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

by

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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.

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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

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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

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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

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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

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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

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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

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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

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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*

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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

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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)

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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

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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.

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[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

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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.

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