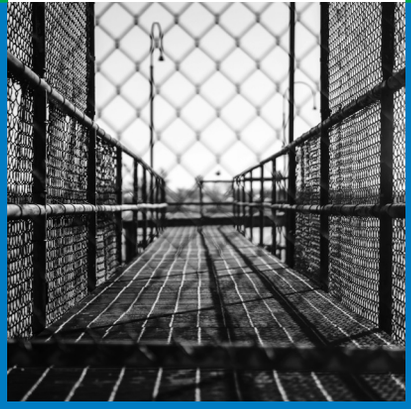

REPORT OF THE CATALAN PREVENTIVE MECHANISM AGAINST TORTURE

JANUARY 2016

SÍNDIC
EL DEFENSOR DE LES PERSONES

ANNUAL REPORT OF THE CATALAN PREVENTIVE MECHANISM AGAINST TORTURE

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Síndic de Greuges de Cataluña

1st edition: January 2016
Report of the Catalan Preventive Mechanism against Torture. January 2016
Layout: Síndic de Greuges

Printed on ecological paper

Original design: America Sanchez
Cover photo: © Gratisography

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I. INTRODUCTION

1. INTRODUCTION

This report describes the activity conducted over the year 2015 by the Catalan Preventive Mechanism Against Torture and Other Cruel, Inhuman or Degrading Punishments (CPMT). This is the fifth report presented to the Parliament of Catalonia in accordance with the terms of Article 74 of Law 24/2009, of December 23, on the Catalan Ombudsman.

A total of 45 centers were visited. In comparison to prior years, in 2015 there have been fewer visits to autonomous government and local police stations, which due to the size of the facilities are briefer. This makes it possible to inspect various on a single trip. On the other hand, there were more visits to more complex centers, such as penitentiary centers and units, juvenile residential centers, social-health care facilities, etc.

The Catalan Ombudsman's Task Force has kept and reinforced some of the methodological innovations introduced in the prior year, such as occasional incorporation of experts into the CPMT Task Force (a doctor specialized in psychiatry and legal-forensic medicine, and an internist specialized in health care administration) and expedient communication to the administration of the facilities visited of the observations and recommendations derived from the visits made.

It must also be borne in mind that all visits follow a previously-established protocol, tailored to the type of center being supervised. Before each visit, the Task Force decides on the objectives and the methodology to apply. The visits are made at any hour, without prior notification. The liberty deprivation areas chosen by the Task Force are visited. These are particularly those with greatest risk of abuse, such as restraint rooms or the special departments in penitentiary centers. If necessary , they hold interviews with the persons deprived of liberty, guaranteeing the confidentiality and voluntary nature of the conversations. Later, the Task Force reaches consensus on the most relevant observations and the conclusions and recommendations that can be derived from them. Then, once they receive a response from the administration responsible for the center that has been visited, the content is evaluated to either close the case, request additional explanations or make follow-up visits.

Aside from the information sheets which take up the main remarks and conclusions drawn by the Task Force for every center visited, the report first features a number of general observations that have also been a result of the visits, investigation and institutional and educational relations managed by the CPMT in this and prior years. These observations are centered on:

1. The Istanbul Protocol and how the health care professionals of this country are unaware of it, especially those who work in centers where there are persons deprived of liberty. This shortcoming has a negative impact on the capacity to investigate and appropriately document complaints of torture and abuse in our country.

2. The new article 520 of the Code of Criminal Procedure and the interpretation of the Mossos d'Esquadra (autonomous Catalan law enforcement agency), considered insufficient by the CPMT, as regards the community directive on the right to access materials and documents essential to challenge the lawfulness of a detention.

3. The admissions into geriatric centers of competent elderly people who cannot freely express their will. In this area, it has been observed that some such admissions made by family members are accepted as "voluntary", against the terms of the Civil Code of Catalonia.

Furthermore, this year's report discusses Constitutional Court Ruling 46/2015, of March 5, 2015, and the Catalan Ombudsman's interpretation of it, in addition to other matters of an institutional nature. Above all, the CPMT has continued its work of building relations with and learning from international authorities, such as the Committee for the Prevention of Torture of the Council of Europe (CPT), which has encouraged us to consolidate our position and exchange experiences.

Last, the report details the main remarks, conclusions and recommendations from every visit made throughout the year, as well as, when relevant, the response from the Administration and the CPMT's evaluation of it.

The general conclusions and recommendations found at the end of the report are taken from this interaction between the CPMT and the administrations responsible for persons deprived of liberty in Catalonia.

II. CRITERIA FOR THE APPLICATION OF THE ISTANBUL PROTOCOL BY HEALTH CARE PERSONNEL

II. CRITERIA FOR THE APPLICATION OF THE ISTANBUL PROTOCOL BY HEALTH CARE PERSONNEL

Background

The *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, known as the Istanbul Protocol, is intended to serve as the main international guideline for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture (even when there is not a specific complaint an investigation must be begun if there are signs that an act of torture or abuse may have been committed) and for reporting findings to the judiciary or any other investigative body.

The manual and principles are the result of three years of analysis, research and drafting, undertaken by more than 75 experts in law, health and human rights, representing 40 organizations or institutions from 15 countries. It was delivered to the Office of the United Nations High Commissioner for Human Rights in August 1999.

It is a technical, professional training document, especially geared to health care professionals, jurists and persons working in the area of human rights. Later, between the years 2003 and 2005, three practical guides on the Istanbul Protocol, for psychologists, physicians and attorneys, were developed.[1]

Through interviews with health care professionals who work with persons deprived of liberty and professional associations, the CPMT has found that, despite its international status, knowledge of the Istanbul Protocol in our country is quite limited. It does not form part of university curricula, nor of specialized or lifelong training programs. Consequently, health care professionals do not have training in the investigation and documentation of torture, or their training in this area is insufficient.

The medical examination of detained individuals, regardless of whether they show physical injuries or not, and the injury report that is written later, are an important tool in the detection of abuse or torture. This is oftentimes the medical document produced closest in time to the alleged events. Therefore, the information it contains is of great value, and must comply with international standards of quality. The Istanbul Protocol establishes the standards that must be followed by any medical examination and investigation of torture or abuse allegations.

The United Nations Committee Against Torture (CAT) as well as the Committee for the Prevention of Torture (CPT) of the Council of Europe have on a number of occasions made recommendations to the Spanish government, and by extension to all competent administrations of the State, on the need to improve the medical documentation for allegations of abuse by persons deprived of liberty. The World Medical Association (WMA) has also made recommendations along these lines, stating, "That the absence of documenting and denouncing acts of torture may be considered as a form of tolerance thereof and of non-assistance to the victims".[2]

On their visits, the CPMT Task Force has examined medical reports and medical care given to persons deprived of liberty as part of its preventive task, and arrived at the following considerations and recommendations.

Considerations

■ A glaring lack of knowledge regarding the Istanbul Protocol was observed in general, and in particular among the medical professionals who provide their services in centers where there are persons deprived of liberty.

■ Medical examinations of persons deprived of liberty are often conducted in the presence of police or other custody officers.

[1] International Rehabilitation Council for Torture Victims (IRCT). Psychological evaluation of torture allegations - A practical guide to the Istanbul Protocol – for psychologists. Copenhagen. IRCT. Medical physical examination of alleged torture victims - A practical guide to the Istanbul Protocol – for medical doctors IRCT. Action against torture - A practical guide to the Istanbul Protocol – for lawyers.

[2] WMA Resolution on the Responsibility of Physicians in the Documentation and Denunciation of Acts of Torture or Cruel or Inhuman or Degrading Treatment.

This practice is systematic in emergency care centers and custody areas.

According to international guidelines, each detainee must be examined in private.[3] Police or other law enforcement officials should never be present in the examination room, or within earshot (only within visual contact). Interviews conducted in a room with the door open are not considered acceptable if there are custody officers nearby. The only exception is if there is compelling evidence of risk and the examiner in question expressly requests police presence.[4] In such a situation, written record must be made of the circumstances in which the examination takes place and the presence of the police or other persons, as well as the physical restraints applied to the detainee.

■ Medical reports and injury evaluations are often incomplete in their description of facts, with inadequate or incomplete descriptions of the injuries, and no judgment as to the degree of coherence between the allegations and the findings of the medical exam performed. It must be remembered that an absence of physical lesions does not rule out the possibility that torture or abuse have taken place.

The Istanbul Protocol and its practical guidelines for doctors and psychologists establish the standards for physical and psychological examination, and the preparation of medical reports when there are allegations of torture or abuse. All medical reports must be drafted following these guidelines, and they should feature the following elements at a minimum:

1. Information on the case and circumstances of the interview

- patient's personal description data

- site and date of the examination

- persons present during the exam

- restrictions to the medical evaluation

2. Relevant personal and medical background

3. Allegations of torture and abuse

- Detailed description of the facts

- Physical and psychological symptoms that the victim claims to have

4. Physical examination. If there are lesions, a detailed description of them, including anatomical drawings and photographs whenever possible.

5. Psychological examination

6. Results of diagnostic tests

7. Diagnosis

8. Prognosis

9. Therapeutic recommendations

10. Conclusions. Description of the degree of consistency and compatibility between the allegations made and the physical and psychological examinations and diagnostic tests carried out.

11. Responsibility. Clinician's signature

■ Forensic doctors, as guarantors of the health and safety of detainees, play an important role in the prevention of torture and abuse. The medical-forensic report on assistance to detainees of the Legal Medicine Institute of Catalonia, which follows ministerial order 16 of September 1997,[6] is not compliant with the minimum standards required by international bodies, nor those of the Istanbul Protocol, as an international reference guide concerning the specific evaluation of abuse, nor does it include any conclusion on the compatibility

[3] UN. Istanbul Protocol, paragraph 123.

[4] CPT (2011) Report to the Spanish Government on the visit made to Spain by the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment, paragraphs 91, 112.

[6] Ministry of Justice. Order of 16 September, 1997, approving the protocol to be used by forensic doctors in their examinations of detainees. BOE (Official State Journal) no. 231 of 26 September, pp. 28.236 to 28.243.

between the alleged facts and those observed in the medical examination.[7]

Recommendations

1. It is the responsibility of the Autonomous Government of Catalonia (Generalitat)—and specifically of the Catalan Ministry of Justice—in addition to professional associations of the health care area, to promote the knowledge and usage of the Istanbul Protocol among the medical professionals who treat persons deprived of liberty, through appropriate training plans, so that they can recognize the physical and psychological signs of torture and/or abuse and document them appropriately.

2. Furthermore, measures must be adopted to guarantee that medical examinations be performed in private, with the sole exception of there being compelling evidence of risk, and the medical examiner expressly requesting the presence of security personnel.

3. It must be guaranteed that in medical examinations any allegation of abuse, and any sign of violence observed, be recorded, even in the absence of a formal complaint.

4. Medical reports and lesion evaluations must always be compliant with the Istanbul Protocol quality standards, and include a judgment on the compatibility between the allegations and the observations of medical examination.

5. The Legal Medicine Institute of Catalonia must develop a mandatory protocol that is compliant with the Istanbul Protocol guidelines, so that medical examinations and reports by forensic doctors be in line with the international quality standards as refers to the documentation and investigation of torture and abuse.

[7] European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT). The CPT standards. CPT/Inf/E (2002) 1 -Rev. 2015.

III. REFORM OF ART. 520 OF THE CODE OF CRIMINAL PROCEDURE IN LIGHT OF COMMUNITY DIRECTIVES, AND ITS INTERPRETATION BY LAW ENFORCEMENT AGENCIES

III. REFORM OF ART. 520 OF THE CODE OF CRIMINAL PROCEDURE IN LIGHT OF COMMUNITY DIRECTIVES, AND ITS INTERPRETATION BY LAW ENFORCEMENT AGENCIES

The 2014 report of the Catalan Authority for the Prevention of Torture contained a number of considerations on the general non-observance by State police forces of the directives adopted in the European Union on the right to interpretation and translation of criminal proceedings (2010/64/EU), on the right to information in criminal proceedings (2012/13/EU) and on the right to access to a lawyer in criminal proceedings (2013/48/EU).

The reform of the Code of Criminal Procedure (LECrim) completed over the past year through organic laws 5/2015 and 13/2015, in force as of October of this year, has partially resolved some of the deficiencies described in our 2014 report. Over the course of two meetings held with senior authorities of the Autonomous Catalan Police Force (July and October), the Torture Prevention Task Force has been able to exchange viewpoints and discover first-hand how the National Commission for Judicial Police Coordination and the Directorate General of the Catalonia Police (hereinafter DGP) have interpreted the reform of Article 520 LECrim.[1]

This section aims to discuss the way both organizations, and especially the DGP, have interpreted the European directives, especially as regards the information to be provided to the detainee.

1. It must first be stated that directives 64/2010 and 48/2013 have been correctly implemented into local legislation and police practice. As for the second directive, the new article 520 LECrim recognizes the detainee's right to hold an interview with the attorney assisting them prior to giving a statement to the police. This implementation has been done within the established time frame, as Directive 48/2013 had to be fully integrated into national legislation prior to November 27, 2016.

In the same way, law enforcement agencies have been applying Directive 64/2010 on the right to translation and interpretation in a positive manner for some time. The only possible criticism is that, in some cases, the effective absence of an interpreter can cause the unnecessary prolongation of the detainee's stay in a police facility. Along these lines, in the same way that the reform under discussion has made provisions to reduce the time it takes for an attorney to appear in a police station from eight to three hours, a suggestion could be made to create a daily list or registry of interpreters effectively available to law enforcement agencies, as well as on-call shifts, in the same way that bar association lists operate.

2. The DGP circular featured other detainee rights related with the right to an attorney or communication with other persons, to the which the CPMT has no objection at this time. Nonetheless, we do believe that there is a deficient, and late, implementation of Directive 13/2012 as regards the right of access to the documents essential to challenge the lawfulness of the detention.

Where this matter is concerned, it is first important to know exactly what the Directive stipulates, especially in its Article 4.2 and 7.1.

> Article 4. *Letter of rights on arrest*.2. In addition to the information set out in Article 3, the Letter of Rights referred to in paragraph 1 of this Article shall contain information about the following rights as they apply under national

[1] The National Commission for Coordination is made up of representatives of the Ministry of Home Affairs and the autonomous ministries responsible for autonomous police forces (the Basque Country, Catalonia and Navarre) as well as the Spanish Attorney General and a representative of the General Council of the Judiciary. It has, among others, the duty to unify police action criteria (RD 769/87, Art. 36.c). Compliance with such criteria is a minimum demand for all police forces. However, this does not impede a certain police force, in compliance with these coordinated interpretive standards, from also assuming other requisites or more demanding interpretive criteria. The Preamble of Directive 2012/13 establishes this minimum, expandable criterion, by stating:

(20) This Directive lays down minimum rules with respect to the information on rights of suspects or accused persons.
(40) Member States may extend the rights set out in this Directive in order to provide a higher level of protection also in situations not explicitly dealt with in this Directive.

law: a) the right of access to the materials of the case [...].

Article 7. *Right of access to the materials of the case*. 1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.

The preamble to the Directive offers additional arguments indispensable for the proper interpretation of the precepts referred to:

(30) Documents and, where appropriate, photographs, audio and video recordings, which are essential to challenging effectively the lawfulness of an arrest or detention of suspects or accused persons in accordance with national law, should be made available to suspects or accused persons or to their lawyers at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4) ECHR, and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention.

(31) For the purpose of this Directive, access to the material evidence, as defined in national law, whether for or against the suspect or accused person, which is in the possession of the competent authorities in relation to the specific criminal case, should include access to materials such as documents, and where appropriate photographs and audio and video recordings. [...].

3. Although the Directive is very clear in referring to "documents", "materials", even "photographs" and "recordings", both the National Coordination Commission as well as the DGP circular propose a minimal interpretation that by no means satisfies the terms of that Directive. In fact, the police forces are not willing to convey any materials whatsoever, but only certain "information", which is also very brief. The DGP circular, which reproduces the indications of the National Coordination Commission is limited to:

- place, date and time of the detention

- place, date and time the crime was committed

- identification of the offense that is grounds for the detention and brief summary of the facts

- evidence from which the participation of the detainee in the offense is deduced (clarifying: "very general evidence, such as, recognition by several persons, without specifying whom; statements from witnesses, without specifying whom; fingerprints, etc.")

4. A sheet with marginal numbering N 01 is attached to the DGP circular. Its title is Information for detainees regarding their rights. Its first fundamental section, Right of access to essential information on the detention, aims to be the practical translation of the circular on this item. Nonetheless, for the information to be conveyed to the detainee on the "alleged participation in the offense", there is only one line, on which it would be very difficult for the police officer to write the nomen juris for the offense the detainee is suspected to have committed. This limitation to the information does not even satisfy the requirements of the DGP and the National Coordination Commission which demand "the identification of the offense that is grounds for the detention and a brief summary of the facts."

Additionally, for the information to be provided to the detainee on the evidence of their alleged participation in the offense, the information sheet has a checklist of items with boxes that the police officer involved only has to mark with an X. For example, "recognition by photograph or video", "existence of incriminatory documents" or "witness statement". There is no way for the detainee to know what these documents are, or who the witnesses whose truthfulness or mendacity will determine the lawfulness of their detention, despite the clarity of the mandate of Article 7 of the Directive, and its unquestionable interpretation pursuant to points 30 and 31 of its preamble.

5. Challenging the lawfulness of a detention, which is the subject matter of this report, is achieved pursuant to the legislation in force by filing a writ of habeas corpus. Article 4 c) of Organic Law 6/84 establishes that the person filing a writ of habeas corpus must indicate the grounds on which this is done. When the grounds are the mendacity of a witness, or the untruthfulness, unsuitability

or insufficiency of evidence, for example, a document, it will be necessary to know the identity of the witness, or the content of their testimony, or of the incriminating document. Substituting that information with an X on a checklist, or eliminating the possibility to know a brief summary of the facts, is tantamount to depriving the detainee of the effective exercise of their constitutional rights.

Along these lines, the Constitutional Court has ruled that "judging the lawfulness of a detention by the police—by means of habeas corpus—requires examination of the concurrent circumstances" (STC 42/15. p.o.l. 3). In the same ruling (p.o.l. 2) it states that "the only constitutionally legitimate grounds to not allow habeas corpus are those based on shortcomings in the budget necessary for a situation of deprivation of liberty that has not been judicially agreed, or a breach of formal requisites". Therefore, any grounds other than these would be sufficient to allow a writ of habeas corpus. To make this possible, all such grounds must be known to the detainee without this knowledge being substituted by a checklist with unspecific, minimal information. The Constitutional Court has stated that a generic judicial ruling does not offer the minimum grounds constitutionally due to monitor the lawfulness of a detention (STC 204/15 p.o.l. 2). For the same reason, superficial, minimal police information does not offer sufficient grounds to challenge the lawfulness of a detainee's detention. Last, the severity of the aforementioned STC 42/15 bears remembering as it states, "ignoring the doctrine of the CC constitutes malpractice and contributes to the banalization of the right to personal freedom, incompatible with the concept of constitutional rule of law.

6. Both the National Coordination Commission and the DGP have established "limitations to this right", in which they state that "the information on the essential elements must not be produced in matters in which: a) the investigating police officer intends to request application of the sub judice rule from the court; b) there is a serious risk to another person; c) there is risk for the investigation".

These scenarios were contemplated by the Directive, but within demands for respect of defense rights that are not being heeded in our case.

To wit, Article 7.4 of the Directive stipulates:

> By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted.

Note that the Directive does not call for the suppression of the information, but only its restriction, denying access to "certain materials". Detainees in Catalonia and in the rest of the State are refused access to these materials across the board. In other words, the Directive contains restrictions to the right of access to "materials" and "documents", while the interpretation in the LECrim and police circulars is a restriction that amounts to a right of access to bare-bones "information".

7. Specifically, the reference of the National Commission and the DGP to the "intention of the investigating police officer to request the sub judice rule" also requires an interpretation that is respectful toward the rights that the Directive is meant to protect. Such an interpretation should not differ from the terms of the Directive in its Article 7.4: "Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review."

It must be remembered that judicial police officers are not parties to the process, and therefore it is technically incorrect to state that the investigating police officer can request application of the sub judice rule. Furthermore, it is surprising that the mere intention of making such a request is considered sufficient grounds for suppression of information. It would be much more appropriate for the investigating officer to make an ex ante request for the sub judice rule to a judicial authority and,

once granted, access by the detainee to the materials indicated by the directive be restricted.

RECOMMENDATIONS

1. The directives of the National Judicial Police Coordination Commission are considered minimal criteria. Furthermore, they do not respect the European mandate as regards the right of access to the elements essential to challenge the lawfulness of a detention. In light of the direct effect of non-implemented or incorrectly implemented Directives, the Directorate General of the Catalonia Police should draw up a new circular establishing the right of the detainee to obtain, except in the cases laid out in the Directive itself, the materials and documents that have led to their detention.

2. The DGP's proposed information sheet with which to read the detainee their rights does not even meet the requirements of the DGP and National Coordination Commission circulars, which require the identification of the offense leading to the detention and a brief summary of the facts. This information sheet must be adapted to make it possible to describe therein, if only summarily, the facts that have led to the detention.

3. A daily list or registry of interpreters effectively available to law enforcement agencies, as well as on-call shifts, must be created so that the lack of availability of these professionals does not unduly prolong a detainee's deprivation of liberty.

IV. ADMISSION IN GERIATRIC FACILITIES OF COMPETENT ELDERLY PERSONS WHO CANNOT FREELY EXPRESS THEIR WILL

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Background

The CPMT Task Force, over the course of their visits to geriatric centers in 2013, 2014 and 2015, has observed a habitual practice in such facilities. It is the acceptance as a "voluntary" admission those made by relatives of elderly persons when the elder, although not being declared legally incompetent, does not have the capacity, de facto, to accept or reject this admission. This practice is supported by the Catalan Ministry of Social Welfare and Family, which has given the following response to the CPMT's actions:

> "Article 7, paragraphs 3 and 4, of Decree 176/2000 states that when an individual cannot express their will at the time of their admission, their family members (progenitors, descendants, spouses, common-law partner or siblings) may act in their name."

Without prejudice to the fact that in many cases the internment of an elderly person who cannot fend for themselves, and whom the family cannot care for in their home, is the most appropriate measure to safeguard their health and dignity, it is also true that such a measure makes for a major limitation on the liberty of vulnerable persons, and that there can exist a risk of abuse that public authorities must work to prevent. Along these lines, the Constitutional Court has established a link between Article 17 of the Spanish Constitution (SC)—the right to liberty and security—and the admission into residential facilities of persons who cannot freely express their will and who do not have a legal representative who can do so on their behalf. These admissions must be regulated by organic law, although in the instrumental aspects, ordinary law may be recurred to (STC 131 and 132/2010).

The CPMT sought the opinion of the Barcelona Bar Association (ICAB) on the regulations in force in Catalonia regarding consent for admission into residential establishments of persons who cannot freely express their will. The ICAB handed down two decisions written by its Elder Rights (June 10 2015) and Regulations (June 11 2015) Committees. These were debated by the CPMT Advisors Council, at their meeting of June 22, 2015. Based on these two decisions and the ensuing debate of the Advisors Council, the CPMT Task Force wrote the resolution that follows, which was submitted to the Advisors Council for consideration on September 28, 2015.

Points of law

The Regulation Decree of the Catalan Social Services System, reformed in the year 2000 , establishes as a general rule that "for admission into a residential establishment, the prior free expression of the person who is to be admitted, or of their legal representative, must be given." (Art. 7.1).

As an exception to this rule, with reference to "persons who cannot freely express their will, and given their personal circumstances, could be declared incompetent", the same Article 7 establishes two differentiated cases:

1. A number of family members (spouse or stable partner; progenitors or descendants of legal age; spouse of the father or mother who has lived at least three years with them; siblings) and a person who has assumed de facto guardianship can substitute, without any prior or posterior control or verification, the consent of the admitted individual (Art. 7.3).

2. If none of these persons intervenes, the institution's technical director acts as the person's de facto guardian (Art. 7.3). It is only in such cases that the courts must be notified of the internment within a maximum period of fifteen days (Art. 7.4).

These provisions, especially the first case described, are contrary to the general rule contained in paragraph [1] because none of the individuals listed can assume the legal representation of the person who cannot express their will if they have not been designated as their legal representative with the guarantees legally required, which would make necessary the intervention of a judicial authority.

Furthermore, the Decree enters into contradiction with the Civil Code of Catalonia,

a law of higher rank, regarding both the internment and the de facto guardianship exercised by facility management:

1. Article 212.4 of the second volume of the Civil Code of Catalonia stipulates that internment in a specialized establishment of a person for reason of mental disorders or diseases that could affect their cognitive capacity "requires prior judicial authorization if their situation makes it impossible for them to decide for themselves". Only in the case of medical emergency requiring internment without delay can such an admission be made without prior authorization. However, a judicial authority must be notified within 24 hours, and will approve or annul the internment, in principle, within 72 hours (Art. 212.5).

2. On another note, Article 225.2.2 of the same code stipulates that "in the case of de facto guardianship of an elderly person for whom there are grounds for incompetence, if they are in a residential establishment, the person ultimately responsible for the facility must notify a judicial authority or Public Prosecutor's Office within 72 hours from the beginning of the guardianship."

As is shown, the code does not predicate the judicial intervention on the condition that the admission has not been participated in by the relatives listed in the Decree, nor does it do so for the internment, nor the guardianship. In other words, the obligation to notify the public prosecutor or judicial authority is always that the person or their legal representative have not given their consent to the admission.

The regulations of the Civil Code of Catalonia, as opposed to those of the Decree, is consistent with the Dependency Act of 2006, which in Article 4 establishes the right of persons in situations of dependency to "freely decide on their admission into a residential center" and the "full exercise of their jurisdictional rights in the case of involuntary internments". As opposed to the Decree, they are also consistent with the 2006 Convention on the Rights of Persons with Disabilities, which promotes in its Article 12 a model for support or assistance in decision-making by the person in situations of disability, instead of a model based on the substitution of decision-making.

Conclusions

It cannot be said that admissions into residential facilities by persons who cannot freely express their will are truly voluntary even though family members or de facto guardians intervene. Therefore, they can only be carried out with judicial authorization, except in emergency cases, in which a judicial authority must be notified of the admission within 24 hours.

Once the admission is made, the director of the residential facility becomes the de facto guardian of the person who was unable to freely express their will to be interned, even though the persons listed in Article 7.3 of the Decree have intervened. Therefore, they must notify the Public Prosecutor's Office or competent judicial authority of this situation.

RECOMMENDATIONS TO CATALAN MINISTRY OF SOCIAL WELFARE AND FAMILY

1. That instructions be sent immediately to all geriatric centers of Catalonia where elderly persons who cannot freely express their will may be interned, informing them of the need to notify the judicial authority or public prosecutor of these admissions in the briefest possible period.

2. That as soon as possible, and once the necessary formalities are completed, it send to the Government an amendment to the Decree regulating the Catalan social services system to adjust it to the legality in force in Catalonia as regards admission into residential facilities of persons who cannot freely express their will.

The content of this resolution will be conveyed to the Catalan Attorney General's Office and the High Court of Justice of Catalonia.

V. CONSTITUTIONAL COURT RULING OF MARCH 5 2015

V. CONSTITUTIONAL COURT RULING OF MARCH 5 2015

On March 5, 2015, the Constitutional Court handed down its ruling (STC 46/2015, BOE of April 9, 2015), in which it declared unconstitutional certain provisions of Law 24/2009, of December 23, on the Catalan Ombudsman (DOGC of September 30 2009). This judgment thus finalizes a writ of unconstitutionality filed by the Spanish Ombudsman on March 24, 2010. The provisions targeted by the writ can be ordered, as the Constitutional Court itself has done, into two groups: first, those relative to the consideration of the "exclusive" nature of the supervision activity of the Catalan Ombudsman as regards the activity of the local Administration of Catalonia and its dependent bodies, and second, those granting the Catalan Ombudsman the condition of Catalan Authority for the Prevention of Torture and Other Cruel, Inhuman or Degrading Punishments (hereinafter, Catalan Preventive Authority against Torture), under the terms of the United Nations' Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, Optional Protocol). The following paragraphs will focus on the second aspect, as with regard to the former, the Court refers to its previous judgment of 2010 on the Statute of Autonomy of Catalonia.

The Constitutional Court has declared unconstitutional the central part of the provisions of Title VIII of Law 24/2009, which establish the Catalan Ombudsman's condition as Catalan Preventive Authority against Torture. The Court's ideology is that only the State has the competency to designate a national preventive mechanism against torture, and to decide if there should be one or several of them, and that this is an integral part of the essential core of exclusive competencies in international relations referred to in Article 149.1.3 SC.

It must be borne in mind that the Court does not annul Title VIII in its entirety, but only Articles 1.b), 68.1 and 2, 69.2, 71.d), 72.2, 74, 75, 77.5.c) and the subsection "Catalan Authority" that closes Chapter I of Title VIII, "as Catalan Authority", of Articles 69.1, 71, 72.1, 73, 76.1, 77.1, and "in his condition as Catalan Authority" of Article 70, of Law 24/2009, of December 23, on the Catalan Ombudsman.

Therefore—and as the Court specifically states—the only content deemed unconstitutional has to do with the attribution to the Catalan Ombudsman of the condition of Catalan Preventive Authority against Torture, but not the roles attributed to him in this subject matter as Ombudsman, nor the composition or duties of the bodies that make up the CPMT: the Task Force and Advisors Council. As a result, the Catalan Ombudsman has made use of his institutional autonomy to change the denomination from "Authority" and, through Resolution of April 9 2015 (DOGC of April 15, 2015), these duties currently belong to the Catalan Preventive Mechanism for the Prevention Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, CPMT), in the same terms expressed in Law 24/2009, of December 23, on the Catalan Ombudsman.

In short, the Catalan Ombudsman continues his work to prevent torture, making visits to facilities where there are persons deprived of liberty, of which he has duly notified the president of the Generalitat, the Parliament of Catalonia and the Administration of the Generalitat. The Catalan Ombudsman has also notified the international bodies and institutions that work in the defense of human rights. Along these lines, it must be noted that he has received the support and cooperation of the Parliament of Catalonia, the Association for the Prevention of Torture (APT), with headquarters in Geneva, the Committee for the Prevention of Torture of the Council of Europe and the Catalan Coordinator for the Prevention and Denunciation of Torture.

In its judgment, the Constitutional Court acknowledges the Catalan Ombudsman's competencies in torture prevention and encourages him to exercise them, in addition to indicating that he may establish a cooperation agreement with the Spanish Ombudsman. Given that the duties that the Catalan Ombudsman exercises with persons deprived of liberty as CPMT coincide with those exercised by the

Spanish Ombudsman as NPMT, aside from his relations with the Sub-committee for the Prevention of Torture (SPT), once again, the need for the Catalan and Spanish Ombudsmen to sign cooperation agreements regarding the exercise of this activity has been made apparent. For this reason, the Catalan Ombudsman has sent the Spanish Ombudsman a proposal for a collaboration agreement between both institutions, based on the full acknowledgment by both parties of a legal framework in which both of their competencies are lawful and valid. Nonetheless, the Spanish Ombudsman has responded that for the time being she does not wish to sign a cooperation agreement, as she considers the competencies to be correctly delimited as they now stand.

Mention must be made of inter-institutional cooperation that took place on occasion of the visit by a delegation of the National Preventive Mechanism against Torture to the Brians 1 Penitentiary Center, in which a member of the Catalan Mechanism's Team participated. This beneficial collaboration experience confirmed the need to normalize cooperation relations between the two institutions.

The possibility remains open for a future Spanish government, following the example set by numerous democracies with territorial distribution of power, in which there are several decentralized mechanisms, to recognize the Catalan Ombudsman as a Mechanism before the United Nations to act in Catalonia.

VI. INSTITUTIONAL REALM

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Composition of the Team and Advisory Council

In May 2015, Jordi Sànchez i Picanyol was elected chairman of the National Catalan Assembly and resigned from his post as Deputy General Ombudsman. Following the Catalan Ombudsman's proposal, the Parliament of Catalonia appointed Jaume Saura Estapà Deputy General in June, 2015.

Given the fact that Jaume Saura was a member of the Advisors Council and the Task Force, it has been necessary to replace him in both of those roles. Along these lines, the Catalan Ombudsman considered it appropriate that the post left vacant on the Task Force continue to be occupied by a member of the Advisors Council and proposed that it be Olga Casado, who had been appointed at the proposal of non-governmental human rights organizations. This maintains the practice, beyond the Catalan Ombudsman Act, of the CPMT Task Force being made up of two persons from the Catalan Ombudsman's Office (the Ombudsman or Deputy Ombudsman he designates, and an adviser from the Security and Justice area) and three members of the Advisors Council.

At the writing of this report, there were a number of openings on the CPMT Advisors Council to be covered. On November 17, the Parliament of Catalonia published the call for three openings for professionals from the realm of health care, university research centers and independent experts, respectively, that will likely be covered in the first months of 2016.

Institutional relations

In the institutional realm, mention should be made of the numerous working meetings held by the Catalan Ombudsman in his "Mechanism" role:

• with the Directorate General of the Police and the Directorate General for Child and Adolescent Services, to discuss the responses received to the recommendations made following the visits to establishments and facilities under their competency in 2014.

• with the Catalan Ministry of Home Affairs, to discuss the modifications to Article 520 of the LECrim and the criteria adopted by all law enforcement agencies to guarantee a standard application of police procedure in the area of detainees' rights.

• with representatives of the Catalan Coordinator for the Prevention of Torture, to discuss the denial by the Directorate General for Penitentiary Services of their requests for communication with an inmate of the Brians 2 Penitentiary Center.

• with the STOP-TASER Association, to listen to their concerns regarding information that had appeared in the media on the possibility of some Mossos d'Esquadra units beginning to deploy tasers. The Catalan Ombudsman is preparing a special report on this matter.

• with the Association of Dependency Service Centers (ACAD.Cat). which, after reading the Catalan Ombudsman's 2014 report, made a number of specific requests, among them, that the Ombudsman not cite the names of the centers visited in the reports written by the CPMT.

In other affairs, the lack of cooperation with the institutions of the Spanish State has led, for yet another year, to the impossibility of entering the Zona Franca Foreign Citizen Holding Center. This year, considering the provisional closure of that center to carry out improvements, and given the numerous complaints received by the Ombudsman over the years for the treatment received there, and failure to fully apply the Regulations, the Catalan Ombudsman has handed down a decision in which he recommends the definitive closure of the center and progressively, that of all such centers in Spain.

Training activity

Especially significant for another year was the training activity conducted to commemorate the International Day in Support of Victims of Torture (June 26),

with a seminar devoted to the role of physicians in the detection and prevention of detainee abuse. The event, held June 26 in the headquarters of the Barcelona Physicians' Association, and organized in conjunction with that organization, was attended by national and international professionals and experts in the field.

The Catalan Ombudsman also traveled to Strasbourg to celebrate the 25th anniversary of the Committee for the Prevention of Torture, and was the only institution from Spain present at ceremony. One of the topics debated was the possibility for Ombudsmen to investigate while a court case is still ongoing. An example was made of the activities carried out within the Catalan Ombudsman's ex-officio action on the so-called "Ciutat Morta" (Dead City) case.

An adviser to the Catalan Ombudsman went to Riga to attend the first training seminar for Ombudsmen who work as preventive mechanisms against torture (First IOI NPM Training on Implementing a Preventive Mandate). She took part in the seminar to learn about different working methods employed by mechanisms for the prevention of torture.

Last November 11th, the Deputy General and CPMT Task Force took part in a training session on the two computer applications that the Directorate General of Police works with, specifically, at the Mossos d'Esquadra police stations (SISD). This will do a great deal to facilitate the Team's work on their visits to these facilities.

Last, the Deputy General and Olga Casado, member of the Team, participated as speakers in the seminar entitled "The Istanbul Protocol: Manual on the Investigation and Documentation of Torture and Abuse", held on December 4 by the Defense Commission of the Barcelona Bar Association.

International recognition

The CPMT has received communications from the Association for the Prevention of Torture (APT) as well as the Committee for the Prevention of Torture (CPT). On August 20 2015, the secretary general of the APT expressed his appreciation for the Authority's 2014 Report sent to him, and his satisfaction with the methodological changes introduced by the Team, following the APT's recommendations. On another note, in a letter dated August 27, the Committee for the Prevention of Torture of the Council of Europe highlighted the Authority's conclusions on police detention and the right to an attorney.

Both bodies confirmed their awareness of the CC judgment, expressed their happiness at the CPMT's continuing its task, and reiterated their commitment to keep cooperating in the future. Along these lines, November 23rd, 2015 the CPT addressed the CPMT to request its assistance for the visit the Committee plans to make to Spain in 2016, and to request updated information on its activities.

VII. CONCLUSIONS AND RECOMMENDATIONS

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1. Lack of knowledge on the Istanbul Protocol

Ignorance of the Istanbul Protocol is widespread. This international manual on the investigation and documentation of torture and other forms of abuse is backed by the UN High Commissioner for Human Rights and is an enormously useful guide to scientifically document reports of torture and abuse. The lack of knowledge on this instrument, by professionals and the responsible institutions alike, has a very negative impact on the effectiveness of the reports of abuse filed before competent jurisdictional bodies.

It is necessary for the Catalan Ministry of Justice, specifically the Institute of Legal Medicine, as well as professional health care associations, to make it known and promote training on the Istanbul Protocol among professionals, and that they adapt the forensic medical protocols to its proposals. Furthermore, it must be guaranteed that medical examinations take place, as a general rule, in private, and that any sign of violence or abuse, even if no formal complaint has been made, be recorded.

2. Insufficient implementation and inadequate interpretation of the European directive on the rights of detained persons

With regard to the new article 520 of the Code of Criminal Procedure and its interpretation by the Mossos d'Esquadra (Catalan Police), the Mechanism takes a very positive view of some of the reforms introduced, that have adapted Spanish legislation and the practice of the Catalan Police to the European framework. Among other examples, this is the case of receiving assistance from an attorney in a police station prior to an interrogation, or the need to have an interpreter in the case of detainees who do not know Catalan or Castilian.

Nevertheless, Article 520 has not been correctly implemented as regards a detainee's right to access to the "elements essential to challenge the lawfulness of the detention". Even worse, the Police of the Autonomous Govt. of Catalonia have adopted the erroneous interpretation of the new precept proposed by the National Judicial Police Coordination Commission at a Spanish state level. Thus, though the directive clearly establishes that the detainee must be able to access "materials" and "recordings", law enforcement agencies are only giving minimal information on the grounds of the detention.

Insofar as the National Commission's interpretive criteria of Article 520 should have the consideration of applicable minimum, the Mechanism recommends a new interpretation of Article 520 to the Directorate General of Police. This new version should overcome these minimums and be aligned with the European directive, and have the necessary checks in place when relevant, to safeguard the sub judice rule and protect victims and witnesses.

3. Persistent signs of abuse in penitentiary centers

In the second half of 2015, three visits were carried out to penitentiary centers involving individual, in-depth interviews of inmates, and also of center administrators and prison officers. Overall, more than 40 interviews of inmates and officers assigned to standard system and special departments, in men's prisons and women's modules, were conducted. Furthermore, over the course of visits to other centers housing persons deprived of liberty, and by cross-checking information, a number of the accounts gathered have been verified. Without intending to cast doubt on the professionalism of the majority of the officers on the staffs, and the extraordinary readiness of administrators at the centers visited, especially to constantly improve the centers' functional plans, all of the foregoing has led to a number of general considerations:

a. There is not a single generalized description of abuse or ill-treatment, but there are accounts of different episodes of this nature that are coherent and do coincide, often even in the identity of the officer(s) allegedly responsible for such practices. There are, however, frequent references to daily humiliations that, due to their

persistence in a context of liberty deprivation, could be considered psychological abuse.

When the information received has been consistent enough, the Catalan Ombudsman has opened a complaint or ex-officio action to investigate the allegations of the inmate. In the same vein, center administrators must investigate, in a thorough, expedient and impartial manner, the complaints of inmates. The reports issued by prison officers and medical services, as well as allegations made by the inmates must be analyzed, and if necessary, the opportune disciplinary sanctions applied. In this area, the use of an instrument like the Istanbul Protocol is essential for documenting the possible cases of physical and psychological abuse that may have come about.

b. Inmates also describe episodes of excessive harshness in punishments. The first degree system and the conditions in which sentences are served under it may be incompatible with the basic rules of respect for human rights and the orientation toward social reintegration and reeducation that should form part of a penitentiary sentence. Despite the fact that the penitentiary regulations that establish the framework for this system are of a State level, there is room for an interpretation by degrees, that is less aggressive to the physical and mental health of inmates.

c. Penitentiary treatment is a basic instrument for reinsertion, but in some penitentiary modules, inmates have the impression of having been forgotten, without programs suited to their situations. Whenever functionally possible, all inmates must have a PIT (Individualized Treatment Program), and these programs must be applied and reviewed on an ongoing basis to keep them realistic and effective.

d. The quality, quantity and variety of the food served in penitentiary centers are a frequent cause of complaint among persons deprived of liberty. This is especially apparent in centers where management of the dining hall is responsibility of the CIRE (Center for Reinsertion Services).

e. Many inmates that were interviewed said that they were aware of the possibilities for administrative and due process appeals, including the Catalan Ombudsman, although they showed a certain mistrust towards the internal complaint management circuit. Thus, measures must be taken to improve this trust.

Furthermore, given the fact that many inmates are still unaware of them, efforts should continue to fully disseminate the due process appeals in place in the penitentiary system, such as the jurist of the center, the Penitentiary Legal Advice Service of the Bar Association (in the case of the ICAB), the penitentiary supervision judge or the Catalan Ombudsman.

4. Coordination between local police forces and the Mossos d'Esquadra (Catalan Police)

As in prior years, there continues to be a very heterogeneous casuistry in the duties of the Local Police within the framework of detention. Local police forces' custody areas, when they exist, tend to suffer deficiencies. Some can be corrected, and others cannot. When they do not exist, coordination mechanisms have been established with the Mossos d'Esquadra (Catalan Police) so that, either the detention is made directly by this force, or detainees are taken by the local police to a Mossos d'Esquadra station, where the police report is written.

The opinion of the Preventive Mechanism continues to be that the Mossos d'Esquadra should be the comprehensive law enforcement agency of Catalonia, while local police forces should play a supporting role. In this area, the general practice should be for local police forces that make an arrest to transfer the detainee directly to the Mossos d'Esquadra station established by protocol between the relevant local council and the Catalan Ministry of Home Affairs, even if this involves the police vehicle leaving its municipality. These agreements must be generalized. The reception of detainees by Mossos d'Esquadra police stations should be expedited and the coordination between the national and local police forces improved.

A law of the Parliament of Catalonia should clarify the competency areas divided

between the Mossos d'Esquadra and local police forces of Catalonia.

5. Excessive disciplinary measures at juvenile internment centers

Over 2015, visits have been made to two educational centers, two therapeutic centers, two intensive educational activity residential centers, a shelter and a residential center for children and adolescents with disabilities and severe behavior disorders. In most cases, they were follow-up visits to evaluate the compliance with recommendations made on other occasions, aside from working toward the objectives for visits in general. On all of the visits, except in the case of the residential center that cares for children with disabilities, interviews have been conducted with the young people staying there. The following conclusions have been reached from the accounts of the minors interviewed:

- Although not in a generalized manner, in some cases there have been accounts of inappropriate application of restraint devices.

- Punishments are not always applied with respect for regulations, especially as regards isolation.

- Major shortcomings have been detected in the facilities of the visited protection centers.

- Minors at some centers report other deficiencies of a material nature, such as the quality or quantity of the food served, the heating and air conditioning, or privacy spaces.

The Preventive Mechanism insists on the demand that the application of disciplinary rules be in line with international rules and standards (United Nations Rules for the Protection of Juveniles Deprived of their Liberty), in such a way that the application of punishments like isolation or solitary confinement cells be avoided. Certain centers must also be remodeled so as to comply with the required conditions of comfort and warmth.

Once again, a reminder must be made of the need for staff members to have the training necessary to apply restraint devices, and that they only be applied when strictly necessary, for the minimum time necessary, proportionally and with all pertinent guarantees.

Lastly, it is indispensable that the Administration perform an intense and systematic supervision of the centers' operations, specifically in the areas indicated, and that includes, in any event, listening to the children and adolescents.

6. Involuntary admissions into geriatric centers

Regarding admission into geriatric centers of elderly persons unable to freely express their will, the Preventive Mechanism has observed a habitual practice at these facilities involving the acceptance as a "voluntary admission" those made by relatives of these elderly persons. This practice is backed by Article 7 of Decree 176/2000, on social services, and condoned by the Catalan Ministry of Social Welfare and Family, but it contradicts superior legislation, such as the Civil Code of Catalonia, and therefore, must be corrected.

The Preventive Mechanism recommends that instructions be sent immediately to all geriatric centers of Catalonia where elderly persons who cannot freely express their will may be interned, informing them of the need to notify the judicial authority or public prosecutor of these admissions in the briefest possible period.

SÍNDIC

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