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## Introduction

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In all democracies the law is part and parcel of a wider notion called ‘the rule of law’. By this is meant that no-one, whether an individual, a company, a private body or an organ of the government, can be above the law. It means as well that the law must apply to everyone equally, without any unfair discrimination. Hand in hand with this principle runs the understanding that all individuals have certain basic rights which the state must not infringe. It is the availability of those rights to people living in Northern Ireland which forms the subject matter of this book.

### **The Development of International Human Rights Law**

After the end of the Second World War, which brought to light horrific violations of human rights in Germany and elsewhere, nations around the world were determined to take steps to guarantee protection of human rights in international and national law. The first concrete manifestation of this was the American Declaration of the Rights and Duties of Man, drawn up in 1948 not by the US government but by the Organization of American States which covers the whole of North, Central and South America. This was followed in the same year by the Universal Declaration of Human Rights, produced under the auspices of the newly created United Nations (UN). The Declaration was proclaimed on 10 December, which is now celebrated worldwide as International Human Rights Day. Neither of these Declarations was a binding legal treaty; they were merely statements of best practice, or so-called ‘soft law’. The first important human rights treaty was agreed in 1950, when Member States of the Council of Europe, meeting in Rome, adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This drew heavily on the provisions of the Universal Declaration, but for those states which ratified the Convention it became fully binding on them in the eyes of international law. The UK was the first country to ratify the ECHR, in 1951, and in accordance with the provisions of the Convention it then became binding on the UK as well as other ratifying countries, which included Ireland, in 1953.

All of these documents promised protection of civil and political rights, such as freedom from arbitrary arrest, the right to a fair trial, freedom of expression, freedom of religious belief and freedom of association. But the American Declaration and the Universal Declaration also promised protection of social, economic and cultural rights, such as the right to the preservation of health, the right to education and the right to work. In 1966, in order to convert the aspirational provisions of the Universal Declaration into binding treaty obligations, the UN adopted two International Covenants: one on civil and political rights, the other on economic, social and cultural rights. A year earlier it had adopted a treaty aimed at tackling racial discrimination. Today there are nine so-called ‘core’ UN human rights treaties:

- International Convention on the Elimination of All Forms of Racial Discrimination 1965
- International Covenant on Civil and Political Rights 1966
- International Covenant on Economic, Social and Cultural Rights 1966
- Convention on the Elimination of All Forms of Discrimination Against Women 1979
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
- Convention on the Rights of the Child 1989
- Convention on the Rights of All Migrant Workers and Members of their Families 1990
- Convention on the Rights of Persons with Disabilities 2006
- Convention for the Protection of All Persons from Enforced Disappearance 2006

The UK has still to ratify two of these core treaties—those on Migrant Workers and on Enforced Disappearances. Ireland has also still to ratify those two treaties, and also the Convention on the Rights of Persons with Disabilities (even though it was prominent in the drafting of that treaty).

The gap concerning economic, social and cultural rights in the European framework was partly filled by the adoption of the European Social Charter in 1961, another document prepared by the Council of Europe; years later, in 1996, it was re-issued in a revised form. The Member States of the European Union (EU) also agreed their own ‘Social Chapter’, as part of the Maastricht Treaty of 1992. The UK ratified the European Social Charter in 1962 and eventually agreed to abide by the Maastricht Social Chapter in 1997; it has not yet ratified the Revised European Social Charter. Ireland ratified the original European Social Charter in 1964 and the revised version in 2000; it also agreed to the Maastricht Social Chapter in 1992.

The Treaty of Amsterdam, signed in 1997, strengthened the EU’s commitment to human rights still further, leading to, amongst other measures, Directives on Race and Employment Equality in 2000. Those Directives resulted in legislation throughout the UK (and also in Ireland) strengthening the right not to be

discriminated against on the grounds of race, religion, age, disability or sexual orientation. Also in 2000 the EU proclaimed its Charter of Fundamental Rights, one of the world's most far-reaching statements of rights. This finally came into force for all EU Member States on 1 December 2009, when the Treaty of Lisbon took effect. People throughout the EU can rely on this Charter in relation to any issue which falls within the competence of EU bodies, although, because of disagreement over the meaning of a protocol to the Charter specifically demanded by the UK Labour government at the time, there remains some doubt as to the extent to which the social rights set out in Title IV of the EU Charter are enforceable in UK courts.

## **The Enforcement of International Human Rights Law**

It is all very well to have international laws on human rights, but if those laws are imperfectly enforced they may as well not exist. International agreements on human rights are particularly difficult to enforce because there is, as yet, no global supreme body to which governments can be made answerable. The UN has tried to get round this problem by insisting that states which ratify the core human rights treaties must periodically submit reports to the UN explaining how they are implementing their treaty obligations. A series of 'treaty-monitoring bodies' has been established to consider and comment on these reports, but no sanctions are imposed in relation to identified failures of implementation.

For seven of the nine core UN treaties a complaints mechanism has also been established, to allow people living in the states that have specifically agreed to this to submit complaints to the relevant treaty-monitoring body; the complaints mechanism for the Conventions on the Rights of the Child and on the Rights of Migrant Workers have not yet entered into force. The UK has agreed to allow complaints to be issued against it only under the Convention on the Elimination of Discrimination Against Women (since 2004) and the Convention on the Rights of Persons with Disabilities (since 2009). Ireland has agreed to allow complaints against it under the Covenant on Civil and Political Rights (since 1989), the Convention Against Torture (since 1992) and the Conventions on the Elimination of Racial Discrimination and Discrimination Against Women (both since 2000).

Under six of the core UN treaties the treaty-monitoring bodies can also conduct inquiries into the human rights situation within states that agree to this procedure. The UK has agreed to such inquiries as regards the Convention Against Torture, the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities. Ireland has agreed to it only as regards the first two of those treaties.

Enforcement of the ECHR is much more meaningful than for any of the core UN human rights treaties because there is an international court in Strasbourg in France—the European Court of Human Rights—which considers complaints

lodged by individuals living in any of the 47 Council of Europe states. However, the responsibility for overseeing the implementation of the European Court's judgments rests with the Council of Europe's Committee of Ministers and, since this is a body composed entirely of political representatives, it is not always as effective as it should be. Full enforcement of judgments sometimes takes years to achieve. A current example is the UK's continuing refusal to comply with a European Court judgment in 2005 which requires removal of the UK's blanket ban on prisoners voting in elections.

## The Development of Human Rights Law at the National Level

In national legal systems there has been a comparable growth in human rights law to that on the international plain. Nearly all countries now have a written constitution containing a Bill of Rights. One of the oldest and best known is that of the USA, where the influence of the first 10 amendments to the 1776 Constitution—adopted in 1791 and collectively known as the Bill of Rights—has been profound. In more recent years, many other former British colonies have marked their independence by adopting a constitution which includes a guarantee for human rights. Even current colonies, such as Gibraltar, are governed by legal provisions guaranteeing human rights.

The 1937 Constitution of Ireland places Articles 40–44 under the general title of 'Fundamental Rights' and they guarantee such rights as the right to be held equal before the law, the right to one's life, person, good name and property, the right to liberty, freedom of expression, freedom of assembly and association, the right of children to education, and the right to freedom from religious discrimination. Ireland later made the ECHR part of its domestic law by passing the European Convention on Human Rights Act in 2003. The Constitution of India of 1950 contains similar legally enforceable fundamental rights, partly based on the Irish model. In Canada, a Bill of Rights was enacted in 1960 but this was supplanted in 1982 by a much more far-reaching Charter of Rights and Freedoms. Australia—a federal state with a written constitution—has decided not to adopt a Bill of Rights at the national level, but some of the states within the federation have enacted their own Bill of Rights. New Zealand—a unitary state with no written constitution and only one chamber in Parliament—adopted a Bill of Rights in 1990. Like the Bill of Rights which still operates in Hong Kong—even after its return to China in 1997—the New Zealand Bill is based almost word for word on the UN's International Covenant on Civil and Political Rights. At present the most advanced national Bill of Rights is probably the one contained in the Constitution of South Africa, in force since 1996.

Nor is the tendency towards protection of human rights apparent only in countries which have an historical connection with English law. In France, the

Declaration of the Rights of Man and of the Citizen (1789) was specifically incorporated into the preamble to the Constitution of the current Fifth Republic in 1958. In Germany, the Basic Law of 1949 devotes the first 19 of its 146 Articles to basic rights. Moreover, in both these countries the constitutional courts, or their equivalents, have gone to considerable lengths to develop the substance of these rights.

At the national level, countries differ greatly in the ways in which they permit citizens to claim their rights and liberties. In the USA, any person can challenge any law in any court if he or she thinks that it violates one of the rights guaranteed by the US Constitution. If the US Supreme Court confirms that a law made by Congress (the US Parliament) is invalid, then that law can be ignored by everyone in the land. In Ireland, constitutional challenges can be brought to courts either before or after a law has been passed, although if the law is declared constitutional before being passed it cannot be challenged again later.

## **Human Rights Law in the United Kingdom**

In the UK, where the unwritten constitution places ultimate power in Parliament and not in any court, it is generally not possible for a court to declare primary legislation (ie an Act of Parliament) to be invalid on the basis that it infringes human rights. The only exception arises when a court encounters provisions in an Act which are not compliant with a directly enforceable human rights standard laid down by EU law (which now includes the EU Charter of Fundamental Rights).

However, the enactment of the Human Rights Act 1998 was a key development in ensuring respect for human rights in the UK. The Act was brought fully into force on 2 October 2000, although it had become binding on the devolved legislatures in Belfast, Cardiff and Edinburgh when they started operating in 1999. Today, therefore, most of the rights provided for by the ECHR can be directly relied upon in UK courts. The Act makes it unlawful for any public authority to act incompatibly with the rights contained in the ECHR unless a provision of primary legislation means that the authority cannot act in any other way. It also requires all legislation to be interpreted and given effect (by everyone) as far as possible in a way which is compatible with Convention rights. Courts now have to 'take into account' the judgments issued by the European Court of Human Rights and are bound to develop the common law compatibly with Convention rights. Any court can declare legislation other than an Act of Parliament to be invalid if it infringes Convention rights, and the High Court, the Court of Appeal and the Supreme Court can all declare parts of an Act of Parliament to be incompatible with Convention rights (but not invalid). In response to a declaration of incompatibility a government minister can make what is called a 'remedial order', which amends the offending legislation in a way that makes it compatible with Convention rights. To date about 30 declarations of incompatibility have been

issued in England, Wales or Scotland and one has been issued in Northern Ireland (see page 21).

As a result of the Belfast (Good Friday) Agreement of 1998 and the Northern Ireland Act 1998, the Northern Ireland Human Rights Commission was tasked with consulting on the scope for a Bill of Rights for Northern Ireland, a document which would supplement the rights contained in the ECHR. After a prolonged process of consultation and public debate the Commission finally presented its advice on this matter to the Secretary of State for Northern Ireland at the end of 2008. The UK government has since shown no enthusiasm for the advice and is still considering whether a Bill of Rights should be enacted for the whole of the UK, perhaps in place of the existing Human Rights Act, with the possibility of a few sections of the Bill being devoted specifically to Northern Ireland.

The position of the CAJ, and of the Northern Ireland Human Rights Consortium of which it is a leading member, remains that Northern Ireland needs its own strong and inclusive Bill of Rights. The CAJ is also strongly opposed to the repeal of the Human Rights Act 1998, which the Conservative Party has promised to repeal if it forms the next UK government after the general election in May 2015.

## **The Role of Non-governmental and Statutory Organisations**

In practice, the educational and campaigning activities of non-governmental organisations (NGOs) may be more effective in improving the law on human rights than court actions. A large number of human rights NGOs now exist, the best known being Amnesty International, which has its global headquarters in London, national sections throughout the world and a regional office in Belfast. Within the UK the two most prominent human rights NGOs are probably Liberty (formerly known as the National Council for Civil Liberties) and JUSTICE (which is the UK branch of the International Commission of Jurists).

In Northern Ireland much valuable work in the field of human rights was carried out in the 1960s and early 1970s by the now defunct Northern Ireland Civil Rights Association. In subsequent years a number of other organisations were formed to work on specific issues. In 1973 the UK government set up the Standing Advisory Commission on Human Rights, to advise it on the law relating to discrimination and other matters in Northern Ireland. Under the Northern Ireland Act 1998 this body was replaced in 1999 by the Northern Ireland Human Rights Commission, the powers of which were further extended by the Justice and Security (NI) Act 2007. Over the years a number of other statutory bodies have been established to deal with various human rights issues. The work of the Police Ombudsman, for example, is extensively covered in Chapter 5.

In 1999 the Equality Commission was established, bringing together the existing anti-discrimination bodies into one unified organisation; more is said about its work in Chapter 12. In 2003 a Northern Ireland Commissioner for Children and Young People was appointed, and in deciding whether and how to exercise his or her functions the Commissioner must have regard to the UN Convention on the Rights of the Child of 1989; more is said about this in Chapter 21. The Commissioner for Older People for Northern Ireland, a post created in 2011, must also have regard to the UN Principles for Older Persons of 1991 (see Chapter 18).

In 1981 the CAJ was formed as an independent voluntary organisation to carry out more general monitoring of the legal system in Northern Ireland. It has sought to maintain high standards of objectivity and political impartiality, aligning itself only with the international human rights movement. This book is a concrete manifestation of its goal to provide information about the protection of human rights in Northern Ireland to as wide an audience as possible.

## **The Content of This Book**

The chapters in this book offer information on a wide variety of common legal problems encountered by people living in Northern Ireland. Although they are ascribed to particular authors, they have been edited and cross-referenced so as to make the book more than a disparate collection of essays. The book aims to be reasonably comprehensive (it has three more chapters than the previous edition) but inevitably there are still some omissions. We have not been able to include chapters on consumer rights, patient rights, property rights or electoral rights, for example. On many topics authors have had to be briefer than they would have liked, but more information can be obtained from the publications listed in the section at the end of the book on Further Reading.

The book begins with a description of how victims who believe that their human rights have been violated can seek to obtain remedies through the courts and tribunals of Northern Ireland and with an explanation of the European dimension, public law remedies and legal aid. It then proceeds to describe the powers of the police, where the distinction between anti-terrorism and ordinary laws is most apparent. The next two chapters look more closely at the rights of detainees and at the system for handling complaints against the police.

Chapter 6 examines the position of prisoners, an area which has given rise to a large amount of litigation in Northern Ireland. Chapter 7 deals with issues related to the rights of immigrants and applicants for asylum. Chapters 8 and 9 explain the extent of people's rights to assemble and express themselves, whether through demonstrations, meetings, organisations or direct speech. Chapters 10 and 11 cover the right to access information and the right to privacy, both topics of great topical interest.

There is then a general introductory chapter on equality rights (Chapter 12), which provides details on the work of the Equality Commission for Northern Ireland and the statutory duty which is placed on public authorities to promote equality of opportunity across the nine grounds of gender, sexual orientation, age, religion, political opinion, disability, race, marital status and dependency. Seven separate chapters then deal with sex discrimination, religious and political discrimination, race discrimination, the rights of people with disabilities, sexual orientation discrimination, ageism and the rights of people who have mental health problems.

Chapter 20 outlines the law affecting family and sexual life while Chapter 21 provides information on children's rights. The final five chapters are devoted to social and economic rights, which some would argue are even more significant than civil and political rights. They deal in turn with education, employment, housing, social security and environmental rights.

Each chapter aims to explain the current law in plain English and for reasons of space is restrained in offering a critique. At times contributors have found it difficult to conceal their objections to some of the relevant legal provisions and the CAJ endorses the points they make in this regard. Unless otherwise stated, the contributors are writing in their personal capacity and not on behalf of any organisation. As far as possible contributors have sought to ensure that their chapters accurately reflect the law in Northern Ireland as of 1 September 2014. If there are mistakes, please let us know.