International Human Rights Law and Mental Disability

by Lawrence O. Gostin

The shameful history of benign and sometimes malignant neglect of persons with mental disabilities is well understood: the deep stigma and unredressed discrimination, the deplorable living conditions, and the physical and social barriers preventing their integration and full participation in society. Countless promises have been made to right the wrongs, but new forms of neglect have always emerged. The mentally disabled have ended up in prison, in equally deplorable adult homes, or on the streets, homeless and destitute, while the wider society has averted its eyes. These promises, Robert Burt writes, "were dishonored in actual practice and were virtually fraudulent."[1]

Now President Bush's New Freedom Commission on Mental Health casts its recommendations as a "promise" for "a life in the community for everyone."[2] This promise was insincere from the outset. The administration released the report without the presence of the president, a White House ceremony, or even a news conference,[3] and the commission's charge virtually prevented it from proposing new expenditures.

Perhaps it is time to frame the concerns of persons with mental disability not simply as a social problem, but as a human rights imperative. Persons with mental disabilities seek four interrelated human rights: liberty, dignity, equality, and entitlement.[4] Human rights jurisprudence, principally in Europe and now emerging in the Americas, focuses on these four themes through cases involving involuntary detention, the conditions of confinement, civil rights, and access to mental health services.[5]

Two landmark cases by the European Court of Human Rights (ECHR) have addressed the liberty interests of persons with mental disabilities. *Winterwerp v. the Netherlands* established that civil commitment must follow a "procedure prescribed by law" and cannot be arbitrary; the person must have a recognized mental illness and require confinement for the purposes of treatment.[6] *X v. the United Kingdom* mandated speedy periodic legal review with the essential elements of due process.[7]

Mental health advocates in Europe are now urging the ECHR to rule on two other issues: detention of "non-protesting" patients and community treatment orders. The problem of "non-protesting" patients arises when persons are confined in fact but not under the force of law. A person may succumb to a show of authority, or may be unable to provide informed consent. In such cases, advocates argue, they should be treated as if they were under detention and afforded all appropriate procedural safeguards.

Pressure for community treatment orders arises from the enduring albeit mistaken belief that mental disorder predisposes people to behave violently. Community supervision orders, designed to compel psychiatric treatment, are increasingly common in the United States and are hotly debated in Europe. Thus far, the European Commission has not viewed compelled outpatient treatment as a deprivation of liberty, but advocates claim that community treatment orders invade bodily integrity and widen the net of people subject to compulsion.

The theme of dignity bears on the living conditions in institutions for persons with mental disabilities. Nongovernmental organizations still discover appalling problems,[8] including long periods of isolation in filthy, closed spaces; lack of adequate care and medical treatment; and severe maltreatment, such as being beaten, tied-up, and denied basic nutrition and clothing. Recently, the ECHR has required increased medical attention to, and appropriate facilities for, persons with mental disabilities. More importantly, it has emphasized that the European Convention's proscription of inhuman and degrading treatment includes actions designed to humiliate persons with mental disabilities.

A new generation of impassioned advocates is also bringing cases to the Inter-American Commission on Human Rights, with promising results. In *Victor Rosario Congo v. Ecuador*, the IACHR found a violation of the right to humane treatment.[9] A person with mental disability had been struck in the head, denied medical treatment, and left in his cell for forty days. The case is important because the IACHR relied on the United Nations Principles for the Protection of Persons with Mental Illness: "inhuman and degrading treatment or punishment should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental."[10] The commission asserted that "a violation of the right to physical integrity is even more serious in the case of a person held in preventive detention, suffering a mental disease, and therefore in the custody of the State in a particularly vulnerable position."[11]

In December 2003, for the first time in its history, the IACHR approved "precautionary measures" to protect the lives, liberty, and personal security of 460 people detained in a psychiatric institution in Paraguay. The case focuses on two boys who have been in isolation for more than four years, naked and without access to bathrooms. "The cells

are completely bare. Holes in the cell floors that should function as latrines are caked over with excrement. Each boy spends approximately four hours of every other day in an outdoor pen, which is littered with human excrement, garbage, and broken glass."[12] The precautionary measures adopted by the IACHR require Paraguay to protect the lives and physical and mental safety of these 460 people and to comply with international protocols on the use of isolation. By using "precautionary measures," advocates can avoid the time-consuming process of "exhausting domestic remedies" before gaining access to the IACHR.

Human rights norms protect equality through their extension to a wide array of civil rights. Simply because a person has a mental disability, or is subject to confinement, does not mean that he or she is incapable of exercising the rights of citizenship, including access to the courts and privacy. The ECHR has found violations of the right to a fair and public hearing in the determination of a person's civil rights. The subject matter of these cases includes the right to control property, to exercise parental rights, and to be granted a hearing in the determination of incompetency or placement into guardianship.

The right to a "private and family life" under the European Convention can be a powerful tool to safeguard the civil rights of persons with mental disabilities. The ECHR has applied this privacy protection to free correspondence, informational privacy, marriage, and the parent-child relationship. It has thus far declined to do so for sexual freedoms, but advocates are pursuing cases to defend this form of intimacy.

Entitlement—involving the right of access to core mental health services—is more fragile. The right to health care is a social and economic entitlement, and the European Convention of Human Rights does not capture this set of entitlements. The IACHR also has not pursued the right to health, even though the Protocol of San Salvador enunciates a full set of health rights.[13] Consequently, the scope and definition of the right to mental health care has remained vague and variable.

Several contemporary initiatives are promising, however. After the U.N. Committee on Economic, Social and Cultural Rights issued General Comment 14 on the Right to Health, the U.N. Commission on Human Rights appointed a Special Rapporteur with a mandate to focus on the right to health.[14] The Rapporteur's first report in 2003 identified three primary objectives: promote the right to health as a fundamental human right, clarify its contours, and identify good practices for putting it into effect.[15]

Another initiative is a new project at the World Health Organization focusing on mental health and human rights.[16] As part of that project, the WHO is currently preparing a mental health legislation manual that provides a tool for countries to adopt international human rights norms into domestic legislation.[17] One key norm is the provision of "public mental health," which frames the right to mental health in terms of population-based services and would require that countries offer screening for mental illnesses, mental health education, and psychiatric services. International human rights norms will have maximum impact only if they are adopted by nations into domestic laws, policies, and programs.

Human rights are not a panacea for persons with mental disabilities. Also, there remains a risk that the human rights framework—remarkable but still incomplete—will prove to be yet another broken promise. Nevertheless, focusing attention on the rights of this group is vitally important. Governments have treated persons with mental disabilities horribly throughout history and into the present, and perhaps the movement for human rights will succeed in lifting persons with mental disabilities from their historically inferior status.

1. R.A. Burt, "Promises to Keep, Miles to Go: Mental Health Law Since 1972," in *The Evolution of Mental Health Law*, ed. L.E. Frost and R.J. Bonnie (Washington, D.C.: American Psychology Association, 2001): 11-30, at 12.

2. President's New Freedom Commission on Mental Health, *Achieving the Promise: Transforming Mental Health Care in America* (Washington, D.C.: President's New Freedom Commission on Mental Health, 2003).

3. J.K. Iglehart, "The Mental Health Maze and the Call for Transformation," *NEJM* 350 (2004): 507-13.

4. R.J. Bonnie, "Three Strands of Mental Health Law: Developmental Mileposts," in *The Evolution of Mental Health Law*, ed. L.E. Frost and R.J. Bonnie (Washington, D.C.: American Psychology Association, 2001), at 31-54.

5. See L.O. Gostin and L. Gable, "The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health," *Maryland Law Review* 63 (2004): 20-121.

6. 33 Eur. Ct. H.R. (ser. A) (1979).

7. 46 Eur. Ct. H.R.) (ser. A (1981).

8. "Reforming Mental Health and Disability: Policy & Practice," Presented by the Mental Disability Advocacy Program (MDAP), 23-25 January, 2003. Agenda available at http://www.soros.org/initiatives/health/events/mental_20030123/agenda_20030123.pdf.

9. Case 11.427, Inter-Am. C.H.R. 63/99, para. 66 (1999).

10. G.A. Res. 119, U.N. GAOR, 46th Sess., 3d Comm. 75th plenary mtg.

11. Victor Rosario Congo, Inter-Am. C.H.R. 63/99, para. 67.

12. Mental Disability Rights International, *OAS Human Rights Commission Orders Paraguay to End Horrendous Abuses in National Psychiatric Facility*, December 18, 2003, available at www.mdri.org/projects/americans/paraguay/pressrelease.htm.

13. Additional Protocol To The American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol Of San Salvador;" San Salvador, 17 November 1988, OAS Treaty Series 69.

14. P. Hunt, "The UN Special Rapporteur on the Right to Health: Key Objectives, Themes, and Interventions," *Health and Human Rights* 7 (2003): 1-26.

15. The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Report of the Special Rapporteur, U.N. ESCOR Comm. On Human Rights, 59th Sess., Agenda Item 10, U.N. Dc E/CN4/2003/58 (2003).

16. WHO Project on Mental Health and Human Rights, available at www.who.int/mental_health/policy/legislation/humanrights/en

17. World Health Organization, *Draft WHO Manual on Mental Health Legislation*, Geneva: World Health Organization, 2003.