

2015

Criminalizing Disability: The Urgent Need of a New Reading of the European Convention on Human Rights

Ana Elena Abello Jiménez

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [Law Commons](#)

Recommended Citation

Abello Jiménez, Ana Elena. "Criminalizing Disability: The Urgent Need of a New Reading of the European Convention on Human Rights." *American University International Law Review* 30 no. 2 (2015): 285-313.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

CRIMINALIZING DISABILITY: THE URGENT NEED OF A NEW READING OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ANA ELENA ABELLO JIMÉNEZ*

I. INTRODUCTION.....	285
II. BACKGROUND: THE RIGHTS OF PERSONS WITH DISABILITIES UNDER INTERNATIONAL LAW	287
III. AN “UNSOOUND MIND”: THE ANTIQUATED TERMINOLOGY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE NEED FOR A PARADIGM SHIFT.....	291
IV. SHIFTING TOWARD THE RIGHT TO LIVE IN A COMMUNITY	297
V. EUROPEAN COURT OF HUMAN RIGHTS: HOVERING ON THE MARGIN OF APPRECIATION	302
VI. ADAPTING THE EUROPEAN CONVENTION TO TODAY’S STANDARDS.....	310
VII. CONCLUSION.....	313

I. INTRODUCTION

The first world report on disability stated that “[m]ore than one billion people in the world live with some form of disability, of whom nearly [two hundred] million experience considerable difficulties in functioning.”¹ This number amounts to about fifteen

* Legal Advisor of the Deputy Prosecutor of Colombia. Universidad Externado de Colombia with Specialization in Criminal and Criminological Sciences and Liability and Damages. L.L.M. in Human Rights and Criminal Justice in Utrecht University.

1. *World Report On Disability*, WORLD HEALTH ORG., xi (2011), http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf.

percent of the world's population.² These statistics clearly show that persons with disabilities are an important part of the population and can be considered the largest minority in the world.³ This percentage is similar in Europe, where there are about 80 to 120 million persons with disabilities.⁴ According to statistics, "one in four Europeans has a family member with a disability."⁵

The right to liberty of people with intellectual and psychosocial disabilities in Europe is enshrined in article 5(1)(e) of the European Convention on Human Rights ("ECHR").⁶ This Convention was drafted in 1950 and, sixty-four years later, it maintains the same wording despite significant changes in international human rights law. A rigid reading of this article leads to criminalizing people with intellectual or psychosocial disabilities and violates the dignity of those with disabilities.

The ECHR refers to "persons of unsound mind."⁷ It does not, however, define "unsound mind" despite the importance of determining who falls within the ECHR's scope. According to Oxford Dictionary, the term "unsound" can have different meanings. When referring to a person, it means, "[n]ot physically sound; unhealthy, diseased; suffering from wounds or injuries."⁸ It is also

2. *Id.* at 261 (stating that the estimated one billion plus people living with a disability in 2010 constituted about fifteen percent of the world's population at the time).

3. See *International Convention on the Rights of Persons with Disabilities: Some Facts About Persons with Disabilities*, UNITED NATIONS (Aug. 14-25, 2006), <http://www.un.org/disabilities/convention/pdfs/factsheet.pdf>.

4. See Council Europe, Comm'r for Human Rights, *Human Rights and Disability: Equal Rights for All*, at 3 (Oct. 20, 2008), available at <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1370848&SecMode=1&DocId=1318344&Usage=2> [hereinafter *Equal Rights*].

5. *Facts and Figures About Disability*, EUR. DISABILITY FORUM, http://www.edf-feph.org/Page_Generale.asp?DocID=12534&id=1&langue=EN (last visited Aug. 4, 2014).

6. Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, art. 5, entered into force June 1, 2010, E.T.S. No. 5 [hereinafter ECHR] ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with procedure proscribed by law . . . the lawful detention . . . of persons of unsound mind.").

7. *Id.* art. 5(1)(e).

8. *Unsound Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/>

defined as “[n]ot mentally sound or normal; not sane.”⁹

The term “unsound mind” is grossly overbroad and implies that such persons are not ‘normal.’ What is normality? Are persons of “unsound minds” those who have a mental illness? Are they those who have an intellectual¹⁰ or psychosocial¹¹ disability? Does the ECHR’s definition include patients in a coma? Whether article 5(1)(e) encompasses all of these categories is unclear. A person who has an “unsound mind” is supposedly someone who cannot exercise self-determination, unlike a person of a “sound mind,” which some define as “[the] state of a man’s mind which is adequate to reason and comes to a judgment upon ordinary subjects, like other rational men.”¹²

II. BACKGROUND: THE RIGHTS OF PERSONS WITH DISABILITIES UNDER INTERNATIONAL LAW

The Convention on the Rights of Persons with Disabilities (“CRPD”) does not use the term “unsound mind.”¹³ Instead, CRPD refers to persons with disabilities as part of a paradigm shift in the social perception of disabilities.¹⁴ Article 1 of the CRPD establishes that “[p]ersons with disabilities include those who have long-term

view/Entry/218175?rskey=BWCa8R&result=7&isAdvanced=false# (last visited Aug. 7, 2014).

9. *Id.*

10. See Council Europe, Comm’r for Human Rights, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, at 6, (Feb. 20, 2012) [hereinafter *Who Gets to Decide?*], available at <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=2343832&SecMode=1&DocId=2050970&Usage=2> (“Persons with intellectual disabilities . . . include those who experience difficulties in their intellectual functioning, for example persons with Down’s syndrome.”).

11. See *id.* (“Persons with psychosocial disabilities include those who are diagnosed with and/or experiencing mental health problems, e.g. bipolar disorder, autism[,] or schizophrenia.”).

12. *Sound Mind Definition*, LECTRIC L. LIBR., <http://www.lectlaw.com/def2/s163.htm> (last visited Aug. 7, 2014).

13. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, pmbl., U.N. Doc. A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD].

14. See *id.* (utilizing a “holistic approach” to ensure social development, human rights, and non-discrimination).

physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”¹⁵ The CRPD, which entered into force in 2008, is the latest United Nations human rights treaty.¹⁶ More countries signed the CRPD on the day of its introduction than any other UN convention.¹⁷ So far, 158 States have signed the CRPD and 161 have ratified it.¹⁸ Almost all the European States have signed the CRPD although a few holdouts remain.¹⁹

Persons with disabilities are equally entitled to the rights of those who do not have disabilities.²⁰ In practice, however, many states deprive people with disabilities of many rights that most take for granted. For this reason, a specific convention was necessary.²¹

The Preamble of the CRPD is significant because it emphasizes equality and human dignity as fundamental values and principles of

15. *Id.* art. 1.

16. *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS, <http://www.un.org/disabilities/default.asp?navid=14&pid=150> (last visited Aug. 4, 2014) (providing that the Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on December 13, 2006 and opened for signature on May 30, 2007).

17. *See id.* (commenting that the Convention had eighty-two signatories).

18. *See Convention and Optional Protocol Signatures and Ratifications*, UNITED NATIONS, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (last visited Aug. 10, 2007) [hereinafter *CRPD Signatories*] (noting twenty-three countries ratified but did not sign the Convention).

19. *Id.*; *see also CRPD and Optional Protocol Signatures and Ratifications*, UNITED NATIONS (July 2014) [hereinafter *CRPD Map*], <http://www.un.org/disabilities/documents/maps/enablemap.jpg> (showing that Finland, Iceland, Ireland, Monaco, and the Netherlands have not yet ratified).

20. *See Human Rights and Persons with Disabilities*, UNITED NATIONS, http://www.un.org/esa/socdev/enable/rights/humanrights.htm#_ftn1 (last visited Aug. 17, 2014) (“The rights of individuals with disabilities are grounded in a human rights framework based on the United Nations Charter, the Universal Declaration of Human Rights, international covenants on human rights[,] and related human rights instruments.”).

21. *See Why a Convention?*, UNITED NATIONS, <http://www.un.org/disabilities/convention/questions.shtml> (last visited Aug. 17, 2014) (asserting that legally binding treaty obligations are required to ensure that persons with disabilities receive the rights that the Universal Declaration of Human Rights guarantees them).

human rights to which people with disabilities are entitled. The Preamble provides that:

Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,

Recognizing that . . . everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,

Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination[.]²²

Further, it recognizes that persons with disabilities are diverse and that discriminating against any person on the basis of disability is a violation of the inherent dignity and worth of a person.²³ The Preamble also highlights the fact that persons with disabilities “continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,”²⁴ which creates a profound social disadvantage.²⁵ Moreover, the CRPD establishes eight guiding principles, which include: respect for inherent dignity, non-discrimination, respect for difference and acceptance of persons with disabilities as part of human diversity and humanity, and full and effective participation

22. CRPD, *supra* note 13, pmbl. (emphasis omitted).

23. *Id.* pmbl. (i) (“Recognizing further the diversity of persons with disabilities.”) (emphasis omitted); *id.* pmbl. (h); *see* art. 2 (defining discrimination as “any distinction, exclusion[,] or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment[,] or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil[,] or any other field.”); *id.* pmbl. (j) (“Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.”) (emphasis omitted).

24. *Id.* pmbl. (k).

25. *See id.* art. (y) (“Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries.”) (emphasis omitted).

and inclusion in society.²⁶

Article 5 of the CRPD specifically addresses equality and non-discrimination and provides that States should consider persons with disabilities as “equal before and under the law” and give them “equal protection and benefit of the law.”²⁷ Accordingly, pursuant to article 8, parties must “adopt immediate, effective[,] and appropriate measures: . . . [t]o combat stereotypes, prejudices[,] and harmful practices relating to persons with disabilities . . . in all areas of life.”²⁸

Article 14 enshrines the right to liberty and security of person,²⁹ which includes the obligation of parties to ensure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is consistent with the spirit of the law.³⁰ Significantly, this provision also requires states to ensure “that the existence of a disability shall in no case justify a deprivation of liberty.”³¹ It also obligates States to ensure that persons with disabilities deprived of their liberty through any process are treated in accordance with international human rights.³²

The CRPD also establishes the right of people with disabilities to live independently and to be included in the community.³³ Article 19 specifically requires States to take effective and appropriate measures to ensure that people with disabilities have the opportunity to choose their place of residence and cohabitants on an equal basis with others.³⁴ It also serves to prevent State parties from isolating or

26. CRPD, *supra* note 13, art. 3(a) (“Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons”); *see id.* art. 3(b); *id.* art. 3(c); *see id.* art. 3(d).

27. *Id.* art. 3(a); *see id.* art. 5(1).

28. *See id.* art. 8 (1).

29. *See id.* art. 14.

30. *Id.* art. 14(1)(b).

31. *Id.*

32. *See id.* art. 14(2) (“States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.”).

33. *See* CRPD, *supra* note 13, art. 19 (“States Parties . . . shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community . . .”).

34. *See id.* art. 19(a) (mandating State Parties to ensure that persons with

segregating people with disabilities from the community.³⁵

III. AN “UNSOOUND MIND”: THE ANTIQUATED TERMINOLOGY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE NEED FOR A PARADIGM SHIFT

While the CRPD is a progressive step in international law, the shocking language of article 5(1)(e) of the ECHR remains unchanged since 1950. This anachronism continues to impinge on the equitable treatment of people of disabilities. It uses terms like persons of “unsound mind,” which assumes the incapacity of the person due to the insanity of his or her mind.³⁶ Article 5(1)(e) allows States to lawfully deprive someone who qualifies as having an “unsound mind” of their right to liberty.³⁷ This is a consequence of emphasizing what is known as the “medical model” of assessing disabilities because it assumes ‘normalizing’ these persons is necessary, even if it requires depriving liberty since such deprivations are purportedly for the good of the person.

This rationale frames people with disabilities as “objects rather than subjects in their own right.”³⁸ The “medical model” locates the “problem” of disability within the person, asserting that such persons could be “fixed” through medicine or rehabilitation, whereas the

disabilities have an opportunity to choose where and with whom they live, equal to the opportunities available to persons without disabilities).

35. See *id.* art. 19(b).

36. Cf. *Sound Mind Definition*, *supra* note 12 (defining the sound mind as one that is sufficient to “adequate[ly] reason and comes to a judgment upon ordinary subjects”).

37. See ECHR, *supra* note 6, art. 5 (“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with procedure proscribed by law . . . the lawful detention . . . of persons of unsound mind”).

38. See Gerard Quinn & Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, UNITED NATIONS OFF. HIGH COMMISSIONER HUM. RTS. 13 (2002), <http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf>

(arguing that putting human rights “values into practice in the context of disability” is a “problem that stems largely from the relative invisibility of people with disabilities in the past[, where] [t]hey tended to be viewed as objects rather than subjects in their own right and the legal protections normally associated with the rule of law were either not applied at all or were severely curtailed.”).

“charity model” provides that only welfare programs or charity can care for them.³⁹

International law slowly changed how it framed the rights of people with disabilities and eventually shifted to a rights-based approach.⁴⁰ Fortunately, most European States, including the European Union, have already ratified the CRPD.⁴¹ The Council of

39. See *id.* (“The ‘medical model’ of disability has frequently been contrasted in recent years with the ‘human rights’ model. The medical model focuses on persons’ medical traits such as their specific impairments. This has the effect of locating the ‘problem’ of disability within the person.”); *Monitoring the Convention on the Rights of Persons with Disabilities*, UNITED NATIONS OFF. HIGH COMMISSIONER HUM. RTS. 8 (2010), http://www.ohchr.org/Documents/Publications/Disabilities_training_17EN.pdf (“When disability is perceived in this way, society’s responses are restricted to only one of two paths: individuals can be ‘fixed’ through medicine or rehabilitation (medical approach); or they can be cared for, through charity or welfare programmes (charity approach).”).

40. See *The United Nations and Persons with Disabilities Chronology: 1945-1980*, UNITED NATIONS, <http://www.un.org/disabilities/default.asp?id=124> (last visited Aug. 11, 2014); *The United Nations and Persons with Disabilities Chronology: 1980’s-Present*, UNITED NATIONS, <http://www.un.org/disabilities/default.asp?id=125> (last visited Aug. 11, 2014) (highlighting the proclamation of the Decade of Disabled Persons as 1983-1993, the 1989 adoption of the Tallinn Guidelines for Action in Human Resources Development in the Field of Disability, 1991 adoption of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, representing as a partial shift from the medical approach, and 1993 issuing of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities); see also Decision 2001/903/EC, of the Council of 3 Dec. 2001 on the European Year of People with Disabilities 2003, 2001 O.J. (L 335) 15, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001D0903&from=> (identifying 2003 as the European Year of People with Disabilities to raise public awareness about the issue); *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UNITED NATIONS, <http://www.un.org/disabilities/default.asp?id=1423> (last visited Aug. 11, 2014) (commenting on the establishment of an Ad Hoc Committee “to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the fields of social development, human rights and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development.”).

41. See *CRPD Signatories*, *supra* note 18 (providing the dates of signing and ratification by U.N. members); see also European Comm’n, *United Nations Convention on the Rights of Persons with Disabilities*, EUROPA, http://ec.europa.eu/justice/discrimination/disabilities/convention/index_en.htm (last updated Aug. 8, 2014) (noting that the Convention entered into force with respect to the EU on January 22, 2011).

Europe has prioritized the rights of persons with disabilities and issued recommendations aiming to ensure that persons with disabilities fully participate in society.⁴² In Recommendation 1592,⁴³ the Council recognized that several fundamental rights were still inaccessible for persons with disabilities in Europe and recommended promoting and implementing equal status, inclusion, full citizenship, and the right to choose.⁴⁴ This initiative demonstrated a shift in policy from an institutional approach to a holistic approach that considers persons with disabilities as citizens rather than patients.⁴⁵ Recommendation 1592 validated not only the rights of persons with disabilities but also the rights of their families, taking into account that families can provide a caring home “as a much better and more natural alternative to life in large-scale institutions.”⁴⁶

42. See Per Sjögren, Chairman, Ministers’ Deputies Council Europe, Welcome Address at the Swedish Conference on U.N. Disability Convention: Protecting and Promoting the Rights of Persons With Disabilities in Europe: Towards Full Participation, Inclusion and Empowerment 27 (Oct. 29, 2008), available at http://www.coe.int/t/e/social_cohesion/socsp/Protecting_and_promoting_the_rights_of_persons_with_disabilities_-_complete_with_cover1.pdf; see, e.g., Eur. Parl. Ass., *Rehabilitation Policies for the Disabled*, Recommendation No. 1185, ¶ 6(ii) (1992), available at http://assembly.coe.int/Main.asp?link=/Documents/Adopted_Text/ta92/EREC1185.htm [hereinafter *Recommendation 1185*] (calling on member States to encourage disabled persons to actively participate in family and community life and the organization of their own lives and provide for proper representation if their interests or needs are not met); Eur. Parl. Ass., *Towards Full Social Inclusion of People with Disabilities*, Recommendation No. 1592, ¶¶ 10, 11(d) (2003), available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta03/erec1592.htm> [hereinafter *Recommendation 1592*] (instructing member States to institute programs that will encourage the social inclusion of people with disabilities); see also Eur. Parl. Ass., *The Protection of the Human Rights and Dignity of Persons with Mental Disorder*, Recommendation Rec(2004)10, arts. 4(1), 9 (2004), available at [http://www.coe.int/t/dg3/health_bioethic/texts_and_documents/Rec\(2004\)10_e.pdf](http://www.coe.int/t/dg3/health_bioethic/texts_and_documents/Rec(2004)10_e.pdf) [hereinafter *Recommendation Concerning Rights and Dignity*] (proclaiming that persons with mental disorders should be able to “exercise all their civil and political rights”).

43. See generally *Recommendation 1592*, *supra* note 42.

44. See *id.* ¶ 2 (noting that rights provided in ECHR were still inaccessible to disabled persons in 2003); *id.* ¶ 3 (stating that it should be the overall objective of the European Council to guarantee “equal political, social, economic and cultural rights” to persons with disabilities).

45. See *id.* ¶ 5 (describing the shift from considering disabled individuals as “patients” to “citizens” with a right to individual support and self-determination).

46. *Id.* ¶ 4.

The Council also issued Action Plan 2006-2015, which, like Recommendation 1592, promotes the rights and full participation of persons with disabilities in society.⁴⁷ The plan recognizes the right of persons with disabilities to live independently as part of a community and aims to raise awareness to eliminate stigmatization and discriminatory behavior against people with disabilities.⁴⁸ It also focused on the individual as “central to a coherent, integrated approach which respects the human rights, fundamental freedoms[,] and dignity of all disabled individuals.”⁴⁹ The plan incorporates the following principles: non-discrimination, equality of opportunities, full participation in society for all persons with disabilities, respect for difference and acceptance of disability as part of human diversity, dignity, and individual autonomy including the right of self-determination.⁵⁰

Similarly, the Human Rights Commissioner of the Council of Europe has issued several papers on disability policies.⁵¹ In 2008, the Commissioner departed from the usual European agenda and stated that people with disabilities still face discrimination all over Europe and that it is incorrect to see them as “objects of concern.”⁵² In

47. Eur. Parl. Ass., *The Council of Europe Action Plan to Promote the Rights and Full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006-2015*, Recommendation Rec(2006)5 (2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=986865>.

48. See *id.* § 1.3 (stating that independence is associated with living in the community and advocating for the use of “accessible and objective information” to combat the stigmatization of and discrimination against persons with disabilities).

49. *Id.* § 2.2.

50. *Id.* § 2.7.

51. See generally Council Europe Comm’r for Human Rights, *The Right of People with Disability to Live Independently and Be Included in the Community*, (June 2012), available at <http://www.coe.int/t/commissioner/source/prems/RigtsToLiveInCommunity-GBR.pdf> [hereinafter *Right to Live Independently*] (positing that the right to live independently and live in a community are fundamental rights that must be extended to persons with disabilities); *Who Gets to Decide?*, *supra* note 10, at 6 (asserting that States must recognize the legal capacity of persons with disabilities to ensure that they may enjoy the full extent of the rights that human rights law guarantees them); Thomas Hammarberg, Council Europe Comm’r Human Rights, *Human Rights in Europe: No Grounds for Complacency*, at 128 (Apr. 2011), available at http://www.coe.int/t/commissioner/source/prems/HR-Europe-no-grounds-complacency_en.pdf (arguing that States must act to make society more inclusive); *Equal Rights*, *supra* note 4, at 3.

52. See *Equal Rights*, *supra* note 4, at 3 (suggesting a shift is taking place whereby human rights law no longer considers persons with disabilities as objects

particular, when recognizing the right to live in the community, the paper affirmed that life in an institution “almost inevitably leads to exclusion.”⁵³ In response, Member States implemented strategies and approaches to achieve a de-institutionalization process.⁵⁴ The Commissioner’s report considered that while de-institutionalization protected the rights of the persons living in institutions, “malpractices, such as keeping persons in bed all day, over-medication[,] and abuse of restraints must be stopped immediately” and involuntary admission must strictly follow national law and be subject to judicial review.⁵⁵

In 2011, the Human Rights Commissioner issued a paper on human rights in Europe that addressed the rights of persons with disabilities.⁵⁶ This paper recognized that the rights of persons with disabilities in Europe are still far from being realized because the law does not yet reflect society’s change in attitude about the rights of persons with disabilities.⁵⁷ It also referred to persons in psychiatric institutions in Europe, describing their plight as “shockingly bad” because authorities often detained persons with disabilities in inhumane and degrading conditions.⁵⁸ The Commissioner explained that “medication is too often used as the only form of treatment” and alternatives, such as different forms of therapy, rehabilitation, and other activities, are necessary.⁵⁹ Yet, “[u]nclear admission and discharge procedures constitute another problem resulting in what, in reality, is arbitrary detention.”⁶⁰ To confront this situation, the Commissioner recommended that States stop committing persons to unsuitable social care institutions and provide resources for

of concern but rather citizens entitled to equal rights).

53. *Id.* at 8.

54. *See id.* (pointing out that many European States now prefer community care over institutionalization).

55. *See id.* at 9-10 (calling for the protection of the human rights of individuals living in institutions).

56. *See generally* Hammarberg, *supra* note 51, at 127 (positing that legal policy has relied too heavily on institutionalization).

57. *See id.* at 15 (calling for a shift from a “charity” approach to a “rights-based” one).

58. *See id.* at 130 (recounting institutions whose living conditions are so egregious that the only legally sufficient remedy is to immediately close them down).

59. *Id.*

60. *Id.*

“adequate health care, rehabilitation[,] and social services in the community” instead of institutions.⁶¹

The Commissioner described the cruel reality of people with intellectual and psychosocial disabilities:

[they] continue to face discrimination, stigmatisation and even repression. They find that their mere existence is seen as a problem, and they have sometimes been hidden away in remote institutions, or in the back-rooms of family homes. They have been treated as non-persons whose autonomy is negotiable and whose decisions are meaningless.⁶²

This is the reality in a majority of European countries, where there is a tendency to declare people with disabilities as legally incapable.⁶³ Furthermore, the Commissioner emphasized that persons with intellectual disabilities are still stigmatized and marginalized. For instance, he highlighted that many people with disabilities are still detained in inhuman institutions, where they are provided with little, if any, rehabilitation.⁶⁴ These institutions often violate the rights of those committed by segregating and depriving the liberty of their patients; these institutions commonly treat patients as dangerous, give them unnecessary sedatives, and completely isolate them from the outside world.⁶⁵ The stigma that these institutions create is so severe that many patients are abandoned by their own families, especially when no alternative care exists.⁶⁶

At the end of 2011, the Commissioner of Human Rights of the Council of Europe intervened as a third party in the case of *Câmpeanu v. Romania* before the European Court of Human Rights (“ECtHR”).⁶⁷ This case represented a turning point because it was

61. *Id.* at 132.

62. *Id.*

63. *See* Hammarberg, *supra* note 51, at 134 (asserting that it is common for many European States to treat people with mental illnesses or intellectual disabilities as legally incapable).

64. *See id.* at 137-38 (“During missions to member states, I have had to conclude . . . that a great number of [persons with intellectual disabilities] continue to be kept in old-style, inhuman institutions”).

65. *Id.* at 132, 138.

66. *See id.*

67. *Câmpeanu v. Romania*, Third Party Intervention by the Council of Europe Commissioner for Human Rights, App. No. 47848/08, para. 1 (Eur. Ct. H.R. Oct. 14, 2011) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145577> [hereinafter *Câmpeanu*, Third Party Intervention].

the first case that resulted in the death of an individual.⁶⁸ The International Centre for the Legal Protection of Human Rights described the case as being the first to detail the “range of extreme human rights abuses routinely inflicted upon people with disabilities placed in long-term stay institutions across Europe.”⁶⁹ In the submission to the ECtHR, the Commissioner argued that society often discriminates against persons with mental health problems and intellectual disabilities,⁷⁰ and States provide limited possibilities for persons with disabilities to be heard.⁷¹ Accordingly, the Commissioner asserted that such discrimination prevents persons with disabilities from seeking legal redress.⁷² States and institutions failing to prioritize the rights of persons with disabilities often isolate persons with disabilities, leading to severely detrimental consequences.⁷³ The Commissioner concluded that the provisions of the ECHR should be interpreted in accordance with the CRPD in keeping with its main purpose.⁷⁴

IV. SHIFTING TOWARD THE RIGHT TO LIVE IN A COMMUNITY

In 2012, the Commissioner issued two additional papers on persons with disabilities. The first paper discussed legal capacity and the second focused on the right of persons with disabilities to live independently and within the community.⁷⁵ The first paper discussed

68. *Câmpeanu v. Romania*, Statement of the Facts, App. No. 47848/08 (Eur. Ct. H.R. Oct. 2, 2008) (HUDOC), available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-113736>.

69. *The Centre for Legal Resources On Behalf of Valentin Câmpeanu v Romania*, INTERIGHTS, <http://www.interights.org/campeanu/index.html> (last visited Aug. 19, 2014).

70. See *Câmpeanu*, Third Party Intervention, *supra* note 67, para. 7 (warning that states must take care to avoid “legislative stereotyping” which can seriously disadvantage persons with disabilities).

71. See *id.* paras. 9, 11 (claiming that persons with disabilities can rarely advocate for their rights, either socially or legally).

72. See *id.* para. 10 (“[C]ases concerning human rights violations experienced by people with disabilities are often not brought to courts”).

73. See *id.* para. 12 (noting that the difficulties faced by disabled persons increase for those living in institutions where they find themselves isolated from their families and legally incapacitated).

74. *Id.* para. 42.

75. *Who Gets to Decide?*, *supra* note 10, at 6; see also *Right to Live Independently*, *supra* note 51, at 14 (discussing how this authority is part of a

the paradigm shift and how it closely relates to equality. The fundamental rights of persons with disabilities are the same as the fundamental rights of other persons; nonetheless, these rights must be interpreted in a manner that fulfills the needs of persons with disabilities.⁷⁶

The Commissioner argued that in light of the ECtHR decision in *Shtukaturv v. Russia*, depriving individuals of their legal capacity may constitute “a serious interference with the individual’s right to respect for private life” enshrined in article 8 of the ECHR.⁷⁷ The ECtHR previously recognized that legal capacity restrictions could interfere with the right to private life.⁷⁸ However, the Commissioner argued that, “[s]ince the Court continues to recognise mental disorder as a possible justification for limiting legal capacity, the European human rights system has not yet fully incorporated the paradigm shift envisioned in the CRPD towards granting persons with disabilities a primary right to support in their decision-making.”⁷⁹

In the second issue paper, the Commissioner advocated for the right of persons with disabilities to live within their community.⁸⁰ This paper explained the relationship between this right and other

larger effort to affect the CRPD’s general goals).

76. See *Who Gets to Decide?*, *supra* note 10, at 11 (asserting that, in the human rights paradigm, disability is not a result of the individual’s impairment but rather “society’s failure to create an inclusive environment.”).

77. See *id.* at 15; *Shtukaturv v. Russia*, 2008-II Eur. Ct. H.R. 360, 377 (2008) (concluding that the State violated the Petitioner’s right to private life under article 8 of the ECHR by providing him with medical reports that he was unable to understand and later incapacitating him without providing an explanation); see also ECHR, *supra* note 6, art. 8 (“Right to respect for private and family life. 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”).

78. See, e.g., *Salontaji-Drobnjak v. Serbia*, App. No. 36500/05, paras. 140, 144 (Eur. Ct. H.R. Oct 13, 2009) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94985> (concluding that, under specific circumstances, legal capacity restrictions must be proportionate to comply with the ECHR’s right to respect for private life under article 8).

79. *Who Gets to Decide?*, *supra* note 10, at 16.

80. See *generally Right to Live Independently*, *supra* note 51.

fundamental rights, such as the right to liberty, the right not to be subjected to torture or ill-treatment, equality, and non-discrimination.⁸¹ The Commissioner argued that relying on institutionalization was “a pervasive violation of [the right to live in the community] which calls for a firm commitment to deinstitutionalization.”⁸² However, the Commissioner acknowledged that governments are increasingly recognizing that deinstitutionalization is necessary.⁸³

The Commissioner departed from the definition of an “institution” that the European Coalition for Community Living previously adopted:

An institution is any place in which people who has been labeled as having a disability are isolated, segregated and/or compelled to live together. An institution is any place in which people do not have, or are not allowed to exercise control over their lives and their day-to-day decisions.⁸⁴

However, the Commissioner went beyond this definition and characterized institutions as “total institutions,” which refers to places where “all aspects of life are conducted in the same place and under the same central authority.”⁸⁵ Individuals in total institutions are treated in the same way and obliged to comply with the same daily routines as others in the institution, severely inhibiting any possibility of self-determination.⁸⁶

The right to live within the community goes beyond the right not to be institutionalized; it requires the support of the community and the families of persons with disabilities to ensure that persons with disabilities may actively participate in the community and that their

81. *See id.* at 5, 11.

82. *Id.* at 5.

83. *See id.* at 13 (commenting that governments acknowledge that deinstitutionalization is inevitable).

84. *Right to Live Independently*, *supra* note 51, at 18; *see also About ECCL: What is the European Coalition for Community Living?*, EUR. COALITION FOR COMMUNITY LIVING, <http://community-living.info/about-eccl/> (last visited Aug. 15, 2014).

85. *Right to Live Independently*, *supra* note 51, at 36 (quoting the well-known sociologist Ervin Goffman)

86. *See id.*

right to self-determination is respected.⁸⁷ In any case, the practice of detaining persons with disabilities in institutions must end because it violates the right to live in the community, increases the risk of exploitation, abuse, and violence, and critically interrupts such person's ability to fulfill their life plans.⁸⁸

The lack of community-based alternatives often continues this heinous practice.⁸⁹ Therefore, the Commissioner recommended governments to "set deinstitutionalisation as a goal and develop a transition plan for phasing out institutional options and replacing them with community-based services, with measurable targets, clear timetables[,] and strategies to monitor progress."⁹⁰

The most recent speech of the Commissioner at the "Human Rights and Disability" international symposium on April 2014 highlighted that a huge gap exists between what the law requires and the reality on the ground, especially with respect to the right to autonomy and the right to live in the community.⁹¹ He recognized that "Europe still has a long way to go even to eradicate the most obvious violations of this right," such as segregating persons with disabilities in institutions.⁹² Indeed, some countries are still building new institutions, sometimes even with European Union funds; other supposedly more progressive countries are building large blocks of apartment buildings away from city centers that exclusively accommodate people with disabilities.⁹³ This may lead to creating

87. *See id.* at 17, 39–40 (describing the right to live within the community as including the right to determine where and how to relate to the community).

88. *Id.* at 31–32, 37–38 (noting that detaining disabled individuals in institutions violates the right to liberty protected in article 14 of the CRPD and article 5 of the ECHR); *see Right to Live Independently*, *supra* note 51, at 37–38.

89. *Right to Live Independently*, *supra* note 51, at 35, 28–39 (explaining that "high levels of institutionalisation go hand-in-hand with lack of community-based options").

90. *Id.* at 7.

91. *See* Nils Muižnieks, Comm'r Human Rights, Council of Europe, Keynote Speech at the International Symposium on Human Rights and Disability: Monitoring the Human Rights of Persons with Disabilities in Europe 1 (Apr. 10–11, 2014), *available at* <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2503663&SecMode=1&DocId=2130702&Usage=2>.

92. *Id.*

93. *See id.* (providing Denmark as an example of a country that abolished institutions but is building apartment blocks for disabled persons far from the city center).

ghettos, which is another way to discriminate against people with disabilities.

The European Union has also focused on the rights of persons with intellectual and psychosocial disabilities. For instance, the European Commission drafted a coherent set of policies to create a European Disability Strategy.⁹⁴ The European Union Agency for Fundamental Rights also submitted several reports regarding persons with intellectual and psychosocial disabilities.⁹⁵ In 2012, it issued two reports: “Involuntary Placement and Involuntary Treatment of Persons with Mental Health Problems” and “Choice and Control: The Right to Independent Living.”⁹⁶ The latter concluded that despite efforts to deinstitutionalize, large institutions and the institutional culture itself continue to limit individual autonomy, which also affect social inclusion and one’s ability to participate in the community.⁹⁷ The report also recognized that many people experience stigma, hostility, and negative attitudes, which contribute to people feeling

94. See *European Disability Strategy 2010-2020*, EUR. COMMISSION, http://ec.europa.eu/justice/discrimination/disabilities/disabilitystrategy/index_en.htm (last updated July 16, 2013) (advocating that European states take steps to promote the interests of persons with disabilities by ensuring the accessibility to public areas, participation in public life and leisure activities, equality, employment opportunities, education and training for the labor market, social protection, and health care services.).

95. See generally *The Right to Political Participation of Persons with Mental Health Problems and Persons with Intellectual Disabilities*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS. (Oct. 2010), http://fra.europa.eu/sites/default/files/fra_uploads/1216-Report-vote-disability_EN.pdf (detailing a FRA study about the level of political participation of persons with disabilities); *The Legal Protection of Persons with Mental Health Problems Under Non-Discrimination Law*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS. (2011), http://fra.europa.eu/sites/default/files/fra_uploads/1797-FRA-2011-Legal-protection-persons-mental-health-problems-report_EN.pdf (considering how both international and domestic law affects the rights of persons with disabilities).

96. *Choice and Control: The Right to Independent Living*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS. (2012), http://fra.europa.eu/sites/default/files/choice_and_control_en_13.pdf; *Involuntary Placement and Involuntary Treatment of Persons with Mental Health Problems*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS. (2012) [hereinafter *Involuntary Placement and Involuntary Treatment*], http://fra.europa.eu/fraWebsite/attachments/FRA-2012-involuntary-placement-treatment_EN.pdf.

97. See *id.* at 67 (arguing that, after leaving an institution, the ability of a person with a disability to live independently is hampered by the difficulty in finding housing, employment, and educational opportunity).

isolated and lead to discrimination.⁹⁸

V. EUROPEAN COURT OF HUMAN RIGHTS: HOVERING ON THE MARGIN OF APPRECIATION

The ECtHR has tried to respect the rights of persons with intellectual and psychosocial disabilities by strictly analyzing what would constitute the “lawful detention . . . of persons of unsound mind” under article 5(1)(e) of the ECHR. The *Winterwerp* case⁹⁹ is one of the most important decisions on this matter and set the precedent for future judgments of the ECtHR. The Court recognized that the term “persons of unsound mind” does not have a definitive interpretation; however, it clarified and later reaffirmed that a person’s views and behaviors, even when they deviate from prevailing societal norms, cannot be grounds for detaining a person.¹⁰⁰

Despite this conclusion, in *Luberti v. Italy*, the Court recognized that national authorities are entitled to a margin of appreciation when determining if a person is detained as a “person of unsound mind” because they evaluate the evidence in every individual case first.¹⁰¹

98. See *id.* at 67-68 (noting that negative attitudes further enforce discrimination and cause isolation of disabled persons).

99. See generally *Winterwerp v. Netherlands*, 33 Eur. Ct. H.R. (ser. A) at 6-7 (1979) (concerning a controversy involving The Netherlands treatment of persons with disabilities).

100. *Id.* at 16, 37; see also *Rudenko v. Ukraine*, App. No. 50264/08, para. 102 (Eur. Ct. H.R. Apr. 17, 2014) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-142421> (affirming that, although the definition of “unsound mind” is an evolving one, it does not permit states to detain individuals who do not conform to societal moors); *R.L. and M.-J.D. v. France*, App. No. 44568/98, para. 114 (Eur. Ct. H.R. May 19, 2004) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-66329> (stating that article 5(e) cannot be read to allow the detention of an individual on the basis of his or her ideas or behavior); *Herz v. Germany*, App. No. 44672/98, para. 47 (Eur. Ct. H.R. June 12, 2003) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61137> (affirming the *Winterwerp* principle that an individual cannot be detained solely because his views or behavior deviate from predominant social norms).

101. See *Luberti v. Italy*, 75 Eur. Ct. H.R. (ser. A) at 12-13 (1984) (stating that national authorities shall be allowed to evaluate evidence produced for them from persons of unsound mind with greater discretion); see also *Ruiz Rivera v. Switzerland*, App. No. 8300/06, para. 62 (Eur. Ct. H.R. Feb. 18, 2014) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-141434>

Under the Convention, the Court may only review decisions taken by national authorities.”¹⁰² However, the Court has established three minimum requirements that national authorities must fulfill to lawfully deprive an individual of the liberty for being of “unsound mind”:

1. The person must be reliably shown to be of “unsound mind”;
2. The mental disorder must be of a kind or degree warranting compulsory confinement; and
3. The validity of continued confinement depends upon the persistence of such a disorder.¹⁰³

(stating that, under *Herz*, national courts have some discretion in deciding which medical analysis of an individual’s mental condition to credit when multiple analyses reach contradictory conclusions); *Rakevich v. Russia*, App. No. 58973/00, para. 30 (Eur. Ct. H.R. Oct. 28, 2003) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61414> (reiterating that national authorities are recognized as having certain discretion when dealing with persons of “unsound mind.”); *X v. United Kingdom*, 46 Eur. Ct. H.R. (ser. A) at 18 (1981) (affirming that the *Winterwerp* conditions must be established to lawfully detain an individual of unsound mind).

102. *Ashingdane v. United Kingdom*, 93 Eur. Ct. H.R. (ser. A) at 18 (1985) (stating that the Court is limited to evaluating the legality of a state’s detention to strictly considering ECHR Article 5(1)(e)). *But see De Wilde v. Belgium*, 12 Eur. Ct. H.R. (ser. A) at 65 (1971) (separate opinion of Judges Balladore Pallierie and Verdross) (arguing that the Court is unqualified to determine whether a state has unduly detained a person of “unsound mind” because it does not have jurisdiction under the ECHR to do so).

103. *See Rudenko*, App. No. 50264/08 para. 99 (mandating that a state must conform with the purpose of ECHR by ensuring it does not arbitrarily deprive individuals of their liberty, including persons of “unsound mind”); *Plesó v. Hungary*, App. No. 41242/08, para. 62 (Eur. Ct. H.R. Oct. 2, 2012) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113293> (holding that a state can only lawfully detain an individual if all alternative measures would prove insufficient to safeguard the detained individual or the public at large); *R.L. and M.-J.D.*, App. No. 44568/98 para. 114; *Rakevich*, App. No. 58973/00 para. 30 (affirming that a state seeking to detain an individual with a disability must satisfy the three *Winterwerp* criteria); *Hutchison Reid v. United Kingdom*, 2003-IV Eur. Ct. H.R. 1, 18 (reaffirming the *Winterwerp* criteria for justifying the detention of a person with an “unsound mind.”); *Varbanov v. Bulgaria*, 2000-X Eur. Ct. H.R. 225, 240 (reiterating the requirements for a finding of an unsound mind); *Johnson v. United Kingdom*, 1997-VII Eur. Ct. H.R. 2391, 2409-10 (restating that, under the ECHR, a state cannot lawfully detain an individual unless it can reliably show through expert medical evidence that the

To reliably establish that a person is of an “unsound mind,” there must be objective medical expertise unless depriving the person’s liberty is an urgent measure, as determined by national authorities.¹⁰⁴ The Court’s standard leaves a degree of questionable flexibility. Disability is a concept that depends on social context and no doctor or scientist may provide expertise on the dangerousness of a person without being influenced by his or her own passions and social and cultural experiences.¹⁰⁵ Thus, determining what mandates compulsory confinement is difficult, as the Court has recognized.¹⁰⁶ This vague and broad criterion based on dangerousness should not be acceptable in a democratic society in the twenty-first century.

The Court requires States to minimize the restrictions on the right to liberty, but its wording is tied to article 5(1)(e) of the ECHR.¹⁰⁷

individual is of unsound mind, that the individual’s condition is of a kind or degree warranting compulsory detention, and that such detention can only last as long as the detained individual’s condition persists); *Ashingdane v. United Kingdom*, 93 Eur. Ct. H.R. (ser. A) at 18 (1985); *Luberti*, 75 Eur. Ct. H.R. at 12-13 (stating that national authorities shall be allowed to evaluate evidence produced for them from persons of unsound mind with greater discretion); *X*, 46 Eur. Ct. H.R. at 18 (outlining the conditions required to lawfully detain an individual of unsound mind).

104. *R.L. and M.-J.D.*, App. No. 44568/98 para. 114 (recognizing that States have great latitude when analyzing confinement in urgent cases). *But see Ruiz Rivera*, App. No. 8300/06 para. 62 (stating that, per *Herz*, national courts have some discretion in deciding which medical analysis of an individual’s mental condition to credit when multiple analyses reach contradictory conclusions); *Herz*, App. No. 44672/98 paras. 46-47, 54 (holding the Court could not substitute its judgment for a national court’s judgment about whether an individual is of “unsound mind” in emergency situations).

105. See Joseph E. Kennedy, *The Danger of Dangerousness As a Basis for Incarceration*, in CRIMINAL LAW CONVERSATIONS 83, 84 (Paul H. Robinson et al. eds., 2009) (explaining that there is no strict science that can absolutely determine the potential dangerousness for mentally ill individuals and how the distinction is merely subjective).

106. *Rakevich*, App. No. 58973/00 paras. 30, 32 (“[T]he national authorities are to be recognised as having a certain discretion, since it is in the first place for the national authorities to evaluate the evidence before them . . .”).

107. See *Rudenko*, App. No. 50264/08 para. 103 (“The Court further notes that the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient . . .”); *Glien v. Germany*, App. No. 7345/12, para. 85 (Eur. Ct. H.R. Nov. 28, 2013) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-138580> (requiring an individual who claims to be mentally ill to have documented the disorder when admitted to a hospital, clinic, or other appropriate institution); *Zagidulina v. Russia*, App. No. 11737/06, para. 52 (Eur.

Therefore, in practice, all the requirements established by the Court to guarantee the lawfulness of the deprivation of liberty still refer to the antiquated and disrespectful view of persons with disabilities. The Court still assesses its decisions based on the undetermined and arbitrary concept of “unsound mind.” To make matters worse, “unsound mind” only relates to the character of the person, not his or her acts, which lead to criminalizing disability. Since this type of criminalization is not evident, affected people have even fewer rights and guarantees than persons who are actually facing criminal charges. For instance, the ECtHR noted that a valid detention based on a mental disorder does not automatically mean that whenever an expert finds that the disorder no longer persists the person must be immediately and unconditionally discharged from detention.¹⁰⁸ This shows that persons with intellectual and psychosocial disabilities face stigma, which is a source of discrimination and contradictory with human rights and human dignity.

In criminal law, it is undisputed that a person must be punished for his or her acts,¹⁰⁹ not his or her personality or character.¹¹⁰ This concept derives from the *nullum crimen sine actione* principle, providing that criminal law only pursues actions or omissions exteriorized by a person.¹¹¹ This principle guarantees that a person cannot be punished because of his or her character.¹¹² This is also

Ct. H.R. May 2, 2013) (HUDOC) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119043> (recognizing that “individuals suffering from a mental illness constitute a particularly vulnerable group” and therefore courts must use strict scrutiny to evaluate their cases); *Plesó*, App. No. 41242/08 para. 62 (holding that, given the severity of detention, courts must determine that no other less intrusive options are available to ensure the safety of the individual and the public).

108. See, e.g., *Johnson*, 1997-VII Eur. Ct. H.R. at 2409 (stating that an individual who did not display a persistent mental disorder should have been immediately released).

109. See *id.* at 95 (stating that a criminal act must be a result of a voluntary physical act and confer responsibility upon an individual actor for those actions).

110. See R. A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* 62 (2009) (arguing that it is improper to hold people criminally liable for subjective thoughts, feelings, and other character traits).

111. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 420 (1978) (expanding on what a voluntary act is and how an act can impose responsibility on an individual as a means of determining subjective criminal intent).

112. See ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 116 (6th ed. 2009) (promoting the idea that “[f]orfeiture of life to protect a person from some minor hurt, loss, or damage would promote honour above respect for life and

consistent with the cultural pluralism that is characteristic of a rule of law society. Democracy provides that it is necessary to prohibit prosecuting and discriminating against a particular group without any reasons and to respect the otherness of human beings.¹¹³

Although the Court seems to recognize this difference, its decisions keep punishing persons with intellectual or psychosocial disabilities for being considered of “unsound mind.” The *Ashingdane v. United Kingdom*¹¹⁴ dissenting opinion argued that no analogy exists between imprisoning and confining a mental patient because the two concepts involve very different public policy issues.¹¹⁵ The purpose of committing and treating mental patients is to cure them and protect society from persons who are considered “genuinely dangerous.” Similarly, the Court has stated that, in a rule of law society, deprivations of liberty belong to the “criminal” sphere where depriving a person’s liberty may be imposed as punishment unless its nature, duration, or manner of execution cannot be “appreciably detrimental.”¹¹⁶ Despite the theoretical differences between the two, depriving a person’s right to liberty on the grounds of having an “unsound mind,” regardless of their actions, turns disability itself into a punishment. The terrible conditions in total-institutions, which often do not provide any treatment or benefit to persons subjected to

limb.”).

113. See *Glien v. Germany*, App. No. 7345/12, para. 85 (Eur. Ct. H.R. Nov. 28, 2013) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-138580> (providing narrow means for depriving liberty); *Plesó v. Hungary*, App. No. 41242/08, para. 62 (Eur. Ct. H.R. Oct. 2, 2012) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113293> (holding that an individual may only be detained if it has been established that all less intrusive alternatives to detention are insufficient); *Rudenko v. Ukraine*, App. No. 50264/08, para. 102 (Eur. Ct. H.R. Apr. 17, 2014) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-142421> (stating that the Court should find that the deprivation of liberty is necessary before allowing it); *Zagidulina v. Russia*, App. No. 11737/06, para. 52 (Eur. Ct. H.R. May 2, 2013) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119043> (reasoning that strict rules must be applied to detention determinations because persons with disabilities are a “particularly vulnerable group.”).

114. 93 Eur. Ct. H.R. (ser. A) at 19 (1985) (holding that the petitioner was only entitled to appear whether the act of detaining the petitioner was lawful, not the specifics of his detention under article 5 of ECHR).

115. See *id.* at 30 (Pettiti, dissenting) (“[O]ne cannot reason by analogy between imprisonment and confinement as a mental patient, the issues of public policy involved being quite different.”).

116. *Engel v. Netherlands*, 22 Eur. Ct. H.R. (ser. A) at 31 (1976).

them, further highlight how having a disability is a punishment.¹¹⁷

Being considered of “unsound mind” is a label that society places on people. Criminological and sociological theories have attempted to explain social exclusion and criminalization of conduct. Although the labeling approach did not exist during the drafting of the ECHR, it became the major theory in the sociology of deviant behavior by the early 1960s.¹¹⁸ Labeling includes “naming or the use of a particular term, degradation processes which officially alter the actor’s status and the effects these two events may have on the actor himself or those who know him.”¹¹⁹ Labeling is “the antithesis of normalization because it transforms rule breaking into deviance and essentially normal actors into deviant ones.”¹²⁰

States and society have used labeling to deprive the liberty of persons with disabilities. The aim of depriving a person’s liberty was to change and ‘normalize’ persons with disabilities, which, in turn, resulted in isolating them from society. States and society have even labeled persons with disabilities as dangerous and caused many to believe that deprivation of liberty is the only way to protect the rest of the society. Over time, various States sanctioned heinous treatments, such as lobotomies, electroshock treatment, and sterilization, which courts later found contrary to human dignity.¹²¹

117. See *Involuntary Placement and Involuntary Treatment*, *supra* note 96, at 42 (recounting the experiences of those involuntarily placed in an institution as frightening, pointing to the lack of control, lack of information, and violent environment).

118. See Erich Goode, *On Behalf of Labeling Theory*, 22 SOC. PROBS. 570, 570 (1975) (commenting on the labeling theory and its fundamental flaws).

119. Stuart A. Kirk & Eileen D. Gambrill, *The Convergence of the Interactionist and Behavioral Approaches to Deviance*, 3 J. SOC. & SOC. WELFARE 47, 52 (1975) (citing Dennis L. Wenger & C. Richard Fletcher, *The Effect of Legal Counsel on Admissions to a State Mental Hospital: A Confrontation of Professions*, 10 J. HEALTH & SOC. BEHAV. 66, 70 (1969); Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 420 (1956) (“Any communicative work between persons, whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types, will be called a ‘status degradation ceremony.’”).

120. Kirk & Gambrill *supra* note 119, at 52.

121. See *Zagidulina*, App. No. 11737/06, paras. 52-53 (outlining the protections the courts have imposed for the mentally ill); *Plesó*, App. No. 41242/08, para. 62 (holding that detention can only be justified when less severe measures are unavailable or infeasible); David L. Braddock & Susan L. Parish, *Social Policy Towards Disability in the Nineteenth and Twentieth Centuries*, in THE HUMAN

As long as the ECHR allows for the deprivation of liberty exclusively on the grounds of being of “unsound mind,” it fails to account for the paradigm shift that has taken place. Despite efforts to apply international law and its eight guiding principles that clearly protect the human rights of persons with intellectual and psychosocial disabilities in Europe, the Court is still bound by article 5(1)(e) of the ECHR, making it impossible to successfully protect the right to liberty.

This provision may allow States to deprive someone of their liberty for a lifetime. Indeed, this is what happened to Valentin Câmpeanu, a man with a severe intellectual disability, who was abandoned at birth and spent his whole life living in social care institutions.¹²² He suffered from other health problems, including HIV, which made his condition and treatment more strenuous.¹²³ He died after authorities placed him in a psychiatric hospital in the most degrading conditions for one week.¹²⁴ He was found dead and alone in a cold room, wearing only a pajamas top and lying in a bed without bedding; although he was incapable of using the toilet or feeding himself, the hospital staff refused to touch him for fear of contracting HIV.¹²⁵ A case like this in the twenty-first century is unacceptable. Yet, these situations are not exceptional in Europe. On the contrary, many persons with intellectual and psychosocial disabilities are abandoned in institutions and forgotten by the State, society, and their families. This situation continues because the law permits depriving a person’s liberty on the grounds of being of “unsound mind” and State policy fails to provide alternatives to depriving a person’s liberty.

The Court accounted for the heinous conditions that Valentin suffered since birth, specifically the fact that his family abandoned him and placed him into State “guardianship” until the end of his

RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL 83, 91-93 (Stanley S. Herr et al. eds., 2003) (providing examples of the atrocious “therapies,” such as the illegal and secret testing of radioactive elements on patients at institutions in Massachusetts from 1946-1973).

122. See *Câmpeanu v. Romania*, App. No. 47848/08, para. 7 (Eur. Ct. H.R. July 17, 2014) (HUDOC), available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-113736#%22itemid%22:%22001-113736%22>}.

123. See *id.*

124. See *id.* para. 23.

125. *Id.*

days. For the first time in the Court's history, a non-governmental organization ("NGO") was allowed to file a petition on behalf of a victim, despite the fact that the actual victim was deceased before the proceedings began.¹²⁶ Although allowing an NGO to petition was a significant step toward protecting the rights of people with disabilities, unfortunately, the Court did not establish a clear standard to apply in future cases. Instead, the Court assumed that this was an exceptional situation. A concurring opinion argued that the Court should have expanded the limits of the representation concept under ECHR based on the equality principle, rather than taking a casuistic approach.¹²⁷ Similarly, the dissenting opinion of Judges Spielmann, Bianku, and Nussberger asserted that the Court missed an opportunity to clarify *locus standi* for a NGO in connection with a complaint on the basis of article 3 of the ECHR.¹²⁸

The right to liberty of persons with intellectual and psychosocial disabilities is not distinct from other fundamental rights. This right is the basis for protecting other human rights because depriving a person's liberty triggers a vicious circle of violating other rights, such as the right to live within the community, the right to health, the right to a private life, and the right to equality and non-discrimination, among others.

The legal framework enforceable in the European System of Human Rights clearly provides the rights that States must recognize for persons with intellectual and psychosocial disabilities. Article 14 of CRPD explicitly establishes that "the existence of a disability shall in no case justify a deprivation of liberty."¹²⁹ The European Social Charter states that disabled persons have the right to independence, social integration, and participation in the life of the community.¹³⁰ It also recognizes the right to be protected from social exclusion.¹³¹ The Charter of Fundamental Rights of the European Union protects the

126. *Id.* para. 112.

127. *See id.* (concurring opinion) (calling on the ECHR to provide a de facto representation for those who are vulnerable).

128. *Id.* at 75 (Spielmann, J., Bianku, J., & Nusberger, J., dissenting).

129. CRPD, *supra* note 13, art. 14(1)(b).

130. *See* Revised European Social Charter, 1996, ETS 163, par. 15 (Part I) and Art. 15 (Part II).

131. *Id.* art. 30 (requiring parties to take measures to ensure that individuals who "live or risk living in a situation of social exclusion" are protected against poverty).

right of persons with disabilities to benefit from measures to ensure their independence, social and occupational integration, and participation in the community.¹³² While many legal frameworks reflect the paradigm shift, the ECHR continues to lag behind.

VI. ADAPTING THE EUROPEAN CONVENTION TO TODAY'S STANDARDS

As a legal instrument, the ECHR should be adapted to the social context and circumstances of today. The ECtHR recognized that ECHR is a living instrument and it must be interpreted in the light of present-day conditions; indeed, the Council of Europe has amended the ECHR by issuing protocols to the Convention.¹³³ The same procedure should be followed to modify the ECHR and eliminate article 5(1)(e) or, at the very least, the term “unsound mind” as a ground to deprive a person of their right to liberty and respect the principle of *pacta sunt servanda*.¹³⁴

Until this provision is amended, the ECtHR must desist from applying this provision because it is contrary to *jus cogens*. This is consistent with article 53 of the Vienna Convention on the Law of Treaties (“Vienna Convention”), which provides that a treaty is void when it is contrary to a peremptory norm of international law.¹³⁵ Article 5(1)(e) of the ECHR violates the principle of non-discrimination, which is a principle included in the core human rights instruments.¹³⁶

132. Charter of Fundamental Rights of the European Unions art. 26, Dec. 18, 2000, 2000 O.J. (C 364) 1 (establishing that persons with disabilities should have measures in the European Union that ensure full social and occupational independence and integration).

133. See *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 15-16 (1978) (“The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.”).

134. See Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331, 332-33 [hereinafter Vienna Convention] (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

135. See *id.* art. 53 (prohibiting treaties that conflict with peremptory norms).

136. See Universal Declaration of Human Rights, G.A. Res. 217 (III)A, art.7, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (providing that all individuals are equal under the law and shall not face discrimination); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art

In particular, the Preamble of the CRPD significantly emphasizes equality and human dignity as fundamental values and principles of human rights.¹³⁷ This Convention further recognizes the diversity of persons with disabilities and that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.¹³⁸

Therefore, using the phrase “persons of unsound mind” in article 5(1)(e) of the ECHR as the sole basis to deprive someone of their right to liberty is contrary to the internationally recognized principle of non-discrimination. According to article 38(c) of the Statute of the International Court of Justice, general principles are a source of international law.¹³⁹ They have significant value because they are the foundations of any legal system and fulfill the aspirations of

1, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) (defining “torture” as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind . . .”); Convention on the Rights of the Child, G.A. Res. 44/25, art. 2, U.N. Doc. A/44/736 (Nov. 20, 1989) (proscribing discrimination against children in any form); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 1, U.N. Doc. A/6173 (Dec. 20, 1965) (defining and condemning racial discrimination); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, arts. 1-2, U.N. Doc. A/RES/34/180 (Dec. 13, 1979) (banning any form of discrimination against women); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, arts. 2-3, U.N. Doc. A/RES/36/55 (Nov. 25, 1981) (prohibiting discrimination based on religion); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, art. 7, U.N. Doc. A/45/158 (Dec. 18, 1990) (affirming the rights and equality of all migrant workers); Declaration on Race and Racial Prejudice, UNESCO Gen. Conf. Res. 20 C/Res.3/1.1/2, arts. 4-6, 20th Sess. (1978), U.N. Doc. E/CN.4/Sub.2/1982/2/Add.1, annex V (1982) (outlining the value of culture and implementing articles to prevent political, economic, and social intolerance); Equal Remuneration Convention (ILO No. 100), June 29, 1951, 165 U.N.T.S. 303 (entered into force May 23, 1953) (requiring equal remuneration for men and women workers); Convention Against Discrimination in Education, art. 1, December 14, 1960, 429 U.N.T.S. 93, 96 (Dec. 14, 1960) (restricting discrimination for education); Discrimination (Employment and Occupation) Convention (ILO No. 111), June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960) (protecting the rights of labor organizations).

137. CRPD, *supra* note 13, pmbl. (a)-(c) (reflecting the United Nations Charter, Declaration of Human Rights, and the International Covenant on Human Rights).

138. *Id.* pmbl. (h), (i).

139. Statute of the International Court of Justice, art. 38, June 26, 1945, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute] (providing the general principles of law recognized by civilized nations).

humankind as a whole.¹⁴⁰ The principle of non-discrimination constitutes *jus cogens* because the international community as a whole accepts and recognizes it and no derogation is permitted.¹⁴¹

Being part of *jus cogens* implies that judges must apply this norm even when it is contrary to a law established by a State in a treaty.¹⁴² As these norms are peremptory, judges do not need the consent of the parties to apply *jus cogens* and may apply it directly *proprio motu*.¹⁴³ Therefore, within the meaning of articles 69(1)¹⁴⁴ and 71(1)(a)¹⁴⁵ of the Vienna Convention, a provision contrary to *jus cogens* has no force and States shall eliminate the consequences of any act performed in reliance of such a provision.

Human rights law must move at a faster pace to effectively protect the rights of persons in the twenty-first century. Human dignity and *jus cogens* are above any other source of law. States and judges must actively promote and guarantee human rights by refraining to apply the law whenever it is unclear or contrary to *jus cogens* and the non-discrimination principle. The superiority of human dignity and *jus cogens* are consequence of the humanization of international law, which aims to identify and realize the common superior values and goals of our society.¹⁴⁶ Provided that a disability is a social

140. See ANTÔNIO AUGUSTO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUST GENTIUM 311 (2010) (referencing the formal sources of international law).

141. See CRPD, *supra* note 13, art. 5 (establishing that all parties shall recognize the right of individuals to be free from discrimination and mandating parties take steps to prevent discrimination); Vienna Convention, *supra* note 134, art. 53 (requiring the invalidation of treaties that violate peremptory norms of international law).

142. See Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003) (acknowledging fundamental principles that permeate all laws); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 495 (2006) (stating that *jus cogens* norms are peremptory over any State-made law).

143. See ORAKHELASHVILI, *supra* note 142, at 495-96 (arguing that judges must enforce *jus cogens* even if the parties do not raise the matter).

144. See Vienna Convention, *supra* note 134, art. 69(1) (“A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.”).

145. *Id.* art. 71(1)(a) (“Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law”).

146. See CRPD, *supra* note 13, pmb. (a)-(c) (recognizing the United Nations

construction, governments must improve their public policies to enable persons with intellectual and psychosocial disabilities to equally enjoy the same rights and opportunities as other citizens.¹⁴⁷

VII. CONCLUSION

Isolation and segregation are not the answer. They have never been. These degrading mechanisms are only used to avoid confronting a difficult reality that requires compassionate, strong, and consistent public policies. An individual with an intellectual or psychosocial disability is as much of a person as any other person. It took society decades to admit that a disability is a social construction and mark the beginning of the paradigm shift. Despite the progress, it is essential to continue eliminating the barriers, both physical and legislative, that prevent individuals from fully integrating into society to achieve the *real* paradigm shift.¹⁴⁸

formation documents and treaties reflect *jus cogens* norms); see also I.C.J. Statute, *supra* note 139, art. 38(c); CANÇADO TRINDADE, *supra* note 140, at 311 (arguing that, in the name of progress of international human rights law, the doctrine of *jus cogens* must override state autonomy).

147. See Marcia H. Rioux, *On Second Thought: Constructing Knowledge, Law, Disability, and Inequality*, in THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL 287, 312-13 (Stanley S. Herr et al. eds., 2003) (using the examples of the ECHR and the Children's Treaty to show that international treaties are generally required to ensure various human rights).

148. See Robert Silverstein, *Statutory Changes in Disability Policy: Types of Legislation, Policies, and Goals*, in THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL 263, 279-80 (Stanley S. Herr et al. eds., 2003) (concluding that governments must eliminate the barriers that prevent individuals with disabilities from participating in society at large).