Global Consultation on the Right to Challenge the Lawfulness of Detention before Court

Persons with psychosocial disabilities[1]

In the context of the consultation held by the Working Group on Arbitrary Detention in cooperation with the United Nations Office of the High Commissioner for Human Rights, we believe it is important to make some remarks regarding the situation of persons with psychosocial disabilities (PWPSD) and recent developments in international human rights law.

We note with concern the progress or no progress at all, made by States towards eliminating committal on mental health grounds as a therapeutic practice, which has been historically used and allowed within the mental health field, marked by the predominance of medical and institutional interventions and the administration of drugs. Since such practice has been naturalized, the deprivation of liberty of PWPSD has become the main state response to address mental conditions, in complete disregard of minimum judicial guarantees and denying this group access to a technical defense.

Such form of intervention by the health system has been linked to a legal framework of judicial capacity which promotes substitute decision-making, denying PWPSD the possibility of deciding over their rights and rendering their situation practically invisible. Thus, deprivation of liberty and the restriction to legal capacity operate as two complementary factors of the same problem: the structural discrimination against this group and their indefinite seclusion in psychiatric hospitals.

In this context, States have to review their practices in the light of recent developments in international human rights law, in particular, the standards developed within the United Nations: the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol[2]; the General Comment on Article 12 of the CRPD, recently adopted by the Committee on the Rights of Persons with Disabilities[3]; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)[4] and its Optional Protocol[5].

In the Inter-American system, States have to take into account the normative framework derived from the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture (IACPPT)[6].

Legal Capacity, Liberty, Security and the Right to Health (arts. 12, 14 and 25 of the CRPD)

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[1] The Convention on the Rights of Persons with Disabilities has coined the term 'mental disability'. However, to refer to this group in the present document we shall use the term '*persons with psychosocial disabilities'*, since this was the name this group had chosen to refer to themselves during the debates on the adoption of the aforementioned convention, even though it was not included in its final wording.

[2] Ratified by Argentina through Law 26,378, enacted in May, 2008 and published in June, 2008.

[3] CRPD/C/GC/1. The document is available at

[4] Granted constitutional status since its incorporation into Art. 75, section 22 of the National Constitution.

[5] Adopted by Argentina through Law 25,932, enacted in September, 2004 and published in the same month. Under the provisions of the Optional Protocol to the CAT, Argentina created the National System for the Prevention of Torture through Law 26,827, enacted on November 28th, 2012 and published on January 7th, 2013.

[6] Adopted by Argentina through Law 23,652, enacted in September, 1988 and published in October in the same year.

When interpreting article 12 of the CRPD, on equal recognition before the law, the Committee on the Rights of Persons with Disabilities explained the link between the right to health- backbone of the treaty-; liberty, and personal security as well as informed consent as part of the right to health.

The Committee has pointed out that: '*Respecting the right to legal capacity of persons with disabilities on an equal basis with others includes respecting the right of persons with disabilities to liberty and security of the person. The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. States parties must refrain from such practices and establish a mechanism to review cases whereby persons with disabilities have been placed in a residential setting without their specific consent.*

The right to enjoyment of the highest attainable standard of health (art. 25) includes the right to health care on the basis of free and informed consent. States parties have an obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment. In conjunction with the right to legal capacity on an equal basis with others, States parties have an obligation not to permit substitute decision-makers to provide consent on behalf of persons with disabilities. All health and medical personnel should ensure appropriate consultation that directly engages the person with disabilities. They should also ensure, to the best of their ability, that assistants or support persons do not substitute or have undue influence over the decisions of persons with disabilities.'

The thematic report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment, Juan E. Méndez, presented before the Human Rights Council on February 1st, 2013[7], also becomes relevant in the matter. The Special Rapporteur clearly stated the need to review and limit abusive practices in health-care settings in view of *'(...) certain key interpretative principles and guidelines, such as the concepts of legal capacity, informed consent, the doctrine of 'medical necessity' and the concept of stigmatized identities (…)'*, which brings us back to the standards mentioned above derived from the CRPD[8].

In order to move forward with the development of these new standards within States, the promotion of deep reforms of their health systems, from a health and social inclusion perspective, is required. This is so since it is in such systems that the structural causes of the massive deprivation of liberty of persons with psychosocial disabilities lies, as a response to mental conditions. In this regard, current international rules adopt a definition of the right to health encompassing a wide range of socioeconomic factors that promote the conditions under which persons can lead a healthy life[9], extending their scope to the underlying determinants of health[10], such as food and nutrition, housing,

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[7] A/HRC/22/53

[8] CRPD/C/GC/1, paras. 40 and 41.

[9] In this regard, see, for example, article 12 of the International Covenant on Economic, Social and Cultural Rights.

[10] In this regard, the 2008 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health highlights that: *'The health of individuals, communities and populations requires more than medical care. For this reason, international human rights law casts the right to the highest attainable standard of physical and mental health as an inclusive right extending to not only timely and appropriate medical care but also the underlying determinants of health, (…). The social determinants of health, such as gender, poverty and social exclusion, are major preoccupations of the right to the highest attainable standard of health (...)'*. Cf. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Human Rights Council, A/HRC/7/11, January 31st, 2008, para. 45.

access to safe water and adequate sanitation, among others[11]. This approach aims at designing sanitary policies from the perspective of health promotion, defined by the World Health Organization (WHO) as '*the process of enabling people to increase control over their health in order to improve it*'[12].

As an operational guideline, this viewpoint requires a definition and orientation of health policies towards a model that guarantees the highest attainable standard of health and well-being for the entire population, by promoting changes in health-care settings and reducing the probabilities of contracting a disease. The latter involves taking preventive action in order to reduce risk factors. At the same time, the health promotion perspective corresponds with the need to design community-based health-care policies, which is why it is necessary to prioritize primary health care (PHC)[13], a level that must be strengthened by State sanitary policies.

According to this approach, the treatment of mental conditions must be interdisciplinary and aimed at sustaining the individual's family, community and social bonds in their environment, from a primary health-care perspective which abolishes seclusion as a sanitary alternative. It is essential to integrate the knowledge and experiences from various fields in order to understand which are the social determinants of health and their particular characteristics[14].

Persons with mental or psychosocial disabilities in the prison system

The arbitrariness which characterizes detentions against persons living with mental or psychosocial disabilities in the penal system becomes manifest in various ways. Both in the development of criminal proceedings –e where the individual's responsibility is debated–, and in the course of prison procedures during the deprivation of liberty (whether it is by an imposition of preventive detention, a sentence or an alternative penalty which is equal to confinement), PWPSD encounter numerous obstacles that prevent their effective access to justice and their enjoyment of due process guarantees[15].

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[11] Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the enjoyment of the highest attainable standard of health (art. 12 of the International Covenant on Economic, Social and Cultural Rights), (22° Session, 2000), UN Doc E/C. 12/2000/4 (2000), para. 4. This view was also taken by the World Health Organization Commission on Social Determinants of Health in its report of March 16th, 2009 (Documents A62/9 and WHA62.14). In the same regard, in relation to the determinants of health, see the Report on the Expert Group Meeting. Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4 Para. 9.a).

[12] Cfr. Health Promotion Glossary by the Division of Health Promotion, Education and Communications, Health Promotion and Health Education Unit, World Health Organization, 1998 (WHO/HPR/HEP/98.1). It takes as reference the Ottawa Charter for Health Promotion, WHO, Geneva, 1986.

[13] According to the Alma-Ata Declaration, adopted by the WHO in 1978 in Geneva, primary health care is essential health care made accessible at a cost a country and community can afford, with methods that are practical, scientifically sound and socially acceptable. Cf. Health Promotion Glossary by the Division of Health Promotion, Education and Communications, Health Promotion and Health Education Unit, World Health Organization, 1998, WHO/HPR/HEP/98.1.

[14] To design a health policy based on the principle of promotion of health, disciplines such as sociology, political science, work relations, recreation, physical education, among others, have to be part of the policymaking team. In this respect, the joint proposal of the States of Argentina, Brazil, EE.UU., South Africa, Uruguay and Venezuela contributes to this line of thought, stating that an effective prison management program should take into consideration the prisoners needs with respect to education, meaningful work, health care, exercise and cultural activities. Cfr. Proposal of the Governments Argentina, Brazil, South Africa, United States of America, Uruguay and Venezuela. E/CN.15/2013/CRP.6 Rules 6.5.

[15] In violation of the right to due process or fair trial enshrined in articles 10 and 11 of the Universal Declaration of Human Rights, article 14 of the International Covenant on Civil and Political Rights, articles 8 and 25 of the American Convention on Human Rights and articles 14, 16, 17, 18, 19 and 20 of the Political Constitution of the United Mexican States; since it contradicts the principles that rule and offer the defendant the possibility of participating in his own proceedings.

It is common for persons with psychosocial disabilities in conflict with the criminal law to be, simply due to their having a psychiatric diagnosis, declared exempt from criminal responsibility, which means that the State does not hold the individual accountable for not being able to understand the criminality of his or her conduct. Such declaration is almost invariably associated with a 'judgment of dangerousness' which justifies the judicial decision to impose alternative penalties: the so-called security measures.

In this case, there is no judgment of the charges under due process guarantees, while there is an imposition of detention –in general, for an indefinite period– as a mechanism of social control on the grounds of a psychiatric diagnosis alone which confirms the cited dangerousness. Such deprivation of liberty is usually implemented in 'penal psychiatric' wards within the prison system itself, thus aggravating segregation and submitting the individual to a double logic of coercion: the criminal one and the medical-psychiatric one.

The dangerousness criterion is a residue of criminological positivism, which is based on a medical diagnosis of certain characteristics of the individual which make him or her 'dangerous' to society. Security measures which deprive a person from his or her liberty, based on the criterion of 'dangerousness', violate the principle of criminal lawfulness (art. 9 of the International Covenant on Civil and Political Rights and art. 9 of the American Convention on Human Rights)[16].

In addition, when a person is declared exempt from responsibility, due to the characteristics of the proceedings themselves, neither effective access to justice nor due process guarantees are upheld. One of the most notorious infringements is the violation to the right to be heard. The absolute silencing of persons with psychosocial disabilities during the proceedings or the creation of false spaces for them to be heard (hearings for which PWPSD cannot rely on the necessary information or assistance; the lack of communicational accessibility, the setting of deadlines which are inadequate for these persons' needs, etc.) represent a fictitious opportunity for participation, which not only mocks due process guarantees but also adds to the already existent stigma and disability.

Final recommendations:

In the present scenario, States have the obligation to implement additional measures to guarantee the right to challenge arbitrary detentions against PWPSD. To that end, we consider that States have to adequate their local legislation and modify their interventions, in both civil and criminal terms, so that they:

- Revise their domestic legal framework in order to adequate the legal capacity regime to article 12 of the CRPD, establishing a model in which mental conditions are not considered grounds on which to restrict the right of persons with disabilities to make their own decisions, even in the event of a crisis. It is the incapacitation model which allows for a deprivation of liberty on the grounds of a disability.

[16] The Inter-American Court of Human Rights has pointed out that citing the criterion of dangerousness to justify sanctions in the criminal system constitutes *'…an expression of the exercise of the state's ius puniendi over the basis of the personal characteristics of the agent and not the act committed, that is, it substitutes the Criminal System based on the crime committed, proper of the criminal system of a democratic society, for a Criminal System based on the situation of the perpetrator, which opens the door to authoritarianism precisely in a subject in which the juridical rights of greatest hierarchy are at stake.'* (Inter-American Court of Human Rights, Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs. Judgment of June 20th, 2005, series 126, paras. 94/96).

- Revise their legal framework in order to eliminate deprivation of liberty on the grounds of a disability.
- Promote a thorough transformation of their health-care systems in order to guarantee PWPSD the enjoyment of the highest attainable standard of health, on the basis of a community-based mental health-care model.
- Review cases in which persons with psychosocial disabilities have been committed to mental institutions without their express consent.
- Implement all reasonable adjustments which are required for their judicial systems to secure access to justice and due process guarantees for persons with psychosocial disabilities who face a restriction of their liberty, on an equal basis with others.
- Establish that the right to enjoy the highest attainable standard of health includes the right to health care on the basis of free and informed consent (art. 25); providing effective mechanisms to ensure that consent is met in interventions involving persons living with psychosocial disabilities. In order to do so, it will be necessary to foster the creation and availability of support mechanisms for decision-making as regards treatment, in case they are required by the individual, so his or her will is respected in all cases. In this regard, it is necessary to promote a system that forbids the provision of consent by substitute decision-makers and which makes available the necessary tools to identify genuine decisions in cases where a person's will has been suppressed by the institutional logic of subjective subjugation itself.
- Abolish the legal concept of security measures in their criminal systems, guaranteeing that a person declared exempt from responsibility, as long as he or she is protected by the presumption of innocence, is not subjected to a criminal intervention by the State. As a consequence, a health-care system which is in line with the points aforementioned will deal with these situations, in compliance with the standards established by the Convention on the Rights of Persons with Disabilities.