

Introduction

1 CENTRAL ISSUES OF THE TEXTBOOK

This textbook conceptualises disability law as a comprehensive body of rules that has matured as a coherent discipline. Specifically, this book addresses international and European disability law and policy, a discipline which has been influenced by disability studies, the disability rights movements and disabled peoples' organisations (DPOs). The textbook highlights, in a comparative fashion, the interaction between different sources of law and legal systems. It examines the most recent disability-related developments at the international, European Union (EU) and regional levels, with the United Nations Convention on the Rights of Persons with Disabilities¹ (CRPD or the 'Convention') serving as the global standard on disability rights.

This textbook maintains a balance between theory and practice and focuses on the relevant legal frameworks, their interpretation and application, as well as on current challenges in the realm of international and regional policy-making in the disability context.

This chapter introduces the reader to the textbook itself and to the novelties and intricacies inherent in international and European disability law and policy. In that regard, the chapter begins with an overview of the developments that led to the emergence of disability law as an academic discipline. Thereafter, the chapter briefly discusses how the language of disability has changed over time. It then goes on to provide an account of the aims and objectives of this textbook, and it outlines the guiding perspective and the methodological approach adopted in the book. Finally, the chapter ends with an outline of the structure of the textbook as a whole.

¹ UN Convention on the Rights of Persons with Disabilities, 13 December 2006, in force 3 May 2008, UN Doc. A/RES/61/106, Annex I.

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2 **DISABILITY LAW AS AN ACADEMIC DISCIPLINE**

In the last decade, disability law has emerged as a distinct and dynamic field of international and European action, and as an evolving academic discipline. This is part of a broader phenomenon related to the expansion and specialisation of international law, which has gradually been divided into various sub-disciplines (e.g. human rights law, international trade law, international investment law and international environmental law, among others). Each area has its own rules, principles and institutions. At the European level, the emergence of disability law is also linked to the development of the EU and the expansion of its competences.

The emergence of international disability law as an academic discipline correlates with the emergence of a comprehensive disability agenda within the United Nations (UN), culminating in the approval of the first comprehensive legally binding instrument on disability rights – the CRPD. The Convention, adopted by the UN General Assembly (UNGA) in 2006, entered into force in 2008, together with its Optional Protocol (OP-CRPD).² Under the OP-CRPD, the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) is charged with the task of considering communications from, or on behalf of, individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

The CRPD is the first international human rights treaty that seeks to ensure the protection and promotion of the rights of persons with disabilities on an equal basis with others. The primary aim of the CRPD was, arguably, not to create new rights but to ensure that existing human rights were made equally effective for persons with disabilities. However, as Mégret points out and as will be discussed in the first part of this textbook, the CRPD ‘also subtly reformulates and extends existing human rights to take into account the specific experience of persons with disability’.³

As will be further examined in Chapters 1 and 3 of this textbook, the CRPD also represents the culmination of previous efforts to shift the perception of disability from the outdated individual, or medical, model to the social model of disability. The Convention embodies what can be termed the ‘social-contextual model of disability’.⁴ That model goes further than the ‘pure’ social model, which attracted many criticisms on account of the fact that it focused

² Optional Protocol to the Convention on the Rights of Persons with Disabilities, note 1, Annex II.

³ Frederic Mégret, ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’ (2008) 30(2) *Human Rights Quarterly* 494. See below Chapter 3, section 3.

⁴ Andrea Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Cambridge-Antwerp: Intersentia, 2015), p. 77.

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on societal barriers (physical, attitudinal and legislative, among others) and neglected the role of impairment in disabling the individual concerned.⁵ According to the social-contextual model, disability is perceived as an interactive process between people with impairments and societal barriers. This contrasts sharply with the medical model of disability, which views disability as a ‘problem’ stemming from the functional limitations of the disabled person rather than as a societal problem arising from disabling and discriminatory barriers. The paradigm shift from the medical model to the social model has also been accompanied by a shift from a social welfare perspective that viewed persons with disabilities as objects of charity towards a human rights-based approach to disability. These paradigm shifts are encapsulated in the CRPD, which requires States Parties to ensure the provision of reasonable accommodation (i.e. adjustments to existing environments, policies and practices, with a view to enabling the participation and inclusion of disabled individuals in society); to take measures to facilitate accessibility; and to raise awareness of the capabilities of disabled persons.

The CRPD attracted a high number of signatories and ratifications on a global scale within a short period of time. The EU officially became a Party to the CRPD on 23 December 2010.⁶ It became the first regional integration organisation to ratify a human rights treaty and to take on its binding obligations.

The EU’s accession to the CRPD has marked a definite step forward in the development of a comprehensive EU disability policy informed by the social model.⁷ As Chapter 10 will discuss in detail, the CRPD has become an integral part of EU law and, due to its sub-constitutional status, it now represents the benchmark against which EU disability initiatives must be assessed. On foot of the momentum generated by the CRPD, the EU has adopted the European Disability Strategy 2010–2020 (EDS 2010–2020),⁸ which attempts to mainstream disability in all EU policy fields and aims to ensure that people with disabilities can exercise their rights on an equal basis with others. The EU legal framework currently includes disability-related provisions in various areas,

⁵ For a critique of the social model of disability, see, among others, Deborah Marks, ‘Dimensions of Oppression: Theorising the Embodied Subject’ (1999) 14(5) *Disability and Society* 611.

⁶ Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ 2010 No. L23/35. See below Chapter 10.

⁷ In this book, the social-contextual model is referred to in connection with the CRPD, denoting the focus of the CRPD on the individual’s impairment in interaction with external barriers in society. By contrast, the social model is referred to in the chapters on EU law, since, as will be argued in Chapter 11, the case law emerging from the Court of Justice of the European Union (CJEU) appears not to be fully in line with the CRPD’s social-contextual model.

⁸ Commission Communication of 15 November 2010, ‘European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe’, SEC (2010) 1324 final.

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such as in the fields of transport; public procurement; and electronic communications, networks and services, among others. However, at the time of writing this textbook, the Employment Equality Directive,⁹ which requires EU Member States to adopt legislation prohibiting discrimination on the basis of disability in the context of employment and vocational training, remains the primary legislative enactment protecting and promoting the rights of people with disabilities. Significant reforms are underway in the EU in the context of disability. A directive on the accessibility of the websites of public sector bodies was approved in 2016.¹⁰ A proposal for a new non-discrimination directive is under discussion, to tackle discrimination, *inter alia*, on the basis of disability outside the labour market.¹¹ Moreover, a ‘European Accessibility Act’ (EAA),¹² which would impose obligations to provide accessible goods and services, is, at this moment in time, in the final stage of the legislative procedure.

There have also been considerable reforms in the disability context within the Council of Europe (CoE) in the period preceding the CRPD and in the period following its adoption. Furthermore, there has been a significant increase in the amount of disability-related cases heard by the European Court of Human Rights (ECtHR), and the Court is increasingly referring to the CRPD as a guide to interpreting the rights contained in the European Convention on Human Rights (ECHR). Regional systems for the protection of human rights – the inter-American and African systems – as well as other transnational regimes, such as the League of Arab States and the Association of Southeast Asian Nations (ASEAN) are also demonstrating an increased recognition of the rights of persons with disabilities, especially since the entry into force of the CRPD.

In attempting to situate disability in a global context, the textbook is underpinned by an understanding of the power relations between the Global North (i.e. Western Europe and North America) and the multifaceted Global South,¹³ and of the complexities related to socio-economic development in

⁹ Council Directive 2000/78/EC of 27 November 2000 on establishing a general framework for equal treatment in employment and occupation, OJ 2000 No. L303/16.

¹⁰ Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, OJ 2016 No. L327/1.

¹¹ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426 final.

¹² Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, COM (2015) 615 final.

¹³ The term ‘Global South’ is used to refer to post-colonial territories and peoples who are negatively impacted by contemporary capitalist globalisation. For discussion of the term, see, among others, Russell West-Pavlov, ‘Toward the Global South’, in Russell West-Pavlov (ed.), *The Global South and Literature* (Cambridge: Cambridge University Press, 2018),

5 3 The Language of Disability

post-colonial contexts.¹⁴ While the textbook does not undertake an extensive analysis of the academic discourse related to development and disability, it provides a comprehensive account of current issues in disability law and policy at the international, European and regional levels. It also highlights and critically analyses the various challenges encountered to date and those which may be encountered in the future in the implementation of the CRPD.

3 DISABILITY LAW AND THE LANGUAGE OF DISABILITY

The adoption of the CRPD, together with various developments that took place before the CRPD,¹⁵ has made disability a human rights issue. These developments in disability law have contributed to extending the ‘language of rights’ to disability law and to placing disability firmly within the realm of human rights discourse. This ‘language of rights’ goes hand in hand with the use of the so-called ‘people-first language’,¹⁶ which is currently used in several international law documents, in the CRPD itself¹⁷ and in the English versions of EU legislation and case law.¹⁸ The Convention refers to ‘persons with disabilities’, as did the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules),¹⁹ which were adopted by the UN before the CRPD.

The language of academic discourse on disability has greatly evolved. Linguistic stereotyping and the use of negative terms relating to disability have long been a focus of scholarly attention and criticism. Furthermore, the use of words and phrases such as ‘the retarded’, ‘the handicapped’, ‘mentally

pp. 1–20. See also Anne Garland Mahler, ‘Global South’ (2017) *Oxford Bibliographies in Literary and Critical Theory*; Vera Chouinard, ‘Living on the Global Peripheries of Law: Disability Human Rights Law in Principle and in Practice in the Global South’ (2018) 7(1) *Laws* 8.

¹⁴ Benedicte Ingstad, ‘Disability in the Developing World’, in Gary Albrecht, Katherine Seelman and Michael Bury (eds.), *Handbook of Disability Studies* (California: Sage, 2001), pp. 219–51; Helen Meekosha, ‘Decolonising Disability: Thinking and Acting Globally’ (2011) 26(6) *Disability and Society* 667; Clare Barker, ‘Interdisciplinary Dialogues: Disability and Postcolonial Studies’ (2010) 3 *Review of Disability Studies: An International Journal* 6; Shaun Grech, ‘Disability, Poverty and Development: Critical Reflections on the Majority World Debate’ (2009) 24(6) *Disability and Society* 771.

¹⁵ For further discussion on these developments, see below Chapter 2.

¹⁶ Phil Foreman, ‘Language and Disability’ (2005) 30(1) *Journal of Intellectual and Developmental Disability* 57.

¹⁷ The French text of the CRPD still uses the word ‘*personnes handicapées*’. For an overview of the CRPD in French, see Mamoud Zani, ‘La Convention de l’O.N.U. relative aux droits des personnes handicapées’ (2008) 3 *Revue de droit international et de droit comparé* 551.

¹⁸ In the French and Italian versions of EU legislation (e.g. the Employment Equality Directive), the words ‘*handicap*’ and ‘*personnes handicapées*’ are still used.

¹⁹ Standard Rules on the Equalization of Opportunities for Persons with Disabilities, 20 December 1993, UN Doc. A/RES/48/96.

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sub-normal' and 'mental deficiency' (all of which evoked pity, fear or even shame) have almost disappeared. Anglo-Saxon literature tends to refer to a 'disabled person', evoking the role of societal and environmental barriers in disabling the individual. However, several scholars, including legal scholars, prefer to use the so-called 'people-first language', referring to a 'person with a physical disability', a 'child with an intellectual disability', a 'person with Down syndrome', a 'person with a learning disability' or, most frequently, simply a 'person with a disability'. This language reflects the view that disability is just one of an individual's many characteristics rather than his or her defining characteristic, or his or her problem, and does not imply any generalised lack of ability or incapacity. The language of rights and 'people-first language' are in accordance with the CRPD.

In this book, the term 'persons/people with disabilities' will be used for the most part. The term 'disabled persons/people' might be used occasionally, but always in line with the idea that people who have (or are perceived to have) 'impairments' are 'disabled' by social structures and systems. This textbook fully embraces the language of human rights and, in that vein, it avoids language that presents people with disabilities as victims of their impairment, who are in need of assistance.

In line with the CRPD, this textbook does not discuss the relevant legal instruments by type of disability. It does, however, embrace the view that disability can arise from the interaction between different impairments (i.e. physical, mental, intellectual or sensory impairments) and external barriers. While acknowledging that terminology can be very problematic, since meanings vary from jurisdiction to jurisdiction, this textbook refers to intellectual disabilities in its broadest meaning, encompassing cognitive and learning disabilities. The use of the term 'mental' in the CRPD seems to refer to persons with psychosocial disabilities. In that vein, this textbook also uses the term 'psychosocial disability' to refer to psychological (mental) impairments, which, in interaction with other barriers, give rise to a disability. As noted by Bell and Waddington, 'examples of conditions that may give rise to a psychosocial disability include: depression, anxiety, stress, addictions, phobias, eating disorders, schizophrenia, post-traumatic stress disorder, bipolar disorder and personality disorders'.²⁰

4 AIMS AND OBJECTIVES OF THE TEXTBOOK

The primary aim of this textbook is to inform the studies of university students who follow basic and advanced programmes in international and European

²⁰ Mark Bell and Lisa Waddington, *The Employment Equality Directive and Supporting People with Psychosocial Disabilities in the Workplace: A Legal Analysis of the Situation in the EU Member States* (Luxembourg: Publications Office of the European Union, 2016), p. 7.

7 5 Guiding Perspective and Methodology

disability law and policy at both undergraduate and postgraduate level. It is intended to be a flexible instrument, written in an accessible style for students generally. However, it is also meant to serve as a useful resource for professional courses and for a range of different educational initiatives and training in the field.

The textbook aims to impart basic knowledge to readers by introducing topics. At the same time, it presents specialist knowledge and outlines current developments and controversial issues in the field. This textbook interacts with the reader and complements existing learning/teaching strategies, including problem-based learning systems. In that regard, the textbook contains a variety of resources and activities, such as problem questions ('group projects'), essay questions and 'thinking points' for reflection, in order to test the reader's knowledge and foster critical thinking.

A further objective of this textbook is to stimulate independent research. For that purpose, further reading lists are provided at the end of each chapter on selected topics, in order to deepen the reader's knowledge. All of those readings are in English, but they have been chosen to be accessible to non-native readers. Additional scholarship in languages other than English is referred to in the footnotes in various parts of the textbook.

Apart from its primary objective to inform the studies of university students, this textbook is also intended as a comprehensive guide to the field of international and European disability law and policy for practitioners, policy-makers and non-governmental actors. By virtue of the large number of case studies and the extensive legal and policy analysis included, lawyers and policy-makers can use this textbook to advance the disability rights agenda at the national, EU and international levels.

On the whole, this textbook can be seen as a valuable tool that can be used to improve the understanding of the rights of persons with disabilities and the challenges associated with the practical implementation of those rights.

5 GUIDING PERSPECTIVE AND METHODOLOGY OF THE TEXTBOOK

Against this background and with the foregoing objectives in mind, this textbook adopts a traditional legal doctrinal approach to jurisprudence and legal literature. An extensive range of primary sources is drawn on in the book and critically analysed. The textbook also builds upon a wide range of secondary sources. To achieve a global focus, it refers to scholarship in English and other languages.

Positioning itself primarily as an educational tool, this textbook is designed to support different teaching activities and styles. It is informed by the

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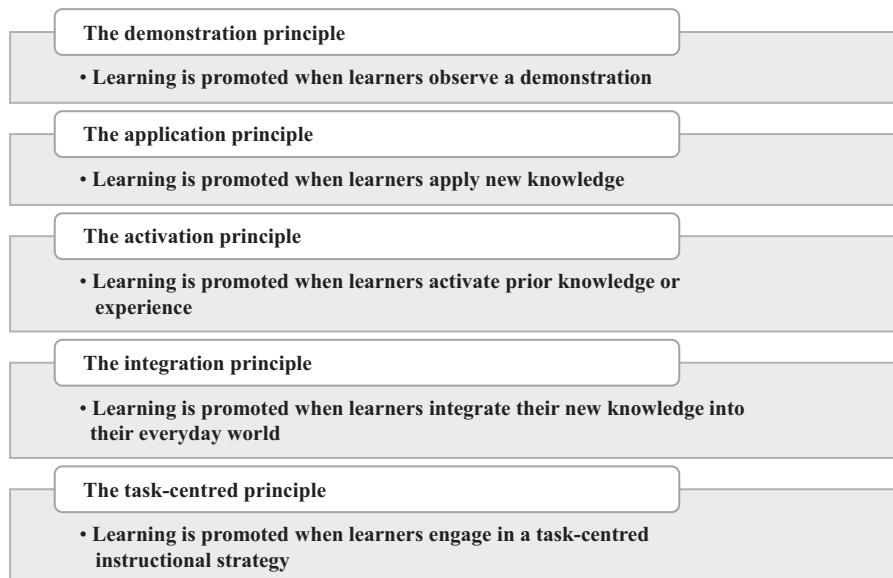


Figure A Merrill's Pedagogy

principle of constructive alignment.²¹ Thus, it aims to encourage coherence between intended learning outcomes and teaching as well as assessment strategies.²² The textbook also attempts to accommodate different learning styles and techniques,²³ based on the understanding of learning and teaching as a student-centred activity. Furthermore, it is informed by the five-pronged approach to pedagogy advocated by Merrill, as illustrated by Figure A.²⁴

²¹ See, for instance, John Biggs, *Teaching for Quality Learning at University – What the Student Does* (Buckingham: Open University Press, 2003); see also John Biggs and Catherine Tang, *Applying Constructive Alignment To Outcomes-Based Teaching and Learning* (2009) available at <https://drjj.uitm.edu.my/DRJJ/MQAGGPAS-Apr2011/What-is-CA-biggs-tang.pdf>. Tang and Biggs affirm that the term 'constructive' refers to 'the idea that students construct meaning through relevant learning activities'. Furthermore, the term 'alignment' refers to 'the situation when teaching and learning activities, and assessment tasks, are aligned to the intended learning outcomes'.

²² John Biggs and Catherine Tang, *Applying Constructive Alignment to Outcomes-Based Teaching and Learning*, note 21.

²³ John Dunlosky, Katherine Rawson, Elizabeth Marsh, Mitchell Nathan and Daniel Willingham, 'Improving Students' Learning with Effective Learning Techniques: Promising Directions from Cognitive and Educational Psychology' (2013) 14(1) *Psychological Science in the Public Interest* 14.

²⁴ David Merrill, 'First Principles of Instruction', in Charles Reigeluth and Alison Carr (eds.), *Instructional Design Theories and Models: Building a Common Knowledge Base* (New York: Routledge Publishers, 2009), vol. 3; David Merrill, 'First Principles of Instruction: A Synthesis', in Robert Reiser and John Dempsey (eds.), *Trends and Issues in Instructional Design and Technology*, 2nd edn (Upper Saddle River, NJ: Merrill-Prentice Hall, 2007), vol. 2, pp. 62–71.

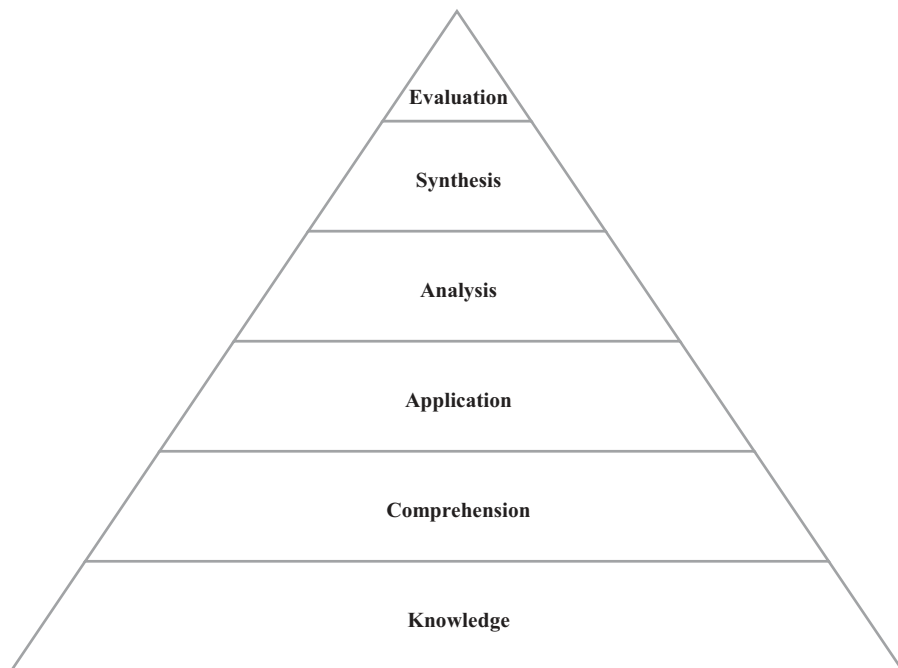


Figure B Learning Levels

This textbook is also informed by Bloom's taxonomy²⁵ of educational objectives, and it is written in accordance with the six levels of intellectual behaviour that are deemed to be important for learning in the cognitive domain (Figure B).

This textbook works from the starting point of the various pedagogical theories highlighted above, in order to provide the reader with the most reliable and comprehensive knowledge in the field of international and European disability law and policy.

In line with the approach adopted, the textbook includes specific pedagogical features. At the beginning of every chapter, clear learning outcomes are delineated, and, at the end of each chapter, a brief summary is provided, which sets out the key issues and the most important concepts discussed. In addition, the textbook includes special 'Did you know that . . .?' boxes and other textboxes. These contain, for example, extracts from soft law, general comments of UN bodies, literature in the field and relevant policy documents, as well as case studies on specific countries. The sources for all of the

²⁵ Benjamin Bloom, Max Engelhart, Edward Furst, Walker Hill and David Krathwohl, *Taxonomy of Educational Objectives: The Classification of Educational Goals*, Handbook I: Cognitive Domain (New York: David McKay Company, 1956). For a simplified explanation of the taxonomy, see, *inter alia*, www.nwlink.com/~donclark/hrd/bloom.html.

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material drawn on are included in the corresponding textboxes. The textbook also contains ‘thinking points’ in the form of bubbles. These are designed to foster reflection and to enhance critical thinking. The number of pedagogical features included in each chapter varies according to the nature of the topic under discussion. Additionally, as mentioned above, every chapter includes activities to help students to reflect on the content, in line with Merrill’s application and activation principles. Review questions, essay questions and group projects support the student’s learning experience and help students to test their knowledge and understanding, to apply the new knowledge that they have acquired and also to activate prior experience.

To increase readability, the textbook includes a list of abbreviations and acronyms at the outset. In addition, in every chapter, acronyms and abbreviations are spelled out, to facilitate ease of reading.²⁶

6 STRUCTURE OF THE TEXTBOOK

This textbook is divided into three main parts. The first part addresses the international framework on disability law and policy, focusing specifically on the CRPD. The second part addresses EU disability law and policy, while the third part centres on regional systems for the protection of disability rights.

Part I of the textbook begins with Chapter 1, which builds the foundations of the textbook as a whole. It addresses the various theoretical models of disability that have been delineated by scholars in the field. It also outlines several core foundational themes in disability law and policy. Finally, the chapter briefly describes the emergence of international disability law.

Chapter 2 addresses the protection of the rights of persons with disabilities under binding international human rights law before the adoption of the CRPD. In that regard, it draws links between human rights law and disability, and it outlines the role of the UN, the International Labour Organization (ILO) and the World Health Organization (WHO) in the development of binding standards for disabled persons.

Chapter 3 provides a comprehensive overview of the negotiation sessions that led to the conclusion of the CRPD. It also provides an account of the structure of the CRPD, its main features and its component parts. Another key focus of Chapter 3 is the monitoring system of the CRPD. Finally, Chapter 3

²⁶ With the exception of: the United Nations, which is referred to as the ‘UN’; the UN Convention on the Rights of Persons with Disabilities, which is referred to as the ‘CRPD’ throughout the textbook; and the European Union, which is always indicated as ‘EU’.

turns its attention to the pivotal role played by persons with disabilities and DPOs in implementing the Convention.

Chapter 4 examines the CRPD's equality and non-discrimination norms. In that connection, an overview is provided of the constituent elements of Article 5 CRPD. The concept of 'reasonable accommodation' is discussed in detail, including the definition and scope of the duty, its objectives and limitations. Thereafter, the concept of 'positive action' is examined. Attention is also paid to the CRPD's provisions related to multiple and intersectional discrimination. The chapter concludes with a theoretical and comparative perspective on the model of equality embodied in the CRPD.

Chapter 5 addresses one of the core principles of the CRPD, namely accessibility. The chapter starts off by addressing the concept of 'accessibility' generally, before focusing on the scope of the accessibility norm in the CRPD. The chapter then links back to Chapter 4 in dealing with the relationship between the duty to reasonably accommodate and the accessibility obligation.

Chapter 6 provides an account of the core norm of legal capacity. It focuses on supported decision-making, and it outlines the connection between legal capacity and independent living, as well as family life.

Chapter 7 focuses on access to justice, and it also addresses the rights of people with disabilities as victims of crimes or as offenders.

Chapter 8 discusses the right to work. It focuses on Article 27 CRPD, which requires States Parties to create an open, inclusive and accessible labour market. The chapter also examines the types of positive measures that States Parties to the CRPD should implement to promote employment of persons with disabilities.

Chapter 9 concludes Part I of the textbook. It addresses core policy issues in relation to a selection of CRPD rights, namely, the rights to education, access to culture and political participation.

Part II of the textbook deals with the EU framework of disability law and policy.

Chapter 10 provides an account of current EU disability law and policy. Since the CRPD is the first human rights treaty that the EU has concluded, the chapter also provides a critical assessment of the status of the CRPD in the EU legal order. Additionally, it focuses on the implementation of the Convention at the EU level.

Chapter 11 examines the relevance, from a disability perspective, of the Employment Equality Directive and the proposed non-discrimination directive. It discusses relevant CJEU case law on disability pre- and post-CRPD ratification.

Chapter 12 links back to the CRPD's core obligations, by dealing with accessibility issues at the EU level and examining pertinent provisions included in EU legislation.

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The third and final part of the textbook focuses on regional disability law and policy.

Chapter 13 evaluates the role of the CoE in shaping European disability policy. The chapter addresses the disability case law of the ECtHR. The chapter also analyses the provisions of the Revised European Social Charter (Revised Charter) and the views of the European Committee of Social Rights (ECSR) as they apply to disability.

Chapter 14 deals with the key features of the inter-American system in protecting and promoting the rights of people with disabilities.

Finally, Chapter 15 outlines developments in the African human rights system, in the League of Arab States and in the Asian transnational regime as they relate to disability law and policy.