

Mental Illness, Human Rights and the Law

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Brendan D. Kelly
Frontmatter
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This book is dedicated to Regina, Eoin and Isabel

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RCPsych Publications

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Foreword

Tom Burns

Professor Brendan Kelly has given us three books for the price of one. In the Preface and Chapter 1 we get a brilliant, crystal-clear overview of the international legislation that has driven mental health law since the Second World War. The alphabet soup of all the various conventions (the UDHR, ECHR, CRPD and more) is clarified for us, with their key features and differences laid out and explained. In Chapters 2–5 he presents the key features of the mental health legislations that clinicians need to understand. He does this in a separate chapter for each of the three UK jurisdictions (England and Wales, Scotland and Northern Ireland) and also for Ireland. These chapters chart how each of these jurisdictions has followed its own individual route to protect the human rights of people with mental illness. What are essentially universal and timeless challenges have been approached using the same basic set of tools but with different priorities. One jurisdiction emphasises advance statements, another advocacy, one emphasises best interests, another is concerned more with risk, whereas another attempts to integrate mental health law entirely with capacity legislation. Last, in Chapters 6 and 7 we are lifted from the mechanics of mental health legislation to consider the broader social context in which the positive human rights of the mentally ill are so clearly compromised and neglected. Why, despite all the rhetoric, is this group of individuals still denied a voice and social inclusion?

Readers will get more from this book than perhaps they expect. Presumably, the most thumbed pages will be your local legislation. Kelly's style of tracing the changes across the reviews and amendments of the individual Acts makes sense of how each jurisdiction has come to its current set of principles and practices. It also highlights those things we have probably become aware of in our peripheral vision. How many of us registered, for instance, that the Mental Health Act 1983 gave mental health review tribunals powers beyond simply upholding or discharging sections? I thought they had just drifted into doing it more and more and we had gone along with it.

How important, in reality, are these differences in emphasis between the jurisdictions? As Kelly points out, the level of ambition in revising

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legislation varies enormously, from tidying-up operations through to radical reform; the tone and emphasis also vary considerably. Yet we know that the Acts are concerned with the same practical procedures that we carry out all the time, wherever on these islands we work. How different would the detention and tribunal review of an individual with psychosis appear to an informed observer in Ireland, Scotland or England? Is it all just words or will the differences in emphasis lead to differences in practice? For a health services researcher like me this is the greatest lost opportunity in these legislative revisions.

What a pity, in this era of evidence-based medicine, that we could not get our legislators to require a full engagement in rigorous evaluations of these changes. And by this I mean rigorous, research-informed and hypothesis-driven evaluations, not just the voluminous annual reports of routinely collected figures. Imagine if we had been able to ask each of the drafting groups (who will have spent hundreds of hours on their tasks – this is no minor undertaking) to attach a clear hypothesis to each proposed change. Even going one stage back and asking them, before fixing a change into law, to state explicitly what was wrong with the current practice. Similarly to record how that could be demonstrated. What would be the anticipated change, and how would the outcome be demonstrated? What would they anticipate to be the change in outcome by legislating for the mental health review tribunal to be able to stipulate a treatment that is not in the current care plan? What will be the effect in Scotland of increased attention to previously expressed preferences and prioritising advance directives? Perhaps most important, how would you measure its effects? How would you decide if the change had been effective and worthwhile? What finding would be enough to make them rethink their changes? Does abandoning the distinction between mental illness and personality disorder and the associated treatability requirement in England and Wales result in more frequent compulsory admissions of individuals with personality disorder? Chapters 2–5 throw up an endless series of such questions and reading across them should stimulate several comparative research projects.

In Chapters 6 and 7, where Kelly concentrates on the forces that continue to disadvantage the mentally ill, he is at his most passionate and powerful. In our current technological phase of medicine it is easy to forget that our profession has a long history of political engagement (not always benign or successful). However, the point is made with some force that the major determinants of a decent life, with dignity, with social inclusion and rights protected as much as possible, lie outside the direct therapeutic encounter. This overlap between the macro-political, what Kelly refers to as ‘structural violence’, and the technicalities of the treaties influencing mental health legislation provides much of the most thought-provoking and emergent quality of this book.

Kelly praises the 1950 European Convention on Human Rights (ECHR) and its adoption in 1998 as the UK’s Human Rights Act. It has provided

an intuitively accessible framework for clear thinking about many tricky problems and highlighted unrecognised errors. We are now all familiar with Articles 2, 5 and 8 (protection of life and of family life and the prohibition of arbitrary detention).

But what are we to make of the 2006 United Nations Convention on the Rights of Persons with Disabilities (CRPD)? Kelly welcomes its unequivocal support for an active campaign to ensure the social rights of marginalised individuals, not just a careful eye to avoid entrenching or strengthening discrimination. However, its statement that no disability should contribute to a decision to deprive an individual of their liberty appears to totally undercut the basis of any mental health law. Mental health law is predicated on the understanding that there are conditions which, by their nature, deserve and require special consideration. Indeed, the whole justification for our profession rests on this!

In the Northern Ireland ‘fusion’ legislation, we see the most pronounced attempt to bring mental healthcare in line with the CRPD. Whether this drive to base compulsion entirely on capacity and thereby treat the mentally and physically ill equally is convincing you will have to decide yourself. I found it tortuous and unconvincing – in particular the introduction of ‘appreciation’ as a way of smuggling psychiatric thinking (and presumably diagnosis) back into the process without actually naming it. Surely this would be an example of where sophisticated research could really teach us something?

The CRPD question brings up an even bigger issue that Kelly seems well aware of, but (probably sensibly) leaves out of this book. This is whether mental health law thinking has become too dominated by an Anglophone (mainly US) over-preoccupation with autonomy as the overriding (sometimes, it seems, the only) principle of medical ethics. An invariable feature of ethical principles is that they are several and they are often at variance with each other and have to be weighed up in each individual case. That, of course, is why they remain principles, not laws. Few textbooks of medical ethics get away with less than four (beneficence, non-maleficence, autonomy, dignity) and many have several more. In most of the world the autonomous individual is not the obvious ideal. People strive to be good members of families, clans, groups and so on. Obligations are as sacred as rights.

When Isaiah Berlin delivered his 1958 inaugural lecture in Oxford on ‘Two Concepts of Liberty’ he distinguished ‘freedom from’ and ‘freedom to’. He identified then the hollow boast of prizing autonomy for individuals who were left to remain diseased or hungry. Thirty years later, in the wake of the successes of their human rights initiatives in mental health, US psychiatrists were writing of the shame of patients with psychosis being left to ‘die with their rights on’. Feminist sociologists, with their ‘ethics of care’, have consistently and cogently critiqued this overemphasis of legalism and autonomy. Psychiatrists in our daily work are confronted with

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its limitations, people exist in and through relationships – they are not an optional add-on. Being careful about protecting autonomy is clearly a good start (our history gives no room for complacency), but it is not really enough. In this excellent book Brendan Kelly has given us the tools and the initiative to move forward the thinking about mental health law and mental healthcare.

Tom Burns
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Preface

This is a book about psychiatry, mental illness and human rights. It is also, unashamedly, a manifesto for change, urging reconsideration of the ways in which the human rights of people with mental illness are protected and promoted, and urging social activism in addition to enhanced psychiatric care.

As is both traditional and necessary, much of this book explores legislative provisions relating to the right to liberty among people with mental illness. In the complicated, contested setting of mental healthcare, it is clearly essential that involuntary detention and treatment are appropriately regulated and monitored, so as to preserve this fundamental right. The opening chapters of this book duly examine legislation relating to these matters in some detail, in England and Wales, Northern Ireland, the Republic of Ireland and Scotland.

An exclusive focus on the right to liberty alone, however, fails to address or even acknowledge a range of broader social injustices and denials of rights commonly experienced by people with enduring mental illness (Kelly, 2007a). This book takes this broader perspective strongly to heart, especially in the closing chapters, which are devoted to achieving social justice for the mentally ill and practical steps towards effecting change.

Chapter 1 sets the scene by considering the emergence of the idea of human rights in the first instance and the relationship between human rights and mental illness. This chapter also explores the United Nations (UN) Universal Declaration of Human Rights (UN, 1948) and eventual recognition of the particular importance of human rights in the context of mental illness in the late 20th century. Key provisions of the legally binding European Convention on Human Rights (ECHR) (Council of Europe, 1950) are outlined next, along with measures to incorporate the ECHR into national law in the UK (Human Rights Act 1998) and Ireland (European Convention on Human Rights Act 2003).

It is the ECHR that has produced the greatest shift in thinking in this area, with a series of judgments that strongly re-emphasised various protections for the rights of the detained mentally ill, especially in relation

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to humane conditions in therapeutic settings and prompt, effective reviews. As is the case throughout this book, the examination of case law in this chapter is thematic rather than exhaustive; more detailed accounts of case law are available elsewhere (e.g. Bartlett & Sandland, 2014). Instead, this chapter explores cases selected thematically to demonstrate key ECHR principles that are likely to be applicable across all countries within the remit of the ECHR, and, possibly, beyond. Chapter 1 concludes with a consideration of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991) and the UN Convention on the Rights of Persons with Disabilities (CRPD) (2006), with particular focus on the rights of people with mental illness.

The next four chapters of the book examine legislative provisions relating to mental illness and human rights, with particular focus on involuntary admission and treatment, in England and Wales (Chapter 2), Northern Ireland (Chapter 3), Ireland (Chapter 4) and Scotland (Chapter 5).

Chapter 2 examines the Mental Health Acts of 1983 and 2007 in England and Wales, with particular emphasis on human rights. A detailed and excellent ‘how to’ guide for users of the legislation is already available from Zigmond (2016), so this chapter focuses instead on specific human rights issues that arose following the Mental Health Act 1983, relating to public safety, the burden of proof in mental health tribunals, the right to ‘respect for private and family life’ (ECHR, Article 8) and powers of tribunals to release patients. This chapter then explores key features of the Mental Health Act 2007 from a human rights perspective, including its definition of mental disorder, criteria for detention, expansion of professional roles, supervised community treatment and mental health tribunals. As with the other chapters, this chapter examines civil rather than criminal mental health legislation, provisions relating to adults rather than children, and mental health legislation rather than mental capacity legislation, although the latter is considered from time to time insofar as it relates directly to mental health legislation.

Chapter 3 examines current mental health legislative reform in Northern Ireland, commencing with the ‘comprehensive legislative framework’ presented by the Bamford Review of Mental Health and Learning Disability (2007a). This chapter then examines Northern Ireland’s Mental Capacity Bill 2015, which seeks to fuse mental health legislation and mental capacity legislation, in apparently improved compliance with the CRPD and along lines similar to those proposed by Dawson & Szmukler (2006) and Szmukler *et al* (2014). This is one of the most challenging and possibly progressive innovations in European mental health legislation in several decades and merits close attention.

Chapter 4 examines mental health legislation in Ireland from a human rights perspective, exploring legislation prior to Ireland’s Mental Health Act 2001 as well as key provisions of the 2001 Act. Specific human rights issues are then examined, pertaining to, among other matters, mental

health tribunals for detained patients, civil proceedings in the courts, mental health tribunals for discharged patients, issues of capacity among ‘voluntary’ patients, the speedy introduction of the Mental Health Act 2008, and alleged paternalism in the interpretation of the 2001 Act by the Irish courts. Particular attention is paid to the implications of these matters for the human rights of the mentally ill and the likely direction of future reforms in Ireland, based on the report of the Expert Group on the Review of the Mental Health Act 2001 (2015).

Chapter 5 moves to Scotland, and focuses on reform of mental health legislation there, commencing with an overview of the Mental Health (Care and Treatment) (Scotland) Act 2003. Again, this is not an exhaustive analysis of the content of the 2003 Act or a ‘how-to’ manual for practitioners, but rather a basis for exploring the process of reform in Scotland, with particular emphasis on human rights. Rather than assuming an approach primarily rooted in case law, this chapter focuses on the process of reform and examines the Limited Review of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Scottish Government Review Group, 2009) (‘McManus Review’) and subsequent Mental Health (Scotland) Act 2015. The chapter concludes with a consideration of the challenges inherent to reform of mental health legislation not only in Scotland but in other jurisdictions too.

Chapter 6 moves beyond issues directly related to mental health legislation and uses as its starting point the provisions of the CRPD, especially in relation to economic and social rights, and avoidance of discrimination and stigma. The concept of ‘structural violence’ (Farmer, 2003) is invoked to describe the cumulative effects of adverse social, economic and societal forces which, along with the social stigma of mental illness, impair access to psychiatric and social services among people with mental illness, impinge on rights, and amplify the effects of illness in the lives of sufferers and their families (Kelly, 2005). As a result of these overarching social and economic factors, many of the mentally ill are systematically excluded from full participation in civic and social life, and are constrained to live lives shaped by stigma, isolation, homelessness and denial of rights.

Rights-based mental health legislation is not necessarily the only or even the best way to address key aspects of this situation, which relates in large part to broader social injustice and denial of rights, rather than just denial of liberty. This chapter argues that the enhancement of individual agency is central to efforts to address the ‘power gap’ experienced by people with mental illness. This can be achieved, at least in part, through a combination of (a) rights-based approaches, (b) approaches based on enhancing direct political participation (e.g. voter registration, formation of more effective interest groups) and (c) additional approaches, including increasing accountability throughout services, recognising the effects of sociopolitical change on the context of care and adapting the concept of ‘soft power’ to strengthen advocacy programmes.

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Chapter 7 concludes by summarising and synthesising key themes and arguments from earlier chapters and outlining ways in which mental health workers can protect and promote human rights and social justice in day-to-day clinical practice, as well as fight for social justice for the mentally ill at local, national and international levels (Callard *et al*, 2012). In this chapter, as is the case throughout the book, there is a strong emphasis on not only the protection of specific human rights, but also the enhancement of societal circumstances that shape the landscape in which mental illness develops and is treated, in which rights are observed or violated and in which recovery takes place.

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The contents of this book do not represent legal advice. Neither the author nor the publisher accepts any responsibility for the use of this book's contents as legal advice. In clinical and legal practice, readers are advised to seek formal legal advice in relation to matters discussed in this book, rather than relying on the overviews, analyses and opinions presented here.

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Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, 1997
Charter of Fundamental Rights of the European Union, 2000
Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union ['Treaty of Lisbon' or 'Reform Treaty'], 2008

UK

Habeas Corpus Act 1679
Bill of Rights 1689
Vagrancy Act 1744
Mental Treatment Act 1930
Human Rights Act 1998
Domestic Violence, Crime and Victims Act 2004

England and Wales

Mental Health Act 1959
Mental Health (Amendment) Act 1982
Mental Health Act 1983
Mental Health Act 1983 (Remedial) Order 2001
Mental Capacity Act 2005
Mental Health Act 2007

Scotland

Mental Health (Scotland) Act 1984
Criminal Procedure (Scotland) Act 1995
Adults with Incapacity (Scotland) Act 2000
Mental Health (Care and Treatment) (Scotland) Act 2003
Mental Health (Scotland) Bill 2014
Mental Health (Scotland) Bill 2015
Mental Health (Scotland) Act 2015

Northern Ireland

Mental Health (Northern Ireland) Order 1986
Enduring Power of Attorney (Northern Ireland) Order 1987
Mental Capacity Bill 2015

Ireland

Criminal Lunatics (Ireland) Act 1838
Constitution of Ireland (Bunreacht na hÉireann) 1937
Mental Treatment Act 1945
Public Authorities Judicial Proceedings Act 1954
Mental Health Bill 1999
Human Rights Commission Act 2000
Mental Health Act 2001
Mental Health Act 2008
European Convention on Human Rights Act 2003
Assisted Decision-Making (Capacity) Bill 2013
Mental Health (Amendment) Act 2015

Cases

UK

- P v Cheshire West and Chester Council and Anor, and P and Q v Surrey County Council* [2014] UKSC 19.
- R v Deputy Governor of Parkhurst Prison, ex parte Hague and Weldon* [1992] 1 AC 58.
- R (C) v London South and West Region Mental Health Review Tribunal* [2001] EWCA Civ 1110, [2002] 1 WLR 176.
- R (D) v Secretary of State for the Home Department* [2002] EWHC 2805 (Admin), [2003] 1 WLR 1315.
- R (H) v Mental Health Review Tribunal* [2002] EWHC 1522 (Admin), [2002] QB 1.
- R (H) v Secretary of State for Health* [2005] UKHL 60, [2006] 1 AC 441.
- R (KB) v Mental Health Review Tribunal* [2003] EWHC 193 (Admin), [2004] QB 936.
- R (M) v Secretary of State for Health* [2003] EWHC 1094 (Admin), [2003] 1 MHLR 88.
- R (Munjaz) v Mersey Care NHS Trust* [2003] EWCA Civ 1036, [2004] QB 395.
- R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2006] 2 AC 148.
- R (N) v Ashworth Special Hospital Authority* [2001] EWHC 339 (Admin), [2001] HRLR 46.
- R (PS) v Responsible Medical Officer* [2003] EWHC 2335 (Admin).
- Rabone and Anor v Pennine Care NHS Trust* [2012] UKSC 2.
- Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74.
- Savage v South Essex Partnership NHS Foundation Trust* [2010] EWHC 865 (QB).

Ireland

- AMC v St Lukes Hospital, Clonmel* [2007] IEHC 65.
Croke v Smith [1994] 3 IR 529.
Croke v Smith (No. 2) [1998] 1 IR 101.
D Han v The President of the Circuit Court and Doctor Malcolm Garland and Doctor Richard Blennerhassett and Doctor Conor Farren and Professor Patrick McKeon and the Mental Health Commission and the Mental Health Tribunal [2008] IEHC 160.
EH v Clinical Director of St. Vincent's Hospital and Ors [2009] IEHC 69.
EH v St. Vincent's Hospital and Ors [2009] IESC 46.
FW v Dept. of Psychiatry James Connolly Memorial Hospital [2008] IEHC 283.
FX v Clinical Director of the Central Mental Hospital [2015] IEHC 190.
JB v The Director of the Central Mental Hospital and Dr. Ronan Hearne and the Mental Health Commission and the Mental Health Tribunal [2007] IEHC 201.
JF v DPP [2005] 2 IR 174.
JH v Vincent Russell, Clinical Director of Cavan General Hospital [2007] unreported High Court judgment.
MD v Clinical Director of St Brendan's Hospital & Anor [2007] IEHC 183.
MM v Clinical Director Central Mental Hospital [2008] IESC 31.
MR v Cathy Byrne, administrator, and Dr. Fidelma Flynn, clinical director, Sligo Mental Health Services, Ballytivnan, Co. Sligo [2007] IEHC 73.
Patrick McCreavy v The Medical Director of the Mater Misericordiae Hospital in the City of Dublin, and the Clinical Director of St. Aloysius Ward Psychiatric Unit of the Mater Misericordiae Hospital in the City of Dublin and the Health Service Executive and, by order, the Mental Health Tribunal [2007] SS 1413.
PL v Clinical Director of St. Patricks University Hospital and Dr. Séamus Ó Ceallaigh [2012] IEHC 15.
Q v St Patrick's Hospital [2006] O'Higgins J, *ex tempore*, 21 December 2006.
SM v The Mental Health Commissioner, The Mental Health Tribunal, The Clinical Director of St Patrick's Hospital, Dublin, Attorney General and the Human Rights Commission [2008] JR 749.
TH v DPP [2006] 3 IR 520.
T O'D. v Harry Kennedy and Ors [2007] IEHC 129.
TS v Mental Health Tribunal, Ireland, The Attorney General, The Minister for Health and Children, The Mental Health Commission, Bola Oluwole and Ciaran Power [2007] JR 1562.
WQ v Mental Health Commission [2007] IEHC 154.
Z v Khattak and Anor [2008] IEHC 262.

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- Aerts v Belgium* [1998] 29 EHRR 50.
Ashingdane v UK [1985] 7 EHRR 528.
Benjamin v UK [2002] 36 EHRR 1.
Croke v Ireland [2000] ECHR 680.
De Wilde, Ooms and Versyp v Belgium [1972] 1 EHRR 438.
E v Norway [1990] 17 EHRR 30.
Fox, Campbell and Hartley v UK [1990] 13 EHRR 157.
Guzzardi v Italy [1980] 3 EHRR 333.
Herczegfalvy v Austria [1991] 15 EHRR 437.
HL v UK (Bournemouth) [2004] 40 EHRR 32.
HL v UK (Bournemouth) [2004] 40 EHRR 761.
HM v Switzerland [2004] 38 EHRR 17.
Hutchison Reid v UK [2003] 37 EHRR 9.
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Johnson v UK [1997] 27 EHRR 296.
Kolanis v UK [2006] 42 EHRR 12.
LR v France [2002] Application No. 33395/96 (ECHR, 27 June 2002).
Megyeri v Germany [1992] 15 EHRR 584.
Munjaz v UK [2012] App no 2913/06 (ECHR, 17 July).
Nikolova v Bulgaria [2001] 31 EHRR 3.
Nowicka v Poland [2003] 1 FLR 417.
Pereira v Portugal [2003] 36 EHRR 49.
Van der Leer v Netherlands [1990] 12 EHRR 567.
Winterwerp v Netherlands [1979] 2 EHRR 387.
X v UK [1981] 4 EHRR 181.
X v UK [1981] 4 EHRR 188.