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Titolare della Cattedra Jean Monnet (Commissione europea)
"Judicial Protection of Fundamental Rights in the European Area of Freedom, Security and Justice"

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DE-POLITICISATION OF HUMAN RIGHTS: THE EUROPEAN UNION AND THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Marcello Sacco*

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1. Introduction

This paper describes how the broad EU¹ governance of human rights is developing. Although the EU was established with an economic prerogative, human rights have gradually become a matter of the EU itself. The EU human rights dimension is in evolution and it is quite controversial. The ECJ first included human rights in the EU general principles and this represents an internal dimension for justice. The EU Treaties then included human rights in the EU constitutional basis and this represents a supranational dimension related to fundamental rights. Finally, since recent years, the EU can ratify international treaties, which represents an international and multilevel dimension of governance. These different EU human rights dimensions interact and shape a new kind of governance where the idea of democracy itself is evolving. To investigate such issues, the paper uses a sampling criteria that focuses on the CRPD, which is the

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* Post Graduate Researcher, School of Law of the University of Leeds. E-mail: lwmsac@leeds.ac.uk

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¹ In order to simplify the text, in this paper, 'European Union (EU)' includes the terms and the relevant acronyms that preceded 'EU' itself as 'EEC' and 'EC'. Although the author is aware of the difference, and even if historical descriptions may be imprecise, the emphasis on this distinction is out of the focus of this paper, and useless for its purposes. Therefore, it will be avoided to facilitate the reading.

first international human rights treaty ratified by the EU. The implementation of the CRPD by the EU shows, among others, two aspects: the first aspect refers to the erosion of the borders between the abovementioned dimensions; while the second aspect refers to new modes of looking at the contemporary representative democracy due to the opportunity for civil society to be a more and more powerful stakeholder. Maintaining a focus on the CRPD, this paper analyses these aspects to describe the evolution of the EU human rights governance, which seems to point to the de-politicisation of human rights themselves.

The CRPD² was adopted on 13th December 2006 and, while writing this article, it includes 175 States Parties.³ The CRPD does not establish new human rights: it states that persons with disabilities are human beings so they must be allowed to enjoy the full range of human rights.⁴ Neither the Covenants nor the European Convention on Human Rights mention disability. These treaties represent an example of the way in which persons with disabilities have been simply forgotten, together with their humanity and rights.⁵ The CRPD restores the status of human beings to “the world’s largest minority”.⁶

The EU has ratified the CRPD. Indeed, this paper focuses on one of the issues that emerge from the conclusion of the CRPD by the EU: the definition of competences, between the EU and its Member States, to implement the CRPD. Although stated in the EU Treaties,⁷ the division of competences between the EU and its Member States needs to be clarified with regard to specific issues to avoid uncertain interpretations. Indeed, Article 44.1 CRPD asks for such clarification when ratified as a mixed agreement.⁸ Following this introduction, the second section of the paper describes the competence issue that interests the EU as Party of the CRPD.

The third section illustrates how the EU competences have practical issues that rise from their uncertainty. Indeed, when the CRPD Committee wrote its Concluding Observations on the EU,⁹ it asked the EU to act on fields where the EU competence is

² United Nations General Assembly Resolution A/61/611, *Convention on the Rights of Persons with Disabilities and Optional Protocol*, 6 December 2006.

³ United Nations, ‘Status of the Treaties - Convention on the Rights of Persons with Disabilities’, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en, accessed 15 January 2018.

⁴ G. QUINN, *A short guide to the United Nations Convention on the Rights of Persons with Disabilities*, in L. WADDINGTON, G. QUINN (eds.), *European Yearbook of Disability Law*, 2009, n. 1, p. 100.

⁵ S. FREDMAN, *Disability equality: A challenge to the existing anti-discrimination paradigm?*, in A. LAWSON, C. GOODING (eds.), *Disability rights in Europe: From theory to practice*, Oxford, 2005, p. 202.

⁶ United Nations, ‘Fact Sheet on Persons with Disabilities’, www.un.org/disabilities/documents/toolaction/pwdfs.pdf, accessed 15 January 2018.

⁷ Consolidated Version of the Treaty on European Union, 2012, in OJ C 326/13, Artt. 4, 5. Consolidated Version of the Treaty on the Functioning of the European Union, 2012, in OJ C 326/47, Part I Title I.

⁸ L. WADDINGTON, *The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences*, in *Maastricht Journal of European & Comparative Law*, 2011, vol. 18, pp. 438-439.

⁹ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the European Union*, 2 October 2015, CRPD/C/EU/CO/1.

uncertain. The aim of this section is to suggest questions related to the competences' practical issues. To answer such questions, two aspects are introduced: legal and political.

The fourth section investigates the legal aspect. The section is divided into two parts: the first part presents background knowledge focused on the competence creep relevant to human rights in the EU; the second part illustrates that human rights are one out of three independent pillars, together with democracy and constitutions. The two parts of this section introduce two legal reasons why human rights are subject to de-politicisation in the EU.

The fifth section analyses the political aspect. The section is divided into two parts: the first part explains why national governments are not worried about the EU managing disability policies; the second part shows how the governance of the EU is moving from hard to soft mechanisms. The two parts of this section explain that a new balance of powers characterises the actual governance of the EU, where human rights are subject to de-politicisation.

2. The EU as Party to the CRPD: The Competence Issue

The EU was an active stakeholder during the drafting of the CRPD.¹⁰ The EU strongly supported the possibility that the CRPD “be open for signature by all States and by regional integration organizations”.¹¹ Finally, the CRPD has been the first human rights treaty of the United Nations (UN) that allows such possibility. The EU has taken advantage of this possibility and signed the CRPD on its opening day for signature, the 30th of March 2007, approved its ratification the 26th of November 2009¹² and formally deposited its ratification the 23rd of December 2010.¹³ After the deposit of all the instruments of accession, the CRPD entered into force the 22nd of January 2011. The possibility for the EU to conclude international treaties derives from Article 218 TFEU. The CRPD is the first UN human rights treaty concluded by the EU and the only one ever ratified by any regional integration organisation.

The EU Member States are Parties to the CRPD as well. At the time of writing this article, only Ireland has not ratified the CRPD yet. The common status of being Parties to the CRPD should imply the need to define the division of competences between the EU and its Member States.¹⁴ Generally speaking, the division of competences between

¹⁰ G. DE BÚRCA, *The EU in the negotiation of the UN Disability Convention*, in *European Law Review*, 2010, n. 2.

¹¹ United Nations General Assembly Resolution A/61/611, *Convention on the Rights of Persons with Disabilities and Optional Protocol*, 6 December 2006, Art. 42.

¹² Council Decision 2010/48/EC, *Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities*, 26 November 2009, in OJ 2010 L 23/35.

¹³ United Nations, ‘Status of the Treaties - Convention on the Rights of Persons with Disabilities’, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en, accessed 15 January 2018.

¹⁴ J. REISS, *Innovative Governance in a Federal Europe: Implementing the Convention on the Rights of Persons with Disabilities*, in *European Law Journal*, 2014, n. 1, p. 114.

the EU and its Member States is included in the EU Treaties, putting into practice the so-called principle of conferral.¹⁵ The EU Treaties confer power of action in defined areas on both the EU and its Member States in either exclusive or shared prerogatives. However, the division of competences as stated in the EU Treaties widely covers limited areas, and it does not define the overlapping of different areas. With regard to human rights, for instance, the principle of non-discrimination is both intersectional¹⁶ and transversal¹⁷ and for this reason its competence may be uncertain. This means that, with regard to the principle of non-discrimination, the borders of the conferral are subject to interpretation, and the ECJ is in charge of guaranteeing univocal interpretations.

Article 44 CRPD includes an attempt to clarify the question of competences where asking its Parties to “declare [...] the extent of their competence with respect to matters governed by the [...] Convention”. As a consequence, the EU included a Declaration of Competence¹⁸ within its conclusion of the CRPD formalising the ratification of the CRPD as a mixed agreement.¹⁹

While writing this article, the mentioned Declaration of Competence is under revision by the EU Commission because the CRPD Committee asked to update such document.²⁰ The revision of the Declaration of Competence should have been submitted one year after the publication of the CRPD Committee Concluding Observations.²¹ However, the new Declaration has not been presented yet as the “discussion will imply longer time than the year given for reporting”.²² Indeed, the division of competences deals with the constitutional Treaties of the EU and their discussion must involve all of the EU Member States, which have to act unanimously to eventually change them.

3. The CRPD Committee Concluding Observations on the EU Initial Report

The mentioned Concluding Observations of the CRPD Committee on the Initial Report of the EU can be analysed with a focus, among others, on the EU competences. In order

¹⁵ Consolidated Version of the Treaty on European Union, 2012, in OJ C 326/13, Artt. 4, 5.
Consolidated Version of the Treaty on the Functioning of the European Union, 2012, in OJ C 326/47, Part I Title I.

¹⁶ D. SCHIEK, A. LAWSON (eds.), *European Union non-discrimination law and intersectionality: Investigating the triangle of racial, gender and disability discrimination*, Farnham, 2011.

¹⁷ S. LAULOM, *French legal approaches to equality and discrimination for intersecting grounds in employment relations*, in D. SCHIEK, V. CHEGE (eds.), *European Union non-discrimination law: comparative perspectives on multidimensional equality law*, London, 2008, p. 283.

¹⁸ Council Decision 2010/48/EC, *Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities*, 26 November 2009, in OJ 2010 L 23/35, Annex II.

¹⁹ J. REISS, *Innovative Governance in a Federal Europe*, cit., p. 112.

²⁰ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the European Union*, 2 October 2015, CRPD/C/EU/CO/1, Para 17.

²¹ Ibid, Para 90.

²² European Commission, *Minutes of the EU High Level Group on Disability meeting*, 2016, available at: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=33665&no=2>, accessed 15 January 2018, p. 2.

to introduce such analysis, this section investigates the position of the Concluding Observations with regard to the duties of the EU under Articles 5, 24, and 12 of the CRPD.

Article 5 CRPD “prohibit[s] all discrimination on the basis of disability and guarantee[s] to persons with disabilities” equality before and under the law. The norm includes the provision of reasonable accommodation, which requires positive actions to avoid discrimination and relocates the cause of personal disadvantages from the individual to the social environment.²³ “The Committee is concerned that not all [...] persons with disabilities [...] receive the reasonable accommodation they need to enjoy their rights”.²⁴ Due to the fact that “the European Community has an exclusive competence [...] with respect to its own public administration”,²⁵ via Article 5 CRPD, the Committee “recommends that the European Union take the necessary measures to ensure that all [...] persons with disabilities receive the reasonable accommodation they need to enjoy their rights”,²⁶ because this duty clearly falls under the EU competence.

Article 24 CRPD states that schools are “the basis of equal opportunity”, so that a positive effort on inclusive education is necessary in order not to discriminate on the grounds of disability within school environments.²⁷ Everyone should be allowed to reach their full potential by the use of personalised formulas.²⁸ Although “the Community shall contribute to the development of quality of education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action”,²⁹ the competence on education is exclusive of the EU Member States.³⁰ Via Article 24 CRPD, the Committee: (i) “recommends that European schools [...] ensure inclusive, quality education for all students with disabilities”,³¹ and (ii) “is concerned that in different European Union Member States, many [persons] with disabilities cannot access inclusive, quality education”³² recommending “that the European Union [...] take

²³ S. FREDMAN, *Disability equality: A challenge to the existing anti-discrimination paradigm?*, cit., pp. 214-221.

²⁴ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the European Union*, 2 October 2015, CRPD/C/EU/CO/1, Para 78.

²⁵ Council Decision 2010/48/EC, *Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities*, 26 November 2009, in OJ 2010 L 23/35, Annex II Para 1.

²⁶ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the European Union*, 2 October 2015, CRPD/C/EU/CO/1, Para 79.

²⁷ Committee on the Rights of Persons with Disabilities, *General Comment No. 4 (2014) on the right to inclusive education*, 25 November 2016, CRPD/C/GC/4, Para 10.

²⁸ J. SCHOONHEIM, D. RUEBAIN, *Reflections on Inclusion and Accommodation in Childhood Education: From International Standard-setting to National Implementation*, in A. LAWSON, C. GOODING (eds.), *Disability rights in Europe: From theory to practice*, Oxford, 2005, pp. 164-165.

²⁹ Council Decision 2010/48/EC, *Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities*, 26 November 2009, in OJ 2010 L 23/35, Annex II Para 3.

³⁰ Consolidated Version of the Treaty on the Functioning of the European Union, 2012, in OJ C 326/47, Art 6.

³¹ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the European Union*, 2 October 2015, CRPD/C/EU/CO/1, Para 85.

³² *Ibid*, Para 60.

measures to facilitate access to and enjoyment of inclusive, quality education”.³³ While (i) European schools are institutions that are part of the EU public administration where the EU has whole competence, (ii) taking measures to change the policies on education of the EU Member States represents an unclear competence.

Article 12 CRPD states that persons with disabilities are recognised “everywhere as persons before the law”, with no derogation. “Equality before the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights”.³⁴ The Declaration of Competence does not mention the question of the recognition of legal capacity, from which derives the issues of guardianship³⁵ and substitution decision making.³⁶ Probably, the Declaration does not mention the question because the EU Treaties do not refer to it either. It should follow that the matter falls under the competence of the EU Member States.³⁷ However, via Article 12 CRPD, “the Committee notes with deep concern that across the European Union, the full legal capacity of a large number of persons with disabilities is restricted”³⁸ and it “recommends that the European Union take appropriate measures”³⁹ to make its Member States change their legislation. Indeed, the CRPD Committee asked the EU to take measures in a field in which the EU has no competence to act.

Why and how should the EU act in order to respect the duties of the CRPD expanding the limits of its competences as conferred by the EU Treaties? In which measure is it possible to interpret the conferral in order to expand the action of the EU? The next two sections try to answer these questions taking into account two main aspects: (i) legal, and (ii) political. While both sections refer to the question of de-politicisation of human rights, section 4 refers to both the EU Treaties and the ECJ, whereas sections 5 refers to both the disposability of governments to lose sovereignty and the emerging importance of civil society.

4. The Legal Aspect: Human Rights and Democracy

This section investigates the legal aspect that is meant to be relevant to the de-politicisation of human rights in the EU. This section is divided into two parts, introducing two legal reasons why human rights are subject to de-politicisation in the EU. The first part presents background knowledge focused on the competence creep relevant to human

³³ Ibid, Para 61.

³⁴ Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014) Article 12: Equal recognition before the law*, 19 May 2014, CRPD/C/GC/1, Para 1.

³⁵ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Germany*, 13 May 2015, CRPD/C/DEU/CO/1, Paras 25-26.

³⁶ P. BARTLETT, *The United Nations Convention on the Rights of Persons with Disabilities and mental health law*, in *The Modern Law Review*, 2012, n. 5, p. 762.

³⁷ Consolidated Version of the Treaty on European Union, 2012, in OJ C 326/13, Art 4.1.

³⁸ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the European Union*, 2 October 2015, CRPD/C/EU/CO/1, Para 36.

³⁹ Ibid, Para 37.

rights' issues in the EU. This part shows the historical evidence that human rights have already been subject to de-politicisation, and that such process is ongoing. The second part illustrates that human rights are one out of three independent pillars, together with democracy and constitutions. This part shows the existence of a tension caused by the necessity to find a correct balance between the three pillars.

4.1. Human Rights in the EU

The European Union is not the Council of Europe.⁴⁰ If the latter has been established to defend human rights, the former has primarily economic and commercial roots. The aims of the Treaty of Rome⁴¹ were essentially economic. "With the Treaty of Maastricht, the Community clearly went beyond its original economic objective, i.e. creation of a common market, and its political ambitions came to the fore".⁴² Since the Treaty of Maastricht, human rights⁴³ have been mentioned in the EU primary legislation. However, the jurisprudence of the ECJ considered human rights issues before their mention in the EU Treaties. This means that human rights issues became matters of the EU due to a non-political initiative. Such evidence explains the so called competence creep,⁴⁴ which occurs when the action of the EU competences are altered by non-political initiatives. To show the existent competence creep relevant to human rights, and to explain the passages that have made the EU an organisation committed to human rights, this section needs to start with the description of the pioneering ECJ case law before focusing on the EU Treaties.

The ECJ had to recognise the EU legislation as hierarchically superior to the EU Member States' legislations due to the fact that the EU Treaties did not contain such disposition. As a consequence of this gap, each EU Member State could have interpreted the EU Treaties subjectively. However, the ECJ "shall ensure that in the interpretation and application of the Treaties the law is observed",⁴⁵ but this role needed to be empowered due to the mentioned gap. To empower its role, the ECJ jurisprudence refers to two leading cases, which established that: (i) the EU legislation is directly applicable

⁴⁰ G. QUINN, *The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth*, in *McGill Law Journal*, 2000, vol. 46.

⁴¹ The Treaties of Rome, signed the 25 March 1957 and entered into force the 1 January 1958, are: (i) the Treaty establishing the European Economic Community (TEEC); and (ii) the Treaty establishing the European Atomic Energy Community (Euratom).

⁴² EUR-LEX, "Treaty of Maastricht on European Union", <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISUM:xy0026>, accessed 15 January 2018.

⁴³ In this paper the terms 'human rights' and 'fundamental rights' are used as synonyms. 'Fundamental rights' is the term used in the EU Treaties standing for 'human rights', which is commonly used otherwise. 'Fundamental rights' emphasises the fact that these rights are meant as constitutional rights in the EU. However, stressing on this distinction is out of the purposes of this paper, therefore it will be avoided to simplify the reading.

⁴⁴ S. WEATHERILL, *Competence Creep and Competence Control*, in *Yearbook of European Law*, 2004, n. 1.

⁴⁵ Consolidated Version of the Treaty on European Union, 2012, in OJ C 326/13, Art 19.

in the EU Member States;⁴⁶ and (ii) the EU legislation enjoys primacy over national law even when constitutional.⁴⁷ Ever since these judgements were made, the EU Treaties have been interpreted with a constitutional approach.⁴⁸

The ECJ case law has established the supremacy of the EU legislation. However, this supremacy seems to be related only to the contents of the Treaties. At the beginning, these contents were primarily economic, as mentioned above, and human rights were not considered. However, the ECJ stated that the limits of its competence do not derive from a strict reading of the EU Treaties but from the general principles of EU law. In addition, the “respect of fundamental rights forms an integral part of the general principles of law protected by the Court of Justice”.⁴⁹ The “general principles of law are unwritten sources of law developed by the case law of the Court of Justice”.⁵⁰ This means that specific issues that are not legislated may be recognised as general principles by the ECJ. Such recognition represents a supplementary law. Only after such recognition, those unlegislated issues may be considered by the ECJ, otherwise the ECJ itself would not have the competence to judge on them.

Subsequently, the ECJ started to use international treaties for its interpretations.⁵¹ Due to the fact that the EU did not have human rights legislation, the fact that specific international human rights treaties had been ratified by the majority of the EU Member States made the contents of those treaties general principles of EU law.⁵² Finally, since the early 1970s, human rights have become a legal matter of the EU through the case law of the ECJ.

The human rights of persons with disabilities are at the international core now. However, only few decades ago, they were neither legislated nor recognised as general principles of the EU law. With regard to the human rights of persons with disabilities, the ECJ action has been only subsequent to political amendments of the EU Treaties.

Indeed, as mentioned above, the Treaty of Maastricht opened the doors to human rights. However, the main shift is represented by the Treaty of Amsterdam. This amended, inter alia, Article F TEU stating that the EU is founded “on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law”. Article F.1 has been added to state the possibility to take action against those EU Member States that would have not respected the dispositions of Article F, while Article F.4 has expanded the powers of the ECJ. In addition, the new Article 6.a TEC was inserted to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. Therefore, since 1997, the

⁴⁶ European Court of Justice, 1963, Case 26/62, *Van Gend en Loos v Administratie der Belastingen*.

⁴⁷ European Court of Justice, 1964, Case 6/64, *Costa v E.N.E.L.*

⁴⁸ D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, n. 4.

⁴⁹ European Court of Justice, 1970, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

⁵⁰ EUR-LEX, “The non-written sources of European law: supplementary law”, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114533>, accessed 15 January 2018.

⁵¹ European Court of Justice, 1974, Case 181/73, *R. & V. Haegeman v Belgian State*.

⁵² European Court of Justice, 1973, Case 4/73, *Nold KG v Commission*.

recognition of disability as a matter not to be discriminated against has been part of the EU primary legislation.

In 2000, the Charter of Fundamental Rights of the European Union⁵³ was proclaimed in Niece. It was a non-binding instrument, but it should have been useful to set general principles related to human rights proper of the EU. After the 2004 failure to be inserted in the EU Constitution, the Charter was amended and proclaimed again in 2007.⁵⁴ It finally became binding the 1st of December 2009 with the entry into force of the Treaty of Lisbon. Article 21 of the Charter prohibits “any discrimination based on [...] disability”. Article 26 states that “the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”. Finally, persons with disabilities’ human rights are stated in the EU primary legislation.

The Treaty of Lisbon amended the Treaty on the European Union (TEU). The new Article 6 TEU gives the status of primary legislation to the Charter. However, Article 51 of the Charter limits its own power over the EU Member States “only when they are implementing Union law”. In 2013, the ECJ dealt with this issue stating that the EU Member States shall respect the EU Charter also when national legislation does not implement EU law but could be connected to it.⁵⁵ While in 1970 the ECJ referred to general principles,⁵⁶ today it has expanded its prerogative to the scope of EU law.⁵⁷

This part of the section has shown how human rights are legally de-politicised in the EU. On the one hand, the action of the ECJ represents a legal means to de-politicise human rights within the EU itself due to the so-called competence creep. On the other hand, the inclusion of human rights in the EU Treaties represents a legal means to exclude human rights from the EU Member States’ national political arena. Furthermore, the possibility for the EU to ratify international treaties represents the last legal means to de-politicise human rights in the EU context. Finally, the conclusion of the CRPD by the EU, as previously explained in section 2, is the first sample of such new possibility.

4.2. Three Different Pillars: Democracy, Human Rights, and Constitutions

The mentioned creep between a court and democratic institutions is the mirror of an existent tension between human rights and democracy. On the one hand, human rights should be excluded by the democratic system, but they need democracy to be protected.

⁵³ Charter of Fundamental Rights of the European Union, 2000, in OJ C 364/1.

⁵⁴ European Parliament, *The Charter of Fundamental Rights*, available at: www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.6.pdf, accessed 15 January 2018.

⁵⁵ European Court of Justice, 2013, C-335/11 and C-337/11, *Joined Cases HK Danmark*.

⁵⁶ European Court of Justice, 1970, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

⁵⁷ F. FERRARO, M. CARMONA, *Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty*, available at: [www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA\(2015\)554168_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf), accessed 15 January 2018.

On the other hand, democracy should guarantee the enjoyment of human rights by citizens, but it needs constraining means to do it. Indeed, human rights and democracy are two different pillars, to which constitutions are added as a third one. In fact, a constitutional document may include: (i) a balance between human rights and democracy; (ii) only one of them; or (iii) none of them.⁵⁸ On the other side of the spectrum, a constitution does not seem to be essential prerequisite to have human rights and democracy guaranteed.

While it may be easy to imagine how the absence of human rights, democracy, and constitutions could impact on our societies, their reciprocal overwhelming action should concern as well: (i) the radicalisation of democracy requires only the right to participation in the political will; (ii) the foundationalism of rights reduces the idea of democracy to elections only; and (iii) the rigidity of constitutions is a barrier to face new necessities.⁵⁹ The radicalisation of democracy brings the danger that the majority of people could legitimately act against the minority. The foundationalism of rights brings the danger that the power of minorities could legitimately impede collective decisions. Finally, the rigidity of constitutions brings the danger that societies could be led by rigid systems limiting both democracy and human rights. The eventual realisation of one of these extreme scenarios would bring claims to substantial changes, which would be probably unable to find stable balances.

Even when such balances would be perfectly defined, their compliance with the needs of society would be maintained only by constant and coherent changes. The evolution of the rights' demand, the necessity for democracy's reforms and the difficulty of constitutional adjustments should be important key points for every political agenda. However, inserting an issue within the political agenda is a sufficient reason to lose the balance of the system, which would be maintained only with a holistic approach that can be hard to guarantee.

This analysis is crucial to identifying three different pillars that evolve with different modalities and velocities. Their differences are the mirror of the different impact of the three democratic powers: legislative, executive, judiciary. Due to the fact that a correct balance of powers is very hard to find, a constant tension is the consequent result. The power preponderance moves from one legal actor to another and within this game courts play a preponderant role with their interpretations and constitutionalisation of law.

The EU sample, as described in the previous part of this section, represents an evidence of this balance of power. Considering the deficit of the EU democracy,⁶⁰ and considering the EU Treaties as a sort of rigid constitution, it would be possible to understand the reasons underpinning the extensive effect-utile⁶¹ of the ECJ when developing its jurisprudence. The same principle may be extended to describe the relationship between

⁵⁸ D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, cit., p. 462.

⁵⁹ Ibid, pp. 463-464.

⁶⁰ EUR-LEX, "Democratic deficit", http://eur-lex.europa.eu/summary/glossary/democratic_deficit.html, accessed 15 January 2018.

⁶¹ D. GRIMM, *The Democratic Costs of Constitutionalisation: The European Case*, cit., p. 466.

the EU and its Member States: when national governments do not act, the national implementation of EU law may become a matter of the ECJ. These samples explain the already mentioned competence creep, which, simply stated, represents the situation where the EU expands the action of its competences without modifying the Treaties.⁶²

Examples of competence creep have already been introduced in the previous part of this section, when describing the evolution of human rights legislation in the EU. For instance, it has been said that the Charter, in a certain way and with all the limits of the case, constitutionalises human rights within the EU. As mentioned, in 2013 the ECJ interpreted Article 51, one of the Charter's limits, stating that the EU Member States are under the obligation to respect the Charter when: (i) implementing EU law, as clearly written in Article 51 itself; but also (ii) when applying national law that may have some relation with EU law. It is evident how this judgement expands the action of the Charter's competences. This form of judicial law-making⁶³ may be considered the response to the slowness that characterises the political attitude towards changes. This sample shows that when political law-making plods along, human rights may be developed through the power of a court whose judgements expand the constitutional value of existing law.

To conclude this section, it may be useful to bear in mind that the EU citizens can invoke EU law before national courts, even when not implemented in their state. This is the so called direct effect of the EU law, as introduced by the ECJ in its already mentioned 1963 case.⁶⁴ With this in mind, it should be recalled that the CRPD has been implemented as semi-primary EU law, with a recognised hierarchical position between the EU Treaties and the general principles.⁶⁵ Hypothetically, the EU citizens could claim before national courts for rights contained in the CRPD due to its status of EU law. Under such eventuality, the de-politicisation of the human rights contained in the CRPD would be extreme because the EU Member States have not the power to amend this treaty as it is a UN product. Under such scenario, the EU Member States would be under constraints that the CRPD is not able to impose on its own, as the judgement of a supranational and unpredictable law-maker court.

The depicted field seems unexplored yet. However, the ECJ has already started to refer to the CRPD developing a relevant jurisprudence with particular regard to the definition of concepts. For instance, the mentioned 2013 judgement,⁶⁶ concerning the interpretation of the Council Directive 2000/78/EC,⁶⁷ explicitly refers to the CRPD as relevant legal context.⁶⁸ In detail, the ECJ refers to the definitions of disability and reasonable accommodation as stated in the CRPD. First, the ECJ judgement states that the "Directive

⁶² S. WEATHERILL, *Competence Creep and Competence Control*, cit.

⁶³ F. TERPAN, *Soft Law in the European Union - The Changing Nature of EU Law*, in *European Law Journal*, 2015, n. 1.

⁶⁴ European Court of Justice, 1963, Case 26/62, *Van Gend en Loos v Administratie der Belastingen*.

⁶⁵ European Parliament, *Sources and scope of European Union law*, available at: www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf, accessed 15 January 2018.

⁶⁶ European Court of Justice, 2013, C-335/11 and C-337/11, *Joined Cases HK Danmark*.

⁶⁷ Directive 2000/78/EC of the European Council, establishing a general framework for equal treatment in employment and occupation, of 27 November 2000, in OJ L303, 2 December 2000, pp. 16-22.

⁶⁸ European Court of Justice, 2013, C-335/11 and C-337/11, *Joined Cases HK Danmark*, Paras 3-5.

2000/78 must, as far as possible, be interpreted in a manner consistent with the convention”.⁶⁹ Due to the fact that “the concept of ‘disability’ is not defined by Directive 2000/78 itself”,⁷⁰ the concept of disability in the Directive itself must be interpreted in the light of the definition stated in the CRPD.⁷¹ Second, due to the fact that the concept of reasonable accommodation is not clarified in the Directive 2000/78,⁷² the Directive itself must be interpreted in the light of the definition stated in the CRPD.⁷³ To conclude, the mentioned judgement gives a legally-binding interpretation for all the EU Member States. This means that, for example, Ireland should use the definition of disability stated in the CRPD even if it has not ratified the CRPD yet. Therefore, after this sample, the field depicted in the previous paragraph should appear more realistic.

5. The Political Aspect: Disability Policies

This section analyses the political aspect that is meant to be relevant to the de-politicisation of human rights in the EU. This section is divided into two parts, which explain that a new balance of powers characterises the actual governance of the EU, where human rights are subject to de-politicisation. The first part explains why national governments are not worried about the EU managing disability policies. The second part shows how the governance of the EU is moving from hard to soft mechanisms.

5.1. The EU Governance and the Political Profile of Disability

The principle of sovereignty is connected to the idea of state as an entity with legal and territorial independence.⁷⁴ The EU Member States have conferred competences on the EU transferring part of their sovereignty with particular focus on issues connected with the aims of the treaties. However, to defend their identity, the EU Member States have historically maintained sovereignty on high-profile policies such as foreign affairs and security.⁷⁵ The EU has been primarily organised as an economic area. However, both the fusion of states and the constitutionalisation of citizens’ rights have been constantly politically delayed or failed. Furthermore, the actual economic and refugee crisis makes governments doubt about the efficiency of the EU project and they tend to polarise their

⁶⁹ Ibid, Para 32.

⁷⁰ Ibid, Para 36.

⁷¹ Ibid, Judgement Pt 1.

⁷² Ibid, Paras 48-52.

⁷³ Ibid, Judgement Pt 2.

⁷⁴ J. HAYWARD, R. WURZEL (eds.), *European disunion: between sovereignty and solidarity*, Basingstoke, 2012, p. 319.

⁷⁵ A. MENON, *Foreign and Defence Policy: The Sovereignty Obsession and The Quest for Elusive Solidarity*, in J. J. HAYWARD, R. WURZEL (eds.), *European Disunion, cit.*, p. 166.

positions: the ‘weakest’ countries ask for solidarity and a closer Union, and the ‘strongest’ ones ask for a repatriation of sovereignty.⁷⁶

National governments are afraid to lose the votes of unsatisfied euro-sceptical electors and they claim to regain their decision-making monopoly assuming to solve the crisis through nationalist programmes. Political elites are following and encouraging a pessimistic mood, instead of driving public opinion towards more illuminated solutions.⁷⁷ Brexit and the other nationalist programmes across the EU are tangible examples of such situation.

However, disability issues are not usually seen as politically high-profile.⁷⁸ Therefore, disability policies are exported from the EU to the local level because national governments have no space in their agenda for low-profile issues. As a result, more than two hundred legal instruments related to disability are active at EU level.⁷⁹ It is important to underline that the mentioned dichotomy, political high/low profiles, is related only to the question of sovereignty. On the contrary, the awareness of citizens seems to work in the opposite direction: citizens look at disability issues as high-profile questions because it is where they are personally touched. Finally, while the EU citizens look at the EU to manage issues that they perceive as high-profile, national governments are pleased to export at EU level the same issues that they perceive as low-profile. For this reason, as the Brexit campaign showed, anti-EU arguments do not include disability issues.⁸⁰ On the other side of the spectrum, the EU is seen by civil society as the closest means to improve the standard of human rights for persons with disabilities⁸¹ and, on the whole, civil society supports the CRPD’s implementation through the EU leadership.⁸²

The CRPD Committee has no possibilities to sanction states due to an incorrect implementation of the CRPD, and the ECJ has not acted in this direction yet. However, the political naming and shaming⁸³ that develops within the EU mechanisms has a political effect that de facto empowers the role of the EU before its Member States. Consequently, the EU Member States tend to autonomously conform with their minimum standards requirements.⁸⁴ The observance of these minimum standards is essential for the EU Member States to maintain their automatic predominance on areas of shared

⁷⁶ J. HAYWARD, R. WURZEL (eds.), *European disunion*, cit., p. 324.

⁷⁷ D. TUSK, *Final remarks by President Donald Tusk to the European Parliament plenary session*, available at: www.consilium.europa.eu/press-releases-pdf/2016/7/47244643871_en.pdf, accessed 15 January 2018.

⁷⁸ G. DE BÚRCA, *The EU in the negotiation of the UN Disability Convention*, cit., p. 22.

⁷⁹ J. ARSENJEVA, *Annotated review of European Union law and policy with reference to disability*, available at: www.disability-europe.net/theme/eu-law-and-policy, accessed 15 January 2018, p. 108.

⁸⁰ D. HANNAN, *Why Vote Leave*, London, 2016.

⁸¹ R. HOWITT, *Brexit could undermine the rights of disabled people*, www.theguardian.com/social-care-network/2016/mar/11/brexit-could-undermine-the-rights-of-disabled-people, accessed 15 January 2018.

⁸² A. LAWSON, G. QUINN, H. CERI JONES, *UK Disabled People and their Families – Stronger and Safer inside the EU*, available at: www.disabilityrightsuk.org/news/2016/june/brexit-stay-go-don%E2%80%99t-know, accessed 15 Jan 2018.

⁸³ E. SZYSZCZAK, *Experimental governance: the open method of coordination*, in *European Law Journal*, 2006, vol. 12 [4], p. 500.

⁸⁴ Council Decision 2010/48/EC, *Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities*, 26 November 2009, in OJ 2010 L 23/35, Annex II Para 2.

competence. Whether the EU legislated or the ECJ stated that an area of shared competence is under common rules instead of minimum standards, the predominance on the competence would be transferred to the EU.⁸⁵ The political game of the EU is a constant extension of minimum standards through its so-called soft-law.⁸⁶ In so doing, even without whole competence on certain areas, the EU can influence its Member States because these would act towards indicated directions to avoid the penalty default⁸⁷ of losing their predominance on areas of shared competence.⁸⁸

Politically avoiding coercion and persuasion, the EU influences its Member States. This fear of losing sovereignty supports an EU-norm diffusion through emulation, which is the simplest way for national governments to conform. Learning from others is the best way to avoid being named and shamed.⁸⁹ Therefore, it is not a surprise that a huge effort of the EU institutions is nowadays dedicated to the spread of best practices among its Member States. Finally, expertise can be institutionalised.⁹⁰ This, for instance, is the mission of the EU Fundamental Rights Agency as well as of the several think tanks that are populating the EU institutions.

To conclude, learning from others and the institutionalisation of expertise are part of a broad international and inter-institutional peer review, which “is a mechanism both for learning systematically from diverse experience [...] and for holding actors accountable”.⁹¹ On the one hand peer review adds value, but on the other hand it purges from local political deviations in favour of a common EU trend. The depicted system allows transparency.⁹² Therefore, local politicians pay attention to complying with the expectations of their voters. Finally, this last consideration closes the circle: while national governments consider disability policies low-profile, a relevant part of the voters gives paramount importance to the governments’ compliance with the EU disability policies. It is evident how, under such governance, human rights issues are de-politicised in the sense that the actual political arena is different from the usual one formed of political parties only.

5.2. The EU Governance and the EU Civil Society

⁸⁵ L. WADDINGTON, *The European Union and the United Nations Convention*, cit., pp. 445-446.

⁸⁶ L. BARANI, *Hard and soft law in the European Union: the case of social policy and the open method of coordination*, in *ConWEB*, 2006, vol. 2.

⁸⁷ C-F. SABEL, J. ZEITLIN, *Experimentalism in the EU: Common ground and persistent differences*, in *Regulation & Governance*, 2012, vol. 6 [3], pp. 413-414.

⁸⁸ A-M. SLAUGHTER, *A new world order*, Oxford, 2009, p. 21.

⁸⁹ L. VANHALA, *The Diffusion of Disability Rights in Europe*, in *Human Rights Quarterly*, 2015, n. 4, pp. 835-836.

⁹⁰ G. DE BÚRCA, R-O. KEOHANE, C-F. SABEL, *Global experimentalist governance*, in *British Journal of Political Science*, 2014, n. 03, p. 478.

⁹¹ G. DE BÚRCA, R-O. KEOHANE, C-F. SABEL, *New modes of pluralist global governance*, in *New York University Journal of International Law and Politics*, 2012, n. 3, p. 17.

⁹² G. DE BÚRCA, R-O. KEOHANE, C-F. SABEL, *Global experimentalist governance*, cit., p. 484.

The drafting of the CRPD was characterised by the exceptional involvement of two actors: the EU, and civil society organisations as disabled people organisations (DPOs). Their engagement was useful to provide expertise and to stimulate a rapid agreement in ratifying the CRPD. However the two actors have also been able to take political advantage of their efforts including themselves within the CRPD: (i) the EU obtained its inclusion in Article 42 related to the possibility for regional integration organisations to be parties to the Convention; and (ii) the DPOs obtained their inclusion in Article 33 regarding the implementation and monitoring of the CRPD. As a consequence of this second result, civil society shall be now considered as part of the CRPD system rather than an external observer.

The concepts described in section 5.A have introduced a new role for civil society in the EU governance. While the division of competences has a typical rigid top down representation, the development of the new EU governance is characterised by the use of horizontal instruments as well. These create a soft net that complements the hard line represented by legally-binding competences. Within the new EU soft architecture, the civil society's influence is defined as the action of civil society that uses EU mechanisms to influence.⁹³

This section briefly introduces four characteristics of civil society in order to show its importance in the EU governance. (i) Civil society has a place in-between citizens and the state,⁹⁴ and it influences without using coercion.⁹⁵ (ii) Civil society may take two forms: (a) non-governmental organisations (NGOs); and (b) active citizens.⁹⁶ (iii) Civil society engagement primarily stems from three reasons to engage: (a) delegation; (b) expertise; and (c) activism.⁹⁷ Finally, as a form of power, (iv) civil society should occupy a defined hierarchical position with regard to political and legal powers.⁹⁸

(i) Civil society may influence when participating in the international political practices described in section 5.A: (a) naming and shaming; (b) learning from others; and (c) peer review. To do this, civil society needs to be solidly organised and accountable. Indeed, the contemporary NGOs' landscape shows massive organisations, which can compete with both international institutions and international political parties. For instance, it is worth mentioning the European Disability Forum (EDF) as the independent DPO that represents 80 million EU citizens with disabilities.⁹⁹ The EDF is part of the EU CRPD Framework to monitor the implementation of the CRPD by the EU. The reports that the EDF writes are legitimately inserted in the mentioned three international political practices.

⁹³ J-A. SCHOLTE, *Civil Society and the Legitimation of Global Governance*, in *Journal of Civil Society*, 2007, n. 3, p. 311.

⁹⁴ N. BERMEO, *Civil society after democracy: some conclusions*, in N. BERMEO, P. NORD (eds.), *Civil society before democracy: lessons from nineteenth-century Europe*, Lanham, 2000.

⁹⁵ A. KUTAY, *Managerial formations and coupling among the state, the market, and civil society: an emerging effect of governance*, in *Critical Policy Studies*, 2014, n. 3.

⁹⁶ C. MAY, *Global Politics and Us*, in *Political Studies Review*, 2015, n. 3.

⁹⁷ J-A. SCHOLTE, *Civil Society and the Legitimation of Global Governance*, cit., p. 312.

⁹⁸ G. BAKER, D. CHANDLER, *Global civil society: contested futures*, London, 2005.

⁹⁹ European Disability Forum, 'About us', www.edf-feph.org/about-us, accessed 15 January 2018.

(ii) Civil society may take two different forms, NGOs and active citizens, which can influence EU policies in similar ways. For instance, in December 2015 the EU launched a public consultation to revise the European Disability Strategy and, once closed, 1518 contributions were submitted by civil society members. These have been grouped into two forms: (a) organisations; and (b) individuals. “Of the 1451 respondents who identified themselves, 80.08% contributed to the public consultation as individuals and 19.92% on behalf of organisations”.¹⁰⁰

(iii) Civil society may be involved for several reasons. For instance, EDF represents citizens with disabilities, which is a sort of delegation. Conversely, the Academic Network of Disability Experts (ANED) may be an example of expertise engagement, meaning that independent experts give their contributions for personal reasons. A third case may be represented by the European Network on Independent Living (ENIL), which appears as an example of activism. Obviously, such different reasons to engage work together. They may be observed in the same civil society actor, either NGOs or individuals, as well as a result of the cooperation between different civil society actors. Finally, it seems important to suggest two considerations: (a) delegation, expertise, and activism are forms of monopoly with which institutions and politicians have to deal;¹⁰¹ and (b) the necessary cooperation between different civil society actors, either NGOs or individuals, explains the increasing importance of international networks.

(iv) Civil society, in the soft architecture of the EU, is hierarchically equal to the democratic institutions. Indeed, the absence of hierarchy is characteristic of the new forms of international governance.¹⁰² As said, civil society represents a source of knowledge, and it is an international influential stakeholder. Due to these two aspects, civil society is a legitimate part of supranational networks as peer of international institutions and political parties, which ask civil society to review them. It is evident how the meaning of peer review does not rely on the mere correction of documents only.¹⁰³

To conclude this section, it may be interesting to numerically quantify the weight of the EU civil society related to persons with disabilities. As it has been previously explained, the EDF represents 80 million EU citizens with disabilities. Therefore, it may be relevant to compare such amount with the turnout of the last EU election. In 2014, the participation was 42.61% that corresponds to 163.5 million valid votes.¹⁰⁴ The main EU political party has been the Group of the European People’s Party (EPP), which gained 29.43% of votes that is equivalent to 48 million voters.¹⁰⁵ This means that, if politically engaged by the EDF, the 80 million EU citizens with disabilities could potentially have

¹⁰⁰ European Commission, *Progress Report on the implementation of the European Disability Strategy (2010-2020)*, 2 February 2017, SWD(2017) 29 final, Annex I.

¹⁰¹ A-M. SLAUGHTER, *A new world order*, Oxford, 2009, p. 63.

¹⁰² Ibid.

¹⁰³ G. DE BÚRCA, R-O. KEOHANE, C-F. SABEL, *New modes of pluralist global governance*, cit., p. 17.

¹⁰⁴ European Parliament, *European and national elections figured out*, available at: www.europarl.europa.eu/pdf/elections_results/review.pdf, accessed 15 January 2018, p. 40.

¹⁰⁵ European Parliament, 'Results of the 2014 European elections', www.europarl.europa.eu/elections2014-results/en/election-results-2014.html, accessed 15 January 2018.

obtained the majority of the EU Parliament seats. It is evident how each politician would de-politicise human rights of persons with disabilities if this would mean maintaining the favour of this incredible group of pressure. Indeed, the previous paragraphs have only partially shown the pervasiveness of the civil society related to persons with disabilities within the EU governance. In fact, the civil society related to persons with disabilities seems not to have entirely expressed its capabilities yet.

6. Conclusion

This paper has described how the principle of conferral can be interpreted. Since the EU has become a human rights promoter, the entire model behind the principle of conferral should have been re-discussed because it seems inadequate. Indeed, it should not be possible to exclude human rights from any competence. The common status of being Parties to the CRPD influences the management of the division of competences between the EU and its Member States making it an urgent topic of the political agenda.

On the one hand, human rights are de-politicised by the action of the ECJ that develops new legislation where political law-makers are uncertain. On the other hand, human rights are de-politicised by the use of a new EU soft governance. This second aspect may be paraphrased saying that in reality the new EU soft governance does not de-politicise discourses, rather it modifies the political arena that is active on certain discourses. While, since recently, decisions have been taken into opaque parliaments influenced by shadowed lobbies, the new EU soft governance seems to ask parliaments to approve laws that have been previously discussed by all the relevant stakeholders with transparent procedures.

This paper, without the presumption of being exhaustive, has described the mentioned attempt of the new EU soft governance with regard to human rights, using the CRPD as a sample. Such attempt cannot but influence concepts such as democracy and constitutions. To describe the situation, this paper has considered the perspective of the EU as Party to the CRPD. The implementation of the CRPD by the EU is an example of how human rights require flexible means to be promptly implemented because civil society monitors, asks for rapid and effective solutions, and wants to take part in changes.

ABSTRACT: The definition of competences between the European Union (EU) and its Member States has always been a topic question. Both the EU and its Member States are Parties to the Convention on the Rights of Persons with Disabilities (CRPD) and this seems to increase rather than diminishing the uncertainty on the relevant competences. Human rights have an intrigued paradigm in the EU: despite the presence of the EU Charter of Fundamental Rights, the EU Treaties do not confer the human rights competence on the EU. This paradigm needs the jurisprudence of the

European Court of Justice (ECJ) to be solved. While, on the one hand, the CRPD seems to need the definition of clear hard competences; on the other hand, it seems to ignite the new EU soft governance architecture. This paper focuses on two main aspects: legal and political. These two aspects are investigated with the effort to depict possible developments of the EU governance, where human rights are promoted also through their de-politicisation.

KEYWORDS: European Union competences – Convention on the Rights of Persons with Disabilities – De-politicisation of human rights – Soft governance – Civil society.