

## **SOME CONTINENTAL EUROPEAN PERSPECTIVES ON SAFEGUARDS IN THE CASE OF DEPRIVATION OF LIBERTY IN HEALTH AND SOCIAL CARE SETTINGS**

WALTER BOENTE\*

This article highlights perspectives and regulations on safeguards in the case of deprivation of liberty of some continental European countries – namely Germany, Switzerland, France, Austria, and Spain. It illustrates the continent’s disparate approaches to the subject, both those founded in history and in the different legal traditions.<sup>1</sup>

Continental legislation struggles to cope with the UN Convention on the Rights of Persons with Disabilities. The most recent observations of the Committee on the Rights of Persons with Disabilities in Germany, in May 2015, recommend for example, that Germany “amend legislation to prohibit involuntary placement and promote alternative measures”.<sup>2</sup> Nevertheless, legislation and practice in these countries might provide some different points of view on deprivation of liberty safeguards.

### **I. GERMANY**

German law reflects the historically common structure of legislation concerning deprivation of liberty in health and social care settings on the continent. Provisions concerning deprivation of liberty grew on two grounds. On the one hand, regulation in private law, and thereby the promotion of the interest of the individual, led to provisions concerning deprivation of liberty in the health interests of the person concerned. On the other hand, regulation in public law, in particular administrative or rather public security law, led to provisions allowing deprivation of liberty to avert danger to life, health, or even “society”; in other words, for the protection of both the interests of individuals as well as the public. Because of these different legal approaches, one and the same interest could be “promoted” or “protected” by different provisions.<sup>3</sup>

---

\* Centre of Comparative, European and International Law, University of Lausanne. We thank Devrim Baki and Euan Elia Hindle for their generous support in the preparation of this article.

<sup>1</sup> For a comparison between the UK and for example Germany in this field, see H.R. Röttgers and P. Lepping, ‘Treatment of the mentally ill in the Federal Republic of Germany: Sectioning practice, legal framework, medical practice and key differences between Germany and the UK’, *The Psychiatrist* 23 (1999), pp. 601 et seq, even if outdated as a result of legislative developments.

<sup>2</sup> Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Germany, N 29 ff.; see also CPRD, Concluding observations on the initial report of Spain, N 35 f.; CRPD, Concluding observations on the initial report of Austria, N 30 ff.; full texts available at <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5)> (last visited July 17, 2017).

<sup>3</sup> For (partially outdated) country reports on Germany in English see for example H.J. Salize, H. Dreßing, Country report on Germany, in: Salize, Dreßing, Peitz (eds.), ‘Compulsory Admission and Involuntary Treatment of Mentally Ill Patients – Legislation and Practice in EU-Member States’, 2002, pp. 82 et seq, full text available at <[http://ec.europa.eu/health/ph\\_projects/2000/promotion/fp\\_promotion\\_2000\\_frep\\_08\\_en.pdf](http://ec.europa.eu/health/ph_projects/2000/promotion/fp_promotion_2000_frep_08_en.pdf)>; European Union Agency for Fundamental Rights (FRA), Country thematic reports on the fundamental rights of persons with intellectual disabilities and persons with mental health problems, Country report on Germany, full text available at <[http://fra.europa.eu/sites/default/files/fra\\_uploads/2142-mental-health-study-2009-DE.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/2142-mental-health-study-2009-DE.pdf)> (last visited July 17, 2017); see also E. Habermeyer, U. Rachvoll et al., ‘Hospitalization and Civil Commitment of Individuals with Psychopathic Disorders in Germany, Russia

This historically established structure is still present in German law, not least because legislative power, in the case of private law, is in the hands of the federal government; in the case of public security law it is in the hands of the federal states, the Bundesländer. This concept also shines through the other continental legislation that will be addressed later.

### A. Constitutional Law

In connection with deprivation of liberty in health and social care settings, the German system is, in contrast to other countries, not driven by the European Convention on Human Rights as such. Because of the crimes of the Third Reich,<sup>4</sup> the German Constitution, the so-called Basic law, stated as far back as 1949 that the liberty of the person can be *restricted* only pursuant to a formal law and that only a judge can rule upon the permissibility of any *deprivation* of liberty:

**Art. 104 Basic Law for the Federal Republic of Germany.**

(1) Liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. ...

(2) Only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. ...<sup>5</sup>

Therefore, the Basic law is still the starting point for German legislation and jurisprudence on deprivation of liberty.

### B. Private law

German Private Law differentiates between “*accommodation* that is associated with deprivation of liberty” and other deprivations of liberty in institutions:

**Section 1906 German Civil Code. Approval of the custodianship court with regard to accommodation.**

(1) It is admissible for the custodian to put the person under custodianship in accommodation that is associated with deprivation of liberty only as long as this is necessary for the best interests of the person under custodianship because

1. by reason of a mental illness or mental or psychological handicap of the person under custodianship there is a danger that he will kill himself or cause substantial damage to his own health, or

2. to avert the threat of substantial damage to health, an examination of the state of health of the person under custodianship, therapeutic treatment or an operation is necessary, which cannot be carried out without the accommodation of the person under custodianship and the person under custodianship, by reason of a mental illness or mental or psychological handicap, cannot recognise the necessity of the accommodation or cannot act in accordance with this realisation.

(2) The accommodation is admissible only with the approval of the custodianship court. Without the approval, the accommodation is admissible only if delay entails risk; the approval must thereafter be obtained without undue delay. ...

---

and the United States’, in: Felthous, Saß (eds.), *The International Handbook of Psychopathic Disorders and the Law, Volume II, Law and Policies*, 2007, pp. 36 et seq.

<sup>4</sup> See R. Strous, ‘Historical injustice in psychiatry with examples from Nazi Germany and others – ethical lessons for the modern professional’, in: Kallert, Mezzich, Monahan (eds.), *Coercive Treatment in Psychiatry, Clinical, Legal and Ethical Aspects*, 2011, pp. 161 et seq; H.R. Röttgers/P. Lepping, n. 1 above, pp. 602 et seq.

<sup>5</sup> Full text in English available at <[http://www.gesetze-im-internet.de/englisch\\_gg/](http://www.gesetze-im-internet.de/englisch_gg/)> (last visited July 17, 2017).

(4) Subsections (1) and (2) apply with the necessary modifications if the person under custodianship who is in an institution, a home or another establishment without being accommodated there is to be deprived of his liberty by mechanical devices, by medical drugs or in another way for a long period of time or regularly. ...<sup>6</sup>

The condition for an *accommodation* associated with deprivation of liberty is that it is “necessary for the best interests of the person under custodianship”. The following conditions embody the principle of legal certainty:<sup>7</sup> “by reason of a mental illness or mental or psychological handicap there is a danger that the person will kill himself or cause substantial damage to his own health”, or “to avert the threat of substantial damage to health, an examination of the state of health of the person under custodianship, therapeutic treatment or an operation is necessary, which cannot be carried out without the accommodation of the person under custodianship and the person under custodianship, by reason of a mental illness or mental or psychological handicap, cannot recognise the necessity of the accommodation or cannot act in accordance with this realisation.”<sup>8</sup>

Conditions for *other* deprivations of liberty in institutions – for example through “mechanical devices, by medical drugs or in another way for a *long period of time or regularly*” - are the same. The definition of “long period of time” is a controversial issue in court decisions and legal literature. In general, it depends on the method of the deprivation of liberty concerned. Against this background a period of several hours or at least one day is considered to be “long”.<sup>9</sup> “Regularly” means a deprivation of liberty

---

<sup>6</sup> Full text in English available at <[http://www.gesetze-im-internet.de/englisch\\_bgb/](http://www.gesetze-im-internet.de/englisch_bgb/)> (last visited July 17, 2017).

<sup>7</sup> Cf. German Federal Constitutional Court (Bundesverfassungsgericht), 23. 3. 2011 – 2 BvR 882/09; German Federal Court of Justice (Bundesgerichtshof), 20.6.2012 - XII ZB 99/12 and XII ZB 130/12.

<sup>8</sup> For questions concerning coercive treatment see E. Flammer, T. Steinert, ‘Involuntary medication, seclusion, and restraint in German psychiatric hospitals after the adoption of legislation in 2013’, *Frontiers in Psychiatry*, 6:153, full text available at <<http://journal.frontiersin.org/article/10.3389/fpsy.2015.00153/full>>; in comparison to the Netherlands T. Steinert, E.O. Noorthoorn, C.L. Mulder, ‘The use of coercive interventions in mental health care in Germany and the Netherlands. A comparison of the developments in two neighbouring countries’, *Frontiers in Public Health* 2:141, full text available at <<http://journal.frontiersin.org/article/10.3389/fpubh.2014.00141/full>>; in the light of the CRPD Staatliche Koordinierungsstelle, ‘Position paper by the State Coordination Agency established in accordance with article 33 of the CRPD’, full text available at <[http://www.wcag2016.de/fileadmin/Mediendatenbank\\_WCAG/Tagungsmaterialien/Panels/Panel\\_08\\_position\\_paper\\_Forced\\_hospitalization\\_20130718.pdf](http://www.wcag2016.de/fileadmin/Mediendatenbank_WCAG/Tagungsmaterialien/Panels/Panel_08_position_paper_Forced_hospitalization_20130718.pdf)>; lately the German Federal Constitutional Court (Bundesverfassungsgericht) declared the related provisions to be partly unconstitutional, full text in English available at <<http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-059.html>> (last visited July 17, 2017); for a comment on this decision in English see A. Ward, ‘A major step forward in CRPD compliance by the German Federal Constitutional Court?’, <<http://www.lexology.com/library/detail.aspx?g=7fdc889d-f50b-4d59-b84a-3bdb4bb75a51>> (last visited July 17, 2017); for the ongoing reform process see <<http://dipbt.bundestag.de/dip21/brd/2017/0066-17.pdf>> and most recently <<http://dipbt.bundestag.de/dip21/brd/2017/0512-17B.pdf>>, only available in German (last visited July 17, 2017).

<sup>9</sup> For cases of deprivation of liberty due to the medical treatment itself Section 1904 CC applies: “Section 1904 German Civil Code. Approval of the custodianship court in the case of medical treatment. (1) The consent of the custodian to an examination of the state of health of the person under custodianship, to therapeutic treatment or to an operation is subject to the approval of the custodianship court if the justified danger exists that the person under custodianship will die or will suffer serious injury to his health that lasts for a long period by reason of the measure. Without the approval, the measure may be carried out only if delay entails danger.

repeated at the same time of the day or for the same reason, generally irrespective of its duration. Nevertheless regarding a time-threshold to establish deprivation of liberty, jurisprudence is in a state of flux, but considers at least thirty minutes as a deprivation of liberty.<sup>10</sup>

The competent authority or, figuratively speaking, (safe-)“guard” in these cases is the custodian who decides on the deprivation of liberty. In emergency cases, in particular if a custodian has not yet been appointed, the family court can take the necessary measures (Section 1846 CC).

The safeguarding process requires the mandatory approval of the custodianship court. If delay entails risk, the approval must be obtained without undue delay. This design of the safeguarding process involves a huge number of cases that have to be handled by the courts. In 2015, custodianship courts approved more than 120,000 cases of deprivation of liberty under Section 1906 CC.<sup>11</sup>

Some elements of the courts’ (safeguarding) process, as outlined in the Act on Proceedings in Family Matters and in Matters of Noncontentious Jurisdiction (APFNJ), are:<sup>12</sup>

- the appointment of a guardian ad litem for the person concerned (Section 317 APFNJ);
- an in-person hearing prior to the measure – to the extent necessary, in the usual environment of the person (Section 319 APFNJ);
- prior to an “*accommodation* that is associated with deprivation of liberty”, an expert opinion on the necessity of the measure has to be obtained. The expert should be a psychiatrist. He or she shall be a physician with experience in the field of psychiatry (Section 321 subsection 1 APFNJ). On the contrary for *other* deprivations of liberty in institutions, a medical certificate shall be sufficient (Section 321 subsection 2 APFNJ);
- duration and extension of the measure are covered by special provisions (Section 329 APFNJ): the involuntary commitment shall cease at the latest at the end of one year; in the case of an obvious need for a longer period of involuntary commitment at the latest at the end of two years, when it was not previously extended;

---

(2) The non-consent to or revocation of the consent of the custodian to a test of the state of health, treatment or medical intervention requires the approval of the custodianship court if the measure is medically indicated and there is justified reason to fear that the person under custodianship will die or suffer serious, long-term detriment to health if the measure is not carried out or is discontinued.

(3) Approval pursuant to subsections (1) and (2) must be given if the consent, non-consent or revocation of consent corresponds to the will of the person under custodianship.

(4) Approval pursuant to subsections (1) and (2) is not required if agreement is reached between the custodian and the physician in attendance that the granting, non-granting or revocation of consent corresponds to the will of the person under custodianship established pursuant to section 1901a.

(5) Subsections (1) to (4) also apply to an authorised representative. The latter may only consent to, not consent to or revoke consent to one of the measures designated in subsection (1) sentence 1 or subsection (2) if the power of attorney expressly includes these measures and is given in writing.”

<sup>10</sup> See German Federal Court of Justice (Bundesgerichtshof), 7.1.2015 - XII ZB 395/14.

<sup>11</sup> The numbers of cases of deprivation of liberty under Section 1906 *subsection 4* CC currently decline; for statistics see <<https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Betreuungsverfahren.html>> (last visited July 17, 2017).

<sup>12</sup> Full text in English available at <[http://www.gesetze-im-internet.de/englisch\\_famfg/](http://www.gesetze-im-internet.de/englisch_famfg/)> (last visited July 17, 2017).

- finally, to make the measure public, special information duties apply (e.g. Section 339 APFNJ).

There are also two fast track procedures for the safeguarding process, with exceptions relating to the hearing of the person concerned as well as the prior appointment of the guardian ad litem (Sections 331, 332 APFNJ). The interlocutory order in turn shall not exceed a duration of six weeks (Section 333 subsection 1 sentence 1 APFNJ).

### *C. Public Security Law*

Due to the distribution of legislative power in Germany, each German federal state has its own law on deprivation of liberty in health and care settings – which is a total of sixteen different laws. Although differing considerably in some of the detail, their overall approach is similar. Most of the laws developed from a pure public security law approach focused on averting danger but evolved over time to the mental health law approach today.

Therefore, deprivation of liberty in health and social care settings is also possible on the basis of federal state law, for example, for North Rhine-Westphalia, the Law on Assistance and Protective Measures in Cases of Mental Illness.<sup>13</sup>

Conditions of deprivation of liberty in German public law do not differ much from private law; differences derive from the scope and perspective of the protected interests. But while private law (the Civil Code) refers quite generally to the principle of proportionality, federal state law explicitly regulates the less invasive measures, including community care by multi-disciplinary teams or social psychiatric services. Furthermore, and different from private law, the execution of the deprivation of liberty is regulated more elaborately.

The competent authority or “guard” in these cases is the judge, while in emergency situations it is the local administrative authority, particularly the local health authority.

Today the courts’ safeguarding procedure is regulated by almost the same provisions as those enshrined in private law (see Section 312 no. 3 APFNJ). Furthermore, this safeguarding process is supported by additional information duties and administrative commissions visiting and supervising the institutions regularly.

### *D. Practice*

For a long time there was a competence conflict between deprivation of liberty on the grounds of private law and public security law. In practice, the easiest way was often used. Today the safeguarding provisions are nearly the same, although fast track procedures are still a problem. However, because the competent person often remains the same and only the procedure changes, there is little motivation to use the fast track procedure as the work reverts to the same desk afterwards.

Today, discussions in this field are centred on the qualification of each person involved in the safeguarding process. There are also special research projects focusing in

---

<sup>13</sup> For other examples see E. Habermeyer, U. Rachvoll et al., n. 3 above, pp. 37 et seq.

particular on the avoidance of restrictions of liberty and on awareness raising for less interfering alternatives.<sup>14</sup>

The UN Convention on the Rights of Persons with Disabilities is also an issue in Germany, but the focus lies on its practical rather than on its legislative implementation.<sup>15</sup>

## II. SWITZERLAND

The last amendment of the Swiss provisions concerning deprivation of liberty was in 2013, when the so-called “centennial reform” of the law of protection of adults came into force.<sup>16</sup> While there is still an overlap of the regulations on deprivation of liberty in private and public law in Germany, in Switzerland there is today a clearer distinction between deprivation of liberty on the grounds of private law in the person’s own interest, and deprivation of liberty through public security law in the interest of others.

### A. ECHR

In contrast to the German system, the Swiss system is driven by the European Convention on Human Rights, not least because the Swiss Federal Supreme Court is not allowed to examine Swiss Federal Law, that is the law of the Federation itself.<sup>17</sup> A constitutional court in the proper sense does not exist.<sup>18</sup> This is why judgments of the European Court of Human Rights on Swiss Federal Law have a special impact on Swiss Legislation.<sup>19</sup>

### B. Care-Related Hospitalisation

Swiss private law allows for the commitment to an appropriate institution. The conditions of hospitalisation are, in this case, that the person suffers from a mental disorder, or mental disability, or serious neglect and the required treatment or care cannot be provided otherwise:

---

<sup>14</sup> See examples on the projects “ReduFix” and “Werdenfelser Weg” in the Statement of the German Federal Government regarding the three concluding observations made in paragraph 20, which were adopted in the framework of the presentation of the sixth periodic report of Germany (CCPR/C/DEU/6) by the Human Rights Committee on 30 and 31 October 2012 (2944th and 2945th meetings), pp. 6 et seq, full text in English available at <[http://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/PDF-Dateien/Pakte\\_Konventionen/ICCPR/iccpr\\_state\\_report\\_germany\\_6\\_2010\\_cobs\\_\\_2012\\_Follow\\_up\\_2013\\_BR\\_en.pdf](http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/ICCPR/iccpr_state_report_germany_6_2010_cobs__2012_Follow_up_2013_BR_en.pdf)> (last visited July 17, 2017); for the declining numbers of cases of deprivation of liberty under Section 1906 subsection 4 CC, see n. 11 above.

<sup>15</sup> See E. Flammer, T. Steinert, n. 8 above, pp. 1 seq.; with a focus on Art. 12 CRPD; V. Lipp, ‘Guardianship and Autonomy: Foes or Friends?’, in: Arai, Becker, Lipp (eds.), *Adult Guardianship Law for the 21<sup>st</sup> Century, Proceedings of the First World Congress on Adult Guardianship Law 2010*, 2013, pp. 103 et seq.

<sup>16</sup> See on this topic I. Schwenzer/T. Keller, ‘A new law for the protection of adults’, *The International Survey of Family Law*, 2013, pp. 375 et seq.

<sup>17</sup> See Art. 190 Federal Constitution of the Swiss Confederation: “The Federal Supreme Court and the other judicial authorities apply the federal acts and international law”; full text in English available at <<https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>> (last visited July 17, 2017).

<sup>18</sup> On this topic T. Fleiner/A. Misic/N. Töpferwien, *Constitutional Law in Switzerland*, 2012, N. 663 et seq.

<sup>19</sup> See on this point T. Fleiner/A. Misic/N. Töpferwien, n. 18 above, N. 665.

**Art. 426 Swiss Civil Code [Hospitalisation for treatment or care].**

(1) A person suffering from a mental disorder or mental disability or serious neglect (the patient) may be committed to an appropriate institution if the required treatment or care cannot be provided otherwise.

(2) The burden that the patient places on family members and third parties and their protection must be taken into account. ...<sup>20</sup>

### 1. Adult protection authority

The competent authority or “guard” for care-related hospitalisation is generally the adult protection authority (Art. 428 para. 1 CC), but the detailed implementation of this competence set out under Swiss Federal Law is up to the Swiss cantons. As a consequence, the competent authority differs from canton to canton and is either an administrative authority or, especially in the French speaking cantons, a court.<sup>21</sup>

The procedure reflects some of the commonly known safeguards. If necessary, the adult protection authority shall order that the person is represented and appoint a person experienced in care-related and legal matters as his or her deputy (Art. 449a CC). The person shall be heard in person unless to do so appears inappropriate (Art. 447 para. 1 CC). If necessary, the adult protection authority shall commission an opinion from an expert (Art. 446 para. 3 CC). A review shall be conducted at the latest six months after hospitalisation, and a second review within the following six months; thereafter as often as necessary, but at least once every year (Art. 431 CC).

In addition, any person committed to an institution may appoint a person whom he or she trusts as a representative to support him or her during his stay and until the conclusion of all related procedures (Art. 432 CC).

### 2. Doctors

Furthermore, the cantons may designate doctors as “guards” who, in addition to the adult protection authority, are authorised to order hospitalisation for a period specified by cantonal law, but not exceeding six weeks. Beyond the specified period, hospitalisation may not continue unless a hospitalisation order from the adult protection authority applies (Art. 430 CC).

The doctor shall examine and interview in person. If possible, he or she shall notify a person closely related to the patient in writing on his or her committal and on the rights of appeal (Art. 431 CC).

### *C. Restriction of freedom of movement in Residential or Care Institutions*

Inspired by German law, special provisions concerning the restriction of freedom of movement in Residential or Care Institutions have existed since 2013:<sup>22</sup>

**Art. 383 Swiss Civil Code [Restriction of freedom of movement].**

(1) The residential or nursing institution may restrict the freedom of movement of the person lacking capacity of judgement only if less stringent measures are clearly insufficient or prove to be so and the measure serves to:

1. prevent serious danger to the life or physical integrity of the client or third parties; or

---

<sup>20</sup> Full text in English available at <<https://www.admin.ch/opc/en/classified-compilation/19070042/index.html>> (last visited July 17, 2017).

<sup>21</sup> See in general I. Schwenzler/T. Keller, n. 16 above, pp. 384 et seq.

<sup>22</sup> See in general I. Schwenzler/T. Keller, n. 16 above, p. 381.

2. remedy serious disruption to life in and around the institution. ...<sup>23</sup>

The competent authority or “guard” in this case is the residential or nursing institution itself.

Conditions for the restriction of the freedom of movement are that the person lacks the capacity of judgement and that the restriction serves the prevention of serious danger to the life or physical integrity of the person or third parties or remedies serious disruption to life in and around the institution. The other condition set out by Art. 383 para. 1 CC, that less stringent measures are clearly insufficient or prove to be so, is a mere declaration of the general principle of proportionality. This declaration was considered important as guidance for those involved in practice.

The safeguarding procedure is generally limited to information and documentation duties. Before the person’s freedom of movement is restricted, it shall be explained to the person concerned what is happening, why the measure has been ordered, how long it is expected to last and who will be responsible for the person concerned during this period (Art. 383 para. 2 CC). Furthermore, a record shall be kept of any measure restricting freedom of movement and the representative in relation to medical procedures shall be notified (Art. 384 para. 1, 2 CC).

The person concerned or a closely related person may submit a written request at any time for the adult protection authority to intervene. In addition, each canton shall make the residential and care institution subject to supervision (Art. 387 CC).

#### *D. Practice*

Being driven by the judgments of the European Court of Human Rights, the Swiss legislator always remains one step behind. There are exceptions, especially in the canton of Ticino but, generally, a strong paternalistic tendency is dominant within Switzerland.

Critical points of the new system seem to become the authorisation for “doctors” to order hospitalisation, accompanied by an unsatisfactory safeguarding procedure – and the fact that the appointment of a representative during the person’s stay is only optional.

### III. FRANCE

In contrast to Germany and Switzerland and due to a different legislative competence structure, France brought together the traditional strings of provisions concerning deprivation of liberty into one act. These are implemented today in the French Public Health Code (PHC) and were last refined in 2013.<sup>24</sup>

---

<sup>23</sup> Full text in English available at <<https://www.admin.ch/opc/en/classified-compilation/19070042/index.html>> (last visited July 17, 2017).

<sup>24</sup> For (partially outdated) country reports on France in English see for example C. Jonas, A. Machu, V. Kovess, Country report on France, in: Salize, Dreßing, Peitz (eds.), n. 3 above, pp. 75 et seq.; FRA, n. 3 above, Country report on France, full text available at <[http://fra.europa.eu/sites/default/files/fra\\_uploads/2149-mental-health-study-2009-FR.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/2149-mental-health-study-2009-FR.pdf)> (last visited July 17, 2017).

## *A. Hospitalisation*

The PHC distinguishes between two types of involuntary hospitalisation: a compulsory hospitalisation at the request of a third party to protect the person's interests (Art. L3212-1 et seq PHC), and a compulsory hospitalisation by official order, to avert danger in the interests of others or the public (Art. L3213-1 et seq PHC). Both methods of hospitalisation are introduced under different conditions.

### 1. Compulsory hospitalisation at the request of a third party

Compulsory hospitalisation at the request of a third party requires that the person's mental state needs immediate care and constant supervision in a hospital setting (full-hospitalisation) or, introduced by a reform in 2011, "other regular medical supervisions" within the framework of an individual care plan, for example out-patient or part-time care. A mental disorder has to make the person's consent impossible (Art. 3212-1 para. 1 PHC).

The first step in safeguarding these conditions is their further differentiation, on the one hand by emphasising the person's rights, especially his or her right to information and, on the other hand by highlighting the decision guiding principles, in particular the principle of proportionality.

The competent authority or the "guard" who is mandated to decide on the deprivation of liberty is the director of the hospital.

To safeguard the conditions set out by the provisions concerned here, in other words the "interest" of the person, there has to be an application for the deprivation of liberty by a so-called "third party". This could be, for example, due to the important role of the family in French legislation, a family member or another close person who is able to act in his or her interest. The application by a third party can be omitted if imminent danger to the person's health has been established by a doctor. Nevertheless, the director of the hospital has to inform the family or other representatives of the person.

Furthermore, two recent medical certificates verifying the fulfilment of the conditions set out by the legal basis are required. In emergency situations one certificate is sufficient.

Today, the admission is followed by an observation period. In the first twenty-four hours, a psychiatrist must issue a medical certificate, confirming or rejecting the need for hospitalisation. Another examination has to take place within seventy-two hours following admission, concluded by a decision on future hospitalisation or medical surveillance. The director can order continued hospitalisation for up to one month, eventually followed by monthly renewals, always based on a medical certificate. If the duration exceeds one year, each year a committee of three members of the institution has to examine the state of health of the person concerned.

Apart from these administrative safeguards, a decision of the French Constitutional Council in 2010,<sup>25</sup> invoking Art. 66 of the Constitution and its requirement that any

---

<sup>25</sup> French Constitutional Council (Conseil constitutionnel), Decision no. 2010-71 QPC, 26.11.2010, full text in French available at <[www.conseil-constitutionnel.fr/decision/2010/201071qpc.htm](http://www.conseil-constitutionnel.fr/decision/2010/201071qpc.htm)> (last visited July 17, 2017).

deprivation of freedom has to be subject to the control of the judicial authority,<sup>26</sup> forced the French legislator to include a new element in this safeguarding process: full hospitalisation can only be continued if it is permitted by the liberty and custody judge within the first twelve days of hospitalisation. Another decision upon admission has to take place within the next six months.

## 2. Compulsory hospitalisation by official order

Compulsory hospitalisation by official order requires that a “mental disorder requires treatment” and “jeopardises the safety of others or seriously threatens public order” (Article L3213-1 para. 1 PHC).

The competent authority, or the “guard” in this case, is the local Prefect, in other words the State's representative.

The Prefect's decision on the admission is based on a medical certificate. In the case of imminent danger, confirmed by a medical certificate, it is the mayor (or in Paris the police commissioner) who can decide on provisional placement measures, but he or she has to inform the Prefect within twenty-four hours.

The observation period after admission is the same as in the case of compulsory hospitalisation at the request of a third party. Based on the final report, the Prefect decides on future care and hospitalisation.

## 3. Information duties

In addition to this safeguarding process there is another layer of safeguarding. The admission process is accompanied by different information duties, informing different administrative and judicial authorities. One example are the County Commissions for Psychiatric Hospitalisations (Commissions départementales des hospitalisations psychiatriques), which are entitled to supervise and, in special cases, to visit the establishment, to assess the person's situation and apply to the judge for the termination of the measures taken. Nevertheless, in practice, they are often considered to be too reserved and there are doubts concerning their independence, as it is the Prefect who appoints most of the members of the commission.<sup>27</sup>

### *B. Other Limitations*

Besides these provisions, in France there is no explicit regulation of deprivation or limitation of liberty in a health and social care context. In particular, concerning the limitation of liberty by bedrails or wheelchair straps in nursing homes for example, in France there only exist codes of best practice as “safeguards” – supported by administrative and judicial authorities supervising the establishments.<sup>28</sup> The legal basis for such deprivation of liberty shall determine the establishment's own regulation

---

<sup>26</sup> Full text of the Constitution of October 4, 1958 in English available at <<http://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly>> (last visited July 17, 2017).

<sup>27</sup> See FRA, n. 24 above, N. 47.

<sup>28</sup> For a critique see Contrôleur general des lieux de privation de liberté, ‘Isolation and restraint in mental health institutions’, full text in English available at [http://www.cglpl.fr/wp-content/uploads/2012/12/CGLPL\\_Report\\_Isolation-and-restraint-in-mental-health-institutions.pdf](http://www.cglpl.fr/wp-content/uploads/2012/12/CGLPL_Report_Isolation-and-restraint-in-mental-health-institutions.pdf) (last visited July 17, 2017).

or the contract with the person concerned, each of which is more clearly specified in the so-called patient's handbook.<sup>29</sup>

### C. Practice

In French legislation, the role of the judge becomes more and more important, in the light of constitutional provisions enforced by the French Constitutional Council. Nevertheless, it remains an administration-based system.

After several amendments,<sup>30</sup> especially to close some backdoors provided by fast track procedures, the exception of "imminent danger" to the common procedure of compulsory hospitalisation at the request of a third party seems to become the new Achilles heel of the French system. Significant regional differences in the application of this exception are already ascertainable. However, the French system's main problem today seems to be the emphasis on security aspects, accompanied by the recent expansion of high-security units in French public psychiatric hospitals for patients with dangerous behaviour. This threatens to tip the scales to the disadvantage of the person concerned.<sup>31</sup>

## IV. AUSTRIA

In Austria the right to liberty and security is laid down in the Federal Constitutional Law on the Protection of Personal Liberty.<sup>32</sup> In 1990, last amended in 2010, an Act on Compulsory Admission of Mentally Ill Persons (Hospitalization Act, HA) was enacted and, in addition, in 2005, an Act on the Protection of the Personal Freedom of Residents of Homes and other Nursing and Care Facilities was enacted.<sup>33</sup>

---

<sup>29</sup> For recommendations and proposals concerning the patient's handbook see in French <[http://social-sante.gouv.fr/IMG/pdf/Elaborer\\_et\\_diffuser\\_le\\_livret\\_d\\_accueil\\_des\\_personnes\\_hospitalisees\\_-\\_recommandations\\_et\\_propositions-2.pdf](http://social-sante.gouv.fr/IMG/pdf/Elaborer_et_diffuser_le_livret_d_accueil_des_personnes_hospitalisees_-_recommandations_et_propositions-2.pdf)> (last visited July 17, 2017).

<sup>30</sup> See on their impact for example M. Coldefy, T. Tartour, C. Nestrigue, 'From Compulsory Psychiatric Hospitalisation to Compulsory Treatment: First Results Following the Institution of the Law of July 5<sup>th</sup> 2011', *Questions d'économie de la Santé*, no. 205 (2015), full text in English available at <<http://www.irdes.fr/english/issues-in-health-economics/205-from-compulsory-psychiatric-hospitalisation-to-compulsory-treatment.pdf>> (last visited July 17, 2017).

<sup>31</sup> See for example French Contrôleur general des lieux de privation de liberté, Opinion of 17th January 2013 concerning unjustified stays in Units for Difficult Psychiatric Patients (UMD), full text in English available at <[http://www.cgpl.fr/wp-content/uploads/2012/12/AVIS\\_UMD\\_20130124\\_EN.pdf](http://www.cgpl.fr/wp-content/uploads/2012/12/AVIS_UMD_20130124_EN.pdf)> (last visited July 17, 2017); see also L. Velpy, B. Eyraud, 'Confinement and Psychiatric Care: A Comparison Between High-Security Units for Prisoners and for Difficult Patients in France', *Culture, Medicine and Psychiatry* (2014) 38, pp. 550 et seq.; A.M. Lovell, L.A. Rhodes, 'Psychiatry with Teeth: Notes on Coercion and Control in France and the United States', *Culture, Medicine and Psychiatry* (2014) 38, pp. 618 et seq.

<sup>32</sup> Full text available at <[https://www.ris.bka.gv.at/Dokumente/ErV/ERV\\_1988\\_684/ERV\\_1988\\_684.pdf](https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1988_684/ERV_1988_684.pdf)> (last visited July 17, 2017).

<sup>33</sup> For (partially outdated) country reports on Austria in English see for example P. König, Country report on Austria, in: Salize, Dreßing, Peitz (eds.), n. 3 above, pp. 75 et seq; FRA, n. 3 above, Country report on Austria, full text available at <[http://fra.europa.eu/sites/default/files/fra\\_uploads/2137-mental-health-study-2009-AT.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/2137-mental-health-study-2009-AT.pdf)> (last visited July 17, 2017).

### *A. Compulsory Admission Act*

The Act on the Hospitalization of Mentally Ill Persons allows for an involuntary placement and deprivation of personal freedom in a psychiatric institution.<sup>34</sup>

The involuntary placement requires that there is reason to assume that due to the person's mental "illness" his or her life or health, or the life or health of others, is seriously and severely at risk and there is no other appropriate possibility of medical treatment or care.

The competent "guard" is the head of the psychiatric institution. In general, only a physician in the public health service or a police physician can decide or order that a person is brought to a psychiatric institution. In hospital, the head of department has to conduct a medical inspection to inform the person concerned and to notify the person's relatives as well as the judge.

The court has to gain a personal impression of the person, inform him or her about the proceedings and hear him or her within four days. If the court deems a placement justified, it must hold oral proceedings within fourteen days.

One of the main Austrian safeguards is the ex lege representation of the person by a so-called Patient Advocate. Patient Advocates represent the person during the whole process and duration of the hospitalisation and are meant to mobilise the person's individual rights.

### *B. Act on the Protection of Personal Freedom of Home Residents*

The Act on the Protection of the Personal Freedom of Residents of Homes and other Nursing and Care was last amended in 2010. It regulates the conditions of restrictions of the resident's freedom by, for example, bed rails, wheelchair straps, trick locks, etc.<sup>35</sup>

Conditions of the restrictions are the mental illness or mental disability of the resident and that, due to this, his or her life or health, or the life or health of others, is seriously and severely at risk. Furthermore, it is a requirement that there is no other appropriate way of avoiding this risk.

The competent "guard" is, in the case of medical restraints, a doctor; in the case of care related restraints, a specially trained person appointed by the establishment; and in institutions caring for mentally handicapped persons, the person in charge of the institution.

In addition to the resident's right to appoint a representative to assert his or her right to personal freedom, he or she is ex lege represented by so-called resident representatives, who are entitled to visit the establishment to get a personal impression of the resident, to inspect relevant documents and to discuss the measures with the competent "guard". Like the resident himself or herself and the head of the

---

<sup>34</sup> See also A. Leischner, C. Zeinhofer, C. Lindner, C. Kopetzki, *Medical Law in Austria*, 2<sup>nd</sup> edition, 2014, N. 293 et seq.

<sup>35</sup> See also A. Leischner, C. Zeinhofer, C. Lindner, C. Kopetzki, n. 34 above, N. 299 et seq.

department, the representative is entitled to request the court to review the restriction of liberty measure.

### C. Practice

In practice, there is a broad awareness of the UN Convention on the Rights of Persons with Disabilities. And, different from other countries, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is considered even in Austrian case-law.

Nevertheless, there are, other than in Austrian guardianship law, no plans to amend legislation. Efforts are made more towards the optimisation of the existing safeguarding system. Its driving force today are the Patient Advocates. These flood the courts with complaints, particularly following amendments to legislation in 2010. This is a seriously costly “problem” of the Austrian System today but there are not yet any reform plans.

## V. SPAIN

In the case of Spain, the most recent reform of deprivation of liberty safeguards happened in July 2015.<sup>36</sup> Differing from France and Austria, the regulation is systematically rooted in private (procedural) law. Special provisions concerning the *restriction* of liberty do not generally exist.

### **Article 763. Non-voluntary hospitalisation due to mental disorders.**

1. The hospitalisation of a person due to mental disorders who is not in a condition to decide for himself/herself, even should he/she be subject to parental authority or guardianship, shall require court authorisation, which shall be obtained from the court of the place of residence of the person affected by such hospitalisation.

Authorisation shall be obtained prior to hospitalisation, unless reasons of urgency should make it necessary to adopt the measure immediately. In such case, the manager of the centre at which patient was admitted shall give the competent court notice thereof as soon as possible and, in any event, within twenty-four hours, so that the court may proceed to ratify the measure, which must take place within no more than seventy-two hours from the time the court was made aware of the hospitalisation. ...

3. Prior to granting authorisation for or ratifying a hospitalisation that has already taken place, the court shall hear the person affected by such decision, the Public Prosecution Service and any another person whose appearance it may deem appropriate or may be requested by the person affected by the measure. Furthermore, the court shall examine the person hospitalised and hear the opinion of the physician in whose care he/she has been entrusted, notwithstanding taking any other evidence it may deem relevant for the case. In all such procedures, the person affected by the hospitalisation measure shall be entitled to representation and defence ...<sup>37</sup>

Spanish law allows for the hospitalisation of a person who has a mental disorder and who is not in a condition to decide for himself or herself. The interests protected are

---

<sup>36</sup> For (partially outdated) country reports on Spain in English see for example F. Torres-Gonzalez, Country report on Spain, in: Salize, Dreßing, Peitz (eds.), n. 3 above, pp. 131 ff.; FRA, n. 3 above, Country report on Spain, full text available at <[http://fra.europa.eu/sites/default/files/fra\\_uploads/2146-mental-health-study-2009-ES.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/2146-mental-health-study-2009-ES.pdf)> (last visited July 17, 2017).

<sup>37</sup> Full text in English available at <<http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traduccion-derecho-espanol>> (last visited July 17, 2017).

not closely defined and even Spanish decisions authorising deprivation of liberty show a mixture of different arguments relating to private and public interests.

In general, the competent “guard” is the judge. Authorisation shall be obtained prior to hospitalisation, unless reasons of urgency make it necessary to adopt the measure immediately. In such cases, the manager of the centre at which the patient was admitted shall give the competent court notice thereof as soon as possible and, in any event, within twenty-four hours. This fast-track procedure is used, for example, in the province of Madrid in about 99% of the cases.

In addition, there are the commonly known safeguards, including a hearing of the person affected, their examination and the appointment of a representative. However, this is only the starting point. Recently the constitutional court took a closer look at these provisions. It strengthened the legal provisions with additional court-directed safeguarding processes, including, for example, the requirement for a certain number of medical certificates.<sup>38</sup>

In addition, the Spanish constitutional court judged the provisions concerning deprivation of liberty unconstitutional because of mistakes in the legislation process. As a consequence, the way was cleared for a fundamental revision. There was no shortage of reform proposals as the UN Convention on the Rights of Persons with Disabilities is foremost in today’s discussions.<sup>39</sup>

The Spanish parliament adopted new provisions in July 2015.<sup>40</sup> The formal legislation process doesn’t seem to pose an obstacle this time. The only drawback is that the new provisions are identical to the old ones.<sup>41</sup>

## VI. SUMMARY

Taking an overview of the legislation in this sample of countries regarding the deprivation of liberty in mental and social care settings, there is a trend to distinguish between provisions concerning deprivation of liberty by “hospitalisation” and other deprivations or restrictions of liberty. Although jurisprudence and legal literature struggle to delineate deprivation of liberty by hospitalisation from other deprivations or restrictions of liberty, both seem to represent fundamentally different categories. While the starting point, deprivation of liberty, is the same – and conditions therefore are at least similar – it is the safeguarding process that marks their differences.

In particular, there is a trend to emphasise the role of the judge, or at least an independent person, but there is no consensus as to whether the judge should play a role in the admission or control process. Each national legislation tries to reconcile its problems with special fast track procedures or explicit deadlines for the decision of the court. The judge does not replace the *medical* experts, but is considered a neutral,

---

<sup>38</sup> Spanish Constitutional Court, Sentencia 141/2012, full text available in Spanish at <<http://hj.tribunalconstitucional.es/en/Resolucion/Show/22988>> (last visited July 17, 2017).

<sup>39</sup> For example, in Spanish, J. Pallarés Neila, ‘Podrías decirme, por favour, qué camino he de tomar para salir de aquí’, Rev. Asoc. Esp. Neuropsiq., 2014; 34 (121), pp. 115 et seq; L.F. Barrios Flores, ‘La regulación del internamiento psiquiátrico involuntario en España: carencias jurídicas históricas y actuales’, Derecho y Salud 22 (2012) I, pp. 31 et seq.

<sup>40</sup> See Organic Law (Ley Orgánica) 8/2015, 22.7.2015.

<sup>41</sup> See n. 40 above.

independent expert in *supervising* the decision making process. Amongst others this supervision leads in practice to a higher quality of medical expert opinion. However, after having safeguarded even the safeguards, the importance of proper, continuous training of each person involved in the process is still frequently pointed out. Nevertheless, the impression remains that this personal aspect and its impact on each individual case hides the fact that the continental European systems themselves are based on a historically founded, objective or sometimes still paternalistic perspective on deprivation of liberty. There might be differences between the national legislations, for example in their use of private or public law mechanisms, regarding the appointment of a representative for the person concerned, or even on the amount of information which the person must receive. But from the today's individual perspective on deprivation of liberty such systems necessarily remain patchwork, taking the wrong starting point.<sup>42</sup>

What does it mean if mental disorder eventually falls away as a condition for deprivation of liberty? The “danger” criteria could take centre-stage – with all its known disadvantages.<sup>43</sup> It might be a step forward to break down the “danger” criterion into its elements: into a situation that will result with sufficient probability in damage to one of the interests protected by law, while the notion of “interest” could serve as a link to future developments in other questions concerning self-determination, as in guardianship or contract law. At the end of the day both concepts might not produce large differences in theory but today's practice shows, that at least the above presented European systems are not able to control the centrifugal forces they have released.

---

<sup>42</sup> See Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities*, September 2015, paras. 6 et seq <<http://www.ohchr.org/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc>> (last visited July 17, 2017).

<sup>43</sup> For the notion of “dangerousness” see P. Bartlett and R. Sandland, *Mental Health Law: Policy and Practice*, 4<sup>th</sup> edition, 2014, pp. 239 seqq.