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Report on the Rights of Persons with intellectual and psychosocial disabilities in the criminal justice system.

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Fuego 965, Jardines del Pedregal
Álvaro Obregón, 01900, México, D.F.
Teléfono/fax + 52 (55) 5652 7366



RIGHTS OF PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM

1. Violation of the right to legal capacity of persons with psychosocial and intellectual disabilities and their unequal access to justice

Mexico ratified the Convention on the Rights of Persons with Disabilities (hereinafter "CRPD" or "Convention") on 2008 undertaking the commitment to adopt all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities. As part of this Convention, the States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. To ensure effective access to justice for persons with disabilities on an equal basis with others, States Parties shall provide procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, in all legal proceedings.¹

Five years have passed since the ratification of this international instrument and there is still much to be done on the legislative modifications put in place to guarantee that the rights of persons with disabilities are enforced. Particularly regarding the criminal justice system and issues related to legal capacity and equal access to justice of persons with psychosocial and intellectual disabilities.²

The current criminal legal framework violates in many ways the rights of persons with psychosocial and intellectual disabilities as it presupposes their incapacity to stand in trial and to be effective participants of legal procedures. When an individual with psychosocial and/or intellectual disability faces a criminal procedure, the judicial authorities are obliged by law to adopt the necessary procedures to ensure that the defendant with "mental illness or intellectual retardation" will not pose a risk to society.³ Therefore, the law calls for a special criminal procedure in which defendants are considered objects of treatment and are deprived of their legal capacity throughout the entire legal process. For example, they aren't able to choose a lawyer or to establish a defense strategy in coordination with his/her attorney.

This means that people with psychosocial or intellectual disabilities are treated differently or separately to everyone else because of their disability. In that sense it is urgent to advocate for the standardization of the domestic legal framework with the CRPD as regards to the equal recognition of persons with disabilities before the law. Particularly, to review the current criminal legislation in order to replace the model of substitute decision-making for a system of supported decision-making that upholds the autonomy, wishes and preferences of the individual, guaranteeing that people with psychosocial or intellectual disabilities have the same access to justice in much the same way as anyone else.

Recommendations:

1. The standards under the CRPD must be taken into account in the implementation of the new criminal justice system in Mexico,

¹ United Nations, Convention on the Rights of Persons with Disabilities.

² United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee), *Concluding observations: Tunisia*, CRPD/C/TUN/CO/1 (2011), par. 23; *Concluding Observations: Spain* (2011), CRPD/C/ESP/CO/1, par. 32; *Concluding Observations: Peru* (2011) CRPD/C/PER/CO/1, par. 25; *Concluding Observations: Hungary* (2011), CRPD/C/HUN/CO/1, par. 26; *Concluding Observations: China* (2012), CRPD/C/CHN/CO/1, par. 22

³ Código Penal del Distrito Federal, Art.29, Fracción VII.

mainly those relating to access to justice, legal capacity, and the principle of equality and non-discrimination.

2. Align the criminal legal framework with the CRPD, particularly review the grounds of unaccountability and the special procedure for *inimputables*.

2. Lack of appropriate supports in the criminal process

Besides the inadequate legal framework, persons with psychosocial and intellectual disabilities are also made vulnerable by a criminal justice system that “neither recognizes nor supports their particular needs, which, in turn, places people with psychosocial and intellectual disabilities at greater risk of discrimination and abuse than their non-disabled peers.”⁴

One of the main issues regarding psychosocial and intellectual disabilities in the criminal justice system is the lack of mechanisms and human resources to help identify when an individual might have intellectual or psychosocial disabilities. Failure to identify disability is likely to mean that appropriate treatment or support will not be forthcoming. But not only that, it also means, in most cases, that suspects spend long periods in police custody or in prison waiting for psychiatric assessment.

In Mexico City, the Prosecutor’s office has no one at the moment capable of doing psychiatric assessments. The Public Defense Office has only one psychiatrist. Therefore, the criminal system has to rely on the Federal Ministry of Health to get the necessary medical exams performed. However, the reality of the Ministry of Health is not better. The Department of forensic medicine at the Hospital Fray Bernardino Álvarez received in one-year period about 1,493 petitions from

the judicial authorities to complete examinations. Approximately 30% related to criminal justice. This Department has currently two psychiatrists and 3 psychologists, which causes serious delays in the assessments, taking approximately eight months for a case to be considered.⁵

In addition to the lack of screening procedures within the criminal justice system, there is also a shortage of appropriately qualified staff and limited training opportunities. Empirical evidence suggests that criminal justice staff have discriminatory attitudes and prejudices against persons with psychosocial and intellectual disabilities and that this stigma influences the outcome of criminal procedures. In this sense, it is of fundamental importance to provide appropriate training for those working in the field of administration of justice, including police, judges, defenders, and prison staff.

Recommendations:

1. Create the necessary supports and adjustments for individuals with intellectual and psychosocial disabilities within the criminal justice system to assist their participation in their procedures.
2. Provide appropriate training for criminal justice agencies regarding the rights of persons with disabilities and the new paradigm derived from the CRPD.
3. Guarantee the existence of screening procedures in the earliest stages of the criminal process to help identify when an individual might have a psychosocial or intellectual disability in order to put into place the necessary supports and accommodations.

⁴ Jenny Talbot and Open Society Foundation, Project on disability rights and criminal justice in Zambia.

⁵ This information was obtained by interviews with members of the Ministry of Health.

3. Deprivation of liberty of defendants with psychosocial and intellectual disabilities.

In Mexico, when an individual is declared unfit to stand in trial, the judge imposes a sentence called security measure. Although security measures are generally understood as “psychiatric treatment”, they actually translate into long time incarceration. The existing legislation doesn’t contain clear regulations regarding the duration of security measures, which means that it is determined solely by the judge, who rarely has the skills or the specialized knowledge to determine the best course of “treatment”.

Deprivation of liberty of a person with disabilities based solely on its condition is arbitrary and incompatible with the standards established by the CRPD. Therefore, the purpose of security measures should be discussed and alternatives to incarceration for offenders with psychosocial and intellectual disabilities developed.

Recommendations:

1. Consider the following conditions for the implementation of security measures: a) the penal sanction cannot be applied unless there is a conduct which has injured a legal right already contained in the criminal code (*nullum crimen sine lege*), b) security measures should be apply case by case, and c) the detention cannot exceed the maximum custodial sentence of the crime concerned.

4. Persons with psychosocial and intellectual disabilities in prison

There are currently two specialized detention centers in Mexico for persons with mental illness or intellectual disabilities: the Male Center for Psychosocial Rehabilitation (CEVAREPSI), in Mexico City and the Federal Center for Psychosocial Rehabilitation (CEFEREPSI), located in Morelos.

Although precise data is not available, the information obtained suggests that by November 2011 there were 40,411 inmates in Mexico City of which 796 had been classified as mentally disabled and therefore unaccountable.⁶ The Federal Center holds 187 persons in detention. Comparing these figures to international statistics it becomes clear that it is far below reality. In the United States, for example, approximately 10% of the prison population has a severe psychiatric condition, schizophrenia, bipolar disorder or major depression. In United Kingdom, 39% of inmates present a psychosocial disability and 75% have a dual diagnosis.⁷ Finally, in Spain, “10% of the prison population suffers from severe mental disorder”.⁸ These data shed light on at least two aspects: first, the lack of accurate and reliable information on the true extent of psychosocial disability in the prison system and on the other hand, the need to conduct appropriate assessments for all detainees to identify those who might have a disability.

Life in prison for persons with psychosocial disabilities is even more difficult than for the rest of the population as prisons are not equipped to adequately treat them. The Mexican legal framework is already deficient regarding persons with psychosocial and intellectual disabilities in general, but when it refers to the rights of this population living in detention it becomes inexistent.

The conditions of prisons and the insalubrious facilities holding inmates with disabilities, as well as the deficiencies in the provision of

⁶ Information obtained through official response SG/SSP/AS/1047/2011, made through enquiry number 0101000075311 via InfoMex to the Vice-Ministry of the Penitentiary System of the Federal District.

⁷ Prison Reform Trust, *Fair Access to Justice? Support for vulnerable defendants in the criminal courts*, United Kingdom, June 2012.

⁸ *El País Semanal*, 3 de febrero del 2013. http://elpais.com/elpais/2013/02/03/eps/1359918792_007462.html

medical⁹ and rehabilitation services constitute clear human rights violations.

Aside from mental health services, prisons routinely treat prisoners with psychosocial disabilities with the same criteria as the rest of the prison population. Guards expect them to follow the same rules and routines. There is serious lack of understanding of the nature of psychosocial disabilities and general assumption that bad behavior is voluntary or manipulative. Mental health considerations are not included in disciplinary proceedings and benefits to early release are not possible if there is no obedience to prison rules.¹⁰

As recognized by the World Health Organization (WHO), detention by its very nature has an adverse effect on mental health. Therefore, the WHO suggests that incarceration is minimized as much as possible, to be consistent with the needs of the community to see the crime punished effectively.¹¹

Recommendations:

1. Generate accurate and reliable information on the true extent of psychosocial and intellectual disabilities in the prison system.
2. Provide adequate mental health services in prison, which includes training the prison staff, create screening procedures, provide psychological and psychiatric therapies and elaborate personal plans for transition to community.

⁹ In addition to drug treatment, people with mental disabilities require psychosocial rehabilitation treatment. This requires the involvement not only of psychiatrists and general practitioners, but also of professional psychology, education, social work, nursing and physical rehabilitation in conjunction diagnose, treat and rehabilitate these individuals. See Human Rights Diagnosis of the Federal District Part V, Justice System paragraphs 2282 y 2283.

¹⁰ Some of these ideas have been abstracted from the Summary of the Conclusions and Recommendations of the Security Commission in Security and Abuse in US Prisons: http://www.prisoncommission.org/pdfs/prison_commission_summary_es.pdf

¹¹ World Health Organization and World Bank, Global Report on Disability, WHO, Geneva, 2011.

5. Absence of adequate community services and treatments

In general, the reintegration of people into society after a period in prison is extremely complicated and the propensity to relapse without adequate support is very high.


In the case of people with psychosocial and intellectual disabilities, there are no proper mechanisms for the transition from prison back to the community. Considering that the majority of people with psychosocial disabilities are in prisons for minor offenses, as well as the abandonment of these are exacerbated during the period of isolation, the treatment that needs to be provided to these people to allow them to fully reintegrate to society is essential.

Recommendations:

1. Create a comprehensive strategy for community inclusion of people with disabilities, particularly those with intellectual or psychosocial disabilities, including a support program to assist them in decision making processes.
2. Implement a pilot program of treatment within the community of people with mental disabilities as an alternative to incarceration, which ensures their right to access to adequate medical care and assistance, counselors and health professionals, as well as peer support.

6. Lack of consideration for the rights of people with mental disabilities in the implementation of the new criminal justice system

Mexico is going through a process of implementation of the new accusatory system arising from the constitutional reform of 2008. Up to date, regulations in relation to people



with psychosocial disabilities has not changed with the reforms that have been implemented in this new system.

Although adjustments were made legislative procedure codes relating to specific aid that should be provided to people with hearing or visual disabilities, there are no regulations related to mental disability. The traditional response of the State regarding this population continues to be exclusion.

Specifically, the laws regarding legal capacity leaves persons with mental disabilities completely defenseless. The current system confronts them to the following procedural violations: determination of imputability without adequate criteria or specialized protocols; preventive detention levels higher than those among persons without disabilities; impositions of internment as security measures that exceed the penalty for the crime they committed, and failure to appoint counsel.

Recommendations:

1. The standards under the CRPD must be taken into account in the implementation of the new criminal justice system in Mexico, mainly those relating to access to justice, legal capacity, and the principle of equality and non-discrimination.

2. Align the criminal legal framework with the CRPD, particularly review the grounds of unaccountability and the special procedure for *inimputables*.

3. Create the necessary supports and adjustments for individuals with intellectual and psychosocial disabilities within the criminal justice system to assist their participation in their procedures.

4. Provide appropriate training for criminal justice agencies regarding the rights of persons with disabilities and the new paradigm derived from the CRPD.

5. Guarantee the existence of screening procedures in the earliest stages of the criminal process to help identify when an individual might have a psychosocial or intellectual disability in order to put into place the necessary supports and accommodations.

6. Consider the following conditions for the implementation of security measures: a) the penal sanction cannot be applied unless there is a conduct which has injured a legal right already contained in the criminal code (*nullum crimen sine lege*), b) security measures should be apply case by case, and c) the detention cannot exceed the maximum custodial sentence of the crime concerned.

7. Generate accurate and reliable information on the true extent of psychosocial and intellectual disabilities in the prison system.

8. Provide adequate mental health services in prison, which includes training the prison staff, create screening procedures, provide psychological and psychiatric therapies and elaborate personal plans for transition to community.

9. Create a comprehensive strategy for community inclusion of people with disabilities, particularly those with intellectual or psychosocial disabilities, including a support program to assist them in decision making processes.

10. Implement a pilot program of treatment within the community of people with mental disabilities as an alternative to incarceration, which ensures their right to access to adequate medical care and assistance, counselors and health professionals, as well as peer support.