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Protection of Persons with Mental Disorders in Public International Law – A Universal Model

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Abstract:

Purpose: *The main goal of the research is to present international legal regulations at the universal level that provide protection for such persons and to discuss their potential effectiveness. An attempt will be made to identify the obligations of the international community to ensure their safety and due care.*
Design/Methodology/Approach: *The article will use two basic research methods from the legal sciences, first, the method of dogmatic research - the basic method of research on the grounds of legal sciences, and second, the method of comparative legal research - nowadays, it is no longer possible to avoid the interaction of individual branches of international law, for which separate judicial measures are often established. It will show similarities and differences in legal regulations in the area of the problems discussed.*
Findings: *There is no strictly legal definition of people with mental disorders, nor is there a single binding convention solely devoted to their protection (the indirect protection may be derived mainly from the Convention on the Rights of Persons with Disabilities 2006). Regulation of their legal protection is done especially through declarations, resolutions and recommendations. Insufficient protection of their human rights forces the need to derive it from rights granted to patients and disabled persons. Further findings will be presented in a separate publication entitled "Protection of persons with mental disorders in public international law - a regional model".*
Practical Implications: *The analysis of legal regulations may contribute to the understanding of how it is possible to achieve social inclusion of people with mental disorders, which de lege ferenda would allow the elimination of current barriers arising in this area. Further development of rights of persons with mental disorders should consist primarily in extending the enforcement of their civil, political, social, economic and cultural rights at the national level to meet the expectations imposed by public international law.*
Originality/Value: *The research contributed to the narrowing of the research gap on the protection of persons with mental disorders (as a certain individual group of persons who are entitled to special privileges in order to improve their social position and to make opportunities equal) in public international law.*

Keywords: *Mental disorders, public international law, non-discrimination.*

JEL codes: *K33, I19.*

Paper type: *Research article.*

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1. Introduction

International law ensures the protection of human rights and fundamental freedoms to all persons, regardless of any circumstances, as all are born free and equal in respect of their freedoms and rights.[i] The principle of equality and non-discrimination was guaranteed not only in the universal[ii] and regional systems of protection of human rights[iii], but also in constitutional traditions of individual states (McCrudden and Prechal, 2009)[iv]. Nevertheless, persons with mental disorders are exposed to discrimination because there is a problem on the legal ground of recognizing them as legitimate legal entities equipped with the capacity for legal acts, who hold the full right to live an independent life and to be included in the society.

In this article an attempt will be made to point out international community's obligations in order to ensure safety and due care for persons with mental disorders. The hypothesis of this article is that persons with mental disorders are protected under international human rights law and have some additional safeguards that are due to them, given the long history of violence, abuse and marginalisation they have been subject to. International cooperation will help to remedy these violations as national legal structures are inadequate or discriminatory in themselves.

The purpose will be served by finding answers to the following research questions: "Are states alone able to develop solutions aimed at protecting persons with mental disorders or will only their international cooperation ensure effective protection of rights of these persons? Can the protection of the rights of persons with mental disorders be separated from the protection under international human rights law, focusing only on internal regulations? Or perhaps on the contrary – will only complementary protection (human rights *in genere* and the rights of a specific group of persons, i.e. persons with mental disorders) ensure effective implementation and control over the observance of these rights?"

Meeting the work's objectives will help to present international legal regulations that provide protection of persons with mental disorders applied first and foremost at the universal level (treaties, declarations and resolutions of international organizations – the United Nations (UN), the World Health Organization (WHO)). This article will constitute the first part of a discussion on the protection of persons with mental disorders in public international law, because the deepening of research in this area - through a detailed analysis of issues relating to the protection of persons with mental disorders at the regional level (European and non-European) - will constitute an area of in-depth analysis presented in a separate publication entitled "Protection of persons with mental disorders in public international law - a regional model".

These publications, despite the fact that they are separate in terms of subject matter, complement each other and create a comprehensive view of protection of persons with mental disorders in international law. International documents at the European

level will then be analysed (documents of the Council of Europe (CE), the European Union (EU)) and as auxiliary in the remaining regional systems, American, African and Arab.[v]

The article will use two basic research methods from the legal sciences. The data were collected and analysed by means of dogmatic research consisting in the analysis of relevant acts of international law and comparative legal research, the aim of which is to indicate similarities and differences between regulations on the universal and regional level. The second methodology used is comparative legal research, which will show similarities and differences in legal regulations in the area of the problems discussed.

The need to take up these issues is associated with the scale of the problem – statistics clearly point out that every year the number of people battling mental disorders accounts for a significant percentage of the population, which is estimated to be 83 million people. In the EU itself and in the EFTA countries, in the last year 27% of persons aged 18-65 experienced at least one mental disorder.[vi] These numbers only include patients in public facilities[vii], the large scale of those treated privately needs to be taken into account too.

Statistics clearly show how numerous the group of people affected by mental disorders is. The degree of awareness of this problem, however, forces an introduction of legal solutions in order to ensure maximum normal functioning to this group. For this reason, it is particularly important – in the context of this study – to point to the fact that persons with mental disorders are a certain individual group of persons who are entitled to special privileges in order to improve their social position and to make opportunities equal.

2. "Health", "Persons with Disabilities" and "Mental Disorders" in Doctrinal Terms

The starting point for an in-depth normative analysis of the issues in question is to clarify the meaning of basic concepts such as "health", "persons with disabilities" and "mental illness/disorders". This is because the relevant literature lacks a universal view, whereby these concepts are the subject of an extensive academic debate. Defining terms in this study is only a tool to achieve the research goals, not an end in itself, therefore only definitions deemed to be the most valid will be presented descriptively below, drawing primarily on the achievements of the WHO.
Health is one of the fundamental personal rights.[viii] It was defined in the preamble of the Constitution of the World Health Organization (WHO, 1946) as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[ix] However, if considered as a strictly mental health concept, the WHO assumes that mental health means well-being where an individual fulfils their potential, can cope with various life circumstances, is able to participate in social life and work effectively (WHO, 2001b). Thus, mental health means much more than

absence of mental disorders. International instruments of human rights protection are the only source of law that legitimizes international review of mental health policy. Mental health and human rights are inseparably connected (Ventura, 2014).

Disabled people are a particular group of patients, exposed to discrimination, who need special conditions in order to enjoy rights universally afforded to them. Following the WHO, it is believed that disabled persons are those unable to ensure by themselves, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not.[x] Therefore, one of the causes of disability may include mental illnesses and disorders.

It is impossible to derive a universally accepted and binding legal definition of the notion of mental disorders from applicable international norms. International law does not define this notion, but only employs it – terms "mental disease/illness" and "mental disorder" are applied interchangeably in international acts[xi], assuming each time that the expression "mental disease/illness" entails all mental disorders (Pużyński, 2007).

In this study, the definition used by the American Psychiatric Association was considered the most valid: "a mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities" (APA, 2013).[xii]

The above, signal-like outlining of the notion of mental disorders would narrow down analyses of legal norms that regulate this matter. Therefore, it needs to be assumed that reference to persons with mental disorders is made not only in legal acts in which the term "mental disorders" occurs, but also legal acts concerning disabled persons and persons with intellectual impairments.

The need for such a broadened look at the way the concept analyzed is defined was pointed out by the WHO, claiming that legislation in terms of mental health may be made up of provisions covering a wide spectrum of issues, e.g., anti-discrimination, general health, disability, employment, social welfare, education, housing, access to mental health care and other services, quality of mental health care, admission to mental health facilities, consent to treatment, freedom from cruel, inhuman and degrading treatment, the enjoyment of a full range of civil, cultural, economic, political and social rights, and provisions for legal mechanisms to promote and protect human rights (e.g., review bodies for mental health facilities, bodies inspecting human rights conditions in medical facilities) (WHO, n.d. "Key Terms…", s.v. "Mental Health Legislation". See also: WHO, 2011a; Drew *et al.*, 2011).

3. Protection of Persons with Mental Disorders at a Universal Level

While after WWII significant development of international humanitarian law and human rights occurred, separation from it of the category of the rights of the patient protecting persons with mental disabilities[xiii] was slow and limited (Rosenthal and Sundram, 2004). Therefore, sources of their protection need to be sought primarily in legal acts concerning people with disabilities.

Among binding legal acts[xiv] the most important step to ensure protection of rights, dignity and full equality of disabled persons, including those with mental disorders[xv], involved the adoption of the Convention on the Rights of Persons with Disabilities (CRPD) of 13 December 2006 (UNGA, 2007), whose parties included 177 entities, including even the European Union. CRPD has to be viewed as a set of international human rights law norms focused on a community of persons with physical and intellectual disabilities (Seatzu, 2018).

For this reason, it develops a set of human rights standards that differ substantially in their rationale to those articulated in general terms by the ICCPR or ICESCR – it provides a set of disability-sensitive adaptations of these general human rights standards (Dimopoulos, 2016). It is significant to maintain that this convention revolutionary moves away from the medical model of disability and prefers the paradigm of the social model of disability. Indeed, the medical model aims merely to cure the impairment and focuses upon the problems of persons with disabilities; on the contrary, the social paradigm seeks to adapt the society to the demands of disabled people (Conte, 2016).

Significant regulation of the situation of persons with disabilities is provided for in Article 12 CRPD, which expresses the principle of equality in the eyes of the law, thus granting an equal right to recognize them as legal entities and granting the same legal capacity with other citizens in all aspects of life (UNGA, 2017). It is the concept of the non-discrimination legal capacity standard that has become the main social determinant for any individual, a universal human right and a value in itself.

Also the most important provisions of the CRPD include ensuring particular protection to women and children (Articles 6 and 7), the right to accessibility to the physical environment (Article 9), access to justice (Article 13), protection of the integrity of the person (Article 17), the right to personal mobility (Article 20), respect for privacy, home and the family (Articles 22 and 23), the right to rehabilitation (Article 26), and the guarantee of political rights (Article 29). There are also several other articles that are highly prominent regarding the rights of persons with mental health-related disabilities, e.g. on deprivation of liberty (Article 14) and on the right to live independently and to be included in the community (Article 19). Article 16(4) CRPD imposes an obligation on states to take all appropriate measures to promote the physical, cognitive and psychological recovery, as well as to promote rehabilitation and social reintegration of persons with

disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. In accordance with Article 4 (1a), States Parties have the obligation to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention,[xvi] while the monitoring of compliance with it is entrusted in the Committee on the Rights of Persons with Disabilities established in this legal act, independent of governments of States Parties (Article 34).

The important role of CRPD in protecting people with mental disorders is mainly that it opens mental disability law to a wide variety of new fields involving social inclusion, including rights relating to employment, housing, community inclusion, and education, not focusing only on rights concerning detention and compulsory treatment (Bartlett, 2012).

International activity for such persons was initiated by two declarations adopted in the 1970s on the UN forum, the Declaration on the Rights of Mentally Retarded Persons (UNGA, 1971)[xvii] and the Declaration on the Rights of Disabled Persons (UNGA, 1975). Even though these declarations are not binding, they are an essential expression of universal consent to the provisions included in them. It is a significant sign of changes in the attitude towards disability, including also mental disability. For a number of years, it was the least understood and the least accepted type of disability, and medicine could not find effective therapy in mental illnesses. The mentally disabled were imprisoned and isolated from the outside environment (Kolwitz and Radlińska, 2015).

It should be borne in mind that CRPD replaced provisions of the resolution of the UN General Assembly of December 17, 1991 The principles of protection of persons with mental illness and the improvement of mental health care (Rosenthal, 1993). It includes a catalogue of 25 principles formulating standards of care and rights of persons who were diagnosed with mental problems. However, these principles were widely criticized because they did not strengthen the rights of the mentally ill, and in some cases even restricted them further (e.g., principle 7 - role of community and culture, principle 11 - consent to treatment) (Harding, 2000; Gendreau, 1997; Rosenthal, 1993; Gooding, 2017; Weller, 2010).

From the perspective of the UN's work to protect people with mental disorders, the extensive work of the Disability Committee established by the CRPD should be appreciated. It works not only with UN bodies and specialised agencies, but also with non-governmental organisations (e.g., the International Disability Alliance, the European Disability Forum and the Global Alliance of National Human Rights Institutions) and other bodies. The Committee's role has been significantly strengthened by making the Optional Protocol to the CRPD in 2010 (UNGA 2010), which currently includes 94 countries. Under the Protocol, the Committee has been empowered to receive and consider individual complaints, as well as to take procedures in case of credible evidence of serious and systematic violations of the

CRPD. The numerous cases considered and reports issued by the Committee have allowed a very detailed analysis of national laws governing the rights of persons with disabilities. The Committee not only demands changes in internal legislation, but also recognises the numerous obstacles and difficulties that limit efforts to implement the CRPD.

These include the inadequacy or even lack of appropriate legislative and regulatory instruments in certain areas (e.g., on mobility), lack of awareness of such instruments (e.g., due to misinterpretation), lack of reliable data and statistics on the population affected by mental health problems, limited financial resources to ensure the proper conditions and needs of people with disabilities (e.g., through limited infrastructure, lack of funding for education to combat prejudice or harmful practices). The shortcomings or errors in internal law listed by the Committee contribute, as a matter of priority, to improving the quality of the services offered to people with disabilities and determine the specific measures and steps that the state should take to reform its public health care system. The Committee's monitoring of the implementation of the CRPD's provisions certainly contributes to the protection of people with mental disabilities (Gostin and Gable, 2004).

When analysing the general level of protection, the numerous resolutions on mental health adopted by the WHO should also be taken into account (WHA, 1975; 1976; 1977; 1986). They formally oblige states to take up tasks specified in them, involving mostly prevention of violation of human rights and discrimination, promoting autonomy and freedom of persons with mental disorders, promoting access to psychiatric care and social integration. Currently the most important of them is the action plan for the coming years – global Comprehensive Mental Health Action Plan 2013-2030 (WHO, 2013).

It is highlighted there that mental well-being is a fundamental element of the definition of health included in the WHO Constitution. It postulates more effective leadership in the area of mental health, provision of comprehensive mental health and social care services, implementation of prevention and promotion in mental health and strengthening research for mental health. Of the latest WHO activities for people with mental disorders, the Quality Rights initiative deserves attention. It aims to improve the quality of and human rights conditions in mental health and social care facilities through educational publications (Morrissey, 2020). It also focuses on the practical implementation of CRPD, e.g., by encouraging health professionals to participate in this activity. Above all, education is intended to be a factor in the inclusion of people with mental disorders in society, and thus to increase their enjoyment of their rights on an equal footing with those in full health.

4. Conclusion

Persons with mental disorders and members of their families have the full right to participate in public life and to access to medical treatment, and the practical

implementation of these rights is an indicator of humanitarianism of the society they live in every day (Wróbel, 2010). The discussion presented above indicates that the protection of persons with mental disorders in public international law is mostly based on non-binding legal acts (declarations, recommendations), since the CRPD remains the only binding convention referring to this group of persons - as persons with disabilities.

It is worth noting that there is still no uniform legal definition of people with mental disorders. Although uniformity is not achievable, it would be desirable to transpose certain definitions into normative terms, such as the concept of mental health. A binding definition of the meaning of the basic concepts regulating the situation of this group of people would eliminate the situation of different interpretations of phrases and concepts used in legal provisions - at universal, regional and national level. This would contribute to the unification of standards for the protection of people with mental disorders, which is reflected in the CRPD's move away from the medical model to a social approach to disability and the desire to give such people as much autonomy and decision-making as possible.

The universal standard for their protection therefore revolves around respecting and enforcing the catalogue of human rights and freedoms contained in legal and human acts, with a particular reference to the application of the principle of equality and non-discrimination.

A deeper study in this area - directing its attention to regional regulations while demonstrating the impact of the universal level of protection on regional models - will be developed in the article "Protection of persons with mental disorders in international public law - a regional model".

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Notes

[i]See Article 1 and Article 2 Universal Declaration of Human Rights.

[ii]See Article 2 of the International Covenant on Civil and Political Rights, p. 3). Moreover, the scope of discrimination is addressed in the International Convention on the Elimination of All Forms of Racial Discrimination (United Nations, Treaty Series, vol. 660, p. 195), the Convention on the Elimination of All Forms of Discrimination against Women (United Nations, Treaty Series, vol. 1249, p. 13).

[iii]See Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 21 of the Charter of Fundamental Rights of the European Union establishing a general framework for equal treatment in employment and occupation; Article 1 of the American Convention on Human Rights, Article 45 of the Charter of the Organization of American States, Article 2 of the African Charter of Human and Peoples' Rights, Article 3 of the Arab Charter on Human Rights.

[iv]C.f. Article 32 of the Constitution of the Republic of Poland, Article 3 of The Basic Law of the Federal Republic of Germany, Article 3 of the Constitution of the Italian Republic, Article 19 of the Constitution of the Russian Federation.

[v]This publication will focus on legal regulations adopted by international government organizations, yet it is worth signalling here the active engagement in the discussed area of international non-governmental organizations and initiatives of individuals.

[vi]The statistics do not cover data on persons under 18 and above 65, and this group is particularly exposed to mental problems, hence the statistics do not allow for an unambiguous assessment of the complexity of the problem. See WHO. n.d. "Data and…".

[vii]Patients in sudden, acute conditions use these measures: at the time of a threat to life of oneself or to the environment in which they function, in acute attacks of the illness, not being able to coexist in an external environment. It needs to be pointed out here that hospitalization most often involves patients with a significant degree of the mental problem.

[viii]C.f. Article 3 and Article 25 of the Universal Declaration of Human Rights, Article 6 of the International Covenant on Civil and Political Rights, Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 2, 3 and 25 of the Charter of Fundamental Rights. The competence to carry out actions to support, coordinate or supplement the actions of the Member States of the European Union in the area of protection and improvement of human health was given to the European Union pursuant to Article 6 of the Treaty on the Functioning of the European Union.

[ix]At the moment 194 countries are members of the WHO and the provisions included in its constitution are binding on all member states.

[x]C.f. Article 1 of UNGA 1975; WHO. 2011b. The WHO introduced the following notions of disability: impairment - any loss or abnormality of psychological, physiological, or anatomical structure or function; disability - any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being; handicap - a disadvantage for a given individual resulting from an impairment or a disability, that limits or prevents the fulfilment of a role that is normal

(depending on age, sex, and social and cultural factors) for that individual; see UNIC Warsaw n.d. Including a person's health status in a psychological angle in the above classification, not only a physical one, expressly falls within the subject matter of this publication.

[xi]For example, a resolution of the UNGA 1991 uses the term "persons with mental illness", while Recommendation No. Rec(2004)10 uses the term "persons with mental disorder" in its title, while an analysis of both texts clearly shows that they cover the same groups of people with their personal scope.

[xii]Currently, there are two universally applied systems of classification of mental disorders: ICD-10 Chapter V: Mental and behavioural disorders, which is part of the International Statistical Classification of Diseases and Related Health Problems prepared by the World Health Organization, and DSM-5: Diagnostical and Statistical Manual of Mental Disorders as a classification of mental disorders of the American Psychiatric Association. See more in Bolton, 2008; Stein *et al.*, 2010; Galderisi *et al.*, 2015.

[xiii]Human dignity is the source of the rights of the patient. Creating effective protection of persons with mental disorders which does not violate their dignity and recognition as persons is a difficult task since it requires an integrated action and cooperation of both medical specialists and state authorities, due to the complexity of the functioning of the system of protection of mental health. See Kulik et al. 2010: 372.

[xiv]The only binding postulate of ensuring protection of persons with mental disorders – and in particular one concerning minors – adopted before the entry into force of the said convention was Article 23 of the 1989 Convention on the Rights of the Child: a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

[xv]Article 1 of the said Convention includes a legal definition of persons with disabilities, which includes those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

[xvi]An interesting tool to measure the compliance of national mental health legislation with Article 12 of the CRPD is the Analysis Instrument for Mental Health (AIM). It is a mechanism that attempts to criticize existing law and proposes indicators to measure whether existing law reflects these contemporary human rights principles. See Byrne *et al.*, 2018.

[xvii]It is worth noting the imbalance of the equality principle included in paragraph 1 of this declaration: the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings. Provisions regarding the abolition of rights for such persons are set out in paragraph 7 of this declaration.