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

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**Abstract:**

**Purpose:** The main goal of the research is to present international legal regulations at the regional 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:** Further findings will be presented in a separate publication entitled "Protection of persons with mental disorders in public international law - a universal model". International law provides dual protection for people with mental disorders. The first of these, called general protection for the purposes of this analysis, should be derived from human rights treaties. There can be no doubt that people with mental disorders are, as it were, originally entitled to human rights based on their inherent dignity. The second is the special protection which applies to certain categories of people (in this case the mentally ill). Only this correlation provides a legal framework for addressing the key problems of people with mental disorders, including their equal legal capacity, which leads to the elimination of discrimination and exclusion from the outside world.

**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**

Persons with mental disorders are particularly vulnerable to human rights violations. In fact, there is a legal problem to recognize these persons as full legal subjects with legal capacity, having full right to independent living and inclusion in society. The aim of this article is to present international legal regulations at the regional level that provide protection for such persons. An attempt will be made to identify the obligations of the international community to ensure their safety and due care.

This article is a continuation of the research presented in the study “Protection of persons with mental disorders in public international law - a universal model”, using hypotheses, problems and research questions and identical methodology. It points out that the existing universal standard of protection of this group of people is based mainly on soft law acts, therefore it is necessary to draw on legal and human regulations, especially in terms of respecting the principle of equality. People with mental disorders - as disabled persons - require certain rights to be equal in order to ensure their normal social functioning.

The differentiation of legal status through the creation of certain safeguards guaranteeing actual equality is referred to in the literature as positive discrimination, or compensatory favouritism. Positive actions consist in temporary privileging of persons with mental disorders in order to eliminate actual inequalities experienced by these persons due to a specific characteristic - the diagnosis of mental problems. In the next sections, the author will discuss what positive action has been taken by countries at the regional level for this purpose and how this relates to universal solutions.

## **2. Protection of Persons with Mental Disorders at the Regional – European Level**

The most effective human rights protection in the European region is ensured by the activity of the Council of Europe and the European Court of Human Rights (ECHR)<sup>i</sup>. This international organization has adopted numerous recommendations and guidelines for the protection of persons with mental disorders (Parliamentary Assembly, 1977; CoE. CoM 1983; Parliamentary Assembly, 1994).

Among binding legal acts adopted by the Council of Europe in the discussed subject matter, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (CoE 1996) is the most essential.<sup>ii</sup> In Article 7 of this convention, the protection of persons with mental disorders is implemented by admitting the possibility of a medical intervention aimed at treating these disorders, without the patient’s consent, if absence of intervention creates a risk of serious harm to their health, subject to protective conditions prescribed by law, including supervisory, control and appeal procedures.

Giving consent to an intervention due to disturbances in mental operations may be performed by a statutory representative, appropriate authority or another person or body provided for this purpose by law (Article 6(3)). What is crucial, the Convention points in its provisions to the principle of primacy of the human being (Article 2) and to the principle of equitable access to health care (Article 3) in light of which the interest and welfare of an individual prevail over the interest of society, and access to health care of appropriate quality must be provided to all citizens in an equitable manner.

Out of non-binding acts, Parliamentary Assembly Recommendation 1235(1994) on psychiatry and human rights deserves particular attention, under which all Member States were called for the first time to adopt legal measures guaranteeing respect for human rights of psychiatric patients. Moreover, Recommendation No. R(99)4 on principles concerning the legal protection of incapable adults (CoE. CoM 1999) in paragraph 25 admits the possibility of subjecting an adult without their consent to treatment of a mental disorder if they may cause serious harm to their health. What is more, interesting legal solutions are pointed out in Recommendation No. Rec(2004)10 (CoE. CoM 2004) concerning the protection of the human rights and dignity of persons with mental disorder, which in Article 4 says that restrictions to the exercise of first generation rights of persons with mental health problems should be in conformity with the Convention for the Protection of Human Rights and Fundamental Freedoms and should not be based solely on the mere fact that a person has mental health problems. The mere “having” of such problems should therefore not be a sole premise for a restriction of civil and political rights.

Member States are also requested to provide all relevant information on the person’s health care needs or services in a format that can be understood by a person with disabilities (CoE. CoM, 2006). The Recommendation of the Committee of Ministers (CoE. CoM, 2011) on the participation of persons with disabilities in political and public life postulates ensuring equal rights and opportunities, access to goods and services, non-discrimination when exercising one’s legal capacity, inclusion in legislative processes and public matters, and highlights in particular access to the right to vote under the same principles as other persons.

The ECHR has ruled in a number of cases involving people with mental disorders, which has allowed the Court to develop both the concept of disability and the case-law to enhance the protection of the rights of people with disabilities (FRA, 2011). The case of *Winterwerp vs. the Netherlands* 1979 is particularly noteworthy where the court considered the need for a flexible understanding of the concept of “persons of unsound mind”<sup>iiii</sup> and laid down minimum conditions to be met in order to reliably demonstrate that a person is mentally ill and needs to be isolated: the existence of a mental illness must be established by the competent authority on the basis of objective medical knowledge, the type and severity of the mental illness must justify the forced isolation of the patient and the severity of the ongoing isolation should depend on the degree of protracted illness (see *Winterwerp/The Netherlands*, 1979;

Varbanov/Bulgaria, 2000; Fernandes de Oliveira/Portugal, 2019; M.S./Croatia, 2015). The ECHR's case law line seems to have been moving towards a social approach for people with mental disorders in recent years, and thus prompting governments to promote the rights and full participation of people with disabilities in society (Lewis, 2002). This consistently demonstrates that the ECHR is a "living instrument which [...] must be interpreted in the light of present-day conditions" (Tyrer/UK, 1978).

The second international organization with a leading role in Europe is the European Union, which despite having a long and rich history of legislation in terms of the rights of the patient, has paid special attention to persons with mental disorders relatively recently. Imposing tasks on the Member States in this regard at the treaty level was only done in 2007 in the Treaty on the Functioning of the European Union in Article 168(1): "A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health". The protection of the rights of persons with disabilities was strengthened by the Charter of Fundamental Rights (2012 O.J. C 326),<sup>iv</sup> which became legally binding with the adoption of the Lisbon Treaty.

The first review document of the community policy in the public health sector addressing the problem of mental health was the report "Action for Mental Health. Activities co-funded from European Community Public Health Programmes 1997-2004" (Lehtinen, 2004). It is a presentation of projects, recommendations and political initiatives taken up in the discussed 4-year period. The then percentage of population of the European Communities suffering from mental problems was close to 20%, which is why a serious fight with negative consequences of this phenomenon started: increased mortality, generating enormous amounts of human suffering, social discrimination and negative impact on subsequent generations. In 2005 the European Commission of the European Communities adopted a Green Paper entitled *Improving the mental health of the population. Towards a strategy on mental health for the European Union*. It included a proposal for creating a community strategy on mental health as a key issue for citizens, society and progress. The Green Paper defined the framework and priorities of this strategy and launched a consultation process for its development.<sup>v</sup>

Even though numerous soft measures for mental health have been adopted in recent years at the Union forum (see European Parliament resolutions on improving the mental health of the population (2006 O.J. (C 305E) 148) and on mental health (2010 O.J. (C 76E) 23), Council conclusions on the European Pact for Mental Health and Well-being, results and future action (2011 O.J. (C 202) 1)), there still is no binding act of Union law concerning strictly the protection of persons with mental disorders.

The European Union Agency for Fundamental Rights (FRA) plays a great role in the protection of such persons. FRA's research into disability or mental health problems was associated with the second criterion concerning the "inability" of a given person to conduct their own affairs. Most frequently, after a decision has been taken on the person's lack of capacity for legal acts, a guardian is appointed for them. However, it is postulated that legal mechanisms based on giving support when taking decisions, promoting independence and autonomy of disabled persons should be developed (FRA, 2013a; FRA, 2013b).

To sum up, it may be stated that the *acquis* regarding the protection of people with mental disorders of both the Council of Europe and the EU consists primarily of soft law acts. They emphasize, above all, equality before the law of such persons (in accordance with Article 12 CRPD) and fair access to civil and political rights. Restrictions on the legal capacity of persons with mental disorders should result not from the fact of having such disorders, but from the inability to conduct their affairs. There is an ongoing debate in the literature as to whether the provisions of the European protection system for people with mental disorders clearly fit into the social model of disability, moving away from the disability's medical model (Maylea and Hirsch, 2017; FRA, 2011; Bartlett, Lewis, and Thorold, 2007). Doubts arise in particular with regard to the ECHR's protection of people with mental disorders and related psychosocial disabilities (Cf. Waddington and McSherry, 2016).

In this respect, it is difficult to state with certainty that the protection of such persons by European countries is fully compatible with the CRPD. The efforts of international organisations clearly show that improving the level of services and equal treatment of people with mental disorders requires systematic action and monitoring of the situation by external, not just national, bodies. A systemic approach and cooperation between countries in this area is essential to eliminate harmful practices and to fully integrate persons with mental disabilities into society.

### **3. Protection of Persons with Mental Disorders at the Regional – non-European Level**

The European system creates the most comprehensive legal regulation of the protection of persons with mental disorders in comparison to the rest of regional systems of human rights protection, which is why relevant regulations of the American, African and Arab systems are presented only briefly.

The first source of international obligations in the history of human rights is the 1948 American Declaration of the Rights and Duties of Man. In Article 16 it guarantees that every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living. Another document worth noting in the context of this study is the 1999

Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities (OAS 1999), which includes persons with mental disabilities in its personal scope in Article 1(1).

In Article 3, the Convention calls States to adopt legislative, social, educational or any other measures needed to eliminate discrimination against persons with disabilities and to promote their full integration into society. Currently the basic document of the American system of human rights protection is the 1969 American Convention on Human Rights, which does not refer directly to the protection of persons with mental disabilities, but only briefly mentions mental health, Article 5 pronounces that every person has the right to have his physical, mental, and moral integrity respected. The bodies overseeing compliance with the provisions included in the American system of human rights protection include the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.<sup>vi</sup>

The African system of human rights protection is created mostly by the activity of the African Union and the African Commission on Human and Peoples' Rights created on the basis of the African Charter on Human and Peoples' Rights.<sup>vii</sup> The most important document ensuring protection to persons with mental disabilities is the 2018 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Adopted at the thirtieth Ordinary Session of the Assembly of the African Union in Addis Ababa, January 29, 2018. Due to such a recent date of adoption of the protocol, it is difficult to assess its effectiveness.

The Arab system of human rights protection was created through the activities of the League of Arab States<sup>viii</sup>, which adopted on September 15, 1994 the Arab Charter of Human Rights (CLAS 1994). In Article 40, the Charter guarantees persons with mental disabilities a decent life that warrants their dignity and enhancement of their self-reliance and facilitation of their active participation in society. However, there is no judicial body in the Arab system that would safeguard compliance with the Charter, thus enforcement of these provisions seems to be impossible in practice.<sup>ix</sup>

In view of the above, it may be concluded that non-European regional systems derive the protection of persons with disabilities primarily from treaties establishing a general catalogue of human rights and from agreements focusing on the protection of persons with disabilities in general. These agreements call for respect for non-discrimination against these people, though without developing a catalogue of rights concerning strictly those with mental disorders. It is therefore difficult to conclude that non-European systems make a real effort to provide effective protection for people with mental disorders.<sup>x</sup> In order to implement such aspirations, it would be desirable for regional international organisations to be more active as initiators and coordinators of activities associated with the protection of people with mental illnesses.

#### 4. Conclusion

In order to ensure the appropriate level of functioning of persons with mental disorders, fully compliant with the principle of equality and non-discrimination, which is paramount for appropriate functioning in the society, it is necessary to apply norms accepted by the international community. The following conclusions encompass the research conducted both in this article and in a separate though related paper: “Protection of persons with mental disorders in public international law - a universal model.”

Compared to other groups of persons requiring special protection and compensatory rights, the regulation of legal protection of persons with mental disorders has been distinguished relatively recently. Inadequate protection in the universal and regional systems of the protection of human rights of persons with mental disorders and members of their families somehow forces the need to interpret this protection from rights granted to individual groups of persons – patients and disabled persons. Still, acts of soft law are primarily applied here (declarations, resolutions, recommendations). Both at the global and regional level the only binding convention concerning this group of persons is CRPD, which ensures the minimum standard of their legal protection.

One of the most important values that this convention protects involves providing people with mental disorders with equal legal capacity (Article 12 CRPD), leading to the elimination of discrimination and exclusion from the external environment. The non-discriminatory legal capacity standard should provide for equal treatment of persons with mental and other disabilities. These persons are entities with full rights and are entitled to assert their rights like other members of society. Equality remains the key to exercising the right to legal capacity of people with disabilities. The development of the social model of disability was initiated in the CRPD - a humanitarian and human rights-oriented model in which the decision-making of people with mental disorders would be autonomous and supported by others only exceptionally, under strictly defined circumstances.

The above research makes it possible to formulate a view that provisions of international law ensure double protection to persons with mental disabilities. The first, called general protection for the purpose of this analysis, should be interpreted from treaties concerning human rights. There must not be any doubt that persons with mental disorders – somehow originally – are entitled to human rights resulting from their inherent dignity. In turn, the second involves particular protection applicable to specific categories of persons (in this case mentally ill persons). Only such a correlation ensures a legal framework that makes it possible to solve key problems of persons with mental disorders, such as care, social integration and protection of civil and political rights. The direct positive obligations of states to protect such persons include, in particular, the adoption of legislation ensuring equal access to health care and health-related services, combating discriminatory practices

in this area, and the adoption of national health policies with particular emphasis on mental health.

Nevertheless, internal legislations of a number of countries still support legal protection, institutionalization and protectionism towards mentally ill persons, contrary to the model of assisted decision-making and better access to mental health and health care (Pathare *et al.*, 2014). National mental health legislations contain a wide margin of recognition of the rights and freedoms of people with mental disorders, which often hinders their ability to eliminate marginalisation and fully integrate them into society. Countries are unable to work out solutions to protect people with mental disorders alone - only their international cooperation consisting in the adoption of an integrated human rights-based approach to mental health will ensure effective protection of these people. It is necessary to ensure effective methods of implementation and enforcement of legislation concerning mental health at the national level in order for it to meet the expectations imposed by acts of international law. This confirms the initial research hypothesis.

Further development of persons with mental disorders will involve mostly extension of enforcement of their civil, political, social, economic and cultural rights, which are guaranteed at all levels of legal and human regulations. The Committee for Persons with Disabilities, as well as other bodies monitoring public health policy, should be given an important role in this respect, as the pressure they exert on national governments allows them to contribute to the introduction of changes in the desired extent. Similarly, further development of international case law at the regional level (particularly as regards the handling of individual complaints in public health matters) will complement efforts to improve the protection of human rights and lives of people with mental disabilities. These actions should serve to implement the right to mental health, thus contributing to the strengthening and positive promotion of universal human rights.

### **References:**

- Bartlett, P., Lewis, O., Thorold, O. 2007. *Mental Disability and the European Convention on Human Rights*. Martinus Nijhoff Publishers, Leiden-Boston.
- CoE (Council of Europe). 1996. *Convention for the protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*. ETS, No.164.
- CoE. CoM (Council of Europe. Committee of Ministers). 1999. Recommendation No. R(99)4 on Principles Concerning the Legal Protection of Incapable Adults and its Explanatory Memorandum. Adopted on February 23, 1999.
- CoE. CoM. 1983. Recommendation No. R(83)2 of the Committee of Ministers to Member States Concerning the Legal Protection of Persons Suffering From Mental Disorder Placed as Involuntary Patients. Adopted on February 22, 1983.
- CoE. CoM. 2004. Recommendation No. Rec2004(10) concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorder and its Explanatory Memorandum. Adopted on September 22, 2004.

- CoE. CoM. 2006. Action Plan 2006-2015, line 9, Section 3.9.3, VI.
- CoE. CoM. 2011. Recommendation CM/Rec(2011) 14 on the Participation of Persons with Disabilities in Political and Public Life. Adopted on November 16, 2011.
- FRA (European Union Agency for Fundamental Rights). 2011. The Legal Protection of Persons with Mental Health Problems under Non-discrimination Law. Understanding Disability as Defined by Law and the Duty to Provide Reasonable Accommodation in European Union Member States. Luxembourg: Publications Office of the European Union. [fra.europa.eu/sites/default/files/fra\\_uploads/1797-FRA-2011-Legal-protection-persons-mental-health-problems-report\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1797-FRA-2011-Legal-protection-persons-mental-health-problems-report_EN.pdf).
- FRA. 2013a. Legal Capacity of Persons with Intellectual Disabilities and Persons with Mental Health Problems. Luxembourg: Publications Office of the European Union. [fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf](http://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf).
- FRA. 2013b. Legal Capacity of Persons with Intellectual Disabilities and Persons with Mental Health Problems – Factsheet. Publications Office of the European Union. [fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems-factsheet-en\\_0.pdf](http://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems-factsheet-en_0.pdf).
- Lehtinen, V. 2004. Action for Mental Health Activities Co-funded from European Community Public Health Programmes 1997-2004. Report Prepared for the European Commission, Health and Consumer Protection Directorate-General European Commission.
- Lewis, O. 2002. Protecting the Rights of People with Mental Disabilities: The European Convention on Human Rights. *European Journal of Health Law*, 9, 293-320.
- Maylea, Ch., Hirsch, A. 2017. The right to refuse: The Victorian Mental Health Act 2014 and the Convention on the Rights of Persons with Disabilities. *Alternative Law Journal*, 42(2), 150.
- Parliamentary Assembly. Council of Europe. 1977. Recommendation 818(1977). Situation of the Mentally Ill. Adopted on October 8, 1977 (12th Sitting).
- Parliamentary Assembly. Council of Europe. 1994. Recommendation 1235(1994). Psychiatry and Human Rights. Adopted on April 12, 1994 (10th Sitting).
- Pathare, S., Shields, L., Sagade, J., Nardodkar, R. 2014. The need to Reform Mental Health Legislation in Commonwealth Countries. Guest Editorial. *International Psychiatry*, 11(1), 2.
- Waddington L, McSherry, B. 2016. Exceptions and Exclusions: The Right to Informed Consent for Medical Treatment of People with Psychosocial Disabilities in Europe. *European Journal of Health Law*, 23(3), 279-304.

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## Notes:

<sup>i</sup>The document substantiating the European Court of Human Rights is the European Convention for the Protection of Human Rights and Fundamental Freedoms. For the relations of provisions of this convention and rights of persons with mental disorders see an interesting study: Lewis, Thorold and Bartlett 2003 and a collection of case law in the discussed aspect: ECHR 2019.

<sup>ii</sup>At the moment the Council of Europe comprises 47 states and so far the Convention has been signed by 35 states, but ratified by only 29. Even though the convention entered into force in merely a half of member states of the Council of Europe, it is an essential step to implement bioethical standards in Europe. See more in Jasudowicz 1997; Andorno 2005.

<sup>iii</sup>“it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society’s attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.”

<sup>iv</sup>Article 21 includes the right to non-discrimination on the grounds of disability. Article 26 points out the need to integrate people with disabilities into society.

<sup>v</sup>Multiannual consultations led to the adoption of numerous soft law acts, i.a. the European Pact for Mental Health and Well-being and the conference Together for mental health and well-being, Brussels, June 12-13, 2008. See more in Moskalewicz 2004.

<sup>vi</sup>For the case law of the Inter-American Commission on Human Rights concerning persons with mental disorders see Gostin 2004.

<sup>vii</sup>For more on the health policy concerning persons with mental disorders in Africa see Gureje and Alem 2000; Alem, Jacobsson and Hanlon 2008; Bartlett, Jenkis and Kiima 2011.

<sup>viii</sup>The Pact of the League of Arab States of March 22, 1945 is the statute of the League of Arab States, which remains silent about the principle of equality and non-discrimination and does not address the issues of disabled persons.

<sup>ix</sup>The League of Arab States formulated the Statute of the Arab Court of Human Rights in 2014, which is to enter into force after submission of seven ratification documents.

<sup>x</sup>The regulations and the case law of the European mental health system may even be considered as a precedent compared to other regional systems.