

Rights to treat vs. rights to be treated

(A clinical perspective on competing rights)

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“Two households, both alike in dignity”

Use of legal tests and legal powers in psychiatry

- Areas of practice involving the law
 - Patients unable to give consent.
 - Non-consensual treatment.
 - Ethically contentious interventions.
 - Interventions to protect others from risk.
- In the practice of clinical psychiatry:
 - Legal tests are clinical tests.
 - Legal powers shape clinical decision making.
 - Law directly affects clinical outcomes.

Challenges and conflicts

- Problems in use of legal tests and legal powers
 - ‘Bright lines’ v. ‘fuzzy lines’.
 - Principles in law helpful but can lack statutory authority.
 - Lack of clarity / codification.
 - Changes in case law and statutory amendments over time.
 - Competing clinical priorities - ‘what is more important?’
- But, clarity of law is *not* enough ...
 - Germany 1933-1945.
 - Lebensunwertes Leben → Aktion Tiergartenstraße 4. → *die Endlösung der Judenfrage*

“Today's human rights violations
are the causes of tomorrow's conflicts”

European Convention on Human Rights (ECHR)

- European Convention on Human Rights¹
 - Convention of the Council of Europe (47 members).
 - Undertaking by member states to protect human rights and political freedoms of their residents.
- European Court of Human Rights (ECtHR)
 - Hears cases alleging violation of rights by a state or state organisation.
 - Judgments finding breaches are binding on the States concerned.

1. *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)*

European Convention on Human Rights

Article	
1	States have obligation to secure these rights and freedoms
2	Right to life
3	Prohibition of torture
4	Prohibition of slavery and forced labour
5	Right to liberty and security
6	Right to a fair trial
7	No punishment without law
8	Right to respect for private and family life
9	Freedom of thought, conscience and religion
10	Freedom of expression
11	Freedom of assembly and association
12	Right to marry
13	Right to an effective remedy
14	Prohibition of discrimination

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Convention on the Rights of Persons with Disabilities (CRPD)

- UN Convention on the Rights of Persons with Disabilities¹
 - International human rights treaty of the United Nations (193 members).
 - Obliges states to promote and protect human rights of persons with disabilities'.
 - Requires “full equality under the law”.
 - “Intended as a human rights instrument with an explicit, social development dimension”.

1. United Nations General Assembly, ‘Convention on the Rights of Persons with Disabilities’ (A/RES/61/106 2007)

UN Convention on the Rights of Persons with Disabilities

Article	Article
1 Purpose	16 Freedom from exploitation, violence and abuse
2 Definitions	17 Protecting the integrity of the person
3 General principles	18 Liberty of movement and nationality
4 General obligations	19 Living independently and being included in the community
5 Equality and non-discrimination	20 Personal mobility
6 Women with disabilities	21 Freedom of expression and opinion, and access to information
7 Children with disabilities	22 Respect for privacy
8 Awareness-raising	23 Respect for home and the family
9 Accessibility	24 Education
10 Right to life	25 Health
11 Situations of risk and humanitarian emergencies	26 Habilitation and rehabilitation
12 Equal recognition before the law	27 Work and employment
13 Access to justice	28 Adequate standard of living and social protection
14 Liberty and security of person	29 Participation in political and public life
15 Freedom from torture or cruel, inhuman or degrading treatment or punishment	30 Participation in cultural life, recreation, leisure and sport

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Incorporation of Human Rights into Scots Law

- Human Rights Act 1998
 - Incorporates ECHR Rights into UK law.
 - Allows recourse to domestic courts for remedy for breach of a Convention right.
 - Unlawful for public bodies to act in a way which is incompatible with the Convention.
- Scotland Act 1998
 - s.57 Scottish Parliament cannot legislate or act if “legislation or act is incompatible with any of the [ECHR] Convention rights”.
 - s.58 Secretary of State can order the Parliament not to take any action which s/he has “reasonable grounds to believe to be incompatible with any international obligations”.

Challenges and conflicts

Example	Conflicted principles	Articles
An individual with suicidal intent secondary to mental illness refusing admission	The right to life conflicted with the right to liberty	10 v. 14
New onset psychosis with poor insight refusing treatment	The right to legal capacity with the rights to health and rehabilitation	12 v. 25 and 26
Doctors obtaining collateral histories about patients who have refused but pose a risk to themselves or others	The right to privacy conflicting with the right to health and life	22 v. 25 and 10
Patient with self-neglect requiring admission secondary to a psychotic illness wishing to leave hospital	Autonomy conflicted with dignity	3 v. 3

- Potential problems with rights-based approaches
 - Too narrow a focus.
 - Prioritising one right (e.g. autonomy) to the detriment of other rights.
 - Too wide a focus.
 - Utilising rights-based law to advocate for wider political change.
 - Issue of conflicting rights.
 - Then, how to decide between them, and who decides?
 - Issue of paradoxical outcomes.
 - e.g. if benefits are available to individuals subject to legal powers.
 - Issue of individual rights v. group rights.
 - Then, how to decide between them, and who decides?

“Argentoratum locutum:
iudicium finitum”

ECHR Art.2 - Right to life

- Edwards v United Kingdom¹
 - Murder of mentally ill prisoner by another.
 - Duty under Art.2 to protect life considered to extend to authorities taking preventative measures to protect an individual against foreseeable risk.
- Rabone v Pennine Care NHS Foundation Trust²
 - Completion of suicide in a voluntary patient.
 - Violation of positive duty under Art. 2, to protect patient from risk of suicide.
- Osman v United Kingdom³
 - Murder of relative of a stalking victim by victim's former teacher.
 - No Art.2 breach found, but pre-existing 'watertight' defence to a civil action against the police constituted a disproportionate restriction on right of access to Court hearing, in breach of Art.6.
 - Obligation to take preventative measures to protect an individual from another individual or himself, where the authority knew (or ought to have known) of the existence of a "real and immediate" risk to life.

1. *Edwards v UK 46477/99 [2002] ECHR 303.*

2. *Rabone and another v Pennine Care NHS Foundation Trust [2012] UKSC 2.*

3. *Osman v United Kingdom [1998] ECHR 101.*

ECHR Art.3 - Prohibition of torture

- Keenan v United Kingdom¹
 - Suicide of 28 year old male prisoner with mental health problems.
 - Art.2 claim rejected but Art.3 claim succeeded due to lack of psychiatric input into his assessment and treatment, and due to the imposition of punishments including segregation.
- MS v United Kingdom²
 - Arrest and detention of man with mental health problems after serious assault on his aunt.
 - Delay in transfer to inpatient psychiatric care.
 - Art.3 breach found on basis of vulnerability, deterioration in condition without treatment, and ‘affront to human dignity’.

1. *Keenan v United Kingdom* 27229/95 [2001] ECHR 242.

2. *MS v United Kingdom* 24527/08 [2012] ECHR 804.

ECHR Art.5 - Right to liberty

- HL v United Kingdom ('Bournewood')¹
 - Man with autism and intellectual disability unable to consent to his placement and deprivation of liberty.
 - Art.5 breach found because detention was not 'in accordance with a procedure described by law'.
- Muldoon²
 - Woman with dementia in LA placement to which she appeared unobjecting, but to which a relative disagreed.
 - The Sheriff found Art.5 breach noting deprivation of liberty could not be Convention complaint: "without express statutory authority governing it".
- 'Cheshire West'³
 - Three individuals with intellectual disabilities cared for in a variety of community settings with 'reasonable restrictions' on their liberty in what were seen as their best interests.
 - Established 'acid test' for deprivation of liberty - whether the individual was: "under continuous supervision and control and is not free to leave".

1. *HL v United Kingdom (2005) 40 EHRR 32.*

2. *Muldoon, Applicant 2005 SLT (Sh Ct) 52.*

3. *P v Cheshire West and Chester Council; P and Q v Surrey County Council [2014] UKSC 19.*

ECHR Art.6 - Right to a fair trial

- Winterwerp v The Netherlands ¹
 - Deprivation of liberty of a Dutch man under emergency procedures with subsequent extensions.
 - Art.6 breach found due to lack of adequacy of process allowing for legal challenge.
 - Established ‘Winterwerp criteria’ for DoL in mental disorder:
 - Presence of disorder established by objective medical experts.
 - Must be of a kind or degree warranting DoL.
 - Must persist through the period of confinement.

1. *Winterwerp v The Netherlands* (1979) 2 EHRR 387.

“In theory there’s no difference between
theory and practice,
but in practice there is”

Emma



Emma





Michael



Violet



lain

Solutions?

- Suggestions:
 - Incapacity / impaired decision-making.
 - Based on generic, non-discriminatory test.
 - Assessment of decision-making ability in relation to a particular treatment decision at a particular time.
 - Allows interventions only when all attempts at support have failed in helping the person to make autonomous decision.
 - Considers ‘undue influence’ (both external and internal).
 - Proxy decision making,
 - Construed in line with known or assessed ‘beliefs and values’.
 - Allows for supported decision-making.
- Next steps?
 - A wide ranging review of mental health law with input from all stakeholders.

References:

- Duffy RM & Kelly BD, 'Rights, laws and tensions: A comparative analysis of the Convention on the Rights of Persons with Disabilities and the WHO Resource Book on Mental Health, Human Rights and Legislation' (2017) 54 International Journal of Law and Psychiatry 26.
- Szmukler G, 'Capacity, best interests, will and preferences, and the UN Convention on the Rights of Persons with Disabilities' (2019) 18 World Psychiatry 34.
- Freeman MC et al, 'Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities' (2015) 2 Lancet Psychiatry 844.