

# THE RIGHT TO MENTAL HEALTH: A HUMAN RIGHTS APPROACH

Human Rights Research Series, Volume 100.

The titles published in this series are listed at the end of this volume.

# The Right to Mental Health: A Human Rights Approach

Natalie ABROKWA



INTERSENTIA

Antwerpen – Gent – Cambridge

Intersentia Ltd  
8 Wellington Mews | Wellington Street  
Cambridge | CB1 1HW | United Kingdom  
Tel.: +44 1223 736 170  
Email: mail@intersentia.co.uk  
www.intersentia.com | www.intersentia.co.uk

*Distribution for the UK and the rest of the world (incl. Eastern Europe):*

NBN International  
1 Deltic Avenue, Rooksley  
Milton Keynes MK13 8LD  
United Kingdom  
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331  
Email: orders@nbninternational.com

*Distribution for Europe:*

Lefebvre Sarrut Belgium NV  
Hoogstraat 139/6  
1000 Brussels  
Belgium  
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21  
Email: mail@intersentia.be

*Distribution for the USA and Canada:*

Independent Publishers Group  
Order Department  
814 North Franklin Street  
Chicago, IL60610  
USA  
Tel.: +1 800 888 4741 (toll free) | Fax: +1312 337 5985  
Email: orders@ipgbook.com

## The Right to Mental Health: A Human Rights Approach

© Natalie Abrokwa 2023

The author has asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as authors of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

Cover design by Danny Juchtmans / [www.dsigngraphics.be](http://www.dsigngraphics.be)

Artwork on cover © Rikke / Shutterstock

ISBN 978-1-83970-359-1 (paperback)

ISBN 978-1-83970-360-7 (PDF)

D/2023/7849/78

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

‘not only is there no health without mental health, but there  
is no mental health without human rights’.<sup>1</sup>

---

<sup>1</sup> Audrey Chapman and others, ‘Reimagining the Mental Health Paradigm for Our Collective Well-Being’ (2020) 22(1) Health and Human Rights Journal 1, 1.



# ACKNOWLEDGEMENTS

*To Kofi*

Writing a dissertation is like a wild rollercoaster ride: there are many ups and downs; it is very exciting but also a bit scary here and there. From the first step until the last keystroke, there were wonderful people to whom I am deeply grateful for – without their encouragement, trust, support, and love, I would have not mastered this ride.

A heartfelt thank you goes out to my two supervisors, Prof. Birgit Toebes and Prof. Aart Hendriks. I could have not asked for a better team. Brigit, you recognised the value of my research project when few others did. You supported me from day one and I am deeply grateful for your mentoring, your trust in me and the opportunities you gave me along the way. Aart, I would like to extend my sincere thanks for your academic encouragement, and your critical reflection on law and the bigger picture. Your critical questions have improved my work tremendously. You both offered me a mixture of freedom and guidance that helped me develop as a scholar. I would like to express my sincere gratitude for your time and ideas. I would also like to offer my special thanks to the members of my Assessment Committee, Prof. van der Wolf, Prof. Sinding Aasen, and Prof. Degener for their insightful comments and suggestions.

I would have never gotten on this wild ride if it was not for my dear friend Samory and my friend and former colleague Wendy. You both believed that I could master a PhD and it was through your support and friendship, that I dared to take on this next academic challenge. At this point, I also need to take the opportunity to thank all my colleagues in the wider mental health community in Ghana – some of whom became interviewees for my dissertation – it is through them that I found the motivation (and passion) to research on the right to mental health.

Despite having been an external PhD student and only occasionally visiting the University of Groningen, I would like to express my special thanks to my colleagues in the Transboundary Legal Department for their collegiality and challenging debates. I remember many warm get-togethers in the office, over coffee or dinner – in addition to all the online meetings. Even from a distance, you made me feel part of our department. An experience I will always cherish.

Last but certainly not least, I wish to pay my deepest gratitude to my family. *Mama* and *Papa*, I am proud to share this moment with you. You have supported me through many wild rollercoaster rides in my life. Thank you for teaching me to dream big and giving me the freedom to discover unknown paths. To my big sister Evelyn, thank you

for showing me and encouraging me at crucial moments in my life that it is okay to take unknown paths. I would also like to thank my son Kuno, who joined our family during my PhD process, for giving me boundless happiness, and for making me stronger and better. Nobody has been more important to me in the pursuit of my PhD than my husband Kofi, whose love and encouragement are always with me. Kofi, where do I begin thanking you? Thank you for being there for me at every step of the way in my PhD process. Thank you for reading early drafts and providing feedback, for the thought-provoking discussions, for your late-night-proof readings, for supporting my international work-related travels – especially as a new mother, thank you for believing in me when I was struggling to believe in myself, and for helping me unwind during the difficult times of my PhD journey. I appreciate every step you take with me in this life. *Me do wo.*



## LIST OF ABBREVIATIONS

AAAQ	Availability Accessibility Acceptability Quality
ACHR	American Convention on Human Rights
AfChHPR	African Charter on Human and Peoples' Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CHPS	Community-based Health Planning and Services
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CteeCRC	Committee on the Rights of the Child
CteeESCR	Committee on Economic, Social and Cultural Rights
CteeRPD	Committee on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECT	Electroconvulsive therapy
ECtHR	European Court of Human Rights
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union
FRA	European Union Agency for Fundamental Rights
HICs	High-income countries
HRCtee	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LMIC	Low- and middle-income country
NCDs	Non-communicable diseases
NCPD	National Council of Persons with Disabilities
NGOs	Non-governmental Organisations
NHIS	National Health Insurance Scheme
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol of the Convention Against Torture
UDHR	Universal Declaration of Human Rights

List of Abbreviations

UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
WGAD	Working Group on Arbitrary Detention
WHO	World Health Organization

# CONTENTS

<i>Acknowledgements</i> .....	vii
<i>List of Abbreviations</i> .....	ix

## PART 1.

CONCEPT AND PROBLEM .....	1
---------------------------	---

### Chapter 1.

<b>Introduction</b> .....	3
---------------------------	---

1.1 Background and Problem .....	3
1.2 Research Questions and Structure.....	7
1.2.1 Research Questions .....	7
1.2.2 Research Structure .....	8
1.3 Methodology.....	9
1.4 Concluding Summary .....	12

### Chapter 2.

<b>Mental Health and Mental Healthcare: Background and Content</b> .....	13
--	----

2.1 Introduction .....	13
2.2 The Meaning of Relevant Terms.....	13
2.2.1 The Concept of 'Mental Health' .....	14
2.2.1.1 The Definition of 'Mental Health' .....	14
2.2.2 The Concept of 'Psychosocial Disability' .....	16
2.2.2.1 The Debate on Terminology .....	17
2.2.2.2 The Definition of 'Psychosocial Disability'.....	18
2.2.3 The Concept of 'Mental Healthcare' .....	21
2.2.3.1 The Definition of 'Mental Healthcare'.....	21
2.2.3.1.1 Institutional Mental Health Services .....	22
2.2.3.1.2 Integrated Mental Health Services .....	22
2.2.3.1.3 Community-based Mental Health Services.....	23
2.3 The Influence of Culture on Accessing Mental Healthcare .....	24
2.3.1 Health-seeking Behaviour and the Perception of Mental Health Conditions and Psychosocial Disabilities.....	25
2.3.2 The Therapeutic Relationship .....	27
2.3.3 Different Approaches to Mental Healthcare.....	28

2.3.3.1	Conventional Mental Healthcare. . . . .	28
2.3.3.2	Traditional Mental Healthcare. . . . .	30
2.3.3.2.1	The Concept of Traditional Healthcare . . . . .	30
2.3.3.2.2	The Governance of Traditional Healthcare . . . . .	32
2.3.3.3	Is There a Benefit of Combining Both Approaches? . . . . .	32
2.4	Challenges Associated with the Mental Healthcare Context . . . . .	33
2.4.1	Barriers to Accessing Mental Healthcare Services . . . . .	33
2.4.1.1	Stigma and Discrimination. . . . .	33
2.4.1.2	Different Perceptions of Psychosocial Disability. . . . .	34
2.4.1.3	Financial Barriers . . . . .	34
2.4.1.4	Availability of Services. . . . .	35
2.4.2	Specific Human Rights Violations in Mental Healthcare Settings. . . . .	36
2.4.2.1	Denial of Free and Informed Consent. . . . .	36
2.4.2.2	Involuntary Treatment and Hospitalisation. . . . .	37
2.5	Concluding Summary . . . . .	38

PART 2.

THE RIGHT TO MENTAL HEALTH AND THE APPLICABLE HUMAN RIGHTS FRAMEWORK. . . . .	39
---	----

**Chapter 3.**

<b>Mental Health as a Human Right: The Evolving Framework . . . . .</b>	<b>41</b>	
3.1	Introduction . . . . .	41
3.2	Mental Health in International Human Rights Law. . . . .	42
3.3	Mental Health in Regional Human Rights Law . . . . .	46
3.4	Mental Health in Domestic Law . . . . .	48
3.5	Taking a Broader View: Mental Health in International Soft Law Instruments	50
3.6	The Meaning of the Right to Mental Health . . . . .	52
3.6.1	Scholarly Debate over the Right to Health and Mental Health. . . . .	52
3.6.2	Delineating a Human Rights Framework in the Mental Health Context . . . . .	54
3.7	Concluding Summary . . . . .	57

**Chapter 4.**

<b>The Right to Health Norm and Mental Health. . . . .</b>	<b>59</b>	
4.1	Introduction . . . . .	59
4.2	Normative Content of the Right to the Highest Attainable Standard of Mental Health . . . . .	60
4.2.1	The Scope of the Right to Health and Mental Health. . . . .	61
4.2.1.1	Underlying Determinants of Mental Health . . . . .	61
4.2.1.2	Access to Mental Healthcare. . . . .	62
4.2.2	The Core Content of the Right to Health and Mental health. . . . .	67

4.3	State's Obligations Arising from the Right to Health and Mental Health. . . . .	69
4.3.1	Obligation to Respect the Right to Health regarding Mental Health. . .	70
4.3.2	Obligation to Protect the Right to Health regarding Mental Health . . .	70
4.3.3	Obligation to Fulfil the Right to Health regarding Mental Health. . . . .	71
4.4	Mental Health as a Justiciable Element of the Right to Health. . . . .	72
4.4.1	Case Law at the UN Level . . . . .	74
4.4.2	Regional Case Law on the Right to Health and Mental Health. . . . .	74
4.4.2.1	A Violation of the Right to Health Norm and Related Rights. . . . .	74
4.4.2.2	A Violation of other Human Rights Explicitly Linked to the Right to Health. . . . .	76
4.4.2.3	Opportunities and Challenges . . . . .	78
4.5	Concluding Summary . . . . .	79
<b>Chapter 5.</b>		
<b>A Human Rights Approach to Psychosocial Disability. . . . .</b>		
5.1	Introduction . . . . .	81
5.2	Protection against Discrimination . . . . .	87
5.2.1	Non-discrimination and the Right to Health Norm. . . . .	88
5.2.2	The Scope of Article 5 CRPD and Mental Healthcare . . . . .	90
5.2.2.1	The Legal Dimension of Equality. . . . .	91
5.2.2.2	The Legal Dimension of Prohibiting Discrimination. . . . .	92
5.2.2.3	The Duty to Ensure Reasonable Accommodation. . . . .	95
5.2.2.4	Specific Measures as Legitimate Differential Treatment . . . . .	97
5.2.3	Obligations Derived from the Right to Equality and Non- discrimination in regard to Mental Healthcare. . . . .	98
5.2.4	Synopsis . . . . .	100
5.3	Legal Capacity and the Protection of Persons not Able to Give Consent . . . . .	101
5.3.1	Legal Capacity and the Right to Health Norm. . . . .	102
5.3.2	The Scope of Article 12 CRPD and Mental Healthcare . . . . .	104
5.3.2.1	The Right to Legal Capacity and Mental Capacity to Consent. . . . .	104
5.3.2.2	The Right to Supported Decision-making and Safeguards . . . . .	108
5.3.3	Obligations Derived from the Right to Legal Capacity in regard to Mental Healthcare . . . . .	111
5.3.4	Controversial Issue: Disadvantages Emerging from Universal Legal Capacity . . . . .	115
5.3.5	Synopsis . . . . .	118
5.4	Protection from Non-consensual Mental Health Treatment . . . . .	119
5.4.1	Non-consensual Treatment and the Right to Health Norm . . . . .	122
5.4.2	Involuntary Treatment and the Protection of Integrity (Article 17 CPRD). . . . .	123
5.4.2.1	The Scope of the Right to Protect the Integrity of the Person . . . . .	124

5.4.2.2	Limitations on the Enjoyment of Personal Integrity . . . . .	126
5.4.3	Situations Amounting to Torture or Ill-treatment (Article 15 CRPD) . . . . .	130
5.4.3.1	The Scope of the Right to be Free from Torture or Ill-treatment . . . . .	132
5.4.3.1.1	The Definition of Torture and Ill-treatment in regard to Mental Healthcare . . . . .	132
5.4.3.1.2	Treatment without Consent . . . . .	136
5.4.3.2	Seclusion and Restraints . . . . .	137
5.4.3.3	Living Conditions in Mental Health Institutions . . . . .	141
5.4.3.4	Controversial Issue: Justifications for Restrictive Interventions . . . . .	142
5.4.4	A Broader Protection against Non-consensual Treatment: The Opportunities of Article 16 . . . . .	145
5.4.4.1	The Scope of the Right to be Free from Exploitation, Violence and Abuse . . . . .	146
5.4.4.2	The Inherent Tension between Protection and Autonomy . . . . .	151
5.4.5	Obligations Derived from the Right to be Free from Non-consensual Treatment in Mental Healthcare . . . . .	152
5.4.6	Synopsis . . . . .	156
5.5	Protection from Involuntary Placement in an Institution . . . . .	158
5.5.1	Involuntary Placement and the Right to Health Norm . . . . .	160
5.5.2	Freedom from Involuntary Hospitalisation (Article 14 CRPD) . . . . .	161
5.5.2.1	The Scope of the Right to Liberty and Security . . . . .	163
5.5.2.1.1	Deprivation of Liberty on the Basis of Psychosocial Disability . . . . .	165
5.5.2.2	Controversial issue: Suicide Prevention versus the Right to Liberty . . . . .	172
5.5.2.3	Involuntary Treatment as an Alternative to Involuntary Hospitalisation? . . . . .	174
5.5.3	Deinstitutionalisation and Independent Living Arrangements (Article 19 CRPD) . . . . .	175
5.5.3.1	The Scope of the Right to Live Independently and be Included in the Community . . . . .	179
5.5.3.1.1	The Right to Live Independently . . . . .	179
5.5.3.1.2	The Right to be Included in the Community . . . . .	182
5.5.3.2	Institutionalisation as a Threat to Life . . . . .	184
5.5.4	Obligations Derived from the Right to be Free from Involuntary Placement in a Mental Healthcare Institution . . . . .	185
5.6	Concluding Summary . . . . .	189

PART 3	
COUNTRY STUDY ANALYSIS.....	193
<b>Chapter 6.</b>	
<b>Bridging Theory and Practice through Country Studies .....</b>	<b>195</b>
6.1 Introduction .....	195
6.2 Design.....	196
6.2.1 Research Approach.....	196
6.2.2 Methodology .....	197
6.2.2.1 Rationale for Country Selection.....	198
6.2.2.2 Methods of Data Collection for the Case Study on Ghana ..	199
6.3 Country Study I: Ghana. ....	201
6.3.1 Background of Ghana .....	202
6.3.1.1 Geographic, Demographic and Economic Characteristics ..	202
6.3.1.2 Legal and Administrative Context.....	202
6.3.1.3 Mental Health Service Provision .....	204
6.3.2 Ghana's Mental Health Legislative Framework.....	209
6.3.2.1 Relevant Legislation .....	209
6.3.2.2 Relevant Policies, Guidelines and Programmes .....	213
6.3.3 Persisting Key Challenge: Interventions Amounting to Ill-Treatment	216
6.3.3.1 The Legal Framework regarding Voluntary and	
Involuntary Interventions .....	216
6.3.3.2 The Legal Framework to Protect against Ill-treatment. ....	220
6.3.3.3 The Role of Traditional Healthcare: A Pathway or a	
Challenge? .....	226
6.3.4 Concluding Summary .....	231
6.4 Country Study II: Germany .....	234
6.4.1 Background of Germany.....	234
6.4.1.1 Geographic, Demographic and Economic characteristics...	234
6.4.1.2 Legal and Administrative Context.....	235
6.4.1.3 Mental Health Service Provision .....	236
6.4.2 Germany's Mental Health Legislative Framework .....	240
6.4.2.1 Relevant Legislation .....	241
6.4.2.1.1 Involuntary Admission.....	242
6.4.2.1.2 Involuntary Treatment .....	244
6.4.2.1.3 Complaint Procedures.....	245
6.4.2.1.4 Community-based Care .....	246
6.4.2.2 Relevant Strategies, Plans and Programmes .....	247
6.4.3 Persisting Key Challenge: Guardianship Regulation	
(Betreuungsrecht) .....	249
6.4.3.1 The Legal Framework regarding the Question of	
Incompetence .....	249

6.4.3.1.1	Restriction of the Capacity to Act . . . . .	250
6.4.3.1.2	Avoidance of Heteronomy in Situations of Impaired Decision-making Skills . . . . .	251
6.4.3.2	The Legal Framework regarding the System of Representation. . . . .	254
6.4.3.3	Accessible Supportive Measures as Alternatives . . . . .	260
6.4.4	Concluding Summary . . . . .	261

PART 4.

ADVANCING THE RIGHT TO MENTAL HEALTH: CONCLUSIONS AND RECOMMENDATIONS . . . . .	267
--	-----

**Chapter 7.**

<b>Conclusions and Recommendations . . . . .</b>	<b>269</b>
--	------------

7.1	Introduction . . . . .	269
7.2	Conclusions . . . . .	270
7.3	Recommendations . . . . .	276
7.3.1	States (and State Actors). . . . .	276
7.3.2	The Committee on the Rights of Persons with Disabilities (CteeRPD) . . . . .	278
7.3.3	Non-governmental Organisations (NGOs) . . . . .	278
7.4	Final Remarks . . . . .	278

<i>List of Instruments . . . . .</i>	281
<i>List of Cases . . . . .</i>	285
<i>United Nations Documents . . . . .</i>	287
<i>Documents of Other Bodies . . . . .</i>	295
<i>List of Tables . . . . .</i>	301
<i>Samenvatting (Dutch Summary) . . . . .</i>	303
<i>Selected Bibliography . . . . .</i>	309
<i>Curriculum Vitae . . . . .</i>	321