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Book review

Rethinking Rights-based Mental Health Laws

Edited by Bernadette McSherry and Penelope Weller, Oxford: Hart Publishing, 2010. 464 pp. ISBN 978-1-84946-083-5 £33

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This book is the product of a project funded by the Australian Research Council, on the subject of 'Rethinking Mental Health Laws'. Four examination questions were put to a number of mental health law experts, mostly from Australia and New Zealand, but including some well-known names from Europe and North America. They were asked to write about one or more of the following:

1. What do you think are the advantages and disadvantages of rights-based legalism governing the mental health system?
2. Do you think there are any alternatives to rights-based legalism and what are the advantages/disadvantages of these alternatives?
3. In the rights-based legalism model, what should be the scope of mental health laws?
4. In what manner should an international human rights framework guide mental health law?

The examinees were then invited to workshop their papers at Monash University's Centre in Prato, Italy, and this exciting collection is the result. It is a combination of 'How did we get here?' and 'Where do we go from here?'. The short answer is that there should be a great deal more to mental health law than protecting the right to be left alone.

It must have looked to the candidates taking the exam as if the examiners were not much in favour of 'rights-based legalism', so it is good to be reminded of how mental health lawyers came to be so concerned about rights. In the UK, 'legalism' was indeed a dirty word to historians such as Kathleen Jones, to whom it represented the complex, restricting but largely useless legal formalities which surrounded institutional mental health care before the Mental Health Act 1959. That Act, and its Scottish equivalent, was designed to set both the doctors and their patients free from these constraints, to treat and be treated in the same way as people with physical illnesses and disabilities, while enabling a small number of patients to be compulsorily detained and treated for their own good or that of other people. For a while there was no such thing as mental health law in the UK.

In the USA, however, mental health law emerged in response to the horrific conditions in state-operated psychiatric institutions in the 1970s. As John Petrila's essay reminds us, 'Had people with mental illnesses been treated in private, non-governmental facilities, or had conditions been humane, mental health law might not have taken root as part of civil rights law, based on federal constitutional principles' (p. 358). But so it did and a new form of 'legalism', based on constitutional or human rights principles, emerged and spread throughout the developed Western world. Not surprisingly, as those principles were almost all about protecting freedom, the new laws concentrated on the criteria and processes of compulsory admission and treatment, and the essays by both Genevra Richardson and Ian Freckleton discussing the importance of non-statutory factors such as 'insight' and 'compliance' in clinical decision-making remind us that the criteria for compulsion are still contentious and contested.

But most Western constitutional principles have little to say about the quality of treatment and the provision of adequate services both in and out of institutions. Constitutional legalism in the US was of very little use once long-term psychiatric care became virtually unobtainable, and 'access to care rather than protection from care is the dominant issue for most individuals' (p. 377). While this may be a peculiarly intense problem in the US (the book was written before Obamacare became law), it is a theme which crops up again and again in these essays and is the starting point for much of the discussion of where we might go from here.

Not surprisingly, as all the candidates were set the same examination paper, there is a considerable

degree of overlap in the subject matter of their answers. This is not a problem, as it allows several common threads to be explored. The workshop must have helped the authors to acknowledge and respond to one another's contributions.

The first common thread is how human rights law is at last developing the 'ideology of entitlement' of which Larry Gostin could only dream in the 1980s. In the United Nations Convention on the Rights of Persons with Disabilities (the CRPD), we now have a binding instrument to breathe life into the Universal Declaration's aspiration of an adequate standard of living, including health care, for all. Papers by Oliver Lewis, Annegret Kampf and Tina Minkowitz discuss its potential at all levels, not just the 'thinking' and the 'talking', but also the 'doing'. The CRPD covers people with both mental and intellectual impairments, so it clearly means to include people with mental disorders as well as mental disabilities. Its guiding principles include respect for their inherent dignity, individual autonomy, freedom and non-discrimination. Article 12 deals in detail with the right of everyone with a disability to legal capacity and to support for those who need help to exercise their legal capacity. Article 14 states that 'the existence of a disability shall in no case justify a deprivation of liberty'. Article 17 preserves the right of disabled people to physical and mental integrity, but is silent as to whether involuntary treatment is permitted or prohibited. And Article 25 obliges parties to require 'health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent'. So, the reader may well think, ratifying this Convention, unless with serious reservations, will require our existing mental health laws to be rewritten. But the reader should be told that the UK, among many others, clearly does not think so, because it has not entered any reservation about the compulsory admission and treatment of people who are mentally disordered or disabled.

A second thread, emerging in particular from the essays by Philip Fennell, Neil Rees and Genevra Richardson, is the complexity arising from having separate systems of law to cater for mental illness – through processes for involuntary admission and treatment – and mental disability – through processes for providing substitute decision-makers for people who are unable to make their own decisions. Why not combine the two and have capacity as the governing criterion? Why not provide substitute decision-makers rather than give the state powers of compulsory detention and treatment? Would this approach not be more consistent with the principles of the CRPD? Again, the reader may well think that, having now got ourselves both a modernised Mental Health Act and a Mental Capacity Act in England and Wales, the next law reform step should be to see whether they could be combined once more in a coherent code. But the omens are not propitious, given that the government rejected the Richardson Committee's capacity-based vision for mental health law. Yet the essay by Jill Peay (the only one to deal with the criminal justice system) shows that capacity to stand trial – currently little used in England and Wales – might provide a more satisfactory route for diversion from the criminal to the civil system.

A third thread is the prospect of developing a new type of 'legalism' which would give more power to multidisciplinary tribunals to secure adequate and appropriate treatment and care. Thus Terry Carney envisages a new role for tribunals, which would continue to protect the patient's liberty interests but would also expand into decisions about medical treatment and social care. Joaquin Zuckerberg sees a similar potential for inquisitorial mental health tribunals in Canada to advance patients' positive rights. And Mary Donnelly, while citing Clive Unsworth's description of treatment reviews as 'a high water mark of legalism', argues that tribunals have the greatest potential for securing the most appropriate treatment through an accessible, fair and participative process. Oddly enough, there is a model in the UK, although it is not mentioned. Mental health reviews in England and Wales are now carried out by the same chamber of the unified tribunal system which deals with the special educational needs of children with learning difficulties and disabilities. The special needs tribunal is unique in having the power to order the authorities to make specified educational services available to an individual child. What a revolutionary idea it would be for the chamber to have the same power to order services to be made available to mental patients! Once again, of course, the omens are not good.

These threads carry through into the universal trend away from institutional care to care in the community. John Dawson discusses the proportionality calculus in community treatment orders, Bernadette McSherry wonders whether regulating voluntary treatment might, perhaps paradoxically, be a step in the direction of ensuring the delivery of high standards of health care, while Peter Bartlett reminds us that mental health law is a preoccupation of economically advanced countries, primarily in North America, Western Europe and Australia. Mental health services are virtually unknown in much of sub-Saharan Africa

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and no amount of legalism, whether old or new, is enough unless there are the services which people need. But it would have been good to hear more from South Africa, where there is a constitutional right of access to health care services and, as Penelope Weller mentions but does not explore, the constitutional court is developing a jurisprudence of justiciability for economic, social and cultural rights.

A final thread is raised by both John Dawson and John Petrila. Petrila comments that 'not all efforts to constrain the exercise of autonomy are coercive' (p. 378). Dawson asks:

> 'Does involuntary treatment reduce the freedom of action of individuals, by imposing external constraints on their will … Or does it advance their liberty … by improving their capacity to exercise control over their lives, free of internal constraints within their minds … ? Perhaps it is capable of doing both.' (pp. 332–33)

He quotes a patient's comment on his involuntary outpatient treatment: 'It's good but there's handcuffs on it.'

Would that be an apt description of the mental health systems of the future or do we need to dispense with the handcuffs altogether? The editors are to be congratulated for moving us on towards a new vision of what 'rights-based legalism', no longer a dirty word, could be all about.

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