

Book Reviews

Mental Disability and the European Convention on Human Rights by Peter Bartlett, Oliver Lewis and Oliver Thorold

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This book examines in depth the way the European Convention on Human Rights has been used to protect and enhance the rights of individuals who suffer from mental disability, whether from mental illness, intellectual or mental impairment, brain injury or personality disorder. Mental disability has now become a major issue for the member states of the Convention as disability discrimination legislation and public awareness have brought disability issues into the mainstream of society. It has been estimated that one in four people will suffer some form of mental disability during their lifetimes, which may or may not result in a degree of mental incapacity. The consequences of this are not only the personal suffering experienced by the individual and their families and friends but also adverse legal consequences, including potential loss of liberty, compulsory treatment and loss of legal status.

The authors set out extensively the case law which has evolved from the Convention as it applies to mental disability and go on to suggest ways in which the Convention can be developed in the future. They argue that the Convention has been used in ways which the draftsmen probably never originally envisaged and point out that the only express mention of mental disability is contained in Article 5(1)(e), the right to liberty. They argue that the European Court has been unduly conservative in the way it has developed the law, despite acknowledging that the Convention is a “living tree”. Since the landmark judgment in *Winterwerp v the Netherlands* in 1979, the case law of the European Court has not been as fertile and prodigious as would have been hoped. The authors suggest that this is not a reflection of the fact that the rights of the disabled are being well protected by member states but rather that this illustrates the difficulties faced by a vulnerable section of society in challenging laws and conditions which at best are paternalistic and at worse abusive.

The authors deal with each of the substantive rights guaranteed by the Convention, starting with the right to liberty enshrined by Article 5. This is the area which has attracted most cases. The meaning of detention and deprivation of liberty is discussed in detail together with the exceptions set out in the Article. In particular, for there to be lawful detention of a person “of unsound mind”, the detention must have some kind of therapeutic benefit and there needs to be a process of periodic review to reflect the recovery of the patient.

The next chapter is devoted to institutional standards and controls. Three broad categories are identified. Firstly, poor physical standards such as overcrowding, insufficient heating, as well as personal issues such as failure to accommodate religious or other sensitivities, can give rise to legal challenge. Secondly, detention policies can be over-controlling, for example the use of seclusion or segregation. Finally, the right to a private life will be affected to some degree.

Medical treatment and the issues of consent and incapacity are dealt with. The clear overlap between inhuman and degrading treatment under Article 3 and the right to autonomy under Article 8 has been examined by the European Court a number of times. The court has, however, not ruled as unlawful the compulsory treatment of a detained mental patient with capacity. It is suggested that this is an area where the Court could push the boundaries, particularly in the light of what the authors call the “soft law” of United Nations conventions and European Council recommendations. This body of international instruments is increasingly being used to argue that people with capacity should no longer be forced to undergo such treatment without their consent.

The right to life under Article 2 carries with it the duty to prevent death and the authors examine the cases relating to suicide and deaths in institutions. Although not expressed in Article 2, the European Court has established that procedural obligations are required in order to make real the substantive obligation to prevent death. So, for example, the State must provide some form of effective official investigation when individuals have been killed as a result of the use of force and State agents must be held accountable. Legal aid should also be made available to relatives who would otherwise not be able to prosecute their claims. Because of the particularly vulnerable nature of a person with mental disabilities, such procedures need to be rigorously enforced.

A large part of the book is devoted to impaired decision-making. The authors argue that since legal capacity can fluctuate and that capacity depends on the factual matter of the decision to be made, the “one size fits all” approach adopted by some States can no longer be tolerated. However, in order for an individual to be allowed to enjoy his or her rights under Article 8, the authors argue that the State has a positive obligation to protect those rights. The State must therefore provide a mechanism for tailored guardianship, adequate supervision of a guardian by a court of protection and access by the individual to a court for review of a guardianship or similar order. Without this assistance, the right for a disabled individual to manage his or her own affairs remains illusory.

Having focussed on the classic Convention rights, the authors discuss the fundamental “right” of every person to be a full member of society. Disabled people have to overcome significant barriers to integration. Discrimination is still a major issue and more use could be made of Article 14. The authors bring together the jurisprudence of the European Court to suggest how the Convention can be used in a dynamic way to bring about change in the way society views disabled people. While acknowledging resource implications, they suggest that there should be a basic right to live in the community and that the State should put into place the facilities to do this such as the provision of social housing or community treatment. Likewise, positive obligations could be imposed on the State to ensure that disabled people can access education, manage their property affairs, marry and have children, vote, form associations and have the right to engage in rewarding work. In all these areas much needs to be done. The raw material of the Convention is there but the question is whether the European Court is willing to expand its remit to take into account the new generation of human rights.

The final chapters of the book explain the procedure at the European Court and highlight the crucial need for proper legal representation, which is essential if disabled people are able to enjoy their Convention rights. The authors conclude by saying that for too long people with disabilities, and people with mental health problems and intellectual disabilities in particular, have been left at the margins of the human rights debate. The Convention offers the possibility to redress this. Some change has started but there is a long way to go.

This book is well written and very readable. It is clearly aimed at those committed to campaigning for

disability rights and lawyers representing the mentally disabled. Not only does it provide a comprehensive overview of Convention law as it currently stands but it imaginatively suggests future developments which the European Court could pursue. Case citations are full and accurate and there are helpful appendices setting out the core materials. These include the Convention itself, the key Protocols, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Recommendation of the Committee of Ministers to Member States Concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorder, and the Recommendation of the Committee of Ministers to Member States Concerning the Legal Protection of Incapable Adults. There is also a list of available internet resources and a final appendix gives some useful practical advice for lawyers representing people with mental disabilities.

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