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Diminished Capacity in International law

The Criminal Code of Latvia, which came into effect in 1999, contains for the first time an article titled diminished capacity. Section 14. states that "(1) if a person, at the time of the commission of a criminal offense, due to mental disorder or mental disability, was not able to understand their acts fully or control them, that is, was in a state of diminished capacity, the court may reduce the sentence to be adjudged or release such person from punishment, according to the actual circumstances of the offense. (2) For a person who has been found to have diminished capacity, the court shall order compulsory measures of a medical nature as set out in this law."

Part I. Background

This new article has created a problem in Latvia: that once a mentally disordered criminal offender has been sentenced with deprivation of liberty in prison and the court imposes involuntary commitment under the diminished capacity article of the criminal code, such a person is imprisoned, which is neither an appropriate place for treatment, nor for rehabilitation.[1] This problem may be addressed in three ways, first of all, efforts should be made to create alternative punishment programs for the mentally disordered criminal offender based on the cooperation of prison administrators, medical professionals, advocates, social workers, and others involved in the criminal justice system. This cooperation should lead to intensive case management of each mentally disordered criminal offender. Secondly, the legislation within Latvia needs to be reevaluated and perhaps reworded regarding the mentally disordered criminal offender. There are statutory construction discrepancies within the statutes regarding civil and criminal commitment that need to be resolved. The definition of diminished capacity needs to be established and uniformly applied, taking into consideration the usage of "diminished responsibility" and "partial responsibility" in the field of forensic psychiatry and by other nations in their legislation. Finally, at the very least, efforts should be made to train judges in dealing with mentally disordered criminal offenders. It is the judge who has the ultimate decision in sentencing the offender to either prison or hospitalization, and they must be able to recognize when a mentally disordered offender appears before them in court.

The governing principle when dealing with the mentally disabled is that they should be integrated into society, and not just institutionalized. The Council of Europe views imprisonment as a measure of last resort for any segment of the population. The concern in Latvia is that once a criminal has been classified as being in a state of diminished capacity, they are imprisoned without proper treatment. This frustrates both

[1] Leimane, Ieva Needs Assessment for the Mental Disability Advocacy Program, www.politika.lv, Latvian Center for Human Rights and Ethnic Studies, 2000.

the goal to integrate the mentally ill back into society, and fails to follow the advice of the Council of Europe that prison should only be used as a last resort. This point is emphasized by the Reed Report's recommended policy for the treatment of the mentally disordered offender, stating that "wherever possible, mentally disordered offenders are to be cared for and treated by health and social services rather than in the criminal justice system."[2]

Presently in Latvia, the diminished capacity criminal offender may be placed in prison without proper treatment. While in prison, people with mental illness are (1) victimized and segregated; (2) learn institutional behavior; (3) lose contact with their families and community mental health providers; and (4) lose their housing, income and insurance.[3] Upon release, there are no available programs to them.[4]
This creates a revolving door cycle, where people with mental illness move constantly between prisons and the community. This is due to the lack of mental health treatment in the criminal justice system and the community, people with mental illnesses who have criminal records often move between the two.[5] Although these results are from research in the United States, it seems that this is a foreseeable consequence throughout the world.

Courts and legislators who are considering a preventive law approach toward mentally ill defendants might consider the creation of a less adversarial and more supportive system of justice. An example of this is the development of therapeutic jurisprudence. "Therapeutic jurisprudence is a theoretical framework that is invaluable in the analysis of society's role in the adjudication and treatment of mentally ill offenders. Therapeutic jurisprudence probes the role of the law itself as a social and economic force in producing both beneficial 'therapeutic' and detrimental 'antitherapeutic' effects upon individuals such as those with mental disabilities."[6] A therapeutic approach to the judicial process is the basis for the development of the mental health specialty courts and other reform initiatives.

The deprivation of liberty of the mentally ill is legitimized by comparing it to the interests of society. The treatment and liberty of the mentally ill is consistently balanced against the interests and protection of society. Various items of legislation recognize a threat of harm to others or themselves as justification for the deprivation of liberty and the provision for treatment for the mentally disordered offender. In Lithuania, the standard for involuntary hospitalization or treatment shall be decided by the court based on the standard of the real danger that by his actions he is likely to commit serious harm to (1) his health, life, (2) to the health, life of others.[7] In Poland, a person who may pose

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[2] Peay, Jill, Mentally Disordered Offenders, The Oxford Handbook of Criminology, 2nd Edition, Clarendon Press, Oxford, 1997.
[3] Barr, Heather, Prisons and Jails: Hospitals of Last Resort, 1999, the Correctional Association of New York and the Urban Justice Center, New York.
www.soros.org/crime/MIReport.htm
[4] Barr, Heather, Prisons and Jails: Hospitals of Last Resort, 1999, the Correctional Association of New York and the Urban Justice Center, New York.
www.soros.org/crime/MIReport.htm
[5]Bazelon Center for Mental Health Law, Mental Illness Among Inmates in Criminal Justice Facilities, Criminalization Fact Sheet IV, October 2000. www.bazelon.org/criminal4.html
[6] Kondo, LeRoy, Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders, Seattle University Law Review, 24 Seattle U.L. Rev., Fall 2000, p. 373.
[7] Lithuania Legislation

a direct threat to his/her own life or health or the life or health of others may be admitted to hospital with the consent required.[8] These standards are in concert with the Council of Europe's recommendations when dealing with the mentally disordered criminal offender. The greatest concern that a mentally disordered offender causes is the possibility of violence towards others. Also taken into consideration is the risk of suicide by the mentally disordered offender, this has implications for placement and internal security precautions.[9]

It is important to provide mentally ill offenders with alternatives to jail or effective forms of treatment. For example, a comprehensive treatment program involving doctors, advocates, and social workers. Once a mentally disordered offender is placed in jail, they are subject to conditions where their mental health may deteriorate even further. They are shunned by their peers, serve longer sentences, and are more likely to fight and have discipline problems attributable to the stress of the environment and lack of mental health services.[10] The focus should be on reducing the criminalization of people with severe mental illnesses. This can be accomplished through a multi-pronged strategy of activities, including jail diversion programs, and effective case management.[11]

Part II. Legislation

A. Basis

In Latvia and other nations, guidelines for the treatment of the mentally ill are set out generally in five pieces of legislation. These are: (1) the Criminal Code; (2) the Code of Criminal Procedure; (3) Health Legislation/Mental Health Laws; (4) the Civil Code; and (5) the Code of Civil Procedure. The first three documents form the basis and procedure for treatment and review of the mentally disordered offender.

The criminal code involves the deprivation of liberty based on a criminal act and contains articles such as incapacity; diminished capacity; mitigating circumstances regarding liability; and compulsory measures of a medical nature, for persons in a state of diminished capacity.[12]

The code of criminal procedure outlines the procedure for the deprivation of liberty of an offender. This includes the time period and procedure for review and who orders the detention; provisions for the transfer of the prisoner from hospital facilities to punishment facilities; and the procedure for the forensic psychiatric examination.[13]

The mental health laws outline in detail the rights of mentally ill persons and restriction thereof; the rights of hospitalized patients and restrictions thereof; the patients' mental health care; the right of the patient or his representative to appeal against the conditions of health care; mental health care provided to mentally ill persons who have

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[8] Poland legislation

[9] Arrington, Scott; Feldman, Richard; Leisher, Michele; Roskes, Erik, A Model Program for the Treatment of Mentally Ill Offenders in the Community, Community Mental Health Journal, October, 1999, Volume 35, Issue 5, p.1.

[10] Bazelon Center for Mental Health Law, Mental Health Treatment in Jails and Prisons, Criminalization Fact Sheet III, October 2000. www.bazelon.org/criminal3.html

[11] National Alliance for the Mentally Ill(NAMI), Mutual Reinforcement: NAMI's Omnibus Recovery State Initiative and Federal Policy Agenda, www.nami.org/update/omnibus.html

[12] Latvia Criminal Code

[13] Latvia Code of Criminal Procedure

committed an act dangerous to the public; examination, treatment, rehabilitation, care and assistance and others.

The civil procedure and code of civil procedure describe the deprivation of liberty based on civil commitment. These do not directly affect the treatment of the mentally disordered criminal offender. The civil commitment statutes do need to accurately correspond with the definitions used in the criminal statutes. Currently there are discrepancies within the legislation for the definition of diminished capacity as used in the civil code and criminal code in Latvia.

B. Characteristics

The following are 7 elements of domestic legislation that can be compared to analyze the treatment of the mentally disordered criminal offender. These points illustrate how the legislation varies throughout Europe.

1. **Punishment Options**

   After determining who has the discretion in sentencing a mentally disordered criminal offender, the available options for the placement of the offender should be examined. This is to determine if a treatment-based deprivation of liberty sentence is available in a nation's legislation or not.

   In the United Kingdom, there are a number of options for sentencing after a receipt of a clinical assessment for mental disorder. The first of these is a criminal justice disposal. This will be at the discretion of the Court to decide after evaluating multiple factors. A criminal justice disposal would signal the end of detention under mental health legislation. Another option is the care and treatment order following a full assessment by mental health services whereby a specialist recommends continuing care and treatment and the criteria under the new legislation are met. The maximum length for the care and treatment order is 6 months. A third option is a restriction order, this is only applicable when the clinical assessment indicates that the offender poses a significant risk of serious harm to others. It is added to the care and treatment order and based on detention in a hospital. Finally, the hospital and limitation order is a sentencing option. The hospital and limitation direction is added to the prison sentence. This requires the offender's detention for medical treatment in the hospital until such time as the clinical supervisor advises that treatment in the hospital is no longer necessary and the offender is then transferred to prison.[14]

   In Lithuania, involuntary hospitalization and involuntary treatment of mentally ill persons who have committed an act dangerous to the public and have been recognized as being of diminished responsibility are both sentencing options.[15]

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[14] White Paper, Reforming the Mental Health Act, Presented to Parliament by the Secretary of State for Health and the Home Secretary by Command of Her Majesty, December 2000, published by the Stationery Office. (White papers contain statements of government policy) www.official-documents.co.uk/document/cm50/5016-i/5016i-07.htm

[15] Lithuania Mental Health Law

In Latvia, medical treatment may be sentenced in the place of deprivation of liberty suitable for such. Medical treatment may also be ordered as the deprivation of liberty punishment which applies to them after a conviction. This is decided on a case-by-case basis. Without deprivation of liberty, a court shall impose upon them the obligation to have medical treatment in a psychiatric medical institution pursuant to their place of residence. However, the state of diminished capacity during the commission of a criminal offense may also just be considered a mitigating circumstance regarding liability and will only be reflected in the length of the sentence.[16]

The Council of Europe/CPT recommends that a mentally ill prisoner should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff. That facility could be a civil mental hospital or a specifically equipped psychiatric facility within the prison system.[17]

"Regarding sentencing and treatment, it is often argued that from an ethical standpoint, mentally ill prisoners should be hospitalized outside the prison system, i.e. in a medical establishment that is part of the health system for the general public, in order to favor access to appropriate hospital psychiatric treatment. On the other hand, the existence of a hospital psychiatric unit in a prison also makes it possible to give treatment in optimum security conditions and to intensify the activities of the medical and social services within the prison system."[18]

2. **Discretion of Sentencing**

This section deals with the collision of medical ethics and penal ethics. The question is who should make the ultimate decision when determining the disposal of the mentally disordered offender. Conceivably there may be a conflict between the tendency of the psychiatrists who are used to rehabilitation and judges who are used to imprisoning criminal offenders.

In the United Kingdom, a criminal justice disposal is made by the Court. However, where medical assessment indicates that there is a need for treatment for mental disorder, the traditional response has been that this should override considerations of punishment in the criminal justice system. This has proved an effective as well as humane response to offending behavior where there is a clear link between the mental disorder and the offense.[19]

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[16] Latvia Criminal Code

[17] Council of Europe, The Prevention of Torture at the Dawn of a New Millenium: Substantive Sections of the CPT's General Reports, CPT/Inf/E (99)1, 5 November 1999.

[18] Council of Europe, Concerning the Ethical Organisational Aspects of Health Care in Prison, Recommendation No. R(98)7, 8 April 1998.

[19] White Paper, Reforming the Mental Health Act, Presented to Parliament by the Secretary of State for Health and the Home Secretary by Command of Her Majesty, December 2000, published by the Stationery Office. (White papers contain statements of government policy) www.official-documents.co.uk/document/cm50/5016-i/5016i-07.htm

In Latvia, the sentencing decision is ultimately in the hands of the judge. Psychiatrists give their opinions regarding the medical assessment of an offender, but the judge is not required by law to listen to their recommendations.

In Canada, the court shall specify that the offender be detained in a particular treatment facility recommended by the central administration of any penitentiary, prison or other institution. Based on the evidence of a medical practitioner. However the court does not need to follow this recommendation and shall choose a place that is reasonably accessible.[20]

3. **Period of review and reevaluation**
   Review and reevaluation is important in both civil commitment and commitment through the criminal justice system. In the criminal justice system, it is important to detect any elements of mental illness as soon as possible.

   Authorities need to constantly reassess and review because the treatment under compulsory powers needs to be considered when a person is charged with an offense and comes before the Courts; or while they are in prison on remand or following conviction for an offense.
   The UK has statutory requirements to review. The Court remand for assessment will be based on the medical recommendation and could be for detention in hospital or for assessment in the community on bail. The Court will have the discretion, in any case, to remand to hospital, subject to a suitable place being available.[21]

4. **Who does the review, is it independent**
   In the UK, a patient has a right to review by the Mental Health Tribunal. A lawyer with experience will chair the Mental Health Tribunal hearing and application or reference of a restricted patient. This is essential to preserving the confidence of the sentencing Court in the efficacy of powers for compulsory care and treatment as an alternative to a prison sentence.[22]

5. **Transfer of the prisoner between facilities**
   There may be some situations where a criminal will be sentenced to prison without any indication of mental illness, but later they may develop mental illnesses or symptoms may become more apparent. Legislation should be in place that will describe the procedure for recognizing mental illness in prisoners and the method for transferring or treating such prisoners.

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[20] Canada Code of Criminal Procedure
[21] White Paper, Reforming the Mental Health Act, Presented to Parliament by the Secretary of State for Health and the Home Secretary by Command of Her Majesty, December 2000, published by the Stationery Office. www.official-documents.co.uk/document/cm50/5016-i/5016i-07.htm
[22] Id.

In Lithuania, persons sentenced to a term of imprisonment who become mentally ill shall be provided with mental health care during their term in prison.[23]

The Council of Europe states that on the one hand, it is often advanced that, from an ethical standpoint, it is appropriate for mentally ill prisoners to be hospitalized outside the prison system, in institutions for which the public health service is responsible. On the other hand, it can be argued that the provision of psychiatric facilities within the prison system enables care to be administered in optimum conditions of security, and the activities of medical and social services intensified within that system.
Whichever course is chosen, the accommodation capacity of the psychiatric facility in question should be adequate; too often there is a prolonged waiting period before a necessary transfer is effected. The transfer of the person concerned to a psychiatric facility should be treated as a matter of the highest priority.[24]

6. Difference in treatment when there is no recognized link between the offense and person's mental disorder

The causes of offending behavior are complex. In the United Kingdom, some cases even where a person has a mental disorder, there will be no clear link between the offense and the mental disorder. But whatever the circumstances of the individual case, people who are before the Courts or in prison should be assessed and if appropriate receive treatment from specialist mental health services at the earliest opportunity. In the majority of cases, this will be in the best interests of the individual. Where there is a recognized link between the offending behavior and the person's mental disorder, compulsory care and treatment aimed at managing high risk behavior resulting from the disorder will also be in the interests of the public.[25]

At the time of sentencing it will often not be possible to establish such a link. It is therefore important that a Court, in considering what disposal should apply to a person with mental disorder, has access to a comprehensive assessment of his or her treatment needs.

The Mental Health Court Programs emphasize identifying the mentally ill at the earliest stage of the criminal justice process as possible. The Mental Health Courts recognize that identifying the mentally ill is a significant challenge that is imperative to the success of any alternative diversion program.

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[23] Lithuania Mental Health Law, Article 34.
[24] Council of Europe, The Prevention of Torture at the Dawn of a New Millenium: Substantive Sections of the CPT's General Reports, CPT/Inf/E (99)1, 5 November 1999.
[25] White Paper, Reforming the Mental Health Act, Presented to Parliament by the Secretary of State for Health and the Home Secretary by Command of Her Majesty, December 2000, published by the Stationery Office. www.official-documents.co.uk/document/cm50/5016-i/5016i-07.htm

7. **Administration of the treatment facilities**

For the most part, the task of administering treatment is delegated to local authorities. In Poland this is the responsibility of the provinces.[26] In Estonia, specialized psychiatric care is organized at the local government and state levels. Psychiatric care is organized by the Ministry of Social Affairs at the state level in Estonia. At the local level, the rural municipality government or city government shall organize psychiatric care in concordance with the county medical officer.[27]
In Lithuania, the Municipal Mental Health Commission is given jurisdiction and responsibility of coordinating the treatment centers and programs.[28]

The Council of Europe recommends that the prison administration and the ministry responsible for mental health should co-operate in organizing psychiatric services for prisoners.[29]
A clear division of responsibilities and authority should be established between the ministry responsible for health or other competent ministries, which should co-operate in implementing an integrated health policy in prison.[30]

C. International Guidelines

Council of Europe and the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

If the standards set out in the binding documents of the Council of Europe are breached, then a complaint may be filed with the Council of Europe leading possibly to a hearing in the European Court of Human Rights. The procedure can only begin after exhausting all other opportunities to resolve the issue. Unfortunately, the European Court of Human Rights has not decided a case discussing the treatment of the mentally disordered criminal offender. The Council of Europe views prison as a last resort. Implying that other methods of treatment and rehabilitation need to be implemented.

The CPT releases their recommendations and opinions in substantive reports. CPT reports contain many principles, including that prisoners are entitled to the same level of medical care as persons in the community at large. This principle is inherent in the fundamental rights of the individual. The CPT also urges that every newly arrived prisoner be properly interviewed. It is important for the prison medical service to have the support of psychiatrists and psychologists, either part or full-time, and that the prison administration and the ministry responsible for mental health should cooperate in organizing psychiatric services for prisoners.[31]

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[26] Poland Criminal Code
[27] Estonia Mental Health Act
[28] Lithuania Mental Health Law
[29] Council of Europe, Concerning the Ethical Organisational Aspects of Health Care in Prison, Recommendation No. R(98)7, 8 April 1998.
[30] Id.
[31] Council of Europe, The Prevention of Torture at the Dawn of a New Millenium: Substantive Sections of the CPT's General Reports, CPT/Inf/E (99)1, 5 November 1999.

The CPT has recently placed more emphasis on the treatment of the mentally disordered offender in the criminal justice system and takes the stance that socio-therapeutic programs are of great importance in a modern penal system.[32]

The Council of Europe in the Ethical and Organizational Aspects of Health Care in Prison, recommendation R(98)7, states in paragraph 55 that "prisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff. The decision to admit an inmate to a public hospital should be made by a psychiatrist, subject to authorization by the competent authorities."[33]

The explanation in the appendix states that "in accordance with the principle of equivalence, every prisoner suffering from a serious mental disturbance should receive appropriate medical treatment as an outpatient and/or in hospital. As far as hospital treatment is concerned, two options may be envisaged according to health policy trends. On the one hand, it is often argued that from an ethical standpoint, mentally ill prisoners should be hospitalized outside the prison system, i.e. in a medical establishment that is part of the health system for the general public, in order to favor access to appropriate hospital psychiatric treatment. On the other hand, the existence of a hospital psychiatric unit in a prison also makes it possible to give treatment in optimum security conditions and to intensify the activities of the medical and social services within the prison system."[34]

It is important to note that treatment is clearly recommended, the only issue is whether the treatment occurs in medical facilities within the prison system, or whether the treatment occurs in facilities outside the prison system.

United Nations

Generally, the standards for the treatment of the mentally disordered criminal offender are covered by United Nations(U.N.) documents. The Council of Europe has addressed the treatment of the mentally disordered criminal offender in more detail.

The U.N. documents that identify the treatment of the mentally disordered criminal offender are the U.N. Principles for the Protection of Persons with Mental Illness, and the Standard Minimum Rules for the Treatment of Prisoners. The Principles for the Protection of Persons with Mental Illness stresses in principle 20 that the protection offered persons with mental illness by the document is extended to criminal offenders as well. Stating that all such persons should receive the best available mental health care as provided by the document.[35] The Standard Minimum Rules for the Treatment of Prisoners has a section covering insane and mentally abnormal prisoners. The article states that "persons found to be insane shall not be detained in prisons," and continues in the next point by saying "prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical

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[32] Id.

[33] Council of Europe, Concerning the Ethical Organisational Aspects of Health Care in Prison, Recommendation No. R(98)7, 8 April 1998.

[34] Council of Europe, Concerning the Ethical Organisational Aspects of Health Care in Prison, Recommendation No. R(98)7, 8 April 1998.

[35] United Nations, Principles for the Protection of Persons with Mental Illness, General Assembly resolution 46/119 of 17 December 1991.

management. During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric after-care." The inability to enforce this document is evidenced in the introduction where it is written that, "the following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions."[36] The documents that are non-binding serve as recommendations and illustrate the international expectations on this topic, yet they are unenforceable. Often times the recommendations become principles in future binding documents.

D. Reforms

Throughout Europe, the legislation regulating the treatment of the mentally ill has been under reform. The Council of Europe recognized that a number of the member states were reviewing their rules on psychiatry and that as of 1994 there had been no overall study on legislation and practice with regard to psychiatry.[37] The United Kingdom is in the process of reforming the Mental Health Act of 1983. The process involves substantially discussing the rehabilitation and treatment of the mentally disordered offender. The government is actively pursuing advice regarding the scope of the new mental health legislation. Lithuania is in the process of updating their Criminal Code and Procedure. Last year the new Criminal Code was passed, but it will only take effect when the Criminal Procedure Code is passed. The Parliament has the opportunity to pass the legislation to take effect in 2003. Estonia passed their new Penal Code in June, 2001, however the new Criminal Procedure has not been passed. Norway pledged $3 billion in 1998 to reform their mental health system.

In Latvia, the Criminal Code that went into effect in 1999 includes a new provision which recognizes the diminished capacity class of criminal offenders. Prior to 1999, this segment of the population was not recognized and distinguished in the law. However, clearer language is required in the statute. Also, a new law regulating the process for the commitment of the mentally ill has been under review for the past two years. Initially a progressive act of legislation, it has been altered for the past two years while under review by the cabinet of ministers.

There is a problem with the vocabulary of the current criminal code in Latvia. The criminal code in Latvia controlling the placement of the diminished capacity criminal offender is vaguely constructed. This leaves the interpretation of the code up to the judge, who has the final determination of where a prisoner will serve their punishment. When a statute is ambiguously constructed, there is adequate room for the judge to inconsistently apply the statute to the cases at hand. This leads to law being made by the judges, as opposed to by the parliament.

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[36] United Nations, Standard Minimum Rules for the Treatment of Prisoners, 31 July 1957.
[37] Council of Europe, On Psychiatry and Human Rights, Recommendation 1235, 1994.

The UK is currently trying to modify their Mental Health legislation. A priority of the Mental Health Act is to provide mental health services with an up to date legal framework. The landscape has been altered and there is a wider role for other therapeutic approaches, modern mental health legislation needs to reflect that landscape.[38]

The Council of Europe recognized in 1994 that a large number of member countries were reviewing their legislation on psychiatry. Also, the assembly observed that there is no overall study on legislation and practice with regard to psychiatry covering the member states of the Council of Europe. The European Convention on Human Rights has generated case-law and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has made a number of observations with regard to practices followed in the matter of psychiatric placements. The reports generated by the CPT illustrate the recommended level of treating the mentally disordered criminal offender, and they illustrate what level the European member nations have attained.

III. Models for effective rehabilitation/reform/diversion

A. Mental Health Courts

Mental Health Courts have recently been established in the United States based on therapeutic jurisprudence and reducing the criminalization of the mentally ill. This is a new judicial concept that began in Broward County, Florida, USA, in 1997. It has since spread to other jurisdictions in the United States and Canada, and recently a program to establish more mental health courts has received federal funding within the United States. In King County, Washington, the goals of the Mental Health Court are (1) preventing the criminalization of the mentally ill through informed legal case management; (2) improving the defendant's well-being and ability to conform to the requirements of the law by engaging the defendant in needed treatment and providing linkage to other needed resources; (3) managing cases to insure public safety; (4) supporting the defendant's personal autonomy through his/her exercise of personal responsibility and legitimate prerogatives.[39]

The Mental Health Courts are designed to assist the mentally ill criminal offender through cooperation between the supervising court and community mental health treatment and related services. The judge in these courts serves as the core of the treatment and supervision process. Judges provide the therapeutic direction and overall accountability for the treatment process. To be effective, mental health courts share that critical need to identify mentally ill or disabled candidates at the earliest possible stages of processing to avoid the damaging experience of arrest and confinement, to intervene

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[38] White Paper, Reforming the Mental Health Act, Presented to Parliament by the Secretary of State for Health and the Home Secretary by Command of Her Majesty, December 2000, published by the Stationery Office.
www.official-documents.co.uk/document/cm50/5016-i/5016i-07.htm

[39] Emerging Judicial Strategies for the Mentally Ill in the Criminal Caseload: Mental Health Courts in Fort Lauderdale, Seattle, San Bernardino, and Anchorage, Monograph, April 2000, U.S. Department of Justice, Washington D.C.
www.ncjrs.org/html/bja/mentalhealth/contents.html

medically to stabilize offenders and then to situate them in an appropriate placement process.[40]

On an international scale, the World Health Organization Regional Office for Europe (WHO) outlined guidelines on how to improve mental health in prisons during a meeting in 1998. The WHO has begun the Health in Prisons Project that discusses the mentally ill. In the Consensus Statement on Mental Health Promotion in Prisons, the WHO focused on rehabilitation, stating that loss of freedom constitutes the punishment. Therefore, health and well-being must not be compromised, and the goal is the reintegration of the prisoner into the community. The statement also included: in order to achieve positive mental health, countries must have in place positive mental health legislation, close integration of health, penal and social policy and effective aftercare following imprisonment. This should be achieved through a close partnership with prisoners, their families, and appropriate community agencies to deliver programs and treatment. The declarations and charters which the member states of the WHO endorse are only recommendations, which cannot be implemented by anyone else than the countries themselves, nevertheless, these are well formulated and advisable recommendations.[41]

B. Further Recommendations

Other model programs focus on the community-based treatment of the mentally ill offender. For example, the Community Support and the Forensic Community Support Programs in Milwaukee, Wisconsin. The goal of the program is to reduce hospitalization or incarceration while improving the quality of life of clients suffering from severe and persistent mental illness who are involved with the criminal justice system. They provide a wide range of services, including: supportive psychotherapy and symptom management; psychiatric evaluations/medication prescription and monitoring; money management; housing assistance; and vocational services.[42]

Other strategies include installing mechanisms to divert criminal defendants with mental illness into mental health services, as opposed to placing them in the criminal justice system. There are strategies to create a continuum of care for people with mental illness as they move between the criminal justice system and the community. For example, build links between jail and community treatment providers by training community mental health workers to track clients in the criminal justice system.

The components necessary to provide comprehensive discharge planning and help ex-offenders with mental illness reintegrate into the community, include linking inmates

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[40] Emerging Judicial Strategies for the Mentally Ill in the Criminal Caseload: Mental Health Courts in Fort Lauderdale, Seattle, San Bernardino, and Anchorage, Monograph, April 2000, U.S. Department of Justice, Washington D.C.
www.ncjrs.org/html/bja/mentalhealth/contents.html

[41] WHO Mental Health Promotion in Prisons, Report on a WHO meeting, The Hague, Netherlands, 18-21 November 1998.

[42] see Community Service Program and the Forensic Community Support Program at the Wisconsin Correctional Service Website: www.wiscs.org/programs/index.asp

with services before release. This would entail pre-release discharge planning to all mentally ill jail and prison inmates.[43]

Many diversion programs rely on proactive case management in order to create a community-based treatment plan that will meet the medical and psychiatric needs of the patient while simultaneously serving the public safety mandates of the enforcement and correctional communities.[44]

C. Solutions Applied

Changing the legislation: The UK is attempting to reform their legislation to handle a new system of mental health care which explicitly deals with the treatment of the mentally disordered and the criminal justice system. Latvia should consider resolving the ambiguities contained in the statutes regarding the mentally disordered criminal offenders and the usage of diminished capacity throughout the criminal and civil codes.

Training of judges: An example of judges taking the initiative in solving the problem is the Mental Health Courts. The creation of these courts did not require any new legislation since they are administered at a local level. The judges in these courts do not handle other kinds of cases, they are very specified and trained in identifying and treating the mentally disordered. In Latvia, the local judges have all of the discretion in determining the sentence. A psychiatrist will give their assessment on an individual, but the sentencing is still the decision made by the judge. For this reason, it is advisable that judges receive extensive training for evaluating criminal offenders that appear in their courts. Perhaps the best solution would be to assign specially trained judges to exclusively handle this population within Latvia.

Establishment of alternative forms of punishment: This would require the cooperation of a vast network of individuals who are involved in the management of these cases. Intensive case management and the cooperation of social workers, advocates, judges and others involved in the criminal justice disposal of a mentally disordered criminal offender are necessary to the implementation of alternative forms of punishment. Without their cooperation, many mentally disordered individuals may find themselves in a revolving door between jail and society which fails to allow these individuals to benefit society and themselves as they never reach their potential.

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[43] Barr, Heather, Prisons and Jails: Hospitals of Last Resort, 1999, the Correctional Association of New York and the Urban Justice Center, New York.
www.soros.org/crime/MIReport.htm

[44] Arrington, Scott; Feldman, Richard; Leisher, Michele; Roskes, Erik, A Model Program for the Treatment of Mentally Ill Offenders in the Community, Community Mental Health Journal, October, 1999, Volume 35, Issue 5, p.1.