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## The ECHR and the Human Rights Problem in Mental Health

The *NRDO* issue 2, 2023, featured an article discussing the motion *Detention of the "socially maladjusted"* initiated by the Parliamentary Assembly of the Council of Europe. As part of this investigation conducted by the Rapporteur Mr Stefan Schennach, MP, a hearing with experts was held. One of them was Professor Marius Turda from Oxford Brookes University (UK). His presentation was featured in the *NRDO* issue 2 as *Moțiune: Detenția celor „inadaptați social”*; Marius TURDA, Eugenia și stigmatizarea indivizilor „cu boli mintale”. The challenge which not only the Parliamentary Assembly, but all of us in Europe are facing and which this investigation is looking into, was further discussed in the *NRDO* „Editorial” of the same issue.

The „Editorial” put the presentation of Prof. Turda to the Parliamentary Assembly in perspective, raised very pertinent questions and gave some general comments related to the work of the Parliamentary Assembly on the investigation in view of the European Convention on Human Rights (ECHR), article 5, 1(e). This paragraph singled out “persons of unsound mind, alcoholic or drug addicts or vagrants” from the general population and restricted their rights. This formulation in the ECHR has had a profound effect in European legislative practice and the interpretation of human rights and thus on decisions of the European Court on Human Rights.

### 1. The ECHR Is important, but contains a flawed argument

The importance and value of the ECHR cannot be denied. It is widely recognized as an important and effective international treaty for the protection of human rights. Europe has in many aspects become a better place to live in the last half of a century, and the ECHR has played an important role in bringing this about.

The ECHR continues to be a very important legal document today. Yet, it is noted that the human rights concept is a developing reality and with this some shortcomings in the ECHR text have come to light. Particularly the section on the right to liberty and security of person which noted the exception of “persons of unsound mind, alcoholics or drug addicts or vagrants” from the general safeguards has become a focus point.

The formulation of this exception is not random and the background for it has first recently come to light following a review of declassified documents on the drafting

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process of the ECHR itself.

The exception was formulated by representatives from the United Kingdom, Denmark and Sweden, with the British taking on a leading role. It was based on a concern that the then drafted human rights texts sought to implement Universal human rights including for persons with psychosocial disabilities or mental health problems, which conflicted with legislation and social policy in place in these countries.

United Kingdom, Denmark and Sweden were countries with strong eugenic movements at the time and had implemented such principles and viewpoints in legislation and practice. See more at *NRDO* issue 2, *Moțiune: Detenția celor „inadaptați social”*; *Marius TURDA, Eugenia și stigmatizarea indivizilor „cu boli mintale”*.

## 2. The ECHR drafting process

The ECHR was drafted in 1949 and 1950. The first draft called a Human Rights Charter was the result of extensive debates during the summer of 1949 by more than 100 parliamentarians in the Council of Europe's Assembly. The Council of Europe at the time consisted of 12 countries. This proposed Charter guaranteed “freedom from arbitrary arrest, detention and exile, and other measures, in accordance with Articles 9, 10 and 11 of the United Nations' Universal Declaration on Human Rights.”<sup>1</sup>

The decision-making body of the Council of Europe, the Committee of Ministers, met in November 1949, and after a review refused to accept the draft Charter prepared by the Assembly. A main concern was that the human rights to be guaranteed were merely enumerated, and that the control of the restrictions on the rights was expressed in a general form.

The Committee of Ministers then called for the establishment of a committee of legal experts to draw up a draft Convention which would serve as a basis for future discussion. The Committee's terms of reference stated that: “due attention should be paid to the progress which has been achieved in this matter by the competent organs of the United Nations.”<sup>2</sup> The Committee was further given the task of determining whether the rights should be more precisely defined, for example to put them in alignment with existing legislation and conditions, or left as general statements of principles.

The Committee of Experts proceeded in the direction of a reduction of the rights into positive-law formulations which seems to have served the purpose of safeguarding the interests of the state rather than the interests of the individual. The state was to enjoy legal security against other states, this was the overriding viewpoint.<sup>3</sup>

In January 1950 the Committee of Experts on Human Rights received comments from Sir Oscar Dowson, representing the Government of the United Kingdom who suggested amendments of the article on the security of person limiting it for certain individuals.

1 Council of Europe DH (56) 10 of 8th August 1956, European Commission of Human Rights – Preparatory Work on Article 5 of the European Convention on Human Rights, p. 3.

2 Council of Europe Doc. AS (1) 116, para. 6, pp. 288-289.

3 Professor of Jurisprudence, Jacob W.F. Sundberg, University of Stockholm; Director of Studies, Institute for Public and international legislation. *Human Rights In Sweden: The Breakthrough of an Idea*, Ohio State Law Journal, Vol. 47, p. 957.

He put it thus: “the lawful detention of persons of unsound mind or of minors, by lawful order, for the purpose of educational surveillance.”<sup>4</sup>

The UK government had already contributed to a submission with the same content to the United Nations Commission on Human Rights in mid-1949. This was the draft of the International Covenant on Human Rights. It was based on the concern that the drafted human rights text sought to implement Universal human rights including for persons with mental health problems and psychosocial disabilities, which conflicted with legislation and social policy existing in the UK and other countries at the time.

This in reality referred to legislation and practices influenced by eugenics. Modern eugenics had emerged in Britain during the 1880s and quickly became popular across the political spectrum. From Britain, it spread to many other countries in Europe including Denmark, Germany, and Sweden.

### 3. Eugenic-driven legislation

British Eugenics Education Society had organised the First International Eugenics Congress in London in 1912. One of the vice presidents of the congress was the Liberal Home Secretary, Reginald McKenna.

Following the congress, Reginald McKenna introduced in Parliament a eugenics-based bill that included forced sterilisation. It was designed to prevent “the feeble-minded” persons from becoming parents. The bill met strong resistance and became the subject of considerable discussion. The bill in an amended form was enacted the following year as the Mental Deficiency Act of 1913. It did not include sterilisation, but it made it legally possible to segregate “mental defectives” in asylums.

With this Act a person deemed to be an idiot or imbecile could be placed in an institution or under guardianship if the parent or guardian so petitioned, as could a person of any of the four categories using terms that today we find offensive, namely: a) Idiots, b) Imbeciles, c) Feeble-minded persons, and d) Moral Imbeciles, under 21 years. It also included persons of any category who had been abandoned, neglected, guilty of a crime, in a state institution, habitually drunk, or unable to be schooled.

Under this Act, 65,000 persons were placed in “colonies” or in other institutional settings. The Mental Deficiency Act was only repealed in 1959. It was operational at the time the United Nations and the Council of Europe introduced international human rights bills.

It was to this Act that the representatives of the British government representatives alluded to when formulating the rights of individuals of ‘unsound mind’.

The preliminary draft to the Human Rights Charter ultimately agreed upon by the Council of Europe’s Committee of Experts at the end of its first meeting repeated word for word the articles of the Universal Declaration on rights to life. It stipulated that: “No one shall be subjected to arbitrary arrest, detention or exile.”

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<sup>4</sup> Council of Europe DH (56) 10 of 8th August 1956, European Commission of Human Rights – Preparatory Work on Article 5 of the European Convention on Human Rights.

#### 4. A Committee of four persons formulated the ECHR text

The Drafting Committee consisted of Sir Oscar Dowson (who submitted the proposal from the United Kingdom), Mr. Martin Le Quesne (a diplomat at the British Foreign Service), Mr. Birger Dons-Møller (a diplomat at the Danish Ministry of Foreign Affairs) and Judge Torsten Salén from Sweden.<sup>5</sup>

For the next meeting of the Drafting Committee, Sir Oscar Dowson, provided a new amendment with a slight textual change, but with the same content as their earlier proposal.

This time the Committee included both the British and Swedish proposed amendments on alcoholics and vagrants into the Convention. With this amendment the article on the security of persons singled out “persons of unsound mind, alcoholic or drug addicts or vagrants” from the general population.<sup>6</sup>

On 7th August 1950, the Committee of Ministers agreed upon the drafted “Convention of Protection of Human Rights and Fundamental Freedoms.” The Article 5 was subjected to a few slight emendations, none relating to the specific exemptions of “persons of unsound mind, alcoholic or drug addicts or vagrants.”<sup>7</sup> The European Convention of Human Rights was signed in November 1950.

#### 5. The ECHR authorize deprivation of liberty on the ground of “insanity”

The Convention’s Article 5 on the right to liberty and security of person, reflecting the work of representatives from the United Kingdom, Denmark and Sweden, thus came to include a specific language permitting the lawful detention of the very wide and undefined concept of “persons of unsound mind”, in other words solely on the ground that they are having or are believed to have psychosocial disabilities or mental health problems.

In summary, it is written into the European Convention on Human Rights that psychiatric involuntary commitments and deprivation of liberty of an alcohol dependant or a vagrant are in accordance with Convention as long as these are based on national laws.

Ms Boglárka Benko, Registry of the European Court of Human Rights was another expert who spoke at the hearing about the motion on the *Detention of the “socially maladjusted.”* Ms Benko explained to the Parliamentary Assembly Committee that “the UN interpretation of the rights of persons with disabilities and the interpretation given by the Committee on the Rights of Persons with Disabilities (CRPD) did not allow for the deprivation of liberty based on an actual or perceived disability. This interpretation provided by the UN was very seldom applied in the context of the European Court of Human Rights (the Court) and in the European system of human rights protection because Article 5 of the Convention, which protected the right to liberty and security, explicitly

5 Council of Europe CM/WP 1 (50) 10 of 6 March 1950, Committee of Experts on Human Rights 2nd Session – Amended text to Articles of British draft. <https://rm.coe.int/09000016809004ac>.

6 Council of Europe CM/WP 1 (50) 14 of 9 March 1950, Committee of Experts on Human Rights 2nd Session – Preliminary Draft Convention. <https://rm.coe.int/09000016809005c8>.

7 Council of Europe Doc. CM/Adj. (50) 5 Rev. para. 6.

provided for the deprivation of liberty of persons of ‘unsound mind’.”<sup>8</sup>

Ms Benko further explained that “the original purpose of allowing for the deprivation of liberty of persons of ‘unsound mind’ was to protect society. Later, the European Court of Human Rights adopted the understanding that Article 5 should also be used to protect the person from him- or herself.”

Treating the European Convention as a “living instrument” is essential if the law is to adapt to these changes, and meaningful human rights is to remain a reality, keeping in line with the developing understanding and agreement on what the human rights are today. It has to be noted though that while this has been applied to many articles of the ECHR, the European Court of Human Rights has been very reluctant to apply this to the field of mental health in view of the article 5, 1(e) specifically authorizing the segregation and removal from society “persons of unsound mind, alcoholic or drug addicts and vagrants.”

## 6. Article 5, (1) and Human rights. Conclusions

The ECHR article 5, 1(e) has become a problem causing an increasing divide between international human rights of the United Nations and the ECHR human rights of Europe.

Ms. Catalina Devandas-Aguilar, the UN Special Rapporteur on the rights of persons with disabilities in 2015 addressed the Council of Europe<sup>9</sup> specifically pointed out: “it must be acknowledged that the European Convention on Human Rights (ECHR) is an instrument which dates from 1950 and the text of the ECHR reflects a neglect and outdated approach concerning the rights of persons with disabilities. Moreover, in matters concerning mental health detention, the 1950 text explicitly permits deprivation of liberty on the basis of ‘unsound mind’ (Article 5(1)(e)). Even though the ECHR is considered to be a ‘living instrument... which must be interpreted in the light of present day conditions’.”

The modern human rights operate with a so-called psychosocial model to disability which looks at the problems and exclusion that persons with psychosocial disability and mental health problems face as caused not by their impairments, but by the way society is organised and understands (or misunderstands) disability.

This shift in approaches is enshrined in the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which has the objective to promote, protect and ensure the full and equal enjoyment of all human rights by all persons with disabilities.

The CRPD stipulates that individuals cannot be discriminated on the basis of their disability, including psychosocial disability.

The United Nations Committee on the Rights of persons with Disabilities also addressed the Council of Europe in 2015 providing a statement based on its jurisprudence, with the aim of assisting Member States of the Council of Europe that are parties or

8 Parliamentary Assembly of the Council of Europe document, AS/Soc (2023) PV04add of 16 June 2023, Committee on Social Affairs, Health and Sustainable Development Minutes of the exchange of views on “Detention of the ‘socially maladjusted’” held in Paris on 22 May.

9 Council of Europe DH-BIO/INF (2015) 20 of 9 December 2015, Committee on Bioethics (DH-BIO), Additional Protocol on the protection of the human rights and dignity of persons with mental disorders with regard to involuntary placement and involuntary treatment – Compilation of comments received during the public consultation – p. 31.

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signatories to the Convention on the Rights of Persons with Disabilities, in fulfilling their international obligations under the UN Convention:

Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments (article 14(1)(b)) and the principle of free and informed consent of the person concerned for health care (article 25). The Committee has repeatedly stated that States parties should repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairments. Involuntary commitment in mental health facilities carries with it the denial of the person's legal capacity to decide about care, treatment, and admission to a hospital or institution, and therefore violates article 12 in conjunction with article 14.<sup>10</sup>

These human rights viewpoints and understandings in regards to mental health are not generally being implemented in Europe due to the belief by many officials and experts that human rights are being upheld in the field of psychiatry through the ECHR and the enforcement through the European Court on Human Rights.

So the task of the Parliamentary Assembly of the Council of Europe in view of the motion on the *Detention of the "socially maladjusted"* is much larger than merely indicating a problem with the language of the text.

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<sup>10</sup> Ditto – pp. 18-19.