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# Chapter 15: Interpreting the UN Convention on the Rights of Persons with Disabilities in Domestic Courts

Anna Lawson and Lisa Waddington

## 1. Introduction

This chapter reflects on the ways in which courts in the 13 jurisdictions included in this study have interpreted the provisions of the CRPD. It does not aim to apply conventional international law techniques (as laid down in the Vienna Convention on the Law of Treaties 1969) to interpret the provisions of the CRPD – nor to provide a detailed commentary on the travaux préparatoires of CRPD provisions or ways in which they have been interpreted by the CRPD Committee.<sup>1</sup> Such interpretations will not be used as standards against which to evaluate the interpretations articulated by domestic courts – although apparent inconsistencies of approach will be identified where appropriate. The focus of this chapter, then, is not a vertical comparison between the interpretations adopted at the domestic and the UN level. It is, by contrast, a horizontal comparison of interpretations adopted by different domestic, and indeed regional, courts.

This chapter will be divided into two main sections (other than the introduction and conclusion). The first of these, Section 2, explores the interpretations which CRPD provisions (from the Preamble to Article 30<sup>2</sup>) have been given by different courts in cases analysed in this study. This section addresses meanings attached to the various CRPD provisions which emerge, not only from extensive and explicit interpretation exercises, but also from more superficial judicial engagements with the CRPD, including what appear to be little more than passing remarks. For current purposes, therefore, the notion of ‘interpretation’ is given a broad meaning. It includes understandings of the CRPD which, although unexpressed, appear to explain what is stated explicitly. This exercise therefore demands that, on occasion, the analysis is tentative.

As will become clear, a number of CRPD provisions have received considerably more interpretive analysis than others. Article 5 on equality and non-discrimination, together with the meaning of disability in Article 1 and relevant definitions in Article 2, have attracted particular attention. So too has Article 12 on equality before the law and the right to legal capacity. Further, it should be noted that interpretations of CRPD provisions appear only in a handful of the cases in which the CRPD is cited. There are many cases in which judgments refer to the CRPD without identifying specific provisions. Even where specific articles are mentioned, there is often no indication of how they are being understood or interpreted. Moreover, even where there is an explicit observation about the interpretation of a CRPD article, it is often not accompanied by a clear explanation of the processes or sources on which it is based.

The second main section, Section 3, explores questions about convergence between the interpretations of the CRPD adopted in the 13 jurisdictions. It begins by reflecting on the extent to which interpretations of the various provisions appear to converge before moving on to consider the nature of the interpretation techniques being used. This section also considers the

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<sup>1</sup> For this type of commentary see, eg, I Bantekas, M Stein and D Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, forthcoming); and G Palmisano, V Della Fina, R Cera (eds), *The United Nations Convention on the Rights of Persons with Disabilities* (Springer, 2017).

<sup>2</sup> Articles 31 onward were not interpreted in any of the cases and, because they focus on issues of monitoring, data and international collaboration rather than on more substantive issues, they have not been included here.

extent to which judges appear to be drawing on UN guidance and transnational judicial dialogue to inform their understandings of CRPD provisions.

Finally, in Section 4, an attempt is made to draw together some of the key findings to emerge from this chapter. Reference is made, in this regard, to the extent to which they cohere with patterns emerging from McCrudden's comparative international law analysis of the UN Convention on the Elimination of Discrimination Against Women (CEDAW),<sup>3</sup> thereby providing a link to the final chapter in which McCrudden will expand further on some of these points.

## 2. Domestic Interpretations of Specific CRPD Provisions

### 2.0 Preamble<sup>4</sup>

The Preamble itself was seldom explicitly interpreted by domestic courts. However, there were cases in which it was mentioned in connection with the interpretation or application of other CRPD provisions. A particularly frequent linkage concerned the CRPD's understanding of 'disability', drawing upon paragraph (e) of the Preamble together with Article 1. Because of this close connection, interpretations of preambular paragraph (e) will be discussed below in connection with Article 1.

In contexts other than the meaning of 'disability', the preamble was cited much less frequently. The only case in which aspects of the preamble (other than those concerning the meaning of 'disability') was interpreted was the Argentinian case of *ZA s/ Inhabilitación*.<sup>5</sup> The court there took the view that the aim or purpose of the Preamble was recognition of 'the diversity of disabled persons' and the importance of 'offering them equality of opportunities and possibilities so they can participate in social life'.<sup>6</sup> The Court relied on this view of the aim of the Preamble to rule that the Civil Code's provisions on incapacity should be reinterpreted to recognize the diversity of people with disabilities through developing a more tailored or graduated approach to incapacitation. While it does not appear that a particular paragraph of the Preamble was cited in this case, there is clear resonance with paragraph (i), which recognizes the 'diversity of persons with disabilities'. To conclude, this case does not engage in interpreting the Preamble as such, but does include some reflection on its overall aim or purpose.

### 2.1 Article 1: Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

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<sup>3</sup> See C McCrudden, 'CEDAW in National Courts: A Case Study in Operationalising Comparative International Law in a Human Rights Context' in A Roberts, P Stephan, P-H Verdier, and M Versteeg (eds), *Comparative International Law* (Oxford University Press forthcoming); 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.

<sup>4</sup> Due to the length and nature of the preamble, it has not been set out in full here. Paragraph (e) of the Preamble is set out in Section 2.1.

<sup>5</sup> *ZA s/ Inhabilitación* (Cámara de Apelación en lo Civil y Comercial de Necochea, Buenos Aires) (18 October 2010).

<sup>6</sup> *Ibid*, at B, 14.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The first paragraph of Article 1 does not appear to have been the specific focus of interpretation in any of the cases included in this study. The second paragraph, however, has frequently been considered – and, as mentioned above, often in combination with preambular paragraph (e), which states that:

... disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

Article 1 (second paragraph) and preambular paragraph (e) have been drawn on by courts across a number of the jurisdictions covered in this study. In particular, courts have often recognized (implicitly) the social model of disability, as reflected in the text above, and the paradigm shift which the CRPD represents, and sometimes referred to Article 1 or the Preamble in this context.

### **2.1.1 Broad concept of disability**

Of the jurisdictions considered in this study, Article 1 of the CRPD and Preamble recital (e) have arguably had the greatest influence on the case law of the Court of Justice of the European Union (CJEU). The CJEU has adapted its definition of disability for the purposes of EU equality law in order to align it more closely with the guidance found in Article 1 CRPD and Preamble recital (e). In light of the obligation to interpret the Employment Equality Directive<sup>7</sup> in a manner which is consistent with the Convention, and drawing closely on Article 1 of the CRPD, the Court has held that the concept of ‘disability’ for the purposes of the Directive must be understood as:

a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.<sup>8</sup>

The CJEU has not, however, attempted to engage in an interpretation of Preamble recital (e) or Article 1 of the CRPD.

Courts in other jurisdictions have drawn on the aforesaid provisions of the CRPD to establish a wide understanding of the concept of disability, and to provide protection from disability discrimination, or disability-related benefits, to a broader group of people than was seemingly envisaged in domestic law. In Germany, for example, where Article 1 of the CRPD has prompted courts to recognize explicitly the social model of disability, and to find that the emphasis on hindrance in participation is of ‘special significance’ with respect to the CRPD’s understanding of disability<sup>9</sup> and that a ‘comprehensive notion’ of disability is required.<sup>10</sup> This has

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<sup>7</sup> Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

<sup>8</sup> Joined Cases C-335/11 and C-337/11 HK Danmark (Ring and Skouboe Werge) ECLI:EU:C:2013:222, para 38.

<sup>9</sup> BSG, Judgment of 30 September 2015 – B 3 KR 14/14 R, para 19.

<sup>10</sup> BSG, Judgment of 11 August 2015 – B 9 SB 1/14 R, para. 21.

led the Federal Labour Court to recognize HIV positive status<sup>11</sup> and psycho-social conditions<sup>12</sup> as disabilities.

Meanwhile, in Italy, courts have drawn on Article 1 to develop a broad understanding of the group of people who can benefit from an 'administration of support'. Courts have therefore extended the administration to people with 'psychosocial disabilities', including people with addictions or compulsive behaviours. In making such a ruling the Tribunal of Catanzaro expressly referred to the Convention and to the social model of disability and applied the 'administration of support' in favour of a person who had difficulties in managing his family life because of his alcohol and gambling addictions,<sup>13</sup> whilst the Tribunal of Varese adopted a similar approach when granting the administration of support to a person with a compulsive spending disorder.<sup>14</sup>

In India courts have also drawn on the CRPD when interpreting the concept of disability, although without necessarily referring to Article 1 or Preamble recital (e). In *Ranjit Kumar Rajak v State Bank of India*<sup>15</sup> and *Desh Deepak Dhamija v Union Bank of India*<sup>16</sup> the High Court of Bombay and the High Court of Rajasthan respectively found that individuals with medical conditions<sup>17</sup> or chronic diseases were to be regarded as disabled and protected from discrimination on this ground under domestic law. The Court drew on the CRPD in reaching this conclusion. In two further cases, *Municipal Corporation of Greater Mumbai v Shrirang Anandrao Jadhav*<sup>18</sup> and *M Venkateswarlu v Andhra Pradesh State Road Transport Corporation*,<sup>19</sup> provincial High Courts drew on the CRPD to find that individuals who were not regarded as disabled under the Persons with Disabilities Act, because their percentage of disability was regarded as too low, should still be protected from employment discrimination under domestic law. In *Shrirang Anandrao Jadhav*, Justice Chandrachud relied explicitly on, inter alia, the Preamble and Article 1 of the CRPD to reach this same conclusion.

In Spain the Supreme Court<sup>20</sup> has drawn similarly on Article 1 of the CRPD to recognize that disability-related benefits must be available to disabled individuals, even if they have not been formally recognized as disabled by a judicial declaration. The Supreme Court has therefore extended, with reference to Article 28(1) of the Convention, the right to receive 'food packages' to people with disabilities who have not been officially recognized as disabled, even though domestic law did not seemingly extend this right to this group.

In the above mentioned judgments courts have interpreted the CRPD, and the guidance on the concept of disability found in Article 1 and Preamble recital (e) broadly, and, in light of that, identified specific groups which they believe are covered by the Convention.

## 2.1.2 Dynamic approach to disability

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<sup>11</sup> BAG, Judgment of 19 December 2013 – 6 AZR 190/12.

<sup>12</sup> BSG, Judgment of 11 August 2015 – B 9 SB 1/14 R.

<sup>13</sup> Tribunal of Catanzaro Decree of 4 April 20.

<sup>14</sup> Tribunal of Varese Decree of decision of 3 October 2012.

<sup>15</sup> *Ranjit Kumar Rajak v State Bank of India* 2009(5) BomCR 227

<sup>16</sup> *Desh Deepak Dhamija v Union Bank of India* 2015(2) CDR 780 (Raj)

<sup>17</sup> *Ranjit Rajak* (n 15) involved an individual who was the recipient of a kidney transplant and needed ongoing medical treatment. *Desh Deepak* (n 16) involved an individual with renal failure.

<sup>18</sup> Write Petition (Civil) No 1900 of 2009 (decided on 11 November 2009) (High Court of Mumbai).

<sup>19</sup> 2016 LabIC 1671 (High Court at Hyderabad for Telangana and Andhra Pradesh).

<sup>20</sup> Judgment 430/2015 of 17 July 2015.

In Argentina one court has understood Article 1 as reflecting a 'dynamic approach' to disability. In *García c/ Gobierno de la Provincia de Mendoza s/ APA* <sup>21</sup> the Supreme Court of Justice of Mendoza, quoting from an academic source, noted in the context of Article 1 that 'the Convention does not impose a rigid concept of "disability", on the contrary, it adopts a dynamic approach which allows adaptations over time and in diverse economic scenarios'.<sup>22</sup>

### 2.1.3 Link between impairment and disability

In the Australian case of *Mulligan v National Disability Insurance Agency*<sup>23</sup> Mortimer J of the Federal Court noted, in terms of Article 1 CRPD, that 'an impairment may, in general terms ... be responsible for or related to a disability'.<sup>24</sup> The reference to an impairment being 'responsible' for a disability seems to indicate a lack of understanding of the social model of disability, which recognizes the role that the environment plays in disabling individuals who have impairments.<sup>25</sup> However, the understanding that an impairment is 'related' to disability does seem to be compatible with the social model. Mulligan J went on to note that the threshold for meeting the 'disability requirements'<sup>26</sup> under the National Disability Insurance Scheme were different and more extensive than under the CRPD, and therefore the CRPD and this interpretation of Article 1 of the CRPD had no relevance for deciding whether Mr Mulligan was disabled for the purposes of the Scheme or not.

### 2.1.4 Distinctions among categories of persons with disabilities

In Mexico the Supreme Court of Justice of the Nation (SCJN) has given a number of rulings related to discrimination and equality in which it has referred to the CRPD. Two of these turned on provisions providing for different treatment for two separate groups of persons with disabilities and therefore implicitly addressed the limits of the concept of disability under the CRPD. In AI 3/2010 the SCJN had to rule on the legality of a statute which required the removal of an elected official from office '[f]or permanent physical or mental incapacity'. The National Human Rights Commission (NHRC) argued that the statute discriminated on the ground of disability and that this was *inter alia* contrary to the CRPD. The SCJN did not agree, finding that there was a distinction between 'disability' and 'incapacity', and that 'when a law makes distinctions based on "incapacity" it is not discriminatory'. Strangely this seemed to imply that, in the Court's view, such incapacity was not a form of disability, and therefore the case did not merit further enquiry into whether the treatment was a form of disability discrimination or, in the alternative, a justified difference in treatment.

A later case also turned on a distinction in the way two groups of persons with disabilities were treated, and the permissibility of that distinction. AI 86/2009 involved a challenge to provisions which provided for admission to public childcare centres for disabled children who were 'dependent' on the care of others, whilst disabled children who were not regarded as

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<sup>21</sup> *García c/ Gobierno de la Provincia de Mendoza s/ APA* (Suprema Corte de Justicia de Mendoza) (12 March 2014).

<sup>22</sup> PO Rosales, "Un estudio general de la Convención Internacional sobre los Derechos de las Personas con Discapacidad" (2008) III JA 1022, quoted in *García* (n 21), section III-3.

<sup>23</sup> [2015] FCA 544.

<sup>24</sup> *Ibid*, para 52.

<sup>25</sup> See, eg M Oliver, *Understanding Disability: From Theory to Practise* (Macmillan Press Ltd 1996), and M Priestley, 'Constructions and creations: idealism, materialism and disability theory' (1998) 13 *Disability and Society* 1,75-94 for further discussions of the social model.

<sup>26</sup> [2015] FCA 544, para 53.

'dependent' were not given such preferential access. The NHRC once again brought this case, claiming that the relevant provision was discriminatory, and that a provision which discriminated on the basis of severity of disability, favouring some disabled people over other disabled people, amounted to disability discrimination which was prohibited under the CRPD. In this case the SCJN found that the statute did make a disability-based distinction and should therefore be assessed to determine whether it was discriminatory.<sup>27</sup> In this book Smith and Stein are critical of the SCJN for failing to reconcile an inconsistent approach in these two rulings by explaining 'why distinctions on the basis of "incapacity" do not trigger disability-based discrimination scrutiny while distinctions based on severity of disability do'.<sup>28</sup>

### **2.1.5 No interpretation or reference to Article 1 or Preamble recital (e) on the concept of disability**

No reference to Article 1 or Preamble recital (e) was identified in the covered case law of the European Court of Human Rights or in Ireland, Kenya or the United Kingdom. A number of judgments from Russian courts referred to Article 1 or Preamble recital (e), but courts did not seek to interpret these provisions further.

### **2.1.6 Overall conclusion on Article 1 and Preamble recital (e) on the concept of disability**

There is certainly some evidence that these provisions of the CRPD are pushing domestic courts to adopt a broader interpretation of the concept of disability than was previously the case, and more generally to recognize the social model of disability. This is reflected in a variety of judgments across the jurisdictions studied and reveals how some domestic courts are interpreting Article 1 of the CRPD and Preamble recital (e) in a wide sense. There are also isolated examples of judgments which pick up on the CRPD's guidance on the concept of disability and interpret elements of that guidance, but these do not as yet reflect a trend across case law or jurisdictions.

## **2.2 Article 2: Definitions<sup>29</sup>**

Apart from 'discrimination on the basis of disability' and 'reasonable accommodation', the definitions set out in Article 2 have not been the subject of interpretive analysis by courts in the cases included in this study.

Since the definitions of 'discrimination on the basis of disability' and 'reasonable accommodation' tend to arise in connection with interpretations of Article 5, discussion of them is integrated into the section on Article 5 below.

## **2.3 Article 3: General Principles**

The principles of the present Convention shall be:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

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<sup>27</sup> AI 86/2009, para 51.

<sup>28</sup> Smith and Stein, this volume, Chapter 11, Section 5.2.

<sup>29</sup> Due to the length and nature of this provision, it has not been set out here. The paragraphs concerning 'discrimination on the basis of disability' and 'reasonable accommodation' are set out in Section 2.5.

- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Paragraphs (a)-(h) of Article 3 set out the ‘general principles’ of the CRPD. Like the first paragraph of Article 1 and the Preamble, these Article 3 paragraphs appeared to be cited reasonably frequently but rarely to be the focus of interpretation in the domestic case law analysed in this volume. Nevertheless, in a number of cases, more detailed consideration was given to the principles set out in Article 3 – particularly Article 3(a) which concerns ‘[r]espect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons’; and Article 3(h), which concerns ‘[r]espect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities’.

Principles of autonomy and independence of decision-making, associated with Article 3(a), were relied on in a number of legal capacity cases in both Italy and Russia. In the Russian case of *Bastrykina v the Department of Social Protection of the Kemerovo City Administration*,<sup>30</sup> a court refused to set aside the city administration’s decision to take into account the wishes of a person with disabilities about the person who should be appointed to be their guardian. After referring to Article 3 (and Article 1), it stated that ‘restriction of a person’s right to express his choice may not be based on the mere fact of his disorder, including mental disorder’.

Similarly in Italy, the Tribunal of Varese<sup>31</sup> relied on Article 3 (together with Article 12) to give effect to the wishes of a person with disabilities in the appointment of administrators of support. Despite the absence of any explicit provision relating to ‘auxiliary administrators of support’ in the Italian Civil Code, the court agreed to the request of Mrs X that such a person be appointed to take care of her dog whilst she was in hospital – recognizing the particular significance of this issue to Mrs X. Further, Article 3 (together with preambular paragraph (n)) was relied on by the Tribunal of Rome<sup>32</sup> to rule that courts should, wherever possible, order administration of support instead of full guardianship as it was less restrictive of legal capacity and thus permitted greater autonomy and independence to the person concerned.

Thus, although these cases do not engage in interpreting Article 3(a) as such, they suggest that the courts in question understand the paragraph to stress the importance of interpreting and applying the CRPD in a way that respects and maximizes autonomy and freedom of choice.

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<sup>30</sup> Decision of Appeal of the Kemerovo Oblast Court of 1 October 2014, case no 33A-9682/2014.

<sup>31</sup> 7 December 2011

<sup>32</sup> Judgment of 21 May 2012 in proceedings concerning the full guardianship of Mrs FA.



Turning now to Article 3(h), this paragraph was considered in the Argentinian case of Solíz, María Lujan s/ excarcelación.<sup>33</sup> The court concluded in this case that this paragraph guaranteed a child's right to 'comprehensive disability-related care',<sup>34</sup> and relied on it to authorize the release from prison of a mother of a child with disabilities – because of the negative impact that prison would have on the child, who had been living with the mother throughout. This case suggests that an expansive approach is being taken to Article 3(h) but, from the information provided, it is not clear that any interpretation of the paragraph was offered.

Apart from the three cases discussed above, in which Article 3 was given more than a mere mention, it was cited (without elaboration) by two cases in a small number of cases in Australia, the European Court of Human Rights, Germany, India, Russia, Spain and the United Kingdom. It did not appear to be mentioned by judgments in the European Union or Ireland.

## **2.4 Article 4: General Obligations**

- (1) States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:
  - (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
  - (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
  - (c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
  - (d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
  - (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;
  - (f) To undertake or promote research and development of universally designed goods, services, equipment and facilities, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines.
  - (g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communication technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost.
  - (h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;
  - (i) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.
- (2) With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these

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<sup>33</sup> Solíz, María Lujan s/ excarcelación, Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal, Sala I, Buenos Aires, 15 de enero de 2009.

<sup>34</sup> These are the words of Aiello, this volume, Chapter 2, Section 5.1.3.

rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

(3) In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

(4) Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.

(5) The provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions.

This article sets out the ‘general obligations’ of the CRPD. Again, its interpretation has received relatively little attention in the relevant case law. This having been said, there is some discussion of the meaning or implications of Article 4(1)(e), Article 4(2) and Article 4(4) – which will now be addressed in turn.

#### **2.4.1 Article 4(1)(e)**

According to Article 4(1)(e), States Parties agree to ‘take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise’. In the Argentinian case of *Machinandiarena Hernández v Telefónica de Argentina*,<sup>35</sup> the Civil and Commercial Chamber of Mar del Plata noted that measures prohibiting disability discrimination generally tackle ‘disabling situations generated particularly by the physical environment’.<sup>36</sup> The fact that a wheelchair user could not access a shop because it had no ramp therefore constituted disability discrimination. For current purposes what is of most interest to the interpretation of the CRPD is the fact that the judgment appeared to consider barriers to the physical environment as being particularly likely to constitute disability discrimination. This perhaps implies that courts will be more reluctant to find that other forms of barrier or exclusion (such as those caused by inaccessible information or technology) amount to disability discrimination. It should be stressed that this view is not made explicit in the judgment, but it does appear to be implicit. It should also be noted that, while the fact that Article 4(1)(e) was mentioned makes the case relevant here, the issue of discrimination is considered more fully in connection with Article 5 below.

#### **2.4.2 Article 4(2)**

Article 4(2) was considered in the Argentinian case of *QC, SY e/ Gobierno de la Ciudad de Buenos Aires s/ Amparo*.<sup>37</sup> The Supreme Court drew on its understanding of Article 4(2) to reject an argument that a local government must confine the provision it made for the care of a disabled child by reference to a rigid and predetermined upper budgetary limit. Drawing on guidance from the Committee on Economic Social and Cultural Rights, it took the view that

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<sup>35</sup> *Machinandiarena Hernández c/ Telefónica de Argentina*, Cámara Civil y Comercial de Mar del Plata, 27 May 2009.

<sup>36</sup> *Ibid*, s III-d), quoting SA Coriat, ‘Asignaturas pendientes en accesibilidad’ (2008) III JA 65.

<sup>37</sup> *Recurso de hecho deducido por SYQC por sí y en representación de su hijo menor JHQC en la causa QC, SY e/ Gobierno de la Ciudad de Buenos Aires s/ Amparo*, Suprema Corte de Justicia de la Nación, 24 April 2012.

The ‘availability of resource’, although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction.<sup>38</sup>

Thus, in the Court’s view, Article 4(2) could not be interpreted to justify the imposition of rigid inflexible upper financial limits on plans for meeting the needs of a particular child with disabilities.

Article 4(2) was also amongst the CRPD articles cited in the Russian case of *Tsurenko v Ministry of Education of the Omsk Region*,<sup>39</sup> in which the court rejected the government’s argument that it could not consider the plaintiff’s application for priority housing because it was time-barred. The reason for the late application was that the plaintiff, who had intellectual disabilities, had been living in a social care home and not been provided with accessible information about his entitlement to apply for state supported housing. While the court does not engage in extensive interpretation of Article 4(2), it appears to have interpreted it (together with the Article 3 principle of full participation) as demanding a forward-looking progressive approach to realizing the rights of people with disabilities – in preference to one in which rights to housing could be destroyed by technicalities based on time limits. This would appear to depart somewhat from conventional understandings of progressive realization as explained, for instance, in General Comment No 3 of the Committee on Economic Social and Cultural Rights.<sup>40</sup>

Interestingly, while these Argentinian and Russian cases appear to have interpreted Article 4(2) in support of an expansive approach, a different approach is evident in the United Kingdom case of *JR 47’s Application for Judicial Review*.<sup>41</sup> McCloskey J (in the Northern Ireland High Court) observed that:

... if the correct question to be addressed were whether the state of affairs pertaining to Mr. E is tantamount to an infringement of the UN Convention, Article 19 in particular, I would supply a negative answer, having regard to Article 4(2).<sup>42</sup>

Although this comment does not amount to an explicit interpretation of Article 4(2), it does indicate that the article was understood as protecting the State from being sued by individuals for not having fully realized rights to independent living – but without any detailed consideration of the adequacy of the steps taken to progressively realize that right.

### 2.4.3 Article 4(4)

Article 4(4) concerns non-regression. In another Argentinian case,<sup>43</sup> it was stressed that this provision recognized the principle of ‘pro homine’ in the interpretation of human rights.<sup>44</sup> This is an expansive approach to the interpretation of international human rights treaties, which is discussed in Section 3.2.1.

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<sup>38</sup> Committee on Economic, Social and Cultural Rights, ‘An evaluation of the obligation to take steps to the ‘maximum of available resources’ under an optional protocol to the covenant. Statement’, 10 May 2007, E/C.12/2007/1, at para 4; quoted in SYQC (n 37), at para 14.

<sup>39</sup> Decision of Appeal of the Omskiy Oblast Court of 18 December 2013, case no 33-8213/2013.

<sup>40</sup> UN Committee on Economic Social and Cultural Rights, General Comment No 3 <<https://www.escr-net.org/resources/general-comment-3>> accessed 20 June 2017.

<sup>41</sup> *JR 47’s Application for Judicial Review* [2013] NIQB 7.

<sup>42</sup> *Ibid*, para 23.

<sup>43</sup> GNT y CAE s/ Autorización, Cámara Nacional de Apelaciones en lo Civil – Sala J, 12 May 2011.

<sup>44</sup> *Ibid*.

By contrast, in the United Kingdom case of *R (on the application of Aspinall, Pepper and others) v Secretary of State for Work and Pensions*,<sup>45</sup> Andrews J rejected an argument that the CRPD imposed on UK government bodies a duty of ‘non-regression’ to ‘refrain from engaging in any act or practice that is inconsistent with the Convention’.<sup>46</sup> In his words,

There is no general principle of ‘non-regression’ in international law and it is difficult to see how any positive duty of ‘non-regression’ can arise specifically under the UNCRPD. The provisions of Article 4 of that treaty are aspirational only, and cannot qualify the clear language of primary legislation....<sup>47</sup>

Thus, an argument for a progressive approach to interpretation, based on the principle of non-regression set out in Article 4(4), was firmly rejected.

Finally, it should be noted that, in addition to the cases discussed above, Article 4 was mentioned (without being interpreted) in a small number of cases in Australia, the European Court of Human Rights, Germany, India, Italy, Kenya and Spain. It did not appear to be cited in any of the judgments from the European Union, Ireland or Mexico.

## **2.5 Article 5: Equality and Non-Discrimination**

(1) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

(2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

(3) In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

(4) Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

As mentioned above, Article 2 contains definitions of discrimination on the basis of disability and reasonable accommodation. These read as follows: –

‘Discrimination on the basis of disability’ means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

‘Reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

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<sup>45</sup> *R (on the application of Aspinall, Pepper and others) v Secretary of State for Work and Pensions* [2014] EWHC 4134 (Admin).

<sup>46</sup> *Ibid*, para 35 per Andrews J.

<sup>47</sup> *Ibid*, para 37.

The principles of non-discrimination and equality are reflected throughout the Convention. However, they are addressed specifically in Article 2, which contains definitions of both discrimination on the basis of disability and reasonable accommodation, and Article 5 which is a stand-alone article on equality and non-discrimination. Given the clear links between the definitions in Article 2 and the content of Article 5, the interpretation of these two sets of provisions is also considered together in this section. The section begins by discussing interpretations given to the broad concept of discrimination, and then examines the interpretations given to the duty to provide a reasonable accommodation.

### 2.5.1 Non-Discrimination

Courts have focussed on a variety of elements in their exploration of the non-discrimination requirements found in the CRPD.

In Argentina, the Civil and Commercial Appeals Chamber of Gualeguaychú made a link between Articles 1, 2 and 12 in the case of *AJCS s/ Declaración de inhabilitación*.<sup>48</sup> The Court held that a person's legal capacity cannot be restricted by reason of disability *inter alia* as this would amount to discrimination within the meaning of Article 2(3) CRPD. This interpretation identifies a link between the non-discrimination requirement and other elements of the CRPD and views denial of legal capacity as a particular form of discrimination.

In spite of the fact that the Disability Discrimination Act 1992 was one of very few statutes to be amended in light of Australia's ratification of the CRPD, there are no cases involving the Act which actually involved a court interpreting Articles 2 or 5 CRPD. However, in a decision of the Supreme Court of Victoria concerning alleged discrimination,<sup>49</sup> Bell J did note that discrimination is prohibited in a variety of international human rights conventions, including the CRPD, and that such instruments require preventative action and effective protection. In the context of the CRPD he stated '[i]t is an object of the Convention on the Rights of Persons with Disabilities to promote respect for inherent dignity of people with a mental illness (and other disabled people)'.<sup>50</sup> Implicitly a link was made between ensuring non-discrimination and the protection of dignity.

In Germany the Federal Social Court has applied Article 5(2) CRPD and, building on earlier constitutional rulings, found that discrimination can also involve excluding opportunities for the development of an individual's potential and for the possibility to carry out activities.<sup>51</sup> The Court found that the assumption made by a benefits agency that disabled people who shared a household with others did not contribute to household responsibilities, or only contributed to a minor degree, and were therefore only eligible for a lower level of benefit was discriminatory. The Court found that the agency needed to establish that this was in fact the case before granting such benefits, as opposed to the higher level of benefit available to people who shared household responsibilities on an equal basis with co-habitants.

A particularly significant case concerning equality was handed down by the Indian Supreme Court in May 2016. *Jeeja Ghosh v Union of India*<sup>52</sup> concerned the forced disembarkation from a plane of a passenger with disabilities based solely on the fact that she had cerebral palsy. The

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<sup>48</sup> Cámara de Apelaciones en lo Civil y Comercial de Gualeguaychú (Entre Ríos) – Sala I, 13 August 2015.

<sup>49</sup> *Collier v Austin Health* [2011] VSC 344.

<sup>50</sup> *Ibid* para 29. Emphasis in original.

<sup>51</sup> *BSG*, Judgment of 23 July 2014 – B 8 SO 14/13 R, paras 25 and 26.

<sup>52</sup> AIR 2016 SC 2393

Supreme Court cited both Article 5 and 9 CRPD<sup>53</sup> and found the articles to be directly applicable.<sup>54</sup> The Supreme Court engaged in a detailed review of the change in discourse in disability rights from a welfare model to a human rights model which resulted from the CRPD<sup>55</sup> and noted the obligations resulting from the CRPD are based on human dignity.<sup>56</sup> The Court consequently held:

All the rights conferred upon [persons with disabilities] send an eloquent message that there is no question of sympathising with such persons and extending them medical or other help. They are also human beings and they have to grow as normal persons and are to be extended all facilities in this behalf. The subject of the rights of persons with disabilities should be approached from human rights perspective, which recognized that persons with disabilities were entitled to enjoy the full range of internationally guaranteed rights and freedoms without discrimination on the ground of disability.<sup>57</sup>

The Supreme Court also set out a wide ranging understanding of the notion of equality in its judgment.

The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of persons with disabilities, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation. The move from the patronising and paternalistic approach to persons with disabilities represented by the medical model to viewing them as members of the community with equal rights has also been reflected in the evolution of international standards relating specifically to disabilities, as well as in moves to place the rights of persons with disabilities within the category of universal human rights.<sup>58</sup>

The SCJN in Mexico has given a number of rulings related to discrimination and equality in which it has referred to the CRPD. In case AR410/2012 the SCJN held that a disability-based exclusion regarding the provision of health care violated federal law in Mexico and the CRPD. However, whilst the Court held that denial of health insurance to persons with disabilities based on a pre-existing condition would amount to discrimination,<sup>59</sup> it failed to address more complex questions. Insurers generally seek to take decisions regarding insurance on the basis of perceived 'risk'. Commenting on this decision in this volume, Smith and Stein write 'in failing to define the differences between "risk" and disability, the SCJN may have inadvertently signalled a potential loophole for insurers to use "risk" as a proxy for disability'.<sup>60</sup> The SCJN also failed to specify whether higher health care risks could result in higher premiums being charged to persons with disabilities, or whether the cost of such a risk should be spread across all insured parties. The SCJN has therefore indicated one broad area where the prohibition of

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<sup>53</sup> Ibid paras 11-12.

<sup>54</sup> Ibid para 13.

<sup>55</sup> Ibid paras 39-42.

<sup>56</sup> Ibid paras 36-38.

<sup>57</sup> Ibid para 42.

<sup>58</sup> Ibid para 39.

<sup>59</sup> AR 410/2012, Seguros Inbursa, SA, Primera Sala de la SCJN.

<sup>60</sup> Smith and Stein, this volume, Chapter 11, Section 5.3.

discrimination found in the CRPD applies, but failed to develop or define the full consequences of the prohibition of discrimination in this field.

In ADR 1387/2012 the SCJN relied on Article 5(2) CRPD in establishing a novel approach to the rules of evidence and procedural law. A student with cerebral palsy brought an action against a hotel chain after it posted an advertisement for an intern, stating applicants with disabilities 'need not apply'. She claimed damages for pain and suffering, but failed to plead or establish that she was qualified for the post. The case was initially dismissed on this ground, but the SCJN, whilst recognizing that the student would eventually have to prove that she was qualified, took a different approach. It held that to require the claimant to establish that she qualified before the merits stage would have a 're-victimizing effect'.<sup>61</sup> The Court took the view that requiring her to plead the information which the discriminatory job advertisement had prevented her from providing would constitute 'residual discrimination' and violate Mexico's obligations to eliminate discrimination by adopting all appropriate means both in general and in the workplace.<sup>62</sup> In taking this approach the Court arguably focused on the goal of addressing employment discrimination, and allowed this to influence its approach to accepting and assessing evidence. In this case the interpretation given to the relevant CRPD provisions extended to procedural law regarding the proof of discrimination, although procedural matters are not explicitly referred to in Articles 2 or 5 CRPD.

Lastly, in AI 33/2015 the SCJN 'loosely equated disability-based discrimination with the existence of stigma, thereby introducing a novel legal criterion of uncertain weight'.<sup>63</sup> The case concerned a challenge to a scheme offering qualification certificates to people with autism. The qualifications were intended to demonstrate skills and make it easier for certificate holders to obtain employment. The SCJN held that the certificates would encourage people to regard individuals with autism as 'different' or 'abnormal' and lead to illegal stigma. The Court equated discrimination under the CRPD with stigma. The judgment is criticized by Smith and Stein in their chapter in this volume for its failure 'to elucidate the link between stigma and discrimination' and its neglect 'to provide criteria for distinguishing actionable stigma from permissible positive discrimination'.<sup>64</sup>

In Russia, in the case of *Consumers' Protection Society 'Public Control in Action' v the Ministry of Transportation of the Russian Federation*,<sup>65</sup> the Supreme Court of the Russian Federation referred to the definition of discrimination, including the denial of reasonable accommodation, found in the CRPD. In doing so it upheld aviation rules which allowed airlines to refuse to carry passengers using wheelchairs where this was not compatible with the capacity and construction of the aircraft, although did note that carriers are still obliged to offer affected passengers an acceptable alternative, without linking this to reasonable accommodation. The Court did not accept the argument that carriers were obliged to make aircrafts accessible to disabled passengers, regarding this as a request to adapt technical requirements for accessibility, which lay outside the jurisdiction of the Court. The Court clearly regarded this differential treatment as justified and not amounting to discrimination under the Convention and noted that the right to refuse to carry such passengers in the covered situations pursued the legitimate goal of protecting public safety. The Court may have therefore read a public safety justification into the non-discrimination requirement in the CRPD.

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<sup>61</sup> ADR 1387/2012, para 166.

<sup>62</sup> *Ibid*, para 165.

<sup>63</sup> AI 33/2015, NHRC, Pleno de la SCJN, 37. See Smith and Stein, this volume, Chapter 11, Section 5.3.

<sup>64</sup> This volume, Chapter 11, Section 5.3.

<sup>65</sup> Judgment of the Supreme Court of the Russian Federation of 14 November 2012 no AKPI12-1299.

The CRPD was drawn on in two very different contexts in two cases from the United Kingdom. In *O'Neill v Department of Social Development*<sup>66</sup> the Northern Ireland Industrial Tribunal, in obiter dictum, rejected the idea that the CRPD prevented a narrow interpretation of the comparator requirement in disability discrimination cases,<sup>67</sup> without referring explicitly to Article 5 of the CRPD. In a second case from Northern Ireland, involving an application for judicial review,<sup>68</sup> Horner J in the Northern Irish High Court considered the relevance of the CRPD's prohibition of discrimination in the context of the right to life, and specifically the legality of abortion prohibitions. He found that the CRPD 'proceeds on the premise that if abortion is permissible, there should be no discrimination on the basis that the foetus, because of a defect, will result in a child being born with a physical or mental disability' and that 'there should not be different time limits for abortion depending on whether the foetus is malformed'.<sup>69</sup> Horner J drew on a number of Concluding Observations of the CRPD Committee in reaching this conclusion. The Committee has expressed concern at the consistency with Article 5 CRPD of abortion laws which allow for later abortions for foetuses which have disabilities.<sup>70</sup> However, he concluded that the abortion of foetuses which had fatal abnormalities, which would lead to death prior to or immediately after birth, were required in light of other provisions of international law. In this case the court interpreted the material scope of the CRPD non-discrimination provisions as extending to deadlines for legal abortions.<sup>71</sup>

## 2.5.2 Reasonable Accommodation

The specific issue of reasonable accommodation and the CRPD has attracted the attention of a number of courts.

The Civil and Commercial Chamber of Mar del Plata in Argentina elaborated on the concept of reasonable accommodation in *Machinandiarena Hernández c/ Telefónica de Argentina*.<sup>72</sup> In that case the Court drew on the work on a Spanish disability law expert, Cabra de Luna, and stated that:

For some persons with disability, equality of treatment may entail a discrimination on the facts, and ... equality can only be made real to the extent that mechanisms allowing these persons to overcome barriers are put in place, for instance through adjustments of the workplace, of teams or methods of work.<sup>73</sup>

The Court therefore recognized that the reasonable accommodation duty was part of the obligation not to discriminate and the broad nature of the accommodations that could be made in the context of employment.

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<sup>66</sup> [2012] NIIT 01922\_11IT.

<sup>67</sup> *Ibid* paras 89-90.

<sup>68</sup> *The Northern Ireland Human Rights Commission's Application for Judicial Review* [2015] NIQB 96.

<sup>69</sup> *Ibid* para 64.

<sup>70</sup> *Ibid* para 65.

<sup>71</sup> This is in line with the recommendation made to Spain by the CRPD Committee in its Concluding Observations. The Committee recommended that Spain abolish a distinction made in legislation which allowed for a later termination date for pregnancies where the foetus has a disability. Concluding Observations of the Committee on the Rights of Persons with Disabilities, Spain, 2011, para 18.

<sup>72</sup> *Machinandiarena* (n 35).

<sup>73</sup> MA Cabra da Luna, 'Discapacidad y aspectos sociales: la igualdad de oportunidades, la no discriminación y la accesibilidad universal como ejes de una nueva política a favour de las personas con discapacidad y sus familias. Algunas consideraciones en materia de protección social' (2004) 50 *Revista del Ministerio del Trabajo e Inmigración*, Espana 23 quoted in *Machinandiarena* (n 35), at s III-d.



The European Court of Human Rights has referred to the definition of reasonable accommodation in Article 2 of the CRPD in a number of cases concerning the treatment of disabled prisoners. In general the Court has used the language of a duty to provide 'special care' to such prisoners, rather than the terminology of reasonable accommodation used in the CRPD - although the two concepts seem similar, if not identical, in the context of disabled detainees. In *Semikhvostov v Russia*<sup>74</sup> the Court condemned the practice of delegating the task of assisting a disabled prisoner to fellow inmates but, since the Court did not make an explicit link with the CRPD, this cannot be regarded as an interpretation of either Article 2 or 5 CRPD. This comment applies more generally to the body of case law of the ECtHR. It is worth noting that the CRPD Committee has also interpreted the reasonable accommodation duty as applying in the context of prisoners with a disability.<sup>75</sup>

The definition of reasonable accommodation found in Article 2 of the CRPD has exerted a clearer influence on the case law of the Court of Justice of the European Union (CJEU). In *HK Danmark*<sup>76</sup> the Court referred to the definition and noted that it (and the Employment Equality Directive) 'envisage not only material but also organisational measures'. In the context of employment, the Court found that a reduction of working hours could be an accommodation measure<sup>77</sup> and held that the concept of reasonable accommodation 'must be understood as referring to the elimination of various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers'. This echoed the Court's definition of disability, which is itself based on Article 1 CRPD. The Court therefore drew on the guidance on the concept of 'persons with disabilities' found in Article 1 of the CRPD to identify the kind of barriers that are the target of reasonable accommodation measures in the context of employment. Moreover, the recognition that reasonable accommodations could be 'organisational measures', such as changes to standard practices or methods, reflects a broad interpretation of the kind of accommodation measures envisaged by the CRPD and EU law.

In the Irish case of *A School v A Worker*<sup>78</sup> the Equality Tribunal took account of the decision of the Court of Justice of the European Union in *HK Danmark*. The Tribunal, taking account of the CJEU's broad view of the kind of accommodation measures which could be required, held that a redistribution of tasks could also be an accommodation measure. The Tribunal therefore relied, albeit indirectly, on the CRPD to confirm that a broad approach should be used to identify accommodation measures.

In the Indian case of *Ranjit Rajak*<sup>79</sup> the High Court of Bombay reflected on the limits to the reasonable accommodation in terms of an 'undue burden'. Drawing on both US and Canadian legislation on reasonable accommodation, which it found had inspired the drafters of the CRPD, it held that an employer's obligation to pay Rs 13,000 per month to cover the medical costs of an employee did not amount to an 'undue burden' in the context of 'the size of the organisation, the financial implications on the organisation and/or on the morale of other employees and the like'.<sup>80</sup> This understanding of 'undue burden' was based on the requirements of the CRPD, since the relevant Indian legislation was silent as to a reasonable accommodation duty. The Court accepted the petitioner's argument that a claim for a reasonable accommodation could only be defeated if it resulted in an undue burden. As a result, when a petitioner claims an

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<sup>74</sup> App no 2689/12, 6 February 2014.

<sup>75</sup> CRPD Committee, Communication No 8/2012 X v Argentina.

<sup>76</sup> *HK Danmark* (n 8).

<sup>77</sup> *Ibid*, para 55.

<sup>78</sup> Full recommendation ADE/14/3, Determination No EDA 1430.

<sup>79</sup> (n 15)

<sup>80</sup> *Ibid*, para 29.

accommodation the duty is on the 'employer to place material before this Court to show the undue hardship that will be occasioned ... [and] [i]n the absence of establishing undue hardship a direction can be issued to accommodate such a person'.<sup>81</sup>

The Italian Constitutional Court has considered the reasonable accommodation provisions found in Articles 2 and 5 of the CRPD in Judgment No 251/2008. While not engaging in any detailed examination of these CRPD provisions, the Court found that the CRPD does not require an absolute prioritization of the rights of persons with disabilities, but provides for a system of protection which must be compatible with other interests, which is itself balanced with the maximum protection of persons with disabilities.<sup>82</sup> Presumably this is an implicit reference to the balancing exercise inherent in the reasonable accommodation duty in combination with the disproportionate burden defence. The need for a careful balancing exercise was also reflected in a judgment of a Regional Administrative Court.<sup>83</sup> The case concerned a reasonable accommodation for a person with a disability who was sitting a bar exam. The Court held that, in light of Article 5(3) of the CRPD, a reasonable accommodation must guarantee an equal access to the profession, whilst also making possible a verification of the competence of the person in question. These two needs had to be balanced.

Italian courts have also reflected on some of the fields where the non-discrimination requirement applies. The Tribunal of Varese<sup>84</sup> has held that persons with disabilities have the exclusive right to take decisions regarding their marriage, and to hold otherwise would breach Article 5. The same Tribunal<sup>85</sup> held that denying a person with a disability the possibility to be supported when making a will would amount to a form of discrimination. The individual in question was affected by severe paralysis. He was able to dictate his will using a communication tool which he controlled by eye movements, and such an accommodation was permitted.

In the Kenyan case of *Duncan Waga v Attorney General* the Industrial Court quoted the definition of reasonable accommodation found in Article 2 of the CRPD. This prompted the Court to consider how the employer could have continued to employ the disabled claimant, rather than waiting 'for the opportune moment to damp (sic) the Claimant at the hour of need without any assistance'.<sup>86</sup> This may indicate that the Court regarded the reasonable accommodation obligation in the CRPD as requiring a proactive approach, involving an investigation into any possibilities for accommodation and that, where such a case came to court, that proactive approach was also required of the court.

In a Russian case concerning discrimination, a district court<sup>87</sup> declined to make a declaration that a bailiff's office was unlawfully located on the fifth floor of a building with no elevator. The court dismissed the claim on the ground that the disabled applicant had failed to demonstrate that he had in fact been prevented from accessing the office. It also referred to the principle of reasonable accommodation and noted that the applicant could have applied to the office via a reception on the ground floor or by mail. In adopting this approach, the court seems to view a lesser degree of access as meeting the reasonable accommodation requirements – although this may have been linked with an assessment of disproportionate or undue burden.

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<sup>81</sup> Ibid, para 25.

<sup>82</sup> Italian Constitutional Court, Judgment No 251/2008, para 15 of the 'Conclusion in Point of Law'.

<sup>83</sup> TAR Lazio No 9367/2015 of 14 July 2015.

<sup>84</sup> Tribunal of Varese Decree of 6 October 2009.

<sup>85</sup> Tribunal of Varese Decree of 12 March 2012.

<sup>86</sup> *Duncan Waga v Attorney General* [2014] eKLR 5.

<sup>87</sup> *Sergiyenko v the Belgorod Regional Department of the Federal Bailiff Service*, Judgment of the Oktyabrskiy District Court of Belgorod of 17 April 2014, case no 2-1664/2014.

In Spain the Contentious-Administrative Chamber of the National High Court has also drawn on Article 2 of the CRPD (as well as Article 24 of the CRPD on education) to order a form of reasonable accommodation for a severely disabled individual who wished to obtain a higher education scholarship.<sup>88</sup> The Court held that the individual could not be required to meet the same academic standards as non-disabled people in order to qualify for the scholarship. The Court regarded the adjustment ie lowering of the requirements, in order to allow a person who was severely disabled to qualify, as a reasonable accommodation that was needed to prevent disability discrimination. However, one could argue that this was a form of positive action, which is allowed under Article 5(4) CRPD, rather than a form of reasonable accommodation as foreseen under Article 5(3) CRPD.

The Court of Appeal in the United Kingdom has been called upon to decide on whether the duty to make a reasonable accommodation found in Article 5 of the CRPD also extends to carers of persons with disabilities. In *Hainsworth v Ministry of Defence*<sup>89</sup> the Equality and Human Rights Commission argued that the CRPD's reasonable accommodation duties did extend to carers. The Court disagreed and found that the CRPD imposed no obligation on State Parties to require employers to make reasonable accommodations for carers. Laws LJ held that '... the United Nations Convention of the Rights of Persons with Disabilities ... expressly concern[s] the rights of persons with disabilities and not their families or carers'.<sup>90</sup> This interpretation of the CRPD, which identifies the group entitled to benefit from protection under the Convention, is clearly of significance beyond the reasonable accommodation duties found in Article 5.

### **2.5.3. Overall conclusion on non-discrimination and reasonable accommodation**

Only a small number of judgments in which courts can be said to be interpreting the non-discrimination provisions of the CRPD were identified in this study. These judgments generally seem to focus on different areas, including meta-principles linked to non-discrimination, specific areas where the non-discrimination requirement applies, impact of the non-discrimination rules on procedural law, exceptions / justifications for different treatment, the kind of measures which can be regarded as reasonable accommodations, the balancing of interests which apply in the reasonable accommodation assessment, and the disproportionate / undue burden defence. The evidence from this study suggests that, on the whole, courts are not interpreting the same elements / dimensions of the non-discrimination provisions of the CRPD, thereby making comparisons and general conclusions regarding interpretations difficult. This may be explained to some degree by the different nature and factual basis of cases courts are confronted with. However, many of the cases allow courts potentially to discuss similar issues, such as meta-principles linked to non-discrimination or the balancing of interests implicit in the reasonable accommodation assessment. Nevertheless, courts in different jurisdictions seem to be picking up on different issues rather than exploring the same kind of elements of the non-discrimination requirements found in the CRPD.

## **2.6 Article 6 Women with Disabilities**

States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

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<sup>88</sup> Judgment 5337/2009 of 2 November 2009.

<sup>89</sup> [2014] EWCA Civ 763.

<sup>90</sup> *Ibid*, para 61.

States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Article 6 of the CRPD, on women with disabilities, was not identified as being referred to by any court in most of the jurisdiction specific chapters in this book. In a small number of cases, eg in Argentina, the article was cited in one or more judgments. However, even here, there is no evidence of any court seeking to interpret the article. In Germany the Federal Social Court raised the question of whether Article 6 of the CRPD could provide the basis for a specific claim of discrimination against women and girls with disabilities, but did not regard it as necessary to resolve the issue in the case at hand.<sup>91</sup>

## 2.7 Article 7: Children with Disabilities

(1) States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

(2) In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

(3) States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

The interpretation of this article appears to have been considered in detail in only one of the cases analysed in this study – the UK Supreme Court case of *Mathieson v Secretary of State for Work and Pensions*.<sup>92</sup> In that case, the government was found to have breached Article 7(2) of the CRPD by failing adequately to consider the best interests of children with disabilities when introducing rules which made children ineligible for certain disability benefits if they had been in hospital for more than 84 days.

Their lordships held that this provision should be interpreted in the same way as Article 3(1) of the UN Convention on the Rights of the Child (CRC), and in accordance with General Comment No 14 of the Committee on the Rights of the Child. This entailed: first, a child's substantive right to have their best interests assessed as a primary consideration in all decisions concerning them; second, the principle that, where a legal provision is open to more than one interpretation, it should be interpreted so as to favour a child's best interests; and, third, the procedural rule that, in every decision affecting a child or children, the potential impact of the decision on them must be assessed as part of the decision-making process.<sup>93</sup> It was the third of these elements of the right that was found to have been breached in the *Mathieson* case.

In general Article 7 was rarely cited in judgments included in this study. While it was cited in a handful of cases in the United Kingdom and Italy, it was only cited in one of the cases reported in this study in Argentina, the European Court of Human Rights, India and Russia. It did not

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<sup>91</sup> BSG, Order of 10 May 2012 - B 1 KR 78/11 B.

<sup>92</sup> [2015] UKSC 47

<sup>93</sup> *Ibid*, para 39 per Lord Wilson.

appear to be cited at all in the reported cases from Australia, the European Union, Germany, Ireland, Kenya, Spain and Mexico.

## **2.8 Article 8: Awareness-raising**

(1) States Parties undertake to adopt immediate, effective and appropriate measures:

(a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

(b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

(c) To promote awareness of the capabilities and contributions of persons with disabilities.

(2) Measures to this end include:

(a) Initiating and maintaining effective public awareness campaigns designed:

(i) To nurture receptiveness to the rights of persons with disabilities;

(ii) To promote positive perceptions and greater social awareness towards persons with disabilities;

(iii) To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

(b) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;

(c) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;

(d) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

Article 8 of the CRPD, on awareness raising, was not referred to by courts in most of the jurisdiction specific chapters in this book. In a small number of cases in Argentina, the article was cited in one or more judgments. However, even here, there is no evidence of any court seeking to interpret the article.

## **2.9 Article 9: Accessibility**

(1) To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

- (a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
  - (b) Information, communications and other services, including electronic services and emergency services.
- (2) States Parties shall also take appropriate measures to:
- (a) Develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
  - (b) Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
  - (c) Provide training for stakeholders on accessibility issues facing persons with disabilities;
  - (d) Provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
  - (e) Provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
  - (f) Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
  - (g) Promote access for persons with disabilities to new information and communication technologies and systems, including the Internet;
  - (h) Promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

In relation to the physical environment, two Spanish cases interpreted Article 9 to require property owners to make their premises accessible. In one of these cases the Supreme Court nullified, on the basis of Article 9, a decision by owners of an apartment building to refuse permission for the installation of a hoist to enable a person with disabilities to use a communal swimming pool.<sup>94</sup> In the other, the Barcelona Provincial High Court held that owners of an apartment building must install a lift so as to remove architectural barriers for residents with disabilities.<sup>95</sup> These cases suggest that Article 9 is being interpreted to create immediately applicable obligations on private individuals akin to obligations not to discriminate.

Russian courts have also referred to Article 9 in connection with the accessibility of the built environment. In *Sergiyenko v the Belgorod Regional Department of the Federal Bailiff Service*,<sup>96</sup> a Russian court refused to grant a declaration that a bailiff's office was unlawfully located on the fifth floor of a building with no lift because the applicant had not demonstrated that he could not access the services of the office even though he was not physically able to reach them. A distinction was drawn in the judgment between reasonable accommodation and universal design. Whilst the latter was described as 'legally binding', it appears to have been understood

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<sup>94</sup> Civil Chamber of the Supreme Court, Judgment 619/2013 of 10 October 2013, second point of law.

<sup>95</sup> Barcelona Provincial High Court, Judgment 202/2015 of 12 May 2015.

<sup>96</sup> Judgment of the Oktyabrskiy District Court of Belgorod of 17 April 2014, case no 2-1664/2014.

as primarily giving rise to obligations at the stage of design and construction. It noted that the process of design and construction should achieve a 'living environment with unobstructed access [for] persons with disabilities ... to buildings and facilities ... without the need for further restructuring and adaptation'.<sup>97</sup> No further light was thrown on how the court envisaged this obligation being enforced. However, this universal design obligation was not held to have been breached in this particular case.

In *Shitikov v Absent Ltd*,<sup>98</sup> reference was again made to Article 9 and it was stressed that private entities offering facilities and services open to the public must take into account all aspects of accessibility for persons with disabilities. However, the argument of the plaintiff (a wheelchair user) that a café should install a ramp to enable him to have access to its services, was dismissed. The case was decided on the basis of reasonable accommodation principles – the court finding that a button should be installed which would allow the plaintiff to call for assistance. Similarly to the Spanish cases considered above, this case seems to suggest that Article 9 was understood to impose obligations of immediate effect – including on private actors – and also indicates that this obligation was considered to be subject to limits of reasonableness. The result is an understanding of Article 9 as including (but perhaps not being limited to) duties which appear very similar to, if not the same as, reasonable accommodation duties.

In relation to information, Article 9 has been interpreted expansively by Russian courts. In *Tsurenko v the Ministry of Education of the Omsk Region*,<sup>99</sup> Article 9 was described as 'impl[ying] equal access to social benefits, including through access to information'. It then appears to have provided the basis for a ruling that the CRPD had been breached by a failure to provide information to a person with intellectual disabilities, who was living in a social care home, about their entitlement to apply for state supported housing. It appears that Article 9 was interpreted in this case both to require that information was made available and to require that that information was accessible. The expansiveness of this interpretation lies in the apparent interpretation of Article 9 as including an obligation to provide information about the entitlements of the disabled person in question.

In relation to transport, an Italian Tribunal<sup>100</sup> has held that the inaccessibility of public transport bus services amounted to indirect discrimination. However, although Article 9 (together with Article 20) of the CRPD was cited, the tribunal engaged in no explicit interpretation of it. Similarly, it is clear from the Australian case of *Innes v Rail Corporation of NSW (No 2)*<sup>101</sup> that the existence of audio announcements on trains was considered as falling within the scope of Article 9. Thus, Article 9 appears to have been interpreted as being sufficiently broad in scope to cover the accessibility of audio-announcements on public transport vehicles.

Interestingly, although Article 9 was not cited in many cases in most of the jurisdictions included in this study, it was cited in approximately 1,000 Russian cases – no other CRPD article was cited in more Russian (or any other) cases.

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<sup>97</sup> Ibid.

<sup>98</sup> Judgment of the Promyshlennyi District Court of Smolensk of 18 December 2013, case no 2-3339/2013.

<sup>99</sup> Decision of Appeal of the Omskiy Oblast Court of 18 December 2013, case no 33-8213/2013.

<sup>100</sup> Order of the Tribunal of Rome of 11 October 2011.

<sup>101</sup> *Innes v Rail Corporation of NSW (No 2)* [2013] FMCA 36.

## **2.10 Article 10: Right to Life**

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

This article was not the subject of explicit or implicit interpretation in any of the cases included in this study. Neither was it merely cited very often – being mentioned in only one of the cases decided by the European Court of Human Rights case and one case from Italy.

## **2.11 Article 11: Situations of Risk and Humanitarian Emergencies**

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

Again, this article was not interpreted (explicitly or implicitly) in any of the cases included in this study. Also, like Article 10, it was seldom even cited. An exception is the European Court of Human Rights, which referred to it in two cases.

## **2.12 Article 12: Equal Recognition Before the Law**

- (1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
- (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
- (4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
- (5) Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 12 appears to be one of the CRPD provisions which has received most interpretation at the hands of domestic courts. Authors of the chapters on Australia, Ireland, Kenya and Mexico all specifically comment on the fact that, in those jurisdictions, it is this CRPD provision which has received most interpretative attention from domestic courts. The only one of the covered



jurisdictions not to yield any cases referring to Article 12 was the European Union. To facilitate analysis, the interpretations which emerge from the cases will now be considered under several sub-headings.

### **2.12.1 Legal capacity, equality, autonomy and a paradigm shift**

Reference was made in several cases to the centrality of the place of equality within Article 12. In the Argentinian case of *AJCS s/ Declaración de inhabilitación*,<sup>102</sup> it was stressed that a legal presumption of capacity arose from the right to equality enshrined in Articles 1 and 12 of the CRPD – and that restrictions of legal capacity based on disability would therefore necessarily constitute discrimination on the basis of disability.

Elsewhere, the link between equality and retention of legal capacity has been stressed – without expressly equating deprivation of legal capacity on the basis of disability with discrimination. Thus, in the Australian case of *Nicholson v Knaggs*,<sup>103</sup> Vickery J observed that ‘Article 12 ... endorses the concept that people with disabilities should have the capacity to exercise legal rights on an equal basis with others in all aspects of life’.<sup>104</sup> Similarly, in an Italian case on support for the exercise of legal capacity, the Tribunal of Varese<sup>105</sup> issued a decree giving permission to an individual with severe paralysis to make his will by dictating it to his administrator of support, using a communication device operated by eye movement. Although the act of writing a will was acknowledged to be a strictly personal one generally required to be exercised by the person themselves, the judge took the view that refusing to recognize the validity of wills written by disabled people through the support of others would constitute a form of discrimination against them. The judge also referred to Articles 1, 2 and 3 of the CRPD.

### **2.12.2 Scope of Article 12**

In the Australian case of *Nicholson v Knaggs*,<sup>106</sup> Vickery J drew attention to the fact that Article 12(2) includes the phrase ‘all aspects of life’. He therefore held that it had relevance to issues of testamentary capacity and the writing of wills, observing that Article 12’s reference to ‘all aspects of life’ emphasised ‘the breadth of the obligation’ and that disabled as well as non-disabled people should therefore be able to enjoy freedom of testamentary disposition.<sup>107</sup>

### **2.12.3 Will and preferences and supported decision making**

Questions have surfaced in a number of domestic cases about the weight which Article 12 requires to be given to the will and preferences of the individual concerned – particularly when they conflict with what has been judged by others to be in the objective best interests of that person. This issue is not explicitly tackled in Article 12 itself but General Comment No 1 of the CRPD Committee clearly indicates that efforts should be made to ascertain a person’s own wishes and that, where known, these should prevail.<sup>108</sup>

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<sup>102</sup> (n 48).

<sup>103</sup> *Julie Ann Nicholson & Ors v Timothy Knaggs & Ors* [2009] VSC 64.

<sup>104</sup> *Ibid*, para 19.

<sup>105</sup> Tribunal of Varese Decree of 12 March 2012

<sup>106</sup> *Nicholson* (n 103).

<sup>107</sup> *Ibid*, paras 74 and 75.

<sup>108</sup> See eg UN Committee on the Rights of Persons with Disabilities, ‘General Comment No 1: Article 12 – The Right to Equal Recognition Before the Law’ (2014), paras 7, 17 and 21.

In an Irish judgment, MacMenamin J has acknowledged that Article 12 of the CRPD aimed to encourage ‘assisted decision-making’ and sought to ‘vindicate the interests of disabled persons’.<sup>109</sup> In light of this, he held that there was a constitutional duty to ensure that the views of people treated under the Mental Health Act are heard, if necessary, through a representative in the form of ‘assisted decision-making’ – which might be achieved, ‘through the help of carers, social workers or, perhaps most appropriately, family members’.<sup>110</sup>

In Germany, the weight to be given to the will and preferences of people with disabilities has given rise to some high profile litigation. The Federal Social Court has interpreted Article 12 as attaching considerable value to the will and preferences of people with disabilities. In BSG - B 9 SB 84/12 B,<sup>111</sup> it ruled that Article 12 ‘should be taken into account’ in shaping the obligations of special representatives – ie representatives appointed for people with disabilities who do not have legal representation and whose capacity to represent themselves is limited. Taking account of Article 12 was held to require special representatives not simply to act on the basis of what they consider the best interests of the person concerned, ‘but rather – as far as possible and reasonable – to support the latter in exercising his or her legal and other capacity to act’.<sup>112</sup>

However, the limits of the weight to be attached to the will and preferences of the person concerned have been tested in two German Federal Constitutional Court cases concerning coercion in connection with medical treatment. The first, BVerfG - 2 BvR 882/09,<sup>113</sup> concerned the constitutionality of a Länder law which authorized coercive medical treatment with neuroleptics for people in psychiatric hospitals who had been assessed as incapable of taking medical decisions. The Court considered the meaning of Article 12 of the CRPD and concluded that it did not confer a right to legal capacity in all situations, holding that rights to autonomy can be restricted by law in cases of lack of capacity caused by illness.<sup>114</sup> This, however, seems to sit uncomfortably with the interpretation of Article 12 expressed by the CRPD Committee in its General Comment No 1.

In the second case,<sup>115</sup> the Federal Constitutional Court was asked to consider the constitutionality of the absence in German law of a mechanism by which a disabled person could be admitted to hospital, without their consent, in order to receive life-saving medical treatment to which they were deemed to be unable to consent. The Court held that the absence of such a law was unconstitutional and contrary to the State’s duty to ‘protect’. The Court explicitly stated that allowing coercion in these circumstances was not, in its view, inconsistent with Article 12 of the CRPD.

#### **2.12.4 Tailoring and least restrictive alternatives**

Many of the domestic cases concerning Article 12 have interpreted it as requiring support or safeguards which recognize the particularity of individual situations, which are tailored to the particular case and which represent the option which is least restrictive of autonomy and

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<sup>109</sup> MX (APUM) v HSE [2012] IEHC 491 at para 52.

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<sup>111</sup> BSG, Order of 14 November 2013 – B 9 SB 84/12 B.

<sup>112</sup> Ibid, para 9.

<sup>113</sup> BVerfG, Order of 23 March 2011 – 2 BvR 882/09, paras 52, 53, and 61.

<sup>114</sup> BVerfG, Order of 23 March 2011 – 2 BvR 882/09, para 52.

<sup>115</sup> German Federal Constitutional Court, Order of 26 July 2016 – 1 BvL 8/15. See also ‘*Limiting Coercive Medical Treatment to Persons under Custodianship Confined in Accommodations is Incompatible with the State’s Duty of Protection*’, Press Release No 59/2016 (25 August 2016) available at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-059.html> accessed 11 June 2017.

independence. An interesting illustration of Article 12 being interpreted to require a focus on the individual, rather than blanket assumptions or standardized responses, is the Kenyan rape case of *Wilson Morara Siringi v Republic*.<sup>116</sup> In this case, the High Court overturned the lower court's reliance on a statutory presumption that people with certain types of disabilities were unable to consent to sex in favour of an approach which would require consent (or the lack of it) to be proved on a case by case basis. The judge described the blanket presumption that people with intellectual disabilities were unable to consent to sexual intercourse as 'improper', 'an affront to the ... dignity' of individuals with disabilities and "inconsistent with the provisions of Article 12 of the Convention on the Rights of Persons with Disabilities which requires State parties to recognize persons with disabilities as individuals before the law, possessing legal capacity to act, on an equal basis with others".<sup>117</sup>

A number of Australian cases have also drawn attention to the importance attached by the CRPD to legal capacity regimes which are responsive and tailored to the particular needs of individuals in particular situations. Thus, in *Re Erdogan's Application*,<sup>118</sup> Dixon J (in the Supreme Court of Victoria), after describing the CRPD as 'underlin[ing] the changing contemporary response to citizens with impaired cognitive capacity',<sup>119</sup> recognized that 'given the complexity of human cognitive and intellectual function, ... capacity is related to the nature and complexity of the transaction or decision or the ongoing continuum of transactions that are in issue'.<sup>120</sup> Also relevant is *In the matter of ER*.<sup>121</sup> While this case did not refer explicitly to Article 12, its focus was legal capacity and the linkage is evident. The Australian Central Territories' Civil and Administrative Tribunal in this case recognized that, foundational to the CRPD, was the idea that legal capacity reflects a spectrum or sliding scale rather than a clean-cut binary.<sup>122</sup>

The interpretation of Article 12 as requiring supports and safeguards which impose the least possible restriction on the autonomy of disabled people lay at the heart of the Australian case of *PJB (Guardianship)*<sup>123</sup> which, on appeal to the Victorian Supreme Court, became known as *Patrick's Case*.<sup>124</sup> The case concerned an application by a mental health facility (in which PJB was detained) for the appointment of an administrator to regulate his financial affairs. If appointed, the administrator was likely to sell PJB's house against his wishes. At first instance Billings J authorized the appointment of the administrator, explaining that he did 'not see that it offends the principles contained in the Convention on the Rights of Persons with Disabilities'.<sup>125</sup> On appeal, however, the Supreme Court of Victoria reversed this decision. Bell J noted that Article 12(4) embodied the principle that any order must be 'tailored to the circumstances, being privative only the extent actually required'.<sup>126</sup>

This understanding of the requirements of Article 12 also featured in the Russian cases of *In re Z (Legal incapacity)*<sup>127</sup> and *In re B (Legal incapacity)*.<sup>128</sup> Article 12(4) was quoted by the court as support for its decision to reject the applications to subject them to guardianship (and remove

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<sup>116</sup> *Wilson Morara Siringi v Republic* [2014] Crim App eKLR.

<sup>117</sup> *Ibid*, paras 15-16.

<sup>118</sup> *Re Erdogan's Application; Erdogan v Ekici* [2012] VSC 256.

<sup>119</sup> *Ibid*, para 52.

<sup>120</sup> *Ibid*, para 54.

<sup>121</sup> *In the matter of ER (Mental Health and Guardianship and Management of Property)* [2015] ACAT 73.

<sup>122</sup> *Ibid*, paras 34-36.

<sup>123</sup> *PJB (Guardianship)* [2010] VCAT 643.

<sup>124</sup> *Patrick's Case* [2011] VSC 327.

<sup>125</sup> *PJB (n 123)*, para 46

<sup>126</sup> *Ibid*, para 353. Footnotes omitted.

<sup>127</sup> Judgment of the Porkhovskiy District Court of the Pskov Oblast of 15 April 2014, case no 2-11/2014.

<sup>128</sup> Judgment of the Porkhovskiy District Court of the Pskov Oblast of 26 December 2013, case no 2-583/2013.

their legal capacity), on the grounds that there were alternative methods of providing support to the women concerned which did not involve depriving them of their legal capacity.

In Italy too, ordinary civil courts have drawn attention to the differences between guardianship and the much less restrictive ‘administration of support’ scheme. In light of the CRPD, and Article 12 in particular, they have expressed a clear preference for the latter.<sup>129</sup> Thus, the Tribunal of Rome,<sup>130</sup> as mentioned in connection with the Preamble above, referred to Article 12 (and other provisions) of the CRPD in support of the view that the CRPD required attention to be given to the importance of autonomy, independence and freedom to make one’s own choices – and hence the need for courts to adopt the option that was least restrictive of the autonomy of the person concerned.

Regimes of plenary or full guardianship which, on the face of it, provide an all-or-nothing approach to legal capacity, have been challenged as inconsistent with Article 12 of the CRPD in a number of countries. The Mexican SCJN’s decision in AR 159/2013<sup>131</sup> provides a particularly interesting example. In this case, it was argued that Mexico City’s Guardianship Act was unconstitutional because it established a plenary guardianship regime which was not consistent with Article 12. The Court held that it was possible to reinterpret the Mexico City statute in a way that was consistent with Article 12. The starting-point for this Article 12 consistent interpretation was the view that:

guardianship must be thought of as a mechanism for providing support so that the person [under guardianship] may make his or her own decisions.<sup>132</sup>

In light of this, the Court interpreted guardianship as a form of ‘reasonable accommodation’ provided to support people with disabilities in making their own decisions – thus introducing requirements into domestic guardianship law to be responsive to the needs and circumstances of each individual and removing the restrictions of legal capacity which had previously characterised the regime.

In the Russian case of *In Re Delova*,<sup>133</sup> the Constitutional Court found that Russian plenary guardianship law was unconstitutional because it was inconsistent with modern human rights law as expressed, in particular, in Article 12 of the CRPD. The Court, however, did not find that plenary guardianship was inherently unconstitutional. Rather, it held that Article 12 required a less restrictive alternative to be available but, at that time, plenary guardianship was the only option. According to the Court, less restrictive arrangements should be made available because Article 12 requires States Parties to

adopt measures that relate to the exercise of legal capacity which provide for appropriate and effective safeguards to prevent abuse ...and which respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.<sup>134</sup>

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<sup>129</sup> Tribunal of Varese Decree of 30 April 2012. See also Tribunal of Vercelli Judgment of 10 April 2014.

<sup>130</sup> Judgment of 21 May 2012 in proceedings concerning the full guardianship of Mrs FA.

<sup>131</sup> Tesis 1ª CCCXLVIII/2013, *Semanario Judicial de la Federación y su Gaceta*, Décima Época, t I, diciembre de 2013.

<sup>132</sup> *Ibid*, p 521.

<sup>133</sup> Judgment of the Constitutional Court of the Russian Federation of 27 June 2012, case no 15-P.

<sup>134</sup> *Ibid*.

After this decision, the Civil Code was amended to include the possibility of partial guardianship as an alternative to plenary guardianship.

The consistency of laws permitting plenary and partial guardianship with the CRPD has also been tested before courts in Spain. In Judgment 282/2009,<sup>135</sup> the Civil Chamber of the Supreme Court considered these laws to be consistent with Article 12 of the CRPD. It stressed that this consistency depended on plenary guardianship being authorized only 'to ensure the adequate protection of the person with a permanent mental illness' and that the scope and limits of any such measure 'shall be determined and open to revision'.<sup>136</sup> Furthermore, according to the Court:

First, the incapacitated person continues to be a fundamental rights holder and the incapacitation is just a protection measure. ... Second, the incapacitation is not a discriminatory measure because the situation motivating it has specific characteristics. We refer to a person whose intellectual and volitional faculties do not allow him/her to exercise his/her rights fully because they prevent him/her from self-government.<sup>137</sup>

Thus, Article 12 was interpreted (as indeed it was in the Russian case of *Re Delova*<sup>138</sup>) as permitting plenary guardianship, involving the total deprivation of a disabled person's legal capacity. It should, however, be noted that this judgment was issued in 2009 – in the early days of the CRPD and before the guidance provided by General Comment No 1. Further, it is noteworthy that subsequent Spanish cases have referred to Article 12 in support of less restrictive approaches and thus contributed to an incremental shift towards greater emphasis on autonomy, support for decision-making and the will and preferences of relevant individuals in connection with legal capacity law.<sup>139</sup> It therefore appears that courts in Spain have gradually moved toward an interpretation of Article 12 as requiring a tailored response to individuals in which support and protection measures should be the least restrictive of autonomy as is possible.

### 2.12.5 Safeguards and monitoring

Article 12(4) of the CRPD requires States Parties to 'ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law'. In the high profile Australian case of *Nicholson v Knaggs*<sup>140</sup> (discussed above), Vickery J observed that '[i]f a State Party implements a mechanism of supported decision making', then Article 12(4) means that it is 'obliged to ensure that appropriate and effective safeguards are in place which respect the rights, will and preferences of the person with disabilities, so that those rights, will and preferences are, amongst other things, free of conflict of interest and undue influence, and are proportional'.<sup>141</sup> He then observed that '[p]ersons with disabilities, including the elderly who suffer from disabilities, are uniquely vulnerable to the exercise of undue influence on the part of others' and that the common law rules on undue influence 'may legitimately be engaged by the CRPD' as

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<sup>135</sup> Civil Chamber of the Supreme Court, Judgment 282/2009 of 29 April 2009.

<sup>136</sup> *Ibid*, seventh point of law.

<sup>137</sup> *Ibid*.

<sup>138</sup> Judgment of the Constitutional Court of the Russian Federation of 27 June 2012, case no 15-P.

<sup>139</sup> See eg Civil Chamber of the Supreme Court's Judgment 421/2013 of 24 June 2013; Civil Chamber of the Supreme Court's Judgment 487/2014 of 30 September 2014; Civil Chamber of the Supreme Court's Judgment 244/2015 of 13 May 2015.

<sup>140</sup> (n 103).

<sup>141</sup> *Ibid*, para 69. Footnotes omitted.

they provided a form of safeguard and thus fell within the scope of Article 12(4).<sup>142</sup> Thus, Article 12(4) was interpreted as authorising long-standing legal doctrines designed to protect everybody, but particularly people in vulnerable situations, from being exploited or unduly influenced by others.

Article 12(4) was referred to in the Australian case of *NN (Review Guardianship)*<sup>143</sup> as requiring high standards of service delivery and reporting by public guardians providing formal support to people with disabilities in connection with their exercise of legal capacity. In that case, the poor standards of service delivery and reporting was noted by the Tasmanian Guardianship and Administration Board. After quoting Article 12(4), it observed that '[t]he reporting function has become increasingly important since Australia ratified the United Nations Convention on the Rights of Persons with Disabilities (... and the Optional Protocol)'.<sup>144</sup> This, it is tentatively suggested, may indicate that Article 12(4) was interpreted as requiring effective mechanisms for monitoring the operation of guardianship-related systems.

### **2.12.6 Conclusion on Article 12**

In sum, the cases discussed in this section have focused on interpreting domestic law with a view to assessing its compliance with, or enhancing its consistency with, Article 12 of the CRPD. From this exercise emerge interpretations of Article 12 which stress its role in securing equality and autonomy. Restrictions have been interpreted by some courts as amounting to discrimination. In relation to autonomy, courts in a number of countries have interpreted Article 12 to require that supports and safeguards are tailored to particular individuals and ensuring that the outcome restricts autonomy as little as possible – the emphasis being on providing support to enhance and enable autonomy, freedom of choice and independence – an interpretation which does appear to be consistent with the wording of Article 12(4) and the interpretation of Article 12 by the CRPD Committee.<sup>145</sup> This having been said, surprising decisions still emerge – particularly those which regard plenary guardianship as consistent with the CRPD or which consider compulsory removal into a hospital against one's will as being disability discrimination.

### **2.13 Article 13: Access to Justice**

(1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

(2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

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<sup>142</sup> *Ibid*, paras 74 and 75.

<sup>143</sup> *NN (Review Guardianship)* [2010] TASGAB 15.

<sup>144</sup> *Ibid*, para 28.

<sup>145</sup> See eg UN Committee on the Rights of Persons with Disabilities, 'General Comment No 1' (n 108).

The interpretive issues relating to Article 13 CRPD which emerge from judgments of domestic courts in this study can be grouped into three main categories – first, procedural accommodations; second, representation; and third, autonomy and voice. These are explored in the following sub-sections.

### **2.13.1 Procedural Accommodations**

Article 13 has been interpreted as including a requirement to make accommodations or adjustments to legal procedures or proceedings by courts in Germany,<sup>146</sup> Russia (where it was framed as a right to effective justice),<sup>147</sup> and the United Kingdom.<sup>148</sup> However, there are marked differences of approach to the operationalisation of these adjustments or accommodations. Thus, the German Federal Social Court<sup>149</sup> has stressed that no duty to make adjustments or accommodations arises if the court was not made aware of the disability of the person in question. It is unclear whether this would be the approach regardless of whether or not the court ought to have realized the person was disabled.

The Russian Supreme Court<sup>150</sup> has stressed the importance of a non-formalistic approach which will enable courts to establish and evaluate all relevant circumstances, including facts associated with disability which may have been linked to failure to comply with a time-bar. No mention is made of whether the court must first be aware of a person's disability in the judgment. Its emphasis on a non-formalistic approach, however, suggests that it did not envisage accommodations being dependent on the court having prior knowledge of a person's disability.

In the United Kingdom case of *JW Rackham*,<sup>151</sup> the Employment Appeal Tribunal accepted that courts were under a duty to make reasonable adjustments for disabled litigants despite the absence of clear provision on the point in the Equality Act 2010. Article 13 was referred to by the judge (Langstaff P), who clearly considered it to include a reasonable accommodation obligation. Guidance on the implementation of reasonable adjustments, issued in this case, is considered in Section 2.13.3 below in connection with autonomy and voice.

### **2.13.2 Representation**

Questions about how Article 13 should be interpreted in the context of representation of disabled people in legal proceedings have arisen in Spain and the United Kingdom. The Spanish Supreme Court has held that, where it is clearly established that a disabled person is not able to represent themselves, there may be circumstances in which it is legitimate – and even required by Article 13 – for their 'tutors' (appointed under a form of guardianship) to represent their views even on such personal matters as divorce.<sup>152</sup> This interpretation appears to focus on facilitating representation of people who are not in a position to represent their own views in court and whose will and preferences do not conflict with their tutor's view of what is in their best interests. It is not clear whether Article 13 would be interpreted as requiring a tutor to

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<sup>146</sup> BSG, Order of 24 May 2012 – B 9 V 13/10 B (decision of the Federal Social Court).

<sup>147</sup> *Gorokhov v the Department of Social Protection and Labour of Yakutsk*, Supreme Court of the Russian Federation of 20 May 2015, case no 74-KG15-4.

<sup>148</sup> *JW Rackham v NHS Professionals Ltd* [2015] UKEAT 0110\_15\_1612 (16 December 2015).

<sup>149</sup> BSG, Order of 24 May 2012 – B 9 V 13/10 B.

<sup>150</sup> *Gorokhov v the Department of Social Protection and Labour of Yakutsk*, Supreme Court of the Russian Federation of 20 May 2015, case no 74-KG15-4.

<sup>151</sup> *Rackham* (n 148).

<sup>152</sup> Civil Chamber of the Supreme Court's Judgment 625/2011 of 21 September 2011.

represent a disabled person in circumstances where that person was in disagreement with the tutor, or wished to represent themselves or to be represented by somebody else.

The central issue in the United Kingdom litigation in *Re X*<sup>153</sup> concerned the question of whether a disabled person should be made party to proceedings about whether their liberty should be restricted. In the final judgment in the litigation to which this particular set of facts gave rise, Charles J interpreted the procedural requirements of Articles 13 and 14 of the CRPD as merely requiring some independent representation (which he felt could, in the majority of cases, be provided by members of the person's family) without making people party to proceedings affecting them. On this view, Article 13 would require the relevant person to be joined as a party to the proceedings only when there was no other way to guarantee their independent representation in court.

### 2.13.3 Autonomy and Voice

The issue of autonomy and voice was referred to, in connection with Article 13, in two United Kingdom cases. In the first of these cases – *JW Rackham*<sup>154</sup> – the Employment Appeal Tribunal accepted, that despite the absence of clear provision on the point in the Equality Act 2010, courts and tribunals were under a duty to provide reasonable accommodations to disabled litigants. In providing guidance as to what this would entail, Langstaff P stated that:

... we think that a considerable value should be placed upon the integrity and autonomy of the individual. It is precisely that which the extracts from Article 13 and Article 1 of the Convention emphasise. If a person entitled to make a decision affecting the conduct of their case makes that decision, it is not in general for any court to second-guess their decision and to make it in a manner which patronises that person. ... [T]here may be exceptions to that, though they may be rare. Generally, we would wish to emphasise the very considerable importance of recognizing that those who have disabilities are fully entitled to have their voice listened to, whatever it is they may be saying.<sup>155</sup>

This suggests that Article 13 is being interpreted to require courts to adopt a flexible approach to proceedings involving a disabled person and to consider making accommodations requested by a disabled litigant even if what is proposed may not be thought to be in their best interests.

In the second UK case on this issue – *AH v West London MHT*<sup>156</sup> – the Upper Tribunal interpreted Article 13 as reinforcing a patient's right to choose to have a public hearing before a mental health tribunal. According to the Tribunal, 'a patient should have the same or substantially equivalent right of access to a public hearing as a non-disabled person who has been deprived of his or her liberty'.<sup>157</sup> Thus, Article 13 was interpreted to require a court to respect a disabled person's wishes about the nature of a hearing – even when this meant departing from a long-standing practice (in this case holding hearings in private) generally considered to be in the best interests of disabled people.

### 2.13.4 Citations of Article 13

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<sup>153</sup> Court of Protection first instance - *Re X and others (Deprivation of Liberty) (Number 2)* [2014] EWCOP 37; and Court of Appeal - *Re X (Court of Protection Practice)* [2015] EWCA Civ 599.

<sup>154</sup> *Rackham* (n 148).

<sup>155</sup> *Ibid*, para 60.

<sup>156</sup> *AH v West London MHT* [2011] UKUT 74 (AAC).

<sup>157</sup> *Ibid*, [22]



In other jurisdictions, there was no case which interpreted Article 13. However, it was cited (generally in one to five cases) in all the jurisdictions except the European Union, India, Ireland, Italy, Kenya and Mexico where no relevant reported case was identified.

### **2.13.5 Concluding Reflections on Article 13**

Although Article 13 was not interpreted by courts in the majority of the 13 jurisdictions in this study, it was interpreted in judgments in four of them. In Russia and Germany, the principal focus was Article 13's requirements to make procedural adjustments to court proceedings. This was also a key issue in the United Kingdom – alongside issues of representation and the autonomy and voice of disabled people in proceedings concerning them. In Spain, the focus was representation. Although the engagement with Article 13 was not extensive in most of these cases, they do highlight the potential of Article 13 to be interpreted (and applied) by courts in such a way as to enhance good inclusive practice within the court system itself. Interestingly, as yet, the cases appear to have focused on the court system although the scope of Article 13 is much broader – extending, for instance, to legal services and police.<sup>158</sup>

### **2.14 Article 14: Liberty and Security of the Person**

(1) States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

(2) States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Article 14 of the CRPD has only been the subject of interpretation in a very small number of cases, and it has also not been widely cited. The article has been referred to in a number of Spanish judgments in the context of proceedings to admit and detain persons with a 'mental disability' in a psychiatric institution on an involuntary basis. The article has been used to reinforce pre-CRPD Spanish case law holding that the competent judge to decide on and monitor an involuntary commitment is one local to the place of residence of the person with a disability. This seems to imply an interpretation of the requirement that 'any deprivation' be in 'conformity with the law' found in Article 14, but this was not explicitly stated in the judgment which did however quote Article 14. Specifically it seems to read into the article requirements regarding the locality of the competent judge and court.

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<sup>158</sup> See generally E Flynn, *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Ashgate, 2015); and A Lawson 'Disabled People and Access to Justice: From Disablement to Enablement?' in P Blanck and E Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (Routledge, 2017)

The ECtHR also cited Article 14 of the CRPD in a small number of cases, including *Jasinskis v Latvia*,<sup>159</sup> which concerned a disabled teenager who was arrested, became unconscious whilst in custody, and later died. Although the Court cited Article 14 of the CRPD, it did not link the provision with its finding of a violation of the right to life under Article 2 of the ECHR or offer any interpretation of Article 14 CRPD. ECtHR judge Pinto de Albuquerque also referred to Article 14 of the CRPD in a partly concurring and partly dissenting Opinion in *Kuttner v Austria*.<sup>160</sup> He argued that the Court had misunderstood the procedural guarantees for criminal offenders who were detained in psychiatric institutions and argued that ‘disability-based arrest, detention or imprisonment is in breach of Article 14 of the [CRPD]’.<sup>161</sup> Since this element of the Opinion was dissenting, it seems this does not reflect the explicit view or interpretation of the ECtHR on Article 14 of the CRPD at present.

In the other jurisdiction specific chapters in this book there is either no evidence that Article 14 of the CRPD has been referred to by courts, or evidence that it was referenced in a small number of cases (eg in the United Kingdom) or in an amicus brief (eg in Ireland), but without courts engaging in any interpretation of the provision.

## **2.15 Article 15: Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment**

(1) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

(2) States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

In spite of the clear significance of Article 15, which prohibits torture or cruel, inhuman or degrading treatment or punishment of persons with disabilities, there is no evidence that it was cited by courts in ten of the 13 jurisdiction specific chapters in this book. The article was cited in one United Kingdom case, but the court in question did not seek to interpret the provision. Article 15 was cited twice by the ECtHR, perhaps reflecting the fact that the ECHR includes a comparable provision (Article 3 ECHR). The article was cited in *Bataliny v Russia*,<sup>162</sup> in which the applicant claimed that he had been physically abused by staff and other patients whilst detained in a psychiatric hospital. The ECtHR also cited Articles 14, as well as Article 15 CRPD and Concluding Observations of the CRPD Committee in *MS v Croatia (No 2)*,<sup>163</sup> which concerned an applicant who had been strapped to a psychiatric hospital bed. However, in neither case did the Court provide any interpretation of Article 15 CRPD, and nor did it indicate how the CRPD influenced its legal reasoning.

## **2.16 Article 16: Freedom from Exploitation, Violence and Abuse**

(1) States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and

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<sup>159</sup> *Jasinskis v Latvia*, App no 45744/08, 21 December 2010.

<sup>160</sup> *Kuttner v Austria*, App no 7997/08, 16 July 2015.

<sup>161</sup> Partly Concurring and Partly Dissenting Opinion of Judge Pinto de Albuquerque in *Kuttner v Austria* (n 160), para. 2.

<sup>162</sup> App no 10060/07, 23 July 2015.

<sup>163</sup> App no 75450/12, 19 February 2015.

outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

(2) States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

(3) In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

(4) States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

(5) States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Article 16 of the CRPD has only been the subject of interpretation in a very small number of cases, and it has also not been widely cited. The judgment in the Argentinian case *PCI y otro c/ Provincia de Buenos Aires s/ Amparo* cited a number of CRPD articles, including Article 16. The Supreme Court of Justice of Buenos Aires held that Article 16 applies for ‘the protection of those persons [disabled people] in violent environments, particularly when these [environments] are created in the family’.<sup>164</sup> This interpretation placed a particular importance on Article 16 of CRPD in the context of family-based abuse which does not seem to be reflected in the text of the Convention.

In Germany the Federal Social Court found that Article 16 of the CRPD should be interpreted as covering compensation to victims of violent crime, finding that a disabled victim of such crime should be allowed to retain her compensation without a reduction being made to benefits she received.<sup>165</sup>

In the other jurisdiction specific chapters in this book there is either no evidence that Article 16 of the CRPD has been referred to by courts, or evidence that it was referenced in a small number of cases (eg the United Kingdom), but without courts engaging in any interpretation of the provision.

## **2.17 Article 17: Protecting the Integrity of the Person**

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

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<sup>164</sup> *PCI y otro c/ Provincia de Buenos Aires s/ Amparo*, Corte Suprema de Justicia de la Provincia de Buenos Aires, 14 June 2010, at s VII.

<sup>165</sup> BSG, Judgment of 24 May 2012 – B 9 V 2/11 R.

This provision was not the subject of any explicit interpretive analysis in the cases included in this study. Neither was it referred to in judgments in such a way as to enable any inferences to be drawn about its interpretation. It is cited in the reported cases from Australia, the European Court of Human Rights and India. It was not cited in reported cases from the European Union, Germany, the United Kingdom, Ireland, or Italy.

## **2.18 Article 18: Liberty of movement and nationality**

(1) States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

(a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

(b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

(c) Are free to leave any country, including their own;

(d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

(2) Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

Only one case was identified in which a court could be said to be interpreting (a particular provision within) Article 18 of the CRPD. The case in question, *State Attorney of the City of Maikop v Republican Social Care Home for the Elderly and Disabled*<sup>166</sup> was decided by a Russian district court. It involved a challenge to the practice of removing passports from persons with intellectual or psychosocial disabilities who resided in social care homes. The passports were kept in the personal files of the residents under the control of the administration. The State Attorney, who brought the case, argued that the internal regulations of the social care home, which provided for the removal of passports, violated federal laws. The district court upheld the claim and emphasised that the contested provisions violated the constitutional guarantee on freedom of movement.<sup>167</sup> The court also referred to Article 18 of the CRPD which as noted above, requires States Parties to ensure 'that persons with disabilities are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification' (Art 18(1)(b)). The judgment can be understood as interpreting Article 18 to require that residents of social care homes must be able to retain possession of their passports.

The only other case identified in this study which includes a reference to Article 18 of the CRPD was decided by a Regional Administrative Court in Italy. In the case in question, TAR Lazio No 6990/2014, a guardian of a disabled child requested Italian citizenship on behalf of that child

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<sup>166</sup> Judgment of the Maikopskiy City Court of the Republic of Adygeya of 21 November 2012, case no 2-3683/2012.

<sup>167</sup> Federal Constitution, Article 27.

and sought to rely on Article 18 CRPD. However, the court did not interpret the article, and dismissed the case for lack of jurisdiction.

The other jurisdiction specific chapters in this book provide no evidence that Article 18 CRPD has been referred to by courts.

## **2.19 Article 19: Living Independently and Being Included in the Community**

States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 19 has received surprisingly little interpretation at the hands of the domestic courts included in this study. In a small number of cases, however, references are made to Article 19 from which it is possible to draw inferences about how it is understood by the judge in question.

The case in which a court comes closest to engaging in a deliberate process of interpreting Article 19 is the German case of BSG - B 3 KR 9/10 R. The Federal Social Court there stated that one of the main goals of Article 19 was to make disabled people independent of the need to rely on the help of others.<sup>168</sup> This interpretation of 'independent' appears to overlook the particular way in which that term is used within the context of Article 19 – where (consistent with long-standing independent living campaigns<sup>169</sup>) – the emphasis is on securing choice and control over support and not on removing the need for support.<sup>170</sup> According to the CRPD Committee's Draft General Comment on Article 19:

Living independently does not necessarily mean living alone; it should also not be interpreted as the ability of carrying out daily activities by oneself. Rather, it should be regarded as the freedom to choice and control, as enshrined in article 3 (a) of the Convention.<sup>171</sup>

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<sup>168</sup> BSG, Judgment of 10 March 2011 – B 3 KR 9/10 R, para 22.

<sup>169</sup> See eg the work of the European Network of Independent Living <<http://enil.eu>> and the Canadian Association of Community Living <[www.cacl.ca](http://www.cacl.ca)>.

<sup>170</sup> See eg the UN Committee on the Rights of Persons with Disabilities, 'Draft General Comment No 5 (2017): Article 19 – Living Independently and Being Included in the Community' available at <[http://www.ohchr.org/Documents/HRBodies/CRPD/DraftGC5Article19\\_DraftGC5Article19\\_5April2017.doc](http://www.ohchr.org/Documents/HRBodies/CRPD/DraftGC5Article19_DraftGC5Article19_5April2017.doc)>.

<sup>171</sup> Ibid, para 15(a).

Three United Kingdom cases contain references to Article 19 which appear to throw some light on how the judges in question understand Article 19. Interestingly, in all three, the emphasis is on what Article 19 does not mean rather than what it does mean.

First Secretary of State for Work and Pensions and Warwick DC v OB and JS and JS (CTB)<sup>172</sup> concerned the payment of housing benefit and whether people with mental health conditions who had been in hospital for periods exceeding a year should be entitled to return to the same home in which they had lived prior to being admitted to hospital. According to Lloyd Davies J, Article 19 does not 'require reinstatement in a pre-existing home'.<sup>173</sup> This suggests that Article 19 was understood to be silent on the issue of entitlement to return to the place which had been one's home before being detained in hospital. However, no reference is made to the importance of Article 19(a)'s reference to choice of where and with whom to live, on an equal basis with others.

The two remaining United Kingdom cases both concern issues relating to the funding of support. In the first, R (on the application of Harrison) v Secretary of State for Health and R (on the application of Garnham) v Secretary of State for Health,<sup>174</sup> it was argued that a benefit should be provided in the form of a cash (or 'direct') payment to the disabled person concerned. Silber J indicated (in an obiter remark) that Article 19 did not require a State Party to 'make cash payments'.<sup>175</sup> In the second, *PH's Application for Judicial Review*,<sup>176</sup> the dispute concerned the introduction by the state of charges for respite care. Treacy J observed that '[t]here is nothing in Article 19 which makes unlawful the charging for such services'.<sup>177</sup> Thus, these cases would suggest that Article 19 is being interpreted as leaving it to States Parties to determine what form benefits should take and also whether or not to charge for services which enable people with disabilities to enjoy their Article 19 rights.

In addition to these references to Article 19 in domestic courts, some reflection on the meaning of the provision appears in the decision of the European Committee on Social Rights in *International Federation for Human Rights (FIDH) v Belgium*.<sup>178</sup> This concerned a 'shortage of accommodation for highly dependent adults with disabilities and their families'<sup>179</sup> in Belgium which, it was alleged, fell short of the obligations set out in Article 15(3) of the Council of Europe's Revised Social Charter of 1996. The European Committee on Social Rights observed that the CRPD 'reflects existing trends in comparative European law in the sphere of disability policies'<sup>180</sup> and quoted (with apparent approval) the interpretation of Article 19 of the CRPD set out in a 2012 issue paper published by Thomas Hammarberg, the then Council of Europe Commissioner for Human Rights. According to this, Article 19 recognizes that

freedom of choice for persons with disabilities 'in the types of services provided and the manner in which they are provided' as a 'key element' of the Convention's principles and a factor playing a 'crucial role' in the implementation of Article 19 by the States Parties because it 'has direct bearing on the way support is provided, and is linked with

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<sup>172</sup> Secretary of State for Work and Pensions and Warwick DC v OB and JS and JS (CTB) [2012] UKUT 489 (AAC) (19 December 2012).

<sup>173</sup> *Ibid*, para 16.

<sup>174</sup> R (on the application of Harrison) v Secretary of State for Health and R (on the application of Garnham) v Secretary of State for Health [2009] EWHC 574 (Admin).

<sup>175</sup> *Ibid*, para 90.

<sup>176</sup> [2014] NIQB 60

<sup>177</sup> *Ibid*, para 78.

<sup>178</sup> *International Federation for Human Rights (FIDH) v Belgium*, Complaint No 75/2011, decision on the merits made public 27 July 2013.

<sup>179</sup> *Ibid*, para 2.

<sup>180</sup> *Ibid*, para 112.

the existence of alternatives. As is often the case, if only one alternative to institutionalisation is provided, the person cannot make any real choice.<sup>181</sup>

The interpretation of Article 19 evident in the extract stresses the importance of the State making a range of support options available to disabled people. Without alternatives, the choice to which Article 19 refers would be meaningless.

In addition to the cases on the interpretations of Article 19 discussed above, the provision was merely cited in a number of jurisdictions. Thus, there were cases in Argentina, Australia, the European Court of Human Rights, Mexico, Russia, Spain and the United Kingdom which simply cited Article 19. It was not referred to in the reported case law from the European Union, Kenya, Italy or Ireland.

## **2.20 Article 20: Personal Mobility**

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

- (a) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;
- (b) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;
- (c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;
- (d) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

The meaning of Article 20 was considered in only one of the cases discussed in this volume – the Mexican SCJN case of ADR 989/2014. In that case, Article 20 was interpreted in light of Article 19 – so that services (mentioned in Article 19 but not Article 20) were held to fall within the scope of Article 20 if they were necessary for the working of mobility devices – in that case, a lift in the home of a disabled woman.<sup>182</sup>

In addition, Article 20 was cited, without further elaboration in judgments from Argentina, Australia, the European Court of Human Rights, Germany, India, Spain and the United Kingdom. It was not referred to by courts in the reported case law from the European Union, Kenya, Ireland, or Italy.

## **2.21 Article 21 Freedom of Expression and Opinion, and Access to Information**

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with

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<sup>181</sup> Ibid, para 114, citing Issue Paper commissioned and published by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, CommDH/IssuePaper(2012)3 12 March 2012, sections 1.1.3 and 3.1.1 available at <https://wcd.coe.int/ViewDoc.jsp?p=&id=1917847&direct=true> accessed 11 June 2017.

<sup>182</sup> ADR 989/2014, Primera Sala de la SCJN, para 108.

others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

- (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
- (b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
- (c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;
- (d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
- (e) Recognizing and promoting the use of sign languages.

No cases containing a reference to Article 21 CRPD on freedom of expression were reported in the jurisdiction specific chapters of this book. There is no evidence of courts interpreting, or even citing, this provision of the CRPD.

## **2.22 Article 22: Respect for Privacy**

- (1) No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.
- (2) States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

This provision was not the subject of explicit interpretive analysis in any of the cases included in this study. Nor were there any statements or observations from which inferences might be drawn about a judge's interpretation of it. It was cited, without elaboration, by courts in Germany and Spain. It was not mentioned by courts in the reported case law from Argentina, Australia, the Council of Europe, the European Union, Kenya, India, Ireland, Italy, Mexico, Russia or the United Kingdom.

## **2.23 Article 23: Respect for Home and the Family**

- (1) States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:
  - (a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;



(b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

(c) Persons with disabilities, including children, retain their fertility on an equal basis with others.

(2) States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

(3) States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

(4) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

(5) States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

### **2.23.1 General interpretations**

Article 23 of the CRPD has been drawn on, and indeed interpreted to some degree, in a number of jurisdictions included in this study. The article was referred to in three Australian cases, although without the courts engaging in any detailed interpretation. For example, in *Patrick's Case* Bell J noted that Article 23 of the CRPD provides for the right to respect for the home of persons with disabilities, but provided no further interpretation of the article.<sup>183</sup> The interpretation given to Article 23 in a number of specific contexts is discussed further in the sub-sections below.

### **2.23.2 Sterilization**

Article 23 of the CRPD has been referred to in a number of cases, from Argentina, Australia, and the United Kingdom, in the context of sterilization. It is noteworthy that the courts took differing views as to the relevance of Article 23 of the CRPD and the compatibility of forced or court-ordered sterilization with the article.

In the Australian case of *ZEH (Guardianship)*, which concerned a request made by parents of a young woman with disabilities for her to be sterilized, G Nihill drew on the CRPD, as well as the Victorian Charter of Human Rights and Responsibilities, to stress the human dignity which had

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<sup>183</sup> (n 124), para 337.

to be accorded to ZEH. The judge explicitly referred to Article 23(1) as well as several other provisions of the CRPD in noting that ZEH had a right to be protected from treatment without her consent.<sup>184</sup> The court then declined to grant permission for the sterilization. The court did not engage in an explicit interpretation of (elements of) Article 23 of the CRPD.

In contrast with ZEH are two United Kingdom cases in which Courts of Protection found a forced sterilization or a court ordered sterilization of a person with a disability to be compatible with Article 23 of the CRPD. In *A NHS Trust v DE*,<sup>185</sup> the Court of Protection granted an application to sterilize DE, a man with learning disabilities whose partner had become pregnant after a long relationship. The application was made by a National Health Service (NHS) Trust and was supported by DE's parents. King J found that DE lacked the mental capacity to make decisions about contraception, and authorized the sterilization procedure as being in his best interests. Counsel for DE argued that Article 26 of the CRPD on Habilitation and Rehabilitation created rights which conflicted with those in Article 23. Article 26 requires States to take measures 'to enable persons with disabilities to attain and maintain maximum independence'. DE's parents were only willing to allow him the degree of freedom which he had had prior to the pregnancy if he was sterilized, meaning that there was a perceived tension between Articles 23 and 26 of the CRPD. Counsel for DE suggested that of the two articles, Article 23 of the CRPD should take priority and be the correct 'starting point', but this argument was rejected.

In *Re DD (No 4) (Sterilization)*<sup>186</sup> the Court of Protection gave little weight to Article 23 of the CRPD and authorized the forced entry into DD's home, her removal to hospital and her sterilization by force.<sup>187</sup> DD had autism, had multiple previous pregnancies and six children in care, and had refused to engage with ante-natal healthcare professionals during her previous pregnancy. Given DD's underlying medical condition, doctors argued any future pregnancy carried a high risk of fatal complications and this justified the sterilization. Whilst Counsel for DD briefly addressed the court about the potential relevance of the CRPD, Mr Justice Cobb held that no discrete argument arose under Article 23.

In contrast to the above cases, the Argentinian case of *AVA s/ Insania y Curatela*<sup>188</sup> concerned a request for sterilization made by a woman with a moderate intellectual impairment. In this case the Civil and Commercial Appeals Chamber of Junín did not explicitly refer to Article 23(1) of the CRPD, but rather based its ruling on Article 1 as well as a domestic instrument providing guidance on fertility issues. However, the ruling arguably contributes to an interpretation of Article 23(1) of the CRPD. The Court held that

it is clear that the goal sought with the recognition of persons with disabilities' right to contraceptive sterilization, is not only the avoidance of pregnancies, but also the removal of every obstacle that prevents them from having effective enjoyment of the right to sexual health, on an equal basis with others.<sup>189</sup>

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<sup>184</sup> [2015] VCAT 20151, para 57.

<sup>185</sup> [2013] EWHC 2562 (Fam).

<sup>186</sup> [2015] EWCOP 4.

<sup>187</sup> See: *The Mental Health Trust & Anor v DD & Anor (No 1)* [2014] EWCOP 11; *The Mental Health Trust & Ors v DD & Anor (No 2)* [2014] EWCOP 13; *The Mental Health Trust & Anor v DD & Anor (No 3)* [2014] EWCOP 44.

<sup>188</sup> Cámara de Apelación en lo Civil y Comercial de Junín, 26 May 2015.

<sup>189</sup> *Ibid*, per Judge Castro Durán.

Quoting an academic paper by Rosales, this judgment also recognizes the right of disabled people to maintain ‘their fertility on an equal basis with the rest of the population’<sup>190</sup> and found that the equal recognition of disabled people’s right to fertility ‘constitutes an explicit recognition of this group, which historically has been the victim of eugenics’.<sup>191</sup> Moreover, also quoting Rosales, the judgment states that it is yet unresolved ‘how the effective exercise of the sexual and reproductive rights of persons with disability is resolved in their daily reality’.<sup>192</sup> This judgment aimed to address this last point. The Court agreed to the sterilization procedure for Miss AVA, given her particular social and family circumstances. Although the judgment does not quote Article 23(1) of the CRPD explicitly, it contributes to its interpretation in particular circumstances. It recognizes that, in certain cases, procedures that may affect the fertility of disabled people (such as a sterilization procedure) can be the best solution for a person with a disability, enabling the person to decide freely and responsibly on the number (if any) of children she wishes to have. Moreover, this second instance judgment contributes to interpreting Article 23(1) of the CRPD as it approaches the right to retain fertility as a relative, rather than an absolute, right, meaning that an individual can be entitled to choose to restrict their fertility in certain circumstances.

These cases indicate that courts across jurisdictions are interpreting and using Article 23 of the CRPD in different ways in the context of (forced) sterilizations of persons with disabilities.

### **2.23.3 Sexual relationships**

A United Kingdom court, the Court of Protection, has read a positive duty into Article 23 of the CRPD in the context of facilitating sexual relationships of individuals with disabilities. In *A Local Authority v TZ (No 2)*<sup>193</sup> Mr Justice Baker interpreted Article 23 as consistent with the view that, in certain circumstances, ‘the state ... is under a positive obligation to take steps to ensure that TZ is supported in having a sexual relationship should he wish to do so’.<sup>194</sup> However, the programme of ‘education and empowerment’ envisaged by the Court for the young disabled man, who was gay and had autism and learning disabilities, involved considerable supervision and restrictions, including being accompanied by a support worker when leaving his care home, the possibility for staff to intervene if there was an ‘identified risk’ and prior safety checks for any individual who TZ wished to spend the night with at his accommodation.

### **2.23.4 Right to marry**

In Italy the Tribunal of Varese<sup>195</sup> has held that a form of guardianship (‘administration of support’) is not permitted with regard to marriage, and, in light of inter alia Articles 5 and 23 CRPD, persons with disabilities have the sole and exclusive right to decide whether and whom to marry.

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<sup>190</sup> Ibid, per Judge Guardiola quoting PO Rosales in Agustina Palacios and Francisco Bariffi (eds), *Capacidad jurídica, discapacidad y derechos humanos: una revisión desde la Convención Internacional sobre los Derechos de las Personas con Discapacidad* (Ediar 2012) 571.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> [2014] EWHC 973 (COP).

<sup>194</sup> Ibid, para 47.

<sup>195</sup> Decree issued by Tribunal of Varese of 6 October 2009.

### 2.23.5 Forced adoption / separation of child from parent with a disability

In Argentina a Family Tribunal<sup>196</sup> has interpreted Article 23 as preventing the separation of a new born baby from its disabled mother and the subsequent adoption of the child, and, where that separation had happened (as in the case at hand), requiring the urgent reunification of mother and child. The Family Tribunal No 3 of Lomas de Zamora also drew on Article 23 CRPD to order that the disabled mother should be given support in looking after the child.

A Mexican case<sup>197</sup> also involved the interpretation of Article 23 of the CRPD in the context of a custody adoption case concerning a parent with a disability. The case concerned a father who had a traumatic brain injury. Following the injury, he was subjected to guardianship which resulted in the automatic suspension of his parental rights.<sup>198</sup> After his wife remarried, her new husband sought to adopt the child,<sup>199</sup> but this was opposed by the disabled man's guardian (who was his father and the child's grandfather). The family court held that the parental rights of the disabled man had been suspended as a result of the guardianship, but not relinquished altogether,<sup>200</sup> and that he could therefore potentially regain his parental rights should his condition improve and his guardianship come to an end. This barred the adoption as it would have been without the disabled father's consent.<sup>201</sup> On appeal, by the second husband (who sought the adoption), the SCJN found that the second husband would have to prove that the father of the child was either unable to consent to give up his parental rights or incapable of parenting, if necessary with the support of his guardian.<sup>202</sup> This could not be proved, as the father was able to express his wish to see his son and, with his guardian, had sufficient resources to support the child.<sup>203</sup>

The SCJN applied Article 23 CRPD and held that

when one parent has a disability and cannot care for the child, [the judge] must consider whether the parent's extended family may assume child-rearing responsibilities or whether other arrangements may avoid separating the child from the parent while also protecting the child's rights and interests.<sup>204</sup>

The SCJN also indicated, in rather general terms, that accommodations should be considered by the judiciary in order to secure and maintain contact between a disabled parent and a child,<sup>205</sup> but failed to interpret Article 23(2) of the CRPD, which requires States Parties to 'render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities'. In short, the SCJN interpreted Article 23 as protecting the right of disabled parents to retain custody of their children, that the role of the extended family of the disabled parent should be considered in deciding whether a disabled parent could retain custody, and that accommodations should be considered to facilitate this.

Both these cases indicate a similar interpretation of Article 23 – namely that it protects the right of a disabled parent to retain custody of their child and block an adoption. In accordance with

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<sup>196</sup> OME s/Inhabilitación, Tribunal de Familia No 3 de Lomas de Zamora, 16 October 2008.

<sup>197</sup> ADR 3859/2014.

<sup>198</sup> *Ibid*, 7.

<sup>199</sup> *Ibid*, 3.

<sup>200</sup> *Ibid*, 7.

<sup>201</sup> *Ibid*, 8.

<sup>202</sup> *Ibid*, 46-49.

<sup>203</sup> *Ibid*, 46-49.

<sup>204</sup> *Ibid*, 38.

<sup>205</sup> *Ibid*, eg 43.

this interpretation a child cannot be removed from the custody of a parent solely because of the disability of the parent. Both courts also read some unspecified reasonable accommodation duties into Article 23 in the context of parents with disabilities, without indicating the extent of these duties or indicating clearly on whom they fall.

### **2.23.6 Financial Support**

In Germany the Federal Social Court held that, in order to ensure full compliance with Article 23(3), it was necessary to provide disabled adults who lived in the same household as their parents with the maximum possible state support so as to promote their independence.<sup>206</sup> This interprets the requirement to provide support to 'children with disabilities and their families' in Article 23(3) as including the provision of support for adults with disabilities who reside with their parents.

### **2.23.7 No reference / no interpretation**

Jurisdiction-specific chapters covering the European Union, India, Kenya, Russia and Spain did not report any case which referred to Article 23 CRPD. Four cases decided by the ECtHR cited Article 23, but without engaging in any interpretation, whilst in Ireland the Irish Human Rights Commission referenced Article 23(4) CRPD in two amicus briefs. The case in question was settled before a judgment was given, and Irish courts had no opportunity to rule on the relevance of the article or give an interpretation.

### **2.23.8 Overall conclusion on respect for home and family life**

The only two issues which generated more than a single case in which courts engaged in an interpretation of Article 23 CRPD concerned sterilization and custody / adoption of a child against the wishes of a parent with a disability. Whilst Article 23 CRPD was interpreted in a largely similar way by the two judgments addressing custody / adoption, the issue of (forced) sterilization generated a diverse – and inconsistent – interpretation across the judgments identified. No conclusion regarding a common approach can be based on the set of individual cases which interpreted Article 23 CRPD in the context of other issues.

## **2.24 Article 24: Education**

(1) States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and life-long learning directed to:

- (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
- (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
- (c) Enabling persons with disabilities to participate effectively in a free society.

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<sup>206</sup> BSG, Order of 23 July 2014 - B 8 SO 12/13 R.

- (2) In realizing this right, States Parties shall ensure that:
- (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
  - (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
  - (c) Reasonable accommodation of the individual's requirements is provided;
  - (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
  - (e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.
- (3) States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:
- (a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
  - (b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;
  - (c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.
- (4) In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.
- (5) States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

Although Article 24 was frequently cited in cases included in this study, there are only two cases in which it was interpreted. In the first of these cases, the German case of *BVerwG - 6 C 35/14*, the Federal Administrative Court drew attention to the fact that Article 24 required education to be provided on an equal basis to people with disabilities. It held, however, that Article 24 did not throw any light on whether or not it was appropriate to disclose, in school certificates or transcripts of results, the fact that reasonable accommodations had been made (in the form of not penalizing dyslexic children for poor spelling or grammar). In its words:

Article 24(1) and (2) of the CRPD recognize the right of persons with disabilities to education free of discrimination. For this purpose, the signatories to the Convention are obliged *inter alia* to enable persons with disabilities equal access to integrative instruction at secondary schools and provide reasonable accommodation of their needs and the support necessary to facilitate educational success.

These provisions ... contain goals for the integration of persons with disabilities in the state school system but do not oblige the school authorities to implement specific arrangements tailored to the needs of disabled people for the assessment of educational achievement and its documentation in a final school report.<sup>207</sup>

The court thus appears to have interpreted Article 24 as entailing a distinction between processes of learning and teaching on the one hand, to which non-discrimination obligations apply; and processes of assessment and recording of performance in assessments on the other, to which non-discrimination requirements appear to be considered less relevant. This should be contrasted with the view of the CRPD Committee which includes the following in a list of core features of inclusive education:

Effective transitions: Learners with disabilities receive the support to ensure the effective transition from learning at school to vocational and tertiary education, and finally to work. Learners' capacities and confidence are developed and learners receive reasonable accommodation and equality regarding assessment and examination procedures, and certification of their capacities and attainments on an equal basis with others.<sup>208</sup>

In the second case to interpret Article 24, the Spanish Constitutional Court's Judgment of 27 January 2014 emphasised that Article 24 of the CRPD laid down the 'general principle' that 'education should be inclusive, ie should promote schooling of children in a centre of mainstream education, providing them with the necessary support for their integration into the educational system'.<sup>209</sup> However, it went on to find that it would be consistent with Article 24 for a disabled child to be educated in a separate special education setting, even where the parents were in favour of mainstream education, if providing the necessary support or adjustments would be 'disproportionate or unreasonable' – subject to a requirement on education authorities to provide reasons for any decision to assign a child to segregated education settings. Thus, this judgment interprets Article 24 as including nothing to prevent the segregated education of disabled children where authorities are able to show that the support needed for placement in a mainstream education setting would be burdensome. The court does not appear to have considered the implications of progressive realization for the resourcing of support for inclusive education – an issue which may not have been relevant to the resolution of the particular case in hand but which has considerable relevance to the ongoing appropriateness of justifying placements in segregated settings on the basis of lack of resource.

Although not interpreted in other cases, Article 24 was cited and sometimes relied on in other cases. It played a substantial role, for instance, in the Indian case of *Sambhavana v University of Delhi*.<sup>210</sup> The Supreme Court there ruled that the University of Delhi should enhance its efforts to make its practices and services inclusive of and accessible to students with visual impairments. The Court quoted Article 24(4) in full and held that it imposed obligations on the

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<sup>207</sup> BVerwG, Judgment of 29 July 2015 – 6 C 35/14, para 39.

<sup>208</sup> UN Committee on the Rights of Persons with Disabilities, 'General Comment No 4: Article 24: The Right to Inclusive Education' (2016), para 12(g).

<sup>209</sup> Fourth Point of Law of the Constitutional Court's Judgment 10/2014 of 27 January 2014.

<sup>210</sup> AIR 2013 SC 3825.

University in relation to staff training and recruitment. The case, however, does not include any interpretation of Article 24 as such.

Although Italian courts did not engage in any interpretation of Article 24, it should be noted that, according to Ferri, most administrative court cases which cited the CRPD concerned education and the majority of them explicitly mentioned Article 24. Further, this provision was quoted extensively in a Constitutional Court judgment<sup>211</sup> – although not interpreted.

In summary, Article 24 was cited by judgments in Argentina, the Council of Europe, Germany, India, Russia, Spain and the UK. It does not appear to have been mentioned in cases discussed in the chapters on Australia, the European Union, Ireland, Kenya or Mexico

## **2.25 Article 25: Health**

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

- (a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;
- (b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;
- (c) Provide these health services as close as possible to people's own communities, including in rural areas;
- (d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;
- (e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;
- (f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

Article 25 of the CRPD was interpreted in two cases - a German case concerning differentiation between access to, or subsidisation of different types of treatment; and an Australian case involving non-consensual treatment of people with mental health conditions.

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<sup>211</sup> Constitutional Court Judgment 80/2010.



First, in the German case of BSG - B 1 KR 10/11 R (the Cialis decision), a disabled man claimed that the State should cover the costs of a drug (Cialis) he had been prescribed for erectile dysfunction, despite the fact that it was not included on the list of medications for which costs could be recovered under public health insurance. The Federal Social Court considered Article 25 of the CRPD, concluding that it did not provide grounds for claiming welfare benefits and that accordingly it did 'not result in an entitlement to the supply of Cialis at the cost of the statutory health insurance fund'.<sup>212</sup> Accordingly, although the extent of interpretation of Article 25 in this case is minimal, the provision was interpreted not to provide the basis for claims to new welfare benefits.

Second, in the Australian case of *Kracke v Mental Health Review Board*,<sup>213</sup> Mr Kracke argued that the non-consensual psychotropic treatment he was receiving under the Mental Health Act 1986 should cease because reviews, required by the Act, had not been carried out. This argument was dismissed by the Victorian Civil and Administrative Tribunal on the grounds that the purpose of the Mental Health Act was to protect the health of mentally ill patients by giving them the medical treatment they needed. The fact that the reviews had not been carried out did not diminish Mr Kracke's need for the medication. Bell J referred to Article 25 of the CRPD in support of the view that 'people with a mental illness have a right to health'.<sup>214</sup>

The judgment in this case does not engage in an explicit interpretation of Article 25. However, the fact that it was used to support the continuance of non-consensual medical treatment suggests an interpretation of it which prioritises the taking of medication over issues of consent. This view does not sit comfortably with the frequent concerns expressed by the CRPD Committee about forced treatment and non-consensual approaches to psychiatry.<sup>215</sup>

In addition to these cases in which Article 25 was interpreted, it was cited by courts in Argentina, Australia, the Council of Europe, Italy, Mexico, Russia and the United Kingdom. The frequency with which it was cited in Russia is particularly noteworthy – it being cited in over 100 Russian cases. Article 25 was not referred to by courts in the EU, India, Ireland, Kenya or Spain.

## **2.26 Article 26: Habilitation and Rehabilitation**

- (1) States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:
  - (a) Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;
  - (b) Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

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<sup>212</sup> BSG, Judgment of 06 March 2012 – B 1 KR 10/11 R, para 16.

<sup>213</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646.

<sup>214</sup> *Ibid*, para 752.

<sup>215</sup> See eg UN Committee on the Rights of Persons with Disabilities, 'General Comment No 1' (n 108), paras 7 and 42.

- (2) States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.
- (3) States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

This provision was not the subject of detailed interpretation in any of the cases included in this study. However, it was referred to in the United Kingdom case of *NHS Trust v DE*,<sup>216</sup> considered in connection with Article 23 above. This case concerned an application to sterilize DE, a man with intellectual disabilities, whose partner had become pregnant after a ten-year relationship. It was accepted that he did not want any more children, that he had the capacity to consent to sexual relations but not the capacity to use contraceptives or the capacity to agree to a vasectomy. The Court of Protection was asked to authorise a vasectomy on his behalf. If DE were not sterilized, his parents argued that his freedom and independence would be limited in order to reduce the risk of his fathering more children. Article 26 was mentioned in argument – it being suggested that it prioritized independence and was therefore in conflict with Article 23 of the CRPD in this case.

An argument that the maximisation of independence under Article 26 should be treated as secondary to the protection of rights to a family life under Article 23 was rejected – the judge stressing that it was unhelpful to regard one type of right as a starting-point or as having priority and that relevant aspects of any of the rights should be considered if they were relevant to the case. Sterilization was judged to be in DE's best interests in this case – but the judgment contains no further reflection on Article 26. Accordingly, this case cannot be said to interpret Article 26 – it merely indicates that it would be inappropriate to assume that Article 23 should have priority over it.

Article 26 was cited (but not interpreted) in cases discussed in the chapters on Argentina, Kenya, Russia, and the United Kingdom. It was not referred to by cases discussed in the chapters on Australia, the Council of Europe, the EU, India, Ireland, Italy, Mexico and Spain.

## **2.27 Article 27: Work and Employment**

(1) States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, *inter alia*:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal

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<sup>216</sup> [2013] EWHC 2562 (Fam).

remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

- (c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
  - (d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
  - (e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
  - (f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
  - (g) Employ persons with disabilities in the public sector;
  - (h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
  - (i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
  - (j) Promote the acquisition by persons with disabilities of work experience in the open labour market;
  - (k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.
- (2) States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

Article 27 of the CRPD has obtained a relatively high profile in national case law, although courts have frequently merely cited the article, rather than interpreting it. In the United Kingdom Article 27 has been referred to in four cases, although no interpretation has taken place. In Argentina the article was referred to in a judgment concerning legal capacity and the right to work, although again no interpretation was offered. The CJEU has considered Article 27 in Case C-363/12 *Z v A Government department, The Board of management of a community school*. The article was referred to by both the Court and Advocate General Wahl, who opined that Article 27(1)(b) lacked direct effect because it left it to 'the discretion of Contracting Parties to determine the measures to be adopted'.<sup>217</sup> No other interpretative statement can be extracted from the Opinion or judgment.

In Germany the Federal Social Court has interpreted Article 27 as seeking to establish a situation free of discrimination.<sup>218</sup> This did not necessarily exist where a disabled person was simply in employment, but instead required that all persons must be given equal access to work and must be permitted to change profession in a non-discriminatory way.

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<sup>217</sup> Case C-363/12 *Z v A Government department, The Board of management of a community school*, Opinion of AG Wahl, ECLI:EU:C:2013:604, para 118.

<sup>218</sup> BSG, Judgment of 6 August 2014 – B 11 AL 5/14R.

In Kenya a rather general level of interpretation was applied to Article 27 by the Industrial Court when it found that the government had failed to enable a group of disabled people to exercise their right to work and employment. In *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Association for the Physically Disabled of Kenya*<sup>219</sup> the Court held:

Article 27 demands that the State shall promote employment opportunities and career advancement for Persons with Disabilities in the labour market, as well as assist Persons with Disabilities in finding, obtaining, maintaining and returning to employment... The State is required to achieve these objectives through legislation and other measures. The Convention is clear the State must promote job retention and return to work programs for Persons with Disabilities.<sup>220</sup>

In Mexico the SCJN has referred to Article 27 in two cases.<sup>221</sup> AI 33/2015 involved a challenge to a federal statute which provided for autistic persons to obtain certificates which were intended to provide evidence of job-related skills and prevent them from being denied employment for which they were qualified. The SCJN found that the certificates 'constituted an unjustified barrier to leading a productive life with the same opportunities as the general population'<sup>222</sup> and invalidated them. The Court did this on the basis that they stigmatized recipients, in that the certificates were only available to people with autism, and the certificates would encourage the general population to view people with autism as 'different' or 'abnormal'. The SCJN cited Article 27 in this case – without explicitly stating that it was reading a duty to combat stigma into the article, or interpreting the prohibition of discrimination in Article 27 as including a prohibition of any action which could lead to stigma. The interpretation is therefore not clear cut or unambiguous.

Of the jurisdictions studied in this book, courts in Russia and India have arguably relied on Article 27 most extensively and interpreted the article to the greatest extent. In India courts have handed down interpretations of Article 27 of the CRPD in four cases and cited it in one further case. Courts have relied on Article 27 to 'fill gaps' in domestic legislation. In *Ranjit Rajak*<sup>223</sup> the High Court of Bombay quoted Article 27 in full and relied on the CRPD to read a duty of reasonable accommodation, and the test for assessing 'undue hardship', into domestic law in the context of a person who had a 'medical disability' (in this case a person who had had a kidney transplant). Article 27 was also of seminal importance in the decision of the High Court of Rajasthan in *Desh Deepak*.<sup>224</sup> The court relied on Article 27 to find that the denial of a job to an otherwise qualified person on the basis of his medical condition was unlawful under Article 21 of the Constitution. The Court also quoted Article 27(1) in full. In *Municipal Corporation of Greater Mumbai v Shrirang Anandrao Jadhav*<sup>225</sup> and *M Venkateswarlu v Andhra Pradesh State Road Transport Corporation*<sup>226</sup> courts referred to Article 27 when finding that individuals who were not regarded as disabled under the Persons with Disabilities Act, because their percentage of disability was regarded as too low, should still be protected from employment discrimination under domestic law, thereby indicating that Article 27, and the Convention as a whole, applied to a broad group of people with disabilities.

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<sup>219</sup> [2015] eKLR.

<sup>220</sup> *Ibid*, paras 28, 29, 30, 32.

<sup>221</sup> ADR 1387/2012; and AI 33/2015 concerning a federal statute benefiting persons with autism.

<sup>222</sup> AI 33/2015, NHRC, Pleno de la SCJN, 37.

<sup>223</sup> (n 15).

<sup>224</sup> (n 16).

<sup>225</sup> Write Petition (Civil) No 1900 of 2009 (decided on 11 November 2009) (High Court of Mumbai).

<sup>226</sup> 2016 LabIC 1671 (High Court at Hyderabad for Telangana and Andhra Pradesh).

Article 27 has been referred to in over 100 judgments in Russia and courts have referred to it to demonstrate that people with disabilities have the right to work on an equal basis with others.<sup>227</sup> Russian courts often refer to Article 27 when interpreting or elaborating on domestic law. This was the case in *Parshin v the Khabarovsk Regional Department of the Ministry of Justice* in which a court referred to Article 27 to establish a specific dimension of a more general right under Russian law. The applicant, a notary, had had his license to practice withdrawn because he had failed to work as a notary for a specified time. The applicant appealed against this decision, arguing that he had been unable to practice because of his disability and, when he had become able to work again, the withdrawal of his license had prevented him from exercising his right to work. The court found in his favour and held that under Article 27 the state had a duty to accommodate him, and the accommodation should enable him to exercise effectively his right to work and take up employment.<sup>228</sup> In particular, the Ministry of Justice failed to take measures to enable the applicant to maintain and continue his employment, and to find out the specific circumstances which had prevented him from commencing the notary's duties and to explain to him the consequences of the expiration of his notary's license. In this case the court recognized and applied the reasonable accommodation provision in Article 27, and applied it in the context of a self-employed person.

One Russian case concerns a judicial order obliging an employer to set up work places for people with disabilities in order to comply with the quota provided by law.<sup>229</sup> The court referred to the first paragraph of Article 27 CRPD and, taking this into account, ordered the defendant company to establish ten work places under the quota. The order itself was based on specific provisions of Russian law which pre-dated the CRPD.<sup>230</sup> The judgment, which merely reproduced Article 27, did not analyse what kind of work places needed to be established and whether their availability would enable persons with disabilities to 'gain a living by work freely chosen or accepted in a labour market', as the CRPD requires, or, on the contrary, their choice would be limited by the specific kind of work places set up within the quota. In that sense the court interpreted Article 27 as justifying a kind of employment measure which is not referred to explicitly in the article and without examining whether it reflected the non-discrimination principle which lies at the heart of the Convention.

Article 27 was not referred to in case law reported from Australia, the European Court of Human Rights, Ireland,<sup>231</sup> Italy and Spain.

## **2.28 Article 28: Adequate Standard of Living and Social Protection**

(1) States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

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<sup>227</sup> Judgment of the Kirovskiy District Court of Tomsk of 7 December 2012, case no 12-329/2012.

<sup>228</sup> Judgment of the Zavitinskiy District Court of the Amur Oblast of 5 June 2015, case no 2-176/2015.

<sup>229</sup> See, for example, Judgment of the Chkalovskiy District Court of Yekaterinburg of 10 July 2012, case no 2-2372/2012.

<sup>230</sup> Federal Law of 24 November 1995 no 181-FZ on Social Protection of the Disabled in the Russian Federation, Article 21.

<sup>231</sup> Although it was presumably discussed in *Z* at the domestic level - a case which led to a preliminary reference to the CJEU (n 217).

(2) States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

- (a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
- (b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;
- (c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;
- (d) To ensure access by persons with disabilities to public housing programmes;
- (e) To ensure equal access by persons with disabilities to retirement benefits and programmes.

This provision was not interpreted in any of the cases included in this study. It was cited by cases discussed in the chapters on Argentina, the Council of Europe, the EU, Kenya, Russia and Spain. No mention of it was made by cases considered in the chapters on Australia, India, Ireland, Italy, Mexico and the United Kingdom.

## **2.29 Article 29: Participation in Political and Public Life**

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

- (a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
  - (i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
  - (ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
  - (iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;
- (b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

- (i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;
- (ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

Article 29 was either not cited at all in the cases identified in the jurisdiction specific chapters or cited in one or two cases without courts engaging in any interpretation. The latter was the situation in Argentina, the ECtHR, India, Kenya and the United Kingdom. The notable exception to this trend was Spain, where Article 29 was cited in two judgments of the Supreme Court (Civil Chamber)<sup>232</sup> and five judgments of Provincial High Courts.<sup>233</sup> These judgments all concerned the right to vote of a person who was subject to a court ordered declaration of incapacity. The Supreme Court's Civil Chamber<sup>234</sup> found that 'Article 29 of the Convention guarantees to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others and, as a logical corollary, exercise the right to vote ...'. The Court also found that '[t]he loss of the right to vote is not an automatic or necessary consequence of the incapacity'. Nevertheless, the Court found that, in line with Spanish law, an individual who is subject to a declaration of incapacity can be denied the right to vote, but, for this to happen, the judge ordering the incapacitation must actually consider and explicitly rule on the removal of the right to vote. Such a ruling would be 'the exception' not 'the rule'.<sup>235</sup> Other judgments of Provincial High Courts have taken a similar approach. The Barcelona Provincial High Court has therefore found that an individual can only be deprived of the right to vote 'when there exist a direct and conclusive evidence that, at the time of the vote, the disabled person will be deprived of all reason and all consciousness'.<sup>236</sup>

In short, Spanish courts have interpreted Article 29 CRPD as restricting, but not excluding, a denial of a right to vote of a person subject to an incapacity order. The courts have also imposed restrictions on when such a limitation can be made – only following an individual analysis of the capacity of the person concerned and only following an explicit and justified order by a court to this effect.

### **2.30 Article 30: Participation in Cultural Life, Recreation, Leisure and Sport**

- (1) States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:
  - (a) Enjoy access to cultural materials in accessible formats;
  - (b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;

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<sup>232</sup> Supreme Court (Civil Chamber), Judgment of 1 July 2014 and Supreme Court (Civil Chamber), Judgment of 24 June 2013.

<sup>233</sup> Barcelona Provincial High Court, Order of 26 May 2015; Barcelona Provincial High Court, Judgment of 9 December 2014; Barcelona Provincial High Court, Judgment of 13 March 2014; Madrid Provincial High Court, Judgment of 10 October 2013; Valencia Provincial High Court, Judgment of 12 May 2014.

<sup>234</sup> Judgment 421/2013 of 24 June 2013, of the Supreme Court's Civil Chamber.

<sup>235</sup> Quotations taken from Second Point of Law of the Supreme Court's Judgment 421/2013 of 24 June 2013.

<sup>236</sup> Extract from the Second Point of Law of the Barcelona Provincial High Court's Judgment 183/2014 of 13 March 2014.

- (c) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.
- (2) States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.
- (3) States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.
- (4) Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.
- (5) With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:
- (a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;
- (b) To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;
- (c) To ensure that persons with disabilities have access to sporting, recreational and tourism venues;
- (d) To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;
- (e) To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.

This provision was not interpreted in any of the cases included in this study. It was cited by cases discussed in the chapters on Italy, Russia and the United Kingdom. Although the number of citations was generally very low, in Russia it was cited in approximately 50 cases. No mention of Article 30 was made by cases considered in the chapters on Argentina, Australia, the Council of Europe, the EU, India, Ireland, Kenya, Mexico or Spain.

### **3. Towards Interpretive Convergence?**

#### **3.1 Interpretation Techniques**

##### **3.1.1 The Vienna Rules and the Pro Persona Principle**

This section aims to provide some context and background for the discussion of the interpretations of the CRPD in Section 2 above. It focuses on interpretive techniques and will



begin by introducing two broad approaches to the interpretation of international human rights treaties. This will be followed by a brief discussion of the extent to which courts in this study appear to be adopting these techniques.

### 3.1.1.1 The Vienna Rules

The starting point for any discussion of guidelines or approaches to the interpretation of provisions in international treaties is the Vienna Convention on the Law of Treaties 1969 (VCLT)<sup>237</sup> Articles 31-33 of this treaty set out the international law rules (the Vienna rules) for the interpretation of international treaties. Article 31 sets out the 'general rule', and provides that treaties should be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. According to Article 32(2), the 'context' of a treaty comprises, 'in addition to the text, including its Preamble and annexes ... any agreements concerning the conclusion of the treaty. Article 32 provides that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

These provisions draw on previous practice and have been acknowledged by the International Court of Justice as a 'codification of existing customary international law on the point'.<sup>238</sup> They are generally considered to enshrine the view that any treaty provision has one correct interpretation or, in the words of Lord Steyn, an 'independent meaning derivable from the sources mentioned in articles 31 and 32' or 'one true interpretation'.<sup>239</sup>

Nevertheless, as has been frequently pointed out, Articles 31-33 of the VCLT are 'not mechanical'<sup>240</sup> and do not lay down a 'step-by-step formula for producing an irrebuttable interpretation in every case'.<sup>241</sup> This is evident from the fact that the International Law Commission envisaged that:

All the various elements, ... would be thrown into the crucible, and their interaction would give rise to the legally relevant interpretation.<sup>242</sup>

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<sup>237</sup> 1155 UNTS 331, (adopted 23 May 1969, entered into force 27 January 1980). See generally R Gardiner, *Treaty Interpretation* (OUP 2008); U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007); O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP, 2011); A Bianchi, DC Peat, and M Windsor (eds), *Interpretation in International Law* (OUP 2015); and HP Aust and G Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016).

<sup>238</sup> International Court of Justice, *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Merits)* [1991] ICJ Rep 52.

<sup>239</sup> *R v Secretary of State for the Home Department, ex parte Adan* [2001] AC 477, 515-17, per Lord Steyn.

<sup>240</sup> See eg J Arato, 'Deference to the Executive: The US Debate in Global Perspective' in Aust and Nolte (n 237) 198 at 198.

<sup>241</sup> Gardiner (n 237) 9-10.

<sup>242</sup> International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' (1966) 2 *Yearbook of the International Law Commission*, 219-20.

Consequently, although application of Articles 31-33 of the VCLT might be expected to generate some degree of convergence between the interpretations of the same provision by different interpreters, their flexibility creates 'substantial room for manoeuvre'<sup>243</sup> and opens the door to 'countless variations'<sup>244</sup> of – or at least broad parameters for – possible interpretations.

### 3.1.1.2 The Pro Persona Principle

As a number of commentators have pointed out, this pro persona (or pro homine) principle of interpretation has been developed, in particular, by the Inter-American Court of Human Rights (IACHR)<sup>245</sup> and is a technique that has commonly been adopted by courts in Latin America. Its development is connected with, and has been influenced by, the prohibition of restrictive interpretations laid down in Article 29 of the American Convention on Human Rights 1969 (ACHR).<sup>246</sup> Its scope, however, has not been confined to the interpretation of ACHR rights. Indeed, it has been said to inform the interpretation of 'the whole universal corpus of human rights'.<sup>247</sup>

The pro persona technique, in essence, involves construing human rights instruments in a maximalist way – giving them the most expansive possible interpretation.<sup>248</sup> According to Rodiles, it 'subsumes other interpretive methods in a unidirectional manner, and systematically eclipses those which might stand on the way to the widest expression of rights'.<sup>249</sup> Despite the attractions of such a maximalist approach, it carries with it risks of focusing on expansion at the expense of practical implementation and effectiveness.<sup>250</sup>

The pro persona approach is not conventionally presented as a technique which operates within the broader context of the guidelines laid down in the VCLT. However, Rodiles has argued convincingly that the pro persona approach could be configured as one which operates broadly within the context of the VCLT – with a particular emphasis being placed on the object and purpose of the human rights provision in question. In his view:

... re-contextualizing pro persona within these rules could facilitate inter-judicial dialogue, departing from Latin America, but reaching beyond the courts operating in the pro persona mood. In that way, Latin American courts could make a stronger contribution to convergence in interpretation at the global plane, particularly on crucial issues for the region, and where the region has crucial things to say.<sup>251</sup>

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<sup>243</sup> HP Aust, 'Between Universal Aspiration and Local Application: Concluding Observations' in Aust and Nolte (n 237) 333, 337.

<sup>244</sup> J-M Sorel and B Eveno, 'Article 31 (Convention of 1969)' in Corten and Klein (n 237) vol 1, 804, para 58.

<sup>245</sup> See eg AF Amaya Villareal, 'El principio pro homine: interpretación extensiva vs. el consentimiento del estado' (2005) 5 *Revista Colombiana de Derecho Internacional* 337; and A Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' in Aust and Nolte (n 237) 153.

<sup>246</sup> 1144UNTS 123, adopted 22 November 1969, entered into force 18 July 1978.

<sup>247</sup> See further M Pinto, 'El principio pro homine. Criterios de hermenéutica y pautas para la regulación de los derechos humanos' in M Abregu and C Courtis (eds), *La aplicación de los tratados sobre derechos humanos por los tribunales locales* (Editoriales del Puerto 1997) 163.

<sup>248</sup> See K Castilla, 'El principio pro persona en la administración de justicia (2009) 20 *Cuestiones Constitucionales* 65, 80.

<sup>249</sup> Rodiles, (n 245) 153, 162.

<sup>250</sup> GL Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *EJIL* 101, 115.

<sup>251</sup> Rodiles (n 245) 153, 173.

### 3.1.2 Interpretative Techniques Used by Courts in this Study

At the outset of this discussion it should be noted that the vast majority of judgments examined in this study did not provide any explicit explanation of the technique being used to interpret the CRPD. Indeed, most did not even acknowledge that they were interpreting the CRPD. The absence of such explanations and acknowledgements seems to be particularly likely in cases where the primary concern is the interpretation of domestic law, where the interpretation of international law (such as the CRPD) is perceived as being of only secondary importance.<sup>252</sup> The vast majority of cases in this study could be characterized in this way.

In the jurisdiction-specific chapters of this book reference was made to the Vienna rules in only three chapters – those on Kenya, Australia and the United Kingdom. In relation to Kenya, Kamundia argues that the Kenyan courts appear to be applying Article 31 of the VCLT to guide their interpretation of CRPD provisions.<sup>253</sup> While there is no indication that this was explicitly acknowledged in any of the cases analysed, it is clear that the Vienna rules may well be used without being explicitly mentioned and conversely that there may be an explicit commitment to applying the rules which is not actually carried out in practice – a point which has led Kanwar to distinguish between adherence to the Vienna rules in name and in fact.<sup>254</sup>

In relation to the United Kingdom, the VCLT was mentioned in one of the cases included in the current study.<sup>255</sup> However, this reference to the VCLT is of only marginal relevance to the current discussion as it consisted of a recognition that the Vienna rules should be used to interpret the provisions of the European Convention on Human Rights (ECHR). No explicit mention was made of the relevance of that guidance to the interpretation of the CRPD

The only clear example of judicial engagement with the Vienna rules in the CRPD context is the Australian case of *Nicholson v Knaggs*.<sup>256</sup> In this case, Vickery J both explicitly declared that he would apply the VCLT guidance to interpreting Article 12 of the CRPD and proceeded to do so in practice.<sup>257</sup>

Turning to the second interpretative technique discussed above, the pro persona principle. This principle was explicitly referred to in the Argentinian case of *GNT y CAE s/ Autorización*.<sup>258</sup> In this case the court held that Article 4(4) of the CRPD – on non-regression – amounted to a recognition of this principle and explained that it ‘requires the supremacy of hermeneutics recognizing stronger rights of the human being’.<sup>259</sup>

Another Argentinian case is also worthy of note in this context, even though there is no indication that the pro persona principle was mentioned explicitly. This is the case of *García*,<sup>260</sup> in which the reasonable accommodation requirements of the CRPD appear to have been

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<sup>252</sup> D Tladi, ‘Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa’ in Aust and Nolte (n 237) 135, 152.

<sup>253</sup> Kamundia, this volume, Chapter 10, Section 5. This argument is made about Kenyan courts more generally by Elijah Asher, ‘Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya’ (2013) 3(11) *International Journal of Humanities and Social Science* 266.

<sup>254</sup> V Kanwar, ‘Treaty Interpretation in Indian Courts: Adherence, Coherence, and Convergence’ in Aust and Nolte (n 237) 239, 246.

<sup>255</sup> *The Northern Ireland Human Rights Commission’s Application for Judicial Review* [2015] NIQB 96 at [55].

<sup>256</sup> *Nicholson* (n 103).

<sup>257</sup> *Ibid*, para 61 ff.

<sup>258</sup> *GNT y CAE s/ Autorización* (n 43).

<sup>259</sup> *Ibid*.

<sup>260</sup> *García* (n 21).

regarded as authorizing a maximalist or 'progressive' approach, akin to the pro persona principle, to the interpretation of provisions of the CRPD as well as domestic law. The following words of an academic commentator were quoted with approval:

Therefore, this last concept of 'denial of reasonable accommodations', understood as a form of discrimination, must be applied: i) to the obligation of adjusting the current legislation to this social group's situation in each signatory State, even the Convention [content] itself, always in a frame of progressive human rights; and ii) to the obligation by the Judiciary and the Administration, in general, of interpreting the current legislation according to those aforementioned reasonable accommodations [in terms of adequacy of] legislation to the situation of this protected social group.<sup>261</sup>

This appears to suggest that courts should, where reasonable, make accommodations to the way in which laws are interpreted and applied in order to give effect to the rights of people with disabilities.

There is no indication in the Mexico chapter that the pro persona principle was explicitly mentioned in any of the cases analysed. However, it was clearly envisaged by the Supreme Court in ADR 989/2014, where it observed that, as a matter of law, courts must seek to 'optimize' and give 'maximum effect' to treaty-based rights.<sup>262</sup> To guide this process, the Court stressed the importance of having regard to the CRPD's purpose of furthering the social model of disability and also to the general principles of the CRPD set out in Article 3.

Outside Latin America, and the primary stamping grounds of the pro persona principle, no mention was made of that principle. However, many courts did draw attention to the importance of the CRPD's object and purpose – particularly in connection with expansive interpretations of its provisions. Thus, Atrey notes that Indian courts (in the cases analysed in her chapter) tended to refer to the core or salient features of the CRPD, and to the paradigm shift it seeks to generate, in order to support expansive or transformative interpretations;<sup>263</sup> and Ferri writes as follows about Italian courts in legal capacity cases:

In most cases they refer to the purpose of the CRPD and to its overarching objectives, using a teleological approach. This is particularly evident when the judges refer to Article 1 of the CRPD and to the concept of disability put forward by the Convention, in identifying those who can avail of the 'administration of support'.<sup>264</sup> Similarly, when identifying the limits of the 'administration of support', Italian judges have referred to the purpose of the CRPD and, using a somewhat teleological approach, have consistently held that Article 12 of the CRPD requires measures of protection which are designed to support the persons with disabilities and are proportionate to his/her own needs.<sup>265</sup>

Interestingly, although frequent references appear to be made to the object and purpose of the CRPD, less emphasis is given to broader contextual factors or, what Article 32 of the VCLT refers to as 'supplementary' means of interpretation. The work of the Ad Hoc Committee which drafted the CRPD is not referred to in any of the cases analysed. On occasion, this lack of context can generate misunderstanding. This may be illustrated by the interpretations of the term 'independent', as used in the German case of BSG - B 3 KR 9/10 R (discussed in connection with Article 19 above). Because enhancing independence is so fundamental to the

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<sup>261</sup> PO Rosales, 'Un estudio general de la Convención Internacional sobre los Derechos de las Personas con Discapacidad' (2008) III JA 1022, quoted in García (n 21), at s III-3.

<sup>262</sup> ADR 989/2014, para 88(i), (vii).

<sup>263</sup> Atrey, this volume, Chapter 7, Section 5.2.

<sup>264</sup> Ferri, this volume, Chapter 9, Section 4.4.3.

<sup>265</sup> *Ibid*, s 5.

CRPD, featuring for example in the Article 3 general principles, there is a danger that failure to refer to the travaux préparatoires (or the forthcoming general comment on the topic) could distort understandings of the CRPD's object and purpose as well as particular provisions within it.

In conclusion, only in a very small number of cases did courts refer to the interpretive technique they were applying to the CRPD. The Vienna rules were rigorously and expressly applied only in one case. In other cases, judges may have had the Vienna rules in mind without referring to them although there are many cases where this seems unlikely – particularly where engagement with the CRPD was minimal or superficial. While regard was frequently had to the object and purpose of the CRPD, consideration of broader context was more rare.

### 3.2 Use of Treaty Body Guidance and Other UN Treaties to Interpret the CRPD

Guidance from the CRPD Committee was seldom mentioned in the cases included in this study. There are, however, three exceptions. In the first, Germany's Federal Constitutional Court,<sup>266</sup> after reaching a conclusion on the implications of the CRPD for the particular facts involved, went on to consider compatibility with relevant CRPD Committee guidance. In its words:

The latest reports (Article 39 CRPD), the Reporting Guidelines (Article 35(3) CRPD and the Concluding Observations (Article 36(1) CRPD) of the Committee on the Rights of Persons with Disabilities within the meaning of Article 34 CRPD relating to construction of the provisions of the Convention and to the legal situation in Germany in particular do not suggest a different ruling.<sup>267</sup>

The Court then went on to consider whether it would have been obliged to come to a different decision had its approach been inconsistent with guidance issued by the CRPD Committee. In its view:

Considerable weight must be attached to the views on the subject of the interpretation of a human rights treaty expressed by the committee that is competent to issue such statements, but according to public international law they are not binding for international and national courts .... These committees do not have the competence to further develop international treaties beyond the scope of agreements and the practice of the States party to the treaty .... It may remain undecided whether the statements issued on the subject of other international conventions apply in the same way for all of the positions taken by the CRPD Committee. In any case, Article 34 ff of the CRPD does not give the Committee a mandate to issue any binding interpretation of the text of the treaty. When interpreting the treaty, a national court should assess the reasoning of the views of competent treaty bodies in good faith though; it does not, however, have to adopt them.<sup>268</sup>

The second case in which reference was made to the CRPD Committee was the United Kingdom case of the *Northern Ireland Human Rights Commission's Application for Judicial Review*,<sup>269</sup> in which Horner J referred to the Concluding Observations of the CRPD Committee on a number of other countries. In his words:

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<sup>266</sup> German Federal Constitutional Court, Order of 26 July 2016 – 1 BvL 8/15.

<sup>267</sup> *Ibid*, para 89.

<sup>268</sup> *Ibid*, para 90.

<sup>269</sup> *The Northern Ireland Human Rights Commission's Application for Judicial Review* [2015] NIQB 96.

There are a number of examples where the Committee has complained about the practice of providing for abortion in a way which distinguishes between the unborn on the basis of disability. It has complained about Spain in its 2011 report, about Hungary in its 2012 report and Austria in its 2013 report.<sup>270</sup>

The third exception concerns the European Court of Human Rights (ECtHR) which, in *MS v Croatia (No 2)*,<sup>271</sup> referred to concluding observations of the CRPD Committee. However, it is not clear what role, if any, these observations played on the reasoning of the Court.

Cases in which reference was made to other UN treaties or to guidance from other UN treaty monitoring bodies were also extremely rare - there was one in Germany, one in the UK and one in Argentina. Little information is provided about the German case, apart from the fact that reference was made to a general comment of the UN Committee on Economic, Social and Cultural Rights.<sup>272</sup> In the Argentinian case of *SYQC*<sup>273</sup> guidance from the UN Committee on Economic, Social and Cultural Rights relating to progressive realization was relied on to inform the court's interpretation of Article 4(2) of the CRPD.<sup>274</sup>

The United Kingdom case was *Mathieson v Secretary of State for Work and Pensions*,<sup>275</sup> which concerned Article 7(2) of the CRPD. According to a majority of the Supreme Court, this should be interpreted in the same way as Article 3(1) of the UN Convention on the Rights of the Child – and in light of the guidance on this provided in General Comment No 14 of the Committee on the Rights of the Child.<sup>276</sup> According to Lord Wilson:

It is impossible to conceive that the UN Committee's analysis of a child's 'best interests' for the purposes of article 3.1 of the Convention on the Rights of the Child does not equally apply to the 'best interests' of a disabled child for the purposes of article 7.2 of the Convention on the Rights of Persons with Disabilities.<sup>277</sup>

In conclusion, the most striking fact about the reference made to other UN human rights treaties and to the work of UN human rights treaty monitoring bodies by judgments analysed in this book is its rarity. Perhaps more interesting and certainly surprising, at least at first glance, is the fact that judgments in this dataset refer to guidance issued by other human rights monitoring bodies more often than to guidance issued by the CRPD Committee. The most obvious explanation for this appears to be the relative youth of the CRPD Committee and the fact that it has therefore had less time than more long-standing committees to build up a body of general comments and other guidance.

### 3.3 Transnational Judicial Dialogue

Another question of interest is the extent to which courts in the jurisdictions studied are engaging in transnational judicial dialogue with regard to the CRPD. Tzanakopoulos defines

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<sup>270</sup> *Ibid*, [65].

<sup>271</sup> App no 75450/12, 19 February 2015.

<sup>272</sup> *BSG*, Judgment of 15 October 2014 – B 12 KR 17/12 R, para 28.

<sup>273</sup> *SYQC* (n 37).

<sup>274</sup> Committee on Economic, Social and Cultural Rights, "An evaluation of the obligation to take steps to the 'maximum of available resources' under an optional protocol to the covenant. Statement", 10 May 2007.

<sup>275</sup> *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47.

<sup>276</sup> *Ibid*, [40].

<sup>277</sup> *Ibid*, [41].

'judicial dialogue' as "'influence" (exercised by the decision of one court on the reasoning and decision of another) or as "reaction", or, even better, criticism and rejection (by one court of the reasoning or decision of another)'.<sup>278</sup> Where the two courts in dialogue come from different jurisdictions, that judicial dialogue can be described as transnational. Tzanakopoulos describes this kind of judicial dialogue as 'engagement by a domestic court of one state with a decision of a domestic court of another state, evident through cross-citation, discussion, acceptance, or rejection of the position of the other court in the text of a judgment'.<sup>279</sup> Waters has described transnational judicial dialogue as 'informal networks of domestic courts worldwide, interacting with and engaging with each other in a rich and complex dialogue on a wide range of issues'.<sup>280</sup> She argues that, by engaging in transnational judicial dialogue, domestic courts become both 'norm internalizers' and 'norm creators'<sup>281</sup> and that there is a 'co-constitutive, or synergistic, relationship in which domestic courts worldwide are becoming active participants in the dynamic process of developing international law'.<sup>282</sup> She also regards transnational judicial dialogue as 'the engine by which domestic courts collectively engage in the co-constitutive process of creating and shaping international legal norms and, in turn ensuring that those norms shape and inform domestic norms'.<sup>283</sup> Tzanakopoulos goes a step further and argues that international law actually requires domestic judges to engage in 'judicial dialogue'. He claims that domestic judges are required 'to consider decisions of domestic courts of other states, to the extent that such foreign judicial decisions on international law may constitute either subsequent practice with respect to treaties, thus impacting on their proper interpretation ....'.<sup>284</sup> Moreover, he argues that certain international treaties are particularly likely to prompt judicial dialogue, including human rights treaties that 'impose inward-looking obligations on states'.<sup>285</sup>

In spite of the great potential for domestic courts to engage in transnational judicial dialogue revealed by Waters, and the obligation to engage in such dialogue claimed by Tzanakopoulos, there is very little evidence of this happening in the jurisdictions and case law studied for this book. Indeed, of all the jurisdictions studied, two solitary examples of transnational judicial dialogue were identified,<sup>286</sup> and neither of these seem to be of particular significance.

One case in which a court attempted to engage in transnational judicial dialogue, by looking to a judgment of a court in another jurisdiction, is the Indian judgment in *P Geetha v Kerala Livestock Development Board Ltd.*<sup>287</sup> In this case the High Court of Kerala was faced with a similar set of facts to those found in *Z v A Government Department*<sup>288</sup> decided on by the Court of Justice of the European Union. While the High Court of Kerala drew on the European court's findings, it failed fully to understand that ruling. The *Z* case concerned a claim of disability discrimination by a woman who was unable to give birth naturally and who was denied paid maternity leave following the birth of her child through a surrogacy arrangement. In this case the CJEU found that the CRPD was not capable of having direct effect in EU law as the provisions

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<sup>278</sup> A Tzanakopoulos, 'Judicial Dialogue as a Means of Interpretation' in Aust and Nolte (n 237) 72 at 75.

<sup>279</sup> *Ibid.*, 78.

<sup>280</sup> MA Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law' (2004-2005) 93 *Georgetown Law Journal* 487, 490.

<sup>281</sup> *Ibid.*, 490.

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*

<sup>284</sup> A Tzanakopoulos (n 278), 73.

<sup>285</sup> *Ibid.*, 80.

<sup>286</sup> For the purposes of this chapter references by courts in those European states which are party to the EU and the ECHR to case law of either the CJEU or ECtHR were not seen as examples of transnational judicial dialogue.

<sup>287</sup> 2015(1) KLJ 494 (High Court of Kerala).

<sup>288</sup> Case C-363/12 *Z v A Government department, The Board of management of a community school* ECLI:EU:C:2014:159.

were not ‘unconditional and sufficiently precise’,<sup>289</sup> but that the CRPD should be ‘relied on for the purposes of interpreting [EU Law]’.<sup>290</sup> The Kerala High Court misinterpreted this position as meaning that it was only ‘the domestic [EU] law that [governed] the issue’<sup>291</sup> when in fact the CJEU drew heavily on the CRPD to interpret the concept of disability in the case. Commenting on this judgment in this volume Atrey writes:

[i]n one way, it simplifies and ultimately mischaracterizes the CJEU’s position that the CRPD had no direct effect because only ‘domestic law’, ie directives of the European Union were applicable to the case; but in another way, it itself relies on the CJEU’s decision even though it is a foreign court and not part of the Indian ‘domestic law’.<sup>292</sup>

A second case in which a court referred to a foreign judgment is MX, decided by the Irish High Court.<sup>293</sup> In that case MacMenamin J noted that the law affecting the rights of persons with disabilities was evolving and cited an English decision which argued that at some point, with sufficient number of ratifications by European states, ‘the CPRD or the practice flowing from it could be taken to amount to a relevant European consensus to inform the interpretation and application of the [ECHR] rights’.<sup>294</sup> The Irish High Court, like the Administrative Court in England, did not consider that that point had been reached in 2012.

No other examples of transnational judicial dialogue were identified, suggesting that, in spite of the large number of references to the CRPD in some jurisdictions, courts (at least in the jurisdictions covered) are not drawing on foreign judgments when interpreting or using the CRPD.

## 4. Conclusion

This chapter has examined how courts are interpreting the provisions of the CRPD and explored a number of factors influencing that interpretation. However, it should be stressed that the majority of cases identified in this study did not involve any interpretation of the CRPD. Instead, most judgments which included a reference to the CRPD did this because it was raised by a party to a case, because the court was rejecting the CRPD as relevant, or because the court acknowledged the existence and potential general relevance of the CRPD but without engaging in any kind of interpretation. In short, case law in which domestic or regional courts actually engage in interpretation of the CRPD is rather uncommon, and it is even more rare for courts to acknowledge that they are interpreting the CRPD or indicate what interpretative method they are applying.

The analysis carried out in this chapter demonstrates that CRPD provisions have been subjected to systematic analysis and explicit interpretation in only a small number of cases. The provisions which have most frequently received such attention are Articles 1, 5 and 12 – with the Preamble and Articles 2 and 3 often being interpreted in combination with them. There is no evidence that courts are more likely to interpret CRPD articles which reflect civil or political rights as opposed to articles covering economic, social or cultural rights, or vice versa. Whilst Articles 5 on equality and non-discrimination and Article 12 on equal recognition before the law

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<sup>289</sup> 2015(1) KLJ 494 (High Court of Kerala) [90].

<sup>290</sup> *Ibid*, [75].

<sup>291</sup> *Ibid*, [70].

<sup>292</sup> Atrey, this volume, Chapter 7, Section 4.2.1.

<sup>293</sup> MX (n 109).

<sup>294</sup> R (on the application of NM) v the London Borough of Islington and Northamptonshire County Council and Others [2012] EWHC 414, para 102.



are civil and political rights, other articles which received above average interpretative attention from courts are Article 9 (accessibility), Article 13 (access to justice), Article 19 (independent living), Article 23 (home and family), Article 24 (education) and Article 27 (employment). Some particularly important civil and political rights, such as the right to life (Article 10) and protection of the integrity of the person (Article 17) were not subject to interpretation in any of the identified cases, and were also cited very infrequently. The articles which were subject to more intensive interpretation may have a particular significance to the daily life of persons with disabilities.

Alongside the interpretations of CRPD provisions which emerge from deliberate engagement in the interpretation of this international treaty – most notably in the Australian case of *Nicholson v Knaggs*<sup>295</sup> – can be found a myriad of understandings which can be inferred from judicial observations about the CRPD in cases where there is no express or sustained interpretive exercise. While these have been included in the analysis above, the light they throw on how judges in the 13 jurisdictions in question interpret the CRPD is often shadowy and may also be transitory.

The cases in which courts have engaged in explicit or (for the main) implicit interpretations of the CRPD have covered a wide range of CRPD-related issues – a fact which makes it more difficult to gauge the consistency of interpretation between different courts and jurisdictions. Where similar issues have arisen in several cases, there does seem to be evidence of converging understandings of core elements of the CRPD. Examples include the understanding of Articles 2 and 5 as requiring failures to provide reasonable accommodation to be treated as discrimination on the basis of disability; and the understanding of Article 12 as requiring support systems and safeguards relating to legal capacity to be tailored to individual circumstances and to be facilitative rather than restrictive of autonomy. Unsurprisingly perhaps, issues on which there currently appear to be most convergence do not raise complex issues of interpretation – being articulated reasonably clearly in the CRPD.

Besides commonalities of interpretation on a number of key issues, the above analysis also demonstrates that interpretations frequently do not address the same issues and, in that sense, no consistent approach can be identified. Courts in different jurisdictions seem to be picking up on different dimensions of the CRPD, rather than exploring the same kind of elements or requirements found in the CRPD. Nevertheless, some inconsistencies between interpretations of specific articles were identified. This was particularly the case where interpretations emerged from limited judicial engagement or analysis of the CRPD. Indeed, as has been explained at relevant points in the analysis above, understandings of CRPD provisions sometimes appear to sit very uncomfortably with guidance from the CRPD Committee and indeed with the aims and understandings evident in its *travaux préparatoires*.<sup>296</sup>

Many of these findings reflect those of Christopher McCrudden in his work on CEDAW. He too found that significant variations between courts in their interpretations of CEDAW occurred relatively infrequently and there was little evidence of transnational judicial dialogue influencing the interpretation given to CEDAW by domestic judges. However, while McCrudden did identify three fields where courts did give significantly different substantive interpretations to CEDAW

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<sup>295</sup> *Nicholson* (n 103).

<sup>296</sup> Reports of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, which negotiated and drafted the CRPD, are available at <https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html> accessed 12 June 2017.

provisions,<sup>297</sup> no such areas were identified in the context of the CRPD, although they may emerge in the future. The similarities between the use and interpretation of CRPD and CEDAW by domestic courts is explored further in the final chapter of this book.

It is important to note that the CRPD itself represents an internationally agreed consensus on human rights and disability. One of the key arguments for drafting the CRPD was to articulate universal human rights in a disability-sensitive manner so as to provide practical guidance to States on measures required to realize the human rights of people with disabilities on an equal basis with the rest of the population.<sup>298</sup> The CRPD is therefore unusually detailed for a UN human rights treaty. Nevertheless, it should not be forgotten that, at the time of writing, it is still less than a decade since 3 May 2008 when it first entered into force. Further studies will be needed to explore how and why patterns of convergence between the interpretations of CRPD provisions by domestic courts change and develop over time.

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<sup>297</sup> Concerning the implications of the requirement that 'special measures' should be 'temporary' for establishing the limits of permissible affirmative action; the application to CEDAW to customary inheritance laws, and whether 'equality' or 'dignity' is the appropriate meta-principle which should influence the interpretation of CEDAW provisions. McCrudden, 'CEDAW in National Courts' in Roberts, Stephan, Verdier, and Versteeg (n 3).

<sup>298</sup> See eg G Quinn and T Degener 'Expanding the System: The Debate about a Disability-Specific Convention' in G Quinn and T Degener (eds), *Human Rights and Disability - the current use and future potential of United Nations Human Rights Instruments in the Context of Disability* (UN, 2002).