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Lisa Waddington, Anna Lawson (eds.)

**The UN Convention on the Rights of Persons with Disabilities
in Practice. A Comparative Analysis of the Role of Courts**

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Introduced in 2008, the United Nations' Convention on the Rights of Persons with Disabilities (CRPD) has existed for over a decade and in a considerable number of its State Parties the act has been in force long enough to demonstrate first issues with its adoption and effectiveness. Implementation of the CRPD should now be considered an overarching priority by organizations and individuals committed to improving the quality of life of people with disabilities. The CRPD is a potential catalyst for a radical reappraisal of policy and practice among governments and organizations concerning persons with disabilities, as well as by service planners and providers, members of professional and voluntary organizations, the research community, and by society at large. The 152 governments that have ratified the CRPD have entered into a commitment in international law to submit detailed reports to the CRPD Committee of the UN human rights commission. The Committee's criticisms of the nature and quality of government implementation highlight the need for sustained and informed advocacy by civil society to raise public awareness about the potential of the CRPD to benefit people with disabilities – here the crucial role belongs to academia.

The scholarly neglect regarding the rights of people with disabilities has just been filled by *The UN Convention on the Rights of Persons with Disabilities in Practice. A Comparative Analysis of the Role of Courts*, edited by Lisa Waddington and Anna Lawson examining the effectiveness of this CRPD implementation process in the context of courts' activity. The volume was published as part of the International Law

in Domestic Legal Orders series of the Oxford University Press. This comprehensive study examines how courts in thirteen different jurisdictions use, interpret and make the act work. The first part of the book contains chapters specific to each jurisdiction (written by experts in both the CRPD and the particular jurisdiction in question), whereas the second part consists of four comparative chapters which draw on the rich analysis of the jurisdiction-specific chapters. The issues addressed by them include respectively the interpretation of CRPD provisions by domestic courts; the legal status of the CRPD in domestic law and its relevance to domestic case law; the uses made of the CRPD by domestic courts; and the judiciary's role and perception of its relationship with the CRPD. The book also includes reflections on the implications of this study, and previous comparative international law studies of CEDAW, for human rights theory.

The first chapter by Ana Laura Aiello provides an overview of how the CRPD is being applied by Argentinian courts. For this purpose, seventy-four judgments are analysed. There are two major findings: first, most relevant judgments involved legal actions against the social welfare system and legal capacity issues; second, most judgments tended to draw on the CRPD as an interpretive aid to domestic law or simply included generic references to the CRPD without putting it to any obvious use in the judgment.

The analysis of Australian jurisdiction provided by Lisa Waddington, shows that Australian courts have referenced the CRPD in their judgments to bolster or support their reasoning in a number of cases. On the other hand, Australian courts have also on occasions explicitly stated that they found the CRPD to be inapplicable or irrelevant. The Australian cases explored in this chapter therefore represent a wide diversity of judicial responses to the CRPD, and provide the basis for a fruitful discussion and analysis.

The chapter by Oliver Lewis presents an overview of the adjudicative bodies of the Council of Europe, i.e. the European Court of Human Rights and the European Committee of Social Rights, and outlines their mandates with regard to integrating UN human rights treaties. The relatively small dataset was forty-five cases dealt with by the Court and two collective complaints decided by the Committee that cite the CRPD up to 2016. The conclusions are that the Council of Europe system has yet to engage seriously in the CRPD's jurisprudential opportunities.

Lisa Waddington also examines implications of the EU's accession to the CRPD regarding the role for the Court of Justice of the European Union (CJEU). Given that the Court has the task of interpreting the CRPD as an instrument of EU law and, in particular, ensuring that EU secondary legislation is interpreted in a manner which is compatible with the Convention wherever possible, it is not surprising to find references to the CRPD in a number of judgments and opinions of its Advocate General rendered both before, and primarily after, the conclusion of the CRPD by the EU.

Valentin Aichele points to German courts' failure to be proactive in demonstrating "friendliness towards public international law" when dealing with international human rights norms. However, in quantitative terms, German courts have referred to the CRPD more often than any other UN international human rights instrument. Furthermore, in qualitative terms, federal courts have become more receptive towards the CRPD.

Another chapter by Shreya Atrey provides an account of Indian appellate courts' engagement with the CRPD and the developing caselaw on disability rights. The High Courts and the Supreme Court have resorted to the CRPD in diverse ways within "citation" and "interpretation".

An interesting view is presented by Eilionóir Flynn referring to Irish jurisdiction being in a specific position as a state which has not ratified the CRPD, but which is obliged to adhere to its provisions under EU law by virtue of the latter's conclusion of the CRPD in 2010. This chapter examines the extent of the impact that the CRPD can have on the judgments of domestic courts on disability rights in advance of the state's ratification of the CRPD.

Delia Ferri highlights how Italian lower and higher courts, including the Constitutional Court and the Court of Cassation, have attempted to overcome the gap between domestic law and the CRPD, by rethinking legal concepts in light of the CRPD, especially with regard to legal capacity and the domestic provisions of the civil code on the "administration of support", but also to non-discrimination legislation and reasonable accommodation.

Elizabeth Kamundia analyses fourteen cases in which Kenyan courts have made reference to the CRPD and finds that there is a steady increase in the usage of CRPD provisions by Kenyan courts, particularly since the coming into force of the Constitution of Kenya in 2010 which transformed Kenya into a monist state.

The Mexican practice is described by Matthew S. Smith and Michael Ashley Stein showing how Mexico's Supreme Court has applied the CRPD to decide cases involving persons with disabilities following its 2011 constitutional reform, frequently failing to do so in an even-handed manner. Civil society organisations that have advocated for progressive rulings have a responsibility for educating the Court to develop workable judicial tests for CRPD-based claims.

Dmitri Bartenev and Ekaterina Evdokimova's analyse on how Russian courts have approached principles and standards of the CRPD, shows that in the majority of cases the CRPD has been used only to reinforce the standards already provided by domestic laws. In a few cases, however, judges interpreted the CRPD provisions to establish new legal concepts or to apply progressively Russian laws concerning the human rights of people with disabilities.

Ignacio Campoy Cervera explores an uneven path to the application of CRPD by different Spanish courts focusing on the rights that have been most frequently referred to the courts: the rights to equality and non-discrimination; equal treatment

as a person before the law; access to justice; personal liberty; honour, reputation and privacy; to education; an adequate standard of living; and participation in political and public life.

The chapter by Anna Lawson and Lucy Series examines courts in the United Kingdom using and interpreting the CRPD in seventy-five cases. The CRPD was used as an interpretive aid only in connection with understanding how ECHR and EU law should be understood in the domestic context, suggesting that, were ECHR and EU law no longer to be part of United Kingdom law, the CRPD would play a greatly diminished role in guiding case law in the United Kingdom.

The second part of the monograph starts with Anna Lawson and Lisa Waddington reflecting on the ways in which courts in the thirteen jurisdictions have interpreted the provisions of the CRPD. Firstly, it explores the interpretations which CRPD provisions (from the Preamble to Article 30) have been given by different courts in cases analysed in this study. Secondly, it considers various issues concerning the interpretations of the CRPD adopted in the thirteen jurisdictions.

The chapter which follows by Lisa Waddington on the domestic legal status of the CRPD and relevance for court judgments, explores four dimensions of the CRPD's legal status: direct effect; indirect interpretative effect (where the CRPD influences the interpretation given to domestic law); use of the CRPD because of commitments to another international treaty; and absence of domestic legal status.

On the basis of the previous chapters, Anna Lawson conducts a functional analysis, identifying and exploring seven ways in which the CRPD has been used in court judgments in the cases analysed in this book: first, its use to invalidate or declare unconstitutional national or regional legislation judged to be inconsistent with it; second, its use to overturn or radically reinterpret domestic jurisprudence or legal doctrine; third, its use to provide normative content to proactively fill gaps' in domestic law; fourth, its use to help resolve ambiguities in domestic law; fifth, its use to bolster or support decisions based on domestic or other international authorities; sixth, its use to affirm the importance of the human rights of disabled people; and, finally, its use as a check on executive or public body decision-making.

The chapter *The Role of the Judiciary and Its Relationship to the Convention on the Rights of Persons with Disabilities* by Lisa Waddington, examines the role of the judiciary with regard to the CRPD. It considers the relationship which the judiciary have or appear to perceive themselves as having with the CRPD and explores some of the factors seemingly prompting courts to refer to it. The first section reflects on: whether judges are able to choose to refer to the Convention or have a legal duty to do so; the significance of the fact that the CRPD is international law; and whether judges appear to see themselves merely as domestic actors, or as agents or trustees of the CRPD. The second section explores whether judges are referring to the CRPD in response to arguments raised before the court or doing so of their own volition.

Also considered are the relevance of *amicus curiae* interventions; reasons for referral related to the domestic legal system; and the role of particularly engaged individuals.

The monograph finds its meta-setting in the last chapter *Human Rights Theory and Comparative International Law Scholarship* prepared by Christopher McCrudden. An account of what we know about the use by domestic courts of international human rights law is identified, based on the findings in this volume and earlier work on the use of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). From that, three aspects of the domestic functions of international human rights treaties are tentatively identified as particularly significant: international human rights law is only partly internationally-directed; domestic courts very seldom appear to be acting as agents of international human rights law; and human dignity acts as an important meta-principle in the domestic use of international human rights law.

The book examines how the CRPD has been given effect and interpreted in different jurisdictions with two main interconnected aims. The first one is to investigate and compare the way in which the CRPD has been interpreted and applied by courts in different jurisdictions; the second is to investigate and deepen understanding of the CRPD's influence at the domestic level. The first of these aims situates it within the emerging field of comparative international law offering the first major contribution addressing an international human rights treaty other than the CEDAW. The second aim situates it within the field of disability law by offering the first sustained analysis of how the CRPD influences domestic court judgments.

This volume is a vital and thought-provoking addition to the literature on comparative international law and disability rights. It provides a critical insight into different ways of interpreting (or failing to interpret) CRPD provisions used by courts and it concludes that the impact of the CRPD on case law has so far been limited despite its implementation in legal systems. This groundbreaking text is the first sustained comparative international law analysis of the CRPD greatly contributing to the theory and practice of interdisciplinary disability studies. It focuses on the intersection between human rights law, disability law and international law through an examination of the role of courts, reflecting on the emerging patterns and trends in judicial usage and interpretation of the CRPD and on the wider implications for human rights theory and the nascent field of international comparative human rights law.

Specifically, it considers the transformative vision of the CRPD as a vehicle for fostering national-level disability law and policy changes. In doing so, it outlines challenges and opportunities in disability rights advocacy and human rights practice. The role of human rights in domestic law and process reflect important dimensions of international law and practice. Human rights advocates often fail to account for the potentially mutually constitutive nature of domestication processes and the transformative role that human rights treaties perform within societies. The

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monograph successfully proves that effective CRPD implementation must result in a human rights practice also including court-based advocacy.

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