BOOK REVIEW: 1. THE LEGACIES OF INSTITUTIONALISATION: DISABILITY, LAW AND POLICY IN THE 'DEINSTITUTIONALISED' COMMUNITY, EDITED BY CLAIRE SPIVAKOVSKY, LINDA STEELE AND PENELOPE WELLER (OXFORD: HART, 2020) AND 2. RECOGNISING HUMAN RIGHTS IN DIFFERENT CULTURAL CONTEXT: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD), EDITED BY EMILY JULIA KAKOULLIS AND KELLEY JOHNSON (LONDON: PALGRAVE MACMILLAN, 2020)

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INTRODUCTION

These two edited multi-author books landed on my desk for review nearly simultaneously, and I read them side by side, because, in different ways, many of the essays are chewing over the same essential questions: why, and how, it is so difficult to change cultures, whether they be social work cultures, medical cultures, legal cultures or wider societal cultural attitudes? And both are doing so as part of the second wave of studies relating to and engaging with the UN Convention on the Rights of Persons with Disabilities, now that the initial wide-eyed and possibly naïve[1] enthusiasm for the Convention and its promise has passed, and the hard work of operationalising in different jurisdictions has not only begun but also run into considerable resistance in many quarters. Much of that resistance could be characterised negatively; some of that resistance less obviously so, especially where the resistance consists of seeking the answers to the hard questions that the drafters of the UNCRPD had to avoid in order to secure the compromises required for consensus. Whilst, almost without exception, all the authors in the two volumes under review would, I think, characterise themselves as supporters of the UNCRPD, many of the essays not only offer explanations as to why progress towards implementation has been so slow in many jurisdictions, but also raise yet further hard questions.

LEGACIES OF INSTITUTIONALISATION

The first book, Legacies of Institutionalisation, brings together 20 contributors from the UK, Canada, Australia, Spain and Indonesia, and reflects the fruits of a workshop (coordinated by the editors) held in June 2018 at the Oñati International Institute for the Sociology of Law in the Basque Country, Spain. The workshop, and the essays, grapple with (as the editors put it in the

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[1] A word that the former Chair of the CRPD Committee, Theresa Degener, said could perhaps be used about the Committee itself in relation to its decision to devote its first General Comment to the issue of legal capacity against a deeply unpromising set of background circumstances. Degener T. Editor's foreword. International Journal of Law in Context. 2017 Mar;13(1):1-5.

thoughtful and wide-ranging introduction, p.3) "the extent to which contemporary laws, policies, practices and practices in the post-deinstitutionalisation agenda continue or legitimate historical practices associated with […] the institutionalisation" of people with disabilities." The book is then divided into three parts. Part 1 (6 chapters) address power dynamics that shape the conditions and possibilities of people with disabilities within and beyond sites of physical containment. The chapters vary significantly both in scope (from episodic disability within the context of the academy to a historical review of the biopolitics of disability in Spain between 1959 and 1981) and relevance to the direct theme of the book. However, within this part, the stand-out chapter is the first, by Liz Brosnan, a Research Associate at the EURIHKA Project based at the Service User Research Enterprise at the Institute of Psychiatry, Psychology and Neuroscience, King's College London. In the chapter, entitled "Navigating Mental Health Tribunals as a Mad-identified Layperson: An Autoethnographical Account of Liminality," Brosnan reflects upon and poses difficult questions arising out of her experience of sitting as a lay member of approximately 40 Mental Health Tribunals in Ireland between 2006-2013. Her experiences lead her to question the value of such Tribunals, and to ask the simple question "is this best that can be done"? In the context of reforms (such as those proposed by the recent Wessely Review of the Mental Health Act[2]) which place faith in the power of such tribunals to serve as champions of those who are detained, the chapter make challenging – but necessary – reading.

Part 2 (5 chapters) is entitled "Complicated Alliances: the Confluence of Ableist, Sanist, Gendered, Classed and Racialised Logics in Law, Policy and Practice." However, those looking to that Part for wide-ranging discussions of these hugely important issues may find themselves disappointed, because with the exception of an interesting but (frankly) slightly off-topic chapter on responses to immigration, the remaining chapters are all, in fact, detailed micro-studies of particular situations within Australasia. Wider themes can certainly be drawn from them, and the introduction to the Part seeks to do so (in particular the ease with which dissenting responses to marginalisation and structural injustice can be silenced and subverted). However, this Part, sadly, to this reader at least, promised more than it ultimately offered.

In Part 3 (6 chapters), the contributors tackle institutionalisation and human rights: the role of the CRPD in the emancipation of people with disabilities. For me, this is the richest section of the book, not least because the contributors ask some of the hard questions posed at the outset of this review. Elivra Pértega Andía, for example, seeks to examine in some detail how the CRPD plays out in the context of whether or not physical restraints should be used in paediatric psychiatric healthcare in Spain. In a stimulating analysis of the submissions of signatory states to the UN CRPD Committee on draft General

[2] Modernising the Mental Health Act. Final report of the Independent Review of the Mental Health Act 1983. GOV.UK, 2018.

Comment 1 (on Article 12: the right to legal capacity), Peter Bartlett comes to the conclusion that:

> "Insofar as the submissions are representative, they suggest that States Parties are simply not interested in engaging with the CRPD project or, at least, the elements of it that concern equality before the law. Instead, there is little evidence that they see a problem that requires correction."[3]

Bartlett seeks to find grounds for optimism, but remains cautious as to whether the message is getting out to stakeholders about the problems that need solving, "let alone the sorts of reform that are necessary, or the terms of any constructive dialogue that needs to happen."[4] It is a shame that we cannot be privy to the conversations that must have taken place between him and Jill Stavert at the workshop, as Stavert's chapter takes a rather more optimistic view of how Scotland's mental health and capacity law might be recast to comply with the CRPD.

Lucy Series' chapter on the UK Supreme Court decision in *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor* [2014] UKSC 19 ('*Cheshire West*') manages to mine the complexities of an English decision about deprivation of liberty to important, and wider, effect. The – deliberately – broad definition of the concept adopted by the majority in the so-called 'acid test'[5] has positives, identifying as it does that supervision, control and loss of freedom exist outside of institutions. It is also a definition which appears to be gaining traction with those working to champion the cause of the CRPD.[6] However, as Series notes, it leads to its own difficulties, and also is, ironically, hard to reconcile with the CRPD, despite the fact that Lady Hale, for the majority, was deliberately seeking to cast the net widely so as to ensure that the definition of deprivation of liberty is the same for those with disabilities as it is for those without.[7] She suggests possible ways forward, but the overriding impression left by the chapter is that there is much work yet to do in identifying what framework actually serves the interests of persons with disabilities in the post-carceral era.

RECOGNISING HUMAN RIGHTS IN DIFFERENT CULTURAL CONTEXTS

Unlike Legacies of Institutionalisation, this book did not arise out of a workshop. Rather, it arises out of the editors' shared interest in the issue of cultural contexts and international human rights law developed when they worked

[3] Spivakovsky, Steele and Weller, page 190.
[4] Spivakovsky, Steele and Weller, page 192.
[5] I.e. whether the person is subject to continuous supervision and control and not free to leave the place (or places) in question.
[6] It was, for instance, used in a major study of disability-related detention carried out to support the work of the Special Rapporteur for Disability. See Flynn E, Pinilla-Rocancio and Gómez-Carrillo M. Disability-specific forms of deprivation of liberty. 2019.
[7] See *Cheshire West* at paragraphs 36 and 37, where Lady Hale made express reference to the CRPD in highlighting that the "whole point about human rights is their universal character" (paragraph 37).

together at the University of Bristol in the United Kingdom. In doing so, they became, they note in their introduction, "increasingly aware of the complexity of interpreting the CRPD's provisions into States Parties' cultural contexts and saw the need for interdisciplinary approaches to exploring this."[8] The editors deliberately did not seek to guide contributors as to the interpretation of 'culture' that they adopted in this. This means that anyone who approaches the book thinking that they will be getting an overview of (for instance) the interaction between the CRPD and particular national legal and political cultures will, for the most part, be disappointed. It also means that the editors have had to work hard in their conclusion to seek to pull together themes from what is by any measure an extremely disparate group of papers. Conversely, the eclectic nature of the contributors' approach to the concept of 'culture' throws up some unexpected and stimulating issues.

Part 1 of the book (4 chapters) looks at culture, disability and the CRPD. Gerard Quinn's contribution on legal culture and Article 12 rehearses themes which will be familiar to those who have followed his work over the years. However, the challenge that he makes to the 'legal fictions' that underpin so many social and political frameworks never loses its ability to engage (if not sometimes also to enrage). James Rice promises a huge amount in his chapter looking from an anthropological point of view at the potential tensions between the CPRD and wider cultural values, in particular through examining how States Parties have sought (through Reservations and Objections) to respond to the universal norms advocated by the CRPD. If the chapter does not quite deliver on the promise, it does at least provide a very helpful jumping off-point for further investigations. Huhana Hickey in her chapter reflecting on indigeneity, colonisation and the CRPD from the Māori perspective makes a powerful case that the CRPD continues the history in which indigenous cultural issues are not taken into account, a case which could fruitfully have benefited from further space to be developed. Her chapter, further, prompted the reflection that the book contained strikingly little discussion of the intersection between disability and other forms of discrimination, perhaps reflecting the fact that the CRPD itself is all but silent on the issue.[9] No doubt if the editors were to be starting their project post-Black Live Matters they would be inviting at least some contributors to reflect upon these questions.

Part 2 (4 chapters) looks at why and how countries ratified (or did not) the CRPD, addressing four countries: the US (Arlene Kanter); Ireland (Eiliónoir Flynn), Cyprus (Emily Julia Kakoullis) and Sri Lanka (Dinesha Samararatne). Whilst all of these chapters may appear to be of parochial interest to enthusiasts of the relevant jurisdictions, they each flesh out the point that can never be repeated frequently enough that international human rights law is, effectively, an empty vessel on the domestic political scene, that it is only

[8] Kakoullis and Johnson, page 4.

[9] Save for the reference in Preamble P that States Parties are "[c]oncerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status."

through domestic political action that it becomes translated and 'domesticated,' and that that process is rarely anything other than slow and painful.

In Part 3 (4 chapters), the contributors look at challenges to implementation of specific articles of the CRPD. Three of the chapters relate to specific countries (China, Hungary and the Nordic States), of which the chapter on the Nordic States is perhaps the most interesting for those who instinctively feel that those States are 'CRPD-friendly' as having been held up for many years as more enlightened than most other States. Rather, Ciara Brennan and Rannveig Traustadóttir suggest, they show that the Nordic welfare model stands at distinct odds with the ethos of Article 19; further, "[i]n the light of the glowing reputation of the Nordic welfare states, criticism does not seem credible by the international community and tends to be rejected by Nordic governments as unreasonable."[10] The final chapter by Matthew S. Smith and Michael Ashley Stein, sits a little oddly in this section, but does contain a fascinating, if perhaps rather optimistic, argument as to the potentially transformative effect of Article 30 CRPD, which requires States Parties to take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

Part 4 (3 chapters, and conclusion) looks at monitoring the CRPD. Whilst this part could be said in reality to have little to do with the stated theme of the book, it contains, for me at least, the two most interesting chapters in the book. The first is the dense and nuanced chapter by Neil Crowther and Liz Sayce OBE looking at ten years of monitoring the implementation of the CRPD in the United Kingdom. Whilst it could on one view be read as a chapter of ten years of failure by the UK Government to live up to the commitments it so blithely signed up to, the authors identify a more complex picture, and, based on that picture, potential strategies for further action. The second chapter is that by Amita Dhanda reflecting on the Indian experience of State Party reporting, gaining particular interest – and piquancy – from the fact that she was intimately involved in the production of the Indian State Report, albeit in circumstances where the final report was very different to that which she had envisaged. Although the story is deeply local, her theme of the uncomfortable relationship between activism and governmental imperatives is of much wider resonance.

CONCLUSION

Whilst (as is always the case) not every part of both of these books works equally successfully, and the Kakoullis and Johnson book perhaps suffers from the editors' – very generous – decision to enable contributors such free reign in thinking about the term 'culture,' they contain interesting and important contributions to the second wave of CRPD studies. At the time of writing, what the third wave of such studies will look like is not yet clear, but at least some

[10] Kakoullis and Johnson, page 265.

of the research agenda will have been set by the contributors to these two books.