

CRPD, forced treatment and alternatives

Tina Minkowitz
Norway
January, 2009

CRPD relevance

- CRPD is 8th core human rights treaty of UN
 - Part of international human rights legal framework
 - Authoritative guidance on interpretation of rights and freedoms of people with disabilities
 - Guides UN HR system including special procedures, UPR, all treaty monitoring committees
 - Regional HR courts and commissions
 - States urged to ratify CRPD and its OP
 - Obligations of signatories

CRPD relevance 2

- CRPD covers people with psychosocial disabilities
 - Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments (CRPD Art. 1)
 - Included in article on purpose, non-derogable
 - Both “mental” and “intellectual”
 - Issues discussed with active participation of WNUSP representing users and survivors of psychiatry

MI Principles

- The exercise of the rights set forth in the present Principles may be subject only to such limitations as are prescribed by law and are necessary to protect the health or safety of the person concerned or of others, or otherwise to protect public safety, order, health or morals or the fundamental rights and freedoms of others. (General limitations clause)

CRPD

- States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. (Art. 4)
- 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. (Art. 1)

MI Principles on detention

- A person may be admitted involuntarily to a mental health facility as a patient or, having already been admitted voluntarily as a patient, be retained as an involuntary patient in the mental health facility if, and only if, a qualified mental health practitioner authorized by law for that purpose determines, in accordance with principle 4 above, that that person has a mental illness and considers:
 - (a) That, because of that mental illness, there is a serious likelihood of immediate or imminent harm to that person or to other persons; or
 - (b) That, in the case of a person whose mental illness is severe and whose judgement is impaired, failure to admit or retain that person is likely to lead to a serious deterioration in his or her condition or will prevent the giving of appropriate treatment that can only be given by admission to a mental health facility in accordance with the principle of the least restrictive alternative. (Principle 16)

CRPD on detention

- States Parties shall ensure that persons with disabilities, on **an equal basis with others**:
- (a) Enjoy the **right to liberty and security of person**;
- (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that **the existence of a disability shall in no case justify a deprivation of liberty**. (Art. 14)

CRPD on detention 2

- States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. (Art. 12)

MI Principles on consent

- “Except as provided in paragraphs 7, 8, 12, 13, 14 and 15 of the present principle, a proposed plan of treatment may be given to a patient without a patient’s informed consent if the following conditions are satisfied:
- (a) The patient is, at the relevant time, held as an **involuntary patient**;
- (b) An independent authority, having in its possession all relevant information, including the information specified in paragraph 2 of the present principle, is satisfied that, at the relevant time, the patient **lacks the capacity to give or withhold informed consent** to the proposed plan of treatment or, if domestic legislation so provides, that, having regard to the patient’s own safety or the safety of others, the patient **unreasonably withholds such consent**;
- (c) The independent authority is satisfied that the proposed plan of treatment is in the **best interest** of the patient’s health needs.” (Principle 11)

MI Principles on consent 2

- Except as provided in paragraphs 12, 13, 14 and 15 of the present principle, treatment may be given to such a patient without his or her informed consent if the **personal representative**, having been given the information described in paragraph 2 of the present principle, **consents on the patient’s behalf**.
- Except as provided in paragraphs 12, 13, 14 and 15 of the present principle, treatment may also be given to any patient without the patient’s informed consent if a qualified mental health practitioner authorized by law determines that it is **urgently necessary in order to prevent immediate or imminent harm to the patient or to other persons**. Such treatment shall not be prolonged beyond the period that is strictly necessary for this purpose. (Principle 11)

CRPD on consent

- States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. (Art. 12)
- “States Parties shall (d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including **on the basis of free and informed consent** by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care. (Art. 25)

CRPD - new HR standard

- From “patients’ rights” to human rights
- UN Special Rapporteur on Torture: In the case of earlier non-binding standards, such as the 1991 Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (resolution 46/119, annex), known as the MI Principles, the Special Rapporteur notes that the acceptance of involuntary treatment and involuntary confinement runs counter to the provisions of the Convention on the Rights of Persons with Disabilities.
 - Special Rapporteur on Torture is expert appointed by UN Human Rights Council, mandate to transmit urgent appeals regarding individuals at risk of torture, undertake fact-finding country visits, regularly report to HRC and GA

CRPD on detention

- CRPD prohibits detention under mental health laws
 - Neither danger criterion nor treatment criterion
- Amounts to justification of detention based on disability, contrary to Article 14
- Danger and treatment criteria inseparable from existence of a disability
- Negotiating history – rejection of proposals to add “solely” or “exclusively”
 - CRPD Article 14, Article 5, Article 3
 - SR on Torture
 - OHCHR Information Note on PWD in Detention

SR on Torture

- “Many States, with or without a legal basis, allow for the detention of persons with mental disabilities in institutions without their free and informed consent, on the basis of the existence of a diagnosed mental disability often together with additional criteria such as being a “danger to oneself and others” or in “need of treatment”. The Special Rapporteur recalls that article 14 of CRPD prohibits unlawful or arbitrary deprivation of liberty and the existence of a disability as a justification for deprivation of liberty.”
 - Cites negotiating history – some delegations wanted to allow detention based on disability plus other grounds, but text proposal was rejected

OHCHR

- “The Convention on the Rights of Persons with Disabilities (CRPD) states clearly that deprivation of liberty based on the existence of a disability is contrary to international human rights law, is intrinsically discriminatory, and is therefore unlawful. Such unlawfulness also extends to situations where additional grounds—such as the need for care, treatment and the safety of the person or the community—are used to justify deprivation of liberty.”

Detention and other HR obligations

- SR on Torture: Deprivation of liberty based on existence of a disability might amount to torture or ill-treatment when severe pain or suffering is inflicted.
 - Depends on duration of detention, conditions of detention and treatment inflicted
- OHCHR: Under international human rights law, persons with disabilities are entitled to enjoy their rights to liberty and security on an equal basis with others, and can be lawfully deprived of their liberty only for the reasons, and in accordance with the procedures, that are applicable to other persons in the same jurisdiction.
 - UDHR Art. 2, 3 and 9, ICCPR Art. 9, CRPD Art. 14, HRC Gen. Comment No. 8

CRPD on nonconsensual treatment

- CRPD prohibits nonconsensual medical treatment
 - Article 12, Article 25
 - SR on Torture: The Special Rapporteur notes that in relation to persons with disabilities, the Convention on the Rights of Persons with Disabilities complements other human rights instruments on the prohibition of torture and ill-treatment by providing further authoritative guidance. For instance, article 3 of the Convention proclaims the principle of **respect for the individual autonomy of persons with disabilities** and the freedom to make their own choices. Further, article 12 recognizes their **equal right to enjoy legal capacity in all areas of life, such as deciding where to live and whether to accept medical treatment**. In addition, article 25 recognizes that medical care of persons with disabilities must be based on their **free and informed consent**.

Nonconsensual treatment and other international law

- Nonconsensual psychiatric interventions, including administration of neuroleptics and other mind-altering drugs, may constitute torture or ill-treatment
 - SR on Torture: CAT; ICCPR Article 7; CRPD Articles 15, 16, 17

SR on Torture

- Whereas a fully justified medical treatment may lead to severe pain or suffering, medical treatments of an intrusive and irreversible nature, when they lack a therapeutic purpose, or aim at correcting or alleviating a disability, may constitute torture and ill-treatment if enforced or administered without the free and informed consent of the person concerned.
- Persons with disabilities are exposed to medical experimentation and intrusive and irreversible medical treatments without their consent (e.g. sterilization, abortion and **interventions aiming to correct or alleviate a disability, such as electroshock treatment and mind-altering drugs including neuroleptics**).

SR on Torture 2

- Torture, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation of powerlessness, whereby the victim is under the total control of another person. ... it is often circumstances external to the individual that render them “powerless”, such as when one’s exercise of decision-making and legal capacity is taken away by discriminatory laws or practices and given to others.

SR on Torture 3

- The **requirement of intent** in article 1 of the Convention against Torture can be effectively implied where a person has been discriminated against on the basis of disability. This is particularly relevant in the context of medical treatment of persons with disabilities, where **serious violations and discrimination against persons with disabilities may be masked as “good intentions”** on the part of health professionals. Purely negligent conduct lacks the intent required under article 1, and may constitute ill-treatment if it leads to severe pain and suffering.

CRPD on legal capacity

- Article 12:
 - (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
 - (3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
 - (4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person....”

Legal capacity

- CRPD Article 12 adopts support model of legal capacity – instead of substituting the will of a person by appointing a guardian or personal representative, support must be provided to allow person to express his or her own will.
- Right to make mistakes/ dignity of risk
- Everyone has a will
- “You can’t not communicate!”

Support

- Support in exercising legal capacity/ supported decision-making
 - Decisions requiring legal formality (marriage, buying/selling house, contracts, will, bank account, rental agreement)
 - Everyday decisions (what to wear, small transactions, activities)
 - Major life decisions (career, education, religion, family, sexuality, community)

Support 2

- Psychosocial disability often a time of crisis and transition (even if long-term)
 - Sometimes the crisis relates directly to the need to make major life decisions
 - Resolution/recovery can be affirmation/acceptance of change and entering new course in life
 - Need time/space shelter, “true asylum”
 - Mental health alternatives like Soteria House, Runaway House, etc. based on this model

Support 3

- Formal or negotiated agreements to provide support in times of crisis
 - Trauma-informed peer support crisis planning
 - Written plans
 - Designated support people
 - This does NOT supplant the person’s decision during the crisis unless so negotiated beforehand
 - Questionable whether agreements to allow someone else to act against your will at a later time are useful
 - Would appear to violate right to have legal capacity on an equal basis

Support 4

- Classic supported decision-making
 - Relationship of trust with one or more individuals, based on mutual agreement to support particular individual in reaching and expressing his/her own decisions
 - Long-term
 - Responds to varying needs at different times
 - Unpaid, usually draws from family/friends/community
 - Can be demonstrated by evidence of existence of relationship of trust, if person does not use language to communicate

Support as competent process

- Classic supported decision-making is based on the idea that interdependent decision-making is a competent process
- Competence of process replaces competence of individual
- Developed for people with intellectual disabilities
- Works in large part by plain language explanation, caring people making sure relevant information is understood, can include interpretation of nonverbal communication and interactive construction of narrative identity

Support as competent process 2

- Requires safeguards to ensure respect for will and preferences of the person, freedom from conflict of interest etc.
- Safeguards vary with degree and nature of support
- Periodic review
- Having more than one supporter for people with complex needs/nonverbal communication

Support as competent process 3

- Does this work for people with psychosocial disabilities?
 - Breaking down information in manageable pieces during a crisis
 - Respecting and accepting alternative kinds of communication
 - Creating conditions for better decision-making by providing emotional support

Support as competent process 4

- Challenges for people with psychosocial disabilities in using supported decision-making:
 - Crisis may entail breakdown in communication and relationships
 - Support cannot prevent a person from making bad decisions – e.g. spending all the money, acting out in anger, etc.
 - This is true for people with intellectual disabilities and non-disabled people as well

Support as competent process 5

- Support can accompany a person through mistakes and help them learn (but not dictate the lessons)
- Ultimately all of us are responsible for our choices whether we come to accept responsibility or not
- People with psychosocial disabilities are always making choices, even during crises

Support as competent process 6

- Does seeing support as a competent process imply that some people's decision-making should not count as competent without support?
 - Inconsistent with equal legal capacity
 - Question about capabilities related to decision-making can give rise to offer of support but not a requirement to use support
 - Need to have some transactional or on-call support or people skilled in accessible communication

Resources

- CRPD <http://un.org/disabilities> and <http://www2.ohchr.org/english/issues/disability/index.htm>
- Materials on Torture <http://www2.ohchr.org/english/issues/disability/torture.htm>
- Detention and PWD http://www.ohchr.org/EN/UDHR/Documents/60UDHR/detention_infonote_4.pdf
- World Network of Users and Survivors of Psychiatry <http://www.wnusp.net>
- Tina Minkowitz tminkowitz@earthlink.net