



## Fundamental Rights Challenges in EU Member States

Access to Procedural Rights of Defendants with Intellectual and/or Psychosocial Disabilities in the Criminal Justice Setting: Selected Challenges from Bulgaria and Lithuania

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JUSTICE FOR ALL

Relevant definitions and their impact on  
access to procedural rights

## Challenges from Lithuania

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MENTAL  
HEALTH  
PERSPECTIVES

# National definitions in relation to persons with intellectual and/or psychosocial disabilities

- Definition established in Lithuanian law is not in line with the concept established by the UN Convention on the Rights of Persons with Disabilities (CRPD):

*Disability is a long-term worsening reduction of the state of health, diminution of participation in public life and possibilities for activity, resulting from a disorder of the person's bodily functions and detrimental environmental factors.*

# EC Recommendation of 27 November

- The criminal law of the Republic of Lithuania does not transpose the concept of a “vulnerable suspect” or a “vulnerable person” provided in the EC Recommendation → procedural safeguards set out in the EC Recommendation are rarely guaranteed to persons with intellectual and/or psychosocial disabilities;
- So far Lithuania **has not implemented** the guarantees provided in the EC recommendations:
  - not transferred to the Lithuanian legal base;
  - not applied in the practice of Lithuanian court.

# Relevant definitions in criminal proceedings

- A term 'mental deficiencies (disabilities)' is used in the Criminal Code.
- Legal doctrine explains that persons having 'mental deficiencies (disabilities) who are unable to exercise their rights of defence are those who suffer from a serious illness that clearly impairs communication, perception or expression, as well as those whose capacity is restricted due to the abuse of alcoholic beverages, drugs or toxic substances'.
- The concept of legal incapacity (declared full or partial incapability to be found criminally responsible) is used in criminal proceedings in relation to persons with intellectual and/or psychosocial disabilities.

# Relevant definitions in criminal proceedings (2)

- Not every mental health condition or psychiatric diagnosis is the basis to find someone not criminally responsible.
- A person who is found to **not be criminally responsible** cannot take part in any proceedings the outcome of which depends on the psycho-intellectual characteristics of the person. That is, the person may not be questioned, may not be shown persons, objects or photographs for identification, and so on. This person may only be subjected to such procedural steps in which their role would be passive, for example, such a person may be shown to a victim to be identified.
- Not criminally responsible -> compulsory medical measures

# Case C 467/18 of the Court of Justice of the European Union, 19 September 2019

The request of the Bulgarian court - for a preliminary ruling in judicial proceedings for compulsory treatment of a man with psycho-social disability (EP) who allegedly committed murder of his mother.

## The story of the case

- On 26 August 2015, after the discovery of a body in a street, police officers attended the home of EP, the son of the victim.
- EP admitted to having killed his mother.
- Informed of EP's mental disorder by witnesses, the police officers took him to the emergency unit of a psychiatric hospital.
- Two weeks later the court ordered that EP be placed in a psychiatric hospital for a period of 6 months under the Health Act - civil involuntary treatment for persons posing a danger for themselves or others due to psycho-social disability

This order was renewed continuously until the date of the request by the judge to the CJ (3 years later).

The forensic psychiatrists - EP was suffering from paranoid schizophrenia.

One year later the district prosecutor suspended the criminal proceedings because EP was suffering from a mental illness.

Since EP was unable to participate in the proceedings, the prosecutor did not serve that order on EP.

More than two years later, the Appellate Prosecutor ordered criminal proceedings to be resumed and made provision for the continuation of EP's committal under the Health Act.

2,5 years later a prosecutor's order closed the criminal proceedings initiated against EP. The Prosecutor's Office concluded that compulsory treatment should be ordered because EP had intentionally committed an offence in a state of mental disorder that made EP criminally irresponsible. That order was served on his sister.



The prosecutor brought an application before the referring District Court for EP's committal to a psychiatric hospital under Article 427 of the Criminal Procedure Code – compulsory treatment.

EP was never questioned during the investigation.

EP was not notified of the criminal procedure initiated against him.

EP was not the subject of criminal proceedings – so he was not given access to a lawyer.

He had no recourse to a judicial remedy against the findings of law or fact of the prosecutors.

## Compulsory treatment – criminal proceedings – therapy and safety

Article 427 of the Bulgarian Criminal Procedure Code provides for a special procedure enabling a court to order, on the **proposal of the Prosecutor's Office**, compulsory psychiatric treatment against **an individual who, in a state of insanity, has committed an act that represents a danger to society.**

Before making the proposal, the prosecutor shall order that an **expert report** be obtained and shall instruct the investigating body to evaluate the **person's behaviour** before and after the act was committed and to assess whether the person represents a danger to society.

The proposal by the Public Prosecutor's Office is examined by the district court of the place of residence of the person concerned, which, after a hearing, gives a ruling by order of a single judge, which is then open to appeal.

## Involuntary treatment – civil proceedings – therapy and prevention

Article 155 of the Bulgarian Health Act establishes a special procedure for obtaining an order for the involuntary treatment of a person suffering from a mental disorder representing a danger to himself or others.

## **Why the Bulgarian court submitted a request to the Court of Justice?**

The judge doubts whether the national Criminal Procedure Code and Health Act provisions governing the compulsory and involuntary treatment procedures are in conformity with the rights guaranteed by Directives 2012/13, 2013/48 and 2016/343 and by the Charter.

The Criminal Procedure Code (Art. 427) does not enable a court to verify whether, during the initial investigation, the person considered to be the perpetrator was granted the minimum procedural guarantees for the exercise of his rights of defence.

EP has alleged a violation of his rights to be informed of the charge brought against him, to remain silent and to have access to a lawyer.

## **The Bulgarian court asks for the interpretation of:**

Article 8 (2), Directive 2012/13/EU on the right to information in criminal proceedings;

Article 12, Directive 2013/48/EU on the right of access to a lawyer, on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty;

Article 3, Directive (EU) 2016/343 on the presumption of innocence and the right to be present at the trial in criminal proceedings;

Article 6, Article 21(1) and Article 47 of the Charter of Fundamental Rights of the European Union

Article 5, para.1, “e” of the ECHR

## The Court of Justice decided:

1. Directive 2012/13/EU on the right to information and Directive 2013/48/EU on the right of access to a lawyer **apply** to judicial proceedings for **compulsory psychiatric treatment of criminally irresponsible persons**.

2. Persons suspected of having committed a crime must be informed as soon as possible of their rights **from the moment when they are subject to suspicions which justify, in circumstances other than an emergency, the restriction of their liberty** by the competent authorities by means of coercive measures and, **at the latest, before they are first officially questioned by the police**.

3. Article 47 of the Charter of Fundamental Rights of the European Union, Article 8(2) of Directive 2012/13 and Article 12 of Directive 2013/48 **preclude national legislation for compulsory treatment** of persons who are criminally irresponsible, **where that legislation does not enable the court with jurisdiction to verify that the procedural rights covered by those directives were respected in proceedings prior to those before that court, which were not subject to such judicial review.**

4. Directive (EU) 2016/343 on the presumption of innocence and the right to be present at the trial in criminal proceedings and Article 51(1) of the Charter of Fundamental Rights **do not apply to judicial proceedings for civil involuntary treatment** (Article 155 of the Health Act).

5. **The principle of the presumption of innocence** referred to in Article 3 of Directive 2016/343 requires, in judicial proceedings for compulsory treatment of criminally irresponsible persons, that **the Public Prosecutor's Office provides proof that the person whose committal is sought is the perpetrator of the crime.**



## Fundamental Rights Challenges in EU Member States

### Deprivation of Liberty of Persons with Intellectual and/or Psychosocial Disabilities in the Criminal Justice Setting: Selected Challenges from Austria and Slovenia

Bernadette Fidler, Ludwig Boltzmann Institute of Fundamental and Human Rights  
Katarina Vučko, The Peace Institute



## Deprivation of Liberty of Persons with Intellectual and/or Psychosocial Disabilities in the Criminal Justice Setting

### Preventive Measures: Nature and Duration of the Measures & Reviews

Bernadette Fidler,  
Ludwig Boltzmann Institute of Fundamental and Human Rights



# Preventive measures in Austria



## Article 21 Austrian Criminal Code

*“(1) If a person **commits an offence** punishable by a term of imprisonment exceeding one year, and if he cannot be punished for the sole reason that he committed the offence in a state of mind that excludes responsibility (Article 11) resulting from a **severe mental or emotional abnormality**, and if in view of his mental state, his condition and the nature of the offence **it is feared** that he might otherwise, in view of his mental or emotional disorder, **commit another criminal offence with serious consequences**, the court shall order his placement in an institution for mentally ill offenders.*

*(2) If such a fear exists, an order for placement in an institution for mentally ill offenders shall also be made in respect of a person who, while not lacking responsibility, commits an offence punishable by a term of imprisonment exceeding one year **on account of his severe mental or emotional abnormality**. In such a case the placement is to be ordered at the same time as the sentence is passed.”*

# Duration of Preventive Measures and Review



## Article 25 Austrian Criminal Code

*“(1) Preventive measures shall be **ordered for an indefinite period**. They shall be implemented for as long as is required by their purpose ...*

*(2) The **termination of the preventive measure shall be decided by the court**.*

*(3) The **court shall, of its own motion, examine at least once per year whether the placement in an institution for mentally ill offenders ... is still necessary.**”*

# ECtHR: Kuttner v Austria (2015)



- Article 5 § 4 ECHR: “speediness” requirement of proceedings

*Article 25 (3) ACC: “The **court shall**, of its own motion, **examine at least once per year** whether the placement in an institution for mentally ill offenders [...] is **still necessary**.”*

- *“Long intervals in the context of automatic periodic review may give rise to a violation of Article 5 § 4”*
- Separate opinion of Judge Pinto de Albuquerque: criticizes the *“lack of effective judicial oversight of the psychiatric detention”*

# ECtHR: Lorenz v Austria (2017)



- Article 5 § 1 ECHR: reasonable intervals of expert opinions

*“Purpose of expert opinions is to reassess dangerousness of the person and to obtain fresh proposals for initiating the necessary therapeutic treatment”*

*“when a person has spent such a substantial amount of his lifetime in preventive detention, **special diligence** is required from the authorities when deciding on the continuation of his or her detention”*

- Article 5 § 1 ECHR: necessary treatment and preparation for release

*“the authorities are under an obligation to work towards the goal of preparing the person concerned for their release, for example [...] transfer to an institution where they can actually receive the necessary treatment [...]”*

- Article 5 § 4 ECHR: reasonable intervals between periodic judicial reviews



# Thank you for your attention!

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Enhancing the Rights of Defendants and  
Detainees with Intellectual and/or  
Psychosocial Disabilities: EU Cross-Border  
Transfers, Detention and Alternatives



## Session 3 - Fundamental Rights Challenges in EU Member States

- ❖ Deprivation of Liberty of Persons with Intellectual and/or Psychosocial Disabilities in the Criminal Justice Setting:  
Selected Challenges from Slovenia

Katarina Vučko, the Peace institute

## Security measures in a mental health facility

### NATURE OF THE MEASURE

- ❖ **Compulsory psychiatric treatment and care in a health care institution**
- ❖ Imposed by the court, on a motion of a state prosecutor
- ❖ On a defendant who has committed a criminal offence in a state of mental incapacity or in a state of substantially diminished capacity
- ❖ Criminal offence for which imprisonment of one year or more may be imposed
- ❖ If the court finds, that, while at large, the defendant is likely to commit a serious offence against life, body, sexual integrity or property and that such danger can be eliminated only by treatment and care in a forensic psychiatric ward of a health institution which meets the special security conditions laid down by law
- ❖ Taking into account: the gravity of the act committed and the degree of the offender's mental disability



## Security measures in a mental health facility

### PROCEEDINGS

- ❖ **Hearing:** state prosecutor + the defendant's lawyer + psychiatrists from the institution entrusted as expert witnesses
- ❖ **Mandatory legal representation!** Throughout the entire proceedings, and already when the state prosecutor makes a motion for security measures
- ❖ **But: The defendant is only summoned if their condition allows for their presence at the main hearing.**
- ❖ Their spouse, parents or guardian must be notified of the main hearing and, depending on the circumstances, other close relatives as well.

## Security measures in a mental health facility

### MAXIMUM DURATION: 5 YEARS

**ASSESSMENT AND REVIEW:** Every six months, the court must re-examine whether further treatment and confinement in a mental health institution are still necessary

**ISSUE:** cases where the court has not heard the defendant before taking a new decision on the duration of the measure? **Human Rights Ombudsman, CPT**

## Security measures in a mental health facility

### IMPLEMENTATION

- ❖ Measure may be executed in the forensic psychiatric wards of the health care institution which meet special professional and security conditions prescribed by the law
- ❖ Defendants = patients
- ❖ Patients must be provided with treatment in accordance with a treatment plan adopted by a multidisciplinary team → must regularly monitor the care plan and shall check its adequacy at least once a month.
- ❖ Currently there is only one such facility in Slovenia - **Forensic Psychiatry Unit of the University Clinical Centre Maribor** (*Enota za forenzično psihiatrijo UKC Maribor*).

## Security measures in a mental health facility

### IMPLEMENTATION CHALLENGES

- ❖ Ministry of Justice project called ‘Organisation of forensic psychiatry in Slovenia’ to upgrade of the forensic psychiatry in Slovenia. It found (among other) that norms and standards for the treatment of forensic patients in a health care institution need to be developed, rehabilitation programmes, protocols of cooperation after expiry of measure...?

### NPM findings

- ❖ Overcrowding
- ❖ Insufficient number of judicial police officers in the Unit, no female officers
- ❖ Implementation of special protective measures – no privacy for patients

ONLY ONE INSTITUTION IN SLOVENIA, FOR ALL DEFENDANTS WITH SECURITY MEASURE OF COMPULSORY TREATMENT

## Security measures in a mental health facility

### AFTER THE EXPIRY OF MEASURE

- ❖ Court notifies social welfare + relatives 3 months before expiry if it is necessary for the purpose of continuing the treatment or the special protection and custody of the convicted person
- ❖ Further measures and treatment are then imposed in accordance with the provisions of the **Mental Health Act**.
- ❖ **CHALLENGE**: no sufficient support, no appropriate institutions?

**ALTERNATIVES?** Open forensic wards with therapeutic community approach existed in the past in Slovenia

THANK YOU FOR YOUR ATTENTION