

**BOOK REVIEW: THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS (EDITED LISA WADDINGTON AND ANNA LAWSON) (OUP, 2018).**

ALEX RUCK KEENE\*

This ambitious, multi-authored volume, explores how the UN Convention on the Rights of Persons with Disabilities (CRPD) has been given effect and interpreted by courts in 11 national jurisdictions and by two regional bodies (the Council of Europe and the European Union). This comprehensive study examines how courts in thirteen different jurisdictions make use of the Convention, and is the first sustained comparative international law analysis of the CRPD,

The first part of the book contains chapters specific to each jurisdiction. The second part consists of comparative chapters which draw on the analysis of the jurisdiction-specific chapters. These chapters reflect on emerging patterns of judicial usage and interpretation of the CRPD and on the wider implications for human rights theory and the nascent field of international comparative human rights law.

Importantly, and helpfully, the national jurisdictions in the first part of the book are drawn from across the globe, and include Argentina, Australia, India, Kenya, Mexico, alongside the European jurisdictions of Germany, Ireland, Italy, Spain and the United Kingdom, and Russia, a world unto itself. As the editors explain, these were selected because there had been at least five judgments in each jurisdiction which seriously engaged with the CRPD, and there was a suitably qualified Anglophone expert able to contribute.

In each of the chapters, the relevant author(s) provides a thumbnail sketch of the legal system of the jurisdiction in question, an explanation of the status of the CRPD within that system, a review of the use of the CRPD by the courts of that jurisdiction, and then an analysis of the way in which the relevant courts have interpreted the CRPD.

Unlike many such multi-jurisdictional works, the book also includes an expressly comparative section at the end, seeking to draw together comparative analysis of the interpretation of the CRPD in each of the 13 jurisdictions, examining the uses to which the CRPD is put by domestic courts.<sup>1</sup> I would draw particular attention to the chapter by Anna Lawson and Lisa Waddington addressing the interpretation of the CRPD on an article by article basis in the different courts, and the thoughtful chapter by Lisa Waddington on the role of the judiciary and its relationship to the CRPD. A final chapter by Christopher McCrudden seeks to place comparative

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\* Alex Ruck Keene, Barrister, 39 Essex Chambers, London, Wellcome Research Fellow and Visiting Lecturer at the Dickson Poon School of Law, King's College London, Visiting Senior Lecturer, Institute of Psychiatry, Psychology & Neuroscience, King's College London, Research Affiliate, Essex Autonomy Project, University of Essex.

<sup>1</sup> A term used by the editors to include the European Court of Human Rights ('ECtHR') and Court of Justice of the European Union ('CJEU').

international law scholarship in the context of human rights theory.

This book straddles multiple purposes and seeks to serve multiple audiences. It could be used both by practising lawyers seeking to run cases involving the CRPD before domestic (or regional) courts, and searching for inspiration from other jurisdictions. It could equally be used by students (albeit, given its hefty price-tag, sadly only students at well-resourced institutions) seeking to gain an understanding of the birth pangs of the CRPD as a living legal instrument, rather than political statement. It could also be used by those seeking to understand the CRPD as a very new, and different, approach to thinking about the very concept of human rights. All of these audiences will find themselves enriched, challenged and stimulated by the individual chapters and the editorial themes of the work as a whole. The chapter on interpreting the CRPD in domestic courts alone represents a major contribution to understanding how some of the key articles are beginning to take life in practice in courts across the world – above all Articles 5 (equality and non-discrimination) and 12 (the right to legal capacity).

Taking a step back, however, the overriding impression from the book is that it is a very open question as to whether the next edition will be able to point to more cases in which the CRPD has actually been interpreted in the fashion advocated for by the Committee on the Rights of Persons with Disabilities. Or will the CRPD be interpreted by domestic and regional courts in a very different fashion?

For these purposes, I focus on the question of Article 12 CRPD, as this has been the subject of some of the most active debates and judicial activity.<sup>2</sup> It has, further, been the focus of some of the most sustained activity on the part of the CRPD Committee. It is unfortunate that, given the cut-off for consideration of cases for the book – on varying dates in 2016 – those covered, especially those from the highest judicial bodies within the relevant jurisdiction, largely pre-dated the growing body of materials generated by the Committee through which it has set out its interpretation of Article 12.

At one level this fact is useful in terms of enabling the editors to be able to fit awkward cases into what is a clear thesis as to how Article 12 should be interpreted by domestic courts. Lawson and Waddington can, for instance, legitimately note that the decision of the Spanish Supreme Court<sup>3</sup> to the effect that plenary guardianship (i.e. the total deprivation of a person's legal capacity) was issued in 2009 "*in the early dates of the CRPD and before the guidance provided by General Comment No 1*".<sup>4</sup>

However, at another level the timing of this first edition is unfortunate because, with

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<sup>2</sup> The only one of the 13 jurisdictions covered in the book not to yield any substantive cases involving Article 12 being the CJEU; in Australia, Ireland, Kenya and Mexico, Article 12 was the provision receiving most interpretative attention.

<sup>3</sup> Civil Chamber of the Spanish Supreme Court, Judgment 282/2009 of 29 April 2009. They also note the judgment to similar effect of the Constitutional Court of the Russian Federation some three years later, *In Re Delova* (judgment of 27 June 2012, case 15-P).

<sup>4</sup> Lawson and Waddington, page 497.

one partial exception, the book cannot engage with the series of cases in which courts have (in different ways) taken issue with the CRPD Committee's interpretation of Article 12 and, in particular, the assertion that Article 12 requires the abolition of substituted decision-making regimes, in other words, regimes where:

*(i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; or <sup>5</sup> (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences <sup>6</sup>*

This assertion has been the subject of extensive debate in academic and activist circles.<sup>7</sup> It is now, however, coming under sustained judicial scrutiny, albeit scrutiny that, for the most part, post-dates the cases considered in this work.

The partial exception is that of the decision of the German Federal Constitutional Court in relation to (in English terms) mental capacity and involuntary (physical) health treatment decided in July 2016.<sup>8</sup> The case was decided just too late for consideration in Valentin Aichele's country chapter, but Lawson and Waddington make brief note of it in their chapter on interpreting the CRPD in domestic courts.<sup>9</sup>

It would have been fascinating to have the case placed in its specifically German context (in which the CRPD has frequently been referred to at Federal court level). It would also have been very interesting to have the full force of the editors' combined intellect brought to bear on the passage from the judgment, cited without comment,<sup>10</sup> in which the Federal Constitutional Court specifically denied the authority of the CRPD Committee to:

*develop international treaties beyond the scope of agreements and the practice of the States party to the treaty.. [and held that] ..Article 34 (et seq) of the CRPD does not give the Committee of the mandate to issue any binding interpretation of the text of the treaty.*

Although Lawson and Waddington do not specifically note this fact in their brief reference to this case, the German Federal Constitutional Court had regard to both

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<sup>5</sup> The word "and" which appeared initially being an error, corrected in a corrigendum published on 26 January 2018, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1/Corr.1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1/Corr.1&Lang=en) (accessed 15 January 2020).

<sup>6</sup> UN Committee on the Rights of Persons with Disabilities, 2014: "*General Comment No. 1 on Article 12: Equal recognition before the law.*" CRPD/C/GC/1.

<sup>7</sup> An extremely useful summary of the debates can be found in chapter 2 of Piers Gooding, *A New Era for Mental Health Law and Policy* (Cambridge University Press, 2017).

<sup>8</sup> BVerfG, Order of 26 July 2016 – 1 BvL 8/15. This case is covered in detail in the November 2016 edition of the 39 Essex Chambers Mental Capacity Newsletter: <http://www.39essex.com/content/wp-content/uploads/2016/11/MC-Newsletter-November-2016-Capacity-outside-the-Court-of-Protection.pdf> (accessed 2 November 2018); an English language copy of the judgment is not available.

<sup>9</sup> Lawson and Waddington, pages 531-532.

<sup>10</sup> Lawson and Waddington, page 531.

the CRPD's General Comment 1 on Article 12,<sup>11</sup> and its 2015 Guidelines on Article 14,<sup>12</sup> the court considering that:

*The UN Committee remained silent [in General Comment 1] with regard to the question that was relevant in the present case, namely medical emergencies in which the "free will" of a disabled person is completely absent.*

*The court took the view that a corresponding approach applied to the guidelines of the Committee regarding the interpretation of Article 14 of the CRPD (of September 2015). In those guidelines the Committee had emphasised that no healthcare measures should be taken in respect of persons with disabilities that are not based on the free and informed consent of the person concerned. The Committee asserted that states should refrain from any form of compulsory treatment. However, the court held that here also the Committee had not provided an answer to the question of what, according to its understanding of the treaty provisions, should happen to persons who cannot form a "free will" and who are in a vulnerable position. The court held that, even taking into account the views of the UN Committee, there were no good reasons under the text and spirit of the CRPD to abandon such persons to their fate, and to conclude that the Convention is opposed to compulsory medical treatment where this is constitutionally required under strictly regulated circumstances.<sup>13</sup>*

The German Federal Court chose to find silence in the relevant materials from the CRPD Committee in order to reach this outcome was perhaps diplomatic, but in reality this represents a deliberate misreading of the very clear, uncompromising, message contained in both General Comment 1 and the Article 14 Guidelines.

In similar vein is the decision of the ECtHR in *AM-V v Finland*,<sup>14</sup> which came too late for Oliver Lewis's masterly chapter on the Council of Europe. The case concerned whether an individual subject to "mentorship"<sup>15</sup> should have been able to have his mentor removed because he would not allow him to move to live with his former foster family.

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<sup>11</sup> UN Committee on the Rights of Persons with Disabilities, 2014: "General Comment No. 1 on Article 12: Equal recognition before the law." CRPD/C/GC/1.

<sup>12</sup> UN Committee on the Rights of Persons with Disabilities, 2015: "Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities."

<sup>13</sup> This is taken from Adrian Ward's report of the case in the Mental Capacity Law Newsletter November 2016: Issue 70 (39 Essex Chambers) [www.39essex.com/content/wp-content/uploads/2016/11/MC-Newsletter-November-2016-Capacity-outside-the-Court-of-Protection.pdf](http://www.39essex.com/content/wp-content/uploads/2016/11/MC-Newsletter-November-2016-Capacity-outside-the-Court-of-Protection.pdf) (accessed 15 January 2020).

<sup>14</sup> Application no. 53251/13, decision of 23 March 2017.

<sup>15</sup> At paragraph 85, the ECtHR described the powers of the mentor thus: "If, like in the present case, the court has specifically ordered that the mentor's function shall also cover matters pertaining to the ward's person, the mentor is competent to represent the ward in such a matter only where the latter is unable to understand its significance [...] In a context such as the present one, the interference with the applicant's freedom to choose where and with whom to live that resulted from the appointment and retention of a mentor for him was therefore solely contingent on the determination that the applicant was unable to understand the significance of that particular issue. This determination in turn depended on the assessment of the applicant's intellectual capacity in conjunction with and in relation to all the aspects of that specific issue. The Court also notes that Finland, having recently ratified the UNCRPD, has done so while expressly considering that there was no need or cause to amend the current legislation in these respects (see Government Bill HE 284/2014 vp., p. 45)."

The Strasbourg court had before it, and directly referenced, General Comment 1; it also had submissions from the Mental Disability Advocacy Centre<sup>16</sup> to the effect that:

*The starting point, based on the current international standards, was that the will and preferences of a person with disabilities should take precedence over other considerations when it came to decisions affecting that person. This was clear from the text of the United Nations Convention on the Rights of Persons with Disabilities. Even in jurisdictions with a former reliance on the "best interests" approach, there was an emerging trend towards placing more emphasis on the will and preferences of the person. There was a clear move from a "best-interests" model to a "supported decision-making" approach. [67]*

*The Centre noted that the Court had held on a number of occasions that guardianship systems constituted a very serious interference with a person's Article 8 rights. Article 8 § 2 of the Convention needed to be interpreted in a manner consistent with international standards, taking into account the international recognition of the importance of autonomy and supported decision-making for individuals with disabilities. Rights guaranteed in Article 2 of Protocol No. 4 to the Convention were closely intertwined with those of Article 8. Circumstances in which an interference would be justified were limited and had to be restrictively construed. Persons with disabilities needed to be able to choose where and with whom to live, and had to be given the opportunity to live independently in the community on the basis of their own choice and, on an equal basis with others. [68]*

Not only did the Strasbourg court take the view that mentorship did not deprive the person in question of their legal capacity,<sup>17</sup> it also endorsed an approach which – contrary to the position in General Comment 1 – was based upon both mental capacity<sup>18</sup> and substituted decision-making. Holding that the applicant's rights under Article 8 ECHR (the right to private and family life) had not been breached, the court used – deliberately – the language of Article 12(4) CRPD to reach conclusions that it is clear are entirely at odds with the Committee's interpretation of that Article:

*The Court is mindful of the need for the domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect the individual and safeguard his or her interests, especially under*

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<sup>16</sup> Now Validity; in something of an irony, Lewis was formerly the Executive Director.

<sup>17</sup> See paragraph 85: "[t]urning to the present case, the Court notes that under Finnish law, the appointment of a mentor does not entail a deprivation or restriction of the legal capacity of the person for whom the mentor is designated (see paragraph 29 above). [...] If, like in the present case, the court has specifically ordered that the mentor's function shall also cover matters pertaining to the ward's person, the mentor is competent to represent the ward in such a matter only where the latter is unable to understand its significance (see paragraph 30 above). In a context such as the present one, the interference with the applicant's freedom to choose where and with whom to live that resulted from the appointment and retention of a mentor for him was therefore solely contingent on the determination that the applicant was unable to understand the significance of that particular issue. This determination in turn depended on the assessment of the applicant's intellectual capacity in conjunction with and in relation to all the aspects of that specific issue. The Court also notes that Finland, having recently ratified the UNCRPD, has done so while expressly considering that there was no need or cause to amend the current legislation in these respects (see Government Bill HE 284/2014 vp., p. 45)."

<sup>18</sup> See paragraph 85 and also paragraph 89: "the decision was based on the finding that, in this particular case, the disability was of a kind that, in terms of its effects on the applicant's cognitive skills, rendered the applicant unable to adequately understand the significance and the implications of the specific decision he wished to take, and that therefore, the applicant's well-being and interests required that the mentor arrangement be maintained."

*circumstances where his or her individual qualities or situation place the person in a particularly vulnerable position. The Court considers that a proper balance was struck in the present case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law, ensuring that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to the applicant's circumstances, and was subject to review by competent, independent and impartial domestic courts. The measure taken was also consonant with the legitimate aim of protecting the applicant's health, in a broader sense of his well-being. [90]*

Other courts around the world have followed suit,<sup>19</sup> a good example being the decision of the Supreme Court of Victoria in *PBU v Mental Health Tribunal and Melbourne Health; NJE v Mental Health and Bendigo Health*,<sup>20</sup> in the context of the lawfulness of the administration of electroconvulsive therapy to individuals lacking the mental capacity to give informed consent. Whilst formally avoiding a direct confrontation with General Comment 1, Bell J expressly cited (at paragraph 91) both the German Federal Constitutional Court decision in 1 BvL 8/15 and *A-MV* as evidence of courts disagreeing with the interpretation of Article 12; the judgment, further, proceeded on the basis that administering ECT to a person unable to consent to it was not, inherently, contrary to the CRPD.

All three of these cases were decided at least a decade after the Convention was adopted and cannot simply be dismissed as decided in the absence of guidance from the Committee. Do they represent the last gasp of an older conception of human rights that accepts the existence of a class of individuals in respect of whom – in the last resort – decisions must be taken? In that conception, the key questions, in human rights terms, are as to the safeguards that must be placed around those decisions. If they do represent this last gasp, is it safe to assume that as those wedded to that older conception retire, the newer model will simply take its place? Or do they represent a more concrete challenge to the assertions of the Committee: and, if so, how do those assertions stand up to the forensic analysis undertaken by the courts? And – if so – what strategies should advocates seek to persuade those courts to adopt the Committee's approach?

As above, I do very much hope that there will be a second edition of this book, in which we can get further answers to these questions. For the present, though, all those involved in the first edition are to be congratulated for what will undoubtedly in due course come to be seen as a seminal text in the 'operationalisation' phase of the CRPD's life.

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<sup>19</sup> See, e.g. the obiter observations of Ellis J in *S v Attorney-General* [2017] NZHC 2629 in relation to the General Comment at paragraph 29: "that its import would appear to be that treating those with intellectual disabilities differently from those without such disabilities will always be discriminatory, however beneficial or preferential such treatment might be. It certainly seems to run contrary to most States' parties understanding of the Convention, including New Zealand's."

<sup>20</sup> [2018] VSC 564.