt crisis that affected the European Union in the early 2010s. According to the so-called "Union method" theorised by German Chancellor Merkel in her Bruges speech on 2 November 2010,[LXIII] the response to the crisis would have required, alongside the measures adopted by EU institutions (Community method), coordinated action by the Member States on the basis of common objectives and strategies.[LXIV] This approach translated into the conclusion of *inter se* agreements, namely the Treaty establishing the European Stability Mechanism (ESM)[LXV] and the Treaty on Stability, Coordination and *Governance* in the Economic and Monetary Union (the so-called *Fiscal Compact*),[LXVI] which complemented EU legislative instruments, respectively, in the provision of financial assistance mechanisms to Member States[LXVII] and in the strengthening of budgetary discipline.[LXVIII]

4.2. The competence of Member States to conclude *inter se* agreements

The power of the Member States to conclude agreements between themselves, even in areas where the Union is itself competent to act, is a corollary of the structure of the EU system of competences. The delimitation of EU competences is based on the principle of conferral (Article 5(1) TEU). The Union does not have a general competence, but can only act within the limits of the competences the Member States have conferred on it in the

founding Treaties (Article 5(2) TEU). Conversely, competences not conferred on the Union remain with the Member States (Article 4(1) TEU). Only in the areas where the EU enjoys exclusive competence (exhaustively listed in Article 3 TFEU) have the Member States entirely transferred competence to the Union. In those sectors, State action is therefore precluded, unless it is authorised by the EU or intended to implement EU law. In all other areas, the Member States remain competent to act and legislate. This also applies to areas of shared competence, in which, however, the exercise of state competence is limited to the extent that the Union has enacted exhaustive harmonization measures, precluding subsequent state action (pre-emption).[LXIX]

The same rules apply to joint action by two or more Member States realised through the conclusion of an international agreement. Indeed, there would be no reason to treat the joint exercise of State competences differently from its unilateral exercise by means of the adoption of domestic law measures. This parallelism is confirmed by the case law of the Court of Justice, according to which Member States may conclude *inter se* agreements not only in areas in respect of which there has been no conferral of competence on the Union, but also in all of non-exclusive Union competence.[LXX]

As far as security and defence policy is concerned, the EU has competence on CSDP. However, despite some disagreement in scholarship as its the exact categorization, CSDP competence is obviously not exclusive. Indeed, CSDP does not replace the security and defence policies of the Member States, as various provisions of primary law abundantly clarify,[LXXI] and is therefore generally classified as a competence supporting and complementing those of the Member States. Consequently, it is undisputed the Member States retain competence to conclude international agreements between themselves on security and defence matters and can resort to them as an alternative to developing cooperation under CSDP.

4.3 The primacy of Union law over agreements between Member States

Nevertheless, it should be borne in mind that respect for the exclusive competences of the Union is not the only constraint on the Member States' ability to conclude and implement *inter se* agreements. A second, more stringent limitation stems from the primacy of Union law over the law of the Member States. As is well known, the relationship between EU law and domestic law is based on the principle, expressed by the Court of Justice since the

landmark *Costa v. ENEL* judgment (1964)[LXXII] and recalled in a declaration annexed to the final act of the Intergovernmental Conference that adopted the Lisbon Treaty,[LXXIII] according to which EU law prevails, in case of conflict, over the domestic law of the Member States.

This conflict rule, first expressed with regard to the relationship between EU law and rules of national law, equally applies to the relationship between provisions of EU law and provisions contained in agreements between Member States.[LXXIV] It would be inconsistent for Member States to be bound by the primacy of EU law when acting unilaterally, but free to escape its constraints by concluding international agreements between themselves (De Witte 2000).

As a consequence, provisions conflicting with directly applicable rules of EU law - whether contained in national legal acts or in *inter se* agreements – are ineffective. Member State practice concerning the conclusion of *inter se* agreements reflects this understanding. Several agreements, especially where there are close links with the EU legal order, contain special supremacy clauses making their application conditional on compatibility with EU law.[LXXV] However, even absent an express supremacy clause in the text of the agreement, such a rule must be regarded as implicit because it flows directly from the principle of primacy (Miglio 2020).

4.4 The integration of agreements between Member States within the EU legal order: the precedents of the Schengen and Prüm Agreements

As already mentioned (*supra* section 4.2) Member States are no longer entitled to conclude *inter se* agreements in areas of EU exclusive competences. This is, however, a shifting boundary, because Treaty revisions may affect the extent of EU competences, conferring new areas of competence to the Union or broadening existing ones.[LXXVI] The application of the principles of *pre-emption* and primacy also means that the exercise of Union competence in areas of shared competence reduces the remaining scope for concluding new agreements and conditions the implementation of existing ones, which must comply with EU law.

This dynamic may result in the obsolenscence of international cooperations established between Member States outside the EU framework. In such case, the agreement may be still in force, but display little if any effect because EU measures superseded it. The agreement

establishing the Benelux Economic Union, concluded by Belgium, the Netherlands and Luxembourg in 1958 with the aim of completing economic integration between the three signatory States, is a case in point. In the decades that followed its conclusion, the objective envisaged by the agreement was attained within the broader framework of the European Communities, and the Benelux Union became utterly marginal. The fate of the Fiscal Compact appears similar today. It reproduced commitments that were already enshrined in EU secondary law measures and its underlying philosophy was ultimately superseded by subsequent developments in European economic governance (Contaldi, De Witte 2021).

One possibility for coordinating external agreements between the Member States with the development of EU law is to incorporate those agreements into the EU legal order. Obviously, this option presupposes that the Union is competent to adopt measures similar in content to the agreement in question. Interestingly, EU competence might have already existed at the time the agreement was concluded, since, as noted above, the Member States are free to conclude agreements between themselves in areas of shared competence. Alternatively, EU competence may have expanded as a result of Treaty change.

Historically, several attempts were made to bring agreements between groupings of Member States within the Union legal framework, although they did not always succeed. Probably the best-known case is the incorporation into EU law of the Schengen *acquis*, comprising the 1985 Schengen Agreement, the 1990 Schengen Implementation Convention, and the measures adopted on their basis. On that occasion, the absorption of a body of law developed in an intergovernmental frame was achieved by means of amending EU primary law. The Intergovernmental Conference that adopted the Treaty of Amsterdam negotiated a special protocol to that end.[LXXVII] The protocol mandated the Council to identify, for each of the provisions or measures forming part of the Schengen *acquis*, a legal basis in the EU Treaty or in the EC Treaty.[LXXVIII] This technique was chosen in order to allow for a differentiation in the way some Member States (United Kingdom, Ireland and Denmark) would participate in the Schengen *acquis* .[LXXIX] Only primary law could exempt those Member States from taking part in full in the Shengen acquis integrated into EU law.

In other instances, the absorption of intergovernmental agreements between Member States took place or was proposed without amending primary law. For instance, the incorporation of large parts of the Prüm Treaty followed was achieved by means of a Council decision, *i.e.* a measure of secondary law.[LXXX] Since the agreement related to areas of shared

competence, there was no need to amend provisions of primary law in order to extend the competences of the Union and authorise the institutions to adopt legislation.

More recently, a similar scheme was proposed, albeit unsuccessfully, to bring the two major intergovernmental agreements concluded during the sovereign debt crisis back into the EU legal framework. In December 2017, the Commission adopted the Communication "Further Steps Towards the Completion of Europe's Economic and Monetary Union: Roadmap".[LXXXI] Two legislative proposals accompanied the Communication, seeking to incorporate the ESM Treaty - which was to be transformed into a European Monetary Fund[LXXXII] - and the *Fiscal Compact,* respectively, into the EU legal framework.[LXXXIII] In both cases, the attempt was abandoned for political reasons, as a result of the decision by the Member States, particularly France and Germany, to preserve the intergovernmental character of the two agreements.[LXXXIV]

4.5 The possible integration of existing cooperation between Member States within the framework of PESCO

Having mapped the relationship between EU law and agreements between Member States in general terms and having briefly recalled the instances of incorporation of *inter se* agreements into the EU framework, the analysis will now turn to the assessment of the legal feasibility of integration into CSDP of experiments of closer defence integration established by groups of Member States outside the EU Treaties. We will be looking, in particular, at instruments establishing military command and control structures.

In that respect, it must first be assessed whether the Union is competent to establish similar bodies and structures. The answer is certainly positive, since the EU Treaty defines CFSP in very broad terms, stating that it "covers all areas of foreign policy and all questions relating to the security of the Union, including the progressive framing of a common defence policy which may lead to a common defence".[LXXXV] Moreover, there are several measures that, in the exercise of Union competences in the CFSP/CSDP area, have established military bodies with advisory tasks, or even entrusted with strategic planning and oversight of the conduct of missions and operations in third countries - the European Union Military Committee (EUMC),[LXXXVI] the European Union Military Staff (EUMS)[LXXXVII] and the Military Planning and Conduct Capability (MPCC)[LXXXVIII] It follows that command and

control structures such as EUROCORPS, EUROMARFOR or EUROGENDFOR could be absorbed into the EU legal framework without the need for Treaty amendment.

PESCO could provide a framework for integrating such forms of cooperation into CSDP. Due to its highly modular character, PESCO would indeed seem the framework of choice for any CSDP initiatives in which not all Member States participate. The advantage of integrating existing command and control structures within the PESCO framework is that this would make possible to reproduce the "variable geometry" of cooperation established on the basis of *ad hoc* arrangements between a restricted group of States, while at the same time keeping the project open to other Member States that are interested in participating and are ready to make the necessary commitments. As to their possible content, PESCO projects can arguably include the establishment of military command and control structures. According to Article 2(d) of Protocol no. 10, PESCO may include the enactment of "concrete measures to enhance the availability, interoperability, flexibility and deployability" of the forces of the participating Member States. Command and control structures such as those analysed in section 3 would contribute to that task. It is also worth noting that there are already PESCO projects aimed at the creation of planning, command and coordination tools.[LXXXIX]

Finally, the possibility of associating third States could also be a factor in choosing PESCO as the most suitable frame for absorbing cooperations established outside the EU framework. One distinct features of PESCO, as provided for in Decision (CFSP) 2020/1639, is the possibility of inviting third countries to join specific projects, albeit only "exceptionally"[XC] The Decision makes the participation of a third country conditional on the cumulative presence of eight requirements, aimed at preserving the Union's decision-making and operational autonomy and the effectiveness of PESCO,[XCI] and on the consent of all States participating in the project concerned.[XCII] Provided that the substantive and procedural conditions are met, the involvement of third States in the framework of an intergovernmental agreement could be reproduced if the latter were to be integrated into CFSP in the form of a PESCO project. This would allow a third country to retain its status as associate State or observer, as is currently the case with Turkey in the framework of EUROCORPS and EUROGENDFOR respectively. That could be hard to achieve politically, but would not be legally impossible.

Evidently, the reframing of instances of defence cooperation established outside the EU Treaties as PESCO projects would require, in addition to a Council decision approving the new PESCO project, the assent of all the States parties to the satellite treaty, including those that are not EU Member States. Conversely, it would not be strictly necessary, although desirable for reasons of legal certainty, that the agreement be terminated, since EU measures would in any event take precedence over it.

5. Conclusions

Our research has shown that there is room within the CSDP not only for new actions on joint defence capability development, but also for the incorporation of existing cooperation instruments that groups of Member States have put in place outside the EU legal and institutional framework. Indeed, the material scope of CSDP is broadly defined and may include not only the development of equipment and other defence capabilities, but also the establishment of military structures.

Because of the flexibility it offers in terms of modulating participation in specific projects and the possibility of associating third states, PESCO might be an appropriate venue to anchor within the EU legal order instances of cooperation established through satellite treaties.

However, the path is fraught with obstacles, more of a political than of a legal nature. As far as the possible involvement of third states is concerned, for instance, the hypothesis of Turkey's participation in PESCO projects would likely meet with resistance.

In addition, the absorption of "satellite" agreements into the EU framework presupposes that Member States regard the EU as the main forum for defence cooperation apart from NATO, and not merely as one of several alternative venues for it. In the intricate landscape of international cooperation, several factors are likely to influence the choice (De Witte 2014). One factor is the possible synergy between CSDP and other Union policies, especially industrial policy. Only time will tell whether this incentive, which is - stronger for capability development projects than for the establishment of command and control structures, is sufficient to counterbalance the flexibility offered by the coexistence of multiple parallel foraand to .

[I] Assistant Professor of European Union Law at the University of Turin and Post-doctoral Research Fellow at the Bocconi Lab on European Legal Studies (BLEST) of Bocconi University (Milan), respectively. An earlier version of this article was published (in Italian) as a CSF Research Paper under the title 'La politica di sicurezza e difesa comune e le cooperazioni tra Stati Membri al di fuori dell'Unione europea in materia di difesa: interazioni e prospettive di integrazione'. Alberto Miglio is the author of sections 1, 4 and 5, while Gabriella Perotto has authored sections 2 and 3. **Email: alberto.miglio@unito.it; gabriella.perotto@unito.it**
[II] In the Strategic Compass, Russian aggression towards Ukraine is described as 'a direct and long-term threat to European security' (A Strategic Compass for a stronger EU security and defence in the next decade, 7).
[III] Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.
[IV] Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021, establishing the European Defence Fund and repealing Regulation (EU) 2018/1092.
[V] Joint Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on the Defence Investment Gaps Analysis and Way Forward, JOIN(2022) 24 final. See Moro 2022/2.
[VI] See Articles 42(6) and 46 TEU, as well as Protocol (no. 10) on Permanent Structured Cooperation established by Article 42 of the Treaty on European Union, annexed to the EU Treaties.
[VII] Article 46(2) TEU and Annex 1 – Principles of PESCO to Decision 2017/2315.
[VIII] Article 2 of Protocol (no. 10) on Permanent Structured Cooperation.
[IX] *Ibid*, Annex II - List of ambitious and more binding common commitments undertaken by participating Member States in the five areas set out by Article 2 of Protocol no. 10.
[X] Regulation (EU) 2021/697 Article 3.
[XI] *Ibid.*, recital 32 and Article 13(3)(a).
[XII] The final report is available on the EDA website.
[XIII] Joint Communication JOIN(2022) 24 final, p. 5.
[XIV] 2022 CARD Report, p. 6.
[XV] Article 46(1) TEU.
[XVI] Article 46(2) TEU.
[XVII] Article 46(3) TEU.
[XVIII] Article 46(4) TEU.
[XIX] Article 46(5) TEU.
[XX] Article 46(2) and (5) TEU.
[XXI] Article 7 of Decision (CFSP) 2017/2315.
[XXII] Annex III to the Decision (CFSP) 2017/2315.
[XXIII] European Training Certification Centre for European Armies - Italy, Greece; Deployable Military Disaster Relief Capability Package (DMDRCP) - Italy, Greece, Spain, Croatia, Austria; Armoured Infantry Fighting Vehicle / Amphibious Assault Vehicle / Light Armoured Vehicle - Italy, Greece, Slovak Republic; Indirect Fire Support (EuroArtillery) - Slovak Republic, Italy, Hungary; EUFOR Crisis Response Operation Core (EUFOR CROC) - Germany, Greece, Spain, France, Italy, Cyprus, Austria; Maritime (semi-) Autonomous Systems for Mine Countermeasures (MAS MCM) - Belgium, Greece, France, Latvia, Netherlands, Poland, Portugal, Romania; Harbour & Maritime Surveillance and Protection (HARMSPRO) - Italy, Greece, Poland, Portugal; Upgrade of Maritime Surveillance (UMS) - Greece, Bulgaria, Ireland, Spain, France, Croatia, Italy, Cyprus; European Secure Software defined Radio (ESSOR) - France, Belgium, Germany, Spain, Italy, the Netherlands, Poland, Portugal, Finland; Cyber Threats and Incident Response Information Sharing Platform (CTISP) - Greece, Italy, Cyprus, Hungary, Portugal; Cyber Rapid Response Teams and Mutual Assistance in Cyber Security (CRRT) - Lithuania, Estonia, Croatia, Netherlands, Poland, Romania; Strategic Command and Control (C2) System for CSDP Missions and Operations (EUMILCOM) - Spain, Germany, France, Italy, Luxembourg, Portugal; European Medical Command (EMC) - Germany, Belgium, Czech Republic, Estonia, Spain, France, Italy, Luxembourg, Hungary, Netherlands, Poland, Romania, Slovak Republic, Sweden; Network of logistic Hubs in Europe and support to Operations - Germany, Belgium, Bulgaria, Greece, Spain, France, Croatia, Italy, Cyprus, Lithuania, Hungary, Netherlands, Poland, Slovenia, Slovak Republic; Military Mobility - Netherlands, Belgium, Bulgaria, Czech Republic, Germany, Estonia, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Austria, Poland, Portugal, Romania, Slovenia, Slovak Republic, Finland, Sweden; Energy Operational Function (EOF) - France, Belgium, Spain, Italy, Slovenia.
[XXIV] European Union Training Mission Competence Centre (EU TMCC) - Germany, Spain, France, Ireland,

Italy, Netherlands, Sweden, Austria, Czech Republic, Luxembourg, Romania.

[xxv] Helicopter Hot and High Training (H3 Training) - Greece, Italy, Romania; Joint EU Intelligence School (JEIS) - Greece, Cyprus; EU Test and Evaluation Centres - France, Sweden, Slovak Republic; Integrated Unmanned Ground System (iUGS) - Estonia, Belgium, Czech Republic, Germany, Spain, France, Latvia, Hungary, Netherlands, Poland, Finland; EU Beyond Line Of Sight (BLOS) Land Battlefield Missile Systems - France, Belgium, Cyprus; Deployable Modular Underwater Intervention Capability Package (DIVEPACK) - Bulgaria, Greece, France, Romania; European Medium Altitude Long Endurance Remotely Piloted Aircraft Systems - MALE RPAS (Eurodrone) - Germany, Czech Republic, Spain, France, Italy; European Attack Helicopters TIGER Mark III - France, Germany, Spain; Counter Unmanned Aerial System (C-UAS) - Italy, Czech Republic; European High Atmosphere Airship Platform (EHAAP) - Persistent Intelligence, Surveillance and Reconnaissance (ISR) Capability - Italy, France; One Deployable Special Operations Forces (SOF) Tactical Command and Control (C2) Command Post (CP) for Small Joint Operations (SJO) - (SOCC) for SJO - Greece, Cyprus; Electronic Warfare Capability and Interoperability Programme for Future Joint Intelligence, Surveillance and Reconnaissance (JISR) - Czech Republic, Germany; Chemical, Biological, Radiological and Nuclear (CBRN) Surveillance as a Service (CBRN SaaS) - Austria, France, Croatia, Hungary, Slovenia; Co-basing - France, Belgium, Czech Republic, Germany, Spain, Netherlands; Geospacial, Meteorological and Oceanographic (GeoMETOC) Support Coordination Element (GMSCE) - Germany, Belgium, Greece, France, Luxembourg, Austria, Portugal, Romania; EU Radio Navigation Solution (EURAS) - France, Belgium, Germany, Spain, Italy, Poland; European Military Space Surveillance Awareness Network (EU-SSA-N) - Italy, Germany, France, Netherlands.

[xxvi] Integrated European Joint Training and Simulation Centre (EUROSIM) - Hungary, Germany, France, Poland, Slovenia; EU Cyber Academia and Innovation Hub (EU CAIH) - Portugal, Spain; Special Operations Forces Medical Training Centre (SMTC) - Poland, Hungary; CBRN Defence Training Range (CBRNDTR) - Romania, France, Italy European Union Network of Diving Centres (EUNDC) - Romania, Bulgaria, France; Maritime Unmanned AntiSubmarine System (MUSAS) - Portugal, Spain, France, Sweden; European Patrol Corvette (EPC) - Italy, Greece, Spain, France; Airborne Electronic Attack (AEA) - Spain, France, Sweden; Cyber and Information Domain
Coordination Centre (CIDCC) - Germany, France, Hungary, Netherlands; Timely Warning and Interception with Space-based TheatER surveillance (TWISTER) - France, Germany, Spain, Italy, Netherlands, Finland; Materials and components for technological EU competitiveness (MAC-EU) - France, Germany, Spain, Portugal, Romania; EU Collaborative Warfare Capabilities (ECoWAR) - France, Belgium, Spain, Hungary, Poland, Romania, Sweden; European Global RPAS Insertion Architecture System (GLORIA) - Italy, France, Romania.

[xxvii] Main Battle Tank Simulation and Testing Center (MBT-SIMTEC) - Greece, France, Cyprus; EU Military Partnership (EU MilPart) - France, Estonia, Italy, Austria; Essential Elements of European Escort (4E) - Spain, Italy, Portugal; Medium size Semi-Autonomous Surface Vehicle (M-SASV) - Estonia, France, Latvia, Romania Strategic Air Transport for Outsized Cargo (SATOC) - Germany, Czech Republic, France, Netherlands, Slovenia; Next Generation Small RPAS (NGSR) - Spain, Germany, Portugal, Romania, Slovenia; Rotorcraft Docking Station for Drones - Italy, France; Small Scalable Weapons (SSW) - Italy, France; Air Power - France, Greece, Croatia; Future Medium-size Tactical Cargo (FMTC) - France, Germany, Sweden; Cyber Ranges Federations (CRF) - Estonia, Bulgaria, Finland, France, Italy, Latvia, Luxembourg; Automated Modelling, Identification and Damage Assessment of Urban Terrain (AMIDA-UT) - Portugal, Spain, France; Common Hub for Governmental Imagery (CoHGI) - Germany, Spain, France, Lithuania, Luxembourg, Netherlands, Austria, Romania; Defence of Space Assets (DoSA) - France, Germany, Italy, Austria, Poland, Portugal, Romania.

[xxviii] Treaty relating to EUROCORPS and the status of its headquarters between the French Republic, the Federal Republic of Germany, the Kingdom of Belgium, the Kingdom of Spain and the Grand Duchy of Luxembourg, Brussels, 22 November 2004. Poland became Framework on 23 January 2022 with the signature of the 'Note of Accession'.

[xxix] Elysée Treaty (also called 'Friendship Pact' or 'Franco-German Treaty'), signed by France and Germany on 22 February 1963 (see Finizio). As pointed out by Finizio, France's interest in engaging in such cooperation with Germany stems from the failure of the European Defence Community (EDC) project in 1954 and the subsequent start of rearmament and West Germany's entry into NATO, as well as the growing tension between France and the United States caused by the former's fear of the latter's political and technological dominance together with the United Kingdom.

[xxx] On the establishment of EUROCORPS, see 'Eurocorps', available on the website of the Centre Virtuel de la Connaissance sur l'Europe (CVCE) (www.cvce.eu).

[xxxi]The personnel consists of the Mission Force Commander and about 70 soldiers who will be stationed at headquarters, an advisory group or the Training Task Force. The composition is multinational, but Spain took command for the first rotation and Germany for the second. Previous participation in the same mission: second half of 2015 (50 soldiers including the mission commander).
[xxxii] EUROCORPS provides personnel for two semesters starting in September 2021, i.e. for about one year (50 soldiers). The composition is multinational, but France took the lead for the first rotation and Belgium for the second. Previous participation in the same mission: second half of 2016 (60 soldiers including the mission commander); first and second half of 2017 (60 soldiers including the mission commander).
[xxxiii] Treaty signed by the Framework Nations on 22 November 2004 and entered into force after ratifications in 2009. See the European Parliament Resolution of 10 March 2010 on the implementation of the European Security Strategy and the Common Security and Defence Policy, para. 73, where the Parliament welcomes the signature on 26 February 2009 of the Treaty of Strasbourg granting EUROCORPS legal personality and calls on the EU to make use of this multinational force if necessary.
[xxxiv] Concerning the functioning of EU Battlegroups, see Perotto.
[xxxv] Cooperation agreement between EUROCORPS and NATO (Brussels, 21 January 1993).
[xxxvi] Treaty between France, Italy, Portugal and Spain, Lisbon, 15 May 1995.
[xxxvii] Western European Union (WEU) Ministerial Council, Petersberg Declaration, June 1992. EUROMARFOR (and EUROFOR) was declared a 'Force answerable to the Western European Union' (FAWEU).
[xxxviii] These are missions aimed at conflict prevention, crisis response and post-conflict stabilisation, as well as peace support operations, such as *peace-keeping, peace-making, peace-building* and *peace-enforcement* missions.
[xxxix] Operations that help prevent conflicts and develop regional security and stability through dialogue, confidence building and increased transparency.
[xl] Operations to help maintain a safe and secure maritime environment such as maritime interdiction missions, protection of freedom of navigation, protection of critical energy infrastructure and maritime communication lines.
[xli] It is an informal forum for cooperation between Western Mediterranean countries. Its members are France, Italy, Portugal, Spain, Malta, Algeria, Libya, Morocco, Mauritania and Tunisia. For an in-depth discussion, see Re.
[xlii] Reference is made to 'real-world operations' to distinguish them from exercises. Also in this case, EURMARFOR activation procedure must be initiated. RWOs for which the EUROMARFOR activation procedure has been initiated are the following: Operation "COHERENT BEHAVIOUR" (Eastern Mediterranean) in support of Operation "ACTIVE ENDEVOUR" (1 October 2002-30 November 2002); Operation "RESOLUTE BEHAVIOUR" (Indian Ocean) in the context of the International Coalition to Counter Terrorism of Operation "ENDURING FREEDOM" (14 January 2003-12 December 2005); Operation "IMPARTIAL BEHAVIOUR" (Eastern Mediterranean - Coast of Lebanon) under UN in support of the UNIFIL operation (29 February 2008-28 February 2009); From the fourth to the seventh activation of EUROMARFOR are RWO concerning the participation in the counter-piracy operation "ATALANTA" in the Indian Ocean (6 December 2011-23 March 2016); Royal operation under the OPCON of COM MARCOM in support of the NATO operation "SEA GUARDIAN" (27 May 2020-16 June 2020).
[xliii] European Union Naval Force Somalia (EU NAVFOR) - Operation ATALANTA and its sister missions EUCAP Somalia and EUTM Somalia.
[xliv] The Permanent Cell is composed of a Director (with the rank of Captain), of the same nationality as the CEMF, and four Senior Officers as National Representatives for France, Italy, Portugal and Spain.
[xlv] 'Police force with military status' means: 'a force with an all encompassing jurisdiction in its homeland and towards its community, tasked with judicial and administrative policing and crime prevention, and whose members possess policing and basic military skills' ('The status of EGF MEMBER, EGF OBSERVER and EGF PARTNER Amsterdam', 15 November 2007, available at eurogendfor.org).
[xlvi] Article 42 of the Treaty between the Kingdom of Spain, the French Republic, the Italian Republic, the Kingdom of the Netherlands and the Portuguese Republic on the establishment of the European Gendarmerie Force, EUROGENDFOR, signed in Velsen on 18 October 2007 and entered into force on 1 June 2012 ('Treaty of Velsen').
[xlvii] On the prerogatives of each State according to its status, see 'The status of EGF MEMBER, EGF OBSERVER and EGF PARTNER Amsterdam', 15 November 2007, available at eurogendfor.org.
[xlviii] Declaration of Intent between the Defence Ministers of France, Italy, the Netherlands, Portugal and Spain concerning the creation of a European Gendarmerie Force, signed in Noordwijk on 17 September 2004.
[xlix] Camera dei deputati,, XVI Legislature, Doc. no. 3083, 'Disegno di legge' presented by the Minister of

Foreign Affairs (FRATTINI) and the Minister of Defence (LA RUSSA) in agreement with the Minister of the Interior (MARONI) with the Minister of Justice (ALFANO) with the Minister of Economy and Finance (TREMONTI) and with the Minister of Labour, Health and Social Policies (SACCONI), Ratifica ed esecuzione della Dichiarazione di intenti tra i Ministri della difesa di Francia, Italia, Olanda, Portogallo e Spagna relativa alla creazione di una Forza di gendarmeria europea, con Allegati, firmata a Noordwijk il 17 settembre 2004, e del Trattato tra il Regno di Spagna, la Repubblica francese, la Repubblica italiana, il Regno dei Paesi Bassi e la Repubblica portoghese per l'istituzione della Forza di gendarmeria europea, EUROGENDFOR, firmato a Velsen il 18 ottobre 2007', presented on 28 December 2009.

[L] Article 4(3) of the Treaty of Velsen.

[LI] Article 4(3) of the Treaty of Velsen.

[LII] Article 4(3) of the Treaty of Velsen.

[LIII] Since 24 September 2020, the commander has been German Major General (OF-7) Andreas Schick. The chief of staff is French Brigadier General (OF-6) Stéphane Gourg.

[LIV] On 9 January 2023, Belgian Brigadier General (OF-6) Patrick Mollet was appointed DCOM.

[LV] www.mcce-mil.org.

[LVI] See, for example, Articles 84 and 86 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; Article 19 of Regulation (EU) No 1052/2013 of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

[LVII] Traité entre la République française et la République fédérale d'Allemagne sur la coopération et l'intégration franco-allemande, 22 January 2019, www.diplomatie.gouv.fr.

[LVIII] Trattato tra la Repubblica Italiana e la Repubblica Francese per una cooperazione bilaterale rafforzata, 26 November 2021, www.governo.it.

[LIX] On the relations between these agreements and the EU legal order and their significance for European integration, see Porchia.

[LX] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

[LXI] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

[LXII] Treaty concluded on 27 May 2005 between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration.

[LXIII] Rede von Bundeskanzlerin Merkel anlässlich der Eröffnung des 61. akademischen Jahres des Europakollegs Brügge, www2.coleurope.eu.

[LXIV] 'Wir müssen das Lagerdenken angesichts dieser neu verteilten Zuständigkeit überwinden, wir müssen uns gemeinsame Ziele setzen und gemeinsame Strategien festlegen. Vielleicht können wir das ja dann gemeinsam so beschreiben: Abgestimmtes solidarisches Handeln - jeder in seiner Zuständigkeit, alle für das gleiche Ziel. Das ist für mich die neue 'Unionsmethode'.

[LXV] Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, www.esm.europa.eu.

[LXVI] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden, eur-lex.europa.eu.

[LXVII] One of the first measures in response to the financial and sovereign debt crisis was the adoption of Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism. The Regulation, which had a limited temporal scope and mobilised limited resources, was based on Article 122(1) TFEU.

[LXVIII] The so-called 'Six-Pack' comprised five regulations and a directive: Council Regulation (EU) 1177/2011

of 8 November 2011 amending Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States. The 'Six-Pack' was supplemented by two further Regulations (the 'Two-Pack') in 2013: Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability; Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits in the Member States in the euro area.

[LXIX] On the subject, especially on the difficulties involved in defining the operational scope of *pre-emption*, see Arena.

[LXX] Court of Justice, Judgment of 30 June 1993, Joined Cases C-181/91 and C-248/91, *Parliament v. Council and Commission*, ECLI:EU:C:1993:271, para. 16; Judgment of 2 March 1994, Case C-316/91, *Parliament v. Council,* ECLI:EU:C:1994:76, para. 26; Judgment of 27 November 2012, Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, para. 68.

[LXXI] Article 29 TEU, which refers to the 'national policies' of the Member States, and Article 24(2) TEU, states that CFSP is 'based [...] on the identification of questions of general interest and on the achievement of an ever-increasing degree of convergence of the actions of the Member States'. With reference to defence policy proper, Article 42(2) TEU provides that common defence policy should be framed progressively and specifies that CSDP 'shall not prejudice the specific character of the security and defence policy of certain Member States'.

[LXXII] Court of Justice, Judgment of 15 July 1964, Case 6/64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66.

[LXXIII] Declaration no. 17 on primacy, in which "[t]he Conference recalls that, according to the settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the European Union on the basis of the Treaties prevail over the law of the Member States under the conditions laid down in the aforementioned case law.

[LXXIV] Court of Justice, Judgment of 28 January 1986, Case 270/83, *Commission v. France*, ECLI:EU:C:1986:37, para. 26; Judgment of 27 September 1988, Case 235/87, *Matteucci*, ECLI:EU:C:1988:460, para. 14; Judgment of 10 November 1992, Case C-3/91, *Exportur v. LOR and Confiserie du Tech*, ECLI:EU:C:1992:420, para. 8; Judgment 15 January 2002, Case C-55/00, *Gottardo*, ECLI:EU:C:2002:16; Judgment 6 March 2018, Case C-184/16, *Achmea*, ECLI:EU:C:2018:158, paras 56-58.

[LXXV] Article 134 of the Convention Implementing the Schengen Agreement; Article 47(1) of the Prüm Treaty; Article 13(3) of the ESM Treaty; Article 2(2) of the Fiscal Compact; Article 2 of the Agreement on the Transfer and Pooling of Contributions to the Single Resolution Fund, concluded within the framework of the Banking Union; Article 20 of the Agreement on a Unified Patent Court.

[LXXVI] For instance, monetary policy became an exclusive (Community, then) Union competence after the Maastricht Treaty, albeit only in relation to the Member States whose currency is the euro. The scope of common commercial policy, long an area of EU exclusive competence, was considerably broadened by the Lisbon Treaty.

[LXXVII] Protocol integrating the Schengen acquis into the framework of the European Union. It was replaced by Protocol (no. 19) on the Schengen acquis integrated into the framework of the European Union.

[LXXVIII] Article 2(1), second subparagraph, of the Protocol. The Council implemented this provision by adopting two decisions: Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis; Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis.

[LXXIX] The United Kingdom and Ireland were granted the right to selectively participate in portions of the *acquis* and in the measures constituting its development. This arrangement, amended by the Lisbon Treaty and now contained in Articles 4 and 5 of Protocol no. 19, continues to apply to Ireland alone as a result of the United

Kingdom's withdrawal. Denmark, which unlike the United Kingdom and Ireland was a party to the Schengen Agreements, continues to be bound by the *acquis* and the measures developing it as a matter of international law, as provided for in the Protocol (no. 22) on the position of Denmark.

[LXXX] Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

[LXXXI] COM(2017) 821 final.

[LXXXII] Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM(2017) 827 final.

[LXXXIII] Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and medium-term budgetary guidance in the Member States, COM(2017) 824 final.

[LXXXIV] See the joint Franco-German Meseberg Declaration of 18 June 2018, www.elysee.fr.

[LXXXV] Article 24(1) TEU. Article 42(2) TEU recalls this definition, stating that CSDP includes 'the progressive framing of a common defence policy of the Union'.

[LXXXVI] Council Decision 2001/79/CFSP of 22 January 2001 setting up the Military Committee of the European Union.

[LXXXVII] Council Decision 2001/80/CFSP of 22 January 2001 on the establishment of the Military Staff of the European Union.

[LXXXVIII] Council Decision (EU) 2017/971 of 8 June 2017 laying down planning and conduct arrangements regarding EU non-executive military missions in the field of CSDP and amending Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, Decision 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian armed forces (EUTM Mali) and Decision (CFSP) 2016/610 on a European Union military training mission under CSDP in the Central African Republic (EUTM CAR). To date, the Military Planning and Conduct Capability (MPCC) is only responsible for non-executive military missions, i.e. those missions whose execution does not involve substitution activities for the territorial state and the possible use of force. The Strategic Compass foreshadows an expansion of the MPCC's competences, which should be placed in a position to also plan, coordinate and command executive operations and actual exercises and 'should be considered the command and control structure of preference'.

[LXXXIX] The European Medical Command (EMC), the Geo-meteorological and Oceanographic (GeoMETOC) Support Coordination Element (GMSCE) and the Network of Logistic Hubs in Europe and Support to Operations (NetLogHubs) projects.

[XC] Council Decision (CFSP) 2020/1639 of 5 November 2020 laying down general conditions under which third States may exceptionally be invited to participate in individual PESCO projects.

[XCI] Article 3 of Decision 2020/1639: 'A third State may exceptionally be invited to participate in a PESCO project, and may continue to participate, if it meets all the following general conditions:
(a) it shares the values on which the Union is founded, as laid down in Article 2 TEU, the principles set out in Article 21(1) TEU, as well as the objectives of the CFSP as set out in Article 21(2)(a), (b), (c) and (h) TEU. It must not run counter to the security and defence interests of the Union and its Member States, including respect for the principle of good-neighbourly relations with the Member States, and it must maintain a political dialogue with the Union, which should also cover security and defence aspects when participating in a PESCO project;
(b) provide substantial added value to the project and contribute to the achievement of its objectives. In line with the priority of a European collaborative approach, and in accordance with Article 4(5) of Decision (CFSP) 2018/909, the means it brings to the project shall be complementary to those offered by the Member States participating in PESCO, for example by providing technical expertise or additional capabilities, including operational or financial support, so as to contribute to the successful outcome of the project and, consequently, to the progress of PESCO;
(c) its participation contributes to strengthening the Common Security and Defence Policy (CSDP) and the Union's level of ambition as defined in the Council conclusions of 14 November 2016, including in support of CSDP missions and operations;
(d) its participation must not lead to dependence on that third State, or to restrictions imposed by it on any Member State of the Union, with regard to arms procurement, research and capability development, or the use and export of arms or capabilities and technologies, which hamper progress or prevent the joint or several use, export or operational deployment of the capability developed under the PESCO project. It has to develop an agreement at an appropriate level on the conditions for further sharing, outside PESCO and on a case-by-case basis, of capabilities and technologies to be developed in the framework of this project, in order to avoid these capabilities being used against the Union and its Member States;
(e) its participation shall be consistent with the more binding PESCO commitments set out in the Annex to

Council Decision (CFSP) 2017/2315, in particular the commitments that the PESCO project in question contributes to achieve, depending on the specificities of the project. For capability-oriented projects, its participation should also contribute to the realisation of the priorities stemming from the Capability Development Plan and the Coordinated Annual Defence Review (CARD), as well as having a positive impact on the European Defence Technological and Industrial Base (EDTIB) and making the European defence industry more competitive. In particular, the participation of a third state in a project should primarily contribute to the readiness, deployment and interoperability of forces;
(f) has an agreement in force with the Union on the security of information;
(g) concluded, where applicable, in accordance with Council Decision (CFSP) 2015/1835, an administrative arrangement which has taken effect with the European Defence Agency (EDA), where the project is implemented with the support of the EDA, taking into account the relevant EDA position paper (7); and
(h) has made a commitment, in its request for participation referred to in Article 2(1) of this Decision, to ensure compliance with the provisions of Decisions (CFSP) 2017/2315 and (CFSP) 2018/909'.

[XCII] The opening of a specific project to the participation of a third State presupposes that the members of the project unanimously agree 'a) that they wish to invite the requesting third State to participate in the project, b) on the scope, form and, where appropriate, the relevant stages of that third State's participation, and c) that the third State fulfils the general conditions set out in Article 3' (Article 2(3) of Decision 2020/1639).

References

- Arena, Amedeo. 2013. *Il principio della* preemption *in diritto dell'Unione europea*. Napoli, 2013.
- Blockmans, Steven and Dylan Macchiarini Crosson. 2021. 'PESCO: A Force for Positive Integration in EU Defence', *European Foreign Affairs Review* 26: 87–110.
- Blockmans, Steven. 2018. 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?', *Common Market Law Review* 55: 1785-1826.
- De Witte, Bruno. 2000. 'Old-Fashioned Flexibility: International Agreements between Member States of the European Union', in Grainne De Búrca and Joanne Scott, eds., *Constitutional Change in the EU: From Uniformity to Flexibility?*, Hart, Oxford, pp. 31-58.
- De Witte, Bruno. 2001. 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements', in Bruno De Witte, Dominik Hanf and Ellen Vos, eds., *The Many Faces of Differentiation in EU Law*. Intersentia, Antwerp-Oxford-New York, pp. 231-267.
- De Witte, Bruno. 2014. 'The European Union's Place among the International Cooperation Venues of its Member States', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 74: 445-464.
- De Witte, Bruno. 2021. 'The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', *Common Market Law Review* 58: 635-681.
- Finizio, Giovanni. 2018. 'Elysée Treaty', in Paolo Craveri, Umberto Morelli and Gaetano Quagliariello, eds., *Dizionario storico dell'integrazione europea*. Rubbettino, Soveria Mannelli, pp. 6868-6875.
- Fiott, Daniel, Antonio Missiroli and Thierry Tardy. 2017. 'Permanent Structured Cooperation: What's in a Name?', *EUISS Chaillot Paper* no. 142.
- Heesen, Julia. 2015. *Interne Abkommen: Völkerrechtliche Verträge zwischen den Mitgliedstaaten der Europäischen Union*. Springer, Heidelberg-Berlin.
- Martill, Benjamin and Carmen Gebhard. 2022. 'Combined Differentiation in European Defense: Tailoring Permanent Structured Cooperation (PESCO) to Strategic and Political Complexity', *Contemporary Security Policy* 43: 1-28.
- Me, Mario. 2007. 'L'iniziativa 5+5 della Difesa: genesi e sviluppi', *Informazioni della difesa* 27(6): 10-15.
- Miglio, Alberto. 2017. 'A Schengen of Defence? Integrating Clusters of Inter-State Defence Cooperation into the EU Legal Framework', CSF Policy Paper no. 25, csfederalismo.it.
- Miglio, Alberto. 2020. *Integrazione differenziata e principi strutturali dell'ordinamento dell'Unione europea*. Giappichelli, Torino.

- Miglio, Alberto. 2023. 'Lo sviluppo di capacità di difesa e la cooperazione strutturata permanente', in Michele Vellano and Alberto Miglio, eds., *Sicurezza e difesa comune dell'Unione europea*. Wolters Kluwer, Padova, p. 55-80.
- Miglio, Alberto and Gabriella Perotto. 2021. 'Una via per l'integrazione dell'Eurocorpo nel quadro giuridico dell'Unione europea', CSF Comment No 239, csfederalismo.it.
- Moro, Domenico. 2022/1. 'L'ora della difesa federale europea', CSF Comment no. 244, csfederalismo.it.
- Moro, Domenico. 2022/2. 'Difesa europea: l'iniziativa politica che serve', CSF Comment no. 247, www.csfederalismo.it.
- Perotto, Gabriella. 2023. 'Gli EU Battlegroups, l'Eurocorpo e altre forme di cooperazione fra Stati membri in materia di difesa', in Michele Vellano and Alberto Miglio, eds., *Sicurezza e difesa comune dell'Unione europea*. Wolters Kluwer, Padova p. 255-273.
- Perotto, Gabriella and Aberto Miglio. 2021. 'La difesa europea e il ruolo dell'Eurocorpo', CSF Comment no. 231, csfederalismo.it.
- Pistoia, Emanuela. 2018. *Limiti all'integrazione differenziata dell'Unione europea*. Cacucci, Bari.
- Porchia, Ornella. 2020. 'I rapporti bilaterali tra Stati membri nel quadro dell´Unione europea', *Il Diritto dell´Unione Europea* 25: 161-178.
- Rossi, Lucia Serena. 2007. 'Intégration différenciée au sein et à l'extérieur de l'Union: de nouvelles frontières pour l'Union?', in Giuliano Amato, Hervé Bribosia and Bruno De Witte, eds., *Genèse et destinée de la Constitution européenne*, Bruylant, Bruxelles, pp. 1219-1243.
- Thym, Daniel. 2017. 'Competing Models for Understanding Differentiated Integration', in Bruno De Witte, Andrea Ott and Ellen Vos, eds., *Between Flexibility and Disintegration. The Trajectory of Differentiation in EU Law*, Edward Elgar, Cheltenham, pp. 28-75.
- Vellano, Michele and Alberto Miglio, eds. 2023. *Sicurezza e difesa comune dell'Unione europea*. Wolters Kluwer, Padova.

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Digitalising Agricultural and Food Systems: policy challenges and actions for the sustainable transition in the EU

by

Mariagrazia Alabrese
Andrea Saba[I]

Perspectives on Federalism, Vol. 14, issue 3, 2022

Abstract

The agricultural and food system faces significant challenges related to climate change, sustainable production, and food security. Digital innovation and the adoption of "enabling" technologies offer promising solutions for addressing these challenges. The European Commission's "From Farm to Fork" Strategy and the Common Agricultural Policy (CAP) place digital technology at the forefront of achieving sustainable agri-food systems. The paper aims to analyse the recent European Union policy agenda concerning digitalisation and the adoption of digital technologies in agriculture and food systems to promote sustainability and food security in Europe. It emphasises the significance of appropriate regulation to ensure that the transformative impact of new digital technologies effectively addresses social and environmental challenges while ensuring inclusivity for all stakeholders.

Key-words

digitalisation; sustainable agriculture; Farm to Fork strategy; common agricultural policy (CAP); distributed ledger technology; digital innovation; digital food systems; agricultural data

With the support of the Erasmus+ Programme of the European Union

This publication is part of the Jean Monnet Module SUSTAIN "EU Law on Sustainable and Climate-Resilient Agriculture after the European Green Deal", co-funded under the EU Erasmus+ Programme of the European Union (620734-EPP-1-2020-1-IT-EPPJMO-MODULE).
The European Commission support for the production of this publication does not constitute endorsement of the contents which reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.
For more information on the EU Jean Monnet Module SUSTAIN, please visit sustain.santannapisa.it

1. Introduction

Addressing the impact of climate change and ensuring sustainable production in a context of growing climate vulnerability as well as improving food security and a better organising supply chain relationships are some of the challenges that the agricultural and food system is preparing to face. In this scenario, digital innovation and the development of applications based on the so-called "enabling" technologies can provide a tool to the actors in the agricultural and food systems to address the challenges in the near future (Basso 2020).

To drive the transition towards sustainable agricultural and food systems, the European Commission published the "From Farm to Fork" Strategy in May 2020, placing it at the heart of the European Green Deal.[II] The Strategy aims to comprehensively outline strategic directions for achieving sustainable agri-food systems that uphold the connection between healthy people, healthy societies, and a healthy planet. Within this strategy, the European Commission has identified innovation and digital technology as key factors to accelerate the sustainable transition. As part of the European data strategy, the European common space for agricultural data will strengthens sustainability, productivity, and competitiveness in the agricultural sector.[III] This will be achieved through the processing and the analysis of information related to production, land use, water usage, and environmental factors. These data-driven insights will enable precise and targeted actions at the individual farm level and facilitate broader monitoring from a systemic perspective (Carletto 2021).

The paper will investigate how the recent European Union policy agenda addresses the issue of digitalisation and the uptake of digital technologies in farming and food systems to ensure sustainability and food security in Europe. Proper regulation of the sector is of fundamental importance to ensure that the disruptive revolution of new digital technologies effectively addresses the social and environmental challenges and leaves no one behind.

2. The Agri-Food System Becomes Digital

According to the FAO, the next agricultural revolution will undoubtedly be digital (Trendov et al. 2019). Digital agriculture will impact the activities of farmers, upstream and downstream stakeholders in the agricultural and food systems, as well as wholesalers and retailers. The World Bank, in line with this perspective, notes that digital technologies have

the potential to accelerate the transformation of food systems in ways never seen before (Lampietti et al. 2021).

By "digital agriculture" or "agriculture 4.0," we refer to the use of new integrated technologies in a system capable of enhancing field operations more productive, efficient, and sustainable, while supporting farmers in decision-making processes related to their activities and interactions with other actors in the supply chain (McFadden 2022). These enabling technologies include field sensors, drones, robotic machines, and advanced devices that can communicate with each other and provide a large amount of data and information (Colantoni et al. 2018). New technologies contribute to defining the paradigm of Agriculture 4.0, which marks the disruption of technologies in the agri-food system through four key factors: the increase in the volume of data currently available, in computational power, and in connectivity; the capacity for data analysis, also in terms of business intelligence, through the use of artificial intelligence and deep learning; the development of new forms of human-machine interaction; and the results achieved in transferring digital data to the physical world and vice versa (Pesce et al. 2019).

As the process of digitalisation impacts not only the agricultural production but the entire food system, it is necessary to consider how technologies such as robotics, artificial intelligence, automation, purchasing platforms, etc., are becoming increasingly widespread and utilised in sectors like processing, packaging, storage, transportation, and retail (Rotz et al. 2019). The creation of more sustainable and secure food systems is among the main objectives generally associated with the use of new enabling technologies in the agri-food sector within international and European Union policies and strategies (Ehlers 2021). Digital transformation holds the promise of ushering in substantial economic, social, and environmental advantages.

Digital agriculture is witnessing a conspicuous shift in trends, notably marked by the proliferation of various robots, most prominently designed for weed control through diverse methodologies (ITU and FAO 2020). The spectrum of robot designs ranges from compact modular units to substantial, specialized tools tailored for specific agricultural contexts such as viticulture and organic vegetable farming. In tandem with robot development, automation is making significant inroads across various domains, particularly in automated irrigation and the partial or complete automation of greenhouse systems. This encompasses technologies suited for vertical farming. These automated systems predominantly harness innovative

sensor technology and data processing to forge novel systems. Additionally, tools aimed at enhancing the efficiency and automation of conventional equipment are also emerging. Another facet of automation is making its presence felt in livestock farming, offering functionalities such as round-the-clock livestock monitoring and automated cleaning.

Moreover, there is a discernible trend of integrating digital tools into everyday farming practices (FAO and ITU 2023). This integration is achieved through a diverse array of digital technologies at the farm level. These technologies encompass interconnected farm management systems that primarily amalgamate remote sensing, decision support systems, various sensors, cloud computing, farm management software tools, and frequently incorporate some form of artificial intelligence. Existing farm management systems are continually evolving in this direction, increasingly incorporating IoT technologies, and capitalizing on readily available open spatial data. Furthermore, a multitude of emerging startups is now offering analogous connected farm management systems, primarily catering to arable farming. These systems come bundled with a wide array of additional services derived from data, such as the calculation of management zones. Many of these systems also provide valuable data for yield monitoring and forecasting. These data-driven insights empower practitioners to boost production, streamline planning, and optimize various operational facets, including logistics, packaging, warehousing, and sales.

3. The Nexus Between Digital Agriculture, Food Systems, and Sustainability

According to the recent guidelines on food security and nutrition from the Committee on World Food Security (CFS), adopted in February 2021, food systems are sustainable when they ensure food safety, availability of supplies, and nutritional adequacy for present and future generations, within the three economic, social, and environmental dimensions of sustainable development.[IV] Sustainable food systems also need to be inclusive, equitable, and resilient (paragraph 21). Digitalisation, as mentioned, encompasses all phases and actors within the complex and multidimensional network of activities, resources, and stakeholders involved in the production and distribution of our food, representing food systems. Therefore, it is interesting to ask whether digitalisation can make a significant contribution

to the sustainability of food systems and what challenges lawmakers and policymakers need to consider with a forward-looking perspective (Adornato 2015).

The initial conceptualisation of the notion of sustainable development dates back to 1987 and is contained in the Brundtland Report, also known as "Our Common Future".[V] This report was named after the chairwoman of the World Commission on Environment and Development, established by the United Nations a few years earlier. The report emphasised the role of innovation and technology in enabling better and broader utilisation of natural resources. However, it also acknowledged that technological development could bring new challenges, such as "marginalising" large sections of the population. This concern aligns with the United Nations' 2030 Agenda, which highlighted the need for "leaving no one behind" and established the 17 Sustainable Development Goals (SDGs).

In the context of digitalisation of agri-food systems, the SDGs serve as a reference grid to understand the real scope of the phenomenon in relation to economic, social, and environmental sustainability goals. The use of new technologies, digitalisation, the Internet of Things (IoT), and various tools encompassed in "agriculture 4.0" or "digital agriculture" play a significant role in advancing all the Sustainable Development Goals. For instance, increased agricultural productivity positively impacts Goal 2 (Zero Hunger), reduced use of natural resources contributes to Goals 6 (Clean Water and Sanitation), 13, 14, and 15 (Climate Action and Life on Land and Below Water), more efficient post-harvest activities reduce waste (Goal 12), and the introduction of automation systems can improve working conditions in certain sectors (Goal 8).

However, the introduction of disruptive technologies in the agri-food sector also brings various trade-offs. For instance, these technologies consume significant energy, which may offset their climate and environmental benefits (Schieffer et al. 2015). Automation may lead to job loss, especially for less-skilled workers. Furthermore, there is the challenge of digital access, particularly in some regions or for small farmers and economic operators with fewer economic and human resources (Jouanjean et al. 2020). This is known as the digital divide, which becomes more pronounced when considering women, who, according to the FAO, face a triple divide: digital, rural, and gender (Trendov et al. 2019).

In addition to the digital divide and the related inaccessibility, lacking digital literacy and skills needed to use specific devices or interpret and leverage the data collected can hinder

harnessing knowledge from data (Tey 2012). Interoperability between various devices is another obstacle in effectively utilising data.

A recent study by the Panel for the Future of Science and Technology (STOA) of the European Parliament - published in March 2023 - has examined the impact of Artificial Intelligence (AI) in the agri-food systems.[VI] The study explores the main applications of AI and the associated risks, defining areas that may require specific legal and policy measures in the future to ensure that all stakeholders in the sector have fair access to the benefits that AI can bring to the agri-food system. Artificial intelligence is considered a key tool to support the sustainable transition of the agri-food system, enabling the development of new tools to improve supply chain processes and decision-making by economic actors (Lindblom 2017).

According to the study, effective management of agricultural data will create new opportunities to enhance the structure and competitiveness of agricultural businesses, streamlining costs and enabling better-informed decisions. However, the lack of data management skills and the adoption of digital tools in agriculture can limit the potential for digital transformation of the agri-food system. The study conducted by the European Parliament addresses key issues related to responsibility, risks, and ethical and social concerns regarding access and data management in the context of artificial intelligence development. The study proposes an ethical framework for designing and developing artificial intelligence technologies, based on six key pillars: equity, transparency, accountability, sustainability, privacy, and integrity (Dara et al. 2022). Among its policy recommendations, the study aims to define the responsibility of technology providers and envisions the possibility of legislative action to clarify the rights and legitimate expectations of agricultural businesses, technology providers, and society.

3.1 The case of distributed ledger technology in the EU

Among these technologies, distributed ledger technologies and blockchain play a prominent role. Exploring the opportunities, weaknesses, and prospects that blockchain technology can bring to the agri-food system involves dealing with a relatively young technology that needs to consolidate its use cases and address key aspects of agri-food systems (Attaran et al. 2019). Factors such as food safety, complex and structured supply chain relationships, difficulties in managing quality characteristics, and risk profiles related to

production should be taken into consideration (Paunov 2019). At the European level, there is no clear legal framework that regulates the use of blockchain technology. To bridge this gap, the European Commission established the EU Blockchain Observatory and Forum, which released an initial assessment report in September 2019.[VII] The report acknowledges the need for clarity to further support the development of blockchain technology and its potential applications in economic sectors. It highlights several areas where European Union will need to intervene, including the legal recognition of distributed ledgers at the territorial level and issues related to responsibility and data protection.

This European initiative follows the European Parliament's Resolution of October 3, 2018, on distributed ledger technologies and blockchain, which emphasises the importance of technology in improving supply chains[VIII]. It notes that distributed ledger technologies can facilitate the traceability of goods and their ingredients or components, enhancing transparency, visibility, and control of compliance, including the effectiveness of customs checks. It also recognises the potential for ensuring sustainability protocols through a distributed ledger, reducing the risk of illegal goods entering the supply chain, and ensuring consumer protection. The potential uses of blockchain technology in the agri-food system can address both business-to-consumer and the business-to-business relationships (Spoto 2019).

The majority of experiences focus on the business-to-consumer relationship, where agri-food companies have utilised blockchain-certified data to demonstrate product origin, the adoption of sustainable agricultural practices, or actions taken to measure their ecological footprint, meeting consumer expectations (Lattanzi et al 2020; Saba 2020). Blockchain technology finds its application in developing a distributed data registry system for agri-food products, by integrating digital and immutable traceability. However, the opportunities for its use in the business-to-business relationships between actors in the agri-food system, where it could facilitate vertical integration and better coordinate contractual relationships between farmers and processing and distribution companies, are still largely unexplored (Saba 2020).

In this scenario, digitalisation combined with the adoption of blockchain technology and protocols based on smart contracts can facilitate and improve commercial relationships among actors in the agri-food system. This can lead to reduced transaction costs, decreased complexity, and the introduction of a fully transparent and traceable verification system at

every stage of the commercial relationship (Commandré et al. 2021). Blockchain technology presents opportunities and potential uses, especially when used in synergy with other enabling technologies, such as Artificial Intelligence, Internet of Things, and Big Data. Together, they can create a digital ecosystem capable of managing the transition to a sustainable agri-food system that recognises the link between healthy individuals, healthy societies, and a healthy planet. However, innovation and new enabling technologies, evaluated for their ability to contribute to the intended goals, need to continue their development and experimentation to fully adapt to the specificities and complexities of the agri-food system (Lattanzi 2017).

4. Toward the ambitious pathways of EU Policies for the Digital Transition of the Agricultural and Food Systems

During the 2019 Global Forum for Food and Agriculture, 74 Ministers of agriculture addressed the topic of digital agriculture by adopting resolutions aimed at promoting environmentally and animal-friendly, high-quality, and safe agricultural production[IX]. These resolutions were intended to reduce costs, improve information availability and traceability throughout the food system, and facilitate trade (Jouanjean 2019). In this context, the Ministers committed to achieving four main objectives: 1) identifying and harnessing the potential of digitalisation to make agriculture more efficient, sustainable, and to improve rural living conditions; 2) expanding and ensuring farmers' access to digital technologies through training programs that impart the necessary skills; 3) improving farmers' use of digital data and ensuring its security and "sovereignty" in terms of protecting and respecting data ownership by the generating entity; 4) managing structural changes through the use of digital technologies in agriculture and rural areas to ensure their vitality and counter depopulation. This is an ambitious strategy that, if consistently implemented at the national or EU level, can lead the digital *revolution* of agri-food systems, while minimising the associated risks - especially the social risks related to excluding workers with limited digital skills and smaller farmers or data governance (FAO 2020).

For several years, the European Union has been exploring the possibilities of leveraging digital innovations in the agricultural and food sector to enhance agriculture and rural development.[X] The 2016 final paper titled "A strategic approach to EU agricultural research

and innovation," marks the culmination of this process, which commenced during Expo Milano in June 2015. Recognising the potential of "smart" applications, the 2016 final paper lays the groundwork for integrating digital innovations in the agricultural sector. An important step in this direction comes from the 2019 Declaration titled "A smart and sustainable digital future for European agriculture and rural areas", wherein almost all EU Member States commit to collaborating on the development of agricultural digitalisation. This commitment is viewed as a crucial and timely means to address economic, social, climatic, and environmental challenges. From this standpoint, the Common Agricultural Policy (CAP) is regarded as a suitable framework for establishing connections between farmers and digital innovation.[XI]

Furthermore, the European Green Deal, which envisages a more central role for agriculture in climate change mitigation, places significant emphasis on digitalisation.[XII] The Farm to Fork Strategy adopts a systemic approach, recognising the complexity of food chains and setting the ambitious goal of "food sustainability" that encompasses economic, social, and environmental aspects (Lattanzi 2021). As part of the strategy, the digital and technological transition of agriculture is prioritised to achieve better climate and environmental outcomes and enhance resilience to climate change. This entails encouraging farmers to adopt technology-based solutions, digital tools, and space-based resources such as remote sensing and open-access data from the EU Copernicus Earth Observation program. These innovative solutions present fascinating opportunities, but their successful implementation requires a skilled workforce and substantial financial investments.

To support this digital transformation, the European Commission's commitment to achieving 100% access to fast broadband internet in rural areas by 2025 is highly positive. Broadband internet access can facilitate the adoption of precision agriculture, artificial intelligence, and harness the EU's leading position in satellite technology, ultimately leading to improved land management, reduced fertiliser use, and greenhouse gas emissions. The main objective in this area is to promote private investments, including from the financial sector, and encourage the participation of SMEs and medium-sized enterprises. While private investments are crucial for driving technological transformation, there is a concern that they might primarily benefit larger, more established economic entities, potentially leaving smaller and marginalised entities behind (Alabrese 2020).

Consequently, it will be crucial to assess how the Common Agricultural Policy 2023-2027 will influence these aspects and, more importantly, how the national strategy for implementing the CAP will promote the digitalisation of agriculture and actively involve the diverse array of small to medium-sized farmers that characterise the agricultural economic landscape in Europe. In this regard, the renewed support for building Agricultural Knowledge and Information Systems (AKIS) under the CAP 2023-2027 will play a pivotal role in disseminating skills and knowledge and facilitating a bottom-up adoption of digital technologies by actors in the agricultural and food systems.

5. Concluding remarks

In the face of the complex challenges posed by climate change, sustainable production, and food security, the agri-food system stands at the threshold of a profound transformation. The fusion of digital innovation and "enabling" technologies offers a potent arsenal for surmounting these challenges. Europe's farsighted "From Farm to Fork" Strategy, aligned with the Common Agricultural Policy (CAP), positions digital technology as the vanguard of sustainable agri-food systems within the broader canvas of the European Green Deal.

This study has navigated the contours of the European Union's agri-food policy paradigm, dissecting its approach to digitalization and the assimilation of digital technologies into agriculture and food systems to bolster sustainability and food security. Unmistakably, the fulcrum for translating the promise of emerging digital technologies into impactful solutions resides in adept regulatory frameworks: crafting a visionary regulatory framework to harness the transformative potential of digital technologies while safeguarding sustainability and inclusivity is a task of paramount significance.

Moreover, the regulatory framework should evolve as a living organism, adapting to the dynamism of technology and its impact. A proactive approach that anticipates emerging trends, embraces experimentation, and calibrates swiftly to societal needs is essential. Continuous dialogue among stakeholders – from tech pioneers to rural custodians – forms the bedrock of a responsive architecture in this field. Central to the framework is the principle of inclusivity. It should dismantle digital divides and ensure equitable access to technologies, leveling the playing field for smallholders and rural communities. Digital literacy programs, targeted investments, and tailored incentives should infuse innovation,

bridging gaps and amplifying voices often unheard. Regulations should strike a harmonious balance between rapid adoption and sustainable scaling. While encouraging disruptive technologies, the framework should embed checks against ecological imbalances and resource depletion. The symbiotic relationship between innovation and environmental stewardship should be fostered through incentivizing eco-friendly practices and circular economy models. Finally, the guardianship of data privacy and ownership should be guaranteed. The regulatory framework should cultivate a culture of data trust, promoting transparent data-sharing mechanisms while safeguarding individual privacy rights. Sovereignty over data should empower farmers, ensuring they control the narrative of their own agricultural journey.

As the landscape of digitalization unfurls, it becomes resoundingly clear that the governance mechanisms put in place hold the key to unlocking the transformative potential of novel technologies. The veritable synergy between technological innovation and incisive regulation will define the course of addressing societal and environmental quandaries, ensuring an inclusive trajectory that leaves no stakeholder behind.

The trajectory of European agri-food systems toward resilience and sustainability hinges upon the harmonious interplay of digital ingenuity and robust regulatory scaffolding. The convergence of these elements promises a future where challenges are not only met but surpassed, and where stakeholders collectively thrive amidst the digital renaissance of agriculture.

[I] Mariagrazia Alabrese, Associate Professor of agricultural law, Scuola Superiore Sant'Anna, Pisa
Andrea Saba, Post-Doctoral Research Fellow of agricultural law, Scuola Superiore Sant'Anna, Pisa
Despite the article's unitary conception, Mariagrazia Alabrese drafted paragraphs 1, 2, and 5, while Andrea Saba drafted paragraphs 3, 3.1 and 4.

[II] Communication from the Commission, 2020, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, COM(2020) 381 final.

[III] Communication from the Commission, 2020, A European strategy for data, COM(2020) 66 final

[IV] CFS 2021/47/7/Rev. 1, 'The CFS Voluntary Guidelines on Food Systems and Nutrition (VGFSyN)'

[V] World Commission on Environment and Development, 1987, Our Common Future, Report transmitted to the General Assembly as an Annex to document A/42/427 - Development and International Cooperation: Environment

[VI] De Baerdemaeke et al, 2023, Artificial intelligence in the agri-food sector. Applications, risks and impacts, Panel for the Future of Science and Technology, Scientific Foresight Unit (STOA), European Parliamentary Research Service, Brussels.

[VII] Tom Lyons at al, 2019, Legal and regulatory framework of blockchains and smart contracts, Thematic report prepared by the European Union Blockchain Observatory and Forum, Brussels.

[VIII] European Parliament resolution of 3 October 2018 on distributed ledger technologies and blockchains: building trust with disintermediation (2017/2772(RSP)), C 11/7.

[IX] Global Forum for Food and Agriculture. Communiqué 2019: "Agriculture Goes Digital – Smart Solutions for Future Farming"
[X] European Parliament, 2019, Research for AGRI Committee – Impacts of the digital economy on the food-chain and the CAP, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels
[XI] Communication from the Commission, 2017, The Future of Food and Farming, COM(2017) 713 final
[XII] Communication from the Commission, 2019, The European Green Deal, COM(2019) 640 final

References

- Adornato Francesco, 2015, 'L'agricoltura che verrà', *Agricoltura, Istituzioni, Mercati*, 1
- Alabrese Mariagrazia, 2020. 'Politiche climatiche, politiche agricole e il bisogno di coordinamento', *Rivista di diritto agrario*, 3
- Attaran Mohsen et al., 2019, *Food Industry,* in M. Attaran, A. Gunasekaran, *Applications of Blockchain Technology in Business*, Springer, Cham
- Basso Bruno et al, 2020, 'Digital agriculture to design sustainable agricultural systems', *Nature Research*, 3
- Braun Anja-Tatjana, 2018, 'Farming in the Era of *Industrie* 4.0', *Procedia CIRP*, 72, 979-984
- Carletto Calogero, 2021, 'Better data, higher impact: improving agricultural data systems for societal change', *European Review of Agricultural Economics*, 48/4
- Colantoni Andrea et al, 2018, 'Smart Machines, Remote Sensing, Precision Farming, Processes, Mechatronic, Materials and Policies for Safety and Health Aspects', in *Agriculture*, 8(4)
- Commandré Yse et al, 2021, 'Implications for Agricultural Producers of Using Blockchain for Food Transparency, Study of 4 Food Chains by Cumulative Approach', *Sustainability*, 13/17
- Dara Rozita et al, 2023, 'Recommendations for ethical and responsible use of artificial intelligence in digital agriculture', *Frontiers in Artificial Intelligence*, 5
- Ehlers Melf-Hinrich et al, 2021, 'Agricultural policy in the era of digitalisation', *Food Policy*, Vol. 100, p. 102019
- FAO and ITU, 2023, *Digital excellence in agriculture report – FAO-ITU regional contest on good practices advancing digital agriculture in Europe and Central Asia*. FAO, Budapest
- FAO, 2020, *Realizing the Potential of Digitalization to Improve the Agri-Food System Proposing a New International Digital Council for Food and Agriculture*. A Concept Note, Rome
- Galli Francesca et al, 2020, 'How can policy processes remove barriers to sustainable food systems in Europe? Contributing to a policy framework for agri-food transitions', *Food Policy*, 96, 101871
- ITU and FAO, 2020, Status of Digital Agriculture in 18 countries of Europe and Central Asia. ITU, Geneva
- Jouanjean Marie-Agnès et al., 2020, *Issues around data governance in the digital transformation of agriculture: The farmers' perspective*, OECD Food, Agriculture and Fisheries Papers,
- Jouanjean Marie-Agnès, 2019, *Digital Opportunities for Trade in the Agriculture and Food Sectors*, OECD Food, Agriculture and Fisheries Papers, No. 122, OECD Publishing, Paris
- Lattanzi Pamela, 2021, 'Il "New Green Deal", la Pac 2021-2027 e la sostenibilità nelle produzioni alimentari', in Paolo Borghi, Irene Canfora, Alessandra di Lauro, Luigi Russo, *Trattato di diritto alimentare italiano e dell'Unione europea*, Giuffrè, Milano
- Lattanzi Pamela et al, 2020, 'Blockchain and the Food Supply Chain: The Future Of Food Traceability', in Andrea Caligiuri, *Legal Technology Transformation. A Practical Assessment*, Editoriale Scientifica, Napoli
- Lattanzi Pamela, 2017, 'L'agricoltura di fronte alla sfida della digitalizzazione. Opportunità e rischi di una nuova rivoluzione', *Rivista di diritto agrario*, 4, 1
- Lindblom Jessica et al, 2017, 'Promoting sustainable intensification in precision agriculture: review of decision support systems development and strategies', *Precision Agriculture*, Vol. 18/3, pp. 309-331
- No. 146, OECD Publishing, Paris

- McFadden Jonathan et al, 2022, The Digitalisation of Agriculture: A Literature Review and Emerging Policy Issues, OECD Food, Agriculture and Fisheries Paper, n. 176
- Metta Matteo at al, 2022, 'An integrated socio-cyber-physical system framework to assess responsible digitalisation in agriculture: A first application with Living Labs in Europe Agricultural Systems', *Agricultural Systems*, 203, 103533
- Paunov Caroline et al, 2019, *How are digital technologies changing innovation? Evidence from agriculture, the automotive industry and retail*, in OECD Science, Technology and Industry Policy Papers, n. 74.
- Pesce Monica et al, 2019, *Research for AGRI Committee – Impacts of the digital economy on the food-chain and the CAP*, European Parliament, Policy Department for Structural and Cohesion Policies, Brussel
- Rotz Sarah et al, 2019, 'The Politics of Digital Agricultural Technologies: A Preliminary Review', *Sociologia Ruralis*, 59(2)
- Saba Andrea, 2019, 'Blockchain e vino: una nuova frontiera', *Diritto Agroalimentare*, 3
- Saba Andrea, 2020, 'Sustainable Agri-Food Systems, Climate Change and CAP Strategic Plans in the ambitious pathways of the EU after the Green Deal', *Perspectives on Federalism*, 12, 1
- Schieffer Jack et al, 2015, 'The economic and environmental impacts of precision agriculture and interactions with agro-environmental policy', *Precision Agriculture*, Vol. 16/1
- Schroeder Kateryna et al, 2021, *What's Cooking: Digital Transformation of the Agrifood System*. Agriculture and Food Series, World Bank, Washington, DC
- Spoto Giuseppe, 2019, 'Gli utilizzi della blockchain e dell'Internet of Things nel settore degli alimenti', *Rivista di diritto alimentare*, 13, 1
- Tey Yeong Sheng et al, 2012, Factors influencing the adoption of precision agricultural technologies: A review for policy implications, Precision Agriculture, Vol. 13
- Trendov M. Nikola at al, 2019, *Digital technologies in agriculture and rural areas*. Status report, FAO, Rome

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

An Inconvenient truth: the narrow trade-off between Equity and Climate Security

by

Davide Orsitto[I]

Perspectives on Federalism, Vol. 14, issue 3, 2023

Abstract

This paper explores the narrow trade-off between climate mitigation policy, growth and income inequality, by examining the empirical evidence on the equity-pollution dilemma faced by policymakers when addressing both climate change and inequality altogether. Initially, a review of the existing literature delineates the evolution of how the relation between climate mitigation policy, growth and inequality is analyzed in research, transitioning from the Environmental Kuznets Curve to the Equity-Pollution Dilemma. The paper then moves to its empirical section, analyzing carbon emission and inequality statistics for a sample of 29 countries that cover industrialized and developing economies. In its concluding remarks, the paper underscores the need for a balanced approach that comprises both climate change mitigation and economic equality in the equation, stating how wealthier nations must pioneer assertive climate initiatives.

Keywords

Climate Mitigation, Inequality, Growth, Trade-off

Introduction

Since the outbreak Almost two decades have passed since then United States' vice president Al-Gore showed himself to the world in *An Inconvenient Truth,* where he tried, with scientific-based evidence, to awaken the public on how climate change was creating a planetary emergency that had near-certain correlation with human activities. In the popular documentary-film, Gore brings up the challenge in spreading the message despite the compelling evidence supporting his claim because, he argues, humans usually cannot bear too much reality. When a truth is uncomfortable and demands a change in regular behavior, it is naturally going to be met with resistance. So well has his argument fared that he released a sequel in the aftermath of the Paris climate accords in 2015, the first international treaty with binding provisions to limit surface mean temperature within the 2°Celsius threshold, where he conveys the urgency to do more lest we bring about sea level rise, extreme weather events, and loss of biodiversity. These threats have been repeatedly brought up by the reports of the Intergovernmental Panel on Climate Change (IPCC), a scientific body that operates under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC), which has been increasingly proactive in analyzing and disseminating the awareness about the risks of climate change with science-related tools.

Although the IPCC reports have become progressively more sophisticated, regular, and methodologically sound, here's the next inconvenient truth that both the reports and Gore's disclosures should highlight on climate change: the policy to address it could inadvertently increase poverty and income inequality. The real dilemma in pursuing diverse policy goals such as redistributive policies and emission reduction regulations lies in identifying the optimal trade-off that maximizes overall success.

1. The trade-off between inequality and climate change: From the Environmental Kuznets curves to the Equity-Pollution Dilemma

When it comes to the authors analyzing the relation between income growth and inequality and climate-friendly policy, the standard literature (Grossman and Krueger, 1995) supports what is called the hypothesis of the Environmental Kuznets curve, with evidence from the 1990s showing how pollution in terms of CO2 emission decreases along with

countries' GDP increases, making an inverted U shape: initially, as GDP increases, environmental degradation increases due to greater spending on polluting fuels. Beyond a certain income threshold, however, environmental degradation proxied by CO2 emission or deforestation decreases as societies prioritize other types of energy mixes and become aware of climate degradation.

The U-shaped relation between the environmental pollution and GDP growth has significantly influenced how the literature has interpreted climate mitigation policies by forming a synergistic image of the relation between inequality and climate change: either an increase in inequality further intensified climate change due to excessive consumption of polluting energy sources by the top percentile population (Piketty 2014), or that climate change, associated to extreme weather events, tends to widen economic inequalities by affecting crop productivity, causing water shortages, and resulting in infrastructural damage (Milanovich 2016).

These traditional approaches have fostered a prevailing view contending that, by addressing climate change, the policy maker would inherently incur in positive externalities and a reduction in income or wealth inequality as well. Baek and Gweisah (2013) were among the pioneers who, despite identifying an ultimate positive correlation between income growth and climate mitigation policies, introduced the scenario where environmental policies curbing and regulating carbon consumption have undesired distributional effects. Consequently, environmental policy may lead to greater inequality, and efforts to solve an issue may give rise to unforeseen negative externalities. According to the mentioned authors, the U-Shaped Environmental Kuznets Curve does not provide an explanation for why industrialized nations reach a peak in environmental pollution, to subsequently reduce emission levels at higher growth level. Levinson and O'Brian (2019) thoroughly ask whether richer people opt for less polluting goods, or richer countries pass regulations making polluting goods more expensive, introducing the concept of the Environmental Engel Curves. The Environmental Engel Curve analyze household or individual carbon at different levels of income and the type of emissions that goods and services that are chosen at different distributional levels are chosen.

In the wake of Levinson and O'Brien (2019), Sager (2019) firstly formulates the *equity-pollution dilemma,* which states how positive income redistribution may raise aggregate household greenhouse gas emission by calculating Environmental Engel Curves in the

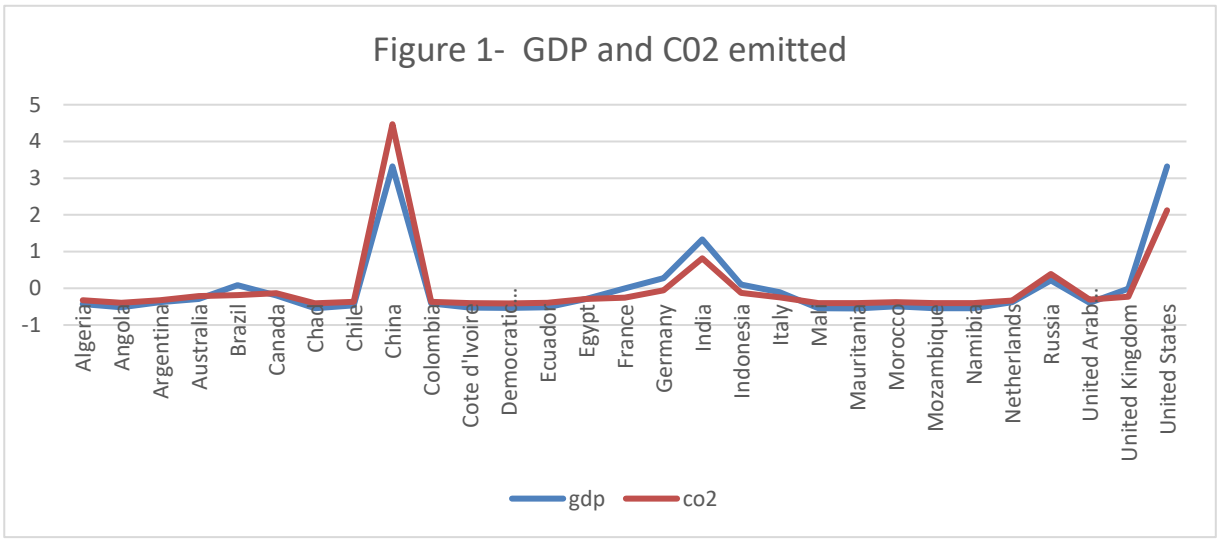
United States. While devising various redistributive scenarios, Sager predicts that Sweden-like income transfers in the United States in 2009 may have increased household carbon by 5.1%. More specifically, marginal micro-level transfers of $1000 from a richer to a poorer household in 2009 may have increased the CO2 emission of the household by a mean 28.5 Kg for each subsidized impoverished household. Sager concludes that, however, the equity-pollution dilemma does not necessarily put climate change against the pursuit of economic equality. An optimum trade-off between redistributive policy and CO2 increase should be looked at in terms of social utility: an inequality-averse policy maker may accept the benefits of a $1000 transfer as they might outweigh the additional environmental cost of greater CO2 levels.

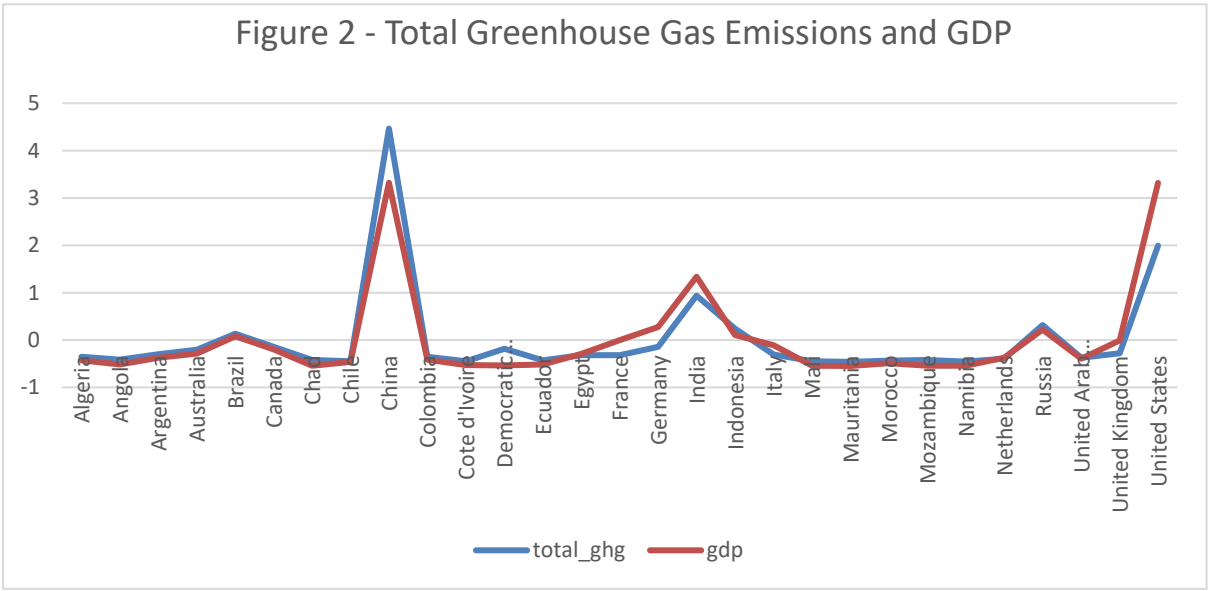
2. The Equity-Pollution dilemma for developing countries

The equity-pollution dilemma has finally been effectively resumed by mounting evidence, brought forward by IMF report[1], which shows that climate security and inequality are two objectives that have a narrow trade-off, especially in developing economies. On the one side, the economic and social impact of climate change is unequal: rising temperatures from fossil fuels and greenhouse gas buildup could have direr consequences on low-income countries. Climate threats such as draughts, storms and hurricanes, rising sea levels and increased water temperature affect more directly activities that poorest economies are specialized in, such as the agriculture, forestry and fisheries sector. On the other, the socio-economic cost of the measures enacted to mitigate climate change (namely, subsidies to types of cleaner fuels in the energy transition, decarbonization strategies, and the like) could stifle developing countries' economic growth. Finally, the dual-sided weakness experienced by many developing countries that stems from both the inequalities induced by climate change and its mitigation policy unveils another paradox.

Figures 1 and 2 describe the paradox by examining the standardized GDP and total carbon dioxide emission values in 2018 of a selected sample of industrialized countries (EU, Canada, US) and a differentiated geographical set of developing countries, among which BRIC countries. The two figures reveal that GDP is strictly positively related to total

greenhouse emissions, which means that richer countries in 2018 emitted a proportional amount of greenhouse emissions.

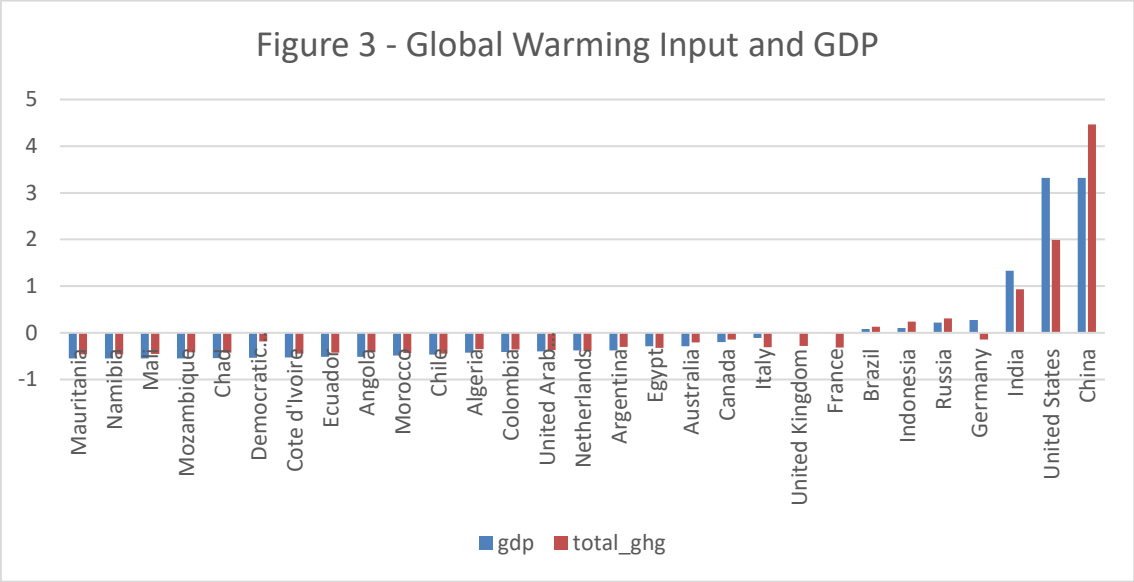




Source: Our World in Data *CO2 and Greenhouse Gas Emissions database.* Author's own calculations.

Figure 3 instead looks at standardized values of greenhouse emissions, which accounts for each country contribution to climate warming, and Gross Domestic Product, which

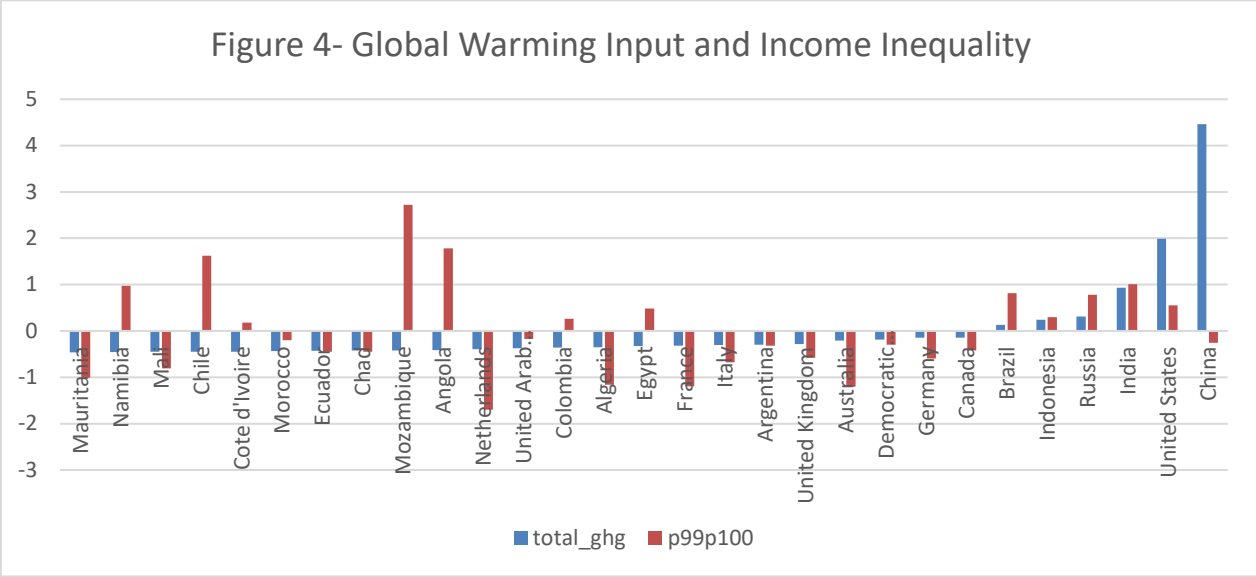
accounts for measures of economic prosperity. As the values are standardized, bars above the 0 line are values that are above average and vice versa. The evidence reveals that the US, Russia, China, and India in 2018 unsurprisingly have above-average Global warming input and GDP with regards to economically and demographically smaller countries. The US however seems to have had the greatest suffering from climate change, together with the Russian Federation, with relation to how much gas emissions have they produced. Aggregate data from the European Union could not be retrieved in the same time frame.



Source: Our World in Data *CO2*

and Greenhouse Gas Emissions database. Author's own calculations.

Figure 4 conversely examines the change in superficial temperature associated to greenhouse emission for 2018, that proxies for climate risk, or the amount of damage received from climate change, and the associated measure of income inequality, which is income perceived at the top 1% of the distribution. As can be seen, countries that have contributed less to climate change on average tend to have higher income inequality than countries that have contributed more on climate change. Striking examples are the United States and China, which feature a very important share of greenhouse emissions, but feature lower income inequality at the top than countries who have less emissions. Namibia, Chile, Mozambique, Angola Russia, Brazil, and Angola all have far higher inequalities than their contribution to development.



Source: Our World in Data *CO2 and Greenhouse Gas Emissions database,* Author's manipulation

The findings suggest a preliminary convergence to the argument that analysis of climate risk should invariably be integrated with economic distributional analysis to ascertain the best trade-off between addressing climate change and lifting millions from poverty. The narrow tradeoff between a socially secure environmental transition and an environmentally viable economic growth implies that climate change mitigation efforts should be equitably distributed in the income distribution to ensure they serve the broader objectives of development, poverty, and inequality reduction. Wealthier nations, owing to their larger historical contribution and greater capacity to afford mitigation, should spearhead ambitious climate actions and cooperate with less affluent nations to alleviate their mitigation burdens. To achieve this end, the 16th Conference of the Parties (COP 16) had introduced the Green Climate Fund (GCF), a multilateral institution that fosters growth and funds green programs that help developing countries to reduce their greenhouse emission. In 2015, via the Paris accord, the fund has become fully operational, with an aim to raise more than 100 billion dollars for climate finance activities by 2020. However, the fund is controversial due to a lack of transparency in both stating its real resources and in achieving its objectives. More importantly, the fund has approved more than $10 billion in funding for more than 160 projects and programs in developing countries to reduce greenhouse emissions, but

effectively many projects still financed fossil fuel production plants. Finally, the GCF does not actively work to reduce inequalities by compensating developing countries for the opportunity cost incurred by giving up projects that would temporarily increase greenhouse gasses for the sake of greater development and growth. In the next Conference of the Parties (COP 28) occurring in Dubai, United Arab Emirates, states ought to consolidate a strategy of financial transfers should therefore be employed and encourage their participation in mitigation efforts, financial transfers across nations can be employed.

[1] Government Official for The National Recovery Plan of Italy. Email: dorsitto@gmail.com

References

- Baek, J., Gweisah, G. (2013). Does Income Inequality Harm the Environment?: Empirical Evidence from the United States. *Energy Policy*. Vol. 62: 1434-1437.
- Grossman, G. M., & Krueger, A. B. (1995). Economic growth and the environment. The Quarterly Journal of Economics, 110(2), 353–377. https://doi.org/10.2307/2118443
- Grossman, G., & Krueger, A. (1993). Environmental impacts of a North American Free Trade Agreement. In P. M. Garber (Ed.), The Mexico-U.S. Free Trade Agreement. MIT Press.
- Levinson, A., & O'Brien, J. (2019). Environmental Engel curves: Indirect emissions of common air pollutants. The Review of Economics and Statistics, 101(1), 121–133. https://doi.org/10.1162/rest_a_00736
- Milanovic, B. (2016). Global inequality: A new approach for the age of globalization. Harvard University Press. https://doi.org/10.2307/j.ctvjghwk4
- Piketty, T., & Goldhammer, A. (2014). Capital in the twenty-first century. Belknap Press of Harvard University Press. https://doi.org/10.4159/9780674369542
- Ritchie, H., Roser, M., & Rosado, P. (2020). CO_2 and Greenhouse Gas Emissions. Our World in Data. Retrieved from https://ourworldindata.org/co2-and-greenhouse-gas-emissions.
- Sager, L. (2019). Income inequality and carbon consumption: Evidence from Environmental Engel curves. Energy Economics, 104507. https://doi.org/10.1016/j.eneco.2019.104507
- Taconet, N., Méjean, A., & Guivarch, C. (2020). Influence of climate change impacts and mitigation costs on inequality between countries. Climatic Change, 160, 15–34. https://doi.org/10.1007/s10584-019-02637-w

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Federalism and the Rights of Persons with Disabilities: An Introduction to the Symposium

by

Delia Ferri, Francesco Palermo and Giuseppe Martinico[I]

Abstract

The aim of this article is to offer an introduction to the Symposium devoted to *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

1. The Idea Behind the Volume

Federalism and the Rights of Persons with Disabilities is an ambitious book, which represents a starting point to embolden legal academics to abandon inward-looking approaches on the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) and embrace the critical potential of comparative federalism. At the same time, it invites comparative federalism scholars to look at the effects on federal systems through the lenses of specific policies and rights, especially recent and less considered ones, like disability rights.

The idea to publish this book arose in 2021, fifteen years after the adoption of the CRPD, together with its Optional Protocol (OP-CRPD) at the UN, and ten years after the ratification of the CRPD by the European Union (EU). At such a critical juncture, as editors, we felt it was important to use comparative federalism literature to advance the state of knowledge on the implementation of the CRPD in multi-level systems. In fact, we felt that comparative federalism can contribute to reflecting on the different qualities that rulemaking in national and subnational entities may display in the protection and promotion of fundamental rights, including 'newer' ones such as disability rights. In this regard the book aligns and tallies with the more recent general acknowledgement that '[c]omparative transnational study is of relevance in shedding light on the evolution, implementation and monitoring of global disability standards' (Broderick, 2023).

So far, while the relation between federalism and fundamental rights has traditionally been all but straightforward, oscillating between highlighting historical experiences of abuse of subnational powers to limit rights (especially in the US) and acknowledging the potential of federalism to better protect them (Schapiro, 2009), the specific case of the rights of persons with disability is still under-researched. Furthermore, the scant scholarship on the inter-relation between federalism and disability law for the most predates the CRPD and is characterised by the lack of a human-rights approach to disability (Cameron and Fraser 2011; Prince 2001). Current research on the CRPD focuses on the Convention as a core human rights treaty, (Bantekas, Stein and Anastasiou 2018) within the broader realm of international human rights law (de Beco 2021; Blanck and Flynn 2017; de Beco 2019; Kakoullis and Johnson 2020). Disability law scholars have also investigated how the obligations set out in the CRPD have been fulfilled by selected State Parties in distinct domains, such as, inter alia, education (de Beco, Quinlivan and Lord 2019; Biermann 2022), or mental health (Weller

2013). In that connection, several contributions have analysed changes in policymaking and legislative advancements driven by the Convention (de Beco 2013; Ferri and Broderick 2020). Other scholarly work has discussed the extent to which the CRPD can act as a driver to improve the lives of people with disabilities (Flynn 2011). Comparative work on the implementation of the CRPD by domestic courts has been edited by Waddington and Lawson (Waddington and Lawson 2018). However, very little research has been undertaken on the impact that the CRPD has had on constitutional structures and, even less so, on the division of powers in federal systems.

Legal research has increasingly discussed not only the normative content of the CRPD itself, but also its domestic implementation, either focusing on distinct rights provided for in the Convention or presenting country case studies. Scholars have often engaged in vertical comparison between the CRPD and national law, encompassing some sort of compliance analysis. Horizontal comparisons across the CRPD, international and regional legal instruments have also gained momentum. Almost no attention has been paid to the potential that federal arrangements can display in the implementation of disability rights, in facilitating matching of citizen preferences, accommodating diversity, leading to more efficient policy outcomes. By contrast, the somewhat recurrent lament about the complexity of implementing the CRPD in federal countries, the growing disappointment with the patchy realisation of disability rights in highly decentralised countries, often disguises an undertone of dissatisfaction about decentralisation and federalism themselves, as it emerges from the present study. Nothing in this volume proves that a federal system *per se* is an obstacle to the proper implementation of the obligations under the CRPD. Such obstacles can be rather found either in the unsatisfactory functioning of the multi-layered governance as a whole, or in the problematic approach to (certain) rights laid down in the Convention, but not in the combination 'federal system – CRPD'. To the contrary, the effects of the CRPD on federal structures has been as indirect and 'unaware' as it has been *de facto* centralising the division of powers. This book has filled a gap in current literature and tendered an analysis of the implications of the CRPD in federal countries, bringing federalism front and centre of each chapter. The comparative method has then been the key to gauge the potential of the CRPD to affect constitutional structures, and its actual effects on the sharing of competences in federal countries which present a multi-layered governance of disability issues.

2. A Human Rights Approach to Disability

The volume is informed and underpinned by a human rights approach to disability, and recognises that the CRPD is *the* global standard on disability rights. In doing so it rejects a medical conception of disability, and the idea of disability as mere individual deficit, deriving from a disease hampering the physiological or cognitive functioning (Drum, 2009). This 'medical model' of disability, which considered people with disabilities unable to participate in society as the result of their own impairments, began to be confronted by disability activists in the 1960s, both in the US (Blanck, Waterstone and Myhill 2014; Pelka 2012; Charlton 1998; Zola 1982; Davis 2015) and in the United Kingdom (Meekosha and Jakubowicz 1999). In the 1970s, the British Union of Physically Impaired Against Segregation (UPIAS) elaborated the idea that society disables people with impairments.[II] Michael Oliver, a UK disabled academic, further expounded a conception of disability as a societal construction, currently termed the 'social model of disability' (Oliver 1996). The 'social model of disability', its numerous academic elaborations (Barnes 2016) and critical accounts (Shakespeare 2006; Morris 1991) have stimulated the international development of disability rights as a key element of the UN work (Kanter 2017; Ferri, Broderick and Leahy, 2024 forthcoming) and informs the content of the CRPD.

From 1970 to 1980, according to Degener and Begg, persons with disabilities became recognised as 'subjects of rehabilitation' (Degener and Begg 2017), whilst tentative signs of a rights-based approach to disability became evident, for example, in the Declaration on the Rights of Disabled Persons.[III] Degener and Begg note that, from 1980 to 2000, persons with disabilities became 'objects of human rights' (Degener and Begg 2017), and the 1993 (non-binding) Standard Rules on the Equalization of Opportunities for Persons with Disabilities[IV] represented a momentous political commitment to realising equality for persons with disabilities. The new millennium represented a crossroads, in that 'international disability policy became a rights-based policy' (Degener and Begg 2017), and a binding treaty to ensure equal rights to persons with disabilities was indicated as the key objective to be achieved. An Ad Hoc Committee was set up in December 2001 by the UN with the mandate to draft a comprehensive international convention.[V] This Ad Hoc Committee released the text of the CRPD, which, as mentioned above, was formally adopted by the UN on 13 December 2006, entering into force on 3 May 2008.

The CRPD is the first international human rights treaty that seeks to ensure the protection and promotion of the rights of persons with disabilities on an equal basis with others. It does not aim to create new rights, but it 'extends existing human rights to take into account the specific experience of persons with disabilit[ies]' (Mégret 2008). With its Preamble, which is quite long and detailed, and fifty articles, it '[forges] new ground and requires new thinking' (Pillay 2014). The transformative potential of the CRPD is linked to the fact that it recasts disability as a social construct. In doing so, the Convention focuses on the removal of barriers to ensure the equal exercise and enjoyment of rights by persons with disabilities and their full participation in society. In fact, Article 1 CRPD acknowledges that 'disability results from the *interaction* between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others' (emphasis added).[VI] Notably, Article 1 CRPD allows for a dynamic approach that can facilitate adaptations over time and in different socio-economic settings, and does not set forth any distinction between different categories of disability.

The novelty of the CRPD also arises from the embedment of the 'human rights model of disability', which has been elaborated by Degener (Degener 2017). Such model as mentioned underpins the overall volume. Without engaging in a thorough discussion of this model, it suffices here to recall some of its core features. Degener argues that this model emphasises the human dignity of persons with disabilities, and 'encompasses both sets of human rights, civil and political as well as economic, social and cultural rights' (Degener 2017). She suggests, *inter alia*, that the human rights model values impairments as part of human diversity, paying attention to intersectional discrimination. Further, the human rights model 'offers room for minority and cultural identification' (Degener 2017).

Alongside being underpinned by the human rights model of disability, the volume on the whole and each chapter focus on selected areas that correspond to key principles of the CRPD: Non-Discrimination and Equality, Accessibility and Participation. Notably, the principle of non-discrimination has been described as the 'leitmotif' of the CRPD (Arnardóttir 2009), as it cuts across both civil and political rights, such as the right to legal capacity, and economic, social and cultural rights, such as the right to education. Article 2 CRPD provides a broad definition of discrimination on the ground of disability, stating that such discrimination comprises the denial of reasonable accommodation, whereby reasonable accommodation is any 'necessary and appropriate modification and adjustments', 'where

needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. The duty to provide reasonable accommodation must be distinguished from accessibility, which, as noted above, is another core principle of the Convention.

Article 9 CRPD on accessibility requires States Parties to take appropriate measures to ensure that people with disabilities have access to environments, facilities, information and services on an equal basis with others. Accessibility duties are generalised and group-based, as well as anticipatory (*ex tunc*).[VII] Moreover, Article 4(1) CRPD includes an array of obligations that are linked to the realisation of the principle of accessibility. These encompass the duty to engage in or promote the research and development of new technologies[VIII] and the requirement for States Parties to provide accessible information.[IX] The CRPD Committee identifies accessibility as an essential 'precondition' for the enjoyment of other human rights and as 'a means to achieve *de facto* equality for all persons with disabilities'.[X]

The principle of participation and inclusion of people with disabilities in society is also a core feature of the Convention. In fact, the CRPD requires the involvement of persons with disabilities in society, and in all spheres of policymaking.[XI] Ensuring participation of persons with disabilities is particularly important for fostering awareness-raising and promoting respect for the rights and dignity of persons with disabilities.[XII]

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

Notably, the volume does not endeavour to cover the implementation of each article of the CRPD. Articles 10 through 30 CRPD, which enumerate specific rights that the Convention promotes and protects and encompass civil, political, economic, social and cultural rights, are however often recalled through the analyses. Notably, among these

provisions, central to the CRPD is the right of persons with disabilities to legal capacity (i.e. the capacity to be a holder of rights and the capacity to act under the law) enshrined in Article 12 (de Bhailís and Flynn 2017), which the chapters of the volume recall at various junctures. This Article also imposes on States Parties the obligation to provide persons with disabilities with adequate supports in the exercise of their legal capacity, in order to enable them to make decisions that have legal effect. Support provided in the exercise of legal capacity must respect the rights, will and preferences of a person with a disability, and it should never amount to substitute decision-making.[XV] While Article 12 has been quite 'controversial' (Scholten and Gather 2018; Pearl 2013), it has also been deemed revolutionary in that it challenges the traditional approaches to legal capacity and guardianship systems (Cuenca Gómez, del Carmen Barranco Avilés, Serra, Ansuátegui Roig and Rodríguez del Pozo 2017). Closely related to Article 12 is Article 19 CRPD, which contains the right to live independently and be included in the community, prohibiting institutionalisation and segregation of persons with disabilities. In particular, although not exclusively, Article 24 on the right to education, Article 25 on the right to health, Article 27 on the right to work, Article 28 on the right to social protection and Article 30 CRPD on the right to participation in cultural life, place, to different degrees, a focus on the inclusion and participation of persons with disabilities in society. Kayess and French suggest that these provisions oblige States Parties to incorporate 'disability sensitive measures into mainstream service delivery' and to ensure 'the provision of necessary specialist services and special measures in a manner that facilitates the inclusion and participation of persons with disability within the general community' (Kayess and French 2008).

In dealing with the CRPD implementation, we as editors, as well as authors have been mindful of the traditional distinction between rights that are subject to immediate implementation (i.e. civil and political rights) and those that are to be realised progressively (i.e. economic, social and cultural rights), a distinction that Article 4(2) CRPD reiterates. However, as argued by Stein (Stein 2007), the CRPD blurs the distinction between these traditional categories of rights and has 'compounded the different categories of rights' throughout its provisions (de Beco 2019).

3. The Implementation of the CRPD and Its Complexities

Overall, the CRPD can be considered 'the single most exciting development in the disability field in decades' (de Bhailís and Flynn 2017) and a 'catalyst for change' (Arbour 2006). To effect that change, the CRPD itself recognises that implementation and monitoring are essential. In this regard the volume does pay particular attention to these aspects, and reflects on the need to adapt implementation and monitoring systems to constitutional structures without undermining the Convention's values and effects.

States Parties to the CRPD are required to adopt legislative, administrative, financial, judicial and all other necessary measures to ensure the realisation of the object and purpose of the CRPD. They must review and amend national laws and policies to ensure compliance with the Convention. Article 4(1)(c) CRPD requires that States Parties mainstream disability in all their policies, and Article 4(1)(d) CRPD obliges States Parties to ensure that public authorities and institutions act in compliance with the Convention. As it is typical for international treaties, there are no specific references in these provisions to the role of the national and subnational levels of governments. Also, there is no definition of 'public authorities and institutions' in the CRPD itself, as these will be identified at the domestic level, in light of the constitutional arrangements of that country, following the still predominant 'federal blindness' approach of international law (Ipsen 1966). However, those provisions must be read in conjunction with Article 4(5) CRPD, which affirms that the obligations laid out in the Convention 'extend to all parts of federal States without any limitations or exceptions'. The latter norm is designed to ensure that both subnational and federal authorities fulfil their implementation obligations under the Convention.

The CRPD, as with other international treaties, includes a specific Regional Integration Organisation clause (RIO clause) specifically aimed at accommodating the European Union's (EU) peculiar legal nature and allowing it to ratify the Convention. While the division of powers which is internal to a federal state remains entirely a domestic matter, the sharing of competences between the EU and its Member States acquires relevance, but only in the context of international responsibility.[XVI]

Notably, the CRPD recognises that the full realisation of human rights depends on appropriate governance mechanisms. It obliges States Parties to put in place structures at the domestic level with a view to facilitating the implementation of the Convention and to

monitoring such implementation. Article 33 CRPD sets forth the obligations to: designate one or more focal points to implement the CRPD (Article 33(1) CRPD); give due consideration to the establishment of a mechanism to coordinate the implementation process (Article 33(1) CRPD); and put in place a structure to protect, promote and monitor the implementation of the Convention (Article 33(2) CRPD). In addition, Article 33(3) CRPD requires States Parties to involve civil society, in particular Disabled People's Organisations (DPOs) in monitoring processes. Quinn suggests that Article 33 in its entirety is a key innovation, with the potential to transform the 'majestic generalities' of the Convention into concrete reform at the domestic level (Quinn 2009).

The focal point must be set up within the government for matters relating to the implementation of the Convention and resources must be allocated to carry out its function and collaborate with persons with disabilities.[XVII] However, Article 33(1) CRPD leaves a margin of discretion to the State Party on whether to create a single focal point or multiple focal points (both horizontally – by creating multiple focal points in the national government and vertically – by creating focal points at the subnational level), although Manca suggests that, during the negotiations on the CRPD, a strong preference for multiple focal points was expressed (Manca 2017). Aichele even maintains that Article 33 CRPD could be read as imposing an obligation on federal states for each of the governments to have a focal point (Manca 2017). In fact, during the drafting process, federal states had 'pointed out that it would be in the interests of their regions to be equipped with focal points that would enable them to ensure their inner sovereignty' (Aichele 2018).

Article 33(1) CRPD also requires States Parties to 'give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels'. The establishment or designation of a coordination mechanism is not a legal obligation, however, and the distinction between the functions of the focal point and the coordination mechanism remains vague and blurred. Nonetheless, in decentralised states, the establishment of the coordination mechanism should be of vital importance to ensure the smooth implementation of the Convention across different levels of government. In that regard, taking into account previous research (de Beco 2013), this volume investigates whether traditional institutional forms of territorial participation have been replicated into the focal point, and whether the coordination mechanism in Article 33 CRPD acts as a 'transmission belt' between the national and the

subnational entities' governments.

It is evident that the CRPD necessitates States Parties to intervene on their governance structures. By including provisions such as Article 4(5) and Article 33(1), the drafters of the CRPD were somewhat mindful of the particular challenges that the implementation of the CRPD brings about in federal systems, where competences on pivotal areas, such as e.g. accessibility, are shared between national and subnational levels. However, these provisions have not prevented gaps in the implementation. Furthermore, a lack of coordination has progressively emerged in federal systems and has been highlighted by the CRPD Committee in its Concluding Observations on States Parties reports. A recent report, written by Woodin for the European Blind Union, indicates the lack of coordination as an issue in some of the federal countries examined. A shortage of coordination efforts between cantons was reported with regard to Switzerland, while in Belgium the 'complexity of governing arrangements made effective participation [of persons with disabilities] problematic'. In a more general fashion, '[l]ack of coordination was evident, where not enough focal points were present at the various levels of government or across ministries' (Woodin 2019).

Article 33(2) CRPD obliges States Parties to create 'a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation' of the Convention. What may constitute a framework is not defined in Article 33(2). Nevertheless, this provision requires States Parties to designate or establish one or more bodies as part of the framework (Woodin 2019). The framework should include 'one or more independent mechanisms' that comply with the '[p]rinciples relating to the Status of National Institutions for the Promotion and Protection of Human Rights (NHRIs)' (also known as the Paris Principles[XVIII]), which sketch out the responsibilities, composition and working methods of NHRIs, placing emphasis on independence and pluralism. The responsibilities of the independent mechanisms within the framework include: awareness-raising activities to ensure that a human rights approach to disability is adopted; the power to deal with individual claims related to violations of the rights provided for in the CRPD; and the assessment of the extent to which the CRPD has been effectively implemented.

As noted above, Article 33(3) CRPD establishes that 'civil society, in particular persons with disabilities and their representative organi[s]ations, shall be involved and participate fully in the monitoring process'. This provision tallies with Article 4(3) CRPD which requires in a general fashion close consultation with, and active involvement of, disabled people,

through their representative organisations, in the development and implementation of legislation and policies and in all decision-making processes concerning issues relating to persons with disabilities. These norms are considered to stem from the participatory process that characterised the negotiation of the CRPD and reflect the slogan of the disability rights movement 'Nothing About Us Without Us'. On the whole, the CRPD demonstrates that the full realisation of human rights of persons with disabilities only passes through a participatory approach to implementation and monitoring.

4. Deploying a Comparative Federalism Perspective: Case Selection and Challenges

As noted at the outset of this article, this volume does not intend to replicate existing academic work on the implementation of the CRPD. Rather, it aims to focus on the effects of that implementation on federal structures and powers. With that in mind, the volume includes a range of chapters on selected countries, which are considered as representative test studies. Those countries have been selected on the basis of three criteria, deploying what Hirschl defines 'inference-oriented research design and case selection' (Hirschl 2005). First, we looked at the ratification date of the CRPD, with the aim of including States Parties that ratified the CRPD at least ten years ago, in order to be able to evaluate trends in the implementation of the CRPD across a relatively long timespan. The deployment of this criterion led us to immediately exclude the US, which to date has not ratified the CRPD. Secondly, we included countries that can be qualified as federal systems adopting a broad and functional understanding (Palermo and Kössler 2017), i.e. countries with at least two tiers of government, where division of legislative powers is constitutionally guaranteed. Finally, we included countries for which there is preliminary evidence of complexities in the implementation of the CRPD, signalled by the CRPD Committee in their Concluding Observations, by literature, as well as by DPOs' reports. Furthermore, the volume embraces a global approach by looking at countries from different geographical areas, including countries that belong to what is often termed the 'Global South', even though it does not engage directly with the academic discourse related to development and disability. It also ensures a balance when it comes to the nature of the legal system: the volume in fact includes countries with a common law tradition, such as India and the United Kingdom, and States

that are usually qualified as responding to a civil law tradition. Further, it encompasses jurisdictions with diverse approaches to international law, i.e. traditionally monist or dualist or characterised by a mixed approach.

On the basis of the criteria indicated, the countries selected are: Austria, Belgium, Germany, Italy, Spain, the UK, the EU, Canada, Mexico, Brazil, Argentina, India, South Africa, Ethiopia. Despite the global reach of the book, we recognise that the somewhat predominant focus on European countries might be perceived as a drawback. However, this is justified due to their comparative relevance for the issue at stake. Not only is Europe a region with a high number of federal systems, but it has also dedicated significant attention to disability policies. Therefore, the interplay between federalism and disability law is of special evidence in the European continent.

Even though, as noted above, the peculiar and non-state legal nature of the EU is actually recognised by the CRPD, by virtue of the RIO clause, the volume deliberately chooses to include the EU as a case study. It does so on the basis of a wealth of literature that has analysed the process of European integration through the lens of federalism (Burgess 2006). Furthermore, a chapter on the EU supports and enriches the comparative analysis, as well as the functional approach to federalism.

On foot of such comparative research design, the selected case studies have been grouped and presented in the book following both a geographic and a comparative logic. The first part is devoted to European cases, including the EU which, as a *sui generis* (federal) system, is placed in the beginning, for reasons of both content (its ratification of the CRPD) and method (it proves that the federal toolkit operates also in non-state organisations). After the chapter on the EU, authored by Ferri and Šubic, the other European examples are ordered by the historical duration of the federal experience. The chapter on Germany (Welti), is followed by chapters on Austria (Bußjäger), Italy (Addis and Monti), Spain (González Pascual) and Belgium (Ghys, Louckx and Dumont). A chapter on the UK, by McCall-Smith, closes this initial part on European examples. Notably, the UK, while no longer a member of the EU, was part of it at the time of the ratification of the CRPD and has a long-standing disability policy revolving around the Equality Act 2010, and for this reason it is included instead of Switzerland. The order also follows a historical evolution of the federal systems from traditional, coming-together federations to more recent, holding-together federal and regional systems, as well as from more symmetric to more asymmetric status and powers of

the subnational units.

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

A comparative chapter written by the editors completes the book by elaborating on the findings of the case studies examined in the previous chapters. It explores trends and patterns in the implementation of the CRPD. In doing so, it endeavours to further clarify, by means of comparative analysis, the role of the CRPD in engendering, provoking dynamics of centralisation or decentralisation. It investigates the manner in which the general principles of the CRPD interact with federal arrangements.

A short concluding chapter closes this edited collection with a brief discussion on the intersection between disability and federalism studies. It highlights likely future developments on the extent to which comparative federalism can enhance the promotion of the rights of persons with disabilities. Notably, the last chapter highlights that this volume only represents a new step in the still little explored field of the intersection between federalism and disability law, and further research is necessary to cast new light on and investigate this topic. In doing so, it calls for a renewed commitment and joint forces among scholars in disability law and comparative federalism for new endeavours to bring forward the research conducted in this volume.

---

[1] Giuseppe Martinico, Full Professor of Comparative Public Law, Scuola Superiore Sant'Anna, Pisa. Email: giuseppe.martinico@santannapisa.it.
Francesco Palermo, Full Professor of Comparative Public Law at the University of Verona and Director of the Institute for Comparative Federalism at Eurac Research in Bolzano/Bozen. Email: francesco.palermo@eurac.edu

Delia Ferri, Professor of Law, Maynooth University, Ireland. Email: delia.ferri@mu.ie

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

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

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

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

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

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

[VIII] Article 4(g) CRPD.

[IX] Article 4(h) CRPD.

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

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

[XII] Ibid, para 76.

[XIII]CRPD Committee, 'General Comment No. 6'; See also Degener and Uldry, 2018.

[XIV] CRPD Committee, 'General Comment No. 6', para 11.

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

[XVI] On RIO clauses and Declaration of Competences, see *inter alia* Delgado Casteleiro 2012.

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

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

References

- Aichele Valentin, 2018, 'Article 33 National Implementation and Monitoring' in I. Bantekas, M.A. Stein, D. Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford University Press, Oxford
- Arbour Louise, 2006, 'Statement by Louise Arbour UN High Commissioner for Human Rights on the Ad Hoc Committee's Adoption of the Convention on the Rights of Persons with Disabilities', United Nations Publications, New York
- Arstein-Kerslake Anna, 2017, *Restoring Voice to People with Cognitive Disabilities. Realizing the Right to Equal Recognition before the Law*, Cambridge University Press, Cambridge
- Bantekas Ilias, Stein Michael Ashley and Anastasiou Dimitris, 2018, *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford University Press, Oxford
- Barnes Elizabeth, 2016, 'Constructing Disability' in E. Barnes, *The Minority Body: A Theory of Disability*, Oxford University Press, Oxford

- Biermann Julia, 2022, *Translating Human Rights in Education: The Influence of Article 24 UN CRPD in Nigeria and Germany*, University of Michigan Press, Ann Arbor
- Blanck Peter, Waterstone Michael and Myhill, William N., 2014, *Disability Civil Rights Law and Policy: Case and Materials (3rd edn)*, West Academic Publishing, St. Paul, MN
- Blanck Peter and Flynn Eilionóir (eds), 2016, *Routledge Handbook of Disability Law and Human Rights*, Routledge, London
- Broderick Andrea and Ferri Delia, 2019, *International and European Disability Law. Text, Cases and Materials*, Cambridge University Press, Cambridge
- Broderick Andrea, 2015, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities*, Intersentia, Antwerp
- Broderick Andrea, 2023, 'Disability Law' in J.M. Smits, J. Husa, C. Valcke and M. Narciso (eds), *Elgar Encyclopedia of Comparative Law*, Edward Elgar, Cheltenham
- Burgess Michael, 2006, *Comparative Federalism: Theory and Practice*, Routledge, London
- Cameron David and Fraser Valentine (eds), 2001, *Disability and Federalism: Comparing Different Approaches to Full Participation*, Institute of Intergovernmental Relations, Kingston
- Celik Elif, 2017, 'The Role of CRPD in Rethinking the Subject of Human Rights', *The International Journal of Human Rights*, Vol. 21, pp. 933-995
- Charlton James I., *Nothing About Us Without Us: Disability Oppression and Empowerment*, University of California Press, Oakland
- Cuenca Gómez Patricia, Barranco Avilés María del Carmen, Serra María Laura, Ansuátegui Roig, Francisco Javier and Rodríguez Del Pozo Pablo, 2017, 'The Impact of Article 12 of the Convention on the Rights of Persons with Disabilities on Qatar's Private Law', *The Age of Human Rights Journal*, pp. 81-104
- Davis Lennard J., 2015, *Enabling Acts: The Hidden Story of How the Americans with Disabilities Act Gave the Largest US Minority Its Rights*, Beacon Press, Boston
- de Beco Gauthier (ed), 2013, *Article 33 of the UN Convention on the Rights of Persons with Disabilities: National Structures for the Implementation and Monitoring of the Convention,* Martinus Nijhoff Publishers, The Hague
- de Beco Gauthier, 2019, 'The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities', *International & Comparative Law Quarterly*, Vol. 68, pp. 141-160
- de Beco Gauthier, 2021, *Disability in International Human Rights Law*, Oxford University Press, Oxford
- de Beco Gauthier, Quinlivan Shivaun and Lord Janet E. (eds), 2019, *The Right to Inclusive Education in International Human Rights Law*, Cambridge University Press, Cambridge
- de Bhailís Clíona and Flynn Eilionóir, 2017, 'Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD', *International Journal of Law in Context*, pp. 6-21
- Degener Theresia and Begg Andrew, 2017, 'From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations' in V. Della Fina, R. Cera and G. Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, Cham
- Degener Theresia and Uldry Marine, 2018, 'Towards inclusive equality: 10 years Committee of the Rights of Persons with Disabilities', German Federal Ministry of Labour and Social Affairs, http://www.anffas.net/dld/files/rapporto_10anni_attivit%C3%A0_comitato_onu_sui_diritti_delle_persone_con_disabilita_4sett_18.pdf
- Degener Theresia, 2017, 'A New Human Rights Model of Disability' in V. Della Fina, R. Cera and G. Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, Cham

- Delgado Casteleiro Andrés, 2012, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?', *European Foreign Affairs Review*, pp. 491-509
- Drum Charles E., 2009, 'Models and Approaches to Disability' in C.E. Drum, G.L. Krahn and H. Bersani (eds), *Disability and Public Health*, American Public Health Association/American Association on Intellectual and Developmental Disabilities, https://ajph.aphapublications.org/doi/book/10.2105/9780875531915
- Ferri Delia and Broderick Andrea (eds), 2020, *Research Handbook on EU Disability Law*, Edward Elgar, Cheltenham
- Ferri Delia, Broderick Andrea and Leahy Ann, 2024 (forthcoming), 'The Global Governance of Disability Rights: Complexities, Participatory Trends and Intersections' in R. Houghton et al (eds), *Edward Elgar Research Handbook Global Governance*, Edward Elgar, Cheltenham
- Flynn Eilionóir, 2011, *From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities*, Cambridge University Press, Cambridge
- Hirschl Ran, 2005, 'The Question of Case Selection in Comparative Constitutional Law', *American Journal of Comparative Law*, pp. 125-155
- Ipsen Hans Peter, 1966, 'Als Bundesstaat in der Gemeinschaft' in E. von Caemmerer, H.J. Schlochauer and E. Steindorff, *Probleme des Europäischen Rechts. Festschrift für Walter Hallstein zu seinem 65. Geburtstag*, Klostermann, Frankfurt
- Kakoullis Emily Julia and Johnson Kelley (eds), 2020, *Recognising Human Rights in Different Cultural Contexts: The United Nations Convention on the Right of Persons with Disabilities (CRPD)*, Palgrave Macmillan, Singapore
- Kanter Arlene S., 2017, *The Development of Disability Rights under International Law: From Charity to Human Rights*, Routledge, Abingdon
- Kayess Rosemary and French Philip, 2008, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', *Human Rights Law Review*, pp. 1-34
- Lawson Anna and Waddington Lisa, 2018, 'Interpreting the Convention on the Rights of Persons with Disabilities in Domestic Courts' in L. Waddington and A. Lawson (eds), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*, Oxford University Press, Oxford
- Manca Luigino, 2017, 'Article 33: National Implementation and Monitoring' in V. Della Fina, R. Cera and G. Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, Cham
- Meekosha Helen and Jakubowicz Andrew, 1999, 'Disability, Political Activism, and Identity Making: A Critical Feminist Perspective on the Rise of Disability Movements in Australia, the USA and the UK', *Disability Studies Quarterly*, Vol. 19, pp. 393–404
- Mégret Frédéric, 2008, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?', *Human Rights Quarterly*, Vol. 30, pp. 494-522
- Mjöll Arnardóttir Oddný, 2009, 'A Future of Multidimensional Disadvantage Equality' in O. Mjöll Arnardóttir and G. Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Martinus Nijhoff Publishers, The Hague
- Morris Jenny, 1991, *Pride Against Prejudice: Transforming Attitudes to Disability: A Personal Politics of Disability*, Women's Press, London
- Oliver Michael, 1996, *Understanding Disability: from Theory to Practice*, Macmillan Education, New York
- Palermo Francesco and Kössler Karl, 2017, *Comparative Federalism. Constitutional Arrangements and Case Law*, Hart Publishing, Oxford

- Pearl Alex L., 2013, 'Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the Legal Capacity of Disabled People: The Way Forward?', *Leeds Journal of Law and Criminology*, pp 1-30
- Pelka Fred, 2012, *What We Have Done: An Oral History of the Disability Rights Movement*, University of Massachusetts Press, Amherst and Boston
- Pillay Navi, 2014, 'The Convention on the Rights of Persons with Disabilities. Training Guide. Professional Training Series No. 19', United Nations Publication, New York
- Prince Michael J., 2011, 'Canadian Federalism and Disability Policy Making', *Canadian Journal of Political Science/ Revue Canadienne De Science Politique*, Vol. 34, pp. 791-817
- Quinn, Gerard, 2009, 'A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities' in G. Quinn and L. Waddington (eds), *European Yearbook on Disability Law: Volume 1*, Intersentia, Antwerp
- Quinn Gerard, 2009, 'Resisting the "Temptation of Elegance": Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?' in O. Mjöll Arnardóttir and G. Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Martinus Nijhoff Publishers, The Hague
- Schapiro Robert A., 2009, *Polyphonic Federalism. Toward the Protection of Fundamental Rights*, University of Chicago Press, Chicago
- Scholten Matthé and Gather Jakov, 2018, 'Adverse Consequences of Article 12 of the UN Convention on the Rights of Persons with Disabilities for Persons with Mental Disabilities and an Alternative Way Forward', *Journal of Medical Ethics*, Vol. 44, pp. 226-233
- Shakespeare Tom, 2006, *Disability Rights and Wrongs*, Routledge, Abingdon
- Skarstad Kjersti and Stein Michael Ashley, 2018, 'Mainstreaming Disability in the United Nations Treaty Bodies', *Journal of Human Rights*, Vol. 17, pp. 1-24
- Stein Michael Ashley, 2007, 'Disability Human Rights', *California Law Review*, Vol. 95, pp. 75-121
- Weller Penelope, 2013, *New Law and Ethics in Mental Health Advance Directives: The Convention on the Rights of Persons with Disabilities and the Right to Choose*, Routledge, Abingdon
- Woodin Sarah, 2019, 'Monitoring of the Rights of Blind and Partially-Sighted People in Europe: An Analysis of the European Blind Union CRPD Database - Article 33: National Implementation and Monitoring', European Blind Union, https://www.euroblind.org/sites/default/files/documents/article_33_2019_report2.pdf
- Zola Irving Kenneth, 1982, *Missing Pieces: A Chronicle of Living with a Disability*, Temple University Press, Philadelphia

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Federalism and the Rights of Persons with Disabilities: Disability-oriented and theoretical consideration of a legal philosopher

by

Maria Giulia Bernardini[I]

Abstract

This article aims to dialogue with Delia Ferri, Francesco Palermo and Giuseppe Martinico, editors of the volume *Federalism and the Rights of Persons with Disabilities. The Implementation of the CRPD in Federal Systems and Its Implications*, in relation to some of the major issues raised by the entry into force of the CRPD. From a legal-philosophical perspective, it is interesting to consider the impact of the CRPD on the reformulation of legal concepts and the redefinition of power relations. Although not all the issues identified have a direct impact on the federal set-up of legal systems that have ratified the CRPD, they are nevertheless worthy of clarification, as they shape the assumptions underlying the analyses that address the challenges the Convention continues to pose several years after its entry into force.

Keywords

Disability, Convention on the Rights of Persons with Disabilities (CRPD), Disability Models, Equality, Capacity, Independent Living.

1. The first steps along a path

There are many reasons for interest in the volume *Federalism and the Rights of Persons with Disabilities*, edited by Delia Ferri, Francesco Palermo, and Giuseppe Martinico. Among them, the chosen research perspective, which is comparative federalism, undoubtedly stands out. This is an innovative lens of analysis, as it allows us to detect whether there are common trends among states and how the transposition of the *Convention on the Rights of Persons with Disabilities* (CRPD) affects the structuring of powers within them. More specifically, this perspective permits us to assess the impact that the CRPD has had on the constitutional structures of the federal states under investigation and the division of powers within them.

The choice is also very timely. After all, some 15 years after the entry into force of the CRPD, although much remains to be done about the implementation of the Convention itself, it is necessary to move beyond the – albeit relevant – identification of the rights covered in this legal instrument and the highlighting of its transformative scope. Indeed, it is now time to also reflect on the transformations produced within individual legal systems. To this end, it is certainly crucial to ask about the effects occasioned by the CPRD on the various levels of regulation and the relations between the internal powers of the States. Furthermore, the attention paid to both the legislative and jurisprudential formants within the volume makes it possible to avoid any formalist reductionism and to appreciate the great ferment discernible in virtually every legal system in relation to the protection of the rights of people with disabilities, although the outcomes can vary, also considerably.

My legal-philosophical training does not provide me with the appropriate tools to conduct further reflections specifically regarding the impact on the CRPD on the federal systems, which I therefore leave to the experts in the field. Rather, my perspective leads me to focus my analysis on other important issues concerning the rights protection, which sometimes have a primarily theoretical relevance. In this essay, I aim to sketch the broad outlines of the issues that have most captured my attention. These are mostly brief reflections, prompted precisely by my reading of the cited volume; due to limits of time and space, the considerations that follow will almost inevitably show a certain margin of inaccuracy. Nevertheless, I have preferred to proceed this way, rather than focusing on a single aspect, because I regard this symposium as a valuable moment of interdisciplinary dialogue, which from its outset promises to be very stimulating and I hope will continue in

the future. Indeed, although not all the issues identified in the following paragraphs have a direct impact on the federal set-up of legal systems that have ratified the CRPD, they are nevertheless worthy of clarification, as they shape the assumptions underlying the analyses that address the challenges the Convention continues to pose several years after its entry into force.

2. Persons with disabilities and human rights: a real model or an approach?

The first issue that piqued my interest is the reference within the volume to heuristic models of disability. After all, the CRPD is widely believed to have fostered the spread of a new culture of disability, where the understanding of disability in socio-contextual terms promoted by disability rights activists and scholars is combined with the language of human rights. In the words of one of the leading experts in disability, the CRPD Convention 'enshrines key tenets of contemporary disability scholarship and activism' (Series 2020). Scholars of disability law have now been widely expressed on these aspects, adhering mostly to the position of the CRPD Committee, for which the human rights model of disability is founded upon the recognition of disability as a social construct and values impairments as aspects of human diversity and one of many multidimensional layers of identity.[II] We are indebted to Theresia Degener (2017), in particular, for what is presented as the development of a true 'human rights model,' designed to remedy the problematic aspects of the social model of disability, the 'big idea' behind disability activism (Shakespeare 2010).

Ferri, Palermo, and Martinico seem to fit squarely into this tradition of thought. They explicitly state that the volume is informed and underpinned by a human rights approach to disability, while highlighting the influence of the social model of disability and the critique of that model on the elaboration of the human rights *model* of disability.

My considerations in this regard pertain to two aspects. The first concerns the possibilities of formulating a genuine human rights model of disability. While I am aware that I adopt a minority position within disability law scholarship, I find no compelling reasons to revise my position on the point I expressed some time ago (Bernardini 2016, ch. 1). In my opinion, it is perfectly possible – as well as appropriate – to adopt a human rights *approach* to disability, that is, to frame issues that stem from disability by referring to human rights as a conceptual framework. Likewise, I do not dispute in any way that the CPRD has

introduced, within international human rights law, a profound innovation, bringing to completion the process of recognizing persons with disabilities as legal subjects instead of legal objects. However, I am not convinced that this is due to the formulation of a true human rights *model* of disability. Rather, in my opinion, the human rights *approach* is something conceptually different from the *model*, understood as a heuristic paradigm for understanding disability.

Among the reasons for believing that a human rights model of disability exists is its greater determinacy compared to the social model, hence its ability to better protect the rights of persons with disabilities. I have no objection to this: the social model tends to be indeterminate, not least because the concept of 'oppression' on which it is based still struggles to find legal recognition, despite copious critical literature on this subject – primarily within the legal-feminist tradition. In this regard, the suggestion by legal theorist Letizia Gianformaggio that oppression, rather than discrimination, should be considered a violation of the legal principle of equality (2005, p. 90), is still extraordinarily relevant. After all, current attempts precisely to recognize the discrimination to which certain social groups are historically exposed, due to structural discrimination or even vulnerability – in its pathogenic sense or in conjunction with intersectionality – also seem to be heading in this direction.

However, it is necessary to keep in mind that the social model was not developed by legal scholars but is rather an instrument of *political claims* and should be understood as such. Indeed, the social model has never been presented in any other terms than that of a heuristic tool: it only offers keys to understanding reality and, as such, needs to be further detailed and fit into different contexts, including the legal one.

The point, if anything, is a different one. I am convinced that the conception of disability accepted within the CRPD does not coincide with that adopted within the social model. This is not because we are talking about two different models (social model on one hand, human rights model on the other), but because the heuristic model of disability to which the Convention refers is *not* the social one.[III] Rather, the CRPD translates into legal terms the relational or intermediate model, to which the biopsychosocial model can also be related. It is precisely this model that allows disability to be valued as a part of human diversity, while also providing space for minorities and cultural identification. Likewise, the relational model is also compatible with the definition of persons with disabilities envisaged in Art. 1, para. 2: the emphasis on the interaction among persons with disabilities and the barriers that may

hinder their full participation requires something different from the concept of oppression. Moreover, the latter does not refer to interaction, but to a power that is exercised over a person or a group.

In short, I do not find it useful to multiply heuristic models of disability without any decisive differences as to the theses set forth. It could be simply argued that the CRPD implements within international human rights law a socio-contextual model of disability (in particular, the theoretical reference is to the relational model of disability). The absence of any reference to human rights in the models of disability elaborated within Disability Studies is due to the context of their original formulation. However, there is nothing to prevent transposing their theses by combining them with respect for human rights, with the effect of applying the cultural models to the legal sphere. This process requires adjustments, but it does not seem to me to constitute a real problem; or, at least, it is not a sufficient reason to argue that we are in the presence of a human rights model, rather than an approach.

3. Inclusive equality and/or justice

The second element I focus on concerns the scope of 'inclusive equality.' Drawing on what the CRPD Committee argued in General Comment No. 6, Ferri, Palermo and Martinico identify four constituent elements of the concept of 'inclusive equality,' presented as a notion that expands the one of substantive equality. These principles are non-discrimination and equality, accessibility, and participation, as well as the respect for the inherent dignity of persons with disabilities.[IV]

Because it clearly draws upon elements of a rich debate that has a long and illustrious tradition, the Committee's position can be brought into dialogue with the arguments that, within the field of legal philosophy, have been put forth on the subject of justice and, consequently, equality too. Indeed, in the legal philosophical sphere, equality is one of the constituent elements of the notion of justice, along with otherness and *debitum*, which consists in giving to each individual what he or she is entitled to.[V] Justice, in turn, is a concept in which various dimensions are predictable. Among these, in addition to the 'classical' dimensions of justice dating back to Aristotle, namely commutative and distributive justice (usually expressed today in terms of redistribution), it is also common for reference to be made to recognition and participation. Based on the assumption that invisibility is an acute

form of social discrimination (Honneth 2001), recognition is considered a fundamental tool for conceptualizing contemporary struggles over identity and difference. It is also closely related to the paradigm of distributive justice and, therefore, inequality (Fraser, Honneth 2003). Recognition and redistribution are in turn related to participation or, rather, 'participatory equality,' which refers to the need to rethink democracy 'from the bottom' (i.e., through a bottom-up perspective), making it inclusive also of the views and voices of individuals labelled as 'different' and, as such, systematically discriminated against and oppressed (Young 2011).

More recently, a meaning of justice derived from criminal law has also 'surfaced' in the debate: restorative justice. The latter aspires to allow for the recognition of the historical exclusion experienced by some groups of individuals and the need for processes to overcome and remedy these injustices.

The first three terms, i.e. recognition, redistribution and participation, where there is a lexical convergence between the legal philosophical reflection and the position of the CRPD Committee, also have a strong relationship with the demands historically advanced within the Disability Rights Movement. Indeed, (re)distribution, recognition, and participation have always constituted the object of the claims of persons with disabilities. The perspective is transformative, i.e., directed at achieving real social transformation (Mladenov 2016), by including persons with disabilities from the very beginning. It does not merely demand that the principles designed for the 'norm' also be applied to persons with disabilities. Rather, the transformative perspective aims at a complete reformulation of social structures and political principles.

As noted earlier, to these dimensions the CRPD Committee adds *accommodation*, which is connected to dignity. Accommodation requires 'making room' for differences, starting with disability. However, it seems reasonable to assume that accommodation should not be limited to the latter; after all, the CRPD is not thought of as a Convention directed only at persons with disabilities, as its scope is universal.

It is not clear to me what the CRPD Committee meant by introducing the dimension of accommodation. I hypothesize that the theoretical reference is to the theses of Sandra Fredman, who has developed a four-dimensional approach to equality, aimed at providing an analytic framework to make the multi-faceted nature of inequality more understandable (recently, Fredman 2022).[VI] For the human rights lawyer, since the substantive conception

of equality cannot be captured in a single principle, the right to equality should: (1) aim to redress disadvantage; (2) counter prejudice, stigma, stereotyping, humiliation, and violence based on protected characteristics; (3) enhance voice and participation; (4) accommodate difference and achieve structural change, rather than requiring members of out-groups to conform to the dominant norm. Taken together, 'the four dimensions of substantive equality create a complex and dynamic conception of the right to equality that builds on existing understandings but also invites further development and evolution' (Fredman 2016, p. 738). The parallels with the dimensions identified by the CRPD Committee – redistribution, recognition, participation, and accommodation, respectively – are clear.

However, applying the principle of accommodation to the field of disability may generate some misunderstandings. Indeed, in this specific context, accommodation refers to the semantic universe of accessibility: according to the CRPD, accommodation is an instrument aimed at ensuring that individuals have access to equality or are treated equally, on a case-by-case basis. Thus, accommodation – more precisely, *reasonable accommodation* – is a measure applied *ex post*. From this perspective, accommodation appears related to *equity*, rather than referring to the dimension of *equality*. For this reason, perhaps it would have been more appropriate if, within the General Comment, the CRPD Committee had referred directly to accessibility, whose relevance is also undoubted within both the CRPD and disability rights scholarship.[VII] Accessibility constitutes a meta-right, that is, a prerequisite for the equal enjoyment of other rights;[VIII] as such, it is one of the central elements of the CRPD. Unlike accommodation, which intervenes *ex post*, accessibility requires 'making room' for disability from the very moment of designing physical and symbolic spaces, thus considering the views of persons with disabilities from the outset. In this perspective, access becomes a complex form of perception that organizes socio-political relations between people in a social space (Titchkosky 2011, pp. 3-4) and, as such, produces that transformation already referred to. This fourth dimension is thus intertwined with the other three, reinforcing the concepts expressed earlier. It requires recognizing every person as worthy of equal consideration and respect, thus recognizing the value of difference and equal ownership of fundamental human rights, moving towards what has been also called 'equal valuing of differences' (Ferrajoli 2007, 795-797).

While 'inclusive equality', understood in four dimensions, presents itself as more complex than the two-dimensional concept (limited to formal and substantive equality), it

nonetheless seems to me that also in this broader conception of equality, the problem of power asymmetry remains unanswered. Nor does this four-dimensional model of equality allow for the legal 'capture' of oppression, i.e., the historical and systemic form of discrimination that affects members of those groups that lack social power. Perhaps, the dimension of 'recognition' seems to aspire to that end, through reference to intersectionality. However, at the present time, the well-known difficulties in the legal operationalization of intersectionality, starting from the evidentiary level, make this process still unfinished. On the other hand, contrary to what one might be led to think at first glance, the *accommodation dimension* – which constitutes the 'novum' of 'inclusive equality' – does not seem to have been designed to investigate the 'spatial' dimension of equality or the power relations present within it. It seems, in short, that the question "[is there] nothing new on the Western front?" [IX] is not only about the degree of implementation of the CRPD's principle of equality within individual national legal systems. The problem is upstream and, as has widely emerged, it is a theoretical one: the call for oppression to be considered a violation of the legal principle of equality (Gianformaggio 2005) confirms in this field as well to be extraordinarily relevant and topical.

4. The right to legal capacity: the role of the legal framework

It is precisely the reference to equality that induces us to consider one of the rights that has most attracted the attention of disability law scholarship: the right to (universal) legal capacity. Although it is not specifically addressed in the volume, it is referred to in many essays, beginning with the introduction by the three editors. After all, the right to legal capacity is considered the lynchpin of the entire CRPD and constitutes the core of the 'egalitarian turn.' Indeed, to the notion of universal legal capacity we owe that shift from legal objects to legal subjects, which has seriously challenged legal systems when it comes to the 'management' of persons with disabilities.

The preclusion of a range of legally relevant activities is somehow reassuring for the legal system, which can neutralize the person subjected to measures aimed at restricting his or her legal capacity. In contrast, the 'universal capacitation' promoted by Art. 12 requires starting from the presumption of a person's capacity and, consequently, redetermining all the limits

placed on his or her legal capacity, with a view – precisely – to enabling the greatest possible expression of that person's preferences, will, and desires.

The perspective embraced by the CRPD is not entirely new for legal systems: for some time now, they have been adopting institutions that are more flexible than traditional incapacitation measures, and which start from the recognition of the centrality of the person. However, the CRPD requires that this principle be not the exception, as is often the case, but rather the norm on which legal systems rest. This 'subversion,' which leads to a complete reversal of the approach to capacity taken toward (those who are considered) vulnerable individuals, is directed at overcoming the paternalistic approach to disability and ensuring equality. Indeed, the presumption of capacity enables even those with limited capacity to act to exercise their fundamental rights, on an equal footing with the other legal subjects.

If universal legal capacity is a powerful tool for the legal systems to ensure the equal valuing of differences, at the same time it exposes them to an unknown, as it involves guaranteeing what in the not-so-distant past was unthinkable and, as such, unthought of: freedom of action in the legal realm. This circumstance explains their reluctance to implement Article 12, especially in relation to the abandonment of substitute decision-making, called for by the CRPD Committee in its well-known *General Comment No. 1*. The latter, based on a disputed strict interpretation of Article 12 provided by the Committee itself, does not allow substitute decision-making under any circumstances.[X] This position triggered a defensive reaction from States, many of which had already expressed reservations at the time of ratification precisely about Article 12 in relation to the possibility of permitting residual substitute decision-making. The choice of most of them not to follow the path towards the abolition of incapacitation advocated by the CRPD Committee, but to opt instead for a reformist approach, has confirmed the initial impression. Indeed, many of the reforms that have recently come into effect reveal the permanence – even if residual – of incapacitating measures. It will be interesting to follow the progress of this new approach and the degree to which it becomes effective.[XI]

I imagine that, among several possible reasons, the right to legal capacity was not a subject of in-depth study within the volume edited by Ferri, Palermo and Martinico because of the chosen perspective of analysis, namely comparative federalism. Indeed, unlike in the case of other rights, in this area it is difficult to imagine a competence other than that of the State, nor would such a solution be desirable or practicable. However, as *Federalism and the*

Rights of Persons with Disabilities investigates the impact of the CRPD on constitutional structures and the division of powers, a few observations on the subject may nevertheless be appropriate in order to broaden the dialogue on this issue. Art. 12 allows for consideration of the relations between the powers of the State and confirms the growing role assumed by the judiciary as a driving force for socio-cultural and legal change.[XII] Indeed, Art. 12 completes a process that, in many States, was already discernible at the jurisprudential level. I refer to the overcoming of a rigid conception of capacity, as if it were a fixed and immutable personal property whose presence or absence can be affirmed with certainty once and for all. Related to the binary conception of capacity, there is in fact also a binary approach to (in)capacity.

For some time now, the judiciary – both on the supranational level and within the various States – appeared to be characterized by a certain dynamism on the subject. On the supranational level, for States that have acceded to the European Convention on Human Rights (ECHR), the orientation of the European Court of Human Rights is of great importance. The Court has not failed to state on several occasions how any declaration of absolute legal incapacity violates the principle of proportionality and, as such, is contrary to the ECHR. Even in recent pronouncements on the subject, there is a clear tendency of the Court to value the individual's capacity to the greatest extent possible.

Also, within the various national legal systems, we see the emergence of jurisprudential orientations that, starting from the presumption of each person's capacity, are inclined to broaden the scope of his or her 'right to rights.' Consider, for example, the tendency to admit that individuals who are subject to guardianship can perform the so-called 'very personal acts' such as – among others – making a donation, drawing up a will, or getting married. By their very nature, these acts can only be performed by a capable person. Therefore, openness to the possibility that persons with disabilities who are subject to incapacitation measures can perform very personal acts cannot but be an expression of an overcoming of the binary conception of capacity. By not granting legal significance to the activity of 'incapacitated' persons, this binarism sanctions their invisibility not only on the social level but also on the legal one.

Unlike what seems to be happening around issues related to the day-to-day functioning of federal systems, where the role of the courts appears to be limited,[XIII] judicial activism in respect of the right to legal capacity is highly significant. Therefore, it can be assumed that

the legislative reforms around legal capacity, recently undertaken by various States around the world, are due to a twofold push: first of all, the push on the regulatory front, coming from the CRPD, which stands out as a particularly demanding standard in this area and presses for an adaptation of national legal systems. Moreover, there also seems to be the (incomplete) push that emanates from the jurisprudential front, both on a supranational level – in particular, in the case-law of the European Court of Human Rights – and within the single States, where judges are slowly starting to make use of the CRPD as grounds for their rulings upholding a person's right to legal capacity.[XIV]

As if caught between two fires, and beyond a formal adherence to the 'legal capacitation' perspective that has resulted in the aforementioned reforms, in most legal systems the legislative power is today confronted with the need to abolish substitute-decision making altogether and with the side effects that may result from an uncritical adherence to what, for some, risks being nothing more than 'legal fiction' (Quinn 2011): the complete abolition to any reference to substitution. The lack of both a theoretical and a legal-political reflection outside the boundaries of the realm of disability law does not help in properly framing the relevant issues and identifying the most appropriate ways to implement the CRPD in this field.

5. Right to independent living and (de-)institutionalization

One area in which federal systems are instead directly prompted to act by the CRPD is the guarantee of the right to live independently and be included in the community, provided for in Art. 19. This article is one of the pillars of the CRPD: the right to independent living has its roots in disability rights activism, which since its creation has advanced a critique of segregation. Through Art. 19, the CRPD aims to definitively overcome the institutional logic that has long been associated with persons with disabilities (see, amongst others, Lewis, Richardson 2020).

Although the cultural framework has significantly changed over the years, it cannot be said that this logic has been completely abandoned; on the contrary, we are now witnessing a disturbing trend toward involuntary (re)institutionalization. Supranational institutions are aware of this tendency. Recently, in 2022, the CRPD Committee released its *Guidelines on deinstitutionalization, including in emergencies* (2022), complementing *General Comment No. 5* (2017)

and the *Guidelines on the right to liberty and security of persons with disabilities* (2016).

With the 2022 *Guidelines*, the CRPD Committee aims to guide states in ensuring the right to independent living and community inclusion, thereby counteracting deinstitutionalization processes and preventing institutionalization. To this end, in paragraph No. 14, the CRPD Committee identifies several indexes that may contribute to the definition of institutionalization. The implicit but foundational assumption of most of these indices is that of an individual with disabilities who is incapable of self-determination and choice. This incapacity in turn legitimizes the denial of the legal relevance of that person's conduct, thus also allowing decisions to be made for his or her good. In this perspective, legal irrelevance and paternalism are intertwined, presupposing and contributing to the image of a person with disabilities as an incapacitated subject. Therefore, independent living is closely linked to universal legal capacity. If a person with disabilities is recognized as a 'capable' individual and his or her right to choose is guaranteed, the choice can also be about where to live and how to live.

Moreover, since the choice in question must be free, institutions are responsible for ensuring the existence of a range of alternatives to choose from that are equally meaningful for the person. It is precisely at this level that the 'federal'[XV] organization of a legal system gains significance, as the provision of the social welfare services necessary to guarantee this right is usually shared among several entities, mostly sub-state actors. Since the delivery of such services can be attributed with a function of furthering the goal of substantive (or, perhaps, inclusive?) equality that is generally envisaged in the apex sources of different legal orders, it is crucial to understand in what terms the relations between the central power and sub-state sources are expressed. In this perspective, could it be assumed that, given their prominence in ensuring the services in question, the CRPD calls for more empowerment of sub-state actors?

Moreover, Art. 19 opens an interesting theoretical question about the definition of the right to independent living. Formally, it is a freedom (more precisely, it is a 'freedom to', theoretically distinct from 'freedom from'[XVI]), which, however requires decisive public intervention in order to create the conditions for its exercise and guarantee its effectiveness. Therefore, not surprisingly the right to independent living is often characterized as a social right,[XVII] even though it is formulated in terms of a right of freedom (the freedom to choose where, how, and with whom to live). Actually, it seems to me that such a right does not fit

into the conceptual frameworks we are wont to use to classify rights and, accordingly, a redefinition of categories is needed. It is not simply a matter of acknowledging the indivisibility of and interdependence among human rights. Rather, the right to independent living is a clear example of the impossibility of maintaining a rigid distinction between rights to liberty and social rights, which we still sometimes rely on today to justify inaction in the face of the ineffectiveness of the latter.

6. Conclusion

The research perspective proposed by Ferri, Palermo, and Martinico is interesting not only for those who deal with positive law but also for philosophers of law. Indeed, the comparative analysis solicits reflections that also concern the theoretical level, raising questions that transcend the scope of disability.

Equality, legal capacity, and independent living lead us to ask whether legal concepts that were formulated in exclusionary terms about persons with disabilities can continue to prevail (o be upheld), or whether they need to be reformulated. Moreover, a critical approach to legal philosophy cannot fail to be concerned with how legal norms 'live,' that is, with the *law in action*, which is also subjected to critical observation with regard to power relations. In this respect, the next step of the investigation could focus on the jurisprudential aspects since judges, because of their function, are usually more inclined to be compliant with a 'bottom-up' perspective and, therefore, to be engines of change, also at the institutional level. These elements can help to recalibrate analyses related to the implementation of the CRPD, which, unfortunately, often still appears to be a field of study restricted to disability law scholars. In this perspective, the volume by Ferri, Palermo, and Martinico takes an important step in the direction of breaking down the existing barriers.

[I] Tenure-Track Professor in Philosophy of Law, Department of Law – University of Ferrara (Italy). Email: mariagiulia.bernardini@unife.it

[II] Committee on the Rights of Persons with Disabilities (CRPD Committee), 'General Comment No 6 on equality and non-discrimination' (2018) CRPD/C/GC/6.

[III] In this respect, Ferri, Palermo and Martinico's position is perhaps not so far from mine. Indeed, in the volume they also refer to the socio-contextual approach enshrined in Art. 1(2) CRPD and not only to the social model of disability (cf. Ferri, Palermo and Martinico 2023, p. 338).

[IV] CRPD Committee, 'General Comment No. 6': "Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a

recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity. The Convention is based on inclusive equality" (CRPD 2018, para. 11).

[V] For an introduction to the topic, see Miller 2023.

[VI] After all, at the end of the Report 'Achieving Transformative Equality for Persons with Disabilities,' also authored by Sandra Fredman and presented to the CRPD Committee, the third recommendation relates precisely to the need to define transformative equality as including the four dimensions indicated (cf. Atrey et al. 2017).

[VII] In this respect, see also Ferri, Palermo and Martinico 2023, pp. 343 ss.

[VIII] CRPD Committee, 'General Comment No. 2 on accessibility' (2014) CRPD/C/GC/2.

[IX] Ferri, Palermo and Martinico 2023, p. 341.

[X] CRPD Committee, 'General Comment No. 1 on Art. 12 – Equal Recognition before the Law' (2014) CRPD/C/GC/1. In the vast literature, see Bernardini 2023; Dhanda 2017; Francis 2021; Series, Nilsson 2018.

[XI] Among the current comparative analysis, see Bach, Espejo Yaksic 2023; Flynn, Arstein-Kerslake, de Bhailís 2020; Martinez Pujalte 2019.

[XII] In this regard, the growing attention to the role of judges within the constitutional rule of law is widely acknowledged, and the positivist conception of the judge as the mouthpiece of the law has now definitively faded.

[XIII] See Ferri, Palermo and Martinico 2023, pp. 352-353.

[XIV] However, it cannot be overlooked that practitioners' knowledge of this legal instrument is sometimes not adequate.

[XV] In the broad meaning adopted in Ferri, Palermo and Martinico 2023.

[XVI]. On this distinction, Berlin 1969.

[XVII] This is also the position expressed by the editors of the volume.

References

- Atrey, Shreya, Sandra Fredman, Meghan Campbell, Sanya Samtani, Jason Brickhill and Nomfundo Ramalenka. 2017. *Achieving Transformative Equality for Persons with Disabilities: Submission to the CRPD Committee for General Comment No.6 on Article 5 of the UN Convention on the Rights of Persons with Disabilities*, manuscript submitted for publication. Oxford Human Rights Hub, https://research-information.bris.ac.uk/en/publications/achieving-transformative-equality-for-persons-with-disabilities-s.
- Bach, Michael, Nicolás Espejo Yaksic (eds.). 2023. *Legal Capacity, Disability and Human Rights*. Intersentia, Cambridge.
- Berlin, Isaiah. 1969. *Two Concepts of Liberty. Four Essays on Liberty*, Oxford University Press, Oxford.
- Bernardini, Maria Giulia. 2016. *Disabilità, giustizia, diritto. Itinerari tra filosofia del diritto e Disability Studies*, Giappichelli, Torino.
- Bernardini, Maria Giulia. 2023. 'Vulnerable Capacity. Notes on a Quiet Legal Revolution', *International Journal for the Semiotics of Law*, Vol. 36, pp. 1415–1442.
- Degener, Theresia. 2017. 'A New Human Rights Model of Disability', in Valentina Della Fina, Rachele Cera and Giuseppe Palmisano, eds., *The United Nations Convention on the Rights of Persons*
- Dhanda, Amita. 2017. 'Conversations between the Proponents of the New Paradigm of Legal Capacity', *International Journal of Law in Context*, Vol. 13, pp. 87–95.
- Ferraioli, Luigi. 2007. *Principia Iuris. Teoria del diritto e della democrazia, vol. II*. Laterza, Roma-Bari.
- Ferri, Delia, Francesco Palermo and Giuseppe Martinico. 2023. Federalism and the Rights of Persons with Disabilities. Hart Publishing, Oxford.
- Flynn, Eilionóir, Anna Arstein-Kerslake, Clíona de Bhailís, and Maria Laura Serra (eds.). 2020. *Global Perspectives on Legal Capacity Reform: Our Voices, Our Stories*, New York, Routledge.

- Francis, Leslie. 2021. 'Supported Decision-Making: The CRPD, Non-Discrimination, and Strategies for Recognizing Persons' Choices about their Good', *The Journal of Philosophy of Disability*, Vol. 1, pp. 57–77, https://doi.org/10.5840/jpd20211198.
- Fraser, Nancy, and Axel Honneth. 2003. *Redistribution or Recognition? A Political-Philosophical Exchange*. Verso, London.
- Fredman, Sandra. 2016. 'Substantive Equality Revisited', *International Journal of Constitutional Law*,, Vol. 14, pp. 712–738.
- Fredman, Sandra. 2022. *Discrimination Law*, 3rd Edition, Oxford University Press, Oxford.
- Gianformaggio, Letizia. 2005. 'L'identità, l'eguaglianza, la somiglianza e il diritto', in Ead., *Eguaglianza, donne, diritto*, edited by Alessandra Facchi, Carla Faralli and Tamar Pitch, Il Mulino, Bologna, pp. 85-105.
- Honneth, Axel, Avishai Margalit. 2001. 'Recognition', in *Proceedings of the Aristotelian Society*, Supplementary, Vol. 75, pp. 111–39.
- Lewis, Oliver, Genevra Richardson. 2020. 'The Right to Live Independently and Be Included in the Community', *International Journal of Law and Psychiatry*, Vol. 69, https://pubmed.ncbi.nlm.nih.gov/32122670/.
- Martinez-Pujalte, Antonio. 2019. 'Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms', *Laws*, Vol. 8, pp. 1-22
- Miller, David. 2023. 'Justice', in Edward N. Zalta, Uri Nodelman (eds.), *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition), URL = <https://plato.stanford.edu/archives/fall2023/entries/justice/>.
- Mladenov, Teodor. 2016. 'Disability and Social Justice', *Disability & Society*, Vol. 31, pp. 1226–41,
- Quinn, Gerard. 2011. 'Legal Capacity Law Reform: The Revolution of the UN Convention on the Rights of Persons with Disability', in *Frontline: The Voice of Intellectual Disability* Vol. 83, http://frontline-ireland.com/legal-capacity-law-reform-the-revolution-of-the-un-convention-on-the-rights-of-persons-with-disability/.
- Series, Lucy and Anna Nilsson. 2018. 'Equal Recognition before the Law', in Ilias Bantekas, Michael A. Stein, and Dimitris Anastasiou (eds.), *The UN Convention on the Rights of Persons with Disabilities. A Commentary*, Oxford, Oxford University Press
- Series, Lucy. 2020. 'Disability and Human Rights', in Nick Watson and Simo Vehman, eds., *Routledge Handbook of Disability Studies*. New York and London, Routledge.
- Shakespeare, Tom. 2010. 'The Social Model of Disability', in Lennard J. Davis, ed., The Disability Studies Reader, Routledge, New York.
- Titchkosky, Tanya. 2011. *The Question of Access: Disability, Space, Meaning*, University of Toronto Press, Toronto.
- Young, Iris Marion. 2011. *Justice and the Politics of Difference*. Princeton, Princeton University Press.

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

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 Steytler[I]

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 sub-national 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

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Disability and Federalism. A Rejoinder

by

Delia Ferri, Francesco Palermo, Giuseppe Martinico

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 fee 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 earlies 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 understandingII. 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
[II] 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

References

- Broderick Andrea and Ferri Delia, 2019, *International and European Disability Law. Text, Cases and Materials*, Cambridge University Press, Cambridge
- Broderick Andrea, 2015, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities*, Intersentia, Antwerp
- Degener Theresia, 2017, 'A New Human Rights Model of Disability' in V. Della Fina, R. Cera and G. Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, Cham
- Oliver Michael, 1996, *Understanding Disability: from Theory to Practice*, Macmillan Education, New York
- Fredman, Sandra. 2016. 'Substantive Equality Revisited', *International Journal of Constitutional Law*, Vol. 14, pp. 712–38.
- Lawson Anna and Waddington Lisa (eds.), 2018. *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*, Oxford University Press, Oxford

PERSPECTIVES ON FEDERALISM
Centro Studi sul Federalismo
Piazza Arbarello, 8
10122 Torino - Italy
Tel. +39 011.15630.890
Mail to: castaldi@csfederalismo.it,
delledonne@csfederalismo.it