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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

In the framework of the report currently in preparation on "Detention of the "socially maladjusted"" by **Mr Stefan Schennach** (Austria, SOC), rapporteur, the Committee **held** a public hearing with the participation of:

- ✓ **Mr Marius Turda**, Professor of 20th Century Central and Eastern European Biomedicine, Oxford Brookes University, UK
- ✓ **Ms Boglárka Benko**, Registry of the European Court of Human Rights, Council of Europe
- ✓ **Mr Thomas Kattau**, Deputy Executive Director, Pompidou Group (Council of Europe International Co-operation Group on Drugs and Addictions)
- ✓ **Ms Laura Marchetti**, Policy Manager, Mental Health Europe, Brussels

Ms Fataliyeva, acting as Chairperson of the Committee, opened the hearing, and introduced the guest speakers.

Mr Turda spoke about the history of the eugenics movement, whose main purpose was to "improve" the genetic "quality" of the human population through the control of reproduction and, at its extremes, through the elimination of those who were considered to be "unfit", physically and/or mentally. The term was first coined by English scientist Francis Galton (who was half cousin of Charles Darwin) in 1883, and from Britain the eugenics travelled fast and wide. The movement was embraced by many professions all over the world.

Eugenicists argued that society needed to be protected from the growing numbers of those labelled "unfit", "maladjusted", "unsound of mind", "feebleminded", "dysgenic" and "sub-normal" due to their physical and mental disabilities. Moreover, they believed it was appropriate to control the reproduction of persons of "unsound mind", thus sterilisation and marriage laws were consequently introduced in many countries, including in some US states, Switzerland, and Denmark.

Even after the Second World War, the eugenic movement re-planted itself and continued to attract political and scientific support for its proposals. The notion of "unsound mind" was re-scripted into the concept of "maladjustment" in the post-war years, and then applied more broadly to justify and advance inequitable social relations across a range of social identities. The link between mental disability and social unfitness remained unchallenged.

The concept of "unsound mind" had historically played a significant role in shaping eugenic thinking and practice. It was deployed in a variety of ways to stigmatise and dehumanise individuals and to advance discriminatory practices and marginalisation of individuals with learning disabilities. It was thus highly problematic to continue to use this expression in the European Convention of Human Rights. Against this background, Mr Turda said the time had come to confront the lingering adherence to eugenics after the Second World War.

Ms Benko explained 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 provided for the deprivation of liberty of persons of "unsound mind". The case-law of the Court allowed the deprivation of liberty of persons with mental disabilities both in the civil law context (such as forced hospitalisation and commitment to social care facilities) and in the criminal law context.

[1] The minutes were approved and declassified by the Committee on Social Affairs, Health and Sustainable Development at its meeting on 20 June 2023.

The underlying approach of the Court was that the right to liberty was such an important element of self-determination, and that the deprivation of liberty was such a serious measure that it had to be restricted to the strict minimum (*Alajos Kiss v. Hungary*) and was only to be resorted to if less severe measures were not possible (*Karamanof v. Greece).*

In order to establish whether detention of a person of "unsound mind" was lawful, the Court based the assessment on three cornerstone criteria developed in the case of *Winterverp v. the Netherlands*. First, the person had to be reliably shown to be of "unsound mind" based on objective medical expertise. Second, the individual's mental disorder had to be of a kind that warranted compulsory confinement. Third, the mental disorder had to persist throughout the period of detention.

From there, the Court gradually developed additional criteria. In *Litwa v. Poland*, the Court held that the deprivation of liberty had to be the last resort. This required that one had to consider other treatments that a person could benefit from (such as outpatient care and care in the community) so that they did not have to have recourse to deprivation of liberty. The second additional element, was the question of placement in an appropriate institution, developed in the case of *Rooman v. Belgium*. The Court held that detention must hold therapeutic purpose for it to be lawful. The third additional element was that national legislation had to ensure procedural safeguards and contain guarantees against arbitrariness, as held in the case of *Shtukaturov v. Russia*.

Ms Benko explained that the original purpose of allowing for the deprivation of liberty of persons of "unsound mind" was to protect society. Later, the Court moved over to an understanding that Article 5 should also be used to protect the person from him- or herself. In the case of *Stanev v. Bulgaria* the Court found that the protection of the welfare of the person could justify his detention. The Grand Chamber held that the need for social protection or the need for housing itself was not sufficient grounds to deprive a person of their liberty, but on the other hand, the fact that someone had been unable to take care of themselves, could be a justification to deprive that person of their liberty. In the case of *Plesó v. Hungary*, the Court said that a balance must be struck between the interest of society and the interest of the person to their right to self-determination.

Mr Kattau explained that the Pompidou group had highlighted for many years to the political level that the concept of "drug addicts" and the wording had evolved over time and that it was outdated. The prevailing view in this field of research, amongst practitioners, and also increasingly in the legal sphere of the Council of Europe member States, was that it was also seen as discriminatory and stigmatising.

It was more appropriate to speak about "people who use drugs" and not "drug addicts". The concept had evolved together with the language also because there was a much better understanding about what addiction and its causes were about. There had been a lot of research over the past 70 years and new methods, particularly thanks to neuroscience and genetics – which helped better understand the phenomenon.

Substance use disorder was defined in the WHO International Classification of Diseases (ICD-11) as a pattern of psychoactive substance use that appreciably increased the risk of harmful physical or mental health consequences to the user or others to an extent that warranted attention and advice from health professionals.

This was a cumulative set of criteria. Only if all these criteria were satisfied, one could speak of the mental disorder of substance abuse. This was problematic because before someone would reach the cumulative five criteria, there would be some people that fulfilled maybe 3 or 4 of them, but not the complete set. When someone had a substance use disorder, they would at least temporarily fulfil the five criteria established by the Court.

However, there were many different facets in terms of the consequences of substance use. The type of substance someone used, and effects of the substance were often determinants to the risk to society and harm to oneself. Mr Kattau noted that there was a fundamental difference between naturally grown cannabis, as compared to crack and cocaine. The latter could make people do things they would normally not do, and the person did not have to be dependent on it, it could come on the first go. Then there were other substances that had very little to no harm, only possible health risks to oneself.

So far, there had not been a single judgment from the Court on "drug addicts", which Mr Kattau believed implied that the criteria for deprivation of liberty in such cases were very strict.

Ms Marchetti spoke about the human rights dimension of the detention of persons with psychosocial disabilities. She noted that this was the term they preferred to use, as the wording in Article 5 (1) was stigmatising.

There had been a paradigm-shift of the biomedical approach towards persons with psychosocial disabilities and mental health. The focus used to be on individual characteristics which were the result of a mental health condition, on the impairment and what a person could and could not do. People with psychosocial disabilities and mental health problems were often considered to be inferior, inadequate or even dangerous for society. Policies and laws legitimised exclusion and deprivation of liberty – at best some minimal level of care was provided, including coercion.

Following the civil and human rights movements in the second half of the last century, the biomedical approach was, however, increasingly criticised. The psychosocial approach to disability posited that the problems and exclusion that persons with psychosocial disability and mental health problems faced were not caused by their

impairments, but rather how society was organised and how the topic was understood. This model also drew attention to the fact that human experiences were varied and there were a series of determinants that impacted an individual's life. Societal structures and practices as well as socio-economic and environmental determinants were seen as bigger influences than an individual's impairment. These factors were shown to disable people from taking part in everyday life. Ms Marchetti noted that these were barriers that needed to be removed and that they were the responsibility of society as a whole.

The new WHO definition recognised mental health as a basic human right and an integral component of health. Mental health was described as a state of mental well-being that enabled people to cope with the stresses of life and realise their abilities. This approach had led to the closure of certain mental health institutions (such as "lunatic asylums") and efforts had been made to replace coercion and forced treatments with support that were more human rights-compliant and respectful of a person's dignity.

Ms Marchetti explained that the UN Convention on the Rights of Persons with Disabilities (UNCRPD) signified a shift from a biomedical approach to a psychosocial model of disability. The purpose of the Convention was to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. It stipulated that persons with disabilities could not be discriminated against on the basis of their psychosocial disability.

Ms Marchetti mentioned a series of reforms that State Parties had to undertake in order to comply with the UNCRPD. This included the creation of justice systems that were universal and did not create separate proceedings or outcomes on the basis of disability; aim to include persons by providing adequate and accessible support; they had to address and remove barriers that persons with psychosocial disabilities faced; and they had to involve persons with disabilities and organisations that represented them in the design, implementation and monitoring of said policies and legislations.

The Chairperson then opened the floor for debate.

Mr O'Reilly said the presentations were extraordinarily interesting. By way of history, in Ireland as in so many other countries, institutionalisation had been used as a way of dealing with persons of "unsound mind", hiding away difference and removing "difficult" people. Mr O'Reilly underlined that this was morally wrong. It was Europe-wide, and Ireland was no exception. In Ireland, they had had a series of reforms, but he had recently witnessed someone with substance abuse die on the street, which was very distressing. The person had developed a dependency on alcohol but the deinstitutionalisation politics in Ireland had unfortunately failed him.

Ms Marra joined her colleague in thanking the speakers. It was very interesting to hear about the case-law of the Court, which was shocking. A few years ago in Switzerland, the government had compensated children who had been institutionalised or been in foster care. Many of them had been given to farmers as cheap labour. They were not put in prison, but still they had been deprived of their family environment. Ms Marra wondered what the link between mental health, homelessness, and drug addiction was. She underlined that human rights were universal, so how could they be differentiated based on impairments?

Mr Moutquin said he could have been diagnosed with a mental disorder in his country until he turned 6 years old. That was the moment when Belgium stopped considering homosexuality as a mental disorder. He reminded his colleagues that it was only last year that WHO had recognised that transsexuals were not mentally ill. In 20 years from now, the current discussions on mental illness would look outdated to the next generations of Europeans. When he raised those issues in the parliament with the national authorities, their answer dealt with the complexity, but it should mainly deal with how much funds are allocated by social care services to take care of those people.

Mr Amraoui noted that it was a very complicated situation. He underlined the importance of safeguards for the deprivation of liberty, but said it was also important to treat people with mental impairments. In Morocco, the government had tabled a bill that suggested very strict internal procedures with safeguards and the obligation to involve a judge. The point was to avoid any kind of misuse or abuse. In reality, such procedures were difficult to apply.

Mr Gevorgyan noted that the presentations were very useful and informative. In Armenia, drug addiction was becoming a huge problem. He was surprised to hear that Armenia and Estonia allowed for deprivation of liberty of persons of "unsound mind" in their constitutions. He noted that the law in Armenia was adopted in 2015, thus not so long ago, and said he believed the Venice Commission had revised and done a lot of work on the adoption of the law in his country. Mr Gevorgyan wondered whether the Council of Europe Human Rights Commissioner kept this issue on her agenda.

Mr Cegonho thanked the experts for their presentations. In Portugal, drug addiction was seen only as a medical problem, but not a criminal one. Consumption was decriminalised in Portugal, and for those with substance abuse, the state substituted drugs with other chemical products. They had also built consumption rooms with medical support and nurses. Those who had problems with substance abuse, but were not part of the substitute drugs programme, could go to these rooms and use their products with medical support. About forced

hospitalisation of persons with mental illness, he noted it was important to have an objective list of criteria to avoid transfer to forced hospitalisation, which could amount into “life imprisonment” for some.

Mr Grin believed it was a very complex and far-ranging subject. He underlined that as long as people were not dangerous to society, they should not be deprived of their liberty. He said it was important to have proper evaluation of patients.

Ms Marchetti noted that when putting measures in place to include persons with mental health illnesses in society, it was important to understand the purpose. If the purpose was for the person to be included in society, then measures had to be built around this. It was important to support decision-making. Advance measures (such as “living wills”) should also be taken into consideration. Patients should be able to choose beforehand, when they had a lucid episode, how to be treated in case their condition deteriorated. Speaking of the process of deinstitutionalisation, Ms Marchetti regretted that many countries had unsuccessful stories in this regard. The complexity of the topic was that measures put in place had to be followed by sufficient budget allocation for outpatient and community care – this was often lacking. Willingness within the system was also necessary to co-operate and provide a continuum of care. Sometimes professionals in hospitals were disillusioned about what to do with people with mental health illnesses. There were thus many measures that could be put in place, but it required political will and adequate funding. Lastly, she noted that forced hospitalisation was a human rights violation which could amount to life imprisonment although the person concerned had not engaged in any criminal activity.

Ms Benko thanked the parliamentarians for their questions, contributions, and comments. Although it was strange to put all these people in one “group” (contagious diseases, drug addicts, people of unsound mind etc.), they had in common that they could pose a risk of danger from the perspective of medical or judicial bodies. She noted that national judicial bodies usually left it to medical personnel to assess that danger. The ECHR did not contain a prohibition of detention on the basis of impairment. Human rights protection might thus be in danger of fragmentation, since the UNCPRD did not contain an enforcement mechanism on par with the Court.

Mr Kattau responded to the situation described by Mr O’Reilly. It was a situation that was encountered daily by first responders. This was a person who was in distress and in need of medical assistance. He noted that many people who used drugs were worried about being institutionalised. There was very little guidance to first responders, who were aware of the fact that they had the duty to protect. The tension lay in the fact that the person had the right to freedom of liberty, but first responders had a legal obligation to protect life. The consequence was that a person in distress sometimes shied away from taking action, so as not to be locked up or be subjected to coercive measures.

With regard to rehabilitation of persons with substance use problems there were a variety of treatment options available. Access and availability were key factors and impacted by waiting lists and financial costs. The second issue was that rehabilitation was often not connected enough to other crucial services, such as housing, jobs, a community support network, etc. This made the risk of relapse imminent.

Mr Turda added (in the context of Article 5 subparagraph e of the ECHR) that there were waves of Americans coming to Britain to bribe addicts to have themselves sterilised in the mistaken belief that they could thus be prevented from passing on their addictions to future generations.

The rapporteur thanked everyone for their meaningful contributions to the report. One thing that had become clear was that eugenics was not a discovery of the Nazis, but it was alive and well in the UK even after the Second World War and was still present in Europe.

The Chairperson then thanked the experts for their contributions and closed the hearing.

List of presence

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