

CONSOLIDATION OF LEGAL CAPACITIES IN ORDER TO GRANT PROFESSIONAL ASSISTANCE TO PEOPLE WITH MENTAL DISABILITIES

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Abstract

Currently, legal assistance of people with mental disabilities, mostly victims of torture and other ill-treatment, has probably raised more ethical and legal controversy than any other area of law. One explanation for this is that clinical medicine cannot treat the patient without his free and informed consent. One can be called to get involved in imposing a certain treatment on a particular patient, who is unable to express consent, and a primary role in this activity rests with the actors on the stage where justice is achieved, those who are to intervene whenever needed to fight against torture and ill-treatment admitted in relation to such persons. The objective of this paper is the concept of reasonable accommodation in the field of justice, which supposes persons with disabilities enjoying or exercising all human rights and fundamental freedoms, on an equal basis with the others.

Key words: professional legal assistance, fundamental rights and freedoms, persons with mental disabilities, reasonable accommodation, torture and ill-treatment

In order to ensure a qualitative service in defending the fundamental rights and freedoms of persons with mental disabilities, the legal community is engaged in a process of developing a number of minimum recommendations for the activity of all those involved in this area, which supposes not only conformism, but also diligence in defending the rights and freedoms of persons with mental disabilities.

The legal framework regulating legal assistance of persons with mental disabilities consists of a series of legal provisions, both national and conventional, based on the principle - *persons with mental disabilities have the same rights as all other people*. The international sources of law, forming the medical-legal framework of treatment of people with mental disabilities, are fully preoccupied with a number of problems regarding the consent of people with mental disabilities (treatment, participation in clinical trials, acts of disposition, sterilization included) and safety measures with pre- and post-criminal character.

At the same time with the ratification of several international instruments on the rights of persons with disabilities (Convention on the Rights of Persons with Disabilities/CRPD), the ratifying states have become bound to ensure that the rights of persons with disabilities are respected, promoted

and protected to the same extent as the rights of the other members of society. Several provisions in international instruments expressly recognize the equality of rights of persons with disabilities, constituting mandatory rules, whose violation has the legal consequence of nullity of all performed actions.

Contemporary doctrine and case law approaches, among others, the terms of social exclusion and inclusion. Social inclusion as an example of relation between institutional knowledge, reflected in a line of public policy, and scientific knowledge is a much debated subject of discussion (Arpinte D., Baboi A., Căce S. ..., 2008).

In the same context, the states' approaches in the field of social policies, regarding vulnerable or disadvantaged groups in society, have been extended by the addition of the terms "social exclusion and inclusion" (Arpinte D., Baboi A., Căce S. ..., 2008).

Specifically, social exclusion is a complex and multidimensional process, which implies the lack or denial of some resources, rights, goods or services, as well as the inability to take part in normal relations and activities within reach of most people in the society, irrespective of them belonging to the economic, social, cultural or political sphere (Camelia Brustur, 2015).

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MATERIAL AND METHOD

The international legal panorama presents us today with a range of instruments having as their domain of regulation – the respect for the fundamental rights and freedoms of persons with mental disabilities. Thus, we shall illustrate by the following:

1. The Parliamentary Assembly of the Council of Europe adopted, in 1977, Recommendation 818/1977 on the situation of the mentally ill, which, among others, called for a more effective legal protection of these persons. We will mention in this context the famous case examined by the ECHR *Winterwerp v. The Netherlands*, following which the European Committee on Legal Cooperation held as a priority the special legal protection of persons with disabilities.

2. Later, in 1983, the Committee of Ministers of the Council of Europe adopted Recommendation R(83)2 concerning the legal protection of persons suffering from mental disorder, and also in 1983 - the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, subsequently adopted, in 1993, by the General Assembly as an outcome of the Decade of Persons with Disabilities. Although these standard rules did not represent a binding document for the Member States, they had been the most comprehensive human rights standards regarding the strategy for disability for over a decade, until the adoption in 2006 of the Convention on the Rights of Persons with Disabilities.

3. In 1994, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1235(1994) on the legal protection of persons suffering from mental disorder committed as involuntary patients. Overall, all these legal recommendations are based on the Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 3, 5, 6 and 8) providing guarantees for persons deprived of liberty by confinement in mental health institutions.

4. The case law of the European Court of Human Rights has also an important place. The provisions of Article 5 of the Convention are an important component of the system of protection of human rights, personal freedom being a fundamental condition that every individual must enjoy, including beneficiaries with mental disabilities. Depriving a person of this right is likely to have a direct and negative impact on the enjoyment of many other rights. In addition, deprivation of liberty places the affected person in a particularly vulnerable position and exposes him

to the risk of torture and inhuman or degrading treatment.

5. At the same time, with the ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD), the ratifying State, for example Moldova, was bound to ensure that the rights of persons with disabilities are respected, promoted and protected to the same extent as the rights of the other members of society. Article 12 of this Convention expressly recognizes the equality of rights of persons with disabilities, constituting a mandatory rule, whose violation has the legal consequence of nullity of all performed actions (CpDOM - The Centre for Human Rights in Moldova, 2012)

National provisions are configured according to the international ones and, in case of opposition or collision of the two, the principle of superiority of the international provision is applicable, if the national legislator acceded to that international instrument. We must emphasize that the creation of a mechanism for effective functioning of the mentioned area is the result of an activity that involves strictly respecting the principles of activity.

Thus, we reiterate that the identification of and compliance with the principles is an obligation of the actor involved in this field. Therefore, we intend to make some recommendations on these matters, in light of national and international provisions.

Legal doctrine and case law designated some general and special principles applicable to granting legal assistance to persons with mental disabilities (Spînu Ludmila, 2015).

General principles:

- *The principle of equality and non-discrimination*
- *The principle of the right to life and physical integrity*
- *The principle of freedom and safety*
- *The principle of the right to express one's own opinion*
- *The principle on the review of the case within a reasonable time*

Special principles:

- *The right to a relationship based on trust between lawyer, doctor, social worker, on the one hand, and the mentally disabled person, on the other hand, achieved through explicit communication, including his holistic representation.*
- *Providing professional legal assistance, state-provided assistance included, to persons with mental disabilities and rejecting their discrimination based on disability.*

- *Mandatory commitment will take place only if the person is a danger to himself or the others.*
- *Restrictions on freedoms of persons with disabilities can only be imposed to protect the person and society.*
- *In examining involuntary commitment of persons with mental disabilities, it is required to provide guarantees of a fair trial.*
- *Psychiatric assistance may be granted at the voluntary request of a person with mental disabilities or with his consent.*
- *Ensuring quality mental health services and the respect of the persons' rights when using these services.*

RESULTS AND CONSIDERATIONS

The principle of equality and non-discrimination involves especially combating social, legal and medical discrimination of persons with disabilities. No admission of discrimination and ensuring equality of rights are requested in order to safeguard the applicability mechanism of provisions designed to guarantee entirely the fundamental rights of persons suffering from mental disorders as well as increased access to qualitative legal and mental health services. **Article 5** of the UN Convention on the Rights of Persons with Disabilities is concerned expressly with *equality and non-discrimination* and states that all persons are equal before the law and are entitled without any discrimination to equal protection and benefit from law. Moreover, it states that in order to promote equality and eliminate discrimination, signatories of the Convention shall take all necessary measures to ensure reasonable accommodation. Equality of rights supposes the right of disabled persons to be perceived, wherever they are, as individuals with rights before the law (that is as subjects with full legal capacity), to benefit from legal assistance on an equal basis with the others and to enjoy equality of rights in all areas of life.

The principle of the right to life and physical integrity states that every human being has the inherent right to life and physical integrity and necessary measures are to be taken to ensure the enjoyment of this right by all persons with disabilities on an equal basis with the other citizens.

The principle of freedom and security provides the right of persons with disabilities, on an equal basis with others, to liberty and security and also states that the existence of a disability shall not, in any case, justify deprivation of liberty. Paragraph 1 of Article 5 of the Convention for the

Protection of Human Rights and Fundamental Freedoms defines the presumption of liberty, a right no one can be deprived of but under exceptional circumstances, and then establishes the exceptions to this rule. One of these exceptions allows the confinement of a person of "unsound mind", but only when some specific conditions are met: detention must be "lawful"; the detained person shall be informed promptly and in a language which he understands, of the reasons for his detention; the detainee has the right to challenge his detention before a court of law.

The principle of the right to express one's own opinion ensures the expression of a mentally disabled person's own opinion, either by insisting on this person's presence in the examination of his case, or in exceptional cases, by him publicly voicing his opinion and preventively communicating with this person to verify this opinion.

The principle on the review of the case within a reasonable time refers to the examination of cases involving people with mental disabilities within a reasonable time.

The right to a relationship based on trust between lawyer, doctor, social worker, on the one hand, and the mentally disabled person, on the other hand, achieved through explicit communication, including his holistic representation. Whenever an act involving a person with mental disability takes place, the latter will be offered confidential assistance. In exceptional cases, following the person's assessment and establishment of a degree of social danger, he will accept the medical establishment insuring security. Medical confidentiality and secrecy shall be guaranteed and significant information may be disclosed only in dangerous cases and only by the competent authorities, in compliance with the legal requirements in this regard.

Providing professional legal assistance, state-provided assistance included, to persons with mental disabilities and rejecting their discrimination based on disability. In order to achieve professional assistance, thus ensuring the exercise on an equal basis with others client/beneficiaries of all the rights and fundamental freedoms by persons with mental disabilities, anyone can request from any institutions the whole range of information necessary for the representation of people with mental disabilities.

It is unacceptable to treat the mentally disabled person under any prohibitive criteria, in a manner less favorable than any other person in a comparable situation.

Mandatory commitment will take place only if the person is a danger to himself or the others. In case of psychiatric emergency, according to international and national regulations, the patient's commitment for a short period is allowed, according to the established procedure which is to be made for a limited time.

Restrictions on freedoms of persons with mental disabilities can only be imposed to protect the person and society. Legal regulations state that mandatory commitment does not involve the application of restricting measures against the material interests of the person with disabilities. In operating restrictions on the freedom of the individual, the one applying the restrictions will ensure the respect for the presumption of liberty, a right no one can be deprived of but in exceptional circumstances, expressly provided by law. In all cases, the dignity of the person with mental disabilities must be respected.

In the process of involuntary commitment of persons with mental disabilities, it is required to provide guarantees of a fair trial. The specific authorities ensure, as appropriate: the person's participation in the examination of his case; the access to a chosen lawyer in the cases requested by the person with mental disabilities; information on the validity of commitment, using accessible terms and in a timely manner; the possibility of challenging the decision of commitment to the psychiatric facility etc.

Psychiatric assistance may be granted at the voluntary request of a person with mental disabilities or with his consent. The consent for commitment is recorded in the medical papers and signed by the individual or his legal representative, as well as the psychiatrist. **The invalid consent of voluntary patients with mental disabilities deems commitment as unlawful detention.** These cases actually represent "involuntary commitment", thus the efforts of medical staff to ensure in such a manner free consent to hospitalization in the psychiatric facility constitute deprivation of the rights and guarantees of protection applying to involuntary commitment, such as judicial control of the detention. Often people are committed with free consent affected by vice, thus it is a little concerning the limited use of the legal procedure for commitment without free consent. Accordingly, a considerable number of persons are *de facto* detainees, but their detention is not recognized in contradiction to international law, as there is consent, although formal, for commitment.

Ensuring quality mental health services and the respect of the persons' rights when using these services. The mechanism of ensuring quality mental health services and the respect of the

persons' rights when using these services malfunctions in many cases and does not produce any legal effects given that it does not have the relevant safeguards for the full exercise of the rights of persons with disabilities. Also, most national legal provisions in this field contravene the international provisions and standards of human rights, particularly those of the Convention on the Rights of Persons with Disabilities. This situation, on the one hand, inconveniences the subjects of these rights and, on the other hand, generates the inefficiency of the authorities in the field and therefore results in conviction with issuing costs.

CONCLUSIONS

We emphasize the fact that recognizing a person's mental alienation is not a reason to deprive these persons of rights and freedoms. Moreover it is an occasion to be very cautious, especially in these cases, to respect their rights and liberties. In other words, these cases involve taking actions, to the highest extent possible, that go beyond the "ordinary" protection limits, as well as fulfilling other needs related to the welfare, rehabilitation and reintegration of persons with disabilities. Identifying their needs could be accomplished by **cooperation of all institutions, including specialized ones**, of civil society with organizations of persons with disabilities; information about public-private partnerships is also very important. At present, to this effect, local government representatives of first and second levels (mayors/deputy mayors, health and education institutions etc.) and civil society (development partners, volunteers, organizations, economic agents etc.) have entered into cooperation agreements in view of various socio-cultural activities or have concluded agreements for services.

International institutions encourage the ones involved in this activity to show maximum diligence to respect the principle of equality before the law in relation to persons with mental disabilities. Thus, one international example is Article 12 of the Convention on the Rights of Persons with Disabilities which states the right of every person with disabilities to be recognized as a subject of law, wherever they are. Moreover, the state recognizes that persons with disabilities enjoy legal capacity on an equal basis with the others in all areas of life, that is exercise capacity as well (*Barriers of social inclusion of persons with disabilities in Moldova. Sociological Study, 2011*).

At EU level, disability is seen as a problem of the whole society and all Member States are

bound to prevent and combat the practices violating the rights of persons with disabilities (Romanian Institute for Human Rights, 2013)

Therefore, States Parties shall take all appropriate measures to ensure access for people with disabilities to the support they may require in exercising their legal capacity. In this regard, States Parties shall ensure that all measures relating to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse, in accordance with international legislation on human rights. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, that they are in no conflict of interest and have no unwarranted influence, are proportional and adapted to the person's situation, that they are being applied for the shortest time possible and are subjected to regular review by a competent, independent and impartial authority or judicial body.

The safeguards shall be proportional to the degree to which such measures affect the rights and interests of the person. In accordance with this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to manage their own financial affairs and to have

equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

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