Alice Diver · Jacinta Miller *Editors*

# Justiciability of Human Rights Law in Domestic Jurisdictions

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# Foreword

The timing of this book with its eclectic and impressive range of essays could not have been published at a better or more opportune moment. Human rights, in all their guises, are often the subject of high-level and vociferous debate in both national and international circles. It seems that not a day passes without some call to either abolish or modify human rights legislation or perhaps even to introduce new laws on humanitarian grounds. In compiling this edited volume, Alice Diver and Jacinta Miller have undoubtedly filled a real gap within the current literature.

This book presents a wide range of topics across an extensive geographical spread. In so doing, it considers some of the major tensions that exist in developing and developed jurisdictions, from a myriad range of perspectives. The essays present a diverse collection of themes all unified by a single golden thread—that of the interpretation given to human rights protection, and if indeed such rights are to be given true substance, the extent to which these can, or even should, be enforced by the courts. The potential tensions in the relationship between human rights and the rule of law are also called into question by another central and unifying theme: that of human dignity. A fundamental question concerns the extent to which the right to dignity can be promoted and protected by law. Similar issues are apparent in the context of protection of other human rights that engage social, political or economic considerations. While these arguments are framed principally in terms of 'rights', the message that emerges ultimately is that such rights may, in fact, be non-justiciable.

The global perspective of the current collection of articles is to be commended highly as an exemplar for demonstrating the superficiality with which some societies and cultures may address similar tensions. Although details and contexts may differ, the potential impact of human rights, in its widest interpretation, is based upon commonalities rather than differences. After all, human rights law affects us all.

This book is a welcome contribution to the polemic discussion of the challenges of human rights in a global context. The careful and nuanced analyses offered by the contributors will be of value to scholars, decision-makers, as well as those responsible for shaping evolving policy balanced within a framework of competing

interests. There is no doubt that readers of this treatise will be compelled to reflect carefully and fully upon what it tells us about human rights law and the extent to which these rights are truly amenable to adjudication by the courts.

Jo Samanta

# Preface

This collection of 16 essays, by 19 authors, is the result of an open call for contributions sent out in the summer of 2014. The general theme was intended to be something along the lines of 'Human Rights? Humans Wronged!'[1] and the invitation to submit a chapter proposal encouraged prospective contributors to look critically at current human rights issues and to evaluate whether the domestic justiciability of certain 'rights' was at times essentially fictive in nature. Several authors sought further clarification: 'Are we looking for gaps in implementation, enforcement, or monitoring?' 'What issues or countries in particular are you hoping to hear about?' The answering brief was, 'Everything and anything that makes you angry, bewildered or upset about the fate of your fellow humans, irrespective of topic or jurisdiction. Success stories are equally welcome however.' As the proposals began to arrive, several colleagues remarked upon the clear lack of 'success stories' amongst them. Generally, contributors were concerned with highlighting in some detail exactly how the limitations or failings of human rights law were continuing to impact significantly upon the rights of some of the most vulnerable members of society. The need to promote and protect human dignity was a common theme, across a wide geographical range (Africa, Europe, South America, the Middle East) and somewhat diverse topics, such as health-relevant rights issues (first chapter to seventh chapter), aspects of transitional justice (eighth chapter to tenth chapter), issues in criminal justice (11th chapter and 12th chapter) and matters falling within the remit of property rights (13th chapter to 16th chapter). The question of whether or not domestic judges and legislators are best placed to embed or ensure greater consistency in relation to domestic justiciability is often

[1] I am very grateful to my patient editor, Anke Seyfried, for suggesting the book's current title instead and for indulging my request for the collection to be as wide-rangingly inclusive as possible, in terms of its subject matter, geographic scope and authorship: early career researchers are well represented here, as are a good number of more established academics, in a bid to gather in a wide range of perspectives, arguments and approaches to the various issues surrounding the domestic justiciability of human rights.

asked within these essays; there are also useful discussions on how the concepts of equality, non-discrimination, fairness and equity might serve—or indeed at times fail—to remind domestic decision-makers of their obligations towards those who lack the means to make their voices heard.

The first chapter is by Jo Samanta (Reader in Medical Law, De Montfort University, Leicester, UK) and is entitled 'Enforcing Human Rights at End of Life: Is There a Better Approach?' It focuses on questions that surround the end, and the ending, of life, from the perspective of lawyers, clinicians and wider society. UK politicians and the media frequently view high-profile cases as comprising either a 'right-to-die' or a 'right-to-live'. Legal challenges relevant to end-of-life decision-making have prompted calls for law reform and led to adjudication before domestic and European courts. The common thread between such cases is the assertion of human rights violations: despite their promise, human rights sometimes fail to deliver, often on the basis of a wide margin of appreciation. This chapter reviews some of the dilemmas that have involved end-of-life decisions for adults with, and without, capacity. It considers a range of domestic and European decisions that have involved a breach, or an alleged breach, of the human rights protected by the European Convention. On the basis of recent jurisprudence, it argues that enforcement of legal rights through the court system should be the last, rather than first, resort.

The second chapter is jointly authored by Jacinta Miller (Senior Lecturer in Law, Northumbria University) and Alice Diver (Senior Lecturer, School of Law and Criminology, Edge Hill University) and is entitled 'Can Rights Be Ring-Fenced in Times of Austerity? Equality, Equity and Judicial 'Trusteeship' over the UK's Fairness Agenda'. It seeks to argue that although the state has a general duty to preserve finite public resources during times of 'austerity', it must also seek to promote just and 'equitable outcomes' via its decision-making processes. Equitable concepts may prove to be more useful than basic equality principles when seeking to define adequacy of living standards; this is especially so given how budgetary limitations have impacted significantly upon the lives of the most vulnerable members of society, not least in respect of such 'fragile' socio-economic rights as adequate housing or access to health care. The promotion and protection of such rights tend to require considerable levels of financial and political bolstering, in the absence of which they are often at risk of being forever framed as merely aspirational in nature, suitable only for some gently progressive form of eventual realisation. Litigation in domestic courts remains key to the promotion of such rights and interests: a rights template tied to the notion of 'socio-economic equity' could perhaps persuade domestic judges to avoid indulging in 'over-deference' and instead perhaps see themselves as the 'trustees' of public budgets, and indeed of those fundamental socio-economic rights that such funds are meant to protect. Arguably, domestic judges are best placed to keep reminding legislators and policymakers of their duties to identify, outline and avoid dipping below basic rights norms and standards and to prevent, or at least clearly denounce, egregious lapses in the preservation of human dignity.

The third chapter is a joint contribution by David Hand (PhD Candidate), Chantal Davies (Solicitor, Senior Lecturer in Human Rights Law and Discrimination Law) and Ruth Healey (Senior Lecturer in Human Geography), University of Chester, UK. Entitled 'The Right to Healthcare: A Critical Examination of the Human Right of Irregular Migrants to Access State-Funded HIV/AIDS Treatment in the UK', it looks at how health care legislation within the United Kingdom has, together with immigration policies, progressively restricted the rights of 'irregular migrants' to access free medical treatment (referred to disparagingly by some as 'health tourism') in spite of the existence of the right to the 'highest attainable standard of health' having been outlined clearly in international human rights law. Policy discussions concerning the allocation of health resources have typically been led by the perception that overseas patients must be actively discouraged from "taking advantage" of the UK's National Health Service, particularly in the context of treatments for HIV/AIDS. The jurisprudence of the European Court of Human Rights is also significant, as are the socio-legal implications of the failure by decision-makers to distinguish between HIV and AIDS.

The fourth chapter by Jacinta Miller (Senior Lecturer in Law, Northumbria University) also examines issues surrounding the right to health, not least that of human dignity. Entitled 'Dignity: A Relevant Normative Value in 'Access to Health and Social Care' Litigation in the United Kingdom?' it considers the extent to which greater recognition might be given to the value of dignity within cases involving 'access to care' difficulties. Particular reference is made to the recent Strasbourg case of *Mc Donald v United Kingdom*. The approach taken in this case raised a number of thorny questions as to how 'dignity' might be better understood and indeed protected during and after assessments of the health and social care needs of older persons, against a backdrop of economic recession and finite resources. The chapter asks whether the concept of a right to dignity as outlined in the *McDonald* litigation is compatible with the current understanding of dignity as it exists in health law generally, not least in relation to the 'right to health' approaches set out in Article 12 ICESCR and CESCR General Comment 14. It argues that dignity is not simply a negotiable interest to be crudely balanced against other individual and collective rights: rather, it offers a clear, baseline standard against which any meaningful forms of implementation and monitoring of a meaningful right to access health or social care must be assessed.

The fifth chapter, written by Emmanuel Kolawole Oke (PhD Candidate, Faculty of Law, University College Cork, Ireland), is entitled 'Patent Rights, Access to Medicines, and the Justiciability of the Right to Health in Kenya, South Africa and India'. It examines how the national courts in these three developing countries have respectively addressed the tensions between patent rights and the right to health, via litigation. As a result of the WTO's Agreement on Trade Related Aspects of Intellectual Property Rights, developing countries that are members of the WTO are required to provide patent protection for pharmaceutical products. These patent rights create conflicts, however, between the intellectual property rights of pharmaceutical companies and the right to health of those patients who cannot afford to pay for patented medicines. The chapter examines the nature of the clash between

patent rights and the right to health, before considering the issue of justiciability of the right to health in Kenya, South Africa and India. It concludes with an analysis of how the domestic courts have adjudicated upon some of the key pharmaceutical patent cases involving the right to health.

The sixth chapter is authored by Eghosa O. Ekhator and Rhuks Ako (both of the University of Hull Law School, UK) and Ngozi Stewart (Faculty of Law, University of Benin, Nigeria). It is entitled 'Overcoming the (Non)justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Right to a Healthy Environment in Nigeria'. Its main argument is that the legal framework regulating socio-economic rights in Nigeria is essentially ambiguous. Such rights, listed under Section II of the Constitution (Fundamental Objectives and Directive Principles), remain non-justiciable by virtue of section 6(6)(c) of the Constitution. Nigeria, as a dualist state, has however ratified and incorporated into national law the African Charter on Human and People's Rights in accordance with relevant constitutional provisions. As such, socio-economic rights must be essentially justiciable. This chapter aims to provide a critical examination of the status of such socio-economic rights in Nigeria, using the right to a healthy environment as a case study and taking a holistic approach to both sides of the argument. Premised on the doctrine of harmonious construction, the authors suggest a means of resolving the debate that currently surrounds the existence and nature of the (non)juridical 'right' to a healthy environment.

The seventh chapter is by Deborah Magill (Research Assistant, Transitional Justice Institute, Ulster University, Northern Ireland) and is entitled 'Justiciable Disability Rights and Social Change: A Northern Ireland Case Study'. Disability discrimination legislation within the UK has for several decades provided justiciable rights for people with disability; these justiciable rights have also been utilised by organisations to bring about significant social changes for disabled people, both individually and collectively. This chapter examines the strategic use of domestically justiciable individual rights by organisations in the area of disability rights in the workplace. In particular, it analyses the differing perspectives on the utility of justiciable rights in securing social change, of two key organisations: Disability Action and the Equality Commission for Northern Ireland. An introduction to the origins and objectives of each organisation is followed by a detailed look at Disability Action's involvement in referring and supporting claimants seeking to litigate their rights and how the Equality Commission for Northern Ireland has engaged in a litigation strategy throughout the decade 2001–2011. The chapter then explores the role played by litigation and its significance for the Equality Commission and Disability Action in their pursuit of achieving meaningful social change for disabled workers. It analyses the reasoning behind each of the organisations' engagement with Industrial Tribunals in Northern Ireland. The empirical data used in this analysis has been drawn from seven case files held by the Equality Commission for Northern Ireland on completed cases that were examined in considerable detail, with interview transcripts from semi-structured interviews with four staff from Disability Action and eight staff from the Equality Commission for Northern Ireland, Disability Action and Equality Commission for Northern Ireland

publications. The analysis also looks to insights drawn from the current literature on law and social change.

The eighth chapter is by Katie Boyle (Anna Lindh Fellow, Lecturer and ESRC Researcher, University of Limerick/University of Edinburgh). Entitled 'Economic, Social and Cultural Rights in Northern Ireland: Legitimate and Viable Justiciability Mechanisms for a Conflicted Democracy', it proposes justiciability mechanisms for economic, social and cultural rights in Northern Ireland. The research builds on an examination of the particular circumstances of Northern Ireland: a transitional 'conflicted democracy' within a wider liberal state, which is a member of the EU and Council of Europe, committed to the operation of international human rights law. The most vulnerable and marginalised persons in society, especially during times of conflict, are often exposed to ESC rights violation on a number of indicators, and transitional justice mechanisms tend to focus mainly upon civil and political rights, meaning that an economic, social and cultural rights deficit is left largely unaddressed. Northern Ireland falls within such a category, and as a result rights violations can undermine its fragile peace. This chapter explores those mechanisms that could assist in addressing the rights deficit in Northern Ireland in accordance with the particular constitutional framework of the UK and with the rule of law. These justiciable mechanisms are applicable beyond the Northern Ireland context, holding wider relevance for the rest of the UK and beyond.

The ninth chapter is by Francesca Capone (Research Fellow in Public International Law and Didactic Co-ordinator of the Master Programme in Human Rights and Conflict Management, Scuola Superiore Sant'Anna, Pisa, Italy). Entitled 'Children in Colombia: Discussing the Current Transitional Justice Process Against the Backdrop of the CRC Key Principles', it outlines why Colombia is at present widely regarded as one of the most interesting case studies in the fields of human rights and transitional justice. The five-decade long civil war has resulted in a countless number of victims, disproportionately affecting the most vulnerable sectors of the population, not least, children. Over the past few years, the Colombian government has sought to achieve a twofold aim: passing laws and regulations to enhance its compliance with international human rights law standards and establishing measures, legal and non-legal, to promote a comprehensive transitional justice process, based upon achieving reconciliation, justice and reparations for the victims of the ongoing armed conflict. Both sets of actions have had an impact on children. Domestic laws aimed at embedding the tenets of the Convention on the Rights of the Child and its Optional Protocols, together with legislation arising out of the transitional justice process, have forged a unique framework: this merits analysis, particularly as it relates to promoting and protecting the best interests of the child principle and to the child's right to participate in all decisions and processes affecting them.

The tenth chapter is by Hilmi Zawati (Chair of the International Centre for Legal Accountability and Justice). Entitled 'Prosecuting International Core Crimes Under Libya's Transitional Justice: The Case of Saif Al-Islam Gaddafi and Abdullah Al-Senussi', it looks to the aftermath of the widespread and systematic violence directed by former Libyan government forces and paramilitaries against peaceful

demonstrations in Benghazi and other Libyan cities in mid-February 2011 and to the UN Security Council's unanimous adoption of Resolution 1970, referring the situation in Libya to the Prosecutor of the International Criminal Court under Chapter VII of the Charter of the United Nations (pursuant to Article 13(b) of the Rome Statute of the International Criminal Court). Consequently, the Pre-Trial Chamber I (PTCI) of the Court issued three warrants of arrest for Muammar Qaddafi and his son Saif Al-Islam, as well as for Abdullah Al-Senussi, Gaddafi's intelligence chief. After the killing of Muammar Qaddafi on 20 October 2011, and following the capture of Saif Al-Islam and Al-Senussi, Libya challenged the admissibility of the cases against them. While the PTCI has determined that the case against Al-Senussi is inadmissible before the Court, it rejected Libya's challenge of the admissibility of the case against Saif Al-Islam and requested that the Libyan government meet its obligations under the UN Security Council's Resolution 1970 (2011) and surrender the suspect to ICC custody in The Hague. After examining the ICC's complementarity regime and its inconsistent decisions on the admissibility of the above cases, and also considering the challenges involved in prosecuting international core crimes under Libya's transitional justice system, this chapter explores whether or not the latter is equipped to undertake the prosecution of Saif Al-Islam and Al-Senussi for international core crimes—particularly those widespread and systematic attacks—allegedly committed by Libyan government agents against the civilian population during the February 2011 uprising. After an extensive analysis of the above cases, this chapter argues that the post-Gaddafi Libyan courts are not the proper judicial bodies to undertake such prosecutions, and reaches the conclusion that, unless Libya restores its justice system and establishes effective judicial mechanisms and democratic institutions, the country will continue to suffer instability for a considerable period of time.

The 11th chapter is by Michelle-Thérèse Stevenson (PhD Candidate, Centre for Criminal Justice, School of Law, University of Limerick). It is entitled 'DNA Evidence Under the Microscope: Why the Presumption of Innocence Is Under Threat in Ireland' and highlights how DNA provides a formidable type of evidence which is becoming increasingly relied upon by the prosecution in Ireland, to the point perhaps where 'fair hearing' rights (under Article 6 of the European Convention) may be compromised. In many jurisdictions, courts and criminal investigators have been quick to seize upon its probative power, yet apparently slow to acknowledge the potential for fallibility. Yet despite DNA evidence's clear advantages, research demonstrates that the interpretation of certain DNA mixtures may be subject to bias. What is more, the scientific community continues to warn that there is still no definitive frame of reference for interpreting certain mixed DNA profiles. There are two additional problems running parallel to this in Ireland. First, the presumption of innocence is marginalised in the jurisdiction. Second, the Criminal Justice (Forensic Evidence and Database System) Act 2014 raises a number of human dignity and rights concerns which present the ancient legal precept of presumed innocence with even further challenges in Ireland. The purpose of this chapter is therefore to investigate the extent to which DNA evidence imperils the presumption of innocence in Ireland.

The 12th chapter is by Maria Helen Murphy, (School of Law, Maynooth University, Ireland.) It is entitled 'Surveillance and the Right to Privacy: Is an 'Effective Remedy' Possible?' and argues that privacy—the right most directly implicated in any discussion of surveillance—is often identified solely as being of benefit to the individual, weighing against general social goods such as security. The imperceptibility of both the concept of privacy and the value of 'national security' favours the security side of the equation, as threats from terrorism and organised crime loom large, and as omnipresent fears in our security conscious society. Recognising these challenges, recourse to an external—yet legitimate—source of privacy protection is an attractive option. Accordingly, the European Convention on Human Rights (ECHR) is a crucial instrument of human rights protection in the area of surveillance. Ireland has avoided direct scrutiny of its surveillance regime from the ECtHR, although the jurisprudence of the Strasbourg Court has played a clear role in the formulation of Irish surveillance legislation. In spite of this influence, there is cause to suspect that legislative reforms may not add up to effective protection of the right to respect for private life as guaranteed by Article 8 of the European Convention. While Article 8 is the substantive article most relevant in the surveillance context, the right to an effective remedy, as provided for in Article 13, must also be considered. The specific function of Article 13 is to ensure the 'availability at national level of a remedy to enforce the substance of the Convention rights and freedoms'. The inherently secretive nature of surveillance presents a considerable obstacle to the justiciability of Article 8 rights in the surveillance context. This chapter considers how the challenges to providing an effective remedy in the surveillance context can be resolved in Ireland and uses the Criminal Justice (Surveillance) Act 2009 (Surveillance Act) as a case study in order to evaluate how the Oireachtas has attempted to meet the standard for an effective remedy.

The 13th chapter is by Roberto Cippitani (Università degli Studi di Perugia, Perugia, Italy). Entitled 'The 'Contractual Enforcement' of Human Rights in Europe', it argues that the sphere of private law can adapt to new and unforeseen social and economic events and circumstances: its traditional function was to provide logical, legal tools (such as contracts, wills and trusts) to solve those difficult problems that tend to arise within the realm of 'human relationships'. Just as private law matters are no longer beyond the reach of human rights law, such too might certain private law concepts (e.g. good faith, fiduciary obligation, fairness, liability and the need for redress) provide a useful means of embedding meaningful rights protections into domestic legal systems. The concept of the contract is particularly significant however, for example, in respect of implementing public policies that are ostensibly aimed at protecting personal and collective rights. Given that 'the contract' arose from a need to protect property interests, and guide exchanges of key rights between individuals and organisations in a manner that aimed to promote some level of fairness and equality between the contracting parties, it is not surprising that much domestic case law and legislation on private law matters increasingly reflect the influence of human rights principles, as do a number of Constitutional provisions. Examples are drawn from domestic

constitutions, case law and statutes on the areas of social service provision, consent to health treatments or research activities, the capacity to provide such consent and the protection of privacy and human dignity. Put simply, the chapter argues that the increasingly blurred distinctions between the spheres of public and private laws seem to be gradually allowing for a more active embedding of fundamental rights protections at the level of domestic implementation.

The 14th chapter is by Alice Diver (Senior Lecturer, Edge Hill University) and is entitled 'Putting Dignity to Bed? The Taxing Question of the UK's Housing Rights Relapse'. It argues that the UK's recent statutory cap on Housing Benefit (known generally as the 'bedroom tax') has given rise to a small but significant spate of domestic cases examining such issues as legally justified discrimination, equality and the impacts of public purse decision-making on the realisation of resource-dependent socio-economic rights. Taken together, these decisions provide useful, if depressing, guidance for anyone keen to challenge the introduction of similar austerity measures: a meaningfully juridical right to adequate housing seems unlikely to be fully embedded into domestic law, or indeed usefully defined, any time soon. The question of whether some form of adequate housing baseline rights standard can be identified (i.e. in respect of preventing indignity, squalor or homelessness) remains unanswered; instances of unequal treatment and discrimination may be framed as both lawful and justified on the basis of finite state resources. Arguably, if public funds are needed for the realisation of such basic entitlements as adequate housing or social security, then these rights might be more accurately described as social privileges. If a 'duty' to preserve finite state resources provides an acceptable 'get out clause' for jurists and legislators (to legally infringe basic rights), then there is no guarantee that similar reasoning might not yet be applied to cases involving civil or political rights issues. Economic austerities should not bring to mind political atrocities: where benefit caps have led directly to food banks, evictions and squalor, it can be argued that the concept of a human dignity baseline has been ill-served by those tasked with ensuring meaningful protection for human rights.

The 15th chapter is by Khanyisela Moyo (Lecturer, Transitional Justice Institute and School of Law, Ulster University) and is entitled 'Justiciable Property Rights and Post-colonial Land Reform: A Case Study of Zimbabwe'. It argues that land reform is an intrinsic component of the right to an adequate standard of living, in that landlessness amounts to an abrogation of the obligation to fulfil this right as outlined in the International Covenant on Economic, Social, and Cultural Rights (ICESR) and the Universal Declaration of Human Rights (UDHR). Access to land is a basic component of the right to adequate food. Further, the World Bank has stated that the emphasis of land reform in developing countries ought to be on improving property rights. Yet land reform programmes also involve the modification of prevailing property rights in a manner that can be construed as infringing upon the right to property. This chapter scrutinises the tension between a justiciable right to property and a state-led agrarian land reform programme in a post-colonial

context by examining Zimbabwean constitutional law. Land reform was a crucial component in Zimbabwe's transition from the racist colonial past to majority rule and justice. The major aims of this reform were to transfer land from whites to blacks so as to foster peace, empower the landless and war veterans, reduce overpopulation in communal areas, maintain and if possible increase existing levels of agricultural production and improve standards of living. Cognisant of the economic importance of the white farmers and also of the experience of Mozambique, where their departure resulted in economic collapse, the country's independence negotiations struck a balance between two competing policy objectives, namely to redress historical economic inequalities and to promote economic growth. These concerns were reflected in the declaration of rights enshrined in the country's independence Constitution, which incorporated a right to property clause that provided the basis for state action. This chapter is divided into three sections. Section 1 outlines the conceptual framework that underlines the nexus between land reform, the right to property and justiciability. Section 2 is a discussion of the various land reform policies adopted by the government of Zimbabwe from 1980 to 2013, focusing on the relevant constitutional and legislative arrangements. Section 3 concludes by analysing these constitutional and legislative frameworks and outlines the implications for human rights justiciability.

The final chapter is by Vinodh Jaichand (Dean and Head of the School of Law, University of the Witwatersrand, Johannesburg, South Africa). It is entitled 'Women's Land Rights and Customary Law Reform in South Africa: Towards a Gendered Perspective'. It argues that the implementation of land rights for women has proven difficult in traditional areas in South Africa, with the use of customary law proving problematic. Arguably, customary law appears quite discriminatory; the Traditional Courts Bill, withdrawn three times from the legislative agenda, has sparked significant controversy. Changes in traditional societal notions on the limitations of the rights of women to access to land have been noted; the constitution provides however for the recognition of customary law, to the extent that it accords with the values of that constitution. As a result, the jurisprudence of the Constitutional Court alludes to "living customary law" rather than "traditional customary law" and the principles of gender balance and equality should be consciously factored in and integrated into customary law as part of the process of social change occurring in communities since the inception of the Constitution. Rather than looking at points of difference between traditional systems of justice and constitutional law, an attempt is made here to reconcile them.

The editors are very grateful to Jo Samanta for kindly agreeing to write the Foreword for this collection; thanks are due also to all of the authors who gave of their time to contribute, and to all who assisted in the circulation of the original call for chapters just over a year ago. Professors Rory O'Connell and Fionnuala Ní Aoláin of the Transitional Justice Institute and Dr Eugene McNamee, Head of the Law School, Ulster University, also merit thanks, for their advice, insight and support. Thanks are also due to Julia Bieler (Editorial Assistant, Springer), for all

her kind help and assistance, and not least to Anke Seyfried, Law Editor with Springer, for all of her wisdom and patience and for her willingness to take a chance on this book project.

Londonderry, UK — Alice Diver
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# Biographies

**Rhuks Temitope Ako** teaches at the School of Law, University of Hull, United Kingdom. He qualified as a Barrister and Solicitor of the Supreme Court of Nigeria in 1999. He obtained his PhD from the University of Kent at Canterbury, UK, following the awards of LLM and MPhil from the Obafemi Awolowo University, Ile-Ife, Nigeria. His research interests include environmental justice, environmental human rights (both of which he teaches at the post-graduate level), corporate social responsibility (CSR) minority rights and public participation law usually in relation to, but not exclusively to, Nigeria's oil industry. Other interests include human security and public private partnership (PPP) in Africa. Dr. Ako has won a number of international awards and fellowships, including the 2010 Volkswagen-Stiftung 'Our Common Future' Fellowship and the 'Limits to Growth' Fellowship in 2012.

**Katie Boyle** PhD, is a constitutional lawyer specialising in the domestic implementation and justiciability of economic, social and cultural (ESC) rights. Her doctoral research identified routes to a justiciable remedy for violations of ESC rights in Northern Ireland as a conflicted transitional justice democracy (University of Limerick 2014). She has previously worked as a legal advisor and litigator for the Government Legal Service in the UK and Scotland. Her work has featured in submissions to the UN Universal Periodic Review (2012) and to the United Nations Committee on Economic, Social and Cultural Rights (2015). Dr Boyle is currently working as a post-doctoral Research Fellow at the Crucible Centre for Human Rights Research at the University of Roehampton in London, where she has compiled the UK Equality and Human Rights Commission 'Populating the United Nations Measurement Framework' project identifying where gaps in human rights protection exist within the UK. She has also previously worked as a Research Consultant with the Scottish Human Rights Commission in connection with Scotland's National Action Plan for human rights and the domestic implementation of ESC rights in Scotland. She was previously appointed as Economic and Social Research Council Fellow at the University of Edinburgh in connection with the Scottish independence referendum and is the previous sole recipient of the

Department of Foreign Affairs Anna Lindh Fellowship, in Ireland, awarded in connection with her work on ESC rights in Northern Ireland. She has lectured in the Comparative International Protection of Human Rights at post-graduate level at the University of Limerick, Ireland. Her research interests primarily focus on ESC rights, deliberative transitional justice mechanisms, constitutional/sub-constitutional transitions and post-conflict reconciliation.

**Francesca Capone** PhD (Scuola Superiore Sant'Anna and Tilburg University), is a Research Fellow at Scuola Superiore Sant'Anna and Didactic Coordinator of the Masters in Human Rights and Conflict Management Scuola Superiore Sant'Anna, Masters and Training Programmes Division. She was previously a guest lecturer for the MA in Human Rights at the School of Advanced Study, University of London, and also served as a Research Fellow at the British Institute of International and Comparative Law.

**Roberto Cippitani** has been a Jean Monnet Chair holder at the Università degli Studi di Perugia since 2011 (project TeKla—The European Knowledge Legal Area) and Co-ordinator of Jean Monnet Research project: Individual Rights & Regional Integration. His teaching and research activity are devoted to EU private law, especially on the interpretation and general theory of EU law, contracts within and between EU institutions, legal aspects of EU policies of research, innovation and education, as well as EU and international integration processes. He gives lectures in EU legal matters in several universities within Europe and abroad, in particular in Latin America and Asia. He teaches on courses at all levels: under-graduates, post-graduates, masters, PhD and training vocational courses. He has published a number of monographs and articles (in Italian, English and Spanish) concerning EU legal topics and another five books or articles concerning Civil Law and General Theory of Law. He is responsible for several projects funded under EU programmes (e.g. Jean Monnet, Erasmus, Tempus, ESF, FP of RTD).

**Chantal Davies** PhD (Chester), MA (Oxon), MA (Chester), LPC (Solicitor), PGCE, FHEA. After graduating with a law degree from Oxford University, Chantal qualified as a Solicitor with Eversheds in Cardiff specialising in employment, human rights and discrimination laws. She then moved on to practice as a Senior Solicitor in Davies Wallis Foyster in Manchester. In 1998, she moved to work as a Solicitor for the Equal Opportunities Commission (EOC) in Manchester, heading up a unit tackling strategic and wider enforcement of the gender equality legislation. Whilst working as a Solicitor for the EOC, apart from undertaking a number of major legal test cases, including to the Court of Appeal and the European Court of Justice, she also sat on several European and national bodies and gave several keynote lectures to leading national organisations. Chantal has been a qualified solicitor for 17 years and her practice has specifically focused on areas of equality law and human rights. Chantal is now a Senior Lecturer in Human Rights Law and Discrimination Law in the Law School at the University of Chester. Chantal has recently completed a 12-month funded project considering the experiences of BME undergraduate students and is currently undertaking follow-up research in relation

to the perceptions of BME students towards employability. Chantal is also the Director of the Forum for Research into Equality and Diversity.

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# Enforcing Human Rights at End of Life: Is There a Better Approach?

**Jo Samanta**

## 1 Introduction

Questions about the end, and ending, of life are of concern to lawyers, clinicians and society more generally. High profile 'right-to-die' and 'right-to-live' cases are a frequent focus of media and political attention. In the United Kingdom the recent profusion of challenges that have concerned end of life decision-making has extended from proposals for law reform to adjudication of disputes before domestic and European courts. Tragic and heartrending circumstances typically underscore the complex disputes and challenges that are brought before these courts. The common thread between them is the assertion of human rights violations.

In end of life cases whilst appeals to human rights might seem to be a logical call, all too often that promise fails to deliver. The Human Rights Act 1998, which gives effect to the European Convention for the Protection of Human Rights and Fundamental Freedoms,[1] consists mainly of negative prohibitions but also imposes a range of positive obligations. To some extent, the legislation has effectively revolutionised many aspects of public health care delivery by way of legally enforceable duties on public bodies such as the National Health Service. These duties also extend, in certain circumstances, to private providers of healthcare as well as health practitioners themselves. Nevertheless, the Human Rights Act is not a panacea for all disgruntled litigants. Constitutional protections such as Convention rights are designed traditionally to safeguard the person's fundamental rights and freedoms against state interference. The extent of positive duties imposed upon member states tends to be limited although in certain circumstances it does impose obligations to act. More negatively, enforceable positive rights are seldom

[1] Hereinafter referred to as "the Convention".

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conferred where resource allocation decisions are involved. The Act safeguards human rights in two ways: first, by requiring that domestic legislation is compatible with the Convention and second, by mandating that public authorities act in compliance with Convention rights.

It is trite law that any person who claims that a public authority has acted, or proposes to act, in a way that is incompatible with Convention rights can bring proceedings against that authority[2] if he or she is a 'victim.'[3] Claimants may also bring an action if they are likely to be a victim, in order to prevent an actual or threatened violation of a Convention right from taking place. Victims can also be family members or those who are connected closely to the person whose rights have allegedly been infringed.[4] Nevertheless, in the area of healthcare and, in particular, at end of life these ostensible rights may be difficult to realise.[5]

This chapter reviews some of the seemingly intractable dilemmas and conflicts that have involved end-of-life decisions for adults with, and without, capacity. It considers a range of domestic and European decisions that have involved breach, or alleged breach, of rights protected by the Convention. These decisions have typically engaged three provisions: the right to life, as protected by Article 2, Article 3 which protects the right not to be subject to inhuman or degrading treatment and Article 8, namely respect for private and family life. Less commonly Articles 9, 6 and 14 have also been engaged. On the basis of the outcomes of recent jurisprudence it concludes that enforcement of legal rights through the court system should be the *last*, rather than first, resort. Whilst the courts are perhaps uniquely qualified for dispute resolution with authority to impose binding decisions on litigants, its adversarial approach is not ideal for the inevitable poignancy of this stage of life. The rule of the court is that one party will win, and that winner takes all. Juridical enforcement of rights against a backdrop of tragic circumstances, professional reputations and ethical beliefs, high emotion and often acute media interest is perhaps not in the best interests of any of the parties concerned. Alternatives means of resolution are proposed as a positive approach for conflict resolution at end of life.

[2] Human Rights Act 1998, section 7(1)(a).

[3] Within the meaning of the Human Rights Act 1998, section 7(7).

[4] This has been a key characteristic of cases brought following the death of the primary victim (e.g. *Nicklinson*).

[5] Samanta (2012), pp. 382–391.

## 2 Withholding and Withdrawal of Life-Sustaining Treatment

Decisions that concern withholding or withdrawing life-sustaining treatment from patients will inevitably engage consideration of the right to life, although the extent to which this right is infringed will be fact and circumstance dependent. Decisions such as these may also brush with the criminal law. At its most fundamental, Article 2 imposes a negative obligation on the state, to refrain from taking life, as well as a positive obligation to safeguard the life of all persons within its jurisdiction, irrespective of their decision-making capabilities.

The positive obligation on the state to preserve life by providing timely and adequate medical care and "take appropriate steps to safeguard the lives of those within its jurisdiction"[6] is a significant aspect of the right to life. Although the negative right not to be 'intentionally deprived of life' is essentially absolute and without exception, withholding life-prolonging treatment in a patient's best interests will not constitute a deprivation of life.[7] The common law suggests that, as far as treatment provision is concerned, the right to have one's life sustained by medical treatment is far more compelling where the individual has been detained, rather than in healthcare related situations.[8]

Medical treatment decisions for adults who lack decision-making capacity are made in their best interests, in accordance with the Mental Capacity 2005.[9] For purposes such as these it is a well-established principle that there is no duty to provide life-sustaining treatment where this is futile.[10] This principle is reflected similarly in the Mental Capacity Code of Practice[11] and contemporary professional guidance.[12]

## 3 Prolonged Disorders of Consciousness

The concept of 'prolonged disorder of consciousness' comprises a range of conditions caused by brain injury that spans from patients who are in a coma (unconscious), vegetative state (VS), through to the minimally conscious state (MCS).

[6] *LCB* v *UK* (1998) 27 EHRR 212.

[7] *Airedale Trust v Bland* [1993] 1 All ER 831.

[8] *R (Application of Mrs Dianne Pretty) v Director of Public Prosecutions and Secretary of State for the Home Department* [2002] 1 AC 800.

[9] Unless the previously competent person had made a valid and applicable advance decision that pertains to the decision to be taken.

[10] *Airedale Trust v Bland* [1993] AC 789 at 868.

[11] Paragraph 5.31.

[12] General Medical Council (2010), p. 80.

Vegetative state and the MCS can be temporary or permanent conditions and patients may alternate between these. Characteristic sleep/wake cycles are often apparent and diagnosis depends upon persistent lack of evidence that patients can communicate, or interact meaningfully, with their environment. Patients in VS and MCS invariably lack decision making capacity and their care and management presents a complex array of legal and ethical challenges.

In the paradigmatic and controversial decision of *Airedale Trust v Bland*,[13] the House of Lords considered the legality of withdrawing life-sustaining treatment, including clinically assisted nutrition and hydration (CANH) from a patient who had been left in a permanent vegetative state (PVS) following injuries sustained in the Hillsborough disaster. Although the case preceded the implementation of the Human Rights Act, the right to life was recognised as a founding principle protected by law as well as a natural right rooted in antiquity.[14]

The heart of the issue concerned whether withdrawal of life-sustaining treatment was in the best interests of a man who would never regain capacity. The House of Lords held that life-sustaining treatment can, and should, be withheld when starting or continuing treatment is not a patient's best interests. Determining whether life-sustaining treatment would be in a person's best interests was to be determined by responsible clinicians according to a *Bolam* justifiable standard (meaning that the decision of whether to withdraw or continue life-sustaining treatment was supported by a responsible body of medical opinion).[15] According to Lord Keith the decision whether continued treatment of a PVS patient was one essentially for clinicians although Lord Browne-Wilkinson recognised that a doctor's perspective might well be influenced by that doctor's own approach to the sanctity of life.[16] On this point Lord Mustill was alone in his reservations about the use of *Bolam* for decisions that concern withdrawal of life-sustaining treatment,[17] a stance reflected recently by the Supreme Court.[18] The presumption in *Bland* was that people in PVS have no enduring interests of any kind, in being kept alive or allowed to die,[19] and that on this basis continuation of treatment would not be in their best interests. The inference that can be drawn here is that consciousness is a necessary condition for recognition of interests.[20] Hoffmann LJ was largely alone in his forthright rejection of the argument that patients in PVS had no interests at all since it was "demeaning to the human spirit" to suggest that unconscious individuals had no interest in their personal privacy and dignity or in how they lived or

[13] *Airedale Trust v Bland* [1993] 1 All ER 831.

[14] *Airedale NHS Trust v Bland* [1993] AC 789 at 826 C-E.

[15] *Bland*, p. 862 *per* Lord Keith.

[16] *Bland per* Lord Browne-Wilkinson, p. 883.

[17] *Bland*, p. 895.

[18] *Aintree University Hospitals v James* [2013] UKSC 67.

[19] *Bland*, p. 861.

[20] *Bland*, p. 897 *per* Lord Mustill.