

## **Persons with disabilities in the criminal process: the right to an effective participation in full equality.**

### **1. Presentation**

Good morning, first of all, I would like to thank the organizers for their invitation to this workshop and the opportunity to share my reflections with you.

My name is Florencia Hegglin. I am from Argentina. I have worked as a public defender in criminal cases for fourteen years. I defend people who are accused of a crime and prefer to be assisted by a public defender. In my country, 90% of the criminal cases choose a public defender.

Today, I'd like to share some ideas that are the synthesis of my experience as a defender of people with disabilities who are subject to a criminal process. In particular, I will present what is happening today with them in the criminal process and how all of them suffer the State Punitive Power on their rights, their bodies and their dignity. Moreover, I will introduce and discuss some proposals to overcome these rights violations.

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**I will divide my talk** into three parts. First, I will introduce a few **previous issues** that must be fully taken into account and incorporated to the discussion. They are a) the specific characteristics of every Criminal Process; b) the right to an effective participation in full equality; c) the CRPD principles. Second, the **Criminal Process & Rights Violations**. Third, **Proposals & Observations**.

I shall only take thirty minutes of your time.

I'd be glad to answer any question at the end of my talk.

I hope that these reflections will act as a good springboard for discussing feasible reforms to the Criminal Justice Systems that are necessary according to the CRPD and with the International Human Rights Conventions.

**Let`s start.**

**(next please)**

### **1. Criminal Processes & Special Characteristics.**

First of all, we must have a clear picture of every Criminal Process.

Unlike the civil, commercial or administrative processes, in the Criminal Process the citizen doesn't pursue a legal action or a complaint. They are not there demanding some damages or the payment of a debt. They are subject to a criminal prosecution by the State Punitive Power and they are accused of having committed a crime, which might not have committed. Thus, if they don't want to be unfairly punished, they must defend themselves and get a proper and fair legal assistance.

Moreover, the consequences of this process are irreversible and irreparable. Defendants lose their liberty but they also suffer a daily ill-treatment, torture and humiliation in prison and over the process. Their families suffer with them.

And finally, we should remember that the prison is not always the consequence of a guilty conviction; as we know, the pre-trial detention is a very usual mechanism in every criminal process<sup>1</sup>. It is usual to see defendants who are declared non guilty and are released after a long-term detention being innocent.

Due to these special characteristics, in every criminal process in the world the defendants have specific safeguards, which are not recognized in other processes.

In this direction, we will precise that there are different types of legal criminal processes in the world, which are guided by different rules and are framed under different political ideologies. We might want to consider the differences when we think and discuss about reforms.

**So that covers our first part, and now I will explain some features of the two models of processes.**

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Mirjan Damaska in *"The faces of Justice and State Authority: a comparative approach to the legal process"* (This is a book I strongly recommend to everybody with an interest in studying criminal processes) develops a comparative analysis of judicial procedures around the world and he examines the political ideologies behind them..

This author uses two models in order to examine the political ideologies behind each kind of process: the **Active State and the Reactive State**.

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In the **Active State**, the government has a managerial function and the administration of justice is devoted to the fulfillment of state programs. This process corresponds to the Continental administration of justice, and it is known as **The Inquisitorial System**. Its main objective is to uncover the truth; c) In order to

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uncover the truth, the Prosecutors and Judges search for evidence and they question witnesses, experts and defendants. e) Parties are considered as sources of information, thus they can readily be converted into objects of procedural action. We have a lot of cases in European and Latinamerican criminal proceedings where the defendants were forced to make statements and to answer police questioning. In this system, the duty to answer quickly has turned into confessions obtained by torture or by compulsion or in misleading statements.

As you can see in this slide, in order to prevent this unfair practice and to limit the power of the State, the National Law and the International Criminal Law have recognized procedural safeguards and one of these guarantees is the right to an effective participation in full equality.

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In the **reactive State**, which exists to maintain social balance and to respect the laissez faire principle, the focus of the judicial system is on **conflict resolution**. This process corresponds to the Anglo American administration of justice, and it is known as **The Adversarial System**. In this model, it is not important if the resolution approaches the truth, because the main objective of the criminal process is to resolve the conflict between the accuser and the defendant. b) The process unfolds as an engagement between two adversaries before a relatively passive decision maker: the Jurors. c) Under the system, the two adversaries take charge of the process, thus the defendant becomes one of the active parties.

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In this model, the disput must be played by rules and these rules must be fair. As Damaska says, the problem is to balance the advantages of litigants to provide equality between them and the balancing act has special problems where one party is the State". Where the State is a party (the standard in ours Criminal Systems), full procedural symmetry is seldom attainable: the Prosecutor does not work under the threat of detention nor punishment. And the disadvantages increase when the defendant is a poor person or belongs to a group in a vulnerable situation without resources to balance the State Punitive Power.

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Aware of the risk of punishing an innocent person and to balance the power of the State, this system also includes procedural safeguards, and among them, it is the right to an effective participation in full equality. **(next please)**

**In conclusion**, as we can see, there are substantives differences in each model, however both of them recognize safeguards. If these safeguards are fulfilled, the process will be fair and the conviction sentence will be lawful, but if these

safeguards are not fulfilled, the process will be unfair and the conviction sentence will be unacceptable.

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Finally, if we are talking about the right to an effective participation in full equality and people with disabilities, we must take into account the CRPD. In a very interesting work, the professors Piers Gooding and Charles O'Mahony address this difficult issue.

As they pointed out, three articles of the CRPD raise challenging questions regarding the right to "Effective Participation in Full Equality": Articles 12, 13 and 14.

I might add the right to not be discriminated (Article 5) as a cross-cutting principle of this Convention. We must remember that this Article also includes that specific measures which are necessary to accelerate or achieve de facto will not be considered discrimination.

**That covers our first part, where we could see a) the special features of every criminal process, b) the two big models and the importance of ensuring safeguards in them, c) and the CRPD. These issues must be taken into account when we think about defendant's rights and reforms. Now, welcome to part 2. We will see whether the Criminal Processes today recognize these safeguards.**

I will take the current Argentinian Case as an example, but I think that it is very similar to other Criminal Systems, according to what I've read in the Committee reports.

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## **2. Current Criminal Process & Rights Violations.**

There are a lot of persons with psychosocial disabilities in the Criminal Justice System. They are accused or condemned to having committed a crime and most of them are in prison or in a mental institution.

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As we know, most of them are subject to trial. A few of them are acquitted due to lack of evidence and the others are convicted without due respect for their right to an effective participation in full equality. There are different justifications to explain this negative conclusion. On the one hand, some traditional authors point out following the medical model that these defendants were subject to a trial when their disability had prevented them from exercising their rights. On the other hand,

others point out, following the social model, that the restriction was not the disability, but the lack of measures to exercise this right appropriately.

After the CRPD we must agree with this last point of view. Actually, defendants with disabilities are subject to process with very little information and without real understanding their procedural positions. As an usual example of the cruelty of the System, we see often that defendants with intellectual impairment confess a crime and agree to a "shortened trial procedure" in which they give up to the right to the trial and accept a punishment, under threat of a more severe penalty (better known as plea bargaining institute). The problem is that they make these critical decisions for their lives without knowing the real meaning of this institute, the real scope of their confessions and the real and heavy consequences of the penalties that they accept.

The criminal process is not accessible to defendants with or without disabilities, neither to witnesses. The investigator's questionings, the forms, the sentences, the records with the release's commitments, the judicial communications, among others, are not written in plain language. The judicial language is obscure and complex and sometimes, it appears aimed at misleading defendants. We should consider that the State Punitive Power always wants to resolve the cases quickly and if the defendants give their confessions, the cases are easily resolved.

**As a result, we must conclude that most of people with disabilities are convicted without an effective participation of them in their processes. Therefore, the processes are unfair and it is certain to condemn an innocent person.**

**The lack of a universal design of criminal process and the lack of appropriate measures and supports in the process violate Articles 12, 13 and 14 CRPD.**

**(next please)** On the other hand, a smaller group with, most of times, severe mental disabilities, is considered without possibility of participating meaningfully and in full equality with others in the process. They are considered unfit to stand trial and their processes are suspended.

Defendants are confined. And they are absolutely forgotten in prison or in mental institution. Many human rights are violated: 1) the right to have a final resolution in reasonable time. 2) the presumption of innocence. 3) The limits that every pre-trial detention must comply. For instance, this year, I have defended a man who was in the Psychiatric ward of a prison for twelve years waiting for a trial, which had been suspended due to his mental disorders. If he had not been diagnosed with this mental disorder, this pre-trial detention would not have lasted so long or might not have applied. Moreover, Hernán Acosta, my defendant, deemed unfit to stand in a trial and ended up being in prison longer than if he had been guilty. The Judges

made differences because of his disability and this is discrimination.

**(next please)** In this respect, the Article 14 of CRPD is also violated. I will speak later about Article 12, in particular.

After describing these right`s violations, we can recognize two very important focal points to pay attention to: 1) the still remaining violation of the right to effective participation in full equality, 2) the CRPD right`s violations.

**Let's leave the current rights violations and now, I will present two proposals of criminal law reforms.**

### **3. Proposal 1**

**(next please)** In order to promote a greater recognition of the right to effective participation in full equality, some traditional authors, following the guidelines of the medical model, have proposed to extend the scope of the "unfitness to stand trial". However, they keep confine as a consequence.

Therefore, this proposal brings more damage than protection **(next please)**.

On the one hand, the defendants will not be able to participate in the trial, even if they want and even if they are able to do so with universal design process and appropriate supports. In this point, the proposal violates Articles 12, 13 and 14.

On the other hand, the confinement, which is against, as we saw, the HRights System and against Article 14.

**In conclusion, this proposal is not good enough.**

**We saw how the safeguard becomes a "dangerous safeguard". Now, we will see Proposal 2.**

### **3. Proposal 2.**

Proposal 2 was developed in Argentina in a New Code of Criminal Procedures, which was sanctioned last year and was suspended last year, too, in December, by a decree of the New President. This proposal took especially into account the CRPD, which was accepted by Argentina in 2008.

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Argentinian legislators interpreted that the support assisted decision-making model obliged them to eliminate the "unfitness to stand trial rule", therefore, all defendants always have to stand the trial.

This proposal set two positive consequences: 1) accessible procedure and supports must be provided when necessary, 2) the defendant's confinement was eliminated. However, we should consider some risk of this reform. First, in the current criminal system supports for persons with intellectual disability don't exist, thus judges and lawyers are not used to dealing with these kinds of measures. Second, the suspension of the proceedings was eliminated, too; thus, defendants are always subject to trial, even if the supports or measures are not enough or are not applied properly.

In this system, some of the defendants will be acquitted and the others will be convicted. Among these, there will be defendants who were not able to participate in their trials in equal conditions because their supporters and measures could not provide them a real understanding of the process or a real way to confront the charges against them. In these cases, the defendants will not have a fair trial.

Therefore, in my opinion, the complete elimination of this rule and the suspension of the process will cause the following unwanted effects and new defendant rights violations:

**First, the elimination of a safeguard to avoid State abuses and to limit or balance the State Power.**

a) The "suspension", in severe and appropriated cases, is not an act of discrimination, but a safeguard to avoid a trial in violation of rights.

**b) CRPD is a bill of rights and must never be consider a new bill to condemn innocent people through an unfair trial.** The State can never use arguments to protect the rights of persons with disabilities, to damage them.

**c) the elimination of the "suspension" will trigger wrongful convictions with an innocent person in life imprisonment.** It is necessary to take into account that it is very difficult to generate doubt in the judges or in the jurors, without knowing the defendant's story of what happened. For instance, it is very common in every process, that the judges or the jurors are convinced that the defendant is guilty of a murder because a witness identified him/her as the murderer. If the defendant is not able to remember or declare that he had actually been hospitalized or in other place with possible witnesses of his/her innocence, he or she will be declare guilty, being innocent. If the supporter cannot guarantee an effective participation, it will be impossible to uncover the truth or to generate doubt in judges. If the defendant cannot question nor reject the prosecutor's "truth", the difference between a true or a false verdict is vanished.

Second, this proposal makes a **partial reading of Article 12 CRPD**. In my opinion, the State obligation to recognize that persons with disabilities enjoy legal capacity must not be interpreted as permission for the State to punish unfairly. The defendant must be considered as a whole and the disability must be considered as one of all the situations of vulnerability that demand positive actions from the State. Thus, if these State positive actions are not enough, punishments must be lower or the criminal process must be suspended.

We should remember that this Article 12, in its point 4, establishes 1) the measures and supports must respect every right of person with disability and one of these rights is the right to defend and the right to EF, 2) the State must provide appropriate safeguards to prevent abuse and the violations of the rights. Therefore, if the supports are not enough but the defendants have to stand the trial, there will be a State abuse and a right violation against Article 12, point 4.

In conclusion, when in spite of this conventional mechanisms, the defendant is still in disadvantage, he or she must keep the specific right to suspend the process as a way to guarantee the effective participation in full equality. If the process continues, the defendant will be tried and convicted in violation of this safeguard and against Art. 12.4 CRPD.

**After this observations and reflections, I think that I should tell about my proposal to discuss with you. That brings us to the end of my presentation.**

I think that in every criminal process, the State must guarantee the trial but also the suspension of this trial when effective participation is not ensured. However, we have to make dramatic changes to the current criminal process, following the CRPD guidelines and international human rights conventions.

As you can see in this slide, these are the current rights violations. Now, we must make these changes.

First, State must ensure accessible procedures and supports. Therefore, the criminal law must be reformed to include a universal design of criminal process, and appropriate measures. It will be necessary to think of training programs to judges and lawyers about the meaning of these measures.

I am sure that the design of an accessible criminal process in plain language, that includes appropriate supports when necessary, will facilitate decisions-making and limit, reduce or eliminate defendant's pre-trial detention and even, their convictions. These reforms must take into account the specific phases of the process (for instance, the arrest, the first evidentiary steps –blood draw, lineups identification, the official communications, judicial decisions). I am sure that these



reforms will eliminate the risk of wrongful convictions. The trials will be fairer and will ensure the requirements of the CRPD.

On the other hand, the unfitness to stand trial must be regulated, as a subsidiary rule. First, appropriate supports and, second, if they do not guarantee effective participation in full equality, only then, defendants must be considered unfit to stand trial and the process must be suspended. However, this suspension must include time limits, in accordance with the right to have a final decision in reasonable time.

And the most important, *the **suspension of the process must never include the possibility of confinement due to disability**. If the Judge ordered a confinement, it must be ruled by the limits of every pre-trial detention (flight risk or interference the investigation)*.

I think that these reforms will end the HR System violations and CRPD violations, too.

Before we move on to questions, I`ll briefly summarize the mains features to guarantee in the future reforms of criminal processes.

1. Universal design
2. Appropriate and enough support
3. UST, plus limited suspension, but never confinement

Thank you very much for your attention.

## **1. Other observations.**

a. If the process continues, the supports will cease a mechanism to assist persons to make decision by themselves and become the surrogate decision-maker. It will be against the Convention.

b. Innocence project<sup>2</sup>, a very famous American civil organization which helps convicted persons to uncover their innocence (they obtained more than 300 exonerations of convicted persons to very long term sentence), confirms this flaw of the Criminal System.

## **2. Recommendations.**

We should be careful with abuses or negligence through the supports. We should consider that misinformation or a misinterpretation of a statement can trigger life imprisonment. In order to limit this risk, a) the defendant should be able to select and appoint the supporter, and if he/she does not appoint none, the State must provide it (excluding Prosecutor and Judge). In this last case, the supporter might be appointed by a competent, independent and impartial authority or judicial body b) the supporter must be subjected to permanent review and, in case of abuses or negligence, to criminal or administrative penalties. c) supports must guaranteed during confinement

## **4. UST & European and Inter-american Human Right Systems.**

As I said, to limit the State or to balance the power of the parties in the legal dispute, every international convention recognizes that in the determination of any criminal charge against a person, everyone shall be entitled to specific minimum guarantees. These procedural guarantees are established in Art. 6 of the European Convention on Human Rights, in Article 8 of the American Convention on Human Rights and in Article 14 of the International Covenant on Civil and Political Rights.

Among this guarantees, the international systems demand the right to an effective participation in full equality with others, which has been recognized as "fitness to stand trial". Therefore, if the defendant cannot exercise his rights and participate in his trial "in full equality" the trial is not unfair and must be suspended. In theses cases, the State has not the chance to subject the defendant to a trial.

Accordingly, we should remember that the European Court of Human Rights has fixed the scope for this rule of effective participation in full equality, in "Standford vs. United Kingdom", "T vs. United Kingdom" and "SV vs. United Kingdom". From these cases some State obligations were fixed which must be considered in the discussion.

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- 1) The right to be present
- 2) The right to hear and follow the proceedings
- 3) The right to fully understand the nature of this trial and what is at stake for him.
- 4) The right to be assisted by an interpreter, lawyer, social worker or friend, when necessary
- 1) The right to explain his version of the events and challenge the arguments and statements of the opposing party.
- 2) The representation by skilled lawyers will not always be enough

In every case, the European Court sanctioned the United Kingdom for not having ensured these rights and a fair trial.

The Inter-American Court of Human Rights has not yet ruled about the right to self-defense or the right to an effective participation in the process, when the defendant is a person with disability, however the Inter-American Commission found a petition, which is connected with this rule, admissible. This is the case of *María Zambrano vs. Ecuador*, of 1 November 2010.

I will tell you the case. In 1989, María Zambrano was accused of a homicide and she was sent to a mental institution. The Judge ordered her statement, but he suspended the statement because she suffered a mental disorder. In 1992, the prosecutor in the case refrained from indicting her because there was no evidence of culpability against her. However, she continued subjected to the criminal process and in confinement. Six years after having sent her to prison, in 1995 the Judge ordered the dismissal and she was released.

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The petitioners alleged a) violation of a fair trial, b) violation of the right to liberty, c) violation of the right to be judged within a reasonable period of time.

The Inter-American Commission founded this complainant admissible as regards Arts. 5, 7, 8 y 25 ACHR and we are expecting the Court resolution.