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COMPARATIVE ANALYSIS BETWEEN FINNISH AND ESTONIAN PSYCHIATRIC PATIENT LEGAL PROTECTION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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ABSTRACT

This research compares Finnish and Estonian Mental Health Acts in the light of European Human Rights Convention. It evaluates whether the psychiatric patients legal protection is sufficient and applies to the purposes of the European Convention on Human Rights. The Finnish Mental Health legislation has been changed in 2016. The amended Finnish Act includes articles, which sets six months time limit for the re-evaluation of the need for coercive treatment. The psychiatric patients condition has to be periodically evaluated in six months cycle. It is necessary to adjust issue in national legislation in order to protect patients' human rights. Convention guarantees right to liberty and security in article five. The need for coercive treatment and legal basis for it shall be estimated periodically. Otherwise the legal protection of psychiatric patient might suffer. This research measures if the Estonian legislation violates Human Rights and to which extend it shall be amended. Those whose liberty has been deprived are entitled to get in front of competent court within a reasonable time. The Estonian Act shall be amended because it is not in accordance with the ECHR. Research briefly questions Finnish patients ombudsman's affectivity. Ombudsman supervises the fulfilment of patient's right and legal protection. However, the ombudsman is not independent, rather part of the treating organization. The non-independency on patient's ombudsman is problematic. The research comes into a conclusion that Estonian Mental Health act should be amended to serve more precisely the purposes of the European Convention on Human Rights.

Keywords: Human Rights, Mental Health Act, European Convention on Human Rights

INTRODUCTION

I chose this rsearch topic because people with congnitive disablities may be prescribes to long or even indefied periods of detention.[1] Protection of those rights, who firstly have cognitive issues and are deprivated from their liberty is extremely important. Congnitively disabled individuals might not be in a state of mind that would enable them to fight for their own rights. Supervisory authorities have a great responsibility. Therefore, thesis also briefly intorduces the problems with patients ombudsman's non-independency as a part of Finnish legislations evaluation.

According to Finnish and Estonian Constitutions right to liberty is guaranteed to everyone. It is also a fundamental right in the light of European Convention on human rights, the United Nations Charter and other international treaties. However, The right to liberty might be deprived according to mental illnesses in both Finland and Estonia. Involuntary treatment is severe restriction of basic human rights and therefore it must be legally justified and in accordance with the legislation. However, the person itself might not be the best one to protect his or her own interest at all times. In severe psychiatric conditions health care personnel are granted certain right to derogate fundamental rights for the benefit of the patient. Law regulates the competences of health care personnel. The national laws should be in accordance within the European legislation within the member states. Therefore it might be expected that the national regulations grant similar fundamental rights. In this thesis I will compare Finnish new Mental Health Act to Estonian Mental Health Act, which is not as updated as Finnish. I will concentrate on the application of the right to liberty and autonomy as described in the European Convention on Human Rights.

In Finland the Mental Health Act legitimizes the involuntary treatment of patient with unsound mind. The Act was amended in 2016 to protect mental health patients legally in accordance with

[1] Arstein-Kerslake, A. Gooding, P. Andrews, L. McSherry B.; Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities- *Human Rights Law Review*, Vol. 17, No. 3, 1, p.399

human rights. Legal protection of patients is also regulated in the mental health act by right of appeal. In Estonia the legislation for the deprivation of liberty on the ground of unsound mind is not as precise as the Finnish one. It lacks the legal protection of the patient, which should be necessary for compliance with fundamental and human rights. The involuntary treatment should be the last option if there are no other ways. Both Finnish and Estonian Mental Health Acts provide three cumulative criteria as the justification for involuntary treatment. The amount of legal protection seems to vary from Estonia to Finland. The legislation that obliges doctor to re-evaluate the need for force treatment is striker in Finland and therefore the comparison is needed.

This thesis aims to find out whether the psychiatric patient legal protection is sufficient and applies to the purposes of the European Convention on Human Rights. Thesis carries out a qualitative research, which evaluates Finnish- and Estonian Mental Health Acts in the light of academic literature. Research answers to two questions: Does the Estonian Mental Health Act violate the European Convention on Human Rights? How should the Estonian Mental Health Act be amended? The hypothesis is that the Estonian Act violates article 5 of the ECHR. Since Estonian Act does not provide periodical re-evaluations for the criteria to compulsory treatment of psychiatric patients. Finnish Mental Health Act provides a point of reference with updated Mental Health Act, which oblige reviews for justifications for treatment of psychiatric patients in every six months.

Thesis starts by defining important conceptions regarding the topic. Second chapter provides overview of the European Convention on Human Rights, focusing on the article 5. It considered couple of relevant court cases: Case Herczegfalvy v Austria and Keenan v United Kingdom, which both considered the interpretation of the article 5 ECHR. Third chapter presents overview of relevant Finnish Law; and how it was amended in 2016 to apply more properly to the means of article 5 of the ECHR. Next chapter, outlines Estonian legislation in the current area. At the end Estonian and Finnish legislations are compares. Finally, thesis proposes possible solutions for amendments for the Estonian Act.

1. DEFINITIONS

1.1. Psychiatric Patient

Psychiatric patient and mental illnesses are challenging to define precisely legally. Either the Finnish Mental Health Act, Mielenterveyslaki (116/1990) nor the European Convention on Human Rights have definition for mentally sick. In mental classifications, mental disorders are defined according to the prevalence of certain symptoms. The criteria for the disorder are fulfilled if the symptoms are moderately severe, long lasting and involve impaired functional ability or disability.[2] ECHR article 5 states that a person might be deprived of his liberty legally on the base of unsound mind.

Definition on unsound mind is rather medical than legal. Unsound mind might be considered as impairment of sense of reality. Sense of reality is lacking in severe psychoses: delirium, bipolar, schizophrenia et cetera. Psychoses are complex to define since their non-concrete appearance.[3] On the contrast, physical disabilities and injuries are easy to define. Psychological illnesses are caused by different factors: biological, psychological and social.[4] The mere concept of mentally ill might be easiest to define trough negative approach. Mentally health person is someone, who is in close contact with reality. [5] It might be hard to draw a line between mental illness and personal feature. People suffering from mental illnesses face prejudices and some regard these diseases as abnormalities rather than medical conditions. However, the fact is that anyone could become victim of psychiatric condition.[6] The definition arising from mental health act "serious mental illness" is even more vague than mental illness and necessitate exact diagnosis. The seriousness of mental condition could be evaluated by quality or intensity. The mere diagnosis

[2] Lavikainen, J., Lahtinen, E., & Lehtinen, V. (2004). Mielenterveystyö Euroopassa. – Sosiaali ja terveysministeriön selvityksiä. Helsinki: Sosiaali ja terveysministeriö (Mentalhealth work in Europe) p.16.
[3] Paso, M., Yksi Lensi Yli Käenpesän –Vapauadenriisto mielisairauden perusteella. Accesible: https://www-edilex-fi.ezproxy.uef.fi:2443/artikkelit/11998.pdf 8.3.2018 (Mental disabilities and deprivation of liberty) p. 111.
[4] The World Health Report 2001: Mental health: new understanding, new hope. (2001). Ed. M. Langfeld. France: World Health Organization. P. 21.
[5] Taylor, S. E., & Brown, J. D. (1988). Illusion and well-being: a social psychological perspective on mental health. Psychological bulletin, 103(2), p. 193.
[6] Whitehead, T. (1982) Mental Illness and the Law. Revised edition. Oxford: Basil Blackwell. P. 64

does not indicate the seriousness of the condition. For example, depression could be mild or so severe that it endangers the patient.[7]

1.2. Legal Protection of a patient

Legal protection for patients has precise harmonised definition. It can be broadly describe by the obligation to treat patients with dignity. European consultation on the Rights of Patients was held in 1994, it aimed at defining patients' rights. Values named at the consultation were: right to respect, right to self-determination, right to physical and mental integrity, right to privacy and right to gain the best possible healthcare. Patients have legal remedies, which may be applied in cases of inadequate medical treatment or custom. The most usual legal remedies, to enforce legal rights, available to patents are: reminder, complaint and damage report. Even the protection under the criminal code shall be applicable in some severe cases.

In Finland, the appropriateness of the professional activity of a doctor may be evaluated from several different perspectives: in criminal, administrative, tort and insurance proceedings. The criminal proceeding might be accurate in occurrence of causing of a disability or decease. Liability for damages is relatively common on the bases of malpractice or recklessness. However, due to the wide insurance protection medical practitioners does not usually have personal liability for damages. The alternative legal proceeding might legally lead into different outcomes even, on similar situations.[8] The protection is granted also through legal obligation for supervision and right to appeal. Legal protection provides principles, which enhances the protection. Healthcare personnel are obliged to respect these principles and in addition the patient is entitle to complain from any misbehaviour.[9] Legal supervision should be provided especially for patients who are deprived from their liberty. In such case consultations, appointment of legal advisers and the knowledge of the legal protection are bases for the legal protection of a patient. The opinion of psychiatrist is essential for the understanding especially

[7] Kaltiala-Heino, R. (2003). *Alaikäisten tahdosta riippumaton hoito. Mitä mielenterveyslain käsite vakava mielenterveyden häiriö alaikäisillä tarkoittaa?*. Sosiaali- ja terveysministeriön selvityksiä 2003:7. Helsinki: Sosiaali- ja terveysministeriö. P. 13 (Underage coercive treatment. What does the concept of severe mental disorder mean on underage people)

[8] Kaivola J, Myllymäki K (2004). Hoitosuositukset ja laki – Duodecim, *120*, 2971-6.

[9] Lohiniva, M. (1987). Terveydenhuollon juridiikkaa terveydenhuoltohenkilökunnan aseman ja vastuun määräytyminen. Helsinki: Lakimiesliiton kustannus.

for legal psychiatric patients. Psychiatrist can not be considered as patients attorney or morally protect patient on his written opinions. The moral dilemma for legal patients psychiatrist shall be strictly observed for the legality to be secured.[10]

1.3. Coercion during inpatient treatment

Coercion of the patient occurs in different ways: coercive measures and coercive treatments. Measures, for example seclusion are used to control the behaviour of the patients while coercive treatment, for instance medication, is used to treat or cure the condition.[11] Involuntary treatment is basically health care carried out without the consent of the patient. Involuntary treatment must always be legally justified. The coercive treatment might be justified on the bases of Finnish Mental Health Act and Estonian Mental Health Act, which both are subject to the ECHR. Therefore the coercive treatment can be justified or unjustified on the bases of ECHR. Finnish and Estonian Mental Health Acts introduce three cumulative criteria for the justification of the involuntary treatment. The Criteria are similar: patient has a mental disability that dangers his or other life safety or health and other mental health services are not suitable for use or are inadequate. The involuntary psychiatric treatment is ultimate solutions, when no other tools are sufficient. The underlying assumption justices the interference of the right to self-determination in order to secure other severe acts that might be caused by the illness that makes the patient unaware of his own interest. [12] Concentrically coercion might appear obvious manners, like seclusion of a patient or usage of sleep ties. The milder type of coercion might appear as the mere keeping of a patient in closed ward, where the doors are clocked and the movement of patient restricted to certain area. Wards might also control personal liberty by prohibiting some devices, for example mobile phones. It is also common that wards have visiting hours and communication with other patients is limited or even forbidden. [13] As before mentioned the coercive treatment shall be last option. However, person lacking legal capacity's view shall be taken strongly into consideration in case he is able to make sound decisions in some specific

[10] Lääkärin etiikka; 7. Painos (2013)/editor. Lahti: Suomen Lääkäriliitto 2000. P. 39, 107(Doctor's ethics)
[11] Kaltiala-Heino, R., Korkeila, J., Tuohimäki, C., Tuori, T., & Lehtinen, V. (2000). Coercion and restrictions in psychiatric inpatient treatment. *European Psychiatry*, *15*(3), 213-219. P. 214
[12] Kaltiala-Heino (2003) p.214
[13] Kuosmanen, L., Hätönen, H., Malkavaara, H., Kylmä, J., & Välimäki, M. (2007). Deprivation of liberty in psychiatric hospital care: the patient's perspective. *Nursing Ethics*, *14*(5), 597-607. P. 600

area, while the reasoning might not be trustworthy in deciding healthcare.[14] The patient might be coerced to biomedical treatments, for example medicine. The biomedical treatments can disturb the human biology and brain functions, even to the point where the main personality characters are blurred.[15]

1.4. Patients' right to self-determination

Right to self-determination is one of the rights that are secured to every patient by legislation. It derives from the right to privacy, which included in the concept of medicine; firstly the right to privacy of medical records but in addition the rights to self-determination and obtain information. The right to self-determination might be considered as ethical principle in healthcare as a right, value, principle or objective.[16] "Right to self-determination" is not exclusive term; the concept of it includes personal interpretation. Right to self-determination for patient's grants that the patient's consent is the initial premise for the legitimacy of the treatment. Patient has also right to refuse from treatment that has been offered, scheduled or initiated for him.[17] Many countries have guideline recommended treatments for illnesses but according to the right to self-determination the patient's aspiration shall be appreciated and treated according to his will.

Doctors and other personnel have to interact with patients in order to value the patient autonomy. Medical doctors have the knowledge skills and inevitably own opinions for the most profitable treatment. On the other hand, the patient has his right to self-determination. Ideally, the patient and doctor reach a common tune on the management of illness. Practitioners are obliged to propose possibilities and issue realistic information of the condition of the patient but they are

[14] 42. Donelly, M (2011). Determing the best interest under the mental capacity act 2005 - *Medical Law Review*. Vol. 19, No. 2, 304–313 p. 309

[15] Colleen, M. Berryesa, Chandler A., Reiner P. (2016). Public attitudes toward legally coerced biological treatments of criminals. - *Journal of Law and the Biosciences*, Vol. 3, No. 3, 447–467. p. 449

[16] Naukkarinen, E. L. (2008). Potilaan itsemääräämisen ja sen edellytysten toteutuminen terveydenhuollossa. *Kyselytutkimus potilaille ja henkilöstölle. Kuopion yliopisto. Hoitotieteen laitos. Väitöskirja. Kuopion yliopiston julkaisuja E. Yhteiskuntatieteet*, *157*. P. 23 (Patient self-determination and its conditions in health care. Survey for patients and staff)

[17] Pahlman, I. (1997) Potilaan itsemääräämisoikeus ja hoitotestamentti. Lakimies, 6/1997. 813-835 p. 821 (Patients self-determination and living will)

not entitled to force or lobby excessively the patient's decision relating to the treatment.[18] [19] The interaction between physician and patient must work openly and the relationship must be safe in order to the treatment to lead to the best results.[20]

1.5. Patients ombudsman

In brief, patient's ombudsmen are experts in the patient's rights. They are meant to be impartial, independent and reliable quarter, who in case of disputes on the medical treatment, which advises on handling of the dispute on behalf of the patient. The main role of the ombudsman is the implementation of the objectives of the attached legislation. The practice of ombudsman has been active and official since the Patient Act came into force in 1993.[21] According to chapter 3, 11§ of the Patient Act each healthcare unit must have a patient ombudsman, who provides information about the patient's rights and acts to promote his or her rights. In the case of mentally disabled patients legal issues the common protections: drafting a reminder or complaint or not sufficient. The supervisory authorities position is pronounced, therefore the patient's ombudsman's functions are vital for the legal protection. Ombudsmen's role is to ensure that patients to enjoy from equal and impartial treatment. The ombudsmen do not take an opinion on the treatment. They do not evaluate, whether issues include malpractice or process reminders. The role is meant to be only supervisory and contributor to patients. The issues concerning patients ombudsman are analysed later on in the thesis.

[18] Quill, T. E., & Brody, H. (1996). Physician recommendations and patient autonomy: finding a balance between physician power and patient choice. *Annals of internal medicine*, *125*(9), 763-769. P. 764

[20] Mark Siegler (1979). A Right to Health Care: Ambiguity, Professional Responsibility, and Patient Liberty - *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine*, Vol. 4, No. 2, 1 June 1979, 148–157.

[21] Nieminen, J., Mussalo-Rauhamaa, H, Pullinen, K., & Riihelä, K. (2009) Potilasasiamiehen työtä ja asemaa tulisi vahvistaa. -Suomen Lääkärilehti 33/2009 2573-2577 (The status of patients' ombudsman shall be verified) p. 2575

2. OVERVIEW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

European Convention on Human Rights was drafted after Second World War and it entered into force in 1953. Convention was formed by the Council of Europe at the time the Union was formed as an economical unit to add human right perspectives. ECHR is legal proof of one of the "additional functions" besides the original aims of the EU as an economic union.[22] It might even be considered as a constitutional instrument, granting rights under certain condition, which was offered by the Council of Europe.[23] As the states had signed the Convention they become subjects to international legal supervision. [24] Primarily, national authorities are responsible for the supervision of the implementation of the Convention. However, according to the Convention Section III and IV procedures before the European Commission of Human Rights and European Court of Human Rights are also possible.[25] Individuals and States may apply against party who has breach the Convention.[26] States who are contracting states to the convention are obliged to apply the rights and freedoms set on it to everyone within their jurisdiction regardless of the citizenship, even in case one does not have citizenship on any of the contracting states.[27] The nature of the Convention is unique. It opens national human rights to international legal controls.[28] According to the Convention patients have right to refuse from the medical treatment article five defines situation were the right to refuse might me derogated.[29] European Court of Human Rights is quarter to which the interpretation of the treaty lastly rests. However, the

[22] Douglas-Scott, S. (2011). The European Union and human rights after the Treaty of Lisbon -*Human rights law review*, Vol.*11*, No.4, 645-682. p 648

[23] Stone Sweet, A. (2012) The European Convention on Human Rights and National Constitutional reordering. Faculty Scholarship Series. Paper 4995. P.1862 Accessible: http://digitalcommons.law.yale.edu/fss_papers/4995 19.2.2018

[24] Coblentz, W. K., & Warshaw, R. S. (1956). European convention for the Protection of human rights and fundamental freedoms. Cal. L. Rev., 44, 94. P.95

[25] Van Dijk, P., Hoof, G. J., & Van Hoof, G. J. (1998). *Theory and practice of the European Convention on Human Rights*. Martinus Nijhoff Publishers. Third edition. The Netherlands: Martinus Nijhoff Publishers, p.5

[26] Harris, D., O'Boyle, M., Bates, E., & Buckley, C. (2014). Harris, O'Boyle & Warbrick: Law of the European convention on human rights. USA: Oxford University Press

[27] Van Dijk P, Godefridus JH Hoof, and Godefridus JH Van Hoof (1998). P. 345

[28] Buchinger, K. European Convention for the Protection of Human Rights and Fundamental Freedoms, Vienna Online Journal on International Constitutional Law, Vol. 6, Issue 2 (2012), p 281

[29] Wicks, E. (2001). The Right to Refuse Medical Treatment under the European Convention on Human Rights- *Medical Law Review*, Volume 9, Issue 1, 1 January 2001, p. 21

Courts judgements are not always self-evident since they have a bit freedom to be creative, therefore below is introduction to ECtHR preliminary rulings.[30]

2.1. Article 5 on the right to liberty and security

Article 5 of European Convention on Human Rights regulates right to liberty and security in general. However, the article lists possibilities for derogations, excluding prisoners of war and victims of international armed conflict.[31] The article guarantees that no one shall be deprived of his liberty unless, 1(e) of the article justifies it on the grounds of unsound mind and other medical conditions as infectious diseases. By the means of the article 5 liberties indicates protection against deprivation of liberty and security of person provides protection against arbitrary deprivation of liberty. The definition of liberty is not unambiguous it includes for example imprisonment, which is almost total deprivation of freedom, as well as closed treatment periods in hospitals or other similar closed institution. Article 5 protects whether the patient is able to move freely within the domain of the institution or not.[32] The restriction of freedom in psychiatric care is generally permissible in many countries as in Finland and Estonia, albeit in many ways medically and legally, and in particular ethically problematic.[33] The deprivation of liberty on the bases of point e of the article shall be applied to persons with unsound mind and people with infectious diseases. The European court of human rights has described on case law, that despite order to coercive treatment, when the justification for deprivation of liberty are not fulfilled the deprivation of liberty in the case compulsory treatment shall immediately be terminated.[34]

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[30] Mowbray, A. (2005). The Creativity of the European Court of Human Rights. - *Human Rights Law Review*, Vol.*5*, No 1, 57-79.

[31] Yip, K. (2017). The Weakest Link: From Non-Derogation to NON-Existence of Human Rights, Human Rights Law reiew. Volume 17 issue 4, 1 December. 770-781. p. 770.

[32] Pellonpää, M. (2000). *Euroopan ihmisoikeussopimus.* Helsinki: Kauppakaari. Lakimiesliiton Kustannus. 3. uudistettu painos. P. 21

[33] Brems, E. (2005). Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms. United Kingdom: *Human Rights Quarterly*, 27(1), p. 294

[34] Mowbray, A. (2005). Compulsory Detention to Prevent the Spreading of Infectious Diseases. Human Rights Law Review, Volume 5, issue 2, 1. January 20015. 387-391. P. 389, The principle was first settled as a case law in case Enhorn v Sweden no. 56529/00.

2.1.1. Case Herczegfalvy v Austria

The case Herczegfalvy v Austria was forwarded to the ECHR in 1992. Mr. Herczvegfalvy was a Hungarian citizen residing in Austria. He had committed serious offencenses, for example assulted his wife. Applicant was determined to serve prison sentences by Regional Cout's decision, while serving his time the inmates behaviour was aggressive. Sentece was served on 13 May 1977 but the Regional Court ordered 10 May that the applicant shall remain in detention since he could commit further offences. Presiding judge confirmed the pre-trial detention on 2 November 1977. Psyhiatrists carried out examinations on his medical condition and find out that he was suffering from paranoi quals. Therefore, Mr. Herczegfalvy could not be considered to be responsible for his actions. Presiding judge ordered applicant to be tranfferred to special institution for offenders suffering from psychiaatric condition. After experts opinions the sentence was seen detention tarher than conviction.

Applicant applied for a release on December 1979 and claimed that his rights quaranteed by article 5,8,10,13 ECHR had been violated. Mr. Herczegfalvy argued that: the time of pre-trial detention exceeded reasonable time as desrcibed in article 5(3), there had been violation of article 5(1) and Austrian Courts decisions had not been fiven speedly nor in accordance with the article 5(4).

It was to the Court to decide whetere article 5 of the Convention had been violated in the case. Court conluded that there was no violation of article 5(1). From 27 May 1978 to 10 January 1979 it was reasonble to assume that applicant might have repeted his offences if released. From 10 January to 3 October 1979 deprivation of liberty neither did violate the article since the court made detention decesion after expert had concluded de diagnosis of mentall illness. From 3 October 1979 to April 1980 article 5 (1) was not violated, since the danger that applican would repeat offences was still valid justification for the detention. From 9 April to 28 November 1984 applicant was in hospitalized with legal grounds on article 429 (4) of the Code of Criminal Procedure and Article 25 (1) of the Criminal Code. Applicant claimed that hes medical condition was imporved during the detention and it was not justified anymore. However, major part of the psychiatrists disagreed with the applicant sense of good mental state.

Applicant argued artilce 5(3) was violated, since everyone is entitled to trial within a reasonable time. The detention periods are from 27 May 1978 to 10 January 1979 and from 3 October 1979 to 9 Aprtil 1980. Mr Hercegfalvy had been deprivade from his liberty for over a year before access to trial. Court took into consideration that the period applicant was deprivated of his liberty lasted about seven months but he had been inprisoned beforehand. The grounds for Austrian court to deprive applican from his liberty was considered as sufficient and no signs of delaying the process on the part of authorities. Court stated that Article 5(3) had not been violated.

According to the article 5 (4) everyone is entitled to take proceeding by which the lawfulness of detention is decided. Mr. Herzegfalvy argued that Austrian courts did not give the decesions speedly, as described in Article 25(3) of the Criminal Code. According to the Article, the decesions must made between reasonable intervals. For the first decision applicant had to wait fifteen moths, which could not be considered as a reasonable time. The timelimit that Austrain legilastion was heading for was one year. In order to comply with the paragraph 4, courts have to act in accordance with the national legislation and aims of the Convention. Court stated on the judgement on 24 September 1992 that Article 5 (4) was violated. Austria was ordered to pay monetary compensation to the applicant.

1.1.2. The case Keenan v United Kingdom

On 3 Aprtil 2001 European Court of Human Rightra delivered a judgement on the case Keenan v. The United Kingdom. Applicant Mrs. Keenan argued violation of his deceseas sons human rights. Mr. Keenan was psychiatric patient, diagnosed with paranoid schizophrenia. He had been treated for the psychiatric condition since the age of 21. He was inprsoned at the age of 28. Mr. Keenan assulted prison personnel as a consequence of attempts to transfer to mental healt ward of the prison. His sentence was prolonged for the misbehavior. Mr. Keenan commited suicide while serving his sentence.

Mr. Keenan's mother claimed that articles 2,3 and 13 of the European Convention on Human Rights was violated. According to article 2, right to life shall be protected for everyone, including those who have been deprived of their liberty. Court stated that the article shall also include protection from self-harm. Mr. Keenan was not diagnosed with any severe mental condition, and therefore authorities could not have been aware of the risk of self-harm. Court stated that there was no violation of article 2.

Article 3 of the Convention prohibits tortute, which means inhuman or degrading treatment or punishment. According to the Court, the incresing of sentence was not standard procedure for mentally disabled. It was revealed that Mr.Keenan's treatment had been insufficiently recorded and monitored. Article 3 was considered to be violated. The insufficient medical treatmen, psychiatric care, was considered as inhuman and degrading punishment. Mentally disabled patients are obliged to be provided at least the minumum standard mental health care[35]
Article 13 ECHR entitles everyone, whose rights have been violated to a remedy. Applicant claimed remedy, since the resposibility of his sons death could not be, which accroding to she would be suitable remedy. Monetary damages was compesated to the Mr. Keenans mother.

2.2. Article 6 on the right to a fair trial

Article 6 of ECHR regulates right to a fair trial. It is principally applicable to the litigations of individuals charged with criminal offences but applies also to other proceedings; for instance, administrative proceedings. According to the article everyone is entitled to public hearing within a reasonable time in front of independent tribunal.

In order to be independent the tribunal shall not be adversely linked to executor, legislator or any party of the case. Reasonable time is not defined specifically. The rationale on the reasonable time rests on the quality of the case and the consequences caused to the litigant. The fair hearing is meant to be public but exceptions are accepted, for example in sensitive private cases the closed hearing is reasonable and justified.

Point 3 of the Article 6 establishes minimum rights for everyone who is charged with criminal offence. According to minimum rights they shall be informed promptly in an understandable language of the reasons of the accusations, have time for preparation of defences. The article grants a right to obtain sufficient time to prepare defence.

[35] Mental Helath: A Right to Treatment, Boston University Law Review, Vol. 51, Issue 3 (1971) p.530-538 p. 534

2. OVERVIEW OF THE CURRENT FINNISH LEGISLATION

In the Finnish Constitution (11.6.1999/731) chapter 2, 7§ states that everyone shall have right to liberty. Finland is committed to the fundamental rights also through international treaties and conventions. The formerly mentioned European Convention on Human Rights is binding to Finland. Finnish legislation includes four acts, which give legal justification for the coercive treatment. These acts are: Mental Health Act, Act on Infectious Disease (583/1986) and Act on Special Care for People with Developmental Disabilities (519/1977). According to the Finnish Constitution article 7§, Freedom of person shall not be deprived on arbitrary bases. Tribunal shall decide the lawfulness of deprivation of liberty and determine punishment for the party whom has breach the law. Any other deprivation of liberty may be subject to judicial review and law protects the rights of those whose liberties have been exploited. The 21§ of the constitution guarantee the legal protection for everyone. Legal protection includes the right to get issued processed in front of authorized tribunal or other sovereign direction without unnecessary delay. The patient Act (785/1992) chapter two regulates patient's rights. According to 3§, the patient is entitled to a high quality of health and medical care. His treatment must be arranged and treated in such a way that his dignity is not violated, and that his convictions and his or her privacy are respected. Everyone shall have right to equal treatment. 6§ provide right to self-determination, patients have to be treated according to his will. Patient Act is more general than the mental health act and it shall be applied in case the Mental Health Act does not regulate issue concerned.

3.1. Operation in the event of violation the temporal legal protection

In Finland the Mental Health Act was amended. The new legislation stepped into force on 8th oh January 2016. It added new points 17b -17d§ to the Act. Since then, the need for involuntary treatment shall be estimated in six months time limit. In cases where the time limit for some reason have exceeded the Health and Wellbeing Institute shall be competent to determine the involuntary treatments sequel or termination. The underlying aim is to secure the legal status and protection for psychiatric patients who are treated against his will. In cases the patients have [36]

[36] HE 92/2015 Hallituksen esitys eduskunnalle laiksi mielenterveyslain muuttamisesta

the estimation of the need for treatments is essential in order to guarantee the fundamental and human rights. The amended legislation provides time limits for the estimation on the patient's treatment.

3.2. Exploitation of the freedom of mental health patient

Psychiatric conditions might interfere the sense of reality. It could be extremely challenging to treat a psychiatric patient in unison with a patient that hence the psychotic state of mind considered him completely healthy. The non-consciousness of the illness in some cases is the basic symptom of mental disease. Therefore there are justifications for the deprivation of liberty of a mentally ill patient in a specific Mental Health Act. The importance of respect for fundamental rights is pronounced in involuntary treatment. [37] Mental Health Act defines the premises under which the involuntary treatment may be undertaken. The premises must fulfil the basic criteria and additional criteria, in other words disease state and exigency for the treatment or harmfulness to patient itself or other.[38]

3.3 Determination to involuntary treatment

Mental Health Act 9 a § a public office doctor has to compose observation referral, "*tarkkailulähete*" or M1- referral, which is doctors written opinion on the demand for coercive treatment, and transmit patient to a hospital for examination. The diagnosis does not have to certain at this point. M1 –referral leads only to coercive psychiatric consultation. During the observation period the diagnosis shall be ensured.

The patient might be in hospitalized for the purposes of analysing the need for coercive treatment. Police forces are obliged to assist health care personnel to precede needed treatment. According to section 31 of the Mental Health Act, the police must provide official assistance in the transportation if it is foreseeable that there is a need for force in delivering the patient to the treatment.

[37] Valo J (2013). Legal Safeguards in Deciding on Involuntary Psychiatris Care. Helsinki Law Review 2013/3 p. 145-172 P. 162
[38] Kaltiala-Heino, R. (2003) P.214

Hearing of the patient before determining to treatment is regulated on chapter 2 §11. Before determination to treatment the patient has to heard and his or hers personal opinion taken into account, while making the decision. The Chief doctor of Psychiatry makes the determination into a treatment. The decision must be made within four days from taking into observation and it should contain reasoning. Patient must be notified of the decision immediately.

Under Finnish Mental Health Act a person may be determined to involuntary treatment according to §8 (1). In order to be justified for coercive treatment the patient has to be diagnosed as mentally ill. In order the determination to treatment to be legal the mere evidence of mental illness are not sufficient, there must be possibility that the patient causes harm to himself or others surrounding him.[39]

[39] R (on the application of John Wooder) v. Dr Graham Fegetter and the Mental Health Act Commission (2002). Patient's Right to Reasons When Subject to Compulsory Treatment under Mental Health Act 1983, - *Medical Law Review*, Vol. 10, No. 2, 228–232. P. 228

4. EVOLUTION OF FINNISH LEGISLATION

On 1992 the Parliament accepted the legislation for Patients status and rights (785/1992) and afterwards the knowledge of the patients right have evolved. In 21th century the patient rights are evaluated more in the light of fundamental and human rights perspective due to the globalization. [40] In 2013 the legal protection of mentally ill patients in Finnish mental health act was discussion in the ECtHR. The main question was whether the legislation violates the legal protection by not granting right for independent decision on the decision of involuntary treatment. Since doctors, who are not independent from the treating, made the decisions hospitals there existed a threat of arbitrary decisions. [41]

According to the proposal (HE 92/2015) the continuing or stopping of involuntary treatment shall be in the competences of Health and Wellbeing Department, in cases where the six months time limit has been expired. This guarantees the psychiatric patients legal protection. It was also proposed that if the decision on the patient's treatment has not been done within six moths the continuing of treatment should be examined immediately. The hospital shall take provisional decision to extend the treatment up to 14 days.

3.7.2012 European Court on Human Rights judge on case x v. Finland on involuntary treatment and forced drug treatment. The appellant argues that article 5 and 8 of ECHR had been violating by taking him into coercive treatment and medication. It was decided that the restriction of right to liberty was justified. However, The continuation of psychiatric treatment, on the other hand, was based on observational evidence made by the hospital's leading physician and another doctor's opinion was obtained. Doctors were both from the same hospital where the patient was treated and the court stated that the appellant should be entitled to independent doctor evaluation. No granting the option for independent opinion violated article 5.

[40]Lötjönen, S. (2004). Loukatun suostumuksesta potilaan itsemääräämisoikeuteen. *Lakimies 102 (2004): 7-8*. P. 8 Patient's self-determination)
[41] Valo J (2013), supra nota 38, p.165

5. OVERVIEW OF CURRENT ESTONIAN LEGISLATION

Estonians Mental Health Act entered into force in March 1997. §3 of the Act describes Voluntary nature of psychiatric care. Psychiatric care without the patients consent is permitted only on the ground of article 11 and 17, which are emergency care and use of psychiatric coercive treatment and supervision. Involuntary emergency treatment for psychiatric patients is only justified if the mental disorder restricts the ability to understand or control behaviour, there is threat that patient danger himself or others or other psychiatric care is not sufficient for the disability. Basically the involuntary treatment shall be applies by court ruling, except cases where it is not possible to gain the court ruling as promptly as needed for the patient's safety.
Article 4 describes the right of a psychiatric patient; according to it involuntary treatment or continuing of it shall be only justified as stated on §11 and §17. Patient shall be also entitled to compensation caused nonfulfillment of treatment. §11 justifies the involuntary emergency psychiatric care in certain situations and §17 in turn justifies other coercive treatments.

According to §11 coercive emergency treatment shall be delivered on psychiatric patients only if: patient suffers from severe mental disorder, non-delivery of treatment will endanger the safety of himself, no other care is adequate. The coercive care is permitted by court ruling or by psychiatrist based on medical examination. The treatment shall be carried out within two days from the beginning of it. After 48 hours the treatment shall continue without consent only with permission from court or doctor. Longer period on involuntary treatment are applied by decisions of court based on applications from the municipality or city government.

Article 12 regulates the procedure for hospitalization of person in need of involuntary emergency psychiatric care. It justifies the hospitalization of a patient without court ruling if it can not be received as quickly as necessary and the patient fulfils criteria described in the §11. The review of involuntary treatment shall be based on article §13. According to it doctor shall examine the patient within 20 hours from the coercive hospitalization of the patient.

6. COMPARISON BETWEEN ESTONIAN AND FINNISH LEGISLATIONS

In both Estonian and Finnish legislation time limits are set for the examination of the need for hospitalization in emergencies. The continuation of treatment is described in the article §12 and 17§ of Finnish Act. The Estonian Act does not include regulation on periods how often the condition of the patient shall be re-evaluated. It seems that it is possible for mentally ill patient be deprived from his liberty and involuntary treated without the justifications for it. The article §17, which has recently been added to the Finnish Act, stands most in favour for Finnish legislation.

6.1. Estonian legislations non-fulfilment of article 5 ECHR

Estonian legislation violates the article 5 of the ECHR, by its insufficient legal base for re-evaluation for the treatment. As the European Court of Human Rights ruled on the case Case Herczegfalvy v Austria the article 5 (4) is violated if there is no possibility within a reasonable time to get evaluated whether the deprivation of liberty is justified. For the purposes of the article, reasonable intervals for the check-ups for justifications of involuntary treatment shall be described in the national legislation. The intervals for re-evaluation fulfils the aims of article 5 ECHR. According to the objective of the Convention the legality of the deprivation of liberty shall be examined within a reasonable time. Estonian legislation does not provide legal framework for the psychiatric patients protection from the unjustified extension of compulsory care.

The lack of review periods in Estonian legislation violated human rights convention and patients legal protection. The lack of regulations on the re-evaluation causes violations to the ECHR article 5. The article 5 (4), purpose is to provide security for individuals deprived from their liberty by granting them right to speedily get in front of competent court and gain a release if the detention is not lawful. In the case of mentally ill patients coercive treatment, physicians shall be in the first hand the ones to reason the legality of the detention as to the symptoms and condition of the patient.

Finnish Mental Health was amended according to the proposal of the government, which rectified issues in light of the Convention.[42] Proposal required addendum of provisions on the occasions in case when the time limit on deciding on the continuation of coercive treatment or end of it have been excessed. It empowered the Institute of Health and Wellbeing as a competent authority to make decisions on the continuation or termination of treatment within 14 days, in case hospitals have failed to make decision within the time limit. Estonia legislation requires similar rectification.

To conclude, Estonian legislation should be amended to fit the purposes of the Convention. Article or articles should be added, which sets reasonable time limit for the evaluation on in hospitalized patients condition. Unlawful deprivation of liberty is a severe violation of the Convention article 5. The amendment should be done as soon as possible to avoid violations of psychiatric patients rights. In order the problem to be fixed, new article shall be added to the Act. Those articles or article provisions, which oblige health care personnel to re-evaluate periodically the condition of psychiatric patients whose liberty, have been deprived. The period for the evaluations shall be reasonable. While drafting the new articles, special occasions shall be taken into consideration for the situations, where patients have disappeared or deadline has bee exceeded. A competent authority shall be named to decide on the special occasions on the bases of doctor's opinion. This authority shall be independent and impartial for the benefit of the patients.

In addition, there shall be right to complain and damages in case the re-evaluations are delayed. The compensation shall carefully consider the term that patient has received care against his will without legal reasoning. In case the patient condition has improved, in such manner that the criteria for compulsory treatment are not fulfilled the patient has theoretically been illegally deprived of his liberty. The illegal deprivation of liberty must be considered seriously and the compensations have also been sufficient on the course

[42] Proposal of the Government HE 92/2015 on the amendment of mental health legislation.

6.2. Problems with Finnish legislation

In Finland tribunals are not competent to command patient for psychiatric treatment. The issuing of involuntary treatment is on doctor competences. This lead to a legal gap, it is possible that perpetrator is irresponsible, although not mentally disabled and therefore he can not be issued nor to punishment neither to involuntary treatment.[43]

Patients' ombudsmen are entitled to act in the benefit of the patient. Ombudsmen might be working inside the health care unit, which might endanger his impartiality. The role of the ombudsman is not completely ethic, since it is not rare that the functions of ombudsman are contradictory. Ombudsmen might be employed by the treating unit and in addition to be the supervisory quarter. To my mind, is obvious that the ombudsman shall not have participated in the treatment of the patient to be considered capable for the occupation. The concept, of ombudsmen mere working inside the treating unit jeopardizes the right and morality of the action. Proper, for example national, supervision to the activities of ombudsmen could be one tool to improve the ethical controversies. However, in Finland such arrangement is not in operation. It may endanger the impartiality of the ombudsman. According to a research, 66% of the ombudsmen have started the occupation by a request of their employer.[44] How can it be ensured that the same person is possible to impartially surveillance the behaviour of his own work place? At least the ombudsman shall not take commands from the employer inside the treating organisation. Although the Patient Ombudsman has no formal authority to make decisions, he can use his expertise so that the patient's perspective and rights become as visible as possible in healthcare activities and throughout the organization.

The functions of the ombudsmen are specifically adhered to the legislation but not any qualification requirements to ac as a ombudsman. Patient's sentiment on the success of the fulfillment of ombudsmen requirements should be regarded as the main review.

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[43] Arvot Ja asenteet suomalaisessa kriminaalipolitiikassa (2011) (40); 2: 263-269, oikeus 2/2011, Oikeuspoliittinen yhdistys Demla ry & Oikeus- ja yhteiskuntatieteellinen yhdistys p. 265 (Values and Attitudes in Finnish Criminal Policy)

[44] Neminen, J., Mussalo-rauhamaa , H. E. L. E. N. A., Pullinen, K., & Riihelä, K. Potilasasiamiehen työtä ja asemaa tulisi vahvistaa. Available: https://www.researchgate.net/profile/Helena_Mussalo-Rauhamaa/publication/256089271_Potilasasiamiehen_tyota_ja_asemaa_tulisi_vahvistaa/links/5481c52c0cf2792435d887e5/Potilasasiamiehen-tyoetae-ja-asemaa-tulisi-vahvistaa.pdf 2.4.2018

CONCLUSION

This thesis purpose is to find out does the national legislations violate psychiatric patients human rights on the European Convention on Human rights. Hypothesis that Estonian Mental Health Act violates ECHR was correct. The Act does not fulfil the objectives of ECHR article 5. Psychiatric patients can be legally deprived from their liberty for the purposes of treatment. The Finnish Mental Health Act corresponds better to the ECHR. However, it is not perfect and has items, on patients' ombudsman, which could be revised. The Estonian Act does not set a time limit for the periodical checks after patients is taken into coercive treatment, which the grounds for treatment should be evaluated. This does not fit the purposes of the article 5. Deprivation of liberty shall be revised within a reasonable time to guarantee that patients are not coercively treated after the passing of the legal criteria.

Thesis concludes, that amendments, which would target at the purposes of the Convention, shall be made to the Estonian Mental Health Act. At minimum, periodical re-evaluation on the condition of the in-hospitalised patients shall be carried out systematically and it shall be described in the legislation. The patients would have right to undergo evaluation of the legality of the coercive treatment from their own applicability before the periodical deadline is excessed. The article 13 of the Estonian Mental Health Act, entitles the patients to apply for the review of the involuntary treatment to rural municipality or city government of the patients' residence. The reviews should be made periodically without the initiative of the patients. Patients' who have been derived from their liberty, and whose exploitation is not any longer or was not in first place justified, shall be entitled to sufficient damages. The damages should be measured case by case, taking into addition the suffering of the patient. The affecting factors should be: length of the period of illegal deprivation of liberty, the quality of it and special affects to the patient.

In addition precise legislation on the special situations would enhance the human rights of those who are deprived of their freedom. The situations where patient has left the treating unit without permission and their restoration to the treatment would be useful.

Further research on the psychiatric patients rights is needed. The concept of the Finnish patient's ombudsmen was briefly discussed in the thesis. Further research on the independency issues on the patient's ombudsmen is needed. Can the ombudsmen act fully independent as being part of the treating unit and how does the patients behold the situation? Should the ombudsmen have qualification requirements? The patients' ombudsman should not be part of the treating organization nor employed by it could be one possible requirement. The concept of ombudsmen should be researched, since it strongly seems that the internal supervisor of healthcare is not sufficient or reliable support for the patients. The periods, which patients are obliged to wait to get court order for exploitation of their freedom could also be examined. According to the Estonian Mental Health Article article 13, the application of involuntary treatment on a person for a term longer than the implementation of preliminary legal protection, the court thereof shall decide the extension and termination. Is the court able to decide within a reasonable time?

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