

Human Rights and Mental Health: Negative and Positive Obligations of States

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Human Rights and Mental Health

- Three relationships:
 1. Mental health policy affects human rights
 2. Human rights violations affect mental health
 3. Positive promotion of mental health and human rights are mutually reinforcing
- Larry Gostin and Lance Gable [2004] *Maryland Law Review* 20-121 at 27.

General Human Rights Instruments

- UN Universal Declaration of Human Rights 1948
- Council of Europe, European Convention on Human Rights
- UN International Covenant for Civil and Political Rights 1976,
- UN Convention on the Rights of the Child 1991
- Charter of Fundamental Rights of the European Union 2000.

International Bioethics Conventions

- 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
Oviedo Convention 1997
- Universal Declaration on Bioethics and Human Rights adopted by the United Nations Educational Social and Cultural Organization (UNESCO) in 2005.

Bioethics Principles

- Individual Human Dignity
- Autonomy
- Beneficence/Non/Maleficence
- Justice

International Human Rights Instruments Disability Rights

- United Nations Convention On The Rights Of Persons With Disabilities 2007
- Persons with disabilities include 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.

International Human Rights Instruments Mental Illness

- United Nations Principles for the Protection of Persons with Mental Illness 1991
- Recommendation Rec(2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder.

International Human Rights Instruments Learning Disability

- UN Declaration on the Rights of Mentally Retarded Persons 1971, which states that a 'mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings, as well as a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.

European Committee for the Prevention of Torture

- The Council of Europe has established that treatment without consent should be based on law and 'only relate to strictly defined exceptional circumstances.' The CPT Standards, Chapter VI, para.41, <http://www.cpt.coe.int/en/docsstandards.htm>.
- Treatment without consent must therefore be based on clear grounds related to the health or safety of the patient or to the protection of others.

International Human Rights Instruments

- World Health Organization, *WHO Resource Book on Mental Health, Human Rights and Legislation: Stop Exclusion Dare to Care* (2005)

Article 5 of the European Convention on Human Rights

- No-one shall be deprived of his liberty unless the deprivation is carried out in accordance with a procedure prescribed by law, and the deprivation is necessary in a democratic society on one of a number of grounds.
- Article 5(1)(e) specifies as one of the grounds unsoundness of mind

Article 5(1)(e)

- States that deprivation of liberty will be lawful if necessary for the prevention of the spreading of infectious diseases, if the person is of unsound mind, an alcoholic, drug addict or vagrant provided it is carried out in accordance with procedures prescribed by law.
- No need for conviction of criminal offence or other wrongdoing therefore the full Article 6 criminal trial safeguards do not apply

Deprivation of Liberty

- *HL v United Kingdom* 5 October 2004 para 89. Complete and effective control over residence, assessment, treatment, movement.
- The concrete situation was that HL was under continuous supervision and control and was not free to leave.

Negative and Positive Obligations

- The state is required to ensure that it does not deprive people of their liberty unlawfully or arbitrarily (Negative Obligation – *Winterwerp v the Netherlands (1979)*)
- The state is required to ensure that private parties within its jurisdiction do not deprive people of their liberty unlawfully or arbitrarily (Positive Obligation – *Storck v Germany (2005)*).

The European Court of Human Rights

- In *Herczegfalvy v Austria* (1992) – The situation of vulnerability and powerlessness of persons detained in psychiatric institutions requires special vigilance on the part of the authorities.

The Approach of the European Court of Human Rights

- The Court has built a framework of rights around Article 5(1)(e) for mentally disordered people

The Winterwerp criteria

- The wide power to detain on grounds of unsoundness of mind has been subject to limits specified in the case of *Winterwerp v the Netherlands* (1979).

The *Winterwerp* criteria

1. There must be objective medical evidence of a true mental disorder presented to a competent authority
2. The mental disorder must be of a nature or degree warranting confinement
3. There must be periodic review of the continued need for detention

Proportionality

- To these must be added a fourth principle, that detention must be a proportionate response to the circumstances. (See *Litwa v Poland*) This is the so-called 'least restrictive alternative.' It is reflected in the provision of the 1983 Act requiring the ASW making the application for detention to state that the treatment which the patient needs cannot be provided without detention.

Rights to Information and Review

- Once a person has been deprived of their liberty, they must be notified of the fact of and reasons for their detention and of their rights to challenge it (Article 5(2)).
- Most important, they have the right under Article 5(4) to seek speedy review of the lawfulness of their detention before a court or tribunal which must have the power of discharge.

Summary Article 5

- The negative obligation requires the state and its agents to ensure that it does not deprive people of their liberty unlawfully or arbitrarily (*Winterwerp v the Netherlands* (1979))
- The positive obligation requires states to ensure that private parties within its jurisdiction do not deprive people of their liberty unlawfully or arbitrarily (*Storck v Germany* (2005)).
- The positive obligation under Article 5(1) and 5(4) requires states to ensure that where a patient could be discharged if suitable community support were made available, there is effective review in situations where provision is delayed *Stanley Johnson v United Kingdom* (1997) 27 EHRR 296.

Article 2

- Duty to pass on risk sensitive information to any person or hospital taking over the care of a mentally disordered person (*Edwards v United Kingdom*).
- Duty of care owed to other in-patients.

Article 3

- Prevention of torture or inhuman or degrading treatment
- Treatment must reach minimum level of severity occasioning physical injury or recognised psychiatric injury.
- In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3.

Article 3

- Treatment of a mentally ill person may be incompatible with the standards imposed by Article 3 in the protection of fundamental human dignity, even though that person may not be able, or capable of, pointing to any specific ill-effects.
(Keenan v United Kingdom)

R(N) v M and others [2003] 1 WLR 562

- Before court could give permission for treatment without consent had to be satisfied that the proposed treatment was both in the patient's best interests and medically necessary for the purposes of Art 3
- Had the treatment been convincingly shown to be medically necessary?

Article 3 and Medical Necessity

- In *Nevmerzhitsky v Ukraine* (2003) and *Ciorap v Moldova* (2007) Article 3 prohibition on torture breached by forcible feeding which was not a medical necessity.

Article 8

- Article 8 held to protect the right of personal integrity as part of the right of respect for private life in *X v. Austria* (1979) 18 D.R. 154 (E.Comm.H.R.) – blood test, *Peters v. Netherlands* (1994) 77-A D.R. 75 (E.Comm.H.R.) – urine test, and *X v. Federal Republic of Germany* (1984) 7 E.H.R.R. 152 (E.Comm.H.R.) – force feeding of prisoner.

Key Cases

- *X. and Y. v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 22;
- *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, p. 26, § 86
- *Pretty v. the United Kingdom*, no. 2346/02, §§ 61 and 63, ECHR 2002-III,
- *Y.F. v. Turkey*, no. 24209/94, 22 July 2003, § 33
- *Glass v United Kingdom* Judgment of 9 March 2004
- *Storck v Germany* no 61603/00 16 July 2005 § 139, 143, 144, 150.

Article 8

- Clear case law from the court establishing that the right of personal integrity part of the right of respect for private life in *Pretty v United Kingdom 2002*, and *Glass v United Kingdom 2004*.
- *Glass* Hospital a public institution and the acts and omissions of the medical staff capable of engaging the responsibility of the government under the Convention (para 71)

Glass v UK and the Bioethics Convention

- Court referred to the Bioethics Convention
- Article 5 General Rule – An intervention in the health field may only be carried out after the person concerned has given free and informed consent
- The person concerned shall be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks

Bioethics Convention

- Article 7 Subject to protective conditions prescribed by law, including supervisory, control and appeal procedures, a person who has mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her disorder only where, without such treatment, serious harm is likely to result to his or her health.

Storck v Germany

- 139 She had refused to take medication, but it had been administered to her by force. She had been cramped with psychotropics and neuroleptics, and attached to beds, chairs and radiators. Had been treated as a mentally insane person for many years and the treatment had permanently ruined her health, and indeed her life. Both detention and infringement of her physical integrity imputable to the State. Alleged violation of positive obligation to protect against interferences with her right to respect for private life.

Storck v Germany

- 143. In so far as the applicant argued that she had been medically treated against her will while detained, the Court reiterates that even a minor interference with the physical integrity of an individual must be regarded as an interference with the right to respect for private life under Article 8 if it is carried out against the individual's will (see *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, p. 26, § 86).

Storck v Germany

- 144 Given medical treatment against her will. It further notes that the findings of at least one expert (see paragraph 23 above) indicated that the medicines the applicant had received in the clinic had been contraindicated and had caused serious damage to her health. However, the Court does not need to determine whether the applicant's treatment was *lege artis*, as, irrespective of this, it was carried out against her will and therefore already constituted an interference with her right to respect for her private life.

Storck v Germany

- 150. The Court considers that on account of its obligation to secure to its citizens their right to physical and moral integrity, the State remained under a duty to exercise supervision and control over private psychiatric institutions.

Summary of Article 8 rights

- Obligation of state under Article 8 to desist from interferences with physical and psychological integrity
- *Herczegfalvy v Austria (1992), Y.F. v Turkey (2003)*
- Obligation of state to protect against interferences with physical and psychological integrity
- *X & Y v Netherlands (1985), Storck v Germany (2005)*

New Positive Obligations?

- The right to an assessment
- The right to care in the least restrictive setting
- Mental Health and Disability Rights

Independent Living and Social Inclusion

UN Convention on Rights of Persons with Disabilities

Article 19 Living independently and being included in the community

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Human Rights and Mental Health

- Need to be aware of positive and negative rights.
- Need to be aware of the impact of the Bioethics Convention and the Council of Europe Mental Illness Recommendation.
- Need to ensure that international and domestic Disability Discrimination Legislation is fully applied to people with mental health problems as well as those with physical disabilities – the Social inclusion agenda.