

BOOK REVIEW: THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY, EDITED BY ILIAS BANKETAS, MICHAEL ASHLEY STEIN AND DIMITRIS ANASTASIOU (OXFORD: OXFORD UNIVERSITY PRESS, 2018)

ALEX RUCK KEENE*

This edited multi-author volume falls into the category of essential but frustrating. It is essential because of what it represents, namely the attempt to provide detailed commentary upon each of the articles of the Convention on the Rights of Persons with Disabilities. The template for the commentary, sensibly, is identical for each article, including an outline of the background to the article, an overview of the negotiations leading to the final wording (in most cases including, but going beyond, the formal *travaux préparatoires*), and then an analysis of each of the material parts of the article. Where relevant, that analysis includes consideration of how the word(s) in question have been interpreted by the Committee on the Rights of Persons with Disabilities, the treaty body for the CRPD, in such documents as 'concluding observations' upon the reports of States Parties¹ and 'General Comments.'² The cut-off point for the text seems to have been the summer of 2017. This means that some authors have also in their chapters had the opportunity to cross-refer to *The UN Convention on the Rights of Persons with Disabilities: a comparative analysis of the role of courts* (Lisa Waddington and Anna Lawson, eds: Oxford, Oxford University Press, 2018), which stands as an important companion piece, looking at the way in which the Convention has been interpreted by domestic and regional courts.

Repeating the same format for each article means, inevitably, that there is a degree of repetition, especially in relation to the background sections within each chapter, but in fairness this is not a book that is intended to be read from cover to cover, but rather to be consulted on an article by article basis. But having (for the most part) a detailed discussion of the *travaux* for each article is extremely useful for purposes of developing arguments – whether academic or otherwise – about the interpretation of the articles in domestic jurisdictions, given the status that *travaux* have under the Vienna Convention on the Law of Treaties.³ Further, the decision to include not just the 'substantive' articles, but also the procedural articles was a wise one. The commentary on the role of the Committee, in particular, is both interesting and important as the Committee continues to find its feet in establishing credibility with governments and courts alike.

* 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.

¹ I.e. the Committee's reports upon the compliance of States Parties with the obligations imposed by the Convention.

² I.e. the Committee's broader statements as to its interpretation of particular articles of the Convention.

³ 1155 UNTS 331.

The editors, Ilias Banketas, Michael Ashley Stein and Dimitris Anastasiou, have pulled together a very wide range of contributors, and, to their credit, have not chosen solely contributors who uncritically seek to evangelise. As has become clear over the years since the CRPD came into effect, the simple message that it seeks to enshrine – i.e. to ensure that persons with disabilities are secured the opportunity to enjoy rights on an equal basis with others – is one that gives rise to real complexities. The best chapters in the book are the ones which seek to address those complexities and do not simply repeat the canard that the CRPD ushers in a ‘new paradigm’ (a term that appears over 100 times in the work). I would in particular single out the chapter on article 12, the right to legal capacity, by Dr Lucy Series and Anna Nilsson. Series and Nilsson are fortunate in that this is the article to which most attention has been devoted since the CRPD came into effect, so they have the most material, but Series in particular is careful to highlight that there are dilemmas in article 12 (and its interpretation by the Committee) that do not afford of easy resolution.

Why, then, do I start the review by saying that the book is frustrating? In part, this is because of some omissions. For instance, not all contributors get a biography at the start, which means that it is not possible to get an understanding on the face of the book as to their credentials and possible perspectives; it is also – perhaps – a shame that there is no overall introduction to the book beyond a very brief preface by the editors.

The book is also frustrating because – understandably for a multi-author volume – the quality of the chapters varies considerably. It is a particular shame that one of the weakest chapters is that on Article 14 CRPD, which does not examine in any detail the intensely fraught question of whether it prohibits detention in the presence of mental disorder, instead focusing on matters such as therapeutic jurisprudence; interesting, but largely irrelevant to the very pressing issues at hand. The commentary on Article 10 (the right to life) is also dominated by consideration of abortion to the detriment of consideration of such important matters about whether the positive obligation to secure the right to life justifies detention in some situations,⁴ or how to approach decisions about life-sustaining treatment in relation to adults who lack capacity to give consent to that treatment. The limited discussion of life-sustaining treatment that there is, in turn, conflates medical assistance with dying and decisions about maintaining life-sustaining treatment, which are, in most jurisdictions, considered separately.

Any book will have omissions,⁵ but it is frustrating that some of the thorniest issues in practice are ones that receive least attention in the commentary. There is no discussion, for instance, in the chapter of Article 17 (the right to integrity of the

⁴ A justification which is well-recognised, for instance, within the regional framework of the European Convention on Human Rights: see, e.g. *Fernandes de Olivera v Portugal* (Application No. 78103/14, decision of 31 January 2019).

⁵ One curious one is that the (sadly) short chapter on Article 13 (access to justice) by Dr Eilíóinir Flynn makes no reference to her excellent book on precisely this subject: *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities*. Routledge, 2016.

person) of how the doctrine of informed consent (of cardinal importance to the Committee) is to operate where a person has suffered a serious injury such that they are in a coma. The discussion in relation to Article 25 (the right to health) advances an idea of “supported informed consent,” but, again, does not grapple with the position where, even with all possible support, a person is unable to give what could be recognised as informed consent. It may very well be that it is possible for treatment decisions to be made in such contexts on the basis of the “best interpretation” of the person’s will and preferences (as per General Comment 1 on Article 12), but to suggest that this represents the operation of “informed consent” strains credulity.⁶ The otherwise excellent commentary on Article 38 on the relationship between the Committee and other bodies is silent as to the tensions that are apparent in relation to compulsory treatment.⁷

The omissions noted above may well be telling insofar as they reflect strategic silences during the negotiation process in relation to matters of particular difficulty – although it could legitimately be said that it is a scholarly imperative to draw out these silences. They may also represent the fact that at least some of those with disabilities have found it difficult to have their voice heard – or, more troublingly – because those voices do not always say what some advocates want them to. It, is in particular, difficult to escape the feeling that this may be so in relation to those with dementia,⁸ and it is perhaps of note there is no reference in the index (and only glancing references in the book) to this condition.

Notwithstanding these criticisms, however, this book will be required reference material for anyone seeking seriously to engage with the CRPD in its second decade. The editors are warmly to be congratulated for shepherding so substantial a work through to press.

⁶ If the Committee considers admissible the complaint by Vincent Lambert’s parents against France in relation to the decision to endorse the withdrawal of life-sustaining treatment (Mr Lambert then having died), it is possible that the Committee will then provide its authoritative view on this difficult subject. In the meantime, some thoughts about the interaction between Articles 10, 12, 17 and 25 can be found in Ruck Keene, A. and Lee, A. *Withdrawing life-sustaining treatment: a stock-take of the legal and ethical position*, J Med Ethics 2019;0:1–6. doi:10.1136/medethics-2019-105599. (<https://jme.bmj.com/content/early/2019/09/05/medethics-2019-105599>)

⁷ See Martin, W., & Gurbai, S. (2019). Surveying the Geneva impasse: Coercive care and human rights. *International journal of law and psychiatry*, 64, 117-128. (<https://www.sciencedirect.com/science/article/pii/S0160252719300032>)

⁸ As to which, see Donnelly, M. (2019). Deciding in dementia: The possibilities and limits of supported decision-making. *International Journal of Law and Psychiatry*, 66, 101466. (<https://www.sciencedirect.com/science/article/abs/pii/S016025271930130X>)