II. Development of Analytical Framework

The aim of this chapter is to build up the conceptual framework necessary for examining the actors stipulated by the CPRD and their role in political and legal implementation practices of international instruments such as the CPRD into the multi-level domestic legal systems of the EU Member States with federal and unitary systems of governance. The developed scope of analysis combines the concepts of multi-level governance and legal systems that allows equal interdisciplinary evaluation of governance-focused and normative-based aspects of implementation of the Art. 33 of the CPRD. In particular, it lays down the theoretical frame used to study the structures, financial and human resources of actors stipulated by the Art. 33 CPRD, as well as their individual and collaborative efforts taken to discharge their responsibilities to promote, protect, implement and monitor the human rights of DPs at the horizontal, vertical and diagonal levels of governance.

1. Conceptualisation of Governance

Traditionally, the state has been studied in isolation and been addressed as an independent variable. Today, however, in view of evolving legal and political order, the state shall be studied both in terms of the state's basic structure, institutional architecture, and specific organizational forms and from the viewpoint of its strategic capacities both within its political system more generally and its compliance to international obligations. Therefore, it might be presumed that the analytical scope of the previously[24] applied theories of governance could not cover the implementative dynamics of all involved actors. Consequently, I have chosen an approach that could embrace the legal and political comparison both at the horizontal and vertical levels of governance.

24 See in Bevir, 2010; Levi-Faur, 2012; Ansell/Torfing, 2016.

1.1 Multi-level Governance

Initially, the concept of multi-level governance (hereinafter referred as MLG) has been developed to be able to capture the new developments in the European integration process and the shifting authority that was not only of central states up to Europe, but also down to subnational authorities. Gary Marks applied the MLG to assess developments in EU structural policy consequent to its major reform of 1988.[25] The MLG has been further developed by Marks and a number of other scholars,[26] to evaluate the evolving scale of EU decision-making structure. The progression of the MLG had to allow the examination of both domestic politics and of international politics.

Prior to MLG development, the field of EU studies in political science has mostly been based on theories of neo-functionalism and intergovernmentalism, which claimed to explicate both the emergence of the European Union and its functioning. However, Marks questioned the efficacy of these concepts in capturing the full picture of European decision-making dynamics and its functioning, by pointing out that both theories fail to cover "flesh-and blood" actors.[27] Moreover, he stated that neither Intergovernmentalism nor Neofunctionalism provide the sufficient space for examining the three different analytical dimensions: that of political mobilization (politics), that of policy-making arrangements (policy), and that of state structures (polity) as the conceptual framework of the multi-level governance can offer.

With the growing significance of international organizations e.g., UN and their legal instruments, the concept of MLG has been also used by scholars examining the implementation of specific rights of particular groups.[28] The introduction of three-actor multi-level structural provision of the CPRD,[29] made the application of concept of MLG a necessity as it allows top-down examination of the role of relevant actors in the implementation of the specific human rights of DPs within particular political and legal structures.

25 Marks, 1992.
26 See for example in Enderlein/Wälti/Zürn, 2010; Bache/Flinders, 2015.
27 Marks, 1992.
28 E.g., Schapper, 2017; Marx at al., 2014; Haussman/Sawer/Vickers, 2010; Waylen et al., 2013; Scholten/Penninx, 2016; Gushchina/Kaiser, 2021.
29 CPRD, Arts. 33 and 4.5.

A part from the fact that governance has become (or should be) multi-jurisdictional, Hooghe and Marks suggest two organizational types for multi-level governance- type I and type II.[30] In view of the fact that in the present study I aim at studying the vertical, horizontal and diagonal[31] structures, capacities, interactions and actions of actors stipulated by the Art. 33 CPRD in promoting, protecting, implementing and monitoring the specific human rights of DPs within four general-purpose governmental tiers of unitary state such as Denmark and 6 general-purpose governmental tiers of federal structures e.g., Austria and Germany, I adopted the type I MLG.

1.1.1 TYPE I MLG

Type I multi-level governance allocates the governing power to jurisdictions at a limited number of levels. These are international, national, regional, local levels of general- purpose governance. In other words, they combine multiple functions, ranging from varying policy responsibilities and a court system to representative institutions. Such jurisdictions do not have intersecting membership boundaries. These types of jurisdictions can be maintained both at every level and across levels. In this form of governance, each Citizen is placed in a Russian Doll set of nested jurisdictions that provides for only one pertinent jurisdiction at any specific territorial level. In this case, territorial jurisdictions, in most cases, are perceived as being stable for several decades or more, despite the fact that allocation of policy competencies across levels is fluctuating.

1.1.2 TYPE II MLG

The type II governance distinctly differs from that of the type I. It is presumed to consist of aim-fixed authorities that, for instance, provide a specific local service, address a common pool resource problem, decide a product Standard and monitor human rights. The executional scale of these jurisdictions is significantly different and the number of these are large. Moreover, the nature of their organization is not fixed. In most cases they react flexibly to demands for governance change.

30 Hooghe/Marks, 2003.
31 Torfing et al., 2012.

1.2 Federal and Unitary Systems

In view of the set aim to study the similar and dissimilar political approaches of the federal and unitary systems in implementing the Art. 33 CPRD at the multiple levels of governance, and the case-selection criteria,[32] in subsections below I will discuss the territorial organization systems that are fundamental for the testing of hypotheses formulated in the subsection 3.3 of chapter III through Most Similar systems Design and Most Dissimilar Systems Design.[33]

1.2.1 Federal systems

Federal systems are polities, which are based on two (or more) levels of government. These operate on principal of collaborative partnership and constituent-unit autonomy through common institutions for the governments of the constituent units in an intergovernmental constitutional relationship that is not determined by the central government alone. The decisive factor here is not the level of decentralization, but the level of constitutionally secured self-governing power that the constituent units may exercise.[34]

Furthermore, Elazar identifies eight distinct species of federal systems including (Federations (e.g., Federal Republic of Austria 1920, 1945 and Federal Republic of Germany 1949, 1949), Confederations (e.g., The European Union), Federacies (e.g., the Faroe Islands to Denmark and Greenland to Denmark)).[35]

In view of the fact that the focus of the present study is federal systems, below I provide details only about one type of the above-mentioned species of federal systems, namely: federation since this type directly applies to the examined Federal constitutional countries, namely Austria and Germany.

Federations are amalgamated systems built on powerful constituent units and a strong general government that enjoys powers delegated to it by the people through a supreme constitution. These units have a direct authority in the exercise of their legislative, administrative and taxing powers. All their major institutions are directly elected by the citizens. Federations rep-

32 See chapter III subsection 2.1.
33 See chapter III Sections 3.1 and 3.2.
34 Kincaid/Tarr, 2005; Watts, 2005.
35 Elazar, 1987.

resent a specific type of federal system in which neither the federal nor the constituent units are constitutionally subordinate to the other. Currently, there are about 20 countries that are fully or partially recognised as an established functioning federation, including Federal Republic of Austria (date of original foundation 1920, date of actual constitution 1945) and Federal Republic of Germany (date of original foundation 1949, date of actual constitution 1949).

In addition, for the purpose of the present comparative analysis, three further considerable variations among types of federations are distinguished:

Maturity of federations: In general, depending on the degree of maturity there could be identified four types of federations: e.g., "mature" federations, "emergent" federations, "post-conflict" federations and "failed federations". Unlike the other three, the 'mature' federations are described as systems that have functioned successfully for at least fifty years or more. In this type fall: e.g., Austria (1945) and Germany (1949). Countries within this category are presumed to rule in constant stability and possess all the elements of a federation outlined previously. Besides, they, in the process of their development, have established governments both at the federal and Länder-levels that have legal and fully functioning autonomous powers.

Bases of internal diversity: Many scholars have underlined the fundamental importance of evaluating the basis of varying internal diversity of federations, which has influenced both the creation and subsequent operation of federations.[36] In general terms, one may distinguish between federations where regional diversity is deeply rooted in internal cultural, linguistic, ethnic, religious and even national differences and those, where regional diversity is largely territorial or historical.[37] The latter type of diversity include Austria and Germany. In this case, the historical separation of Germany, for example, might provide fundamental basis for identifying and understanding regional diversity in the CPRD implementation across Germany.

Variations in the form of the distribution of legislative and executive authority: Actually, all federations operate on the basis of constitutional distribution of legislative and executive powers across the governmental levels. However, the separation of powers might take varying forms.[38] In

36 Watts, 2008; Moreno/Colino, 2010.
37 Burgess/ Pinder, 2007.
38 Majeed/Watts/Brown, 2006.

the context of European federal countries with a civil-law tradition, such as Austria and Germany, the legislative power and administrative jurisdiction has, in majority of cases, been accorded to different governmental levels. This way, the federal legislatures have been able to develop uniform legislations and, in consideration of varying regional circumstances, assign the constituent unit governments with the task of implementation. These federations are more centralized in legislative terms and more decentralized in administrative terms. Therefore, this type of federation has to collaborate and coordinate extensively across the governmental levels. Nevertheless, in its extreme form, maintained by Germany, it has formed a virtually interlocking relationship of governments at different levels.[39] This might lead to significant implementation challenges in particular policy fields.

1.2.2 Unitary Systems

In contrast to federal systems, in unitary systems the ultimate authority, constitutionally or in practice, is located within the central government. The constituent units might enjoy administrative, legislative, or financial independence, which, nevertheless, could only be authorised or approved by the central government that has an indivisible sovereignty to overrule constituent units on any matter.

However, in the course of evolution, a number of significant macro-developments with regard to the territorial governance have occurred in the unitary systems, which caused considerable structural changes, the most relevant of which are considered below.[40]

From centralization to decentralization: While the focus in the 1950s to 1960s was mainly put on the consolidation of national unity through a centralization process, there has also been decentralization efforts during this period.[41] However, these have taken the form of administrative deconcentration rather than political decentralization, which allowed the delegation of political decision-making power rather than simply administrative functions to the lower governmental levels. Nevertheless, interest in political decentralization has risen starting from the mid-1970s. As a result, France started a decentralization reform program in 1982 that reshaped the French

39 Watts, 2013, 19–34.
40 For a fuller account see, Loughlin, 2009, 49–66.
41 See, Sharpe, 1979.

politico-administrative framework considerably.[42] Currently, the political decentralization is already perceived as a fundamental precondition for 'good governance' by entities such as the European Union (EU), the Council of Europe, the UN Human Settlements Program (UN-HABITAT), the World Bank and the IMF.

From regionalization to regionalism: The "regionalization" is perceived as a top-down approach to regional issues, which operates under the control of the central state. It was the prevailing approach applied to regional governance and planning during the period of 1950s to late 1970s.

The regionalism, which emerged in 1980s, in turn, is a bottom-up approach that permits key political and other actors from within the regions exercising greater authority over the political, social, cultural and economic affairs of their regions. It might function in collaboration with the central state normally without risking the break-up of the state itself. Regionalism, as a consequence, has been adopted by not only large nation-states such as France, Spain, the UK and Italy but also by smaller states such as Denmark, Sweden and Finland, which either introduced administrative regions, or as in the case of Sweden, set up both administrative regions and elected regional governments. Thus, the tendency towards establishing political and administrative regions has not only been firmly anchored in the governance of the unitary systems[43] but also significantly affects the policy-making and implementation processes.

2. Conceptualisation of Legal Systems

With an aim of controlling and explaining implementation variations, I, in consideration of the case-selection criteria,[44] and design of comparison[45] have chosen legal systems that have a number of common features e.g. Civil Law. Accordingly, below I provide elaboration upon the legal systems.

2.1 Legal Systems

Traditionally, the efficacy assessment of a certain legal measure has solely been based on the examination of political structures, whereas in case

42 See, Ohnet, 1996; Loughlin, 2009: 49–66.
43 Loughlin, 2013: 2–19.
44 See chapter III subsection 2.1.
45 See chapter III Section 3.

of legal measures, the study of the legal system of the examined political structure, such as unitary or federal might be equally important. The study of the relevant legal system, especially in analyzing the implementation of an international legal treaty, such as the CPRD, in its turn, could help to evaluate if the legal systems of federal and unitary political structures follow dissimilar and/or similar strategies of incorporating the International Law in their domestic laws, and if the incorporated International Law has similar/or dissimilar application effect at all legal levels in the legal systems of the federal and unitary structures. In the same vein, the study of legal systems of the chosen countries should assist in identifying similar and/or dissimilar influences of International Law on reshaping legal norms of the specific field, such as the education by the judiciary at all governmental levels.

For the full comprehension of the underlying concept of a legal system one should look into the definition of the law. As Joseph Raz puts it, "the three most general and important features of the law are that it is normative, institutionalized, and coercive. It is normative in that it serves, and is meant to serve, as a guide for human behaviour. It is institutionalized in that its application and modification are to a large extent performed or regulated by institutions. And it is coercive in that obedience to it, and its application are internally guaranteed, ultimately, by the use of force".[46] While law can be described as any standard that is legitimate, valid and enforceable, the divergences in processual and structural enforcement of laws within countries has led to the tradition of clustering the domestic legal systems into certain groups or families based on their commonalities with regard to legal concepts, especially the system of legitimacy, validity, and enforceability.[47] Consequently, the objects of classification find their true and distinct identity through their assignment to a particular class. A national legal system could thus be better understood, and its existence affirmed, through its classification as a Common Law System or a Civil Law System.[48]

In the light of the fact that the modern democratic state exists and functions on the bases of three fundamental powers, namely: legislative, execut-

46 Raz, 1980.
47 David/Brierley, 1985: 7.
48 Glenn, 2008: 421–441.

ive and judicial,[49] and that they grow more and more interdependent,[50] the study of legal systems in isolation would put the validity of present research results in question. Thus, in the following subsection, I shall discuss the legal systems, most particularly the Civil Law System to which all four selected countries belong, with an aim of analysing the effects of the Civil Law in applying International Treaties in the national legal systems with federal and unitary political structures.

2.1.1 Civil Law Legal Systems

Unlike the Common Law[51] legal systems, where the court judgments are not based on the systematised law and academic jurisprudence has no significant value, the Civil Law System, also called continental European or Romano-Germanic legal systems, can be referred as having counterpole and constant characteristics. It is founded on concepts, categories, and rules originating from Roman Law,[52] with some impact of Canon Law, sometimes largely supplemented or modified by local customs or culture.[53] The most prevalent feature of the Civil Law is that its core principles are codified into a referable system that functions as a primary source of law. This, as a rule, refers to a number of private law codifications of the nineteenth century, including the German Civil Code of 1896, and the Austrian General Civil Code of 1811. While the codification was of a significant value from the historical perspective, it would be incorrect, however, to presume that the codification is the main defining characteristic of a Civil Law as opposed to Common Law. Civil Law Systems are, in fact, much more identifiable by their tendency towards systematisation and imbedding the court decisions into law that finally would lead to new codifications.[54]

Actually, in legal systems with Civil Law, the case law is secondary and subordinate to statutory law. Thus, Civil Law is primarily a legislative system, which, however, leaves room for the judiciary to adjust rules to

49 See, Montesquieu, 1949.
50 CCJE opinion no. 18 (2015) on "the position of the judiciary and its relation with the other powers of state in a modern democracy".
51 Today, under the category of Common Law fall, for example, legal systems of the United States, United Kingdom Australia, Canada, New Zealand and Ireland.
52 Plessis, 2015.
53 For more on Historical development of Civil Law, see, Watkin, 2017.
54 Kischel, 2015: 389–529.

social change and new needs, through judicial interpretation and creative jurisprudence.

In view of the great number of Civil Law countries and the great variety of their socio-political traditions as well as their Civil Law System adoption process, it is presumed that Civil Law jurisdictions should be further subdivided into four distinct groups, namely: Roman, German, Scandinavian and socialistic.[55] Nevertheless, the positive effect of additional Civil Law subdivision for comparative research is perceived to be largely obscure.[56] Therefore, in consideration of the research aims of the present study, namely finding out the dissimilarities and/or similarities of federal and unitary systems in implementing the CPRD in their domestic law, I do not apply the additional Civil Law subdivision in my assessment and evaluation process. Instead, I will examine the legal traditions of the chosen SPs with Civil Law systems in giving effect to International Law.

2.2 The Reception and Execution of International Law

2.2.1 The Reception of International Law

The domestication of International Law takes place mainly through monist or dualist approaches. The doctrine of dualism is assumed to be based on Heinrich Triepel's work, "Völkerrecht und Landesrecht" of 1899.[57] It, unlike the monist doctrine,[58] hinges on the presumption that International Law and domestic law are two different legal orders with their distinct legal characteristics. The difference, hereby, is seen in three fundamental factors:

International Law and domestic law have different sources:[59] this means that the sources of domestic law are the nationally/locally made decisions of the lawmakers in a given country, e.g., acts of parliament(s) or executive regulations. The sources of International Law, instead, are customs and Treaties.

55 See, Rheinstein, 1987.
56 Kischel, 2015: 222 – 229.
57 Triepel, 1899; see also Triepel, 1923.
58 See e.g.: Blackstone, 1890: 67; Kelsen, 1920, Paras. 30–51; Kelsen, 1934; Verdross, 1926: 34–42; Lauterpacht, 1950; Krabbe, 1919.
59 Triepel, 1923: 82–83.

International Law and domestic law have different subjects:[60] within this criterion, it is assumed that the subjects of domestic law are individuals in their inter-relations or in their relations with the constitutional organs of the state, whereas the subjects of International Law are states.

In respect, the function or substance of law, International Law and domestic law have different objects:[61] here, it is presumed that the two systems function on different levels and that their material substance or content rarely overlap.[62]

In legal orders based on the approach of dualism, the rules of International Law require what Triepel called "Umguss" transformation into rules of national law for being directly applicable[63] and thus binding.[64] To this end, the SPs should take further legislative measures in addition to international-level ratification for allowing domestic-level implementation of the rules of International Law, including customary law and Treaties and give individuals and legal persons an opportunity to effectively invoke the provisions of the International Law in cases of violation of their human rights in their relations with each other or vis-à-vis the state organs. In taking further legislative steps to implement the ratified treaty, the SPs might, in addition, decide the status of the ratified international treaty in the domestic law. Thus, the ways and means of domestic-level implementation of international laws are left on the constitutional rules and legal traditions of the given SPs since the International Law does not regulate the SPs duties for making Treaties binding on their constitutional organs.[65]

2.2.2 The Execution of International Law at the Domestic Level

In an attempt to legally recognise the normative rights, the SPs pursue varying procedures in embedding Treaties into their legal systems with an aim to make its provisions executable for the state authorities. In states with dualistic legal traditions, such as Austria, Denmark and Germany, the international human rights law does not automatically become a part of the ratifying country.

60 Ibid., 81.
61 See also Fischer/Köck, 2000: 36; Wasilkowski, 1996: 326.
62 Wasilkowski, 1996: 329–330.
63 Verzijl, 1968: 91.
64 Hart, 1994: 100–110.
65 See for example Henkin, 1995: 65.

In fact, there are four key methods for the incorporation of international human rights instruments in domestic law:

Direct incorporation of rights recognised in the international instruments into a bill of rights in the national legal order;

Enactment of different legislative measures in the civil, criminal, social and administrative laws to give effect to the different rights recognised in human rights instruments;

Self-executing operation of international human rights instruments in the national legal order; and Indirect incorporation as aids to interpret other law.[66] Consequently, depending on the legal and political system of a given SP, the execution nature and end effect of the CPRD might not be similar across the ratifying states.

Thus, Campbell argues against the court-centred approach by stating that "human rights diminish when we seek to cure democratic deficiencies by anti-democratic devices' in other words, he finds it dangerous when the strategy of implementation is primarily bestowed on judicial instead of political instruments of state power. Therefore, he presumes that it would be more favourable if the states adopt an approach anchored in the 'democratic Bill of Rights" with a strengthened power of parliamentary committees in conducting compliance assessment of draft legislation, make inquiry and push for the adoption of the proposed reforms. A parliamentary committee might initiate inquiries both by external requests and of its own accord. Normally, it will have the authority to call witnesses and carry out public investigations into non-compliance of ministries and its officials. This would bring, he assumes, to the formation of a comprehensive set of human rights legislation, which would achieve better enforceability and consideration by the courts through improved legal status.[67]

In practice, however, the effectiveness of both court-centred approach and parliamentary approach depend on the existing legislation framework: e.g., if the state has no antidiscrimination legislation enacted that protects DPs against discrimination in the private field then there would be no available legal instrument to litigate against such violations. Therefore, the existence and cooperative work of both might contribute to the effective protection, implementation and compliance of the rights of DPs.

66 The CPRD Resource: Part I. National Frameworks 2/5. Retrieved from: https://www.un.org/esa/socdev/enable/comp101.htm (last accessed on 01.07.2022).

67 Campbell, 2006.

These instruments can, in addition, be complimented by alternative methods of dispute resolution. In such cases, the institutions like disability commissioners and public service ombudspersons might play an important role in providing effective legal remedies by ensuring the right to free and accessible trial for disabled individuals, who face additional barriers in making legal claims simply because most of judicial processes are inaccessible, and/or unavailable to them. For instance, the

European Union Agency for Fundamental Rights stated in its 2011 report on access to justice that in many EU Member States the inaccessible court proceedings and high amount of legal costs, which mainly includes attorney and court fees, often prevent access to justice.[68] This was also confirmed by the UK Lord Justice Jackson's report on the rules and principles governing the costs of civil litigation, where he states that: "in some areas of civil litigation costs are disproportionate and impede access to justice".[69] Undoubtedly this situation has a highly negative effect on the execution of the equal right of access to justice for DPs, stipulated by the Art. 5 para. 1 and 2 and Art. 13 para. 1 CPRD as they are often reported to be living in poverty or below the poverty lines. Correspondingly, the European Court of Human Rights has underlined that court fees that are payable in advance of instituting proceedings should not prove such a financial burden as to prevent or deter applicants from exercising their right to a remedy.[70]

Therefore, the disability commissioners and/or public service ombudspersons may assume supportive roles including complaint investigation, inquiries holding and awareness raising activities. If empowered to launch proceedings alleging disability rights violations and/or to intervene in proceedings initiated by other parties, these statutory institutions can have a positive contribution on the judicial enforcement. Within the parliamentary approach, these institutions can send disputes and issues to parliamentary investigation bodies and give evidence in their inquiries. Moreover, both the CJEU and the ECTHR accept the validity of non-judicial dispute mechanisms so long as the decisions of such bodies may ultimately be supervised by a judicial body and so long as the alternative mechanisms themselves conform to general requirements of fairness. However, the ombudsperson institution plays an important role in Nordic countries and many of the Central and Eastern European countries, but in other coun-

68 European Union Agency for Fundamental Rights, 2011.
69 Jackson, 2009.
70 European Union Agency for Fundamental Rights, 2011.

tries, as in Germany, the institution of the ombudsman plays only a minor role as human rights protection is based exclusively on the judicial system and the Constitutional Court.[71]

3. MLG and CPRD Implementation

This section operationalises the concepts of MLG and legal systems by building up a theoretical frame for evaluating the role of multi-level actors in promoting, protecting, implementing and monitoring the CPRD provisions. Thereby, it should be noted that the literature on the CPRD implementation and monitoring dynamics is very limited. Apart from the Gauthier de Beco and state relevant representatives[72] descriptive contributions on the Art. 33 and its implementation in the six SP to CPRD, Arnardóttir and Quinn's[73] rather normative publication on the description and effect of the CPRD on the European and Scandinavian states, as well as other descriptive contributions,[74] there is no systematic comparative study reflecting the influence of international disability law on multiple governmental levels of states and the role of national structures in these processes. And most importantly, there is no research studying the legal and political system-based dynamics of CPRD implementation and monitoring, which could contribute to the better implementation of and compliance with the CPRD.

Therefore, in the following subsections I conceptualise the role of the CPRD Committee as an international body. I build up the analytical frame for the EU Disability framework and its legal competencies and institutional capacities to ensure the implementation and monitoring of the CPRD within its member states to which belong all chosen SPs.[75] In the last part of the subsections I combine legal norms and governance concepts to create an assessment frame for actors stipulated by the Art. 33 CPRD.

71 Nußberger, 2012.
72 Beco (eds.), 2013.
73 Arnardottir/Quinn, 2009.
74 Quinn, 2009a; Gatjens, 2011; Raley, 2015. For the views of Disability organizations see International Disability Alliance, 2009; Mental Disability Advocacy Centre 2011. See also OHCHR et al., 2007.
75 For more see chapter III.

3.1 CPRD Monitoring at the International Level

The adoption of the CPRD aims at initiating paradigm shift for DPs from medical based to human-rights-based approach of governance not only at the national but also at the international level. Therefore, it provides for an international body, namely the CPRD Committee on the Rights of DPs (hereinafter referred as CPRD Committee), to monitor the implementation of the Convention in states and regional integration organizations that are parties to the Convention.[76] Furthermore, it mandates the committee to base its monitoring work on two key procedures:

SP reporting: Similar to other human rights Treaties, under Art. 35 of the CPRD the SPs shall submit a report on the implementation of the Convention to the consideration of the Committee. The SP report consists of two-part documents; the common core document and a treaty-specific document. The common core document[77] is a 60–80-page report, which provides general and practical information on the implementation of all the human rights Treaties that a state has ratified and it is, therefore, not disability-specific. The common core document includes, among other things, information on the constitutional, political and legal structure of the SPs. The treaty-specific document, in its turn, is an about 60-page report that describes the legal and practical implementation practices of the CPRD provisions in the SPs. It should contain detailed information on the concrete measures applied for the implementation, draw on successful practices and provide, in line with the reporting guidelines, the article-by-article analysis of the Convention.[78]

Thus, the reporting and monitoring process generates a series of dialogues at and between the international and national levels. The key actors in these dialogues are the SPs, Monitoring Bodies, DPOs and organs of

76 CPRD, Art. 34 ()1 that reads: "there shall be established a Committee on the Rights of DPs (hereafter referred to as "the Committee"), which shall carry out the functions hereinafter provided".

77 Guidelines for the common core document can be found in Compilation of Guidelines on the form and content of reports to be submitted by SPs to the international human rights treaties, HRI/GEN/2/Rev6. Retrieved from: http://www2.ohchr.org/english/bodies/icm-mc/docs/9th/HRI-GE-2-Rev6.doc (Last accessed on 01.07.2022).

78 In October 2009, the CPRD Committee adopted the guidelines on treaty-specific document to be submitted by SPs under article 35, paragraph 1 of the CPRD with an aim to encourage comprehensive and uniform reporting. Retrieved from: https://digitallibrary.un.org/record/672005 (Last accessed on 01.07.2022).

the UN, principally the CPRD Committee provided for by the Art. 34 of the CPRD. Since reporting to the CPRD Committee is a dynamic process, the production of a report envisages, provided the comprehensive characteristic of the CPRD, the participation of a wide range of governmental ministries and departments, e.g., the Ministries of Social Affairs, Health, Education, Justice, Employment, Finance and Defence. All these ministries have to contemplate on the questions: what have we done to ensure the effective implementation of the CPRD? And/or what should we have been doing to better implement the provisions of the CPRD? To coordinate the input from the different ministries the SPs most often establish an interdepartmental working group. These procedures might result in improved cooperation within the multiple levels of governments and contribute to awareness raising within various ministries and departments on different aspects of the implementation of the CPRD through exchange of information and discussions on achievements and unresolved problems.

In addition, the 2009 guidelines on treaty-specific documents to be submitted by the SPs under Art. 35, para. 1 CPRD explicitly requires SPs to encourage and facilitate the involvement of non-governmental organizations, including organizations of DPs in the reporting process. It might include not only involvement of the DPOs in the state report development processes but also submitting shadow reports and list of questions for the SPs, as well as participation in the plenary discussions at the international level. The constructive involvement of these organizations is assumed to be not only a positive contribution to the reporting quality but also promote the enjoyment of all rights stipulated by the Convention. Therefore, the SPs are under the duty to provide information on the tools and methods used to consult with civil society, specifically with representative organizations of DPs in their reports. Furthermore, the state reports should contain explanations on the measures taken to ensure the full accessibility of these processes for the DPOs.

After the submission of the report by the SP, the dialog process between the CPRD committee and national actors starts: the CPRD Committee carries out a preliminary examination of the SP report and compiles a list of issues that intend to complement and revise the information found in the initial reports. Thereby, the SP is under the duty to submit the written response for the list of issues within the set time limit. The CPRD Committee then considers both, the report and the response to the list of issues, at its plenary sessions. In order to answer to the inquiries of the Committee members and to provide additional information upon request

of the Committee, the SPs, including the designated Monitoring Bodies and the DPOs are invited to participate at the plenary session. At the end of the examination process, the CPRD Committee issues concluding observations that aim at acknowledging the effective actions taken to implement the CPRD, pointing out the social, economic, political, legal and administrative barriers impeding its further effective implementation, urges action on main areas of concern and offers constructive suggestions and recommendations for future steps. Subsequent to the issuance of concluding observations, the SP has to report what actions have been taken to remedy the stated issues within a year.

Individual complaint Mechanism: the CPRD Committee, provided that the SP has ratified the Optional Protocol to the CPRD, might receive and examine individual communications against SPs;[79] the Committee may perceive a communication as inadmissible if all available domestic remedies have not been exhausted. However, this could not be the case when the application of the remedies is unreasonably prolonged or unlikely to bring effective relief. Following the receipt of the communication, the Committee, confidentially, communicates the reported matter to the state, which in its turn, within six months, shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken.[80] Upon the end of examination, the Committee shall forward its suggestions and recommendations to both the SP concerned and the petitioner.[81]

In fact, the efficacy of lodging a communication under the OP-CPRD is presumed to be arguable as the CPRD Committee is not a court with judicial powers. Consequently, the views adopted by the Committee are, by no means, legally binding on the SPs since the OP-CPRD provides a quasi-judicial procedure in which the resultant decisions of the CPRD Committee are not legally enforceable such as domestic court judgments, or some other regional judicial mechanisms e.g. the European Court of Human Rights. For instance, the German Constitutional Court- FCC, made it clear that CPRD Committee does not have competence to decide on the extent and

79 Opt-Protocol to the CPRD, Art. 1 (1) that reads: "A SP to the present Protocol recognizes the competence of the Committee on the Rights of DPs ("the Committee") to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction, who claim to be victims of a violation by that SP of the provisions of the Convention.".

80 Opt-Protocol to the CPRD, Art. 3.

81 Opt-Protocol to the CPRD, Art. 5.

the context to which the CPRD should be observed in the light of German Constitution.[82] Regardless of this,[83] it calls upon German courts to consider the CPRD reporting documents, General Comments and jurisprudence on individual complaints.[84] In considering the CPRD in its decisions, the FCC comes, in contrast to the CPRD Committee, to the conclusion that not every forced treatment, not every fixation and not every exclusion from voting rights needs to be prohibited. Thereby it builds its argumentation on the wording of the Convention, and partially also on the case law of the ECHR, whereas according to Felix Welti, in studying the passages of its decisions in isolation, the impression could arise that the FCC assesses German law against the standards of the CPRD.[85]

Furthermore, some scholars point out that the views adopted by the Committee are of general characteristics and do not, in most cases, contain the full evaluation of the relevant legal tools and structure of the given SP, which might result in no further action, as it was with the case of Liliane Gröninger v. Germany[86] and other communications concerning examined SPs.[87]

Thus, the potential positive impact of the individual complaint mechanism under the Optional Protocol to the CPRD might be highly dependent on the traditions, processes and structures of the legal system in question: e.g., readiness of the domestic courts to acknowledge and to be abide by the International Law jurisprudence.

82 FCC (BverfGE), 142, 313 <346 Rn. 90; FCC, Judgment of the second senate of 24 July 2018 – 2 BvR 309/15 `u.a. -, juris, Rn. 91; With regard to international court decisions, See also FCC, 111, 307 317 et seq.; 128, 326 366 et seq., 370; stRspr).

83 For disapproving opinion see Payandeh, 2020: 125–128; Schmalenbach, 2019: 567, 569. For approving opinion see Reiling, 2018: 311–338.

84 FCC (BVerfG), B v 26.7.2016, 1 BvL 8/15, BVerfGE 142, 313 Rn 89, 90; FCC, Judgment of 24 July 2018, 2 BvR 309/15, 2 BvR 502/16, BVerfGE 149, 293 Rn 91; FCC, Judgment of 29 July 2018 29 January 2019, 2 BvC 62/14, BVerfGE 151, 1 Rn 64, 65.

85 Welti, 2021: 30.

86 Tolmein, 2015: 185- 192.

87 See Chapter IV.

3.2 EU Disability Framework

The European Union legal framework shapes the legal and political processes of the member states within the scope of its exclusive,[88] shared[89] and supporting[90] competences. Therefore, in laying down an evaluative framework for the national and subnational disability laws of the selected cases, it is important to consider the disability law and policy under the EU primary and secondary legislation, its responsibilities under and competencies concerning the CPRD in the following subsections.

3.2.1 EU Primary Law

The development of the European disability law and policy started with the soft law measures and programmes focused, mainly, on the vocational training and employment[91] with the 1999 adaption of the Treaty of Amsterdam. The EU[92] has been equipped with a responsibility and explicit right to address discrimination, including on the ground of disability, in accordance with the EU Primary Law, namely the Art. 19 of the Treaty on the Functioning of the European Union- TFEU[93] in all policy fields falling under its competencies. The Treaty of Amsterdam, in addition, provided for a statement envisaging that the Commission, in its harmonization measures stipulated by the Art. 114 TFEU[94] concerning health, safety, environmental protection and consumer protection, takes as a base a high level of protection, which was meant to foster the use of internal market legislation to protect and promote the rights of DPs.[95] This, eventually, opened the door to adaption of a number of key secondary legislative instruments, the start of which marked the Directive 2000/78/EC of 27 November 2000 on the

88 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2016] OJ C202/1 (TFEU), Art, 3.
89 TFEU, Art. 4.
90 TFEU, Art. 6.
91 Council Recommendation (EEC) 86/379 on the employment of disabled people in the Community (1986) OJ L225/43. See also Waddington, 2007; O'Mahony/Quinlivan, 2020.
92 At the time of adoption EC.
93 Ex Art. 13 of the Treaty on the European Community-EC.
94 Ex Art. 95 EC.
95 See for example Broderick/Ferri, 2019, chapter 10.

establishment of a general framework for equal treatment in employment and occupation (Directive 2000/78/EC).[96]

At the same time, the EU drafted the Charter of Fundamental Rights (hereinafter referred as The Charter), which was proclamated on 7 December 2000. At that time, however, it did not have binding force, as a result, it has been reproclamated on 12 December 2007.[97] This was an important step taken by the EU towards insuring human and fundamental rights at the EU level, since the objective of The Charter is to set out all the civil, political, economic and social rights to which European citizens and residents are entitled, and The Charter forms an integral part of the Treaty of Lisbon. Thus, making The Charter's provisions binding on all EU institutions and member states except the UK and Poland in their implementation of EU law with the entry into force of the Treaty of Lisbon on 1 December 2009. However, for the correct impact assessment on the laws and policies of the member states, it should be noted that (A) The Charter does, by no means, extend the field of application of Union Law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.[98] (B) The Charter contains not only rights, but also principles. The difference between the two is that 'rights' constitute subjective rights, which may be directly invoked as such by the individuals in courts, whereas "principles" define an objective to be taken into account by the EU legislature and invoked upon their incorporation into the EU Member States' legislations.

While some member states argued that listing "principles" alongside real subjective "rights" would mislead individuals into believing that "principles" gave them true "rights", it is made clear that examples of social rights are e.g., the right to engage in work (Art. 15 Charter), the right to protection in the event of unjustified dismissal (Art. 30 Charter), the right to fair and just working conditions (Art. 31 Charter), and the right of access to placement services (Art. 29 Charter).

The examples of principles, on the other hand, are e.g., the access to social security and social assistance (Art. 34 Charter), enjoyment of health care (Art. 35 Charter), DPs integration in the life of the community (Art. 26 Charter), access to services of general economic interest (Art. 36 Charter).

96 For more see the Sub-sec. on EU secondary legislation.

97 Council of the European Union (2007). Charter of Fundamental Rights of the European Union, OJ C303, 14.12.2007.

98 See the Charter, Art. 51 (2).

In addition, Art. 21 para. 1 of The Charter states that any discrimination based on any ground, including disability shall be prohibited.[99] The scope of this article is broad,[100] it spans from accessibility and employment to the enjoyment of the rights stipulated by The Charter. However, the provision in Art. 21 para. 1 does not create any power to enact antidiscrimination laws in these areas of Member State or private action. In contrast, it only applies to discriminations by the EU institutions and bodies, when exercising powers conferred under the Treaties, and it applies to Member States only insofar as they act within the framework of Union Law.[101] A clear example of this is the EU failure to adopt the Equal Treatment Directive proposed by the Commission in 2008 up to now—a Directive, which would obligate the Member States to prohibit discrimination in areas of EU competence beyond employment and occupation.[102]

Thus, the primary function of the Charter was to increase the visibility of disability rights within the EU legal framework,[103] whereas in the background it played a key role in building a bridge between EU legislation and the Council of Europe's two principal instruments – the European Social Charter (ESC) and European Convention on Human Rights (ECHR). The utmost importance of the latter lays not only in its landmark[104] decisions concerning the rights of DPs and their reflection in the European disability-related jurisprudence, but also in its direct accessibility for the citizens of its SPs. The ECHR will become even more important for the EU and its member states if the resumed negotiation on the EU's accession to the European Convention on Human Rights is successful, as accession will help to ensure that the EU is subjected to the same international oversight on human rights as its 27 member states, meaning that citizens will be

99 the Charter, Art. 21 (1): "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

100 See, Coleman v Attridge Law, Case C 303/06, CJEU 2008; Kaltoft, v Kommunernes Landsforening, Case C-354/13, CJEU 2014.

101 OJ C 303/17 – 14.12.2007.

102 Lawson, 2017: 61–76.

103 Ferri, 2021.

104 Grigoryan, 2017; Lewis, 2018; Köppen, 2019; Welti, 2021. For the list of selected disability-related ECTHR Case-law see also the Factsheet – DPs and the ECHR (May 2022) at: https://www.echr.coe.int/Documents/FS_Disabled_eng.pdf (Last accessed on 01.07.2022).

able to challenge the EU's actions before the European Court of Human Rights,[105] which is more of an exception than norm in the case of CJEU.

3.2.2 EU Secondary Law

In addition to disability-related measures envisaged by the EU Primary Law, the EU shapes the disability law and policy of the member states through enacting secondary legislation, which falls into four categories:

Regulations: regulations adopted by the EU are binding legislative acts which must be applied in their entirety across the EU Member States (e.g., Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway, and Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport);

Directives: Directives set out aims to be achieved and impose a requirement on member states to transpose it into national law for implementing those aims. The most important EU Directive is the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which prohibits discrimination inter alia on the basis of disability in the field of employment and vocational training. This Directive characterizes the principle of equal treatment as meaning that there should be neither direct, indirect discrimination, nor discrimination by association.[106] Moreover, the Art. 5 of the same Directive require that 'reasonable accommodation' be provided to guarantee compliance with the principle of equal treatment with regard to DPs. Thus, employers and providers of vocational training have to take appropriate measures, where needed in a given case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.[107] This burden is not considered as disproportionate when it is sufficiently remedied by existing measures under the disability law of the

105 For more see the Joint statement on behalf of the Council of Europe and the European Commission of 29 September 2020: https://www.coe.int/en/web/portal/-/the-eu-s-accession-to-the-european-convention-on-human-rights (Last accessed on 17.07.2022).

106 Case C-303/06 Coleman, judgment of 17 July 2008, where the Court of Justice ruled that Directive 2000/78/EC protected a mother of a disabled child from harassment and discrimination in employment, when the problems were due to the fact that the mother needed extra time off to take care of her child.

107 See, The Case C-312/11 Commission v. Italy, judgment of 4 July 2013.

member state involved. It addresses both public and private bodies with respect to conditions for access to employment, vocational guidance and training, employment and working conditions. Later, most specifically after the ratification of the CPRD by the EU and adoption of the European Disability Strategy[108] (EDS), the EU adopted two new directives specifically addressing DPs: the first was the

2016 Web Accessibility Directive[109] and the second, the 2019 European Accessibility Act,[110] which covers accessibility only for limited products and services,[111] and thus lags far behind;[112]

Decisions: decisions have a direct application and are binding on member states to which they concern e.g., companies or individuals;

Recommendations and opinions: recommendations and opinions are not binding and serve as a tool for the EU institutions to suggest a line of action and to make non-binding statements without imposing legal obligations on those to whom it is addressed.

3.2.3 European Disability Strategies

Complementary to the EU primary and secondary legal instruments, the EU adopted the European Disability Strategy 2010–2020 (EDS)[113] prior to the CPRD ratification to set out its disability-related policy priorities and its implementation steps at both the EU and member states levels for the next 10 years. It aimed at empowering DPs in a way that they can enjoy their full rights, and benefit fully from participating in society and in the European

108 For more see below.

109 Directive (EU) 2016/2102 of the European Parliament and of the Council on the accessibility of the websites and mobile applications of public sector bodies (2016) OJ L327/1.

110 Directive (EU) 2019/882 on the accessibility requirements for products and services (2019) OJ L151/70.

111 Areas such as health services, education, transport, housing and household appliances are not covered by the directive.

112 Ferri, 2021; European Disability Forum, 2019, analysis of the European Accessibility Act. Retrieved from: https://www.edf-feph.org/publications/european-accessibility-act/ (Last accessed on 17.07.2022).

113 European Commission, 'European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe' COM (2010) 636 final. Retrieved from: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM%3A2010%3A0636%3AFIN%3Aen%3APDF (last accessed on 01.07.2022); See also Hosking, 2013; For the progress evaluation see Anglmayer, 2017.

economy. To achieve its objective, the EDS underlined eight priority fields of action: e.g., accessibility, participation, equality, social protection and health.[114]

While the priority field "accessibility" of the EDS was instrumental for adopting directives 2016/2102 and 2019/882/EU, its achievements in all other priority fields were quite modest as it becomes evident from the Commission's 2017 progress report on the EDS.[115]

In March 2021, the European Commission adopted the second strategy for the Rights of DPs 2021 – 2030.[116] It includes action fields similar to the first strategy e.g., accessibility and equal participation in the democratic processes, justice, education, and all health services.

The second EU Disability Strategy, thus, builds on the first Disability Strategy. However, it sets new impulses and therefore it is expected that it will initiate more significant steps towards the comprehensive implementation of the CPRD in the EU.[117]

3.2.4 The CPRD Conclusion by the EU

The CPRD is the first of all UN human rights instruments that has provided for accession by the 'regional integration organizations' in addition to nation states.[118] This unprecedented provision allowed the EU to conclude the CPRD in its capacity as a regional integration organization.[119] Thereby, it declared the extent of its competence with respect to CPRD.[120] The areas in which the EU claims competence, were elaborated in the EU's

114 For the detailed analysis of the European disability Strategy 2010–2020 see Lawson, 2017, 61–76.

115 Commission Staff Working Document – Progress Report on the implementation of the European Disability Strategy (2010 -2020) SWD (2017) 29 final. Last accessed on June 30 2022 at: https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=2725.

116 The Strategy might be found at:☹https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8376&furtherPubs=yes (Last accessed on 17.07.2022).

117 Ferri, 2020.

118 CPRD, Art. 44.

119 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 DPs [2010] OJ L23/35.

120 Annex II to Council Decision 2010/48/EC of 26 November 2009: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1401271474087&uri=CELEX:32010D0048 (Last accessed on 01.07.2022.

initial implementation report to the CPRD Committee in 2014, according to which the substantive rights of the Convention, where the EU predominantly shares competence with the member states includes combatting discrimination on the ground of disability and the co-ordination of employment and social policies, education, and the collection of European statistics.[121]

In fact, the majority of the international agreements, which the EU concludes, including the Convention, constitute the inclusion of concurrent jurisdictions of both the member states and the EU. Such mixed agreements entail a shared contractual relationship between an international organization and its members and one or more third countries and/or international organizations. Most notably, these kinds of agreements are only applied by the EU and its member states.[122] To this end, the member states are free to act collectively, individually or jointly with the community to fulfil the obligations under an international agreement in cases when the EU does not have exclusive competence to legislate and adopt binding acts.[123] Furthermore, it is important to mention that in accordance with the Art. 2, para 5 of the TFEU, legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to certain areas shall not entail harmonization of member states' laws or regulations.

The CPRD has been binding on the institutions and the 28[124] member states of the Union upon entering into force in January 2011.[125] Moreover, it has been integrated into EU legal framework, and, in hierarchical terms, placed below the Treaties but above secondary EU law.[126] Nevertheless, the

121 Report on the implementation of the UN Convention on the Rights of DPs (CPRD) by the European Union, 2014 (CRPD/C/EU/1), 182.

122 Waddington, 2009: 111–139.

123 CJEU Case, C-316/91: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991CJ0316 (Last accessed on 01.07.2022).

124 In 2020 the EU member states are 27 as the United Kingdom left the European Union on 31 January 2020.

125 The EU's institutions are the European Parliament (EP), the European Council, the Council of the EU (Council), the Commission, the Court of Justice of the European Union (CJEU), the European Central Bank and the Court of Auditors.
TFEU, Art. 216 (2): "agreements concluded by the Union are binding upon the institutions of the Union and on its Member States ".

126 CJEU, Joined cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11), EU:C:2013:222, para. 32.

CPRD, despite its higher status over the EU secondary legal instruments, cannot lead to annulment of an EU secondary legal instrument in case of its inconsistency with the CPRD provisions.[127] The CJEU also underlined that the applicability of EU Secondary Law in relation to international instruments can be considered only in case the international provision is directly enforceable.[128] In order to establish whether the international legal instruments have direct applicability, the CJEU assesses if it can be directly enforceable in the domestic legal system of its SPs.[129] Alternatively, the CJEU proves if the provisions of the international instrument in question are based on an "unconditional and sufficiently precise" obligations, meaning that their legal and administrative enforcement should not be subject to the adoption of additional transformation measures.[130]

It should be noted as well that prior to the above-mentioned decisions, the CJEU ruled that where international agreements are concluded by the EU they are binding on its institutions, and accordingly they prevail over acts of the EU[131]. Therefore, The CPRD is recognized to form the integral part of the EU legal order.[132] Furthermore, it stated that in view of the fact that the provisions stipulated by the Employment Equality Directive have close reference to matters falling under the CPRD objectives, it should be interpreted in accordance with the Convention.[133]

Thus, after the CPRD ratification by the EU, the CJEU in defining the concept of disability, cautiously moved to a social model of disability[134] by stating that it should be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective

127 Waddington, 2018: 131–152.

128 E.g. CJEU, Joined Cases C-120/06 P and C-121/06 P, Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and others v. Council of the European Union and Commission of the European Communities EU:C:2008:476, para. 108.

129 Ibid.

130 See CJEU Case, C-363/12, Z. v. A Government Department and The Board of management of a community school EU:C:2014:159, para 90; Case C-356/12 Wolfgang Glatzel v Freistaat Bayern EU:C:2014:350, para 69.

131 CJEU, Cases 335/11 and 337/11, HK Danmark, acting on behalf of Jette Ring v. Dansk almennyqttigt Boligselskab DAB and HK Danmark, acting on behalf ofLone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation, judgment of the Court of 11 April 2013 (Grand Chamber), para. 28.

132 Ibid., Para 30.

133 Ibid., Para 32.

134 Betsh, 2013.

participation of the person concerned in professional life on an equal basis with other workers.[135] However, it maintained that, the limitation that the illness causes must be of a long or uncertain duration, in order to be considered as a disability.[136] In addition, the CJEU recognizes that the concept of 'disability' cannot be defined by reference to the origin of the disability in question.[137] However, in considering the Daouidi case,[138] it found that for assessing the duration of a limitation, the key measurement factor should be if it is factual in nature and if it, in practice, entails a medical diagnosis.[139] To this end, Waddington and Broderick assume that by necessitating that an individual experience a limitation related to their impairment, the Court "seems to exclude from the definition of disability individuals who are disabled by socially-created barriers, such as false assumptions and prejudices about an individual's ability, and possibly even barriers in the physical environment."[140]

In view of accommodation measures, the CJEU noted that reasonable accommodation should be understood as referring to the eradication of the various barriers that hinder the full and effective participation of DPs in professional life on an equal basis with other workers.[141] Therefore, a reduction in working hours could be viewed as an accommodation measure in a case in which reduced working hours make it possible for the worker to stay in employment.[142] The CJEU also holds that in these cases the possibility of providing an assistant should also be considered.[143]

135 CJEU, Cases 335/11 and 337/11, HK Danmark, acting on behalf of Jette Ring v. Dansk almennyqttigt Boligselskab DAB and HK Danmark, acting on behalf ofLone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation, judgment of the Court of 11 April 2013 (Grand Chamber). Para. 38; Case C-397/18 DW v Nobel Plastiques Ibérica SA EU:C:2019:703.

136 CJEU Cases 335/11 and 337/11. Para. 39.

137 Ibid. Para. 40.

138 CJEU Case, C395/15 Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal (Daouidi v Bootes Plus SL) EU:C:2016:917. see also Ferri, 2019: 69.

139 CJEU Case, C395/15. Para. 55 et seq.

140 Waddington/Broderick, 2018, 58.

141 CJEU, Cases 335/11 and 337/11, HK Danmark, acting on behalf of Jette Ring v. Dansk almennyqttigt Boligselskab DAB and HK Danmark, acting on behalf ofLone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation, judgment of the Court of 11 April 2013 (Grand Chamber). Para. 54.

142 Ibid. Para. 56.

143 Ibid. Para. 63.

While the EU has ratified the CPRD, it has not, yet, ratified the Optional Protocol to the CPRD, despite the 2008 Commission's call for its ratification.[144] In fact, the proposal to conclude the Optional Protocol has been overwhelmingly approved by the European Parliament[145] in the following year. Moreover, The EU Member States and the Commission have been called to report every three years to the Council and to Parliament on the status of implementation of the Optional Protocol in accordance with their respective fields of competence.[146] However, it did not yet come to the EU's accession due to absence of unanimity in the Council.[147] As a result, the door to complaint mechanism provided by the CPRD Committee remains firmly closed for alleged EU non-compliance victims, which was criticised by the CPRD Committee and has been called upon ratification of the Optional Protocol to the Convention by the European Union.[148]

3.3 CPRD Implementation at the National Level

Upon the ratification, the SPs are obligated under the CPRD to fully and comprehensively implement all the provisions enshrined by the CPRD at all governmental levels.[149] Accordingly, they are responsible for acting consistently with the CPRD and insuring that public authorities and institutions act in conformity with the Convention.[150] Moreover, they are

144 The Proposal has been based on Arts. 13, 26, 47(2), 55, 71(1), 80(2), 89, 93, 95 and 285 in conjunction with the second sentence of the first paragraph of Art. 300(2), and the first subparagraph of Art. 300(3) of the EC: Proposal for a Council Decision concerning the conclusion of the Optional Protocol to the UN Convention on the Rights of DPs. COM (2008) 530–2 (core). 2.9.2008.

145 European Parliament legislative resolution of 24 April 2009 on the proposal for a Council decision concerning the conclusion, by the European Community of the Optional Protocol to the United Nations Convention on the Rights of DPs (T6–0313/2009): http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2009-0313 (Last accessed on 01.07.2022).

146 Ibid.

147 Art. 300 (2): "…The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules and for the agreements referred to in Article 310".

148 CPRD Committee, Concluding observations on the initial report of the European Union (CRPD/C/EU/CO/1), Paras. 6 and 7: ec.europa.eu/social/BlobServlet?docId=14429&langId=en(Last accessed on 01.07.2022).

149 CPRD, Art. 4 (5).

150 CPRD, Art. 4 (1D).

required to take into account the protection and promotion of the human rights of DPs in all policies and programmes.[151] Hereby, CPRD Committee differentiates between direct and indirect policies.[152] Examples of policies directly affecting DPs are social insurance, personal assistance, accessibility requirements and reasonable accommodation. Measures indirectly affecting DPs might include education.[153]

The Convention provides that the SPs adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the CPRD, and to take due care in eliminating all forms of discrimination against DPs.[154]

3.3.1 CPRD Implementation at the Sub-National Level

Under the International Law, the state is one single entity, irrespective of its unitary or federal nature and internal administrative division. Accordingly, only the state as a whole is bound by obligations envisaged by the ratified international treaty. This is stipulated by the Art. 27 of the Vienna Convention on the Law of Treaties, according to which a SP "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[155] More specifically, a state going through CPRD reporting process and/or complaints mechanism cannot defend itself by claiming that the alleged violation was committed by a local authority as in accordance with customary International Law, it is recognized that "the conduct of any State organ shall be considered an act of that State under International Law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a

151 CPRD, Art. 4 (1C).

152 CPRD Committee, General Comment No. 7: Articles 4.3 and 33.3- on the participation of DPs, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, (CRPD/C/GC/7), Para. 18.

153 Ibid., Para. 20.

154 CPRD, Art. 4 (1A and B).

155 United Nations, Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Art. 29; CPRD, Art. 4 (5); See also CPRD Committee, Concluding Observations on Austria (CRPD/C/AUT/CO/1), Para. 10.

territorial unit of the State".[156] For instance, in its General Comment No. 16, the Committee on Economic, Social and Cultural Rights underlined that "Violations of the rights contained in the Covenant can occur through the direct action of, failure to act or omission by States parties, or through their institutions or agencies at the national and local levels".[157] It should be mentioned that the actions of certain institutions exercising public powers is attributed to the state even if those institutions are regarded in internal law as autonomous and independent of the executive government.[158]

Thus, SPs to the CPRD, should assume obligation to bind the regional and Länder-level governments[159] to promote, protect and implement the human rights of DPs, as they are actually those who are to translate national human rights strategies and policies into practical application.

Little has been done to study the role of sub-national governments in implementing the Convention despite their decisive role. Perhaps this is the cause of presumption that human rights protection in general are to be a matter of uniformity across the SP or a matter of constitutional structure of a given state that can only be addressed internally. However, most probably this is the result of underestimation of the role and capacity of sub-national governments with regard to implementation of International Law.

In fact, the need for involving regional, state and municipal governments in the process of negotiation of international obligations has long been recognised to have high significance. Particularly, the Art. 4 para. 6 of the Council of Europe's 1997 Charter of Regional Self-government states that: "Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly". However, there were no significant efforts to study the result and effect of such consultations, in particular for assessing to what extent the perspective of regional governments has been taken into account upon the ratification of international conventions. In

156 UN General Assembly (1966). International Covenant on Civil and Political Rights (ICCPR). United Nations, Treaty Series. (vol. 999). 171, Art, 50- sect. IV.E.1.

157 CESCRCommittee, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant) (E/C.12/2005/4), 11 August 2005, para. 42.

158 International Law Commission, Commentaries to the draft articles on Responsibility of States for internationally wrongful acts (sect. IV.E.2); 82. Retrieved from: http://www.eydner.org/dokumente/darsiwa_comm_e.pdf (Last accessed 01.07.2022).

159 CPRD, Art. 4 (5): "the provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions".

addition, there have been no further efforts to acknowledge the role of the sub-national governments in implementation of international obligations after they have been assumed by the SPs.
Given the significant share of implementation of the sub-national governments, this way of addressing the effective implementation of international conventions might not be the optimal approach for the equitable application of international obligations across the state. Therefore, on the one hand, it might be presumed that exact implementation guidelines at the national level are one of the fundamental elements for the successful implementation of an international convention. On the other hand, however, flexibility in implementation might prove to be much more effective with regard to regional structures and traditions.

In addition, the involvement of sub-national governments in post-ratification processes is considered to be key to successful implementation, for instance, the Human Rights Council Advisory Committee underlines that representatives of local authorities should be involved in the drafting of human rights policies.[160] The CPRD Committee also expressed concern that subnational governments did not participate in the development of national action plans,[161] which would be ensured through institutionalized cooperation on human rights between the national/federal and local governments. For example, in its General Comment No. 4 (the right to adequate housing), the Committee on Economic, Social and Cultural Rights underlined that SPs should take steps "to ensure coordination between ministries and regional and local authorities in order to reconcile related policies".[162] Nevertheless, according to the final report of the Human Rights Council Advisory Committee on the role of local government in the promotion and protection of human rights, the implementation of human rights often fails due to the lack of adequate coordination between central and local govern-

160 Human Rights Council, Final report of the Human Rights Council Advisory Committee on the Role of local government in the promotion and protection of human rights, thirtieth session, Point 21. Retrieved from: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_49_ENG.docx (Last accessed on 01.07.2022).

161 CPRD Committee, concluding Observations on the Initial Report of Austria (CRPD/C/AUT/CO/1), Para. 10.

162 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, para. 12. Retrieved from http://www.refworld.org/docid/47a7079a1.html (Last accessed on 01.07.2022).

ments. Furthermore, the implementation might fail also in SPs, where laws regarding the competence sharing between central government and local government are not simple, accessible and clear: "a clear-cut division of powers between the different tiers of government is the precondition for the establishment of accountability, and hence the precondition for the implementation of human rights".[163]

3.3.2 Focal Points

While human rights Treaties, such as ICCPR and the ICESCR do not, traditionally, provide for exact structural measures within the SPs, the CPRD requires for particular structural changes. Specifically, under the Art. 33 it provides that the SPs shall establish or designate national structures for the implementation and monitoring of the Convention. Specifically, it obligates the SPs to establish or designate within their governments one, or in case of decentralized systems of governance, more FPs[164], which according to the Handbook for Parliamentarians on the CPRD should be established or designated through legislative, administrative or other legal measures and be permanently appointed.[165]

Art. 33. Para. 1 does not, in fact, specify the location of the FP. However, the national level FP, as the key supervisor and the promoter of the human rights, in consideration of the fact that the Convention endorses and represents a paradigm shift in the understanding of disability, from approaches that have a medical and charity-based focus to approaches that are based on human rights and have a social dimension, should preferably be established with ministries responsible for human rights and justice.[166] Furthermore, the OHCHR Thematic Study states that it would be preferable not to locate the FP in the ministries of health or welfare and labour affairs.[167]

163 Human Rights Council, Final report of the Human Rights Council Advisory Committee on the Role of local government in the promotion and protection of human rights, thirtieth session, Point 33. Retrieved from: https://www.refworld.org/docid/47a7079a1.html (Last accessed on 01.07.2022).

164 CPRD, Art. 4 (5).

165 OHCHR et al., 2007: 94.

166 As an example for the FP designated with the ministry of justice see the case of Australia at: https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/government-international/international-participation-in-disability-issues (Last accessed on 01.07.2022).

167 Human Rights Council, 2009, 7.

Nevertheless, tasking the traditionally involved ministry, such as the ministries of social affairs with the CPRD implementation and at the same time working on the change of its governing approach could instead be much more beneficial for the effective implementation of the Convention.[168] To ensure effective shift from medical model to human-rights-based governing approach, the SPs are required to provide trainings about the human rights of DPs for the appropriate civil servants.[169]

In addition, the CPRD Committee underlines that the FP should "be of a sufficiently high institutional rank to effectively carry out its duties as a mechanism for facilitating and coordinating matters relating to the implementation of the Convention at all levels and in all sectors of government".[170]

The designated FPs should, in addition, be equipped with adequate financial and human resources as it is suggested by the Handbook for Parliamentarians on the CPRD and confirmed by the CPRD Committee.[171] The purpose of adequate resources is twofold: on the one hand, it should help in discharging the duties of the FPs under the CPRD, especially in organizing the vertical and horizontal mainstreaming and coordination of the CPRD. On the other hand, it should ensure close, effective and institutionalised consultancy and inclusion of DPOs in the work of the FPs.

The FPs are mandated to ensure multi-sectoral and multi-level implementation and monitoring of the CPRD, promote awareness of the Convention across the SP, prepare state reports in collaboration with all relevant actors, as well as cooperatively develop action plans on the Convention, which would reflect all governmental levels and elaborate on the prioritised political action field and policy initiatives for the given period of time.[172]

168 OHCHR et al., 2007, 94.
169 CPRD, Art. 4 (1I), and Art. 13 (2).
170 CPRD Committee, Concluding observations on the initial report of Argentina (CRPD/C/ARG/CO/1), Para. 51; OHCHR et al., 2007: 94.
171 OHCHR et al., 2007: 94; CPRD Committee, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland (CRPD/C/GBR/CO/1), Para. 68.
172 OHCHR et al., 2007: 94 – 95.

3.3.3 Coordination Mechanisms

Under Art. 33 para. 1 CPRD, the SPs have to provide for coordinating bodies that would insure the compliance with the rights stipulated by the CPRD and facilitate related action in different sectors and at different levels of government.[173] It should consist of a permanent structure with appropriate institutional arrangements to allow coordination among intragovernmental actors.[174] In most cases these CMs maintain staffed secretariat and are placed within the ministries of social affairs. However, DPOs argue that the efficacy of these mechanisms are questionable since they do not have a clear legal mandate, are allocated no or very limited resources for their functioning, and often involve very few DPs or exclude persons with certain types of disabilities.[175]

According to Gauthier de Beco, the designation of a CM helps policymakers in regarding DPs as right-holders and not as people in need of assistance.[176] Nevertheless, the structure and functions of a CM intersect with that of the FPs- they are often mandated with the promotion of dialogue in the disability field and awareness-raising. Accordingly, the SPs might find it difficult to decide on its structural and functional implementation and end up choosing two-in-one option.

3.3.4 National Human Rights Institutions

The idea of establishing national institutions for promoting, protecting and monitoring the human rights (hereinafter referred as NHRI or MF)[177] was in discussion in the aftermath of the World War II, when the United Nations (UN) has been created to "maintain international peace and security (…) to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental

173 CPRD, Art. 33 (1): States Parties, in accordance with their system of organization, shall give due consideration to the establishment or designation of a CM within government to facilitate related action in different sectors and at different levels.
174 Ibid.
175 For more see Human Rights Council, 2009: http://www2.ohchr.org/english/issues/disability/docs/A.HRC.13.29_en.doc(Last accessed on 01.07.2022).
176 Beco/Hoefmans, 2013.
177 The term "Independent Monitoring Framework (MF)" is used by the CPRD.

freedoms for all without distinction(...)".[178] Nevertheless, it took over three decades till the concept of NHRIs became known and accepted by UN Member States.[179]

In 1991, when the UN had already achieved the adoption of a number of conventions and realised the difficulties connected with their implementation at the domestic level, the establishment of NHRIs seemed the best possible solution for the problem of state non-compliance.[180] Consequently, the UN initiated the development and adoption of the Principles relating to the Status of NHRIs (hereinafter referred as Paris Principles) in 1991,[181] which should, theoretically, ensure the independence of NHRIs.[182] Nevertheless, in contrast to states' relative willingness to ratify human rights Treaties, some SPs operate NHRIs that are not fully compliant even with the Paris Principles (B level) or (C level).[183] The states that have (A level) are considered to be fully compliant with the normative framework for the status, mandate, composition and operational methods of the national institutions.[184]

The Vienna Declaration and Programme of Action adopted at the Vienna World Conference in 1993[185] has also reaffirmed the important and

178 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 1.

179 For the history of proposals for national bodies, see: Pohjolainen, 2006: 30–71.

180 For more see, Pohjolainen, 2006; Cardenas, 2014.

181 See the report of the 1991 workshop: UN Doc. E/CN.4/1992/43 of 16 December 1991; later reproduced in the appendix of GA Res. 48/134 of 20 December 1993.

182 United Nations Human Rights Council (OHCHR) (1991). Report of the International Workshop on National Institutions for the Promotion and Protection of Human Rights (E/CN.4/1992/43), 16 December 1991, Paras. 26 – 110; see also, UNICEF, 2012; Brodie, 2015; Meuwissen, 2015; Beco/Murray, 2014.

183 Austria maintains an Austrian Ombudsman Board, which has a B level accreditation status since 2011. The designated MCs under the CPRD, instead, do not even have a C level status. For more see, Schulze, 2013; The accreditation status of National Institutions as of May 18, 2022 can be found at: https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/StatusAccreditationChartNHRIs.pdf (Last accessed on 01.07.2022).

184 The accreditation of NHRIs is based on three status-levels; NHRI with A status is fully compliant, with B status is partially compliant, and C status is considered non-compliant with Paris Principles. There are States that did not apply for accreditation. Accreditation of more than one institution is not welcomed. For more on the history, process and the role of accreditation, see, Cardenas, 2014: 33 – 54; Meuwissen, 2015.

185 UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, Para. 34.

constructive role of NHRIs in upholding the rule of law, democracy, and human rights awareness at the domestic level and encouraged the member states to establish and to strengthen the NHRIs.[186]

Following the UN resolution and World Conference Declaration, the Council of Europe adopted a Resolution (97) 11 on the cooperation among NHRIs, member states, and the Council of Europe, and issued a recommendation (97) 14 on the establishment of NHRIs. Nevertheless, the European states were not fast in following the recommendations of the Council of Europe. Moreover, in established democracies, NHRIs were adopted almost entirely in response to international regime pressures, leading to inordinately weak institutions, which according to Sonia Cardenas can be explained by the fact that both consolidated democracies and democratising European states have often adopted a post–human rights ideology: "the notion that human rights are already institutionalised within the state and therefore somehow irrelevant for today's national debates. In other cases, the rejection has been based on the assumption that 'human rights' constitute a more appropriate frame of reference for states in other parts of the world—for them, but not us: to invoke Makau Mutua's imagery, the European view stereotypically equates human rights abuses with savage acts of the other rather than its own barbarities or its mundane degradations and marginalised communities".[187]

The role of national institutions has been further developed by the recent human rights Treaties.[188] Most particularly, the Optional Protocols to the Convention Against Torture (OPCAT)[189] and to the CPRD[190] make it clear that the SPs, in accordance with their legal and administrative systems, are required to maintain, strengthen, designate or establish within the SP, a framework, including one or more independent mechanisms, as appropri-

186 Vienna Declaration and Programme of Action. Para. 36.
187 Cardenas, 2014: 256 – 309; See also, Wouters /Meuwissen, 2013.
188 Carver, 2010; Beco, 2011; Byrnes, 2014: 222–239.
189 UN General Assembly, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), (resolution A/RES/57/199) adopted on 18 December 2002.
190 CPRD, Art. 33 (2); Quinn, 2009b; Gatjens/Fernando, 2011; Stein/Lord, 2010; Manca, 2017.

ate, to promote, protect and 'monitor' the implementation of the provisions enshrined in the CPRD.[191]

In view of this, the compliance of an NHRI/independent MF should not only be evaluated on the bases of the General Observations developed by the GANHRI Sub-Committee on Accreditation (SCA) but also consider recommendations of the CPRD Committee.

3.3.4.1 Independence and Legal Status

The relation between the NHRI and the state and non-state partners with regard to its independence has been the central point of discussion in the negotiation process of the Paris Principles.[192] In rapporteur Mr Dominique Turpin's view: "it could not be taken for granted that the State, and in particular the Executive branch, was predisposed to promote and protect human rights, because the principle of authority, which was an inherent characteristic of the State, tended to restrict the principle of freedom, which was the basis of human rights. Nevertheless, fears could be allayed somewhat by the concept that it was the State which was or should be at the service of the individual and not vice versa".[193] Consequently, he concluded that "the higher the status of the instrument establishing the National Institution in a country's legislative hierarchy, the easier it was for the institution to ensure that its independence was respected". Accordingly, the Paris Principles stipulate that the establishment or designation of a National Institution should be based on a constitutional or legislative text, specifying its composition and its sphere of competence. This makes them less likely to be overturned: e.g., the fact that the Office of Russian ombudsman was stipulated by the constitution, saved it from being dissolved due to its confrontation with the state policy on Chechnya.[194] Nevertheless, the same example shows the weakness of this safeguard as the office of the ombudsman managed to survive but the government removed the ombudsman and installed a government-friendly person as an ombudsman.[195] Similarly,

191 CPRD, Art. 33 (2); See, CPRD Committee, Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of DPs (CRPD/C/1/Rev.1, annex), Para. 2.
192 E/CN.4/1992/43, Para. 26 and 111 -167.
193 Ibid. 27.
194 Cardenas, 2014: 264–266.
195 Ibid.

the lack of immunity safeguards made possible the forced resignation of the first executive director of the German Institute of Human Rights, who, unlike others wanting to focus on human rights abroad, pushed too hard to consider domestic human rights violations e.g., discriminative treatment of noncitizens and the unequal state welfare policy between western and eastern citizens.[196]

Besides, the relations of NHRI with non-state partners must be based on continuing and sustained consultation and the principle of complementarity, with due regard for the specific characteristics of each party.[197] This means that the NHRIs "should not act as a substitute for the non-governmental organizations. The national institutions and the non-governmental organisations must preserve their independence and their cooperation must be a source of mutual synergism…".[198] Thus, the value of a NHRI is that its distance, conversely, enables it to act as a bridge or mediate between government and non-government entities – a partner – trusted yet separate from both.[199] To this end, the NHRI should, in addition to legal status, fulfil the criterion of composition (method of appointment of members and discharge), the scope and duration of mandate and method of operation set force in the Paris Principles to have a status of independent or autonomous institution.[200]

3.3.4.2 Composition

The requirements for Paris Principal compliant composition not only ensures the independence of the NHRIs but also is key to securing the confidence of civil society.[201] Therefore, the SPs should pay attention to these three main points in establishing or designating an NHRI:

196 Mertus, 2009: 121 -123.
197 E/CN.4/1992/43, Paras. 111 – 128; See also, Smith, 2006.
198 Ibid. 127.
199 Beco, 2007; Beco/Murray, 2014.
200 E/CN.4/1992/43, Para. 29; See also the statement of the CPRD Committee, CRPD/C/1/Rev.1, annex. Para. 15.
201 Renshaw, 2012.

A. Pluralist representation

The composition of the National Institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of... representatives of non-governmental organizations responsible for human rights... concerned social and professional organizations, including associations of lawyers... and eminent scientists,... Universities and qualified experts, parliament and government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).[202] There are different ways in which pluralism may be achieved through the composition of the National Institution, for example: (a) members of the governing body represent different segments of society as referred to in the Paris Principles; (b) pluralism through the appointment procedures of the governing body of the National Institution, for example, where diverse societal groups suggest or recommend candidates; (c) pluralism through procedures enabling effective cooperation with diverse societal groups, for example advisory committees, networks, consultations or public forums; or (d) Pluralism through diverse staff representing the different societal groups within the society.[203] Depending on the particular NHRI model, the options "can – and even should, as far as possible – be combined with each other".[204] In any case, according to OHCHR the "diversity should be reflected across all parts of the organization and all levels of seniority".[205] Besides, the NHRI should include other minority group representatives depending on its mandate. Most particularly, the MF under the CPRD, "should ensure the full involvement and participation of DPs and their representative organizations in all areas of its work".[206] The Involvement and participation of DPOs "should be meaningful and take place at all stages of the monitor-

202 UN General Assembly, Principles relating to the Status of National Institutions (The Paris Principles), (Resolution A/RES/48/134), (Composition).
203 SCA General Observations as adopted on 21.02.2018, 2.1.
204 Beco/Murray, 2014.
205 OHCHR, National Human Rights Institutions, 39.
206 CRPD/C/1/Rev.1, annex, Para. 20.

ing process, and be accessible, respectful of the diversity of persons with disability...".[207]

In addition, the considerable number of European NHRIs often consist of university representatives, who, in some cases, might even be in majority. The tendency might be explained by the fact that European universities have rich human rights research capacity, which is imperative for NHRIs work, or that the NHRI is an institute with a focus on research.[208] The NHRIs also include qualified experts, which might be another way of covering the diversity requirement. However, especially in this category, the NHRI tasked with the CPRD monitoring should ensure the representation of disability rights experts and individuals, who hold UN or supranational posts on human rights thus helping to establish links with human rights Monitoring Mechanisms.[209]

The representatives of parliament are another important group to include in the NHRIs, especially with regard to cooperation and awareness raising. However, this should be balanced against the capacity of the given parliament to exercise independent oversight.[210] There are concerns that parliamentarians might bring their political agenda to the NHRI,[211] leading to a conflict of interests and a perceived lack of independence of the institution. In view of this risk, the SCA provides that "members of parliament, and especially those who are members of the ruling political party or coalition, or representatives of government agencies, should not in general be represented on, nor should they participate in decision making".[212] Besides, the number of secondees should not exceed the 25 percent, they should not be appointed to senior level positions[213] and they should participate in NHRIs structures only in an advisory capacity.[214]

The involvement of government members in the NHRIs proves to be much more problematic: on the one hand, their inclusion might facilitate communication flows between the public administration and the NHRIs as they are seen as both the recipients of recommendations and the providers

207 Ibid.
208 Beco/Murray, 2014.
209 Ibid.
210 Carver, 2000: 14.
211 Murray, 2007.
212 SCA, General Observations 1.9.
213 SCA, General Observations 2.5.
214 SCA, General Observations 1.9.

of information.[215] If the government members are to be included in the structures of the NHRIs, then it should be ensured that they represent diverse ministries and in the case of decentralized political structures, also representatives of Länder /municipalities.

On the other hand, the involvement of governmental representatives in the decision-making processes might impede the independence of the NHRIs "since they hold positions that may at times conflict with an independent NHRI".[216] Therefore, the government representatives, "whose roles and functions are of direct relevance to the mandate and functions" of the NHRI and "whose advice and cooperation may assist the NHRI in fulfilling its mandate" should be allowed to participate, but their number cannot exceed the other members represented in the decision-making body[217] or they should, preferably, be placed in advisory committees.[218] In any case, they should not have voting rights.[219] However, the CPRD Committee is more restrictive in this respect as it states that "article 33 requires States parties to ensure that the MFs are independent from the FPs appointed under article 33 (1) of the Convention".[220] Besides, "the Advisory bodies such as disability councils or committees comprising representatives of departments and units involved in the implementation of the Convention should not be involved or in any manner take part in the activities of the MF".[221] Nevertheless, SPs, in practice, disregard these requirements, especially by establishing or designating Monitoring Bodies under the CPRD, where the government members are represented in equal footing with civil society.[222]

B. Adequate infrastructure

The NHRIs shall have "an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of

215 Beco/Murray, 2014.
216 SCA, General Observations 1.9; See also SCA, General Observations 2.3 that states: "government members should not have decision-making or voting capacity".
217 SCA, General Observation 1.9.
218 SCA, General Observations 1.9.
219 Principles relating to the Status of National Institutions. Composition 1E; See also SCA, General Observations 2.3.
220 CRPD/C/1/Rev.1, annex, Para. 9.
221 Ibid. Para. 22.
222 As it is shown in the chapter V.

this funding should be to enable it to have its own staff and premises, in order to be independent of the government and not be subject to financial control which might affect its independence".[223] Accordingly, NHRI should have complete financial autonomy as a guarantee of its overall freedom to determine its priorities and activities.[224] The funding should be stipulated by a national law and include, at a minimum, the following:

- The allocation of funds for premises which are accessible to the wider community, e.g., DPs also by ensuring as wide a geographical reach as possible;
- Salaries and benefits awarded to its staff comparable to those of civil servants performing similar tasks in other independent institutions of the state;
- Remuneration of members of its decision-making body (where appropriate);
- The establishment of well-functioning and accessible communication systems including telephone and internet;
- The allocation of a sufficient amount of resources for performing the mandated activities and ensuring their accessibility to DPs. If the NHRIs are given additional responsibilities e.g., CPRD monitoring, additional financial resources should be allocated to discharge these functions[225] at all governmental levels.[226]
- The funding, which might be provided by the executive and, ideally, approved by the legislature,[227] should be separate budget line over which the NHRI has absolute management and control.[228] However, according to the FRA 2010 report, NHRIs with mainly an advisory role often do not have a separate budget at all.[229] In any case, the NHRIs and their respective members and staff should not face any form of reprisal or intimidation, such as "... unjustifiable budgetary limitations, as a result of activities undertaken in accordance with their respective mandates,

223 Principles relating to the Status of National Institutions (Composition).
224 SCA, General Observations 1.10; See also, CRPD/C/1/Rev.1, annex. Para. 15 B – E.
225 SCA General Observations 1.10; See also CRPD/C/1/Rev.1, annex. Para. 11.
226 CRPD/C/1/Rev.1, annex, Paras, 18 and 19.
227 OHCHR, National Human Rights Institutions, 41.
228 SCA, General Observations 1.10; See also CRPD/C/1/Rev.1, annex. Para. 17.
229 European Union Agency for Fundamental Rights, 2010, Para. 4.3.3.

including when taking up individual cases or when reporting on serious or systematic violations in their countries".[230]

C. Method of appointment/dismissal

"In order to ensure a stable mandate for the members of the National Institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate".[231] Accordingly, the CPRD Committee underlines that the members of the MFs should be appointed in a public, democratic, transparent and participatory manner,[232] this should, preferably, be carried out by the Parliament upon the nomination of the civil society.[233] Appointments by the government are regarded as political bias and thus have to be avoided.[234] In any case, elected/appointed members should "serve in their own individual capacity rather than on behalf of the organization they represent".[235] Besides, the members of the NHRIs should include full-time remunerated members to assist in guaranteeing: (a) the independence of the NHRI free from actual or perceived conflict of interests; (b) a stable mandate for the members; (c) regular and appropriate direction for staff; and (d) the ongoing and effective fulfilment of the NHRI's functions.[236]

To ensure the independence of the appointees and thus to raise its public legitimacy,[237] the legislation establishing the NHRIs should also provide

230 CRPD/C/1/Rev.1, annex. Para. 31.
231 Principles relating to the Status of National Institutions (Composition).
232 CRPD/C/1/Rev.1, annex. Para 15a; According to SCA General Observations 1.8, these requirements can be achieved by:
a) Publicizing vacancies broadly;
b) Maximizing the number of potential candidates from a wide range of societal groups;
c) Promoting broad consultation and/or participation in the application, screening, selection and appointment process;
d) Assess applicants on the basis of pre-determined, objective and publicly available criteria….
233 Carver, 2000: 14.
234 Ibid.
235 SCA, General Observations 1.8.
236 SCA, General Observations 2.7 – 2.9.
237 Carver, 2004.

members with immunity from legal action with regard to their activities[238] and "contain an independent and objective dismissal process", with reasons "clearly defined", and not left to the discretion of those appointing the members.[239] To this end, the dismissal should be based only on "serious grounds of misconduct or incompetence" and enacted with "fair procedures".[240] Besides, it is explicitly stated that: "dismissal of members by the Executive ... is incompatible with the independence of the National Institution".[241]

3.3.4.3 Mandate, Competence and Responsibilities

The Paris Principles state that the NHRIs "shall be given as broad a mandate as possible, which shall be set forth in a constitutional or legislative text, specifying… its sphere of competence".[242] According to the CPRD Committee, these should "encompass the promotion, protection and monitoring of all rights enshrined in the Convention".[243]

A. Promotion Competence

The responsibilities falling under this competence shall include raising awareness, building capacity and training; regularly scrutinizing existing national legislation, regulations and practices, as well as draft bills and other proposals, to ensure that they are consistent with Convention requirements; carrying out or facilitating research on the impact of the Convention on national legislation; providing technical advice to public authorities and other entities on the implementation of the Convention; issuing reports at the initiative of the MFs themselves, when requested by a third party or a public authority; encouraging the ratification of international human rights instruments; contributing to the reports that

238 Carver, 2000: 12; OHCHR, National Human Rights Institutions, 42; See also, SCA, General Observations 2.5.
239 SCA, General Observations 2.1.
240 Ibid.
241 SCA, General Observations 2.1.
242 Principles relating to the Status of National Institutions. Competence and Responsibilities 2.
243 CRPD/C/1/Rev.1, annex. Para. 15; The SCA General Observations 1.2 provide for only promotion and protection Competencies, although it enlists 'monitoring' under the protection competence.

states are required to submit to United Nations bodies and committees; and cooperating with international, regional and other NHRIs.[244] While the majority of enlisted responsibilities are clear, three of them require further elaboration:

I. **Human rights training/capacity-building**: The importance of human rights education in proper implementation of conventions has been recognized by a number of international instruments.[245] The CPRD, however, went a step further by requiring that SPs should ensure adequate training in the rights recognized in the CPRD of state officials, civil servants, judges, law enforcement officials, professionals and staff in education system, as well as organizations of DPs (DPOs).[246] The important role of NHRIs in providing human rights education and training has been underlined by the Paris Principles,[247] UN Declaration on Human Rights Education and training[248], Vienna Declaration and Programme of Action[249] and by the CPRD Committee. The latter, in particular, stressed the capacity building of DPOs by the MFs in the state reporting procedures.[250] Besides, it made clear

244 CRPD/C/1/Rev.1, annex. Para. 13.

245 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Preamble; World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, A/Conf.157/23, Part I, para. 36; UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Art. 13; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, Art. 10; UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Art. 7; UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, Art. 10; UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Art. 29.

246 CPRD, Art. 4 (1I), Art. 8 (2B and D), Art. 13 (2), Art. 24 (4); CRPD/C/1/Rev.1, annex. Para. 23 E, K, L and N; In 2011, the requirement was also reconfirmed by the UN Declaration on Human Rights Education and Training adopted by the General Assembly on 19 December 2011 (A/RES/66/137).

247 Principles relating to the Status of National Institutions Competence and responsibilities 3 f.

248 UN Human Rights Council, United Nations Declaration on Human Rights Education and Training: resolution, 8 April 2011, A/HRC/RES/16/1, Art. 9.

249 Vienna Declaration and Programme of Action, Para. 36.

250 CRPD/C/1/Rev.1, annex. Para. 23 E, K, L and N.

that the DPOs should be provided capacity-building and training to be able to participate effectively in policy making and monitoring activities at all governmental levels.[251]

II. **Providing technical advice to public authorities and other entities on the implementation of the Convention**: the Provision of advice is one of the most important instruments in NHRIs mandate, which should be possible both at the vertical and horizontal governmental levels. This means that NHRIs should be able to provide advice on any matter concerning the Convention, including civil, political, economic, cultural and social rights at the federal, state, provincial, regional and municipal levels.[252] Advice can be provided in form of opinions, recommendations, proposals and reports in the "creation or amendment of any legislative or administrative provisions, including bills and proposals and any situation of violation of human rights within a State…".[253] The advice by NHRIs might be provided both at the request of the authorities and on their own motion and is not binding on public authorities. However, both the SCA and CPRD Committee require governments to "respond to advice and requests from NHRIs, and to indicate, within a reasonable time, how they have complied with their recommendations".[254]

III. **Contributing to the reports that states are required to submit to United Nations bodies and committees**: SPs that have ratified international human rights Conventions shall submit state reports. In this context, the governments might consult with NHRIs "in the preparation of a state report".[255] However, NHRIs "should neither prepare the country report nor should they report on behalf of the government".[256] The CPRD Committee provides that the contribution of MFs in the process of drafting initial and periodic reports might be done by "disseminating, in a timely manner, information

251 General Comment No. 7. Paras. 60 and 94 j; Actually, the statement of the Committee addresses SPs, but as it was shown and underlined above, the NHRI have an important role to play in this respect, especially in considering its special position.

252 CRPD/C/1/Rev.1, annex. Paras. 15 And 18; Principles relating to the Status of National Institutions Competence and responsibilities 3a; Vienna Declaration and Programme of Action. Para. 36.

253 SCA, General Observations, 1.6.

254 SCA, General Observations, 1.6; CRPD/C/1/Rev.1, annex. Para. 16.

255 SCA, General Observations, 1.4.

256 Ibid.

> in accessible formats among stakeholders at the national level on upcoming reviews by the Committee of States parties' obligations under the Convention; encouraging the departments or units responsible for drafting the reports to ensure participatory and transparent consultation processes; providing written contributions, as appropriate; informing civil society organizations, including organizations of DPs, of the opportunities they have for participating in the official drafting process or of their options for preparing and submitting alternative reports; and supporting civil society organizations and organizations of DPs in drafting those alternative reports".[257]

The MFs under the CPRD might choose to submit parallel or shadow reports to the CPRD Committee independent of the SP and in their own right by providing information related to each of the first 33 articles of the Convention, as well as contribute to the preparation of lists of issues, both for the general and the simplified reporting procedures and answer the list of questions.[258]

B. Protection Competence

The tasks under this competence shall include taking into consideration individual or group complaints alleging breaches of the Convention; conducting inquiries; referring cases to the courts; participating in judicial proceedings; and issuing reports related to complaints received and processed.[259] In fact, these responsibilities might be divided into two categories of actions, proactive and reactive, and require that the MF under the CPRD "must have expeditious and full access to information, databases, records, facilities and premises, both in urban and rural or remote areas; it must have unrestricted access to and interaction with any persons, entities, organizations or governmental bodies with which it requires to be in contact; its requests are addressed properly and in a timely manner by implementing bodies".[260]

257 CRPD/C/1/Rev.1, annex. Para. 23c; See also, Müller/Seidensticker 2007; Kjaerum, 2009a: 17 – 24.
258 CRPD/C/1/Rev.1, annex. Para 23 d, f and g; See also, SCA, General Observations 1.4.
259 CRPD/C/1/Rev.1, annex. Para. 13.
260 CRPD/C/1/Rev.1, annex. Para. 12.

Proactive Action: this type of action concentrates on eliminating problems before they arise thus preventing violation from happening. Here, it might be expected that the MF conducts inquiries and "that all facilities and programmes designed to serve DPs are effectively monitored by 'independent authorities' for preventing the occurrence of all forms of exploitation, violence and abuse". Marianne Schulze argues that the obligation to ensure effective monitoring in this context is not linked to the Independent Mechanism in Art. 33.2 CPRD.[261] However, the requirement of the guidelines cited above in conjunction with the wording ' independent authorities' show that the monitoring function envisaged by the Art. 16.3 CPRD should be carried out by institutions that are designated as MFs under the CPRD.[262] Issuing reports on considered and processed complaints and publishing collected information on violations might be another way of proactive action as it might expose the wrongdoings of the state, which might be costly and political sensitive for them.[263]

Reactive Action: This type of action denotes active steps on already occurred violations. In this case, the MF shall, in the first place, handle individual and group complaints alleging violations of the rights guaranteed under the Convention either by referring the cases to the judiciary, including as part of its ability to follow up on its own recommendations[264] or by acting as a quasi-judicial body. Unlike the CPRD Committee, Paris Principles do not require that an NHRI has the ability to receive complaints or petitions from individuals or groups regarding the alleged violation of their human rights. However, where it is provided with this mandate, it should be provided with a number of functions and powers, including ability to receive complaints against both public and private bodies[265] and to be accessible[266] to all vulnerable groups across the state in order to adequately fulfil this mandate. Some organizations perceive it to be problematic by stating that for "a clear line" between the role of an NHRI and the judiciary,

261 Schulze, 2014: 217 – 218.
262 For more see Danish Parts of chapter V.
263 Kjaerum, 2009b.
264 SCA, General Observations, 1.6.
265 SCA, General Observations, 2.9.
266 Carver, 2000: 83.

the NHRI should not have judicial powers.[267] Scholars, instead, argue that quasi-judicial mandate of an NHRI is key to its public legitimacy.[268]

Reactive action can also include direct and indirect engagement in litigation[269] and submitting third-party interventions before international, supranational or national courts. An NHRI decision to litigate or intervene in a case should be based on the presumption that the case raises an important human rights issue that might not be properly addressed if it does not take action. In case of third-party interventions, however, the NHRI is not a full party to the proceedings and it does not take the side of one party or the other; its role is to point out the human rights dimension of the case. Unlike the litigation, this instrument has been used by the European NHRIs in disability-related cases both at the domestic and supranational courts.[270]

C. Monitoring Competence

The responsibilities assigned to the MFs under this competence includes developing a system to assess the impact of the implementation of legislation and policies; developing indicators and benchmarks; and maintaining databases containing information on practices related to the implementation of the Convention.[271] In fact, the Paris Principles do not explicitly provide NHRIs with a mandate to monitor compliance with human rights Treaties. To this end, the SCA states only that NHRIs might "make recommendations to, and monitor respect for, human rights"[272] within the state and by the public authorities.

The CPRD, however, introduced the 'monitoring' mandate and defined it as an instrument that shall help independent MFs in measuring the impact of mainstream policies and programmes on DPs, as well as the impact of disability-specific policies.[273] To this end, they shall, in cooperation with relevant actors, including DPOs, FPs, and CMs, continuously develop data

267 Amnesty International, para. 4.D.1.
268 Carver, 2000; Pegram, 2011; Linos/Pegram, 2015; For the general discussion on legitimacy see, Goodman/Pegram, 2012.
269 Welch/Haglund, 2017.
270 For more see chapter V.
271 CRPD/C/1/Rev.1, annex. Para. 13.
272 SCA, General Observations 1.6.
273 CRPD/C/1/Rev.1, annex. Para. 39D.

collection systems[274] to facilitate the identification and bridging the gaps that prevent DPs — as rights holders — from fully enjoying their rights, as well as the gaps that infringe on duty bearers to fully discharge their legal obligations to respect, protect and fulfil the rights of DPs.[275]

3.3.4.4 Methods of Operation

The section of the Paris Principles on operational framework of the NHRI addresses a number of functions that have already been elaborated above. Consequently, this subsection focuses on two points that are fundamental to the sustained, effective and legitimate operation of the NHRIs/MFs.

A. System of multi-level NHRIs/MFs

In consideration of particular needs at the national level,[276] the states are encouraged to establish NHRI that shall, within the framework of its operation,"... set up local or regional sections to assist it in discharging its functions".[277] Accordingly, the SPs to the CPRD with federal or decentralized administrations should ensure that the established or designated federal or national MFs "can properly discharge their functions at the federal, state, provincial, regional and local levels".[278] If the SP maintains a multi-level system of MF, then it "shall ensure that the federal or national MF can properly interact and coordinate its activities with the state, provincial, regional, local or municipal MFs",[279] among other things, also by providing the appropriate support.[280] However, Andrew Wolman states that "no single strategy has emerged to address federalism concerns. Some countries have established unitary but deconcentrated NHRIs, while others have multiple sub-national human rights institutions but no internationally recognized NHRI" as it is in Austria. In any case, the established/designated MF might

274 Ibid. Para. 38.
275 Ibid. Para. 39c.
276 Vienna Declaration and Programme of Action. Para. 36.
277 Principles relating to the Status of National Institutions. Methods of operation E.
278 CRPD/C/1/Rev.1, annex. Para. 18.
279 Ibid.
280 CRPD/C/1/Rev.1, annex. Para. 19.

consist of a single independent mechanism: e.g., NHRI or be composed of a number of entities[281] as it is the case with the CPRD MF of Denmark.[282] All mechanisms are required to be independent from the executive branch and at a minimum, one of them should be Paris Principles- compliant.[283] When the MF consists of two or more mechanisms, the appropriate and close cooperation between all the entities that make up the MF should be ensured.[284]

B. Multi-level cooperation with state and non-state bodies

As an integral part of their work, the NHRIs are required to cooperate and interact with all relevant institutions both at the international, supranational and national levels. The independent MFs established or designated under the CPRD should cooperate with the CPRD Committee by participating in the state reporting procedure, contributing to general discussions and General Comments, as well as support in communication and inquiry procedures under the Optional Protocol.[285]

Their collaboration across wider Europe takes place within the framework of European Network of National Human Rights Institutions (EN-NHRI),[286] which is regulated by the Council of Europe resolution (97) 11 on the cooperation among NHRIs, member states, and the Council of Europe.

The cooperation and interaction of the NHRIs with the executive, legislative and judiciary branches shall take place in the framework of their responsibilities discussed above. In addition, the SPs shall ensure that the MFs established/designated under the CPRD can interact, in a regular, meaningful and timely manner, with FPs and Coordinating Mechanisms appointed pursuant to Art. 33.1 CPRD.[287] The formalization of interaction between these bodies whether through legislation, regulations or a duly authorized executive agreement and Directive is highly welcomed.[288] The

281 CRPD/C/1/Rev.1, annex. Para. 14.
282 Ventegodt-Liisberg, 2013.
283 CRPD/C/1/Rev.1, annex. Para. 14.
284 Ibid.
285 CRPD/C/1/Rev.1, annex. Part III.
286 For more See, Beco, 2007, 2008.
287 CRPD/C/1/Rev.1, annex. Para. 21.
288 Ibid.

NHRIs shall also "maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions".[289] This provision is of high importance especially in taking into account that European states often have multiple and even overlapping accountability structures: e.g., Austria, in addition to CPRD MCs, maintains the Austrian Ombudsman Board, whereas Denmark tasked both the parliamentary Ombudsman and the Danish Institute of Human Rights with the disability related issues, and Germany maintains both disability Commissioners and the German Institute for Human Rights. In view of this, Richard Carver argues that generally the model of a single NHRI is likely to lead to greater effectiveness.[290] In taking into account that the considerable amount of the designated independent mechanisms under the CPRD function more as research institutions, meaning that they, unlike the ombudsman/disability commissioners, have tasks to promote but not to protect human rights- except individual complaints or conduct investigations. I argue that a single NHRI cannot be an option unless NHRIs are accorded with the protection mandate and adopted to the political structure of the state.

In view of the fundamental role played by the non-governmental organizations in expanding the work of the NHRIs, Paris Principles require the NHRIs to "develop relations with the non-governmental organizations devoted to promoting and protecting human rights, particularly vulnerable groups (especially children, refugees, physically and mentally DPs…".[291] Besides, it is assumed that the inclusive operation of the NHRIs provides them with legitimacy that might otherwise be seen as a pawn of the state.[292]

Under the CPRD, however, the CSOs and most importantly the organizations of DPs play a central role. In the first place, they have been involved in the drafting of the CPRD, including the negotiations of the Art. 33 CPRD.[293] Second, upon the ratification of the Convention, the SPs are required to "undertake a broad, inclusive consultation process with

289 Principles relating to the Status of National Institutions. Methods of operation F.
290 Carver, 2011.
291 Principles relating to the Status of National Institutions. Methods of operation G.
292 Renshaw, 2012.
293 Trömel, 2009; Woodburn, 2013; Melish, 2014; Schulze, 2014; Raley, 2016.

civil society organizations, in particular with DPs and their representative organizations, in order to designate or establish an independent MF".[294]

And last but not least, the SPs are required to ensure the multi-level and multi-sectional participation of the DPOs not only at all policy-making phases[295] but also ensure their involvement in the MF by making sure that independent MFs allow for, facilitate and ensure the active involvement of organizations of DPs in such frameworks and processes, through formal mechanisms, ensuring that their voices are heard and recognized in its reports and the analysis undertaken.[296] The inclusion of DPOs in the independent MF and the work thereof should be ensured at all working stages and governmental levels and in a manner that is accessible to all groups of DPs,[297] including women, children, migrants and learning/hearing disabled.

3.3.5 Organized Interests

Effective political mobilisation of organized interests constitutes the fundamental element of contemporary politics. Private actors, such as coalitions and clubs as well as associations and social movements acting on behalf of public interest, not only lobby for their interests but have also taken on much bigger roles as experts, administrators and facilitators of public goods and services, as well as private regulators, thus initiating the shift of the debate from 'government' to "governance". Organized interests are therefore located at and have gained access to all levels of governance, spanning from local to international arena.

This, however, has not by any way, diminished the role of the state in governance. In contrary, it is argued that today's world politics is anchored not just in traditional geopolitical concerns but also in a large diversity of economic, social and ecological questions, such as pollution and human rights, which are among an increasing number of transnational policy issues which cut across territorial jurisdictions and existing political

294 CRPD/C/1/Rev.1, annex. Para. 8.
295 CPRD Committee, General Comment No. 7 Part III.
296 CRPD/C/1/Rev.1, annex. Paras. 2, 3, 5, 20, 39E; See also CPRD Committee, General Comment No. 7. Paras. 34 – 39.
297 CRPD/C/1/Rev.1, annex. Para. 20, See also CPRD Committee, General Comment No. 7. Paras. 39 and 94j.

alignments, and which require international cooperation for their effective resolution.[298]

Organised interests are the promoters of versatile societal issues. Their type and form of acting may vary according to their resources, the pursued interests, such as economic or social, and field of acting, such as environmental protection or human rights of DPs. Their main and fundamental objective is to promote specific interests of a particular group by influencing the policy making processes. As such, they, most probably, depending on the institutional structure, that is, the type of governance they interact with, will act differently in promoting and protecting their interests.[299]

3.3.5.1 Types of Organized Interests

According to Fritz Scharpf's approach, there could be identified four categories of organized interests:

I. **Clubs**; these are groups of actors with different objectives and joint resources. This type, most presumably represents the industry associations that establish interest groups for effecting the legislative processes of governments.

II. **Associations**; these are groups of actors with shared objectives and resources. This type is maintained by membership dues and aim at reflecting the collective position of the group through comprehensive decision-making measures.

III. **Social movements**; these are groups of actors with shared objectives and separate resources. Every member, in this type, contributes to the construction of a collective purpose without defining a clear-cut organizational structure.

IV. **Coalitions**; these are individual actors, who aim at forming a temporary collaborative action to achieve their particular objectives. This type shares neither purpose nor resources. Most often, it consists of a lobby firm commissioned to pursue the interest of companies.[300]

On the bases of this approach, it might be presumed that the character of organized interests predetermines the type of organizational form and

298 Held/McGrew, 2007.
299 Mahoney, 2007: 366–83.
300 Scharpf, 1997.

decision-making framework. Besides, depending on this structure, tools, methods, and resources for strategic action might very. While coalitions and movements ability to act strongly depends on the large majority member approvals, clubs and associations are free to act without reflecting their members' opinions. Moreover, the decision-making board of associations may well decide upon an action that does not necessarily enjoy the approval of the majority of members, thus, reflecting only the interests of minority.[301] Consequently, clubs and associations, in this case, might be perceived of being more flexible and developed in their strategic actions.

Nevertheless, in comparison to interest groups that have shared resources, collective actors, which have shared objectives but individual resources are less able to act jointly. This, however, can be favourable as it insures more action flexibility. Accordingly, these types can be very useful for responding to policy issue fluctuation since they can easily shift from firm commitments to adoptive form of actions.

While this concept does not offer any distinction between civil society and corporate interests, for the sake of analytical clarity, in this work, only civil society, more specifically organizations of DPs (DPOs) is addressed.

3.3.5.2 DPO Types in the LMG Framework

In general, there are different groups of DPs in the form of associations, welfare rehabilitation service providers and self-help groups. Most often, however, they take the form of social movements. The main aim of these organizations is to promote and protect their interests through voicing their needs and views on priorities, monitoring legislative amendments and policy initiatives, advocating for change and organising public awareness campaigns. To put it more directly, organized interests are collective non-state actors involved in governance processes.

Along the highly important role of external representation and advocacy, disability-specific DPOs have the duty of providing general disability tailored support and care, as well as information, socialisation and guidance through and assistance for the unfamiliar, in some cases non-manageable disability related bureaucracy.

301 Hassel, 2010.

In some countries, such as Germany, the DPOs might have a legal right to act as the legal representatives of their members, thus, facilitating their communication with various government bodies. They might also, as it is in Austria and Germany, ensure access of DPs to justice by means of strategic litigation. Many scholars assume that the latter action might prove to be a successful instrument for the achievement of political goals of marginalized groups.[302] Nonetheless, this instrument remains largely unused by the DPOs allowed to litigate. Some scholars explain this by resource insufficiency.[303] Whereas, according to Lisa Vanhala, who examined the organizational structures and legal actions of the UK and Canadian DPOs, strategic litigation by the DPOs depends on the governance structures of organizations that shape the 'meaning frames': DPOs that are composed and lead by members that have human rights understanding of disability, act in accordance with this notion.[304] Consequently, she argues that only organizations that are composed of DPs and adopt the understanding, that DPs are the subjects of law, will apply the strategic litigation instrument.[305] Still others assume that opportunities of DPOs to take legal actions might be limited due to configuration of states: "the political configuration of the state shapes the opportunities afforded to movements; shifts in that configuration can open or close 'windows' for action".[306] The plausibility of this assumption might find its confirmation especially in states with multi-level legal and political structures, as well as verying political traditions.

Depending on the type and form of the DPO, the space of legal and political action may be limited to local and regional/state representations or even extend beyond the region/state to the national, supranational[307] and international levels. E.g., the organization for visually impaired might operate as a representative organization both at local, state/regional levels and at the national, supranational like European Blind Union and international levels such as the World Blind Union. In addition, organizations of DPs might form alliances at the supranational and international levels. Most often, however, they come together as umbrella organizations in order to

302 Manfredi, 2004; Zemans, 1983: 700; Lempert, 1976; Lawrence, 1990; McCann, 1994; Harlow/Rawlings, 1992; Müller, 2019.
303 Kitschelt, 1986; McCarthy/Zald, 1977: 1212–41.
304 Vanhala, 2011.
305 Ibid.
306 Andersen, 2005.
307 European Disability Forum, for more information, refer to: https://www.edf-feph.org/publications/european-accessibility-act/ (Last accessed on 01.07.2022).

have a solid participation in the development of policy alternatives and legitimate policy positions at the national level.

Nevertheless, it is hypothesised that the rate of participation, efficacy of cooperation and impact of these organizations significantly depend on the financial means and structure of the country where they operate. Moreover, the role of organized interests in gaining access to the policy-making processes might be identified through the types of MLG.[308] Associations and clubs, for example, are more influential in an MLG I form of governance, where they maintain institutionalized and/or centralized access to the policy-making process through their engagement in advisory committees, social and economic councils, as well as at the implementation level of welfare state institutions. In contrast, movements and coalitions are more likely to be successful within the MLG type II governance form due to their policy-specific orientation.

3.3.5.3 DPO Participation within the CPRD Framework

The right of every individual to participate at government of his country, directly or through freely chosen representatives has found its first international recognition with the Art. 21 of the Universal Declaration of Human Rights in 1948. Later, it was reaffirmed by the Art. 25 of the International Covenant on Civil and Political Rights and specified by other human rights instruments.[309]

The involvement and consultation of DPOs has been mentioned in the international non-binding instruments, such as the 1975 Declaration on the Rights of DPs and 1993 UN Standard Rules. The Art. 5 of the 1983 ILO Convention No. 159 concerning Vocational Rehabilitation and Employment was the first binding legal instrument to envisage representative participation rights of DPs in the employment policy-making.

The comprehensive participation rights of DPs, however, has been ensured only with the CPRD that requires the SPs to adopt legislation and policies recognizing the right of DPOs to participation and involvement and enact regulations establishing clear procedures for consultations at all levels of authority and decision-making[310] affecting DPs directly or indir-

308 Hassel, 2010.

309 International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5c; Convention on the Elimination of All Forms of Discrimination against Women, Art. 7; Convention on the Rights of the Child, Arts. 12 and 23 (1).

310 CPRD Committee, General Comment No. 7, Para 94e.

ectly.[311] The CPRD Committee states also that public authorities should give due consideration and priority[312] to DPOs in all stages of decision-making processes[313] across all parts of decentralized states without any limitations or exceptions.[314] DPOs that have been denied access to participation should have a possibility to seek legal redress.[315]

Thereby, the CPRD puts clear distinction[316] between organizations "for" DPs and organizations "of" DPs, in considering that the latter should be rooted in, committed to and fully respect the principles and rights recognized in the Convention and be led, directed and governed by DPs.[317] The different types of organizations of DPs might include self-advocacy organizations representing the interests of one specific group of DPs, including disabled children, learning disabled and cross-disability organizations, which are composed of persons representing all or some of the wide diversity of impairments.[318] Furthermore, the CPRD Committee points out that the SPs might encourage the establishment of umbrella organizations of DPs to facilitate the coordinated and collaborative implementation of Art. 4.3 and 33.3, which should accept all organizations of DPs as members to ensure openness, democratic decision-making and representation of full and wide diversity of DPs.[319] Such organizations should be organized, led and controlled by DPs and speak on behalf of their member organizations and solely on matters that are of mutual interest and collectively decided upon.[320] The umbrella organizations cannot represent individual DPs as they often lack detailed knowledge on disability-specific needs.[321] Normally, there should be only one or two such organizations at each decision-making level.[322] "The existence of umbrella organizations within States parties should not, under any circumstances, hinder individuals or organizations

311 Ibid. Para. 18.
312 Ibid. Para. 23.
313 Ibid. Para. 15.
314 Ibid. Para. 69.
315 Ibid. Paras. 65 and 66.
316 Ibid. Paras. 13 and 14.
317 Ibid. Para. 11.
318 Ibid. Para. 12.
319 Ibid., Para. 12a.
320 Ibid.
321 Ibid.
322 Ibid.

of DPs from participating in consultations or other forms of promoting the interests of DPs".[323]

Moreover, under the Art. 33 para. 3 and in accordance with the General Comment No. 7, the SPs are required to ensure easy access of and liaison with the DPOs by FPs and/or Coordinating Mechanisms through formal procedures of consultation,[324] as well as guaranty that independent MFs allow for, facilitate and take care of the active involvement of DPOs and give due consideration to their views and opinions in their reports and analysis[325] at all governmental levels.[326] This, among other things, includes:

- Consulting the SP in preparing the initial/periodic state report;
- Carrying out monitoring of the CPRD implementation and submitting parallel reports with priority issues and concrete recommendations;
- Suggesting issues for the list of issues and questions the Committee should ask the SP, before the Committee adopts its list of issues;
- Submitting parallel written replies to list of issues and questions;
- Giving an oral presentation during the plenary session in which the constructive dialogue between the CPRD Committee and the SP delegation takes place;
- Advising the Committee members on the priority areas that require immediate action, and suggesting concrete recommendations on the issues that were raised during the constructive dialogue before the adoption of the concluding observations;
- Working with the National Monitoring Mechanism and the government on implementing CPRD Committee's recommendations and follow-up.

In addition, SPs are obligated to provide for the mandatory realization of public hearings prior to the adoption of decisions, and include provisions requiring clear time frames, accessibility of consultations, including an obligation to provide reasonable accommodation[327] and transparency.[328] The CPRD Committee, besides, requires the SPs to ensure "an enabling environment for the functioning of organizations of DPs",[329] including by adopting a policy framework favourable for the sustained operation of the DPOs.

323 Ibid.
324 Ibid. Paras. 35 and 41.
325 Ibid. Para. 38.
326 Ibid. Paras. 15, 31, 32, 49, 65, 74, 83, 94 E, I and S.
327 Ibid. Paras. 22 and 94e.
328 Ibid. Paras. 33 and 43.
329 Ibid. Para. 94b.

This includes "guaranteeing their independence and autonomy from the State, the establishment, implementation of and access to adequate funding mechanisms, including public funding and the provision of support, comprising technical assistance, for empowerment and capacity-building"[330] at all governmental levels.[331] This applies also to effective participation of DPOs in the processes of the independent MFs.[332]

330 Ibid. Para. 94b.
331 Ibid. Para. 94 J.
332 Ibid, Para. 39.