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Jennifer W. Reiss

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The Convention on the Rights of Persons with Disabilities in the Post-Lisbon European Union

*Jennifer W. Reiss**

INTRODUCTION

A recent development in European law, less heralded, but no less path-breaking than the Treaty of Lisbon, was the ratification by the European Union (EU) of its first human rights treaty, the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Concluded as a mixed agreement, the CRPD's pioneering monitoring mechanisms demand a high level of cooperation from both the EU and its Member States. As the Treaty of Lisbon fundamentally changed the frameworks by which the European Union's institutions operate,¹ the EU (at the time, still the European Community) formally participated in the negotiation of its first international human rights treaty, the CRPD.² But the CRPD is a breakthrough in more ways than one: the CRPD is the first United Nations human rights treaty of the 21st century;³ it adopts a modern "social model" of disability⁴ to explicitly recognize the legal rights of the world's largest marginalized group,⁵ and in a break from its predecessor treaties,⁶ the CRPD contains novel provisions for implementation and monitoring,⁷ which portend a "progressive[] reconfigur[ation] of the structure and process of human rights oversight."⁸

The CRPD provides for a treaty monitoring body (the Committee on the Rights of Persons with Disabilities) with an international Conference of States Parties to monitor periodic State reports and to issue general recommendations, and it is supplemented by an Optional Protocol under which it can receive individual or collective complaints.⁹ But these traditional functions and institutions are underpinned by the requirement to establish national "focal points" to facilitate and monitor steps taken by national and sub-national organs to fulfill the Convention. This requirement — a first in international human rights law — effectively charges a named government body with oversight of CRPD compliance. The CRPD also requires cooperation with non-governmental organizations, which it is



Signing of the UN Convention on the Rights of Persons with Disabilities, 2007.
Source: UN Photo/Paulo Filgueiras

hoped, will be facilitated by these organizational centers. The CRPD thus revolutionizes governments' accountability to the international community.

This unusually activist stance from the UN on monitoring and implementation has already grabbed the attention of academics and policy-makers.¹⁰ In Europe, however, the questions posed by the CRPD go far deeper than merely how to more effectively translate treaty commitments into practice. The conclusion of the CRPD by both the EU and independently by its Member States as a mixed agreement generates questions about the nature and future of European integration in the context of expanding EU authority and Member State rejection of formal constitutionalism.¹¹ How will the EU and Member States implement Convention duties in areas of shared competence? As the Commission begins to implement a Code of Conduct under the Convention,¹² the practical effectiveness of the Convention within the EU is at stake. Unless the current Code is revised to provide a concrete formula by which responsibility is divided and action taken, the CRPD will remain merely an empty promise of equal rights for the disabled.

This article proceeds in three primary parts: section one briefly describes the substance of the CRPD, section two situates its adoption in the context of European Union law, and section

** Jennifer W. Reiss is an associate attorney at White & Case LLP. An earlier version of this paper was drafted while the author was an associate of the Center for Human Rights and Global Justice, New York University School of Law. LL.M., Cambridge University, 2010; J.D., Harvard Law School, 2011; B.A., University of Pennsylvania, 2007. Many thanks to Fernanda Nicola, Daniela Caruso, and the Brief staff for helpful comments on drafts, and also to Gráinne de Búrca for advice on an earlier version this article.*

“[T]he CRPD is in essence a bill of rights for the disabled community, reaffirming that impairments do not negate fundamental protections accorded to persons by virtue of their basic human dignity.”

three recounts and critiques the Code of Conduct which ostensibly governs how the EU will fulfill its obligations.

PROVISIONS OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Substantively, the CRPD obligates signatories to go beyond the mere provision of non-discrimination legislation and address the full panoply of civil, political, economic, and social rights through the lens of disability. Underlying principles animating the Convention explicitly include individual autonomy, and “full and effective participation and inclusion in society.”¹³ Article 4 of the CRPD requires active and comprehensive state engagement in the human rights of disabled persons. This obligation is then supplemented by specific provisions in Articles 5 to 30, which touch on traditional elements of the human rights agenda — de facto equality, the right to life, judicial access, freedom from torture (or cruel, inhuman or degrading punishment), privacy, rights to home and family, education, employment, and

participation in public life, among others — as well as more specific concerns of the disabled community, including: accessibility, independent living, rehabilitation, and personal mobility. The last section of the convention includes articles dealing with logistical issues: data collection, international cooperation, reporting, and monitoring.¹⁴

Without negating the applicability of pre-existing human rights instruments,¹⁵ the CRPD is in essence a bill of rights for the disabled community, reaffirming that impairments do not negate fundamental protections accorded to persons by virtue of their basic human dignity. In this sense, one could argue that the CRPD should require little accommodation in national legal systems. Presumably, signatories like the EU, which are already active in protecting the human rights of its citizens, have generally applicable laws in place. The difficulty lies in the disability-specific provisions — the core of the Convention — which are designed to mainstream disabled persons and address the existing human rights gap engendered by their exclusion from the general

population. Governments will have to review nearly the entire corpus of existing law for lacunae ignoring the needs of the disabled, from signage on buildings and making public information available through assistive technologies to specialized training for social services employees and the provision of cultural materials and sports activities in accessible formats. Indeed, the CRPD would be superfluous if it did not alert governments to, and compel action on those dimensions of human rights protection they have thus far failed to address from a disability perspective. However, the sheer pervasiveness of the neglect the CRPD addresses makes its implementation substantially more complex than other human rights instruments.



All-wheel minibused used for public transport in the mountain valleys of Switzerland, 2011.
Source: Flickr user Kecko

ADOPTION BY THE EUROPEAN UNION

Added to the immense task described above are the multiple layers of responsibility and accountability in the EU's supranational system — where Member States have exclusive legal competences, the EU has exclusive legal competences, and there is a vast interstitial space of shared competences — as well as the notion of legal clarity becomes more than a desirable end of CRPD obligations, but essential to its implementation.

In brief, powers — or competences — can be exclusive or shared (whether internal to the EU or in its external relations with non-member states).¹⁶ According to Article 2(2) of the Treaty on the Functioning of the European Union (TFEU), in areas of shared competence the Member States are only free to act to the extent that the EU has not done so. There is also a lesser form of “supplementary” competence for the EU to support or coordinate Member State actions, provided for in Article 2(5) TFEU. It should be noted that the TFEU explicitly includes the principles of “sincere cooperation” and “mutual respect” in the exercise of delineated competences, meant to reinforce the essentiality of loyalty between the EU and the Member States for effective action in a cooperative federal structure.¹⁷

Concluding treaties like the CRPD as “mixed” agreements — i.e. jointly by the EU and its Member States — has been the norm when some of the matters covered by the agreement fall outside the EU's competence, or because in respect of matters for which competence is shared, the Member States have chosen to act under their own powers rather than through the Union.¹⁸ Mixed agreements are necessary to maintain the practical effectiveness of a cooperative federalist system,¹⁹ but they are also politically useful given the inherent volatility of this governance style.²⁰ Thus far, mixed agreements have tended to involve discrete issues, like humanitarian aid, nuclear safety, and participation in the Cartagena Protocol on Biosafety.²¹ Because it does not impose a strict competence structure on the Commission and Member States, mixed agreements offer the space to experiment with creative modes of governance — especially when dealing with convoluted shared competences. Indeed, the Union has already begun

experimenting with inventive modalities for managing shared competences that may be importable into the mixed agreement context.

For example, Council regulations now require Commission observation of bilateral air service agreements, and encourage the acting State to include standardized clauses drafted by the Commission in conjunction with the Member States.²² In multi-lateral agreements “disconnection” clauses have been added not-

ing that EU law on point prevails over the international agreement inside the Union, but does not affect individual Member State obligations.²³ Another option is the so-called Open Method of Coordination (OMC) a ‘soft law’ mechanism which stresses decentralized, voluntary, mutual learning via the setting of guidelines, timetables, and benchmarks for achieving generalized goals, often announced by the European Council, which are then translated into specific national policies tailored to circumstances in Member States. The intention is that civil society and stakeholders are involved in this debate and initial policymaking. These policies are then subject to peer review with the objective of exchange of best practices and thus gradual harmonization of EU objectives without resort to legislative or regulatory dictates in sensitive policy areas.²⁴

With that context in mind, appended to the Council Decision concluding the CRPD on behalf of the European Union is a declaration of the powers of the Union vis à vis the Member States.²⁵ Many of the CRPD's obligations clearly engage shared and supplementary Union competences, particularly in terms of CRPD Articles 9 and 20 on accessibility and personal

mobility, respectively. Ostensibly then, this document should be the foundation for any further exploration of dividing powers under the Convention. Unfortunately, it is not very helpful. The powers of the Union are very general ones, relatively apparent from a plain reading of the CRPD. The EU specifies exclusive competence regarding its own public administration and shared or supplemental competence in areas where it is provided for in the TFEU, such as transport, discrimination on the grounds of disability, employment and vocational training.²⁶

The Decision does include an additional appendix to “illustrate” existing Union legislation relevant to matters covered by

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the Convention, including seventeen items on accessibility, nine on employment and social inclusion, eight on mobility, five on access to information, five on data collection, and three on relevant aspects of international cooperation. However, (1) this listing may or may not be comprehensive and (2) interested parties are left to investigate each of the forty-seven acts independently to assess the extent of the EU and Member States' comparative undertakings. Moreover, the document is somewhat biased in emphasizing the EU as the predominant actor. Although it might have been appropriate to include some discussion of what is clearly Member State competence as a counter-point to elucidate the declaration of the EU's competence, there is no such explicit discussion of what might be exclusively the province of the Member States.²⁷

Many of these instruments have as their legal basis in Article 114 TFEU — the European 'commerce clause' empowering the EU to adopt harmonizing legislation in support of the internal market.²⁸ This is noteworthy because the article is subject to extensive qualifications pursuant to political concerns of the Member States, which further complicates the question of who is responsible for attending to the needs of disabled consumers. Comprehensive implementation will clearly

take time, resources, and ultimately, political capital within the Commission. When seen in that context, the opaquely announced division of competences becomes somewhat understandable. However, one must remember that delineating powers in the case of the CRPD means so much more than horse-trading in the bland 'Euro-speak' of a Brussels bureaucrat. It directly translates into political responsibility and — more importantly — accountability to fill one of the last true gaps in European human rights law. Delineating competences means that the paraplegic knows where to turn when she is denied access to public transport, it means that the schizophrenic can petition to be cared for by his family, rather than locked in an institution, and it means that autistic children can no longer be marginalized or excluded from a real education as a burden to the public. There are palpable consequences of the path the EU decides to take.

THE CODE OF CONDUCT

In late 2010, the Council, Commission, and Member States adopted a Code of Conduct with the primary purpose of describing the function of the Commission as the focal point for implementation of the CRPD (in accordance with Article 33(1) of the Convention).²⁹ With the inventive monitoring and

implementation provisions of the CRPD, the United Nations has engaged itself in a quest for continued effectiveness for the international human rights regime. In the Convention's Code of Conduct, the EU had a similar chance to innovate, develop new governance mechanisms, and enhance its ability to fulfill its growing responsibilities in the human rights field. Unfortunately, the Code of Conduct leaves much to be desired.

The document is preoccupied foremost with management within the UN monitoring context but not truly with the division of responsibilities between the levels of governance. Coordination meetings may be convened on the subject of any type of competency prior or concurrent to UN committee meetings, with referrals on subjects of either shared or exclusive Union competence to a Disability High Level Group. In the event of Member State competence over a given subject, "coordinated positions" may be expressed by either the EU Presidency, an appointed Member State, or by mutual consent the Commission, who will also speak in cases of exclusive Union competence.³⁰ In shared competence, determining who will make statements on behalf of the EU is an issue of "the preponderance of the matter," a term which is left undefined.³¹

Only in the event of deadlock on shared competence combined with a pressing UN deadline is there provision for anything but the same vague standards suggested by the EU documents concluding the CRPD. Disagreements are referred to relevant Council Working Groups designated by the Presidency and as a last resort, to the Permanent Representatives Committee, who will vote on the matter in accordance with the EU voting rules assigned to the subject.³²

If the EU is serious about its obligations under the Convention, the current Code of Conduct is not enough. The plight of the disabled is not going to be ameliorated by streamlined procedures in New York or Geneva. A better Code would not skirt the issue of competences, but instead establish precise circumstances under which the procedures for managing competences are triggered and initial steps are outlined to move from obligation to legislation. And to do so, it would adopt a discursive focus: establishing pathways for information sharing and consultation, but couching it in the firmer legal approach adopted by the EU's existing coordinating Regulations.

For example, the key provision in a revised Code should stipulate that the entity to which an issue of compliance is first presented — whether the Member States or the Commission

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— shall notify all appropriate focal points³³ either of (1) the action proposed by that body to address compliance in accordance with an express competence or (2) the concern that compliance would be better served by action at another level of governance. In the latter case, a proposal or opinion on further conduct should be appended. This procedure would have to have some appropriate time limitation.

CRPD focal points of nations affected by the proposed action can then craft a response to the notification. If there is agreement between the Commission and the Member States in competency or method, the notifying focal point would be authorized to proceed. If there is disagreement, the initial notification would act as a binding agreement to enter into mutual discussions on the issue. Efficiency and effectiveness would be served by forcing participation in the cooperative procedure, so neither the Commission nor the Member States can shirk difficult questions. It also provides a forum for information sharing on better methods and unintended consequences. Discussions could trigger notification to and response from the European Parliament to increase democratic participation and the breadth of expertise available.

There should also be clarity in the procedures regarding what would happen if negotiations deadlocked. The CRPD obligations are obviously ongoing, and thus to be a good global citizen, the EU could not just leave the issue unresolved, however politically prudent that may be. The EU’s judicial cooperation regulations³⁴ seem to provide for a final resolution in favor of the Commission in such cases by replacing the open-ended supervision provided for by earlier laws.³⁵ A fairer and more definitive solution may be to provide for referral to the Court of Justice of the European Union for an Advisory Opinion on the Union powers in controversy after some extended time (such a provision would also respond to a potential critique of lack of judicial oversight, without necessarily encumbering innovation). The conceivable existence of a permanent deadlock in negotiations between Member States and the Commission was a key point that the Court of Justice left unresolved after the case of *Commission v. Sweden*.³⁶

Finally, to be prudent, a revised Code of Conduct would include review and expiry provisions, with perhaps a five-year limit and explicit provision to send the review report to the UN CRPD Committee for consideration. If anything, such procedures should be welcomed at the United Nations as improving

the probability of compliance with the substantive provisions, as well as buttressing the establishment of the local focal points so key to the Convention’s innovative approach.

A further delineation of areas of competence — complete with existing affected legislation and proposed additional acts in both the EU and Member States — is useful if the EU is serious about effectively implementing the CRPD. In other words, without a dualist-style strict division of powers, the onus is on the EU and Member State institutions to behave themselves: to agree on the extent of the responsibilities on each side, ensure that the network of responsibilities is comprehensive, and stand by the agreed responsibilities. A precise declaration of competences keeps both sides honest. That said, it may not be realistic to create a straight recital of competences when the legal impact of the CRPD is so pervasive, but something more than the current Code is clearly warranted.

CONCLUSION

The Treaty of Lisbon is part of an ongoing constitutional process between the European Union and Member States. Increasingly, those “two levels of government are [seen as] complementary elements of one system” existing “in permanent interdependency,” which places the interests of individual citizens — rather than the state — at the center of its constitutional universe.³⁷ Seen in that light, the concurrent advent of Lisbon and the CRPD is powerful. As the international human rights system continues to mature and recognize a fuller conception of individual dignity, perhaps unconsciously, the European Union is moving in a direction that aligns concrete political institutions with that vision. Nevertheless, the fulfillment of citizen-centered governance depends in large part on the cooperative ethos and notion of mutual responsibility suffusing Europe’s chosen style of federalism. The EU’s institutions *must* collaborate.

This obligation is especially profound in external relations agreements like the CRPD. In establishing the concept of “focal points”, the UN has recognized that clarity of responsibility and coordination of national action within international organizations is key to effectiveness: mere general mandates and reporting are insufficient to ensure accountability. Although Lisbon improves coordination on external action with the new unitary role of High Representative, a coordination problem remains outside the area of common foreign and security policy.³⁸ Legislating mutual consultation in the management of shared

competences — particularly in agreements like the CRPD where responsibilities are difficult to specify outright — is one key element in the equation of deepening integration whilst respecting difference. Respecting and celebrating differences is of course

the touchstone of the Convention on the Rights of Persons with Disabilities itself, and that should be the ultimate end of crafting its place in EU law.

Endnotes: The Convention on the Rights of Persons with Disabilities in the Post-Lisbon European Union

¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 Dec. 2007, 2007 OJ (C 303) 1. Further references will be made to the consolidated versions of the Treaty on the European Union [18 May 2008, 2008 OJ (C 115) 13] and the Treaty on the Functioning of the European Union [18 May 2008, 2008 OJ (C 115) 47] incorporating the Lisbon Treaty changes [hereinafter TEU (AA) ('as amended') and TFEU respectively]. Similarly, for clarity's sake, this paper adopts the post-Lisbon nomenclature; the 'European Union' (and derivations thereof) will be substituted for reference to all precursor organizations unless absolutely necessary.

² See generally, Gráinne de Búrca, *The European Union in the Negotiation of the UN Disability Convention*, 35 EUR. L. REV. 174 (2010).

³ Convention on the Rights of Persons with Disabilities, G.A.Res. 61/106, UN GAOR, 61st Sess. Supp. No.49, UN Doc. A/RES/61/106/Annex II, at 65 (13 December 2006) [entered into force 3 May 2008; hereinafter CRPD]. As of August 2011 the CRPD has 149 signatories with 103 ratifications; the EU and all EU Member States have signed, and the EU ratified on 12 December 2010. See UN Enable, Convention and Optional Protocol Signatures and Ratifications, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (last visited 19 Aug. 2011).

⁴ For an overview of the social model of disability and its contrast to the traditional medical model, see Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 85-93 (2007).

⁵ Gerard Quinn, *A Short Guide to the United Nations Convention on the Rights of Persons with Disabilities*, 1 EUR. Y.B. DISABILITY L. 89, 89-90 (2009).

⁶ These include, the Convention on the Prevention of Genocide (1948), the International Convention on the Elimination of all Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights, International Covenant of Economic Social and Cultural Rights (both 1966), the Convention on the Elimination of Discrimination against Women (1979), the Convention against Torture (1984), the Convention on the Rights of the Child (1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

⁷ CRPD, *supra* note 3, Arts. 33-40. For a primer on traditional monitoring systems for UN human rights treaties, and critiques thereof see PHILIP ALSTON & JAMES CRAWFORD EDS., *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* (2000); see also Off. UN High Comm. for Hum. Rts [OHCHR], *Expert Paper on Existing Monitoring Mechanisms, Possible Relevant Improvements and Possible Innovations*, UN Doc. A/AC.265/2006/CRP.4 (16 Jan. 2006); UN Dep't of Econ. & Soc. Affairs, *National Institutional Frameworks and Human Rights of Persons with Disabilities*, UN

Doc. A/AC.265/2006/CRP.5 (14 Aug. 2006). Other relevant UN Studies and Reports are accessible at <http://www2.ohchr.org/english/issues/disability/documents.htm>. For an overview of the various monitoring mechanisms in the CRPD, see Michael Ashley Stein & Janet E. Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32 HUM. RTS Q. 689 (2010).

⁸ *Id.* at 690.

⁹ Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A.Res. 61/106, UN GAOR, 61st Sess. Supp. No.49, UN Doc. A/RES/61/106/Annex II, at 65 (13 Dec. 2006) [entered into force 3 May 2008].

As of August 2011, the Optional Protocol has 90 signatories with 62 ratifications — not including the EU, although there is a pending proposal to sign. See *Commission Proposal for a Council Decision Concerning the Conclusion by the EC of the CRPD*, COM (2008) 530 final (Feb. 2008).

¹⁰ See, e.g., Stein & Lord, *supra* note 7; Presentation by Gerard Quinn to the Parliament of New Zealand, 19 Feb. 2009, <http://www.odgi.govt.nz/documents/convention/20090219-gerard-quinn-address-comvoices-breakfast.doc> (last visited Oct. 11, 2010); European Disability Forum, EDF Contribution to the UNOHCHR Thematic Study to Enhance Awareness on the Structure and Role of National Mechanisms for the Implementation and Monitoring of the CRPD (September 2009) www.def-feph.org (last visited Oct. 11, 2010).

¹¹ Council Decision 2010/48/EC, 2010 O.J. (L 23) 35. The Commission is designated as the "focal point" for coordination under the CRPD. *Id.*, Art. 3. See Delia Ferri, *The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: Some Reflections from a "Constitutional" Perspective* (University of Catania Online Working Paper No. 4, 2010) available at http://www.lex.unict.it/cde/quadernieuropei/serie_speciale/diversita_culturale.asp.

¹² Council of the European Union, Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities, Doc. No. 16243/10 (Nov. 29, 2010) available at <http://register.consilium.europa.eu/pdf/en/10/st16/st16243.en10.pdf> [hereinafter Code of Conduct].

¹³ CRPD, *supra* note 3, Art. 3(a), (c).

¹⁴ For a more detailed analysis see Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?* 34 SYRACUSE J. INT'L L. & COMM. 563, 590 *et. seq.* (2007).

¹⁵ CRPD, *supra* note 3, Art. 4(4).