CRIME, CRIMINAL JUSTICE AND PRISON IN LATIN AMERICA AND THE CARIBBEAN

HOW TO IMPLEMENT THE UNITED NATIONS' RIGHTS AND DUTIES MODEL

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CRIME, CRIMINAL JUSTICE AND PRISON IN LATIN AMERICA AND THE CARIBBEAN:

HOW TO IMPLEMENT THE UNITED NATIONS RIGHTS AND OBLIGATIONS MODEL

By

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THE RIGHT TO HEALTH IN PRISONS

VÍCTOR DE CURREA-LUGO[1]

INTRODUCTION

As a human right health constitutes a special technical, legal, medical and philosophical debate area. The different notions about what is and what should be the right to health make it a slippery one. Gaols[2], prison and detention centres in general constitute another more real, less «theoretical,» harsher, if you wish, field. However, according to Foucault, the hospital as an institution shares a part of the prison tradition as a social control institution.[3]

Such an approach from the point of view of human rights deliberately evades important theoretical debates to focus on a more operative look at health in prisons; that is, the importance of theoretical views and studies is not ignored, but we limit ourselves to submitting some rather operative considerations on what should be the assurance of the right to health in custody situations. The prison is a closed area that should be open to many eyes, institutions, debates, etc., including the institution of those human rights that are in force in the field of health.

This paper is divided into several items, the first one being a brief explanation of what we understand as the right to health; next, a review of the rights of persons under custody; lastly and once immersed into the subject we address the relationship between the prison system and health; the conditions of imprisonment and health; health services in detention centres; health programmes, and some considerations from the point of view of medical ethics.

HEALTH AS A HUMAN RIGHT[4]

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2 In a somewhat arbitrary manner, we use here the term «gaol» to refer to all types of detention centres, and «detainee» to refer to a person who is deprived of her or his freedom, independently of time or of her or his legal condition.

3 FOUCALT, Naissance de la clinique. Presses Universitaires de France, Paris, 1963. Edition consulted: El nacimiento de la clínica, Madrid, Siglo XXI, 1986. Translation by Francisca Perujo, pp. 16-41

4 This section is adapted from: DE CURREA-LUGO, Víctor: La salud como derecho humano. Deusto University, Bilbao, 2005

The ultimate goals of the right to health are to save lives, restore health, maintain health, and/or mitigate suffering; these goals must not be abandoned even if not attainable 100% of the time; nor should we ask for the impossible or deny what is indispensable. The right to health is not, nor can it be the right to be healthy, but to benefit from decisions, means, and available, accessible, acceptable and quality resources which will make it possible to assure the maximum health level possible. This right involves liberties and protection measures. Liberties such as control by the individual of her or his own body and health; of information related to her or his health; the possibility to reject treatments; the right to reproductive and sexual health and not to be tortured, among other liberties. And protection measures related to access to the means and resources which may enable the individual to maintain and/or try to recover her or his health[5] understanding as access not only access per se, but the opportunity, availability, efficacy and efficiency of health services.

Health viewed as a human right requires of the acceptance of a number of concepts without which it is difficult, if not impossible, to deliver a coherent discourse. This series of concepts includes the acceptance of human rights as both a moral and a legal proposal, with the implications that this implies. A moral justification would allow us to speak of moral rights[6] which become a legal claim when the explicit rule so permits or, rather, when it mandates it. Following Rawls, the Social Contract is agreed to by the members of a community who are free, equal and rational and therefore liable.[7] Rawls defines the person as a moral and political agent ("basic units of deliberation and responsibility")[8]. This Contract determines the rules that shall govern that given community. In the Latin American case, for instance, those communities have regarded health as a human right and they have so established it, in different manners, in each Constitution.[9]

Acceptance of human rights

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5 Committee on Economic, Social and Cultural Rights: The right to the highest attainable standard of health. 11/08/2000. E/C.12/2000/4, CESCR General Comments Nº 14, Geneva, 25th April to 12th May 2000, comment 8.

6 On a discussion in this sense, see: RUIZ MIGUEL, Alfonso: «Human rights as moral rights» in: Anuario de derechos humanos, núm. 6, (Madrid, 1990), pp. 149-160. The notion of a «moral right» must not be fused together with the notion of «charity,» which would be a contradiction of the terms, as it is almost intended by Buchanan's approach. See: BUCHANAN, Allen: "Rights, Obligations, and the special importance of Health Care", in: BOLE III, Thomas J.; BONDESON, William B.(ed.): Rights to health care, Kluwer Academic Publishers, Dordrecht, 1991, pp. 169-184.

7 RAWLS, John: Political liberalism, Columbia University Press, New York, 1993. Edition consulted: El liberalismo político. Crítica, Barcelona, 1996. Translation by Antoni Domènech.

8 RAWLS, Political… pp. 59-65

9 Pan American Health Organization and World Health Organization: El derecho a la salud en las Américas. Estudio constitucional comparado. Washington, 1989.

The acceptance of human rights includes acceptance of our power to demand such rights from the State. We understand that a State is a legally constituted one when it has been conceived as an organ produced by the law and, therefore, as a legal system as a whole, based on the rule of law.[10] Legal principles do not depend on the will of the States, especially when the development of international human rights instruments specifies the duties of the State. These agreements are not plain moral exhortations or good will declarations, but legal obligations with which the States must comply; valid obligations for the collective conscience of our time. Through agreements in the international realm, and by means of constitutional law internally, the State binds itself to being compliant with certain rights that are regarded basic.

There is an old debate on whether there are main human rights and secondary human rights. This notion was nourished by the idea that human rights are divided, although only formally, in two lists contained in the 1966 agreements; it arises from the notion that there are "generations of rights" and that some generate omissions on the part of the State («negative» actions), and other so-called positive actions. In the Tehran and Vienna declarations there is no notion of generations of rights, since the two 1996 covenants (of civil and political rights, and social, economic and cultural rights) are complementary and interdependent, it being possible to assert that each right has its own personality; that it does not depend on whether or not it is included into one or another covenant, but on its rapport with the notion of dignity.[11] Some are still intending to set boundaries between civil and political rights, on the one hand, and social rights on the other. It is difficult to define such a boundary but also useless and even dangerous when the time comes to demand compliance with legal responsibilities, especially because it denies the notion of human rights as one integrated entity.

All this implies expenses for the State, which refutes further the myth of generations of rights. Assuring the protection of life, the right to defence or the right to vote (the guarantee of an electoral system) implies State expenditures. This is why it is not acceptable to divide rights between those that imply expenditures by the State and those that do not, so that the guarantee of the former would depend on resources. There are aspects in the right to health that do not depend either on resources (equality in access to services, for instance), or on the abundant or scarce resources available, but on how they are managed. A right that depends on circumstances is no

10 BOBBIO, Stato…, pp. 73 y 132.

11 Proclamation of Tehran, (UN, 1968), paragraph 13; and the Vienna *Declaration and Programme of Action,* (UN, 1993). «All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.» (Vienna, paragraph 5).

longer a right but something that we diminish to the category of a simple claim that cannot be demanded either morally or legally, such as that which we grant to human rights.

For Rubio Llorente human rights are not a closed list; not a "defined and stable cast", instead, he believes that "their contents continue to grow and expand together with humanity's moral and political progress"[12], to which we could add technical and scientific progress. Human rights originate in the notion of human dignity, whose contents have been gradually specified in a developing historical process.

Health could or could be or not be a human right. But if we accept that it is, health would be a full right, not a second-generation right (for some of second class). A human right that is not accompanied by a duty on the part of the State and a right for the person is not a right. In the case of health, even if it seems to be mostly related to the so-called social rights, after a broader reading and a more careful look at international human rights law it becomes clear and conclusive that health exists as a right; it surpasses the framework of social rights to establish itself, as each one of the rights, as a right with its own personality and, in such a capacity, subject to specific legal protection.[13]

One debate that is related to basic rights is that on whether there are resources or not. It is possible to find ourselves before at least four scenarios: a) there is recognition of law and the guarantee thereof; b) the recognition of law and the difficulty in guaranteeing it because of problems of availability of material resources; c) the recognition of law, a relative availability of resources and an unfair distribution of such resources; and d) the denial of law.

It is not acceptable to place scenarios b (lack of resources) and c (inequality) on the same level to justify a bad distribution of the resources with the argument of little availability, nor is it acceptable to subject the recognition of the right to its immediate material possibility or its regulation to financial rather than to legal reasons. As a right, health implies a fair distribution of the available resources, independently of whether they are scarce or abundant. This fair distribution of the resources has at least two moments: a) a fair allocation of resources according to the needs of the health

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12 RUBIO LLORENTE, Francisco: «The hard core of human rights from the perspective of constitutional law,» in: VV.AA.: *El núcleo duro de los derechos humanos*, J.M. Bosh, Navarra, 2001, p. 69

13 See: ALFREDSSON, Gudmundur; TOMASEVSKI, Katarina (ed.): *A Thematic guide to Documents on Health and Human Rights,* Martinus Nijhof Publishers, London, 1998; LEARLY, Virginia: "The Right to Health in International Human Rights Law", en: Health and Human Rights, núm. 1 (Boston, 1994), pp. 24-56; TOEBES, Brigit: "*The Right to Health*" en: EIDE, Asbjorn et al (ed.): Economic, Social and Cultural Rights, Martinus Nijhoff Publishers, Dordrecht, 2001, pp. 169-190; and by the same author, TOEBES, Brigit: The Right to Health as a Human Right in International Law, Intersentia - Hart, Antwerp, 1999.

sector, which, in turn, depends on the needs of other sectors (justice, defence, education, etc.) and what priority health is given on the state agenda; and b) fair distribution within the health sector of the abundant or scarce resources allocated to it, that is, the equality sought in the distribution thereof. Let us repeat the words of Pechman, Aaron, and Taussig: "the best financing method (of social security) depends decidedly on what the nation regards as the system's reason for being".[14].

The position that health occupies in international human rights law is indisputable. It appears as a part of other rights such as work and social security;[15] it is included explicitly into International rules against racial discrimination and discrimination against the woman;[16] it appears as a limitation to the exercise of other rights;[17] it is the result not only of action by the State but also of abstinence on its part (for instance in the case of torture and everything related to the physical integrity of persons);[18] and finally it also appears as a right in itself.[19] In practice, the right to health depends also on the observance of other rights such as the labour rights of the workers in clinics and hospitals.

Health as a mandatory right

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[14] Cited by: MUSGROVE, Philip: «The effect of social security and health care in income distribution» in: MESA-LAGO, Carmelo (comp.): *La crisis de la seguridad social...* p. 236

[15] In the *Universal Declaration of Human Rights* (UN, 1948) it is provided for in the right to social security; and likewise in several international agreements of the International Labour Organisation.

[16] See: *International Convention on the Elimination of All Forms of Racial Discrimination* (UN, 1965); and *Convention on the Elimination of All Forms of Discrimination against Women* (UN, 1979).

[17] The *International Covenant on Civil and Political Rights* (UN, 1966) shows health as a condition that limits the exercise of certain rights in this order: liberty of movement (art. 12), freedom... to manifest his religion or belief in worship (art. 18), freedom of expression (art. 19), the right of peaceful assembly (art. 21) and the right to freedom of association with others (art. 22). It appears further as a limit in the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (UN, 1981), and in the Convention on the Rights of the Child (UN, 1989).

[18] See: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UN, 1984*); International Covenant on Civil and Political Rights* (UN, 1966); *Second Optional Protocol to the International Covenant on Civil and Political Rights*, intended to abolish the death penalty (UN, 1989); *Declaration on the Protection of all Persons from Enforced Disappearance* (UN, 1992); *Convention on the. Prevention and Punishment of the Crime of Genocide* (UN, 1948); *International Covenant on Civil and Political Rights* (UN, 1996); *Convention on the Rights of the Child* (UN, 1984).

[19] See: *International Covenant on Economic, Social and Cultural Rights* articles 10 and 12 (1966); *International Convention on the Elimination of All Forms of Racial Discrimination*, art. 5; (1965); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 14 (1984); *Convention on the Rights of the Child*, art. 39 (1989).

We have accepted health as a right, and we have accepted that it is the State whom we shall hold accountable for human rights. We understand that some actions to ensure health may take place within the realm of solidarity among equal and free individuals, but that is not the territory of health as a right, since we establish a difference between solidarity and the duties of the State, although on occasions both may meet each other in the end. Explicitly and indisputably health is in the sphere of international human rights law, with its own specific position, and with sufficient legal recognition so as to make it possible to assert that it is not erroneous to speak of the right to health.

In modern law, the fact that health is within the realm of the so-called social rights places it among those rights of "gradual application" depending on available resources, as per the Limburg principles.[20] But something that must be clear is that such principles must be understood as goals to be reached, and not as pretexts to postpone accomplishments.[21]. There are cases, however, where health would draw away from (or would at least confront) the notion of progressive application: in cases of medical emergencies; in cases where the violation is related to direct and basic human dignity conditions, and when the State prepares policies that seek to guarantee, in principle, the right to health of future generations without having satisfied the needs of current generations.

In interpreting article 12 of the *International Covenant on Economic, Social and Cultural Rights* of 1966,[22] the United Nations Committee on Economic, Social and Cultural Rights has established that there are three levels of health-related State duties:

" The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote. The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary,

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[20] These principles establish that the States: a) act as quickly as they can (without postponing their efforts indefinitely); b) comply immediately with at least such matters that are subject to immediate implementation (such as the prohibition of discrimination); and c) not wield the argument of the availability of resources (whether scarce or abundant) to evade minimum, basic responsibilities.

[21] TURK, Danilo: *El nuevo orden económico internacional y la promoción de los derechos humanos*. Andean Judicial Commission, Colombia Chapter. Bogotá, 1993. P. 365 and fol.

[22] This article starts with the following statement: «The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health ».

judicial, promotional and other measures towards the full realization of the right to health."[23]

These thoughts are accompanied by certain additional considerations of relevance: a) "The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body (…),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"[24]; b) …good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. (…) the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."[25] And c "The Committee interprets the right to health (…) as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health."[26]

Acceptance of the right implies recognition of the fact that it can be demanded from those that the State has entrusted with the task of materialising the rule. Therefore it is valid to submit our claim to health workers, private companies that provide public services, and the State. The nuance here is that in one lineal model it looks like the social power to demand is directed to the State, whereas the individual power to demand is directed to the physician, without a possibility for the beneficiary individual user of services to demand such services from the State.

The creation of state mechanisms to respond to social needs is one of the basis of the social State. The social State implies, among other things, acceptance of the link between the right (the moral and legal notion that binds the State), and the service. Here we define the health service as something that goes beyond hospitals and clinics; we understand as service the sum of resources, institutions, services and procedures that a State coordinates together for health objectives, including, then, water processing and distribution, and rubbish control services among others.

It is common to hear that the right to health is affected by limitations in public resources which in turn depend, whether abundant or scarce, on political decisions concerning health, while the guarantee of the right to health is not regarded a priority item for the debate on resources.[27] The law

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[23] Committee on...Rights, *The right to…*comment 33.
[24] Committee on...Rights, *The right to...*comment 8.
[25] Committee on...Rights, *The right to…*comment 9
[26] Committee on...Rights, *The right to…*comment 11.
[27] Brody limits the debate to the private health model of the United States ignoring the existence of other successful health models that offer universal coverage as in the case of the Nordic countries or Cuba. See: BRODY, Baruch: "Why the right to health care is not a useful concept for policy debates,» in: BOLE III, *Rights to health...*, pp. 113-131. See also, CHAPMAN, An-

is the guide for the use of the scarce or abundant resources; the resources are not the limit to law. The legislators have a clear limit in the preparation of the rule: human rights (whether it be the rule that governs health, the immigration service or the electoral colleges).

Private enterprises

The State has the responsibility to guarantee health for as long as it is regarded a human right. Thus, public health services are the instruments through which the State guarantees this right that it has voluntarily forced itself to recognise as such. In the case of the offer of health services provided by private concerns (or of prisons managed and/or surveilled by private companies), we must remember that the States are responsible not only for action and for omission, but for allowing third parties to violate human rights (the obligation to protect, as explained before). The State must, furthermore, regulate those services whose public interest and offer are related to vital needs, as is the case with health. We understand that certain public services are inherent to the materialisation of the social State but their nature as such cannot be betrayed when those who have been entrusted by the State to provide such services are private concerns. "The social State does not focus so much on the formal legitimacy of the means of production but on the distribution of what has been produced."[28]

In general terms we accept that private companies as well are bound by the law, that they are not lawless institutions and that they could not be anti-legal, but that they equally must observe certain social coexistence principles. Enterprises such as the slave trade in Africa, offshore manufacturing in Central America and arms manufacturing have generated ethical and legal debates; the same is possible with health companies, accepting that the limit to corporate activity is human dignity. This does not deny either the market, or private property, or capital gains; it only sets a limit to the corporation.[29] The fact that a good may be produced, distributed and consumed does not exempt it from the ethical debate, since with that logic the current slave trade in Sudan should not be a matter of concern for us.

To conclude, we must specify, first, that international human rights law includes health as a subject in different law systems, but it is not fully

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drey: (Ed.): *Health Care Reform. A Human Rights Approach.* Georgetown University Press, Washington, D.C., 1994

[28] GARCIA-PELAYO, Manuel: *Las Transformaciones...* p. 17. See in general about the implications of the social State that García-Pelayo develops, p. 31

[29] Some elements of this extensive debate appear in VV.AA: *Entre el libre comercio y el comercio justo,* NGO Co-ordinator for Development, Madrid, 2000; especially: HABBARD, Anne-Christine; GUIRAUD, Marie: «*La Organización Mundial de Comercio y los derechos humanos*,» pp. 123-138.

guaranteed in them. It has, in any event, its own specific weight and it enjoys sufficient legal recognition to make it possible to assert that it is not erroneous to speak of the right to health. The second conclusion is that including health into several covenants destroys completely the notion that health is an economic and social right (not counting the already difficult and dangerous difference between the latter and civil and political rights).

One third conclusion is that thusly defined health is not an issue intended for the masses, but above all, for persons; it is an individual value whose actions may or may not be collective but whose target is not society but the individual. In fact, there is no room in international human rights law for the collective health (that is, services for a majority of individuals) versus individual health dichotomy to which certain authors refer. And the fourth and last conclusion is that, whether by omission or by action, health appears clearly as a State duty. The point is not to deny that there are health service conditions at the micro level that may violate basic values (the physician-patient relationship, for instance), but to stress that, as can be seen on a day-to-day basis in hospitals, many of the daily violations of values in the health services originate in the macro organisation of the service, which depends, either by action or by omission, on the State.

THE RIGHTS OF PERSONS UNDER CUSTODY

There are two non-negotiable premises that seem to be too easily forgotten for being so obvious, but that must be taken into consideration even under the most difficult conditions. One: the person under custody is a human being and as such she or he is entitled to human rights; and two: imprisonment is a legal punishment that must not be the excuse for all types of punishments. The person under custody loses her or his right to freedom, but not her or his dignity, nor the rest of human rights.

The different societies have adopted imprisonment as a form of punishment for certain offences in accordance with certain criminal rules that have been established, but such punishment does not go beyond the loss of freedom, which implies, strictly, that the person under custody does not necessarily lose her or his entitlement to all other rights. The person under custody has rights that are consecrated in international covenants and accepted by internal constitutional law. Such covenants establish that

"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any

charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. (…) 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[30]

The due process is a central element for the legal security of persons vis-à-vis the justice authorities: "1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (…) 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."[31] During the proceedings the person accused has the right to be informed promptly of the nature and cause of the charge against her or him; to have adequate time and facilities for the preparation of her or his defence; to be tried without undue delay; to be tried in her or his presence, and to defend her or himself; not to be compelled to testify against her or himself or to confess guilt.[32]

In addition, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"[33]. The purpose of the prison is specified: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation" [34] And certain limits are established to punishment and detention systems: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[35]

What is regarded as torture is "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or

[30] Art. 9, International Covenant on Civil and Political Rights (UN, 1966).
[31] Art. 14, International Covenant on Civil and Political Rights (UN, 1966).
[32] Art. 14, International Covenant on Civil and Political Rights (UN, 1966).
[33] Art. 10 (1), International Covenant on Civil and Political Rights (UN, 1966).
[34] Art. 10 (3), International Covenant on Civil and Political Rights (UN, 1966).
[35] Art. 7, International Covenant on Civil and Political Rights (UN, 1966).

acquiescence of a public official or other person acting in an official capacity."[36]

To put these principles into practice under detention conditions there are the "*Standard Minimum Rules for the Treatment of Prisoners*" (1957) which specify the duties of prison authorities and the limits of imprisonment measures.

These minimum rules (hereinafter "rules") include the following: a) non discrimination: "There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (rule 6.1); b) the adequate registration of detainees: "In every place where persons are imprisoned there shall be kept a bound registration book" (rule 7.1); c) the characteristics of detention centres: "Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room" (rule 9.1); d) hygiene: "All parts of an institution regularly used by prisoners shall be properly maintained and kept scrupulously clean at all times" (rule 14); among other general measures mentioned throughout this document.

Anti-discrimination rules are especially aimed at women, minor children, and political prisoners, but homosexuals, those accused of sexual crimes and the mentally ill must be included into the list of vulnerable persons. The registration book is a tool that prevents forced disappearances and tortures; good hygiene conditions are the best tool to prevent the dissemination of infectious and contagious diseases; political detainees are more vulnerable to bad treatment and torture; those accused of sexual crimes must be especially protected from attacks by other inmates.

Compliance with these rules, especially those that are directly related to the health of detainees is also a medical matter and in this sense a matter in which the health personnel should be directly involved (see, *infra*, rules 25 and 26). Nelson Mandela (Robben Island Prison registration 220/82) said "It is said that no one truly knows a nation until one has been inside the jails. A nation should not be judged by how it treats its highest citizen but how it treats its lowest one".[37]

HEALTH AND DETENTION

[36] But «It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions» art. 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN, 1984).

[37] MANDELA, Nelson: *Long Walk to Freedom*, London: Litte, Brown, 1994.

Detention and the health system

There are at least three different views of one single prison: that of the prison director, that of the prison guards, and that of the detainee. These visions do not always coincide, and more often than not contradict each other. Another view should be added: that of the health personnel.

The general detention measures focus on prison security. However, there are certain limits to such security as, for instance, that of the dignity of the detainees and their own survival. The false security vs. health dichotomy must be combated. It is important for the discipline system to be known and respected not only by the inmates but by the prison authorities. A clear visits system that is complied with determines to a considerable extent the mental health of persons.

Disciplinary measures

Imprisonment includes disciplinary measures to ensure a certain level of behaviour on the parte of the detainees. But these measures, independently from the offence committed, may not include torture, nor other cruel, inhuman and/or degrading treatments.[38] Naturally, punishments that endanger the health or the life of persons may not be imposed either. "Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences" (rule 31).

Jobs

Many prisons have a system of work programmes for detainees, which may be used to shorten sentences. As in any work site, a minimum number of safety and protection conditions must be provided, as well as the respective measures concerning health at work (occupational health).

Female detainees

The woman in prison is more vulnerable than the man in prison. "…prisons tend to be managed from a male perspective. (…) the procedures and programmes are designed for the needs of the majority male population …"[39]. This is why some authors maintain that women are made "invisible" in prison matters. For instance, the architectural design of prisons is made with the males in mind. As to security measures, with women the display of

[38] Art. 7, *International Covenant of Civil and Political Rights* (UN, 1966); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*UN, 1984).

[39] COYLE, Andrew: *A Human Rights Approach to Prison Management.* International Centre for Prison Studies, 2002, pp. 133-134.

force required for the male inmates is not necessary. And as to the jobs assigned, the women are offered jobs that reproduce the gender roles.[40]

If the circumstance that they may be mothers, nursing mothers and/or pregnant women, the vulnerability is even greater. The possibility that the women may have been the victims of sexual abuse and/or physical mistreatment, or that they be affected by sexually-transmitted diseases before entering into the prison is high.

In patriarchal societies care of the children depends on the mother. A mother in prison means a family without her support, in addition to a detainee with many more reasons to generate anxiety, depression and mental illness in general. Adequate care of female detainees requires compliance with the non-discrimination principle[41] and close surveillance to detect forms of physical and mental violence against them.

"1] Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate" (rule 8). In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution. 2] No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer. 3] Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women" (rule 53).

And concerning the right to health of female detainees: "(1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate. (2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers." (rule 23)

In general it may be asserted that, despite such rules, "the discrimination that prevails outside is reproduced and stressed inside women's prisons (…) in many prison centres certain requirements are demanded of the women in order to have the right to the conjugal visit (adoption of birth-

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[40] RODRIGUEZ, Maria Noel: *Mujeres madres en prisión en América Central,* EUNED, San Jose, 2005, p. 29

[41] *Convention on the Elimination of All Forms of Discrimination against Women* (UN, 1979).

control methods, proof of the marital relationship, etc.) which are not demanded of male inmates."[42]

Underage children

Persons under 18 years of age are understood to be underage, whereby they are protected by the rights set forth in the Convention on the Rights of the Child ("Young prisoners shall be kept separate from adults", rule 8), prison must be the last recourse to be applied to minor offenders, and efforts must be made towards the establishment of halfway institutions (welcome centres, educational homes, day training centres) to facilitate the treatment of these underage persons.

Unwritten practices

There are unwritten codes of behaviour in prisons that perpetuate dynamics and/or practices that may affect the right to health. It would be appropriate to examine such codes and to change and/or prohibit them if deemed necessary. Certain power conducts, habits established by the guards, prisoner practices that are usual and allowed, may constitute an atmosphere of impunity that is harmful to the rights of the inmates. Forms of conflict solving inside the prison must be examined. To a considerable extent such practices are fostered and perpetuated –or at least accepted—by the prison guards and authorities, who should be responsible for the eradication thereof. Official corruption in prisons is concealed by impunity and the indifference of societies concerning what occurs inside their detention centres. "Prisons usually cannot select their prisoners; they have to accept whoever is sent to them by the court or the legal authority. They can, however, choose their staff" [43]

The right to health in detention centres

It would be ideal for the health services of the detention centre to be a part of the health system of the society; for the health care of detainees to by supported by the national health system and its different structures. "The medical services should be organized in close relationship to the general health administration of the community or nation" (rule 22,1).

Unfortunately "in almost all countries the department that provides assistance to prisoners is not the department that provides health care and promotes health, but that in charge of custody and surveillance, as inadequate as that may be in many cases and as inefficient as it is in all cases."[44]

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[42] RODRIGUEZ, *Mujeres madres...* p. 31

[43] COYLE, *A Human Rights Approach...* p. 13

[44] MARTIN Vicente: «Prisons and public health,» *El País*, Madrid, June 8 2004. The author is chairman of the Spanish Correctional Health Association.

Because of compliance with the State's duty to ensure the health of detainees the State is criticised with the argument that a State cannot ensure the health of those who violate the law and leave those who comply with the law unattended. The reality is that it is a State's duty to see to the health of persons whom it has deprived of freedom; secondly, detainees are more vulnerable in terms of health than the population in general. The principle of "equivalence" is then formulated in view of such circumstances, whereby it is asserted that the health services devoted to the correctional population must be as good as those for the population in general.

There are some specific rules to ensure the right to health while under custody. The first measure is the adjustment of detention facilities to standards according to which it is possible to ensure a minimum in terms of health conditions, such as the provision of drinking water or preventing overcrowding.

The second measure is the organisation of health services within the detention facilities equipped with adequate diagnosis and therapeutic resources. "At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. (…) They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality" (rule 22,1). "Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers." (rule 22,2).

The third measure must be as exhaustive a medical exam as possible of every detainee on the day of her or his entry into prison. This makes it possible to make an early diagnosis of certain diseases and start the necessary treatment; establish vulnerabilities (for instance, malnutrition and disabilities); identify addictions (drugs); put on record whether the person shows any type of injuries (which is useful in the struggle against torture); avoid the propagation of communicable diseases (especially sexually-transmitted diseases, hepatitis and tuberculosis). This initial contact of detainees with the detention centre's health service must serve to identify health education needs to put measures into practice later and collectively.

"The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work" (rule 24).

"The entry into prison provides an opportunity to improve the health condition of society's marginal and/or marginated communities, or at least

to minimise the risk of worsening it (…) To waste such an opportunity implies a double injustice."[45]

In the case of female detainees the first exam must include a thorough gyneco-obstetric exam and the recording of every finding, especially if related to sexual abuse. It is recommended that female detainees by examined by persons of the same sex. In the case of persons with disabilities, the health personnel must report such condition to the detention centre's authorities in order for such disabilities to be taken into account for instance when a cell is assigned and improvements are made concerning physical barriers for the movement of disabled detainees, etc.

The fourth measure is the development of special programmes (for instance against tuberculosis) when deemed advisable. Regular programmes include the doctor's visit, vaccination programmes, patient follow up, treatment supervision, emergencies and dental care ("The services of a qualified dental officer shall be available to every prisoner", rule 22,3) etc. "The medical officer (…) should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed," rule 25,1).

Regulating control of detention conditions is also a task. "The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment," rule 25,2). "1] The medical officer shall regularly inspect and advise the director upon: a] The quantity, quality, preparation and service of food; b] The hygiene and cleanliness of the institution and the prisoners; c] The sanitation, heating, lighting and ventilation of the institution; d] The suitability and cleanliness of the prisoners' clothing and bedding; e] The observance of the rules concerning physical education and sports, in cases where there are no technical personnel in charge of these activities. 2] The director shall take into consideration the reports and advice that the medical officer submits (…) and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority." Rule 26).

Accepting that certain detainees require special care; that there are areas within the prison of greater security than others, and being realistic about the operative difficulties implicit in the care of a certain type of detainee, it is understood that, in any event, the right to health of persons under custody does not depend on the crime that they may have committed, nor on

[45] MARTIN Vicente: "Prisons and...

how dangerous they may be, but --however repetitive as it may sound-- on their condition as human beings.

Detention conditions and health conditioning factors

If the State has the right to deprive persons of their freedom in accordance with previously-established and defined rules, it has the duty to look after the living conditions and health of the persons detained. "When a state deprives people of their liberty it takes on a responsibility to look after their health in terms both of the conditions under which it detains them and of the individual treatment which may be necessary as a result of those conditions."[46]

Overcrowding

One of the main problems of prisons in Latin America is prison overcrowding, understood as the "excess of persons deprived of their liberty over the lodging capacity officially provided for." Out of 18 countries examined, 15 have critical overcrowding problems.[47]

It is not possible to continue considering prisons as warehouses where persons that the society marginates and deprives of freedom are put away. Overcrowding is associated with skin diseases (parasites) and respiratory diseases (tuberculosis). In this case, as in many others, the solution lies not in the use of antibiotics, but in avoiding overcrowding.

According to the *Minimum Rules* "All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation." (Rule 10). There is not a rule on the minimum space required for each detainee. The estimates of area per person depend on the time that such person will be assigned to the cells, the impact of a smaller space being greater if the amount of time to be spent in it is greater.[48]

Food and drinking water

There is a minimum of nutrients and kilocalories per person per day that is required to ensure an adequate nutrition. According to UN recommendations: "1] Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served. (2) Drinking water shall be available to every prisoner whenever he needs it." Rule 20). Bad nutri-

[46] COYLE, *A Human Rights Approach to...* p. 49
[47] RODRIGUEZ, *Mujeres madres...* p. 23
[48] COYLE, *A Human Rights Approach to...* pp. 44-45

tion affects the immune system, that is, the capacity to react to infections. It was reported that in a prison in Honduras "the female inmates do not have drinking water and must boil the water for their personal consumption."[49]

Personal hygiene of detainees

Detention centres must be equipped with facilities and conveniences for the detainees to be able to keep themselves clean. "The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner." (Rule 12); "Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene…" (Rule 13); "Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness." (Rule 15). "In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly." Rule 16). Shower and bath facilities must be easily accessible (especially for the physically impaired), clean, and designed to permit privacy (especially in the case of women). In Japan encouragement programmes have been developed for inmates who help by maintaining adequate hygiene conditions in their cells. [50]

Health services in detention centres

Health is not just the health service in prisons; it involves other aspects; however, it is the most visible element and in the event of an emergency, the most relevant one. The vulnerability conditions of detainees make the health service of the detention centre a central element in disease prevention and treatment, and it should also be so in ensuring the right to health.

Concerning the essential elements of the basic core let us determine its coverage. On the basis of the Comment of the UN Committee on Economic, Social, and Cultural Rights,[51] the right to health includes the following essential and inter-related elements:

Availability

This implies having a sufficient number of public health establishments, goods and services, as well as programmes. It is necessary to have physical,

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[49] RODRIGUEZ, *Mujeres madres...* p. 98

[50] WATANABE, Shinya: «Medical care and hygiene in Japan's prisons,» in: CARRANZA Elías (Coord.): *Justicia penal y sobrepoblación penitenciaria,* Siglo XXI publishers, San José, 2001, p. 289. See, in general, pp. 285-296

[51] See, in general, Committee on Rights, *The right to…*

human and financial resources so as to guarantee the right to health of detainees. The health profiles of prisons are special and, therefore, they on occasions require the development of special programmes.

In a study on female detainees in Central American prisons it was found that "many correctional centres do not provide a sufficient, specialised and quality care with due consideration of women's sexual and reproductive health. The lack of gynaecologists and paediatricians for the children who live with their mothers was noticed in several establishments."[52]

Accessibility

Health establishments, goods and services must be accessible to all persons without discrimination. Accessibility has four overlapping dimensions: i) Non discrimination; ii) Physical accessibility; iii) Financial accessibility; iv) Access to information. Non discrimination implies that medical care cannot vary depending on the type of crime that the person commits. Physical accessibility implies that the schedules must be adjusted to the prison's hours, but also that during the night and/or weekends there must be mechanisms available to make it possible for prisoners to have access to health services. Financial accessibility in the case of prisons must be a concern of the centre's director but never of the detainee. And as to access to the information the detainee has the right to know what her or his ailment is, about the therapeutic possibilities, and even about the rejection of treatments.

With regard to physical accessibility and the very design of prisons, it is necessary to take into consideration aspects related to both architectural barriers, and health conditions before starting to build a detention centre.

Acceptability

All health establishments, goods and services must be respectful of medical ethics and culturally appropriate. In the case of prisons with highly dangerous prisoners it is necessary to attain a balance between due protection measures for health personnel and the right of the inmates to have access to the services, taking into account the confidential nature and privacy of the medical examination. Confidentiality is a central element here. The reasons for consultation are neither public information nor are they available to the prison's authorities; instead, they fall under professional medical secrecy.

Quality

Health establishments, goods and services should also be appropriate from the scientific and medical points of view and of good quality. As compared to health centres outside the prison, the detention centre's health service should ideally have sufficient and adequate resources that should allow it a

[52] RODRIGUEZ, *Mujeres madres...* p. 31

certain autonomy, precisely because of the security characteristics of a prison. For instance, autonomy is recommended to perform laboratory tests expeditiously without depending on an outside centre, since a timely diagnosis will prevent the unnecessary transportation of detainees or the postponement of necessary trips.

Health programmes in detention centres

We must not forget that detainees continue to require health services regardless of their condition as detainees. Medical visits for hypertension, diabetes, control of uterus cancer, etc., constitute a part of the daily duties of the health team. Now, in addition to this, both because of the type of individuals who are sent to detention centres (malnutrition, vulnerability), and because of the characteristics of correctional institutions (overcrowding, control measures, etc.) the development of certain health programmes is a must. This is the case of special programmes against tuberculosis, sexually transmitted diseases (especially HIV/AIDS), mental health, emergency services during night hours and/or when a doctor is not on duty, etc.

In these cases the centres must have precise strategies for prevention, diagnosis and treatment of diseases, or the timely and adequate transfer (in the event of emergencies) to competent health centres.

Tuberculosis

In the poor countries and because of the level of malnutrition, it is frequent to find patients with tuberculosis. If this is not treated each individual with active TBC can infect between 10 and 15 persons per year. The increasingly frequent combination between HIV/AIDS and TBC is mortal. The reappearance of tuberculosis in developed countries has occurred only after the appearance of cases that are resistant to conventional treatments in New York associated with HIV/AIDS.[53]

In 2002 more than 10% of Russia's total population was suffering from active tuberculosis. Approximately 42% of all TBC patients in Russia were in prisons and at least 60% of the latter are multiresistant to treatments.[54] The treatment of TBC patients may require isolation, a special diet (especially if the average of nutrients in prison is lower than what is ideal), ventilation, health education to improve prevention, supervision to prevent abandonment of the treatment (particularly because of its length), a control baciloscopy, and a review of those cases where resistance to treatment was found.

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[53] See in general: Doctors without borders: *MSF Memoria Internacional*, 2003/2004

[54] Improving Prison Healthcare in Eastern Europe and Central Asia, Guidance Document 1, pp. 2-3

The International Red Cross Committee, ICRC, has developed programmes against tuberculosis in prisons of the Southern Caucasus, Georgia, Armenia, and Azerbaijan, having attained good results despite having found cases of resistance to treatments, and the detention conditions that facilitate the disease.[55]

Sexually-transmitted diseases, STD (especially HIV/AIDS)

Sexual practices among detainees, whether with consent or forced, increase the risk of becoming infected. At the present time it is possible to provide effective, fast-acting, and inexpensive treatments for most sexually-transmitted diseases. Complications from non-treated diseases are dangerous, such as in the case of the pelvic inflammatory disease (a complication of gonorrhoea and the Chlamydia infection), which can result in infertility.

One of the most troubling problems within the STD realm is that of HIV/AIDS because of what it represents both as a disease and a stigma. In the case of the Lurigancho prison, in Peru, the percentage of HIV/AIDS is 2.6% (seven times higher than the 0.3% percentage for the entire country).[56] Whether voluntary or forced, sexual practices inside prisons increase the risk of infection. Detention conditions (malnutrition, overcrowding) increase the vulnerability of HIV-infected persons. Social stigmatisation of HIV-infected persons and budgetary restrictions for protection of the detainees' health make it impossible to give them due priority.

It is the doctor's duty to prevent transmission of the disease; develop health education programmes; encourage the use of condoms; do diagnostic testing among the correctional population; and establish the adequate treatments and follow up for these patients in a timely manner, both because of the risk of complications, and infection of other detainees. It is important for prevention programmes to reach the family members and relatives of the detainees.

Mental health

Being in prison is sufficient to become depressed, but not all detainees develop the mental disorder known as "major depresión." A person under custody who does not express any worries is what would be regarded "abnormal". Nobody, in principle, likes to be locked up. In England, the suicide rate among prisoners is six times greater than among the general population. Fourteen percent of female inmates and 7% of male inmates suffer from

[55] International Red Cross Committee: «Southern Caucasus; the correctional population is the most vulnerable to a tuberculosis epidemics,» IRCC News, March 23 2005.

[56] International Red Cross Committee: «Peru: international HIV/AIDS seminar; vulnerable populations and prisons,» regional news, June 4, 2004.

mental disorders, as compared to 0.5% for the population in general.[57] An explicit visits system; timely access to lawyers; legal security; the right to know the charges filed, are the basis for prevention of mental disorders.

Mental illness requires professional care. "1] So far as possible, the personnel shall include a sufficient number of specialists such as psychiatrists, psychologists, social workers, teachers and trade instructors. 2] The services of social workers, teachers and trade instructors shall be secured on a permanent basis, without thereby excluding part-time or voluntary workers" (rule 49).

In addition to this, the encouragement of recreational and sports activities makes it possible to improve integration and raise self esteem at the detention centre. "The minimum time recommended per day is "at least one hour's exercise in the open air…"[58] Religious practices must also be permitted, since this is a human right that is not lost upon entry into the prison.[59] "If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. (…) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected" (Rule 41). "So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination" (Rule 42).

In general there are two risks vis-à-vis mental illness: exaggeration and negation. We must not "pathologies" every trait of behaviour of the prisoner. Becoming depressed, feeling sorry and crying are normal. In cases of declared mental illness it must not be denied under the assumption that it is but a normal reaction to the loss of liberty. The difference between a normal emotional reaction and a mental disorder it is not always easy to diagnose, and it is a task for a professional, not the prison guard to perform. Mental illness worsens the situation of the detainee, especially because there are correctional centres with areas for the mentally ill that, rather than provide relief and support, leave the patient in abandonment together with so many other abandoned ones.

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[57] «Is the mental health of officials and prisoners in danger?» *El Mundo Digital*, September 5, 2003.

[58] COYLE, *A Human Rights Approach...* p. 47

[59] «Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching» Art. 18, *International Covenant on Civil and Political Rights* (UN, 1966).

The authorities have the responsibility to prevent the trade and consumption of psychoactive substances inside the prison. On many occasions such trade involves those in charge of surveillance. Such control is a task for the medical staff both because of the addiction to substances as an illness, the effect of such substances on health and on the (violent) behaviour of the detainees, and because of the effect it has activating other mental disorders (such as major depression). And it is the responsibility of the health personnel not to distribute psychiatric drugs massively and irresponsibly.

The health staff must face and prevent suicide among detainees. In 2005 the suicide rate in California prisons was found to be 27 per 100.00 prisoners, twice the suicide rate for the nation in prisons (14) with almost one suicide per week. Seventy percent of suicides occurred "in isolated disciplinary units".[60]

One last aspect of mental health to be taken into account is the mental health of both, the prison guards, and the prison staff. Part of the aggression of the institution against the detainees lies in the bad labour conditions of the personnel in charge of the prison, which do not justifies them.

Emergencies

The first problem with night emergencies is that of the security controls set up for the prison population during the night. This is where it is possible to observe again the tension between security and health. Nobody is expecting that security measures be given up, but that they do not make it materially impossible to have access to health services, or even alert about the fact that someone is ill or wounded in the detention area.

The second problem is diagnosis, something that should be done by a professional, but never, as it occurs many times, by a prison guard who does not have any training at all in the field of health. This type of situation has generated more than once deaths that could have been prevented had the patient been transferred in a timely manner. Guards seem not to understand that what causes a patient to be in serious condition is not the amount of blood but other medical considerations that cannot be understood by everybody.

The third problem is transportation, which should be adequate and timely. Detention centres should have at their disposal adequate ambulances. Each prison, in turn, should have a reference hospital to which prisoners should be referred in case of need, thus avoiding bureaucratic red tape and unnecessary transport to medical facilities without sufficient capacity. "Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals". (Rule 22.2). Escorts and security measures must be provided for beforehand for this type of situation. It is

[60] «Suicide record in California Prisons,» *La Opinión Digital*, January 3, 2006.

important for the correctional institution's executive staff to understand that certain medical emergencies may cause the death of the patient and, therefore, they must not delay transfers alleging security reasons.

Health education

In some way gaol facilitates the follow up of certain health programmes and the possibility to develop sustained programmes of health education that would benefit not only the inmates but their family members and relatives (for instance, a campaign to encourage the use of prophilactics to prevent sexually-transmitted diseases and undesired pregnancies).

It is true that not all health variables depend on information, and it is also true that information is not enogh to prevent diseases, but it is indeed a central element in disease prevention and its timely diagnosis.

MEDICAL ETHICS AND PERSONS UNDER CUSTODY

Before approaching medical duties it is necessary to define medical rights. The health personnel have the right to demand respect for their medical decisions, such as therapeutic measures, orders for the transfer of patients to more specialised medical centres chosen for a given treatment; respect for the confidential nature of clinical histories and in general for the information provided by the detainees; the establishment of priorities for health reasons; the request for laboratory exams; special measures (diets, nutritional control, etc.). The recommendations made by health personnel to the prison authorities must be heard and taken into consideration; for instance, those related to food quality; the supply of drinking water; the resources necessary for the health service; the availability of areas for isolation of detainees for medical reasons, etc.

In cases where the health personnel observe deliberate, continued and systematic practices that damage the health of the patients (tortures, low calorie supply, etc.) they must inform the authorities about this type of situation. Not much is gained by assisting a torture victim or giving nutritional support to an undernourished person when facing a policy that affects detainees in a massive way.

Doctors and health personnel are not allowed to judge the crime committed by the person or to act on the bases of the crime committed. In addition they must abstain from giving any kind of support to measures that imply tortures or cruel, humiliating or degrading treatments; they cannot perform any kind of experiments using the prison population without the individuals' express authorisation; they must respect the information entrusted to them by the inmates because of or on the occasion of their profes-

sional practices; nor can they show any type of discrimination in providing medical care to detainees, except if it is based on medical criteria.

Medical ethics must be observed in providing care to detainees, in the same manner as in the case of non detainees, and even with greater care. For instance, confidentiality of medical information is part of professional secrecy; of the act of trust that has arisen from the doctor-patient relationship, and this must not be betrayed by health personnel. Since the prison is a closer and smaller space, the impact generated by the declassification of information can be highly harmful for the detainee and even for health personnel.

The medical practice must be neutral and seem neutral to the eyes of those persons to whom it shall be exerted: the patients, and in the case of prisons the detainees. The doctor is not a member of the security detachment and therefore her or his actions must be separated from any police or security action aimed at the detainees. "The medical officer shall have the care of the physical and mental health of the prisoners" (Rule 25,1). In like manner, health personnel must abstain from supporting practices that imply converting government opponents into "mentally ill" patients to justify their imprisonment.

CONCLUSION

The conclusion seems to be that prisons are detrimental to health, and that it is preferable to be free and healthy than imprisoned and ill. But once a person is brought under custody the correctional authorities in general and the health personnel in particular become responsible for guaranteeing the right to health of detainees. International human rights law and medical ethics establish specific and clear rules to this effect, to determine protection actions and measures. For certain matters common sense is sufficient, it being understood that detainees do not lose their condition as human beings, nor any of the other human rights. Detainees continue to be entitled to rights. The punishment of prison is that which is determined by the laws of one country, but that punishment must not be intensified by additional forms of punishment; imprisonment is a legally established punishment that must not be an excuse for all types of punishment.

For purposes of guaranteeing the right to health, health personnel must have resources and programmes that enable them to comply with regular activities (visits, treatments), as well as with special programmes when warranted (tuberculosis, HIV/AIDS, etc.). According to international human rights law, the instruments (programmes and services) needed to guarantee the right to health must comply with four requirements: availability,

accessibility, acceptability, and quality. These programmes must at all times and places be consistent with medical ethics principles. And beyond care programmes, health personnel have the duty to see to it that imprisonment conditions (overcrowding, food and drinking water supply, cleaning services, etc.) not be detrimental to the health of detainees. Compliance with the rules of treatment of detainees, especially those that are directly related to their health is also a medical issue, and as such, a matter in which health personnel must be directly involved.

The mixture of elements such as malnutrition, depression, diseases, lack of adequate and timely treatments, consumption of psychoactive substances, non-hygienic conditions, and overcrowding, constitute an explosive mixture against the health of persons under custody and the absolute denial to the right to health. Such denial constitutes an additional, illegal and unfair punishment that is added to the punishment of imprisonment. In one prison in Honduras no treatment is available for HIV/AIDS patients and medication is provided only for the symptoms thereof; the centre does not have a provision for medicine; there are no medical night shifts; means of transport to health services outside the prison are not always available; and there is an absolute lack of psychiatric services.[61] The World Medical Association expressed that:

"The problem of the deterioration of health in prisons is a direct result of the human rights violations that occur in them. It cannot be solved under conditions of correctional overcrowding, lack of access to exercise, sunlight and an adequate food supply, and minimum health care or no health care at all for the persons held in prison (…) What is urgent almost desperately is a change in prison conditions, and in the quality of the health care that is provided in them".[62]

Perhaps the solution to this problem lies beyond the walls of the detention centre; beyond the office of the prison director, perhaps it has its roots in health policies and/or correctional policies; if such be the case, the debate and questions with respect thereto must be submitted to those who have made possible, with their decisions, the lack to the right to health in detention centres.

[61] RODRIGUEZ, *Mujeres madres...* p. 99

[62] TIDBALL-BINZ, Morris: «Health care and correctional overpopulation: a problem for all» in: CARRANZA Elias (Coord.): *Justicia penal y...* pp. 48-57