



INTERNATIONAL LAW, MENTAL HEALTH AND HUMAN RIGHTS



Carla A. Arena Ventura
University of São Paulo, Brazil

June 2014

International Law, Mental Health and Human Rights

Carla A. Arena Ventura
Fulbright Scholar
Center for Civil and Human Rights
University of Notre Dame

Introduction

Persons with mental health illness are exposed to a range of human rights violations, which can occur inside institutions, through inadequate and harmful care and treatment, but also outside, with people experiencing limitation to the exercise of civil liberties and rights to employment, education and housing. These violations are often motivated by the stigma, myths and misconceptions associated with mental illnesses which can, in turn, also impact on their ability to gain access to appropriate care and reintegrate into community.¹ A legal framework must critically address these issues affecting the lives of people with mental illnesses such as within institutions or in the community.

International human rights instruments are important in the context of mental health because they are the only source of law that legitimizes international scrutiny of mental health policies and practices within a sovereign country and also because they provide fundamental protections that can not be taken away by the ordinary political process. Mental health and human rights are inextricably linked. They are complementary approaches to the betterment of human beings. Some measure of mental health is indispensable for human rights because only those who possess some reasonable level of functioning can engage in political and social life. On the other hand, human rights are indispensable for mental health as they provide security from harm or restraint and the freedom to form and express beliefs that are essential to mental well-being.²

Therefore, international and regional systems have addressed the human rights of persons with mental illnesses through treaties, declarations and thematic resolutions. This paper aims at presenting and discussing these instruments, focusing on the ones celebrated in the region of the Americas. Taking into account the existing challenges to assure the human rights of people with mental illnesses, the results of this research bring into discussion how the promotion of mental health and human rights can have mutually reinforcing and synergistic results at national levels.

International and Regional Human Rights Instruments and the Protection of People with Mental Illnesses

Countries which have ratified or adhered to international human rights conventions are obliged to respect, protect and fulfill³ the rights enshrined in them.

¹ Wildeman, Sheila. Law and Mental Health: a relationship in crisis? *The Dalhousie Law Journal*, 33, 1, 1-14 (2010) [hereinafter Wildeman, *Law and Mental Health*].

² Gostin, Lawrence & Gable, Lance. The Human Rights of Persons with Mental Disabilities: a global perspective on the application of human rights principles to Mental Health. *Maryland Law Review*, 20-121 (2004) [hereinafter Gostin & Lance, *The Human Rights of Persons with Mental Disabilities*].

³ Governments can conceive their human rights duties broadly to include: 1) respect: the State's obligation not to infringe upon human rights; 2) protect: the State's obligation to prevent private violations; 3) fulfill: the State's obligation to promote human rights. Thus international human rights law places the onus on the State to safeguard the human rights of all people, including individuals with mental illnesses (Gostin & Lance, *The Human Rights of Persons with Mental Disabilities*, supra note 2).

Among these instruments are the International Bill of Rights, which includes the United Nations (UN) Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966).

Therefore, although the Universal Declaration of Human Rights is not, in itself, a legally binding instrument, it establishes a fundamental set of human rights that applies to all nations. Article 1 of the Declaration provides that “all people are free and equal in rights and dignity”, setting up that people with mental illnesses are protected by human rights law by virtue of their basic humanity⁴ (UN – Charter, 1948). The Universal Declaration was followed by the two core UN human rights conventions established in 1966. These international covenants, although not specifically designed for the protection of persons with mental illnesses, provide legally enforceable⁵ protection of human rights in State-parties.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) in Article 12 states steps for the realization of the right to health. To clarify and operationalize this provision, the UN Committee on Economic, Social and Cultural Rights adopted, among other provisions, General Comment⁶ 5 in 1996 and General Comment 14 in 2000. In General Comment 5, the Committee recognized the application of ICESCR with regard to people with mental and physical disabilities and with the General Comment 14 affirmed that the right to health extends not only to timely and appropriate health care but also to the underlying determinants of health.⁷ Thus, the right to health has undergone an evolution and resulted in the appointment by the UN of a Special Rapporteur on the right to health, whose mandate includes the right to mental health.⁸ However, in spite of these developments, the lack of language that pertains specifically to people with mental illnesses in the International Bill of Rights and other mainstream conventions has long impaired the application of these instruments to people with mental illnesses. Thus, while international human rights law has grown tremendously over the last thirty years, the development of

⁴ In addition, in 1993, the Vienna Declaration, established during the World Conference on Human Rights meeting in Vienna, reemphasized the fact that people with mental and physical disabilities are protected by international human rights law and that governments must establish domestic legislation to realize these rights (UN, 1993 – Vienna Declaration).

⁵ There are two types of enforcements created in the two mentioned Conventions. The International Covenant on Civil and Political Rights requires Governments an obligation of result, as State-parties must respect and ensure the enforcement of human rights under the covenant. On the other hand, in recognition that economic and social rights are more likely to require the investment of resources, the International Covenant on Economic, Social and Cultural Rights creates a requirement of progressive realization. Therefore, the latter creates immediate obligations on Governments to begin planning to bring about the full enforcement of the rights recognized under the covenant. Despite the significant differences between legal obligations created under the two instruments, there is a growing recognition that the division between these two sets of rights is often artificial. Indeed, the World Conference on Human Rights declared in Vienna in 1993 that “all rights are universal, indivisible, interdependent and interrelated” (WHO, *The Role of International Human Rights*, supra note 13).

⁶ General Comments are important sources of interpretation of human rights conventions produced by human rights oversight bodies to guide Governments in the preparation of their official reports. They are non-binding, but represent the official view as the proper interpretation of the convention by the human right oversight body (WHO, *The Role of International Human Rights*, supra note 13).

⁷ General Comment 14 confirms that the right to health is not a right to be healthy. It is a right to facilities, goods, services and conditions that are conducive to the realization of the highest attainable standards of physical and mental health (Hunt & Mesquita, *Mental Disabilities and the Human Right*, supra note 15).

⁸ Gostin & Lance, *The Human Rights of Persons with Mental Disabilities*, supra note 2.

international law to protect specifically the rights of people with mental illnesses had been relatively limited.⁹

After years of no action regarding this vulnerable group of the population, the UN Human Rights Commission, with the UN General Assembly and international human rights oversight bodies have taken a stand on the need for all governments to enforce human rights conventions with respect to people with disabilities. In April 2000, the UN Human Rights Commission adopted resolution 2000/51 urging Governments to cover fully the question of the human rights of persons with disabilities.¹⁰ As a result of this movement, the UN General Assembly adopted in 2006 the Convention on the Rights of Persons with Disabilities¹¹ (CRPD), intended to protect the rights of persons with disabilities, including the ones with mental disabilities.¹² The Convention gives substance to the complex nature of the right to health by adopting a social, rather than a medical, model of disability. The social model of disability addresses environmental constraints that limit people with disabilities to engage in community life, emphasizing the relationship between stigma, discrimination, structural inequalities, inadequate service provision and deficits in health.¹³ The CRPD provides a “framework for ensuring that mental health laws fully recognize the rights of those with mental illness”.¹⁴

There are also agreed international standards of good practice which are not legally binding. These include the UN Declaration on the Rights of Mentally Retarded Persons (1971)¹⁵; the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991)¹⁶; the Standard Rules for

⁹ WHO, *The Role of International Human Rights*, supra note 13.

¹⁰ Id.

¹¹ The preamble of the Convention recognizes that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”. In addition, Article 1 states that “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” (Weller, Penelope. *Human Rights and Social Justice: The Convention on the Rights of Persons with Disabilities and the quiet revolution in International Law. Public Space: the Journal of Law and Social Justice*, 4,74-91 (2009)).

¹² “Mental disabilities” is a broad term that includes people with disabilities caused by a mental illness (such as people with a diagnosis of mental illness or with intellectual or developmental disabilities).

¹³ Weller, Penny. *The Right to Health: The Convention on the Rights of Persons with Disabilities. Alternative Law Journal*, 35: 2, pp. 66-71 (2010)[hereinafter Weller, *The Right to Health*].

¹⁴ Perlin, Michael L. “Abandoned Love”: the impact of Wyatt v. Stickney on the Intersection between international human rights and domestic mental disability Law. *Law and Psychology Review* 35,121-142 (2011) at 139.

¹⁵ The Declaration affirms that persons with intellectual disability have the same rights as other human beings. These rights cannot be restricted without due process that must contain proper legal safeguards against every form of abuse. It protects against the common practice in some countries of stripping away a person’s rights through a finding of mental incompetence or by placing people with an intellectual disability under guardianship for a lifetime without process (WHO, *The Role of International Human Rights*, supra note 13).

¹⁶ The United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care are the broadest human rights rules concerning mental health treatment and assistance. Such principles are particularly useful as guidelines for the interpretation of the rights established in human rights treaties. They established minimum standards of practice in the mental health field and have served as models to mental health legislation in many countries. The provisions establish standards for treatment and living conditions in psychiatric institutions and create protections against arbitrary detention in such facilities (Rees, Neil. *International Human Rights Obligations and Mental Health Review Tribunals. Psychiatry, Psychology and Law*. 10, 1, 33-43 (2003)).

Equalization of Opportunities for Persons with Disabilities (1993)¹⁷; the Declaration of Madrid (1996)¹⁸ and other standards such as WHO's Mental Health Care Law: ten basic principles and WHO Guidelines for the Promotion of Human Rights of Persons with Mental Disorders (1996).¹⁹ These standards may serve to countries as interpretative guides to international treaty obligations. International human rights instruments create a number of broad protections that provide important rights to people with mental illnesses²⁰, such as: the right to the highest attainable standard of physical and mental health; protections against discrimination; protections against torture, inhuman, or degrading treatment; and protection against arbitrary detention.²¹

Concurrently with the international human rights UN institutions, regional human rights systems provide additional opportunities for the protection and development of human rights, sharing many of the ideals and goals of the UN system.²² However, the regional nature of these systems has allowed for the implementation of novel approaches and institutions to protect and promote human rights in Europe²³, the Americas and Africa.²⁴ Considering that human rights treaties need States to establish mechanisms for the implementation of human rights so that these treaties can function,²⁵ these regional systems have created additional fora for the protection and promotion of human rights, often through more direct means. Courts and Commissions established at the regional level granted individuals the ability to redress human rights grievances that have not been appropriately dealt at the

¹⁷ The Standard Rules recognize the right of people with mental disabilities to participate in national planning for mental health and social service systems reforms needed to bring countries in line with international human rights standards. (WHO, *The Role of International Human Rights*, supra note 13).

¹⁸ The Declaration of Madrid was approved by the General Assembly of the World Psychiatric Association in 1996 emphasizing ethical standards for psychiatric practice (WPA, 1996).

¹⁹ The Ten Basic Principles and the Guidelines represent a further interpretation of the 1991 Principles and are used as a tool to evaluate human rights conditions in institutions and to draft mental health legislation (WHO, 1996). WHO, *Improving Health Systems*, supra note 12.

²⁰ The right to health and the right to mental health contain both freedoms and entitlements. The freedoms include the right to control one's health and body, and the right to be free from interference such as the right to be free from torture, non-consensual treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. It entails the right to services that are available, accessible, acceptable, and of appropriate or good quality. It includes the right of access to rehabilitation services and individualized treatment, that enhances autonomy, the right to independence and social integration, with least restrictive services, especially community-based services, the right to informed consent and to refuse treatment, protection of human dignity, non-discrimination, rule of proportionality and due process protections. Thus, when a right must be restricted, the principle of proportionality may require governments to use appropriate due process which may include judicial safeguards, such as a hearing or a guarantee of independent and impartial decision-making (WHO, *The Role of International Human Rights*, supra note 13).

²¹ WHO, *The Role of International Human Rights*, supra note 13.

²² Gostin & Lance, *The Human Rights of Persons with Mental Disabilities*, supra note 2.

²³ The European Convention for the Protection of Human Rights and fundamental Freedoms was drafted in 1950 by the Council of Europe and entered into force in September 3rd, 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention and the earliest opportunity (CE, 1950).

²⁴ The African Charter on Human and People's Rights was adopted on June 27th, 1981 and entered into force in October 21st, 1986. In addition to the general protections under the convention, the African Charter is the only one of the three regional conventions that explicitly creates special protections for people with disabilities (OAU, 1981).

²⁵ Beco, Gauthier. Human Rights Indicators for Assessing State Compliance with International Human Rights. *Nordic Journal of International Law* 77, 23-49 (2008).

domestic level or to challenge domestic policies and practices that violate human rights norms.²⁶ The European and Inter-American regional systems are particularly important because they have the most highly developed mechanisms for implementation.

In the region of the Americas, a combination of instruments affords protection of human rights to all persons, including those with mental illness. These instruments include the American Declaration of the Rights and Duties of Man (1948), the American Convention on Human Rights (1969), the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (1988), and the Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities (1999).²⁷

The American Declaration of the Rights and Duties of Man is a non-binding document that covers the protection of civil, political, economic, social and cultural rights. The American Convention on Human Rights explicitly states that every person has the right to physical, mental and moral integrity, that no one shall be subject to cruel, inhuman or degrading punishment and treatment and that all persons deprived of their liberty shall be treated with the inherent dignity of the human person. The Additional Protocol to the American Convention on Human Rights provides further protection for people with mental illnesses, stating that, in order to achieve the full exercise of the right to education, programs of special education should be established so as to provide special instruction and training for persons with physical disabilities or mental deficiencies. It also establishes that all persons affected by a diminution of their physical or mental capacities are entitled to receive special attention to help them to achieve the greatest possible development of their personality, and that everyone has the right to social security to protect them from the consequences of old age and disability which prevent them, physically or mentally, from securing the means for a dignified and decent existence. In addition, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities was adopted in 1999 and entered into force in 2001, calling on governments to facilitate the full integration of persons with disabilities into society through legislation, social initiatives and educational programs.²⁸

A non-binding regional instrument, the Declaration of Caracas was adopted in 1990 by the Regional Conference on Restructuring Psychiatric Care in Latin America and is an example of regional collaboration for the protection of the rights of persons with mental illnesses. This Declaration aimed to promote community-based integrated mental health services by restructuring psychiatric care involving services provided in mental hospitals. It further states that mental health legislation should safeguard the human rights of persons with mental illnesses and that services should be organized so that these rights can be enforced.²⁹

In October 2004, state representatives, international organizations and representatives of civil society, including persons with intellectual disabilities and

²⁶ Id.

²⁷ WHO, *Improving Health Systems*, supra note 12.

²⁸ The Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities is the first human rights international instrument that specifically addresses the issue of people with disabilities and represents a priceless commitment by Latin American States to secure that they will enjoy the same rights the rest of the community is endowed with (Corte IDH. Caso Ximenes Lopes vs. Brasil. Fondo, Reparaciones Y Costas. Sentencia de 4 de julio de 2006. Versão em português. Serie C, n. 149 [hereinafter CIDH, *Ximenes Lopes vs Brazil Case*]).

²⁹ WHO, *Improving Health Systems*, supra note 12

their families, adopted the Montreal Declaration on Intellectual Disability (Montreal Declaration) at an international conference organized by the Pan-American Health Organization and the World Health Organization. This Declaration recognizes the human rights of persons with intellectual disabilities, including the right to health, and interconnections between this and other rights. The Montreal Declaration represents an important step in standard setting rights and obligations surrounding intellectual disabilities.³⁰

Table 1 synthesizes international and inter-american regional binding (hard law) and non-binding (soft law) human rights instruments related to persons with mental illnesses.

Table 1. Synthesis of international and inter-american regional human rights instruments related to persons with mental illness.

| International Human Rights Instruments | |
|---|--|
| Binding | Non-Binding |
| International Covenant on Civil and Political Rights (1966) | UN Declaration of Human Rights (1948) |
| International Covenant on Economic, Social and Cultural Rights (1966). | UN Declaration on the Rights of Mentally Retarded Persons (1971) |
| Convention on the Rights of Persons with Disabilities (2006) | UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991) |
| | UN Standard Rules for Equalization of Opportunities for Persons with Disabilities (1993) |
| | General Comments 5 (1996) and 14 (2000) of the International Covenant on Economic Social and Cultural Rights |
| | WHO's Mental Health Care Law: ten basic principles (1996) |
| | WHO Guidelines for the Promotion of Human Rights of Persons with Mental Disorders (1996) |
| | Declaration of Madrid (1996) |
| | UN Resolution 2000/51 |
| Inter-American Human Rights Instruments | |
| Binding | Non-Binding |
| American Convention on Human Rights (1969) | American Declaration of the Rights and Duties of Man (1948) |
| Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (1988) | Declaration of Caracas (1990) The Montreal Declaration on Intellectual Disability (2004) |
| Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities (1999) | |

An analysis of these instruments shows the absence of agreement on the most appropriate terminology. Mental retardation, mental illness, mental disorder, mental incapacity, mental disability and several other terms are all used in different

³⁰ Hunt & Mesquita, *Mental Disabilities and the Human Right*, supra note 15.

connotations and shades of meanings. These differences have a crucial bearing on how the right to health must be interpreted and implemented to people with mental illnesses.³¹

The CRPD does not precisely define disability, in order to make it more comprehensible to different people, considering this an evolving concept.³² Therefore, the lack of a specific language regarding to the people with mental illnesses in human rights international instruments makes it difficult to apply the rules to such people.

In addition, it is a paradox as, at the same time that it is fundamental to use a specific terminology on human rights binding and non-binding instruments, this also creates a label on these persons. People are classified as mental patients, a social category rather than a medical condition. In this sense, mental illness has not only social causes, but social consequences as well. Once people are labeled, the label tends to remain with them, scarcely diluted by the word “former”. Historically, after certain point, the damage done by the label of patient with a mental illness becomes pervasive and permanent, no matter how slight or temporary the actual disturbance was. Then, it is very difficult to prove that someone became “normal” again.³³

In this paper, we use the term mental illness, following several WHO instruments, and aiming at focusing the violations of rights of people diagnosed with a mental illness. The international and regional human rights documents mentioned previously emphasize that persons possess rights because of their humanity. Thus, persons with mental illnesses should not need to prove they deserve certain rights or that they can be trusted to exercise them in socially and culturally acceptable ways.³⁴ However, several of these instruments do not establish monitoring and accountability mechanisms, making it hard to achieve the realization of these rights.

Also, as much as the right to health means more than access to treatment, the great majority of non-binding instruments, approved mainly by UN and WHO, focused on guidelines and minimal standards which should be used in providing treatment to people with mental illness. Considering that when institutionalized, persons with mental illness have several human rights violated, this is still a great concern regarding the care to this group of people. Nevertheless, it is important to emphasize that human rights do not stop at the hospital door. Mental health legislation is more than care and treatment legislation that is narrowly limited to the provision of treatment in institution-based health services. Rather, it must set minimal standards for therapeutic environment and prevention of neglect and abuse of patients, establishing the role of Governments as well as health professionals in the process of assuring the human rights of people with mental illnesses.

Conclusions

The international and regional human rights instruments presented in this paper led to a move away from an illness paradigm towards a disability paradigm aiming at understanding the social consequences of mental illnesses. Nevertheless, they left domestic governments with a wide range of discretion in relation to each of these rights and freedoms. In this scenario, national mental health legislations should provide a legal framework for addressing critical issues such as the community

³¹ Id.

³² Dhir, Aaron A. Human Rights Treaty Drafting through the lens of mental disability: the proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities. *Stanford Journal of International Law*, 41, 181-216 (2005).

³³ Ochberg, *Mental Health and the Law*, supra note 5.

³⁴ Gostin & Lance, *The Human Rights of Persons with Mental Disabilities*, supra note 2

integration of persons with mental disorders, the provision of care of high quality, the improvement of access to care, the protection of civil rights and the protection and promotion of rights in other critical areas such as housing, education and employment. Human rights are not a matter between citizens and their government, but a matter of international law enforceable against the State on behalf of persons living within or under the control of the State. This renders each country's mental health laws, policies and practices subject to international human rights standards and susceptible to international monitoring and control.

Economic, social and cultural rights, such as the right to health, are foundational for the exercise of other rights. Minimal levels of social and economic status, including sufficient conditions of health, are a prerequisite to the exercise of civil and political rights. Without a fundamental government obligation to satisfy basic health needs, including mental health, other rights become less meaningful, and people with mental illnesses become more vulnerable to economic and social marginalization.

If the right to health is to become tangible, rather than aspirational, international institutions, governments and civil society must articulate achievable methods of implementing and enforcing it. The development of a remarkable, but still incomplete, human rights structure acts as an important mean to achieve these goals and persons with mental illnesses will certainly benefit from the continual development of human rights systems at the international, regional and national levels.