
Book Section:
Lawson, A orcid.org/0000-0001-5400-0100 and Waddington, L (2018) Setting the Scene. In: Waddington, L and Lawson, A, (eds.) The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts. International Law and Domestic Legal Orders . Oxford University Press , Oxford, UK , pp. 1-12. ISBN 9780198786627

https://doi.org/10.1093/oso/9780198786627.001.0001

Chapter 1: Setting the Scene

Anna Lawson and Lisa Waddington

1. Introduction

This book explores how a particular international human rights treaty, the UN Convention on the Rights of Persons with Disabilities (CRPD), has been given effect and interpreted by courts in 13 different jurisdictions. It has two main inter-connected aims. The first is to investigate and compare the way in which this international treaty 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 this study within the emerging field of international comparative law. The second connects it with scholarship in the field of disability law. More details about the contribution which this book makes to each of these fields is provided in Sections 2 and 3. This is followed (in Section 4) by an explanation of the methodology used; and (in Section 5) by a brief explanation of the structure of the book.

2. Comparative International Law

The term 'comparative international law' was coined by Anthea Roberts in 2011 to refer to what she describes as an 'emerging practice' and an 'emerging phenomenon'[1] evident particularly in case law. In her words:

> Lawyers are familiar with comparative law (the study of the similarities and differences between national systems and laws) and international law (the law created by States on the international plane). But academics and practitioners are yet to conceptualize an emerging combination of the two, whereby national courts and other arms of government domesticate international law in diverse ways, thereby creating a basis for comparative study.[2]

The growing body of comparative international law literature[3] thus responds to a need to explore and understand differences (and similarities) in the ways in which international law is used and interpreted in different states and jurisdictions.

Roberts suggests that comparative international law 'calls for micro-comparison about how different legal systems interpret and apply substantive international norms in diverse ways'.[4] The range of topics which might be subjected to such micro-comparison is as extensive as is the reach of international law – including topics relating to human rights, humanitarian law, the law of the sea and the law of trade and investment. Given this breadth, as McCrudden has argued, there is a need for comparative law scholarship to be sensitive to 'the particular dynamics that each area of international law may generate' and 'the possibility that theories generated by a comparative international law analysis of domestic understandings of one area

---

[1] A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' 60(1) International & Comparative Law Quarterly (2011) 57, 59, and 60.
[2] Ibid, 60.
[3] See in particular Roberts, ibid; C McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW' (2015) 109(3) American Journal of International Law 534; and A Roberts, P Stephan, P-H Verdier, and M Versteg (eds), Comparative International Law (OUP forthcoming).
[4] Roberts (n 1) 60.

of international law may not explain what is happening in another area'.[5] The first of his three-part comparative international law analysis of the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[6] lays the foundations for what he terms comparative international human rights law, as well as making a convincing case for the added value which comparative international law approaches bring to human rights scholarship.

Besides differing in relation to areas of law, comparative international law investigations also differ according to the nature of the domestic institution or agency which is selected for scrutiny. In human rights contexts, obvious institutional actors, whose interpretations and uses of international law might be compared, include governments, national human rights institutions, civil society organizations and courts. Academic commentators and practitioners have noted that the significance of questions about how domestic courts interpret and apply international law has increased over recent years.[7] This is, in part, because international law is playing a heightened role in domestic cases – a point made by the United Kingdom judge, Lord Bingham, in the following words in 2005:

> To an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance.[8]

It is also because, as Roberts has argued, domestic judicial decisions are playing an increasingly important role in the development and enforcement of international law – with judgments in domestic cases being looked to by international courts and domestic courts in other jurisdictions when establishing custom or interpreting international treaties.[9]

Views remain divided about the ideal role which domestic courts should play in enforcing or interpreting international law. There are long-standing calls for domestic courts to generate convergence and consistency, by acting as guardians of the international legal order or as objective enforcers of international law without regard to domestic concerns.[10] Others have argued that insistence on convergence or consistency, and the notion of impartial enforcement, would be counterproductive and stressed the value (and inevitability) of the influence on domestic courts of domestic concerns and contexts.[11] Frishman and Benevisti, for example, have drawn attention to the danger of political backlash associated with the subjugation of domestic concerns to the quest for convergence; and to the valuable potential of divergent approaches to generate creativity and experimentalism which may open up spaces of constructive ambiguity and strengthen, rather than weaken, international law.[12] Similarly,

---

[5] McCrudden, this volume, Chapter 19, Section 1.
[6] C McCrudden, 'Comparative International Law and Human Rights: A Value Added Approach' in Roberts, Stephan, Verdier, and Versteg (n 3), particularly in section C. The second and third parts of this trilogy (arranged by content rather than publication date) are respectively: C McCrudden, 'CEDAW in National Courts: A Case Study in Operationalising Comparative International Law in a Human Rights Context' in Roberts, Stephan, Verdier, and Versteg (n 3); and C McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW' (2015) 109(3) American Journal of International Law 534.
[7] See eg AM Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191; W Burke-White and AM Slaughter, "The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47 Harvard International Law Journal 327.
[8] T Bingham, 'Foreword' in S Fatima, Using International Law in Domestic Courts (Hart Publishing 2005).
[9] Roberts (n 1) 57, 57-58.
[10] See eg H Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 British Yearbook of International Law 65, 93; and R Falk, The Role of Domestic Courts in the International Legal Order (Syracuse University Press 1964).
[11] See eg O Frishman and E Benvenisti, 'National Courts and Interpretive Approaches to International Law' in: HP Aust and G Nolte (eds), The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence (OUP 2016) 317.
[12] Ibid, 325-327.

Roberts has argued that 'placing a premium on consistent interpretation can undermine the creative role each court may play in developing international law'.[13]

A growing body of scholarship has drawn attention to the fact that impartial enforcement is, in reality, impossible to achieve. In Knop's colourful words, 'domestic interpretation of international law is not simply a conveyor belt that delivers international law to the people', but is rather 'a process of translation from international to national'[14] which inevitably involves an element of creativity. Notwithstanding this, judges may present themselves as objectively enforcing international law in particular cases. Roberts offers, as a possible explanation for this, the fact that the claim to be merely enforcing international law may provide 'a cloak to disguise their progressive development of the law' or operate as 'a shield to justify inaction and deflect criticism for not developing the law'.[15] She argues that, in practice, there is not a brightline distinction between the law enforcing role of domestic courts and their law creation role. In reality, despite the fact that judges may present themselves as impartial enforcers of international law, each decision will also involve an element of law creation – the blend of creation and enforcement varying from case to case. Because processes of interpretation or translation will be influenced by domestic context (including issues such as legal training), Roberts argues that 'international law might take on different qualities as it is domesticated in particular States or regions' and that it is indeed this which constitutes the 'essence' of comparative international law.[16]

This book offers a comparative international law analysis of the way in which the CRPD has been interpreted and applied by courts in 11 national jurisdictions and two regional ones. Focusing as it does on comparing the domestication of an international human rights treaty, it sits within the domain of what McCrudden has called comparative international human rights law. As he notes, comparative international law techniques have been 'surprisingly under-developed' in the context of human rights,[17] suggesting that (at the time he was writing) there was only 'one 'major study' which applied the 'comparative method to the interpretation of international human rights law … in different domestic legal systems'[18] – a 2015 study of the interpretation and application of CEDAW carried out by Hellum and Aasem.[19] To this must now of course be added McCrudden's own ground-breaking comparative international law analysis of CEDAW.[20]

As well as providing additional data and insights to a field which remains surprisingly sparsely populated, this book offers two important and distinctive contributions. First, it provides the first large-scale comparative international law analysis of the CRPD. While this remains a relatively young treaty (coming into force only in May 2008), it contains radical restatements of universal

[13] Roberts (n 1) 74.
[14] K Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 New York University Journal of International Law and Politics 501, 505–506. See also J White, Justice as Translation: An Essay in Cultural and Legal Criticism (University of Chicago Press 1990); SE Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108(1) 108(1) American Anthropologist 38; S Zwingel, 'How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective' (2012) 56 International Studies Quarterly 115; and R Provost, 'Judging in Splendid Isolation' (2008) 56 American Journal of Comparative Law 125.
[15] Roberts (n 1) 71.
[16] Roberts (n 1) 79.
[17] McCrudden, 'Comparative International Law and Human Rights' (n 6) section B.
[18] Ibid.
[19] A Hellum and H Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, 2015).
[20] See in particular, McCrudden, 'CEDAW in National Courts' (n 6); and McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties?' (n 6) 534.

human rights,[21] respect for which has the potential to initiate fundamental changes in various aspects of the domestic law of countries around the globe.

Second, the methodology used in this study differs from that used in previous comparative international human rights law studies. Unlike McCrudden's work on CEDAW,[22] it draws on the expertise and insights of researchers familiar with different jurisdictions to provide the jurisdiction-specific data. Unlike Hellum and Aasem's work on CEDAW,[23] authors of jurisdiction-specific chapters were each asked to focus on the same issues and structure their chapters in the same way – thereby facilitating comparison. In addition this study has a focus on case law which is not found in the work by Hellum and Aasem. While the methodology used here carries its own risks and limitations (discussed in Section 4.4), it also offers alternative approaches and insights on the process of gathering relevant data.

3. Disability Rights Law

Since the CRPD was adopted by the UN General Assembly in December 2006, it has been the subject of a wealth of academic literature. Aside from journal articles and chapters in books with a focus other than the CRPD, this literature includes extensive commentaries on the background and implications of the full range of its provisions.[24] It also includes volumes devoted to specific thematic issues[25] and others which explore the history of the CRPD and a range of themes and issues, often including a focus on various national or regional implementation or interpretation issues.[26] To date, however, there has been no large-scale comparative analysis of the way in which the CRPD is being applied or interpreted by courts in different jurisdictions.

---

[21] See eg the discussion in F Megret, 'The Disabilities Convention: Towards a Hollistic Concept of Rights' (2008) 12 (2) International Journal of Human Rights 261.
[22] (n 6).
[23] Hellum and Aasen (n 19).
[24] See eg G Palmisano, V Della Fina and R Cera (eds) The UN Convention on the Rights of Persons with Disabilities: A Commentary (Springer 2016); and I Bantekas, M Stein and D Anastasiou (eds), The UN Convention on the Rights of Persons with Disabilities: A Commentary (OUP forthcoming).
[25] Examples include B McSherry (ed), Special issue, (2008) 26 (2) Law in Context; R Rieser, Implementing Inclusive Education: A Commonwealth Guide to Implementing Article 24 of the UN Convention on the Rights of Persons with Disabilities (Commonwealth Secretariat, 2008); E Flynn, From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities (CUP 2011); A Mukherjee (ed) Special issue (2012) 16 (6) The International Journal of Human Rights; P Weller, New Law and Ethics in Mental Health Advance Directives: The Convention on the Rights of Persons with Disabilities and the Right to Choose (Routledge 2013); E Flynn, Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities (Ashgate 2015).
[26] Examples include A Kanter (ed), 'Symposium: The United Nations Convention on the Rights of Persons with Disabilities' (2007) 34(2) Special issue of Syracuse Journal of International Law and Commerce; O Arnardóttir and G Quinn (eds), The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives (Martinus Nijhoff Publishers 2009); DA Ziegler (ed), Inclusion for All: The UN Convention on the Rights of Persons with Disabilities (International Debate Education Association 2010); J Kumpuvuori and M Scheinin (eds), United Nations Convention on the Rights of Persons with Disabilities: Multidisciplinary Perspectives (The Center for Human Rights of Persons with Disabilities VIKE 2010); MH Rioux, L Basser, and M Jones (eds), Critical Perspectives on Human Rights and Disability Law (Martinus Nijhoff Publishers / Brill Academic 2011); J Anderson and J Phillips (eds), Disability and Universal Human Rights: Legal, Ethical and Conceptual Implications on the Convention on the Rights of Persons with Disabilities (Netherlands Institute of Human Rights/Utrecht University 2012); M Sabatello and M Schulze (eds), Human Rights and Disability Advocacy (University of Pennsylvania Press 2014); C Ngwena and C Albertyn (eds), 'Special Issue on Disability' (2014) 30 (2) South African Journal on Human Rights; A Kanter, The Development of Disability Rights under International Law: From Charity to Human Rights (Routledge 2015); C O'Mahony and G Quinn (eds) Disability Law and Policy: An Analysis of the UN Convention (Clarus Press 2017).

Accordingly, this book adds a new dimension to the literature on disability and the CRPD. It is the first to offer an extensive comparative analysis of the way in which domestic courts are using and interpreting the treaty. In addition, each of the jurisdiction-specific chapters provide important insights into how judges are using the CRPD and the implications of this for the development of domestic law that respects and upholds the human rights of disabled people.

The importance of the role played by judges, and their interpretation of domestic law, for an effective implementation of the CRPD is a point which has been stressed by the UN Committee on the Rights of Persons with Disabilities. Thus in Nyusti & Takács v Hungary,[27] one of the earliest cases (or individual communications) to come before the Committee, Hungary was found to be in breach of Article 9 of the CRPD for failing to ensure that privately owned banks made their ATM services accessible to blind customers. Prior to the case coming before the CRPD Committee, a discrimination claim had been rejected by the Hungarian Supreme Court, which overturned a ruling of the first instance court that the bank had discriminated against the blind customers contrary to the Hungarian Equal Treatment Act. One of the reasons which the Supreme Court gave for this decision was that the customers had entered into contractual relationships with the bank at a time when the ATM machines were inaccessible and they were therefore barred by contract law from subsequently demanding a more accessible service – an argument which has the potential to render impotent a great deal of disability non-discrimination law. Although the CRPD Committee did not comment specifically on the problems of this reasoning (endorsed by the Hungarian government when the case came before the CRPD Committee),[28] it recommended that the government:

> (b) Provid[e] for appropriate and regular training on the scope of the Convention and its Optional Protocol to judges and other judicial officials in order for them to adjudicate cases in a disability-sensitive manner;
>
> (c) Ensur[e] that its legislation and the manner in which it is applied by domestic courts is consistent with the State party's obligations to ensure that legislation does not have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of any right for persons with disabilities on an equal basis with others.[29]

These words of the CRPD Committee draw attention to the importance of the role it understands domestic courts to play in giving effect to the CRPD. As yet, however, there has been little research on this topic – a gap this book aims to begin to fill.

4. Methodology

4.1 Selection of Jurisdictions

Within this study, there are 11 national level jurisdictions – in alphabetical order, Argentina, Australia, Germany, India, Ireland, Italy, Kenya, Mexico, Russia, Spain and the United Kingdom – and two regional jurisdictions, the Council of Europe (European Court of Human Rights and European Committee on Social Rights) and the European Union. A number of criteria were

---

[27] Committee communication 1/2010 21 June 2013. Views adopted 15-19 April 2013 <http://www.ohchr.org/Documents/HRBodies/CRPD/Jurisprudence/CRPD-C-9-D-1-2010_en.doc>.

[28] For criticism of this reasoning, see eg A Lawson, 'Accessibility Obligations in the United Nations Convention on the Rights of Persons with Disabilities: Nyusti and Takács v Hungary' (2014) 30 (2) South African Journal on Human Rights 380.

[29] Nyusti and Takács (n 27) para 10.2. For criticism of this recommendation see eg O Lewis, 'Case Comment: Nyusti and Takács v Hungary: decision of the UN Committee on the Rights of Persons with Disabilities' (2013) European Human Rights Law Review 419

used to select the 11 national level jurisdictions: First, there needed to be a significant number (at least five) cases in which judgments had seriously engaged with the CRPD. This criterion was not satisfied by a number of jurisdictions (eg Canada, China, Japan, South Africa, Uganda) which were explored with a view to inclusion in the book. Second, there needed to be a suitably qualified expert (in both the CRPD and the relevant domestic law), able to work at a suitable level in the English language, who was willing and available to contribute a chapter to the book and collaborate in this project. These were essential preconditions, both of which led to chapters being withdrawn after the commencement of the project. One chapter (on Canada) was withdrawn after initial research carried out by the relevant expert revealed that there were, at that time, an insufficient number of relevant cases. Another two chapters (one which would have covered both the Czech Republic and Slovakia and another on Peru) were withdrawn because the employment circumstances of the relevant experts changed, with the result that it was impossible for them to find the necessary (substantial) time to carry out the research. No suitably qualified alternative experts could be found.

A third important criteria, which was linked to the first, was that the state in question had ratified the CRPD. Initially this was treated as an essential precondition. However, in light of helpful comments from the anonymous reviewers of the book proposal, we decided to include one state (Ireland) in which there was case law relating to the CRPD despite the fact that it had not been ratified.

A further fourth and fifth criteria were relevant to ensure balance within, and breadth across, the jurisdictions selected. Thus, the fourth criteria concerned the nature of the legal system – we were keen to include a good mix of countries with a common law tradition (Australia, India, Ireland, Kenya, and the United Kingdom (although Scotland's legal system does not share this tradition[30]) and a civil law tradition (Argentina, Italy, Germany, Russia, Spain, and Mexico). We were also keen to include jurisdictions with approaches to international law ranging from strongly monist (eg Argentina, Mexico, and Spain) to strongly dualist (eg Australia and the United Kingdom).

The fifth criteria was geographical spread. Six of the selected countries (Ireland, Italy, Germany, Russia, Spain, and the United Kingdom) are located within Europe. Two are from Latin America (Argentina and Mexico), one from Africa (Kenya) one from Asia (India) and one from Australasia (Australia). Substantial efforts to identify and include more non-European countries (satisfying the first two criteria mentioned above) proved unsuccessful. Particularly regrettable is the absence of a chapter on a country with an Islamic law tradition.

Alongside the 11 national jurisdictions, there is a chapter on the Council of Europe and another on the European Union. Plans to include an additional chapter on the Inter American Court of Human Rights were abandoned after advice from the prospective authors that sufficient case law had not yet materialized.

Regional jurisdictions were included in this study for two main reasons. First, the EU is itself a party to the CRPD and, particularly because the CRPD remains the only international human rights treaty to which the EU is a party, interesting questions arise about the use and interpretation of the CRPD by the Court of Justice of the EU. The CRPD can therefore impact directly on case law of the Court of Justice of the European Union, and be interpreted by that court. However this reason does not apply to the Council of Europe as it is not a party to the CRPD. Second, analysis of the way in which the CRPD is used and interpreted by the adjudicative bodies of regional organizations (such as the Council of Europe and the EU) has

[30] See the explanation of this in Lawson and Series, this volume, Chapter 14, Section 2.

the potential to provide useful context for, or comparisons with, the ways in which the CRPD is used and interpreted by domestic courts – particularly those in countries falling within the jurisdiction of the EU or the Council of Europe. The aim was not therefore to carry out separate comparisons of the ways in which the adjudicative bodies of regional organizations are interpreting the CRPD – an exercise which McCrudden has suggested does not sit squarely within the realms of comparative international human rights law, which is primarily concerned with understanding how international law is interpreted at the national (and not the regional) level.[31] Rather, the regional jurisdictions were included in order to provide additional context for, and comparison with, national jurisdictions.

4.2 Jurisdiction-Specific Chapters

As well as providing rich and original jurisdiction case studies in their own right, the 13 chapters on different jurisdictions provide the content for the comparative analysis presented in the final five chapters of this book. Ten of the jurisdiction-specific chapters were written by experts, at all career stages, other than the editors. The editors were responsible for writing the remaining three jurisdiction chapters.

In order to facilitate subsequent comparison, authors of the jurisdiction-specific chapters were provided with more detailed guidance, and given less latitude over issues of coverage and structure, than is typical in edited collections. A template, to guide the structure and methods of the jurisdiction-specific chapters was drawn up by the editors and piloted on the Australian chapter by Lisa Waddington. A copy of the Australian chapter, together with a detailed template and guidance, was then sent to each jurisdiction-specific expert.

Each of the jurisdiction-specific chapters includes contextual information about the country (or regional organization) in question, including its general approach to international law and the history of its engagement with the CRPD. Each also contains a detailed analysis of cases in that jurisdiction which explicitly refer to the CRPD – together with an account of how those cases were identified and, where it was not possible to analyse all of them, how the selection was made. The resulting dataset is extensive. It includes 7 cases from Italy's Constitutional Court (and almost 600 from its administrative courts); 8 cases from Ireland; 8 cases from the European Union; 10 cases from Mexico; 14 cases from Kenya; 28 cases from India; 45 cases from the Council of Europe; 61 cases from Germany; 62 cases from Spain; 75 cases from the United Kingdom; 81 cases from Australia; 197 cases from Argentina; and over 1,500 from Russia.

In Argentina, Germany, Italy, Mexico, Russia and Spain the chapter authors worked with case reports in the language of the country in question and, unless indicated otherwise, provided the translations for any direct quotations appearing in the chapter. In all of the jurisdiction-specific chapters, the judgment and expertise of authors played an important role in their analysis of the selected cases. There is necessarily an element of subjectivity in such analyses.

4.3 Comparative Analysis

Alongside editing drafts of the jurisdiction-specific chapters, the editors drew upon the information they contained to carry out a series of comparative analyses. Drafts of these comparative chapters were sent to the authors of the jurisdiction-specific chapters with requests to check for any omissions or errors concerning their particular jurisdiction.

---

[31] McCrudden, 'Comparative International Law and Human Rights' (n 6) section C.4.

One strand of the comparative analysis focused specifically on the interpretation of CRPD provisions made in cases across all 13 jurisdictions. This comparison is set out in Chapter 15. Three further comparative analyses were undertaken which explored, broadly, how and why courts were using the CRPD. First, structural similarities and differences between the jurisdictions were explored – focusing on the legal status of the CRPD in domestic law and the relevance of this to case law. This is presented in Chapter 16. Second, in Chapter 17, the various uses made of the CRPD by courts from the 13 jurisdictions were analysed with a view to establishing both the nature of these uses and also whether there were any similarities or differences between jurisdictions, or groups of jurisdictions. Third, in Chapter 18, attention focused on the role of the judiciary and, more particularly, the relationship which judges appear to perceive themselves to have with the CRPD (eg in terms of whether they portray themselves as its objective guardians or enforcers, or whether instead they perceive themselves to be using the CRPD to solve a domestic problem). Also included in this chapter is an analysis of factors which seem to prompt courts to refer to the CRPD.

Findings based on all these comparative exercises are summarized in the conclusions to Chapters 15-18. In the final chapter, Chapter 19, Christopher McCrudden reflects on the findings as a whole, comparing them to the findings of his comparative international law research into CEDAW.

4.4 Limitations of the Methodology

The methodology used in this project relies on analysis of qualitative data (in the form of references to the CRPD in court judgments). It entails two stages of analysis – first, in connection with the initial analysis carried out by the jurisdiction-specific experts; and second, in connection with the comparative analysis carried out by the editors. At both these stages, the analysis was shaped by judgments and interpretations made by the researchers and it is entirely possible that different researchers would analyse the data differently and arrive at different conclusions.

The two-stage analysis also creates the possibility that the editors, when carrying out the comparative analysis, might misunderstand or misinterpret information provided by authors of the jurisdiction-specific chapters. In order to reduce the likelihood of such error, drafts of the comparative chapters were sent to authors of the jurisdiction-specific chapters for comment prior to finalization.

Other important limitations concern the nature of the data collected and analysed by authors of the jurisdiction-specific chapters. This was limited, for reasons of practicality and time-management, to court judgments in which there was an explicit mention of the CRPD. Judgments which did not refer to the CRPD, despite the fact that they might legitimately have been expected to do so, would enrich the analysis. However, for reasons of practicality, these were not identified or included. In this respect, our methodology follows that of McCrudden in his comparative international law analysis of CEDAW.[32]

Authors of jurisdiction-specific chapters were not asked to provide data on the use of the CRPD by quasi-judicial bodies. Such bodies can take on an important role where a large number of complaints are decided by specialized adjudicative mechanisms rather than through courts of general jurisdiction. However, and again for reasons of practicality and workload, a systematic

[32] Explained in McCrudden, ‘CEDAW in National Courts’ (n 6), section III.

coverage of these bodies was not attempted. Nevertheless, where authors chose to cover them, relevant data and analysis is included.[33]

Neither were authors of the jurisdiction-specific chapters asked to provide information about the broad legal context or culture within which judges are operating. Data is therefore not (generally) provided about the CRPD and disability-related training of judges. The importance of such training, as discussed above, has been stressed by the CRPD Committee and would provide an interesting topic for future research.

Other contextual issues falling outside the scope of this study include rules and practice relating to third party interventions and the engagement of civil society in rights-related legal proceedings. Accordingly, this project did not engage in any depth with important questions about entitlement to make interventions; the impact of interventions; the experiences of intervenors and courts receiving interventions; and barriers in the way of more frequent or effective interventions. Investigation of these issues would provide useful context for findings emerging from this study but were beyond the scope of what could realistically be accomplished within it.

Finally, it should be noted that the data collected was all publicly available. Authors were not asked to locate unpublished court judgments. Neither were they asked to carry out interviews, focus groups or any other form of empirical inquiry beyond their identification and analysis of relevant court judgments. Empirical data of this type would be required in order to explore some of the questions raised by the current study. For example, interview-based data from judges might help to throw additional light on factors which explain their engagement with and interpretation of the CRPD. Again, however, such investigations could not realistically be carried out within the scope of this project.

5. Disability-Related Terminology

Debates about the use of the language of disability continue to flourish. It is not the purpose of this section to contribute to them. Neither is it our aim to introduce one particular type of terminology to be used rigidly throughout the book. Our aim is instead to acknowledge the existence of the debate and the reasoning which underpins different usages – before explaining the approach adopted in this book.

There are strong arguments for using the terminology of ‘disabled people’, on the one hand, and ‘people with disabilities’ on the other. In support of the former, there are arguments based on the social model of disability, according to which people perceived to have impairments are disabled by external social forces.[34] On this view, the term ‘disability’ is reserved for ‘the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical and social barriers’.[35] It is thus used to indicate a particular form of exclusion or oppression. From this standpoint, it makes sense to refer to such people being ‘disabled’ – in the same way as it would make sense to refer to them being oppressed. If disability is understood in this way, however, it would not make sense to refer to a person as having a disability.

[33] See, in particular, Chapter 2 on Argentina.
[34] For a particularly clear explanation and analysis of social model perspectives, see M Priestley, ‘Constructions and Creations: Idealism, Materialism and Disability Theory’ (1998) 13 Disability and Society 75.
[35] Disabled People’s International, Proceedings of the First World Congress (DPI 1982).

In favour of the term ‘people with disabilities’ there are also good arguments. The one which is most commonly advanced is that this phrase positions ‘people’ before ‘disability’ – hence the fact that it is often referred to as ‘people first’ language.[36] Given the centrality of the CRPD to this book, another argument in favour of this approach is that it is this terminology which is used in that treaty.[37]

In recognition of the fact that authors of different chapters will have different preferences about this terminology, no attempt has been made to impose uniformity across the book. Accordingly, unless authors indicate to the contrary, the two types of terminology should be understood as synonymous and interchangeable.

6. Structure of the Book

After this introductory chapter, the next 17 chapters fall into two main categories. First, the jurisdiction-specific chapters are set out in Chapters 2-14. Second, the comparative analysis carried out by the two editors is set out in Chapters 15-18. It is in these chapters that the core findings of this project are presented.

The closing chapter is written by Christopher McCrudden. This chapter provides valuable linkage between this project and his own comparative international law analysis of CEDAW as well as drawing out important questions about human rights theory and scholarship.

[36] See eg G Quinn, ‘The Human Rights of People with Disabilities under EU Law’ in P Alston, M Bustello and M Keenan (eds), The EU and Human Rights (OUP 1999) 285.
[37] For an interesting discussion of the use of this terminology in the CRPD, see R Kayess and P French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ [2008] 8 Human Rights Law Review 1.