

**THE RIGHTS OF PERSONS WITH MENTAL
DISABILITIES IN THE NEW MEXICAN
CRIMINAL JUSTICE SYSTEM**

A report by:



DISABILITY RIGHTS INTERNATIONAL



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**A report by:
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DISABILITY RIGHTS INTERNATIONAL

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Disability Rights International (DRI) is an international human rights organization dedicated to the rights and full participation in society of people with disabilities. DRI documents abuses and promotes international awareness and oversight of the rights of people with disabilities. DRI trains and supports disability rights and human rights activists worldwide to promote rights enforcement and service-system reform.

DRI is based in Washington, DC with regional offices in Mexico and Serbia. DRI has investigated human rights conditions and collaborated with activists in more than twenty countries of the Americas, Asia, Europe, and the Middle East. DRI has authored or published reports on the United States (2010), Mexico (2010), Vietnam (1999, published by UNICEF), Serbia (2007), Argentina (2007), Romania (2006), Turkey (2005), Peru (2004), US Foreign Policy (2003, US NCD), Kosovo (2002), Mexico (2000), Russia (1999, published by UNICEF), Hungary (1997), and Uruguay (2005). These reports have brought unprecedented international attention to the human rights of people with disabilities.

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We would also like to thank the invaluable participation and timely contributions of the participants of the roundtable discussion. These contributions, included in this report, reflect the obstacles and barriers faced by people with mental disabilities in Mexico to be able to access to the criminal justice system, and propose necessary and realistic solutions to address this problem. We thank the authorities of the Federal Government, representatives of the Judicial Branch, officers from the Human Rights Commission of the Federal District (DFHRC), civil society organizations, mental health professionals, and the families and friends of people with mental disabilities. We are also grateful for the participation of members from the *Colectivo Chuhcan*, the first organization run by persons with psychosocial disabilities in Mexico.

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I. BACKGROUND & SUMMARY

For any criminal justice system to work effectively, it is essential to take into account the rights of persons with mental disabilities given that they are more likely than the rest of the population to be involved in criminal proceedings – either as defendants, victims or witnesses.¹ During criminal proceedings, these persons with physical and mental disabilities face numerous obstacles to effective exercise of their right to justice.² It is well established that this population requires a range of accommodations with regard to physical access, communications, as well as psychological and social support. Because of this lack of accommodations and other factors – including the deplorable conditions prevailing in jails, prisons, and psychiatric services,³ a disproportionate number of people who have been incarcerated have a mental disability. Some international studies have estimated that 40% of people in criminal justice systems have mental disabilities.⁴ In countries, such as Mexico, with no community-based service system, the number may be even higher.⁵ Despite this, Mexican criminal justice officials reported to us that the number of people with mental disabilities in the criminal justice system is assumed to be about 2%, which shows how poor identification of this group is since this percentage makes absolutely no sense when compared to international data. Given that in Mexico there is no effective system for identifying people in the criminal justice system with mental disabilities, by definition it also becomes clear that Mexico does not have a good system for diversion or treatment. In the 2010

¹ Blzchut, *The Right of Persons with Intellectual, Psychosocial and Communication Disabilities to Access to Justice in the Criminal Process*, p. 3.

² United Nations Office on Drugs and Crime, *Handbook on Prisoners with special needs* (2009) Vienna, p. 12 <http://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf>, [Last visit, June 2013].

³ United Nations Office on Drugs and Crime (UNODC), *Handbook on prisoners with special needs* (2009), p. 11, <http://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf>, [Last visit June 2013]

⁴ See Bernstein, Robert, *Criminal Justice Reform: Lessons from the Deinstitutionalization Movement* (2011), p. 1, available at <http://www.bazelon.org/LinkClick.aspx?fileticket=AremSqYTGyM%3D&tabid=40>, [Last visit June 2013] and Seena Fazel and Katharina Seewald, “Severe mental illness in 33,588 prisoners worldwide: systematic review and metaregression analysis” in *The British Journal of Psychiatry* (2012), available at <http://bjp.rcpsych.org/content/200/5/364.full.pdf+html>. With regards to the high numbers of persons with mental disabilities in prisons, the United Nations Office on Drugs and Crime (UNODC) referred to the World Health Organization (WHO), which estimates that as many as 40 per cent of prisoners experience from some form of mental disability and are up to seven times more likely to commit suicide than people outside of prisons. According the UNODC, in the United States the numbers are even higher and studies elsewhere have revealed a similar situation in prisons. UNODC, *supra* nota 3 p. 10

⁵ See Disability Rights International and the Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, *Abandoned and Disappeared: Mexico’s Segregation and Abuse of Children and Adults with Disabilities* (the product of a two-year investigation documenting conditions in Mexico’s mental health system) posted at www.disabilityrightsintl.org

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report, *Abandoned & Disappeared*, Disability Rights International and the *Comisión Mexicana de Defensa y Promoción de los Derechos Humanos* have documented the denial of access to justice for people detained in Mexico's criminal justice system, including the *de jure* discrimination and denial of legal capacity that makes it impossible for people to take legal action to vindicate their rights.⁶

In Mexico, the criminal justice sector is in the midst of its implementation of the accusatorial system. The year 2012 marked the midway point of the eight-year period mandated by the country's Constitution for all 33 federal and state jurisdictions to fully implement the reform, and there are still enormous needs to be met in terms of preparing for full implementation. One such critical need concerns the protection of the rights of persons with mental disabilities under the system, that so far have been ignored and not taken into account in the implementation process.

At this moment, the approach to this issue could not be more timely to advocate for those states in Mexico who are building their legal framework, to ensure access to justice for all persons with disabilities who are currently before the criminal system and those that will be linked to it in the future.

Considering the referred aspects that make it essential to highlight the basic rights of persons with mental disabilities in the implementation process of the new justice system, Disability Rights International (DRI) and the American Bar Association –Rule of Law Initiative (ABA-ROLI) held a roundtable discussion on the "The Rights of Persons with Mental Disabilities in the New Mexican Criminal Justice System," dialogue that represented the first of its kind in Mexico during which adversarial criminal justice reform from the perspective of mental disability was discussed. This roundtable brought together key players in the issue from different areas, whose participation and knowledge on this problem can contribute positively to the respect and guarantee of the rights of this population. The roundtable was attended by a total of 27 participants, among which are authorities from the federal government, federal and local justice operators, human rights commissions' officials, mental health professionals, civil society organizations and persons with mental disabilities.

A. Summary Conclusions

The main conclusion of this discussion is that **immediate action is needed to ensure effective access to justice for persons with mental disabilities**. To date there has been a total lack of any proposals for reform that would address the enormous gaps in access to justice now facing people with disabilities. Legislative reforms associated with Mexico's recent ratification of the UN Convention on the Rights of Persons with Disabilities (from here onwards "CRPD" or "Convention") have not addressed the right of people in the criminal justice system, and they have not brought

⁶ *Id.* at 49.

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Mexico into line with CRPD article 12 requiring protection of the right to legal capacity for people with disabilities. Roundtable participants said that practical examples that could be adapted to Mexico are urgently needed in the following areas:

- Internationally accepted legal standards for determining criminal responsibility;
- Effective assistance of counsel for people with mental disabilities;
- Accessibility in criminal justice proceedings;
- Supported-decision-making for people with mental disabilities;
- Jail diversion programs to the community with community-based support;
- Community support to assist with reintegration to society.

With current attention to law reform in the area of criminal justice, a tremendous opportunity to include people with disabilities will be lost unless immediate action is taken.

II. IDENTIFIED PROBLEMS

During the roundtable discussion, the participants identified different serious problems that this criminal reform process faces to respect and fulfill the right to access justice of persons with disabilities. Among these problems the following stand out:

A. Disregard for the rights of persons with mental disabilities in the implementation of the new criminal justice system

The Mexican regulations that exist in relation to persons with mental disabilities have not changed with the reforms to implement the new adversarial system. Even though legislative adjustments have been made to procedural codes with regards to specific supports that must be afforded to persons with hearing or visual disabilities, there are no regulations regarding mental disabilities. This confirms that the traditional response of the State regarding this population is exclusion. This is a serious problem considering that current regulations deny access to justice for persons with disabilities involved in criminal proceedings. This legislation fundamentally violates the right to legal capacity of persons with disabilities, which leads to other violations in due process. Specifically, and as it will be demonstrated ahead, the legislation regarding legal capacity leaves persons with disabilities completely defenseless while facing, among others, the following procedural violations: the determination of unfitness to stand trial without any criteria or specialized protocols; longer detention on remand compared with other persons without disabilities; imposition of detention as a security measure that exceeds the penalty for the crime they committed, and the impossibility to designate a lawyer. On the other hand, persons with mental disabilities as victims are also excluded from accessing justice given that their legal capacity to access it is not recognized.

B. Violation of the right to legal capacity of persons with mental disabilities and their inability to access justice

Mexican legislation on the right to legal capacity of persons with disabilities is inconsistent with the new paradigm presented by Article 12 of the CRPD, which establishes the obligation of States to provide the necessary supports to persons with disabilities so that they can fully exercise their right to legal capacity. Mexican legislation establishes a regime of substitute decision-making model instead of a model based on supported decision making. Judges assume that persons with mental disabilities do not have legal capacity, regardless of their "incapacity" having been declared in a civil proceeding through an interdiction trial. Additionally, it should be highlighted that the systems that provide for guardianship are clearly incompatible with Article 12 of the CRPD.⁷

⁷ See UN Committee on the Rights of Persons with Disabilities, *Concluding Observations: Tunisia*, CRPD/C/TUN/CO/1 (2011), para. 23; *Concluding Observations: Spain* (2011), CRPD/C/ESP/CO/1, para. 32; *Concluding Observations: Peru* (2011) CRPD/C/PER/CO/1, para. 25; *Concluding Observations: Hungary* (2011), CRPD/C/HUN/CO/1, para. 26; *Concluding Observations: China* (2012), CRPD/C/CHN/CO/1, para. 22.

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The violation of the right to legal capacity implies that persons with mental disabilities cannot even access justice. A clear example of this derives from a comparison of the criminal procedure codes regarding the rights of minors and persons with disabilities. In the case of minors who have been abused by their parents or guardians, they can come directly to the Prosecutors office; however, persons with mental disabilities cannot because the codes do not provide a way for them to access justice directly and the only way they can access is through their guardians or legal representatives. Another such example of the impossibility faced by persons with mental disabilities to access justice is when they are detained in a mental health center and their only possibility is to access justice through their guardian, who is the director of the institution and precisely the person who is violating their rights.

Moreover, the denial of the right to legal capacity for persons with mental disabilities also leads to other violations of their rights in the criminal proceedings. This is exemplified by the fact that people with disabilities do not even have the right to name for themselves a lawyer that they trust—who instead is appointed by the Prosecutor's office or the judge—, or to establish a defense strategy in coordination with their lawyer.

C. Arbitrary detention of persons with mental disabilities

The deprivation of liberty of a person with a disability based solely on his/her condition constitutes arbitrary detention and is incompatible with the standards established by the CRPD.⁸ The arbitrary detention to which persons with mental disabilities are subjected to does not only violate their rights but also affects society from an economic point of view, given that the State spends resources inadequately to treat these persons in the criminal justice system when they should and need to be treated in the community. In the following paragraphs we analyze the aspects that make the detention of persons with mental disabilities in Mexican detention centers arbitrary.

a) Inadequate determination of their unfitness to stand trial and its consequences

One of the most serious problems faced by persons with disabilities in the criminal process is the inadequate assessment of their unfitness to stand trial. The judge has no standardized instruments that allow him to effectively determine it. Furthermore, the determination of a person's unfitness to stand trial extends to all the acts of the accused, even after he/she has been sentenced; that is to say, a person who is declared unfit to stand trial will fulfill his/her sentence without the possibility of accessing judicial remedies for early release or to obtain treatment in the community.

⁸ Article 14, Convention on the Rights of Persons with Disabilities, Resolution adopted by the General Assembly, A/61/611 (December 13, 2006), *entered into force* on May 3, 2008. Mexico ratified the CRPD and its Optional Protocol on December 17, 2007. Available at <http://www.un.org/disabilities/convention/convention.shtml>.

b) Failures in the determination and application of security measures

When a person is declared unfit to stand trial, he/she is given a security measure –which in Mexico generally consists in his/her imprisonment— that is not based on specialized criteria, and is determined at the discretion of the judge without taking into account its purpose, reasonableness and proportionality.

One of the main problems of incarceration as a security measure is that it is based on a discriminatory Mexican law that orders the deprivation of liberty of a person when he/she is declared mentally unfit to stand trial. Another problem is that the nature and duration of commitment do not bear some reasonable relation to the purposes for which the individual is committed, which is that he or she regains competency or be successfully diverted to community treatment.

Moreover the implementation of these measures is not individualized and does not take into account essential elements such as the link between the person and the crime and the specific risk that the person represents –such as failure to appear at the trial or the impact on the victim or the community. This problem is exemplified in Mexico City's jails for persons with psychosocial disabilities and in other prisons that have special areas for this population, where persons with disabilities are arbitrarily detained for minor property offenses, and according to the "danger" that they could represent. Another problem related to security measures is that because the penalty is applied with the object of "readapting" the subject, if the judge considers that the person is not readapted, he authorizes the retention of the person thus exceeding the maximum term of imprisonment for the crime in question.

D. Absence of and Need to establish Community Services and Treatments

Even though one of the paradigms that should be present in the criminal reform is the social reintegration of persons with disabilities, the transition bridges from the prison to the community are nonexistent and there is no regulation focused on services in the community for persons with mental disabilities who have been linked with the Mexican criminal justice system. In prisons in Mexico there is no rehabilitation or support for the creation of a life plan that allows inmates to obtain tools for life in freedom. Considering that most people with mental disabilities are in prisons for minor property offenses, and that their abandonment is exacerbated during the isolation period, the treatment provided to these people to reintegrate them into society is essential. Moreover, the establishment of community services is highly significant considering that in Mexico and in other countries, people with mental disabilities return to prisons again and again for committing minor offenses, which could have been avoided if they had received the services and support they need in the community.

III. PROPOSALS AND RECOMMENDATIONS

During the roundtable discussion, it was concluded that in order to have an effective justice system in Mexico that protects the right to access justice of persons with disabilities who are involved in it, it is necessary to adopt various measures. ***Practical models that can be adapted to Mexico are especially needed.*** The major legal obstacle to access to justice for people with mental disabilities in Mexico is the law on legal capacity, which does not conform to the requirements of the UN Convention on the Rights of Persons with Disabilities (CRPD). While legislative reform is urgently needed, immediate improvements to protect people with disabilities could be made by creating new accommodations within the criminal justice system, training criminal justice officials and criminal defense attorneys, and improvements in community based diversion and support programs.

Among these measures the following stand out:

A. Consideration of the CRPD standards on access to justice

- The standards established in the CRPD must be taken into account in the implementation of the new criminal justice system, particularly those relating to access to justice, legal capacity, and the principle of equality and non-discrimination.
- The criminal procedure codes should regulate procedural accommodations for persons with mental disabilities, which must meet rationality criteria, be evaluated on a case by case basis and should not affect the rights of third parties or impose a disproportionate burden. Through this regulation, the parties may allege the required accommodations in a specific case.
- In particular, access to justice for women with mental disabilities must be ensured given that they suffer from multiple discrimination –by having a disability and being women—, and constitute a segment of the prison population that is growing rapidly, which tends to have higher rates of substance abuse and who are the main victims of physical and sexual abuse.
- There is an urgent need to train and sensitize relevant government actors in this process —in relation to the standards enshrined in the CRPD on access to justice. Especially prosecutors, judges and legislators, and legal counsel to represent defendants with disabilities.
- Persons with disabilities should be involved in decision-making on issues that affect them. Moreover, the participation of civil society in this implementation process is of

great importance. With the involvement of both sectors, the reform to the justice system in Mexico will have greater legitimacy.

B. Respect and guarantee of the right to legal capacity

- Criminal procedure codes must be reformed so that those who are under the guardianship regime can have access to justice, regardless of the guardian's respective consent. Guardianship mechanisms in Mexico must be promptly revised to ensure that people with mental disabilities are not limited in their access to justice.
- Within the reasonable accommodations that must be implemented for effective access to justice for persons with mental disabilities, models of supported decision-making must be considered.
- Legal capacity of persons with mental disabilities should be presumed until a reform that replaces the "substitution" of legal capacity for a model of "support" for the person with disability is implemented.

C. Respect of due process to prevent arbitrary detention

- The grounds for declaring a person unfit to stand trial should be reviewed in light of the CRPD standards on legal capacity of persons with disabilities, as well as internationally accepted standards for psychiatry. Mental unfitness to stand trial should be determined by a judge based on standardized instruments. Moreover, persons found unfit to stand trial must be guaranteed access to justice on an equal basis to others.
- For the implementation of security measures, the following basic conditions should be considered: a) the criminal penalty sanction cannot be applied if there is no a crime contained in the criminal code (*nullum crimen sine lege*); b) the security measure should be individualized to the specific case, and c) the imprisonment cannot exceed the maximum term of imprisonment of the crime in question.
- Despite the fact that in several codes of criminal procedures the opposite is established, the simple fact of having a disability does not justify a detention as a security measure. Security measures must be individualized, it means, applied according to the degree of risk that the conduct of the persons with disability might pose in the future.
- Personality studies should not be decisive in the determination of the judges' decision to grant prison privileges and even the determine or modify the security measure;

instead, they should only serve as one of the assessment criterion used by the judge to determine the situation of the prisoner. Persons with mental disabilities that apply for early release should be able to present their own studies –which could present a very different view to that of the studies issued by the authority.

D. Support for transition and integration to society

- The reform process must contemplate regulation on social reintegration of persons with mental disabilities, establishment of alternatives to prisons and creation of community based services. These models constitute an essential base to enable them to reintegrate to the community, and are the only way to avoid the 'revolving door' effect.
- Treatment in the community for persons with disabilities as an alternative to incarceration implies that these persons should have access to proper medical treatment and have assistance from counselors and health professionals, as well as peer support. There are models around the world of alternative measures to imprisonment and early identification of persons with mental disabilities which could significantly help to avoid unnecessary incarceration and create opportunities for community integration. One way to achieve positive results in the creation of support services for people with mental disabilities in the community is through the implementation of pilot programs.
- Support networks among persons with mental disabilities should be created in order to avoid institutionalization and offer support in their integration to the community. At this point, the *Colectivo Chuhcan* –first organization in Mexico run by and for persons with psychosocial disabilities— proposes an alternative to the psychiatric model and may offer an important solution.

“The rights of persons with mental disabilities in the new Mexican Criminal Justice System”

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