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STEERING COMMITTEE FOR HUMAN RIGHTS
CDDH

Draft opinion of the CDDH for the DH-BIO

on the draft Additional Protocol on the protection of the dignity and fundamental rights of persons with mental disorder with regard to placement and involuntary treatment

Introduction

1. The CDDH is invited to adopt an opinion for the Committee on Bioethics (DH-BIO) on the draft Additional Protocol on the protection of the dignity and fundamental rights of persons with mental disorder with regard to placement and involuntary treatment (see document CDDH(2018)10).

2. During its 100th meeting[1], the Bureau suggested that the CDDH sticks to its opinion already adopted in June 2016 at its 85th meeting[2] concerning the Parliamentary Assembly Recommendation 2091(2016)[3], while stressing that, according to the CDDH, it is up to the DH-BIO to determine when and under which conditions to resume the work on the Additional Protocol.

3. On this basis, the Secretariat prepared the draft opinion hereafter for discussion by the CDDH during its 90th meeting[4].

4. This document also contains the comments received from four delegations (Belgium, Estonia, Finland and Switzerland).

[1] Berlin, 8 - 9 November 2018, document CDDH-BU(2018)R100, § 26.
[2] Strasbourg, 15-17 June 2016, document CDDH(2016)R85, Appendix IV.
[3] Parliamentary Assembly Recommendation 2091(2016) - "The case against a Council of Europe legal instrument on involuntary measures in psychiatry".
[4] Strasbourg, 27-30 November 2018.

Draft CDDH Opinion

1. Concerning the draft Additional Protocol on the protection of the dignity and fundamental rights of persons with mental disorder with regard to placement and involuntary treatment, under preparation within the Committee on Bioethics (DH-BIO), the Steering Committee for Human Rights (CDDH) reiterates the comments it adopted at its 85th meeting (15-17 June 2016, document CDDH(2016)R85, Appendix IV) in respect of Parliamentary Assembly Recommendation 2091(2016) "The case against a Council of Europe legal instrument on involuntary measures in psychiatry". These comments read as follows:

    1. The Steering Committee for Human Rights (CDDH) notes that Article 14 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) is interpreted by the committee established under this convention as prohibiting any deprivation of liberty on the basis of a mental disability. Consequently, according to the committee established by the CRPD, any national mental health law providing for a deprivation of liberty on the basis of such a criterion is incompatible with the convention.

    2. The CDDH also notes that, stemming from this interpretation, the Parliamentary Assembly of the Council of Europe, recommends the Committee of Ministers to[5] :

        (i) withdraw the proposal to draw up an additional protocol concerning the protection of human rights and dignity of persons with mental disorders with regard to involuntary placement and involuntary treatment;

        (ii) instead focus its work on promoting alternatives to involuntary measures in psychiatry, including by devising measures to increase the involvement of persons with psychosocial disabilities in decisions affecting their health.

    3. Whilst the CDDH shares the Assembly's willingness to do the utmost to promote alternatives, it nevertheless notes that under certain circumstances, involuntary measures may be warranted in order to prevent the patient causing harm to him/herself or other persons. The Court has said that "a mental disorder may be considered as being of a degree warranting compulsory confinement if it is found that the confinement of the person concerned is necessary as the person needs therapy, medication or other clinical treatment to cure or alleviate his/her condition, but also where the person needs control and supervision to prevent him/her from, for example, causing harm to him/herself or other persons."[6] For this reason involuntary measures in psychiatry continue to be provided for in the laws of member States and regularly applied. Bearing in mind this reality, the CDDH notes the need to ensure that in all circumstances, involuntary measures are embedded with the guarantees required by the European Convention on Human Rights so as to (i) safeguard the human rights of the person concerned[7], and in particular provide the possibility for the right to an effective remedy against such a

[5] Recommendation 2091(2016) of the Parliamentary Assembly "The case against a Council of Europe legal instrument on involuntary measures in psychiatry".
[6] *Bergmann v. Germany*, No. 23279/14, judgment of 7 January 2016, § 97.

[7] Involuntary measures, in particular placement, raise important human rights questions especially concerning Article 5 §1(e) (right to liberty and security), but also in some cases Articles 3 (prohibition of torture and inhuman or degrading treatment) and 8 (protection of private and family life) of the European Convention on Human Rights.

measure and (ii) prevent violations of the Convention similar to those already found by the European Court of Human Rights in many occasions. It underlines that this is the purpose of the additional Protocol under discussion in the DH-BIO[8].

4. Given that the Court regularly receives applications revealing violations of the ECHR as a result of involuntary measures, the CDDH considers that an additional Protocol to the Oviedo Convention could be an effective tool to define the indispensable legal guarantees to prevent such violations in our member States. Such an instrument would aim at better protecting the rights of the persons concerned both in law and in practice.

5. Finally, if the CDDH is convinced that involuntary measures should be exceptional and only be envisaged in the absence of alternatives, it is also convinced that the possible drawing up of a legal instrument to lay down such measures within the Council of Europe would not diminish in any way the credibility of the Organisation, but would on the contrary encourage the progressive transition to a more uniform application of voluntary measures in psychiatry by the member States, in accordance with the spirit of the United Nations Convention on the Rights of Persons with Disabilities.

2. This said, the CDDH considers that it is up to the DH-BIO to determine**,** taking into consideration the comments received during the public consultation, when and under which conditions to resume the work on the Additional Protocol.

3. In this respect, the CDDH wishes to draw DH-BIO attention to the comments sent by the delegations of Belgium, Estonia, Finland and Switzerland within the CDDH. These comments appear below as an appendix to this Opinion.

[8] The CDDH has already had the opportunity to express its opinion on the preparation of such a protocol in 2009 (document CDDH (2009)008).

Appendix

Comments received from CDDH delegations

BELGIUM / BELGIQUE

1. Nous saluons le travail effectué au sein du Comité Bioéthique du Conseil de l'Europe concernant l'élaboration d'un projet de protocole sur le placement et le traitement involontaire des personnes atteintes de troubles mentaux. Cependant, nous ne pouvons offrir notre plein soutien à la rédaction de ce projet de Protocole.

2. Si l'on admet la nécessité de traiter des patients sans leur consentement dans des cas d'extrême nécessité (ex. patient incapable de s'exprimer), l'encadrement prévu par le projet risque à notre sens de porter préjudice de manière disproportionnée au droit à l'intégrité physique des personnes. Ce projet donne une légitimité au traitement involontaire, sans encourager son éradication et promouvoir le dialogue patient/médecin ainsi que la mise en place de traitements différents qui recueillent le consentement du patient.

3. Bien que le projet de protocole mentionne que les Parties s'engagent à assurer le développement et à privilégier le recours à des mesures moins restrictives et intrusives que les mesures involontaires, aucune obligation n'est réellement prévue à cet égard.

4. De manière plus générale mais non exhaustive, nous vous soumettons ci-dessous quelques éléments qui témoignent de notre inquiétude à l'égard de ce projet de protocole :

   (i) Le projet ne concerne que les majeurs, excluant les mineurs qui peuvent, eux aussi, être atteints de troubles mentaux et être confrontés au placement et à un traitement involontaire. Leur inclusion nous parait opportun comme le prévoit la Recommandation (2004)10 relative à la protection des droits de l'homme et de la dignité des personnes atteintes de troubles mentaux.

   (ii) Il nous parait nécessaire de protéger davantage les personnes atteintes de troubles mentaux en mentionnant expressément dans le projet de protocole que l'inadaptation aux valeurs morales, religieuses, sociales, politiques ou autres ne peut être considéré comme un trouble mental permettant de justifier un traitement ou placement involontaire.

   (iii) Pour le projet de protocole (art. 2), une mesure involontaire est une mesure appliquée à une personne atteinte d'un trouble mental qui s'oppose à la mesure**.** La définition d' « involontaire »devrait être approfondie. L'introduction de la définition de « volontaire » pourrait permettre de clarifier cette notion. Que se passe-t-il si une personne est incapable de s'exprimer, n'exprime ni consentement, ni opposition ? Par principe, 'involontaire' signifie 'où la volonté n'a pas de part'. Or, l'opposition est une mode d'expression de la volonté. Le projet de protocole n'entend-t-il donc ne viser que les personnes capables de s'exprimer qui s'opposent à une mesure ?

   (iv) En vertu de l'art. 11, i. b), du projet de protocole, s'il existe un danger pour autrui (contrairement au cas où le patient risque de porter atteinte à sa santé), un traitement involontaire est possible sans exiger que l'aptitude du patient à prendre une décision soit altérée. Il suffit donc d'évoquer un risque d'atteinte pour autrui pour justifier un traitement involontaire.

   (v) On notera qu'une mesure involontaire existe lorsque la personne s'oppose à la mesure en vertu de l'article 2, tandis que l'article 10 et 11 du projet de protocole exige dans certains cas, pour adopter une mesure involontaire, une capacité gravement altérée du

patient. Or, lorsqu'une personne a sa capacité altérée, peut-elle s'opposer ? et quid si elle ne s'oppose pas ?

(vi) L'article 12 applique les mêmes règles de procédure au traitement et au placement involontaire. La décision est prise par un tribunal ou un autre organe compétent. En cas d'urgence (art. 13), le texte mentionne que la prise de décision est laissée à un organe compétent.

(vii) Pour être un organe compétent, il suffit d'être désigné par la loi. Mais il n'existe pas de garantie quant à la nature ni quant à la neutralité de cet organe compétent. Ainsi, il conviendrait de clarifier les critères selon lesquels la procédure d'urgence peut être utilisée.

ESTONIA / ESTONIE

8. **The Draft Additional Protocol as it has been drafted creates hesitations and questions**. Due to the limited scope of the Protocol, it will not be applied to minors and it will not be applied in the context of criminal procedure. Taking into account that at the same time the European Convention on Human Rights (especially Article 5 § 1 (e) and Article 8) and relevant case-law established by the European Court of Human Rights (ECtHR) already duly protects the rights with regard to involuntary placement and involuntary treatment, and is applicable also in respect of minors and in the criminal law context, the Draft Protocol rather causes confusion.

9. As the Draft Additional Protocol raises substantial questions/hesitations, we mention only aspects of principle importance and will not submit technical amendment proposals regarding the wording of each Article at this stage of the proceedings.

10. Concerning the criteria for involuntary placement and treatment, we refer once again to the Convention on Human Rights and the case-law of the ECtHR (e.g. *Winterwerp v. the Netherlands,* 24 October 1979). As **Articles 10 and 11** of the Draft Protocol **depart from the relevant criteria established already by the ECtHR**, Estonia finds that these Articles should be amended and conciliated.

For example, criteria foreseen in Articles 10 (ii) and 11 (ii) of the Draft Protocol according to which the placement and treatment may only be used for therapeutic purpose is definitely too narrow. The ECtHR has accepted that "the detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons" (*Hutchison Reid v. the United Kingdom*, 20 February 2003, § 52; see also *N. v. Romania*, 28 November 2017, § 151).

11. Estonia cannot accept the wording of **Article 12 § 2** either**. It disregards the courts' independence in the process of evaluation of proof**. Namely, it is generally acknowledged principle that no evidence has predetermined weight and a court shall evaluate all evidence in the aggregate according to the conscience of the judges.

12. Therefore, the wording of Article 12 § 2 should be amended accordingly, taking into account that the courts do not "act on the basis of the medical examination", but shall evaluate all evidence, including the statements of the person herself/himself, other interested parties to the proceedings etc.

13. **Article 18 remains unclear and Estonia proposes to delete it altogether**. We note that if specific treatment is carried out without lawful grounds and with purpose which is not legally or morally acceptable, it cannot be considered a treatment but torture or inhuman or degrading treatment (which is prohibited under Article 3 of the Convention on Human Rights). At the same

time, every treatment has side effect, some of which cannot be foreseen. Article 18 in its current wording is unclear and can be misinterpreted.

14. Also **Article 19** remains unclear. It is not understandable which information is meant here, and at which point it should be given and to whom.

FINLAND / FINLANDE

Comments by the Finnish Government

General remarks

15. The Government of Finland reiterates the need to carefully consider the objective and purpose of this draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment in order to ensure its full conformity with international human rights standards. The Government believes that – to the extent allowed by the nature of this instrument – **the prevention of coercive measures should be given greater emphasis** in the draft Additional Protocol.

16. In addition, the Government proposes to add an article that would emphasise the use of voluntary measures as a general rule and the use of involuntary measures only as a last resort.

Article 2 – Scope and definitions

17. The Government refers to its earlier comments, where it has paid attention to the definition of *mental disorder*. "Internationally accepted medical standards" include also mental disorders for which the use of involuntary measures is always excluded (e.g. sleep disorders, gender dysphoria). The Government considers it important that at least the Explanatory Report explains the use of the definition and the related problems.

18. Moreover, it should be noted that the Convention on the Rights of Persons with Disabilities applies also to persons with psychosocial disabilities *i.e.* persons with mental health problems. The Convention presents a shift from the medical model of disability towards the human rights based approach to disability where the person is at the centre of all decisions affecting him or herself.

19. The Draft proposes that *treatment* would mean intervention *irrespective of where this treatment takes place*. The Government holds that the Convention should be applied only to treatment provided in social welfare and health care units.

Article 5 – Proportionality and necessity

20. The Government refers to Article 10 and proposes that the following text (bolded) be added:
"Involuntary measures shall only be used in accordance with the principles of proportionality and necessity. Persons subject to such measures shall be cared for in the least restrictive environment possible and with the least restrictive or intrusive treatment possible, taking into account their health needs and the need to protect other persons from **serious** harm."

Article 9 – Appropriate environment

21. Considering the content of Article 22, the Government proposes that the term *appropriate environment* in Article 9 be replaced with *registered facility*. In addition, the use of appropriate facilities, furniture and equipment could be required in the article, for instance as follows (struck through and bolded):
"Parties to this Protocol shall take measures to ensure that any involuntary placement and any involuntary treatment take place in ~~an appropriate environment~~ **a registered facility. Such facilities shall be appropriate to the needs of the person subject to such measures as well as the need to protect others."**

Article 14 – Extension of an involuntary measure

22. The Government points out that the article does not specify how chains of decisions should be prevented.

Article 17 – Seclusion and restraint

23. As to Article 17, paragraph 1, the Government refers to the comment on *appropriate environment* regarding Article 9. In respect of Article 17, paragraph 3, the Government proposes considering whether this paragraph should require that the persons subject to seclusion or mechanical restraint can see and hear the staff monitoring them.

Article X – Specific treatments/Treatment with the aim of producing irreversible effects

24. The Government considers it important to ensure that the proposed wording will not preclude measures necessary for preventing a risk to a patient's life or health.

Explanatory Report

25. **Paragraph 19 -** See comment on the definition of *mental disorder* regarding Article 2 of the Draft Additional Protocol.

26. **Paragraph 52 -** The Government finds it positive that the term used in Article 8 is interpreted to include appropriate training and continuing training.

27. **Paragraph 56** - Regarding the security classification of facilities (*high, medium, and low levels of security*) the Government considers that the need for security classification should not be emphasised but primarily the organisation of treatment, care and rehabilitation should be underlined.

28. **Paragraphs 72 and 74 -** The Government proposes that the paragraphs include examples of non-restrictive, voluntary measures, such as crisis plans and psychiatric *advance directives*.

29. **Paragraph 126 -** The Government proposes a clarification of the concept of *house rules* as follows (bolded) in order to emphasise that the house rules are disciplinary regulations for ordinary life that apply to all people, typically for instance in residence houses (vs. "institutional power").

"126. The right to communicate with other persons or bodies shall not be unreasonably restricted. This does not mean that a facility cannot, for example, have "house rules" regarding visiting times, but such rules should be available for independent scrutiny. **Such "house rules" should only consist of rules for everyday life that are normally set for living in any given housing.** An example of circumstances in which it might be reasonable to place some restrictions on communication would be to prevent harm to the future prospects of the person concerned (for example if a person indicates that s/he intends to resign from his or her job, but is not considered to have the capacity to make that decision)."

Comments by the Parliamentary Ombudsman of Finland

30. The Government has reserved the possibility for the Parliamentary Ombudsman to provide his comments on the draft Additional Protocol.

31. The following comments by the Parliamentary Ombudsman relate to issues he has found important in his work as National Preventive Mechanism under the Optional Protocol to the United Nation's Convention against Torture and as national mechanism tasked to promote, protect and monitor the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD).

Article 2 - Scope and definitions - (Paragraph 4) "involuntary" refers to a placement or treatment applied to a person with mental disorder who objects to the measure;

32. According the draft Explanatory Report "(t)he definition of "involuntary" for the purpose of this Protocol refers to a placement or treatment applied to a person with a mental disorder who

objects to the measure, even if that person has a legal representative who is prepared to authorise it. This applies irrespective of the legal capacity of the person as defined by national law" (para. 21).

33. The definition may be too narrow as regards compliant patients who do not actively object to the measures applied to them. According to the case law of the European Court of Human Rights the placement of such patients in a psychiatric facility may nevertheless amount to deprivation of their liberty and call for procedural safeguards equivalent to those applicable to objecting patients.

I refer to the decision *H.L. v. UK* (2005) where the court considered the key factor to be that the health care professionals treating H.L. exercised complete and effective control over his care and movements from the moment he presented acute behavioural problems. It found both that H.L. had been deprived of his liberty and that that deprivation of liberty had taken place without the necessary procedural safeguards. (See in particular para. 90 and 123 of the decision; see also *Storck v. Germany*, 2005, para. 68-75 and 89).

Article 9 - Appropriate environment - Parties to this Protocol shall take measures to ensure that any involuntary placement and any involuntary treatment take place in an appropriate environment.

34. The draft Explanatory Report defines an "appropriate environment" by reference to the CPT-standards (Extract from the 8th General Report [CPT/Inf (98) 12]). In my opinion the possibility to take outdoor exercise on a daily basis (in the absence of medical considerations) should also be included in the list in paragraph 57 of the Report. The drafters should also consider strengthening the rights of persons with physical disabilities in psychiatric facilities in accordance with the requirement to provide reasonable accommodation in article 5(3) of the CRPD.

Article 16 - Appeals and reviews concerning the lawfulness of involuntary measures - Paragraph 2: Parties shall ensure that any person subject to an involuntary measure can effectively exercise the right to be heard in person, with the support of his or her person of trust, if any; or through his or her representative, if such a person has been designated, at such reviews or appeals.

35. For many patients the right to access to a court or other remedies is illusory if they do not receive appropriate support. According to the case law of the European Court of Human Rights "special procedural safeguards" are required for people who are not capable of acting for themselves (*Winterwerp v. Netherlands* (1979), para. 60 and *M.H. v. United Kingdom* (2013), para. 77).
36. Therefore, the draft article 16(2) is very important. However, the exceptions mentioned in the draft ("if any", "if such a person has been designed") are problematic as they may justify failures to provide the patient with necessary support. There should be a more straightforward obligation to provide the patient with appropriate support, if needed. Such an obligation would also correspond to the requirement of article 12(3) of the CRPD ("States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.")

37. **Chapter VI - Seclusion and restraint [Specific situations]** - Involuntarily admitted psychiatric patients may be subjected to more restrictions than seclusion and restraint, for instance, search of the patient's belongings and his/her person and seizure of the patient's belongings. Any such measures should also be subject to adequate safeguards.

Article - 19 Right to communication - 3. Their right to communicate with other persons and bodies shall not be unreasonably restricted.

38. Restrictions on the right to communicate may amount to an interference with the patient's and other person's rights under article 8 of the European Convention of Human Rights (ECHR). Consequently, such restrictions must be "in accordance with the law", which implies that there must be appropriate protection in national law against arbitrary interferences with that right. (see e.g. *Herczegfalvy v. Austria* (1992), para. 87-92).

Article 21 - Complaints procedure - Parties shall ensure that persons subject to an involuntary measure as well as [their lawyer] any person providing them with legal assistance, representative and person of trust, if any, have access to an effective complaints system, both within the responsible authority and to an independent outside body, regarding issues related to the implementation of involuntary measures, which are not covered by the procedures provided for in Article 16.

39. Regarding measures and restrictions not subject to appeal, the complaints procedure envisaged in article 21 must meet the requirements of an effective remedy in accordance with article 13 of the ECHR. Therefore the procedure must be construed as ensuring either the prevention of the alleged violation of the patient's rights, or the provision of adequate redress, including compensation for a victim of violation (see, for instance, *Kudla v. Poland* (2000), para. 158). I suggest that some reference to this case law is included in the Explanatory Report.

SWITZERLAND/SUISSE

40. La Suisse soutient les efforts visant à mieux encadrer le recours à des mesures de placement et de traitement involontaires car celles-ci continuent de poser des problèmes importants dans de plusieurs Etats européens, comme en attestent les nombreux constats de violations de la CEDH posés par la Cour dans ce domaine.

41. Dans le même temps, la Suisse considère qu'il est important de veiller à tenir suffisamment compte des travaux menés au niveau international sur la protection de la dignité et des droits des personnes atteintes de troubles mentaux, en particulier la Convention des Nations Unies relative aux droits des personnes handicapées, ainsi que l'exige le préambule du projet de protocole additionnel.

42. Dans ce contexte, une attention accrue doit être accordée au principe de subsidiarité, selon lequel des mesures alternatives au placement et au traitement involontaires devraient être systématiquement recherchées.

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