Freedom, Security & Justice: European Legal Studies

Rivista quadrimestrale on line
sullo Spazio europeo di libertà, sicurezza e giustizia

2021, n. 1

EDITORIALE SCIENTIFICA
ES

Rivista scientifica on line "Freedom, Security & Justice: European Legal Studies"
www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

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2021, n. 1

FOCUS

20 años de la Carta de derechos fundamentales de la UE. Su aplicación por los Tribunales Españoles

Il Focus contiene i testi rivisti di alcune delle relazioni tenute in occasione del Convegno internazionale organizzato presso l'Universidad Pompeu Fabru di Barcellona (28/29 settembre 2020)

THE UNCONVICTED DETENTION OF PERSONS WITH MENTAL IMPAIRMENTS: THE ECHR "UNSOUND" THAT DOES NOT SOUND

Marcello Sacco*

1. Introduction

Within the European area of freedom, security and justice, detention is a critical topic entailing mutual recognition and normative harmonisation, which are still far from complete realisation. European states and regions have distinctive approaches to detention, often at the edge of human rights guarantee. Besides, detention is a sensitive topic including different areas, as the conditions of prisoners[1] and the confinement of migrants,[2] among others. Mavrouli linked the detention of migrants to the cultural approach to "migration as a threat", which fosters a need for securitisation. The author suggested that extreme securitisation may undermine the values of freedom and justice.[3]

The idea concerning a dark side of securitisation applies to the topic of this article as well. States justify the involuntary detention of persons with mental impairments with the excuse of security, which is twofold. On one hand, there is a medical and paternalistic tendency to look at persons with mental impairments as not able to take care of themselves. On the other hand, there is a cultural stereotype that labels persons

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Double blind peer reviewed article.

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The author is grateful to Prof. Angela Di Stasi for her precious support.

[1] C. PAPACHRISTOPOULOS, *The Tale of the European Sandcastle: On the Convergence and Divergence of National Detention Systems across the European Union*, in this *Journal*, 2019, n. 2, pp. 120-139.

[2] R. MAVROULI, *The Challenge of Today's Area of Freedom, Security and Justice: A Re-Appropriation of the Balance between Claims of National Security and Fundamental Rights*, in this *Journal*, 2019, n. 2, pp. 90-119.

[3] Ibid.

ISSN 2532-2079
DOI:10.26321/M.SACCO.01.2021.08

with mental impairments as a threat to society.[4] This stigma may cause the denial of liberty (among other rights) to a disadvantaged category of persons, who may be detained although unconvicted of any crime.

"The involuntary placement and involuntary treatment of mentally ill patients are central issues in mental health care. Their massive impact upon the liberty and freedom of the persons concerned have made them a topic of controversial legal and ethical debates for more than 100 years".[5] Despite centenary debates and human rights law, "involuntary admission and detention are widely used to treat patients with mental illness in Europe".[6] A 2008 study revealed that the rate of compulsory admissions in north-western Europe is up to 200 cases per 100,000 people. The research also emphasised the scarcity of reliable data and the plurality of legal systems that regulate the issue, which made it difficult to depict the situation.[7]

The right to liberty is a pillar of international human rights protection. However, it is also among the few rights that allow derogations because it is not absolute but can be limited to guarantee other rights as well as the rights of others. The critical factor is whether the status of disability is a sufficient reason to deny people the right to liberty. The UN Convention on the Rights of Persons with Disabilities[8] (CRPD) marks a paradigm shift in the concept of disability that entails equal treatment for everyone. This shift includes the fulfilment of the right to liberty (among others) by persons with disabilities. Thus, involuntary detention based on disability should be prohibited because of discriminating. The EU and all the EU Member States ratified the CRPD. Thus, the principles of the Convention should be implemented and pursued in the European area of freedom, security and justice.

However, international law instruments are not always consistent with one another. For instance, the EU Fundamental Rights Agency (FRA) affirmed that "there is no internationally accepted definition of involuntary placement".[9] FRA assumed that any placement is involuntary when not respecting the right to liberty of the placed person.[10]

The involuntary placement of persons with mental impairments is an example of a controversial issue where different conventions, courts and institutions seem to have distinctive approaches. The European situation needs to be included in the international sphere in order to enter the debates concerning unconvicted detention. For this reason, the next sections frame the issue in five international contexts: (i) the United Nations; (ii) the Convention on the Rights of Persons with disabilities; (iii) the EU Charter of

[4] H.J. SALIZE, H. DREßING, M. PEITZ (eds.), *Compulsory Admission and Involuntary Treatment of Mentally Ill Patients – Legislation and Practice in EU-Member States*, Mannheim, 2002, pp. 2-3.
[5] Ibid, p. 2.
[6] M. ZINKLER, S. PRIEBE, *Detention of the Mentally Ill in Europe – a Review*, in *Acta Psychiatrica Scandinavica*, 2002, n. 106, pp. 3-8.
[7] A. DE STEFANO, G. DUCCI, *Involuntary Admission and Compulsory Treatment in Europe: An Overview*, in *International Journal of Mental Health*, 2008, vol. 37, n. 3, pp. 10-21.
[8] Convention on the Rights of Persons with Disabilities, 2006, A/RES/61/106.
[9] European Union Agency for Fundamental Rights, *Involuntary Placement and Involuntary Treatment of Persons with Mental Health Problems*, 2012, p. 9.
[10] Ibid, p. 14.

Fundamental Rights; (iv) the Council of Europe; and (v) the Oviedo Convention. In detail, the last section reveals an international dispute about the involuntary detention of persons with disabilities that was unresolved at the time of this article.

2. The United Nations ban on unconvicted detention

The Universal Declaration of Human Rights (UDHR) is the first universal document establishing fundamental human rights. Its Article 3 affirms that "everyone has the right to life, liberty and the security of person"[11] and "no one shall be subjected to arbitrary […] detention".[12] The joint lecture of these two statements entails that arbitrary detention violates the right to liberty. Thus, if the involuntary placement of mentally impaired persons were classified as a form of arbitrary detention, it would be contrary to the Declaration.

The International Covenant on Civil and Political Rights (ICCPR) is a binding human rights treaty that empowers the UDHR principles. Article 9 states that "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary […] detention […] except on such grounds and in accordance with such procedure as are established by law".[13] This means that national legislation could authorise exceptions to the right to liberty, which is not absolute. However, the Human Rights Committee (HRC) published a first General Comment (GC) on Article 9 ICCPR in 1982, explaining that it "is applicable to all deprivations of liberty, whether in criminal cases or other cases such as, for example, mental illness".[14]

In 2014, the HRC produced a second GC on Article 9 ICCPR. Here, it stated that "examples of deprivation of liberty include […] involuntary hospitalisation".[15] Since "the right to liberty of persons is not absolute", the Committee clarified that "the enforcement of criminal law" is the only acceptable exception to that right.[16] It also affirmed that "States parties should revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention".[17] Despite this, the GC did not exclude the possibility to involuntarily detain persons with mental impairments, accepting the eventuality as "a measure of last resort".[18]

The HRC enhanced awareness of the involuntary detention of persons with mental impairments. For instance, in 2009, the Office of the High Commissioner for Human Rights (OHCHR) published a report stating that "unlawful detention encompasses

[11] The Universal Declaration of Human Rights, 1948, Article 3.
[12] Ibid, Article 9.
[13] International Covenant on Civil and Political Rights, 1966, General Assembly Resolution 2200A, Article 9(1).
[14] Human Rights Committee, *General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 1982, p. 1.
[15] Human Rights Committee, *General Comment No. 35 - Article 9 (Liberty and Security of Person)*, 2014.
[16] Ibid, p. 3.
[17] Ibid, p. 6.
[18] Ibid.

situations where the deprivation of liberty is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment. […] such measures […] are to be considered discriminatory and in violation of the prohibition of deprivation of liberty".[19] "This should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention […], but that the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis".[20]

In 2016, the HRC asked the OHCHR for a specific report on the fulfilment of human rights by mentally impaired persons.[21] The OHCHR delivered its work after considering 40 contributions to the drafting process.[22] In short, it emphasised "the absolute ban on deprivation of liberty on the basis of impairments".[23] Besides, the OHCHR highlighted that deprivation of liberty also occurs when due process is denied to persons considered somehow incapable.[24] The report is innovative in its effort to outline the way forward a contemporary situation that is mostly discriminating against persons with mental impairments. The crucial factor is the definitive shift from a medical perspective to a human rights approach to disability, in line with the CRPD principles. This is the starting point of any good practice on the matter.[25] Building upon the OHCHR report, the HRC approved a resolution that urged states to align their policies with those indicated,[26] and organised a forum to spread the good practices.[27]

The HRC hosts the Special Rapporteur on the Rights of Persons with Disabilities.[28] In her 2019 annual report, the Rapporteur focused on the deprivation of liberty of persons with disabilities. The report revealed that "persons with disabilities are systematically incarcerated, imprisoned, detained or otherwise physically restricted across the globe, regardless of the economic situation of the country or its legal tradition".[29] The Rapporteur introduced a fundamental definition when stating that "a

[19] Human Rights Council, *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities*, 2009, A/HRC/10/48, p. 15.
[20] Ibid, p. 16.
[21] Human Rights Council, *Mental Health and Human Rights - Resolution Adopted by the Human Rights Council on 1 July 2016*, 2016, A/HRC/RES/32/18.
[22] Human Rights Council, *Mental Health and Human Rights - Report of the United Nations High Commissioner for Human Right*, 2017, A/HRC/34/32, p. 3.
[23] Ibid, p. 10.
[24] Ibid, p. 11.
[25] Ibid, pp. 11-18.
[26] Human Rights Council, *Mental Health and Human Rights - Resolution Adopted by the Human Rights Council on 28 September 2017*, 2017, A/HRC/RES/36/13.
[27] United Nations Human Rights Office of the High Commissioner, *Consultation on Human Rights and Mental Health: "Identifying Strategies to Promote Human Rights in Mental Health"*, <https://www.ohchr.org/EN/Issues/Pages/MentalHealth.aspx> accessed 15 November 2020.
[28] United Nations Human Rights Office of the High Commissioner, *Special Rapporteur on the Rights of Persons with Disabilities*, <https://www.ohchr.org/en/issues/disability/srdisabilities/pages/srdisabilitiesindex.aspx> accessed 15 November 2020.
[29] Human Rights Council, *Rights of Persons with Disabilities - Report of the Special Rapporteur on the Rights of Persons with Disabilities*, 2019, A/HRC/40/54, p. 4.

deprivation of liberty is disability-specific if there are laws, regulations and/or practices in place that provide for or permit such a deprivation based on a perceived or actual impairment; or where specific places of detention, designed solely or primarily for persons with disabilities, exist".[30]

The report also clarified that "involuntary commitment to mental health facilities for short or long periods of time is the most recognized form of deprivation of liberty on the basis of impairment".[31] This means that states legislate on the criteria to restrict liberty instead of abolishing the discriminatory practice of unconvicted detention. The Rapporteur emphasised that institutionalisation is a severe form of deprivation of liberty that denies the right of individuals to choosing for themselves.[32] Also, she argued that persons could be detained at home because of both stigmatised cultures and the absence of available support services.[33] Lastly, the Rapporteur affirmed that deprivation of liberty is a precondition to other forms of discriminatory practices because it generates a vulnerable position.[34] The restrictions of the liberty of persons with disabilities have many justifications, but their roots are mainly social, although misleadingly linked to the condition of individuals.[35]

To conclude, the right to liberty is one of the pillars of the International Bill of Human Rights[36] and of the whole UN human rights system, which includes the right to liberty in all its conventions. Despite the central stance of the right to liberty, international bodies have often had to clarify that it also applies to persons with mental impairments. Besides, international bodies themselves have sometimes held inconsistent positions. Their harmonisation towards the absolute ban on the deprivation of liberty based on any impairment is an actual result following the CRPD entry into force,[37] the most recent UN human rights convention (at the time of this article).

3. Article 14 CRPD: the liberty of persons with disabilities

The CRPD is the United Nations treaty that establishes the international standards concerning the human rights of persons with disabilities. Adopted by the UN in 2007, the CRPD counts 182 States Parties in January 2021.[38] Generally speaking, the Convention states that persons with disabilities have the same rights that any individual

[30] Ibid.
[31] Ibid, p. 5.
[32] Ibid.
[33] Ibid, p. 6.
[34] Ibid, p. 7.
[35] Ibid, pp. 7-9.
[36] The International Bill of Human Rights includes three documents: the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic Social and Cultural Rights.
[37] Human Rights Council, *Rights of Persons with Disabilities*, cit., p. 13.
[38] United Nations Human Rights Office of the High Commissioner, *Status of Ratification – Interactive Dashboard*, <https://indicators.ohchr.org/> accessed 31 January 2021.

has. This principle emerges in Article 5 CRPD, which recognises that all persons are equal before and under the law, prohibiting all forms of discrimination based on disability.

Therefore, persons with mental impairments are entitled to the right to liberty as anyone else. Thus, they should inherently fulfil the right to liberty, since it is established by all the international legislation concerning the issue, as anyone does. Besides, Article 14 CRPD refers explicitly to the liberty and security of persons with disabilities. For this reason, this section explores the link between Article 14 and the involuntary detention of persons with mental impairments.

Several European governments ratified the CRPD declaring their peculiar understanding of Article 14. For instance, in 2018, "Ireland declares its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental disorders". Besides, in 2016, "the Kingdom of Netherlands declares its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental illness". Also, in 2013, "Norway declares its understanding that the Convention allows for compulsory care or treatment of persons, including measures to treat mental illnesses".[39]

These misleading interpretations probably derived from the fact that the CRPD states the right to liberty without explicitly denying any form of involuntary placement. As a consequence, states were maintaining their practices concerning the detention of mentally impaired persons inferring they were respecting the Convention. The CRPD Committee acknowledged this issue while working on its first States Parties Observations. Due to this, it prepared a statement to clarify the scope of Article 14 CRPD.[40] "In that regard, the Committee has established that Article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived disability".[41] Besides, "the involuntary detention of persons with disabilities based on presumptions of risk or dangerousness tied to disability labels is contrary to the right to liberty".[42]

The quoted statement paved the way for drafting the 2015 guidelines on the right to liberty of persons with disabilities.[43] The Committee reaffirmed that "Article 14 does not permit any exceptions whereby persons may be detained on the ground of their actual or perceived impairment [because] it is discriminatory in nature and amounts to arbitrary deprivation of liberty".[44] Also, the Committee emphasised that "the

[39] United Nations Treaty Collection, *Convention on the Rights of Persons with Disabilities*, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4> accessed 15 November 2020.
[40] Committee on the Rights of Persons with Disabilities, *Report of the Committee on the Rights of Persons with Disabilities on Its Twelfth Session (15 September–3 October 2014)*, 2014, CRPD/C/12/2, pp. 14–15.
[41] Ibid, p. 14.
[42] Ibid, p. 15.
[43] Committee on the Rights of Persons with Disabilities, *Report of the Committee on the Rights of Persons with Disabilities*, 2017, A/72/55, pp. 16–21.
[44] Ibid, p. 17.

involuntary detention of persons with disabilities based on risk or danger, alleged need for care or treatment or other reasons […] is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty".[45] Therefore, there seems to be no room for divergent interpretations.

In 2019, the Special Rapporteur on the Rights of Persons with Disabilities dedicated a chapter of her annual report to Article 14 CRPD. She wrote that "article 14 (1) (b) does not permit any exception whereby persons can be deprived of their liberty on the basis of their actual or perceived impairment".[46] The Rapporteur affirmed that the denial of liberty prevents the fulfilment of any other right. It is interesting when she quotes "unsound mind" (implicitly from the ECHR, as illustrated in Section 5) affirming that such a label cannot limit the liberty of persons.[47] Lastly, the report denounces that the crucial factor affecting the right to liberty is the denial of legal capacity to persons with mental impairments.[48]

The guidelines on Article 14 CRPD refer to Article 12 (equal recognition before the law) and 19 (living independently and being included in the community). The Committee explained both these articles through two dedicated General Comments (GCs). The analysis of these two GCs can offer a precious contribution to this paper's discussion.

The GC on Article 12 states that "the denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, […] constitute arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention".[49] Persons with disabilities possess both legal personality and legal capacity. Legal capacity entails the power to engage in legal situations. "Legal capacity and mental capacity are distinct concepts".[50] Mental capacity reflects the skills of each person that may vary but are always present. Low mental skills must not justify the denial of legal capacity nor the possibility to make choices.[51]

When mental skills are so low that their interpretation may be compromised, support is required. "Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making".[52] When "it is not practicable to determine the will and preferences of an individual, the 'best interpretation of will and preferences' must replace the 'best interests' determinations".[53] This is because the *best interest* principle guarantees the legal personality but undermines the legal capacity of the individual. Therefore, the

[45] Ibid, p. 19.
[46] Human Rights Council, *Rights of Persons with Disabilities*, cit., p. 11.
[47] Ibid, p. 12.
[48] Ibid, p. 13.
[49] Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014) - Article 12: Equal Recognition before the Law*, 2014, CRPD/C/GC/1, p. 10.
[50] Ibid, p. 3.
[51] Ibid, pp. 3-4.
[52] Ibid, p. 4.
[53] Ibid, p. 5.

residence of mentally impaired persons should be their choice, as it emerges through the supported interpretation of their will and preferences.[54] Otherwise, it amounts to involuntary detention.

Article 19 CRPD states that "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".[55] The GC on Article 19 explains this principle in detail.[56] Instead of repeating concepts already illustrated above, it might be interesting to report the comments of some European governments during the drafting process of the GC. These comments show the challenges concerning the recognition of the right to liberty to each individual.

For instance, Denmark held the view that "to assume that no one would ever require someone else to make a decision on their behalf would […] be flagrantly wrong [and] ultimately irresponsible".[57] Besides, "Germany remains convinced that there are situations in which persons with disabilities simply are not able to make decisions even with the best support available".[58] Lastly, Norway referred to its previous submission concerning the possibility to withdraw legal capacity and highlighted that its "position on these matters remains unchanged".[59]

In sum, these governments (Parties to the CRPD and Members of the European area of freedom, security and justice) made it clear that their laws concerning the faculty to decide on behalf of individuals remained valid in order to take care of people. Although the declared aim may be appreciated, the critical factor that violates the CRPD is that involuntary placement is always a form of unconvicted detention, regardless of the quality of the placement. Therefore, these examples show an evident and documented friction between the international and the national levels concerning the unconditional respect of the right to liberty for unconvicted persons with mental impairments.

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[54] G. SZMUKLER, *The UN Convention on the Rights of Persons with Disabilities: "Rights, Will and Preferences" in Relation to Mental Health Disabilities*, *in International Journal of Law and Psychiatry*, 2017, vol. 54, pp. 90-97.

[55] CRPD Article 19 (a).

[56] Committee on the Rights of Persons with Disabilities, *General Comment No. 5 (2017) on Living Independently and Being Included in the Community*, 2017, CRPD/C/GC/5.

[57] *Response from the Government of Denmark with Regards to Draft General Comment on Article 19 of the Convention on the Rights of Persons with Disabilities – Living Independently and Being Included in the Community*, p. 1, <https://www.ohchr.org/Documents/HRBodies/CRPD/DGCArticle19/State%20Party%20observations_Denmark.docx> accessed 15 November 2020.

[58] *German Comment Regarding the Draft General Comment on Article 19 of the UNCRPD*, p. 3, <https://www.ohchr.org/Documents/HRBodies/CRPD/DGCArticle19/State%20Party%20observations_Germany.docx> accessed 15 November 2020.

[59] *Submission by the Norwegian Government Committee on the Rights of Persons with Disabilities Draft General Comment No. 5 (2017) Article 19: Living Independently and Being Included in the Community*, p. 2, <https://www.ohchr.org/Documents/HRBodies/CRPD/DGCArticle19/State%20Party%20observations_Norway.docx> accessed 15 November 2020.

4. The EU Charter of Fundamental Rights: one foot in two camps

The European Union Charter of Fundamental Rights[60] (the Charter) states the fundamental rights of the EU citizens. It was proclaimed in 2000 as a non-binding instrument to include in the EU Constitution, which has never seen the light. Then, the Charter was amended and proclaimed again in 2007; finally, it became binding in 2009[61] with the entry into force of the Treaty of Lisbon.[62]

The Charter "brings together in one text all the fundamental rights protected in the Union",[63] and it has constitutionalised several principles that already were internationally recognised, thus explaining its "anticipated application".[64] For instance, the jurisprudence of the European Court of Justice (ECJ) considered human rights issues before their mention in the EU Treaties,[65] starting from 1970 when the Court stated that the "respect of fundamental rights forms an integral part of the general principles of law protected by the Court of Justice".[66] Immediately after, the ECJ began to look at international treaties as EU general principles because ratified by the majority of the EU Member States.[67] Afterwards, fundamental rights entered in the EU primary legislation with the Treaties of Maastricht (1992) and Amsterdam (1997), paving the way for the proclamation of the Charter (2000).[68]

The Charter is divided into seven titles.[69] The second title concerns freedoms and starts with Article 6, which states that "everyone has the right to liberty and security of person". The formula is the same as in Article 9 ICCPR (illustrated in Section 2) and Article 5 ECHR (investigated in the next section). This means that the Charter imported

[60] Charter of Fundamental Rights of the European Union, 2000, in OJ C 364/1.
[61] O. MARZOCCHI, *The Protection of Fundamental Rights in the EU*, 2020, p. 3, <https://www.europarl.europa.eu/ftu/pdf/en/FTU_4.1.2.pdf> accessed 15 November 2020.
[62] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007, in OJ C 306/1.
[63] Communication COM(2010)573 final of the EU Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, of 19 October 2010.
[64] A. DI STASI, *The Enlargement of Competences of the European Union between State Sovereignty and the so-called European "Sovereignty": Focus on the Limits of Applicability of the Charter of Fundamental Rights of the European Union*, in *Araucaria. Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales*, 2020, vol. 45, pp. 131-154.
[65] M. SACCO, *De-politicisation of human rights: the European Union and the Convention on the Rights of Persons with Disabilities*, in this *Journal*, 2018, n. 1, pp. 147-164.
[66] European Court of Justice, 1970, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.
[67] European Court of Justice, 1974, Case 181/73, *R. & V. Haegeman v Belgian State*. European Court of Justice, 1973, Case 4/73, *Nold KG v Commission*.
[68] A. DI STASI, *L'evoluzione dello "statuto" giurisprudenziale dei diritti fondamentali nell'Unione europea in "statuto" normativo degli stessi. Il valore aggiunto della Carta dei diritti fondamentali,* in A. DI STASI (ed.), *Tutela dei diritti fondamentali e spazio europeo di giustizia: L'applicazione giurisprudenziale del Titolo VI della Carta*, Napoli, pp. 41-102.
[69] I Dignity; II Freedoms; III Equality; IV Solidarity; V Citizens' rights; VI Justice; VII General provisions.

the principle established in the post-second world war period and its evolution from the relevant jurisprudence and literature.

The combination of liberty and security is interesting because suggesting that both the two are matters of freedom. This idea might exclude that security reasons justify limitations of liberty. However, this affirmation is notoriously far from the reality since liberty is a *qualified* or *non-absolute* right,[70] which means that persons' liberty can be limited to protect other rights and the rights of others. Therefore, it seems that security may somehow prevail over liberty within the paradigm of freedom.

The European area of freedom, security and justice is proclaimed in Article 3 TEU and includes a relationship between freedom and security by definition. Thus, different interpretations of this relationship may impact on the fulfilment of Article 6 of the Charter and the whole European architecture. Among others, Herlin-Karnell emphasised an asymmetry between liberty and security within Europe: despite both are fundamental values, they are potentially antithetical.[71] The author suggested that crisis-driven agendas (i.e. migration, terrorism, pandemics) nurture the system's unbalance, increasing the perceived need for security at the expense of personal liberty. However, persons with mental impairment cannot be considered a crisis-related issue since it is a standard policy area. On this matter, the fair balance between security and liberty should not be subject to any seesaw.

The alleged prevalence of security over liberty might raise more than one question. For example, to what extent may the confinement of presumed dangerous persons be accepted? Usually, presumed dangerous persons belong to specific categories of individuals, such as migrants, minorities, and disabled, among others. This means that a *normal* majority restricts the liberty of a *different* minority on the basis of established security standards. This factor reminds the securitisation dilemma as emerged in the introduction of this article, and it should stimulate debates about who decides on security standards and what their decision-making limits should be.

Recently, Covid-19 levelled the categories of persons experiencing confinement. In fact, the pandemic invested all the people, bringing to the fore the social distress that the restrictions on liberty may cause to individuals despite presumed security reasons.[72] The persons affected by quarantine measures (whether at home or displaced) experienced lack of freedom due to a kind of unconvicted detention. Even the Schengen Area's

[70] Human Rights Committee, *General Comment No. 35*, cit., p. 3.

[71] E. HERLIN-KARNELL, *The domination of security and the promise of justice: on justification and proportionality in Europe's 'Area of Freedom, Security and Justice'*, in *Transnational Legal Theory*, vol. 8(1), pp. 79-102. See also: A. DI STASI, *Il perfezionamento dello spazio europeo di libertà, sicurezza e giustizia: avanzamenti e criticità*, in A. DI STASI (ed.), *Tutela dei diritti fondamentali e spazio europeo di giustizia: L'applicazione giurisprudenziale del Titolo VI della Carta*, Napoli, pp. 103-147.

[72] United Nations, *COVID-19 and Human Rights - We Are All in This Together*, 2020, <https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf> accessed 15 November 2020.

liberties were at risk of collapsing during the pandemic,[73] in order to protect citizens. Decades of treaties and rights struggle put aside in few days by scientific and medical committees drawing a red line over which security overwhelmed liberty within the paradigm of freedom as proclaimed in Article 6 of the Charter.

The situation of general emergency due to the pandemic is like the daily routine of persons with disabilities when not free to live independently in the community. Among different cases, this occurs when scientific and medical committees decide that persons with mental impairments have to renounce their liberty due to imposed security standards. As emerged in Section 2, the UN interprets Article 9 ICCPR with a ban on deprivation of liberty based on impairments.[74] Since Article 6 of the Charter seems to have imported Article 9 ICCPR and its interpretation, the Charter might exclude the unconvicted detention of persons with mental health issues as well. This inference would be consistent with Articles 21 and 26 stating that the Charter prohibits "any discrimination based on […] disability" and "the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community".

However, the Charter has two limitations, at least. First of all, Article 51 of the Charter limits its power over the EU Member States "only when they are implementing Union law". Although the ECJ expanded the Charter's power over national legislation connected to Union law[75] and representing EU legislation's scope,[76] Article 51 frames the Charter in the conferral principle.[77] Besides, Article 6 TEU states that "the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties". This principle may prevent the ECJ from judging on the displacement of persons with mental impairments because the issue is subject to national competence.[78] Second, Article 52(3) states that the "Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention".

Di Stasi, among others, investigated the boundaries of Article 51 and she emphasised that "the Charter is not applied, apparently, to the violations of fundamental rights which do not show any link with the law of the Union".[79] Since the EU institutions have to respect the Charter, the EU Commission wrote a strategy to

[73] Fondation Robert Schuman, *Restoring Free Movement in the Union*, 2020, <https://www.robert-schuman.eu/en/european-issues/0562-restoring-free-movement-in-the-union> accessed 15 November 2020.
[74] Human Rights Council, *Mental Health and Human Rights*, cit., p. 10.
[75] Court of Justice, Second Chamber, judgment of 11 April 2013, *Joined Cases HK Danmark*, C-335/11 and C-337/11.
[76] F. FERRARO AND J. CARMONA (eds.), *Fundamental Rights in the European Union*, 2015, p. 5.
[77] The competence issue is stated also in Article 6 TEU.
[78] European Union Agency for Fundamental Rights, *op. cit.*, p. 13.
[79] A. DI STASI, *The Enlargement of Competences of the European Union between State Sovereignty and the so-called European "Sovereignty"*, cit., p. 144.

guarantee that all its legislative proposals respect and foster the Charter's principles. This entails that EU law should "reflect" fundamental rights so that the EU Member States would respect the Charter through its mediation by EU secondary legislation.[80] The critical factor is that the Union can legislate only within its competence areas, which are subject to a constant "creep".[81] Besides, the development of a "fundamental rights culture"[82] might enlarge the EU fields of action as well. This idea reflects the increasing importance of soft power in implementing fundamental rights through influence instead of coercion.[83] Therefore, the full potential of the Charter does not rely on its contents only, but it also raises from innovative strategies and methodologies to promote the EU values.

Di Stasi addressed Article 52(3) of the Charter as an "equivalence clause" between the Charter's principles and the ECHR.[84] She also emphasised the "compatibility clause" included in Article 53, which prevents interpretations of the Charter that are not consistent with the ECHR.[85] These two Articles in conjunction with Article 6 TEU entail that, although the Charter is meant to be the centre of the EU fundamental rights system, the ECHR has a kind of primary relevance that impacts the European area of freedom, security and justice.[86]

Based on Article 52(3) of the Charter, "the rights in Article 6 are the rights guaranteed by Article 5 of the ECHR […] they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR".[87] The close link between the Charter and the ECHR is explicit in Article 6 of the Treaty on the European Union[88] (TEU) stating that the EU shall accede to the ECHR, which principles "shall constitute general principles of the Union's law".

Therefore, for the purposes of this paper, the mere contents of Article 6 of the Charter add little to the old and imported formula of liberty and security of persons, even though the relevant principles might have evolved in the last decades. The Charter has one foot in two camps from where it has collected general principles instead of offering its evolutive contribution since it is decades younger than the ECHR and ICCPR. The critical factor is that the dilemma concerning the liberty and security of persons with mental impairments has evolved in the UN (as illustrated in the previous sections) while the CoE seems still anchored in its 1950 positions (as investigated in the

[80] Ibid.
[81] S. WEATHERILL, *Competence Creep and Competence Control*, in *Yearbook of European Law*, 2004, n. 1.
[82] Ibid.
[83] M. SACCO (ed.), *The European Union and the CRPD: EU opportunities to influence the domestic implementation of independent living rights*, University of Leeds, 2020.
[84] A. DI STASI, *Tutela multilevel dei diritti fondamentali e costruzione dello spazio europeo di giustizia*, in A. DI STASI (ed.), *Tutela dei diritti fondamentali e spazio europeo di giustizia,* cit., pp. 11-38.
[85] Ibid.
[86] Ibid.
[87] Explanations Relating to the Charter of Fundamental Rights, 2007, in OJ C 303/17.
[88] Consolidated Version of the Treaty on European Union, 2012, in OJ C 326/13.

next section). This discrepancy has caused an ideological gap where the Charter is in the middle with few legal possibilities to contribute because the competence on the involuntary placement of persons with mental impairments is a national one.[89]

Despite the challenges of directly impacting on national and local policies, the Union can take advantage of several strategies to promote the Charter's principles. As mentioned above, the EU institutions must act in compliance with fundamental rights. In turn, these can reach the national and domestic levels through the mediation of the EU institutions' activity. This mediation operates in two levels: (i) through secondary legislation and (ii) with soft strategies.

As mentioned above, EU secondary legislation must comply with the Charter. Therefore, the EU Member States indirectly respect the Charter by implementing EU secondary law. Besides, the EU can influence the EU Member States through its soft governance, where it has no competence to legislate.[90] For instance, the EU institutions may publish soft documents and guidelines, which are not binding but promote minimum standards. For example, a *green paper* of the EU Commission emphasised that "compulsory placement of patients in psychiatric institutions and involuntary treatment affects severely their rights".[91] Besides, a *resolution* of the EU Parliament stated that "all forms of in-patient care and compulsory medication should […] be regularly reviewed and subject to the patient's consent [and] any restriction of personal freedoms should be avoided".[92] Also, in 2012, FRA published a report on the involuntary placement of persons with mental health problems raising awareness on the issue.[93] Furthermore, the European Disability Forum (EDF) regularly campaigns against any institutionalisation. Although it is a civil society organisation, EDF is part of the EU disability-related governance because of being: (i) funded by the EU Commission; (ii) member of the EU CRPD monitoring framework; and (iii) secretariat of the EU Parliament Disability Intergroup.[94] Lastly, the European Semester and the European Structural and Investment (ESI) Funds are innovative soft opportunities for incentivising the transition from the involuntary placement of persons with disabilities to community services.[95]

To conclude, the Charter is a powerful instrument to guarantee the liberty of persons with mental impairments. Despite some formal limitations, the Charter supplements and fosters the multilevel governance that promotes fundamental rights in the EU.

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[89] European Union Agency for Fundamental Rights, *op. cit.*, p. 13.
[90] M. SACCO (ed.), *The European Union and the CRPD*, cit.
[91] Communication COM(2005)484 of the EU Commission, *Green Paper - Improving the mental health of the population: Towards a strategy on mental health for the European Union*, of 14 October 2005, p. 11.
[92] Resolution P6_TA(2006)0341 of the EU Parliament, *Improving the mental health of the population - towards a strategy on mental health for the EU*, of 6 September 2006, p. 5.
See also: Resolution P6_TA(2009)0063 of the EU Parliament, *Mental Health*, of 19 February 2009.
[93] European Union Agency for Fundamental Rights, *op. cit*.
[94] M. SACCO (ed.), *The European Union and the CRPD*, cit.
[95] Ibid.

5. The Council of Europe and the "unsound mind"

The Council of Europe (CoE) is the continent's leading human rights organisation. All its 47 Member States are parties to the European Convention on Human Rights[96] (ECHR), an international treaty, ratified in 1950, protecting human rights and political freedoms in Europe. It states the right to liberty in its Article 5: "everyone has the right to liberty and security of persons [except for] persons of unsound mind", among other cases. The European Court of Human Rights (ECtHR) oversees the ECHR's implementation in the Member States.

The ECtHR jurisprudence concerning the involuntary placement of persons with mental impairments started in 1979 with the Winterwep case. This judgement linked the concept of mental impairments to that of unsound mind, "whose meaning is continually evolving as research in psychiatry progresses".[97] The Court also clarified that the detention of individuals with an alleged *unsound mind* is arbitrary. However, medical evidence can justify their denial of liberty.[98] This exception seems to entail that the ECHR allows persons' involuntary detention because of their alleged *mental disorder*.

Terms like *unsound mind* and *mental disorder* have been part of the Court's vocabulary as a legacy of the '50s when the ECHR was adopted. Today, they may appear discriminatory due to the international law's evolution and the entry into force of the CRPD. Despite this, the Court has to use them because they are part of the ECHR and its jurisprudence. The crucial factor (investigated in this section) is the evolving interpretation that the Court and the Council of Europe give to the meaning of those terms because entailing a consequent human rights recognition.

While the ECtHR was studying the Winterwerp case, the issue about persons with mental impairments' involuntary detention entered the CoE's political bodies agenda. In 1977, the CoE Parliamentary Assembly acknowledged that "profound changes have taken place in Europe in attitudes towards mental illness from both the medical and social points of view".[99] Thus, it was time for governments "to review their legislation and administrative rules on the confinement of the mentally ill".[100] Five years later, the CoE Committee of Ministers recommended national governments to implement a list of rules limiting the involuntary placement of persons with mental impairments.[101]

In 1994, the CoE Parliamentary Assembly stressed that changes were slow and disharmonious. Also, it emphasised the need for new legal measures to guarantee the

[96] European Convention on Human Rights, 1950.
[97] European Court of Human Rights, Chamber, judgment of 24 October 1979, application no. 6301/73, *Winterwerp V The Netherlands*, par. 37.
[98] Ibid, par. 39; European Court of Human Rights, Second Section, judgment of 28 October 2003, application no. 58937/00, *Rakevich V Russia*, par. 27.
[99] Council of Europe Parliamentary Assembly, *Situation of the Mentally Ill*, 1977, Recommendation 818, par. 3.
[100] Ibid, par. 15.
[101] Council of Europe Committee of Ministers, *The Legal Protection of Persons Suffering from Mental Disorder Placed as Involuntary Patients*, 1983, Recommendation (83) 2.

rights of mentally impaired persons against involuntary placement and treatment.[102] Subsequently, the CoE Committee of Ministers created a working party "to draw up guidelines to be included in a new legal instrument of the Council of Europe".[103] Lastly, in 1999, the Committee informed the Assembly that the working group concluded a public consultation and was drafting guidelines concerning a new legal instrument.[104]

In the middle of this five-year dialogue, the CoE opened the Oviedo Convention for signature in 1997.[105] Although "designed to preserve human dignity, rights and freedoms",[106] the treaty does not include limitations to the involuntary detention of persons with disabilities. Actually, it states that "a person who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder".[107] Thus, the *intervention* may entail measures of detention.

In 2004, the CoE Committee of Ministers built upon the working group's guidelines publishing a recommendation "to enhance the protection of the dignity, human rights and fundamental freedom of persons with mental disorder, in particular those who are subject to involuntary placement".[108] In short, the Committee set a list of limitations but failed to exclude the possibility of detaining persons with mental impairments without consent.[109] Afterwards, the Committee on Bioethics started to work on a protocol to the Oviedo Convention based on that recommendation. However, the CoE Parliamentary Assembly asked the Committee to adopt a different approach for being consistent with the CRPD.[110] The international dispute that has characterised the drafting of that protocol about the involuntary detention of persons with mental impairments is investigated in the next section.

The entry into force of the CRPD influenced the political discussions within the CoE and the ECtHR's jurisprudence. For instance, the 2012 Stanev judgement mentioned Article 14 CRPD as the evolution in human rights concerning involuntary placement cases.[111] Although the Court sentenced that the complainant had his right to

[102] Council of Europe Parliamentary Assembly, *Psychiatry and Human Rights*, 1994, Recommendation 1235.
[103] Council of Europe Working Party of the Steering Committee on Bioethics, *"WHITE PAPER" on the Protection of the Human Rights and Dignity of People Suffering from Mental Disorder, Especially Those Placed as Involuntary Patients in a Psychiatric Establishment*, 2000, DIR/JUR (2000) 2, p. 2.
[104] Council of Europe Committee of Ministers, *Psychiatry and Human Rights*, 1999, Doc. 8443.
[105] 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, 1997, ETS No164.
[106] Council of Europe, *Details of Treaty No.164*, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164> accessed 15 November 2020.
[107] Oviedo Convention, Article 7.
[108] Council of Europe Committee of Ministers, *Protection of the Human Rights and Dignity of Persons with Mental Disorder*, 2004, Recommendation (2004) 10, p. 3.
[109] Ibid, 5-10.
[110] Council of Europe Parliamentary Assembly, *Involuntary Placement and Treatment of People with Psychosocial Disability: Need for a New Paradigm*, 2013, Doc. 13316, p. 1.
[111] European Court of Human Rights, Grand Chamber, judgment of 17 January 2012, application no. 36760/06, *Stanev V Bulgaria*, par. 72.

liberty violated, it confirmed the general principles that would allow the involuntary placement of persons with mental impairments from the jurisprudence of the 33-year-old Winterwerp case.[112] This judgement entails that the unconvicted detention of persons with disabilities can violate Article 5 ECHR, although it is not forbidden.

The crucial factor that may determine the legitimation of the involuntary placement of mentally impaired persons is the possibility for the individual to complain before a court at any moment.[113] This principle is paramount because of establishing the primacy of legal protection over medical prescriptions. Such a principle entails that any medical decision must be subject to human rights scrutiny.

In the 2019 Rooman case, the ECtHR defined the relevant legal framework, including Article 14 CRPD and the Guidelines of the CRPD on the right to liberty.[114] In its judgement, "the Court considers that Article 5, as currently interpreted, does not contain a prohibition on detention on the basis of impairment, in contrast to what is proposed by the UN Committee on the Rights of Persons with Disabilities".[115] Although the Court seems to limit the use of detention, its interpretations cannot change Article 5 ECHR allowing the deprivation of liberty for *persons of unsound mind*.

In December 2019, the ECtHR published an updated guideline on Article 5, which includes a chapter concerning the "detention of persons of unsound mind".[116] In short, the Court confirmed the possibility of detaining mentally impaired individuals without their consent when specific conditions apply. These conditions do not include evidence of committed crimes, affecting unconvicted persons as a consequence. On this matter, the ECtHR guideline is not consistent with the OHCHR position illustrated in Section 2. Unless having a certified disability might be considered as a crime.

Once detained, individuals have the right to appeal; however, some concerns remain. For instance, the medical decisions on the restriction of liberty are immediately applicable, and the victims should claim before a court while in disadvantaged conditions, which may include involuntary treatments. Usually, criminals go to jail after due process; why is it possible to detain persons with *unsound mind* before seeking legal justice? This situation does not sound consistent with the anti-discrimination values of the European area of freedom, security and justice.

6. The Additional Protocol to the Oviedo Convention: an international dispute

This section builds upon an episode introduced in the previous section. It investigates an international dispute that was actual at the time of this article. The

[112] Ibid, par. 145.
[113] Ibid, par. 172.
[114] European Court of Human Rights, Grand Chamber, judgment of 31 January 2019, application no. 18052/11, *Rooman V Belgium,* parr. 116-117.
[115] Ibid, par. 205.
[116] European Court of Human Rights, *Guide on Article 5 of the European Convention on Human Rights*, 2020, pp. 24–26.

narration aims to show some challenges that international bodies face in their attempt to shift from a medical-based to a human rights-based approach to disability.

As previously introduced, the Oviedo Convention is the CoE treaty aiming to guarantee human rights in biomedicine. It was open for signature in 1997, but not all the CeE Member States signed and ratified it. At the time of this article, Austria, Belgium, Germany, Ireland, the Russian Federation, the United Kingdom, and others have never signed the treaty; Italy, Luxembourg, Netherlands, Poland, Sweden, and Ukraine signed but not ratified it.[117] For the purposes of this article, the critical factor of the Oviedo Convention is that it allows the involuntary placement of persons with mental impairments.[118]

In October 2013, the CoE Parliamentary Assembly promoted a recommendation to shift the paradigm concerning the involuntary placement of persons with mental impairments towards a human rights approach.[119] This initiative aimed at encouraging the CoE Committee on Bioethics (DH-BIO) to adopt a human rights perspective in its elaboration of a new protocol to the Oviedo Convention concerning the involuntary placement of persons with disabilities. The crucial factor was that since the CRPD entered into force "it is the very principle of involuntary placement and treatment of people with psychosocial disability that is being challenged".[120]

The Oviedo Convention "is the only international legally binding instrument on the protection of human rights in the biomedical field. It draws on the principles established by the European Convention on Human Rights, in the field of biology and medicine".[121] The Committee on Bioethics "is assigned the task to conduct regular re-examinations foreseen in the Convention and its Additional Protocols and to develop further its principles, as appropriate".[122] The DH-BIO is an intergovernmental body including delegations of the CoE Member States, and closely working with EU representatives.

In 2015, the DH-BIO launched a public consultation on its initial draft that received several comments.[123] Almost all the 38 contributors expressed some concern on the initial draft protocol. Among those, the Special Rapporteur on the Rights of Persons with Disabilities (recalling the GC on Article 12 CRPD and the Guidelines on Article 14 CRPD)[124] affirmed that "by the very nature of 'involuntary', the draft Additional

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[117] Council of Europe, *Chart of Signatures and Ratifications of Treaty 164*, <https://www.coe.int/en/web/conventions/full-list> accessed 15 November 2020.
[118] Oviedo Convention, Article 7.
[119] Council of Europe Parliamentary Assembly, *op. cit.*
[120] Ibid.
[121] Council of Europe, *Oviedo Convention and Its Protocols*, <https://www.coe.int/en/web/bioethics/oviedo-convention> accessed 15 November 2020.
[122] Council of Europe, *Oviedo Convention - The Committee on Bioethics*, <https://www.coe.int/t/dg3/healthbioethic/Activities/Bioethics%20in%20CoE/> accessed 15 November 2020.
[123] Council of Europe Committee on Bioethics, *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*, 2015, DH-BIO/INF (2015) 20.
[124] See Section 3.

Protocol necessarily denies individual dignity and integrity in violation of a series of human rights".[125] The Rapporteur observed that the drafted protocol was not respecting the CRPD because of using the *best interest* principle to impose choices, thus violating the persons' dignity and integrity by acting against one's own will and autonomy.[126]

Afterwards, the CoE Parliamentary Assembly continued its process towards a recommendation by publishing a report that expressed concerns about the draft protocol maintaining a link between mental impairments and involuntary placement.[127] The report confirmed that the initial draft was not consistent with the CRPD principles. Hence, it risked violating the rights of persons with disabilities. The report suggested to "withdraw the proposal [and] instead focus […] on promoting alternatives to involuntary measures in psychiatry".[128]

Following the report's concerns, the recommendations of the CoE Parliamentary Assembly acknowledged that "involuntary placement and involuntary treatment procedures give rise to a large number of human rights violations in many member States, in particular in the context of psychiatry".[129] The Assembly urged the CoE Committee of Ministers to instruct the DH-BIO to align its draft protocol with the CRPD principles. "Ignoring the interpretation of the CRPD by its monitoring body established under international law would not only undermine the Council of Europe's credibility as a regional human rights organisation, but would also risk creating an explicit conflict between international norms at the global and European levels".[130]

Despite these recommendations, the CoE Committee of Ministers replied that "involuntary measures could be justified subject to strict protective conditions".[131] Hence, the DH-BIO received a green light for maintaining its perspective, and it published the Draft Additional Protocol in June 2018.[132] The document recognised "the potential vulnerability of persons with mental disorder"[133] and addressed such vulnerability by allowing involuntary placement.

As a consequence of the published Draft, which seemed to ignore the 2015 consultation, a worldwide campaign started to ask for its withdrawal, and several international organisations published concerned documents.[134] Among these, the CRPD

[125] Council of Europe Committee on Bioethics, *op. cit.*, p. 27.
[126] Ibid, p 29.
[127] G. MAGRADZE, *The Case against a Council of Europe Legal Instrument on Involuntary Measures in Psychiatry*, 2016, Council of Europe Parliamentary Assembly Doc. 14007.
[128] Ibid, p. 4.
[129] Council of Europe Parliamentary Assembly, *The Case against a Council of Europe Legal Instrument on Involuntary Measures in Psychiatry*, 2016, Recommendation 2091 (2016), p. 1.
[130] Ibid, p. 2.
[131] Council of Europe Committee of Ministers, *The Case against a Council of Europe Legal Instrument on Involuntary Measures in Psychiatry*, 2016, Doc. 14199, p. 1.
[132] Council of Europe Committee on Bioethics, *Draft Additional Protocol Concerning the Protection of Human Rights and Dignity of Persons with Mental Disorder with Regard to Involuntary Placement and Involuntary Treatment*, 2018, DH-BIO/INF (2018) 7.
[133] Ibid, p. 2.
[134] European Disability Forum, *Withdraw the Additional Protocol to the Oviedo Convention*, <http://www.edf-feph.org/withdraw-additional-protocol-oviedo-convention> accessed 15 November 2020.

Committee adopted a statement denouncing that the Draft "blatantly conflicts with the human rights of persons with disabilities".[135] In addition to violating Articles 12 and 14 CRPD, the Draft infringes both Article 25 CRPD, which "requires States to provide health care to persons with disabilities on the basis of free and informed consent", and Article 17 CRPD, because "involuntary placement and treatment represent also a threat to the right to physical integrity [which] may amount to torture or cruel, inhuman or degrading treatment".[136]

In June 2017, the CoE Parliamentary Assembly built upon its previous recommendation and started a new procedure for voting a resolution opposing the DH-BIO Draft Additional Protocol.[137] The procedure included an informative report[138] and an opinion of the Committee on Equality and Non-Discrimination.[139] Both these documents reaffirmed the need for a new conceptual approach of the DH-BIO. Consequently, the Assembly recommended "the Committee of Ministers to redirect efforts from the drafting of the additional protocol to the drafting of guidelines on ending coercion in mental health".[140] Besides, the Assembly addressed its resolution to "the member States to immediately start to transition to the abolition of coercive practices in mental health settings".[141]

In its resolution, the CoE Parliamentary Assembly affirmed that "involuntary measures in mental settings [rely] on coercion to 'control' and 'treat' patients who are considered potentially 'dangerous' to themselves or others".[142] Involuntary measures are undertaken "despite the lack of empirical evidence regarding both the association between mental health conditions and violence, and the effectiveness of coercive measures in preventing self-harm or harm to others. Reliance on such coercive measures […] leads to arbitrary deprivations of liberty".[143] These passages link to the idea of excessive securitisation, as quoted in the introduction of this paper.

Lastly, in November 2019, the CoE Steering Committee for Human Rights (CDDH) commended the DH-BIO's comments on the Parliamentary Assembly's just-published recommendation to the Committee of Ministers. Although the DH-BIO "considers that the current draft text is not in conflict with other international instruments [it] has

[135] Committee on the Rights of Persons with Disabilities, *Statement by the Committee on the Rights of Persons with Disabilities Calling States Parties to Oppose the Draft Additional Protocol to the Oviedo Convention*, 2018, p. 1.
[136] Ibid, p. 2.
[137] S. KYRIAKIDES, *Protecting the Rights of People with Psychosocial Disabilities with Regard to Involuntary Measures in Psychiatry*, 2017, Council of Europe Parliamentary Assembly Doc. 14334.
[138] R. DE BRUIJN-WEZEMAN, *Ending Coercion in Mental Health: The Need for a Human Rightsbased Approach*, 2019, Council of Europe Parliamentary Assembly Doc. 14895.
[139] S. GAFAROVA, *Ending Coercion in Mental Health: The Need for a Human Rightsbased Approach*, 2019, Council of Europe Parliamentary Assembly Doc. 14910.
[140] Council of Europe Parliamentary Assembly, *Ending Coercion in Mental Health: The Need for a Human Rights based Approach*, 2019, Recommendation 2158 (2019).
[141] Council of Europe Parliamentary Assembly, *Ending Coercion in Mental Health: The Need for a Human Rights based Approach*, 2019, Resolution 2291 (2019), p. 2.
[142] Ibid, p. 1.
[143] Ibid.

decided that the current draft text had to be carefully reviewed, having particular regard to strengthening measures promoting autonomy in mental health care".[144]

The analysis of this international dispute concludes with this openness of the DH-BIO towards a different approach to the involuntary detention of persons with mental impairments. While waiting for a new draft, in September 2020, 16 civil society organisations sent a letter to the CoE Council of Ministers as a reminder that they are keeping their guard up.[145] It will be interesting to follow this process's development and analyse its future impact on the CoE Member States and ECtHR jurisprudence. It would be advisable that international human rights instruments be consistent with one another in order to represent explicit models for the harmonisation of national standards.

It seems relevant to conclude this section mentioning another situation where international entities had conflictual approaches to disability. In the early 1970s, the World Health Organisation (WHO) felt the necessity to go beyond the consolidated International Classification of Diseases,[146] because this classified "disorders that could be prevented or cured [but] stop[ped] short of the consequences of disease".[147] Consequently, in 1980, the WHO published the International Classification of Impairments, Disabilities and Handicaps.[148] However, during the drafting phase (lasted several years) and soon after its publication, the 1980 Classification was criticised because of its consolidated medical approach, which stressed the negative stigma to disability as a disease to cure. Subsequently, the WHO accepted the critics and published a reprint, in 1993, admitting that the document needed to be rewritten.[149] Lastly, in 2001, the new Classification of Functioning, Disability and Health was released,[150] after constructive dialogues between the WHO and persons with disabilities' organisations. This supplementary effort developed an innovative multidimensional approach (the biopsychosocial model)[151] where health condition has both environmental and personal components.[152] To conclude, the WHO episode is very similar to the DH-BIO ongoing dispute, demonstrating that often *ipsa historia repetit*.

[144] Council of Europe Steering Committee for Human Rights, *CDDH Comments on the Parliamentary Assembly Recommendation 2158(2019)*, 2019, CDDH(2019)R92.
[145] European Disability Forum, *Open Letter to the Council of Europe Committee of Ministers and Committee on Bioethics Regarding the Draft Additional Protocol to the Oviedo Convention*, 2020, <http://edf-feph.org/newsroom/news/open-letter-council-europes-committee-ministers-and-committee-bioethics-regarding> accessed 15 November 2020.
[146] World Health Organisation, *International Classification of Diseases – Eight Revision*, 1968.
[147] World Health Organisation, *International Classification of Impairments, Disabilities and Handicaps: a Manual of Classification Relating to the Consequences of Disease*, 1980 (1993 reprint with foreword), p. 10.
[148] World Health Organisation, *International Classification of Impairments, Disabilities, and Handicaps*, 1980 (1993 reprint with foreword).
[149] Ibid, pp. 1-6.
[150] World Health Organisation, *International Classification of Functioning, Disability and Health*, 2001.
[151] Ibid, p. 18.
[152] Ibid, p. 16.

7. Conclusion

This article revealed the controversial international debate concerning the involuntary placement of persons with mental impairments. Although such a practice does not respect the right to liberty of persons, it is still debated and tolerated. As the HRC argued, individuals' liberty should be restricted only in case of criminal law enforcement[153] (at least as long as new forms of rehabilitations will substitute prisons). Otherwise, the risk is that of detaining persons, who are unconvicted of any crime, on the basis of personal characteristics. Indeed, this eventuality is resoundingly discriminatory.

The very fact that such a debate exists is evidence that human rights' universality is still a relative concept. Even the European area of freedom, security and justice seems uncomfortable with the inclusion of *unsound* persons in society. On one hand, governments declare they want to maintain compulsory placements and treatments for persons with *mental disorder*;[154] on the other hand, the Council of Europe struggles to align with United Nations standards.[155]

The article is about the unconvicted detention of persons with mental impairments, but its critical approach also emphasises two controversial relations: the first one is between the rights to liberty and security, and the second one is between the principles of *pacta sunt servanda* and *pro homine*. Where are the borders among these rights and principles and when do evolutive interpretations legitimately overcome consolidated jurisprudence and dated terminologies? Similarly to the ECHR *unsound mind*, there are several examples of outdated terms in international conventions. For instance, the word *race* is present in many treaties,[156] despite the term is internationally repudiated and the existence itself of races is scientifically contested. Why *race* is banned (although still written on the treaties' stone) while *unsound mind* (referred to persons with mental impairments) is not? May it be a matter of presumed security?

Involuntary placements and treatments are meant to guarantee the security of persons with mental impairments, but they often obtain the opposite result. For instance, Italy counts a sad list of persons died during a *Trattamento Sanitario Obbligatorio*[157] (TSO).[158] Among others, Andrea Soldi was sitting on his usual bench in the park when city police picked him up for a TSO.[159] He died suffocated in the same way in which

[153] See Section 2.
[154] See the comments of governments quoted in Section 3.
[155] See Sections 5 and 6.
[156] Inter alia: European Convention on Human Rights, 1950, Article 14; International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Articles 1, 2, 4, 5; International Covenant on Civil and Political Rights, 1966, Articles 2, 4, 24, 26; Convention on the Rights of the Child, 1989, Article 2.
[157] Compulsory Healthcare Treatment
[158] Telefonoviola, *Morti di TSO*, <http://www.telefonoviola.it/Morti-di-TSO> accessed 15 November 2020.
[159] While writing this article, the Turin Court of Appeal sentenced against the psychiatric and the agents.

George Floyd lost his life in Minneapolis.[160] In England, Lucy Dawson was placed on a psychiatric ward for months and received electric shock therapy, but her symptoms were misdiagnosed since she was suffering a form of encephalitis only. "Lucy likened her admittance to the ward to being put in prison".[161] How did involuntary placement and treatment guarantee the security of these innocent persons?

The compulsion to increase security for guaranteeing freedom and justice is an equation that does not add up. On one hand, it is acceptable that states want to protect citizens from presumed dangers. On the other hand, persons who are meant to be *presumed dangers* must always have their human rights guaranteed. Therefore, they cannot be detained if unconvicted of any crime because this infringes their right to liberty, burying the rule of law and persons' dignity.

The social model of disability suggests that disability derives from a society that cannot include the peculiarities of persons. Consistently, the CRPD states that "disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society". This principle entails that wheelchair users are not disabled until facing inaccessible stairs. Similarly, the alleged social dangerousness of persons with mental impairments is not absolute, but it results from the interaction between individuals that need specific services and a society that does not offer those services in the community. Consequently, while ramps would allow wheelchair users to participate in society, community services could allow persons with mental impairments to safely live their life out from institutions. This idea implies that involuntary placement is not the only solution to guarantee security, which could instead derive from the respect of liberty within inclusive environments. Therefore, society should foster inclusive communities instead of building institutions.

Benjamin Franklin said that "those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety". The principle that some rights can be sacrificed to increase the fulfilment of other rights is not consistent with the definition of human rights as universal, indivisible, interdependent and interrelated. The natural character of human rights implies that they manifest the inalienable dignity of each person. Therefore, the denial of any human right affects individuals' dignity, even putting into question the very status of human being. The unconvicted detention of persons with mental impairments entails the classification of categories of individuals having fewer rights than others, which amounts to discrimination and should be definitely banned.

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ABSTRACT: Detention is an acknowledged violation of the right to liberty that enforces criminal law procedures. It is a coercive measure that aims to guarantee social freedom, security and justice. However, there are categories of persons that can be detained although unconvicted of any crime. Among others: (i) migrants within hotspots; (ii) pre-trial detained; and (iii) persons with disabilities. This paper focuses on the involuntary detention of persons with mental impairments, which is a common practice all over the world where states pretend to protect people from themselves and society through forced placement. Unfortunately, such a practice could also justify involuntary treatments that violate the dignity of individuals. While the international community is trying to revise this habit, the Council of Europe shows an "unsound" position.

KEYWORDS: unconvicted detention – forced placement – persons with disabilities – mental impairments – unsound minds.