AUTONOMY, SELF-DETERMINATION AND CAPACITY:
keys to prevent elder abuse

Prof. Dra. MARÍA ISOLINA DABOVE
Conicet - Universidad de Buenos Aires
isolinadabove@gmail.com

4th Annual World Congress on Adult Guardianship
Berlin, September 14-17, 2016
Introduction

Autonomy, self-determination and legal capacity are relevant instruments of our dignity and human condition. (Equality and non-discrimination, Article 2 of the Universal Declaration of Human Rights).

However, prejudices against people, abuse and violence against older people and persons with important disabilities hinder their respect.

In this panel we wonder how to prevent this kind of abuse or mistreatment in capable elders, and also in older adults with significant mental problems.
1

What means elder abuse?

a) Concepts, cases and elements.

b) Legal instruments of Argentine and Inter-American Law.
What means elder abuse?

a) Concepts, cases and elements.

Elder abuse: a single or repeated act or omission to the detriment of an older person that harms their physical, mental or moral integrity and infringes the enjoyment or exercise of their human rights and fundamental freedoms, regardless of whether or not it occurs in a relationship of trust (Article 9, OAS, 2015).

Cases: financial abuse, physical and sexual violence, psychological mistreatment, expulsion from the community and any form of abandonment or negligence.
What means elder abuse?

b) Legal instruments of Argentine and Inter-American Law.

National Constitution:
- Articles 16 and 37 about equality.
- Article 18: abolition of the death penalty for political reasons and the prohibition of all kinds of torture and whipping.

International human rights treaties:
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- Convention on the Rights of Persons with Disabilities (Art. 75 inc. 22 and 23).
- Inter American Convention on protecting the human rights of older persons
Why the promotion of autonomy and self-determination of the elderly are useful to avoid it?

a) Concepts, cases and elements.

b) Legal instruments of Argentine and Inter-American Law.

c) Institutions to empower older people and guarantee autonomy.
Why the promotion of autonomy and self-determination of the elderly are useful to avoid it?

a) Concepts, cases and elements.

Autonomy: "self-rule and self-government".

The legal ability to decide by oneself, *to make informed choices, free of coercion, based on one's own personal beliefs and values*

Elements: legal capacity and will.
Why the promotion of autonomy and self-determination of the elderly are useful to avoid it?

b) Legal instruments of Argentine and Inter-American Law.

National Constitution
International and Inter American Treaties HR (NC Art. 75 inc. 22 and 23).
- UN Convention on the Rights of Persons with Disabilities
- Inter-American Convention on Protecting the Human Rights of Older Persons.

Why the promotion of autonomy and self-determination of the elderly are useful to avoid it?

c) Institutions to empower older people and guarantee autonomy.

- Advance directives or living wills,
- Informed consent,
- Contracts for mandate for their own disability forecast,
- Representation to act in legal or financial matters (power of attorney),
- Living trusts
- Substitution or replacement carried out by family members.
Elderly with restricted capacity: judicial measures and new guardianship

a) Concepts, cases and elements.
b) Judicial measures and the principle of least restricted capacity.
c) The new guardianships.
d) Monitoring systems; family role, volunteers to prevent elder abuse.
Elderly with restricted capacity: judicial measures and new guardianship

a) Concepts, cases and elements.

When autonomy is affected significantly due to a cognitive impairment that puts personal life and property at risk, a judge could order three types of restraints concerning legal capacity (of exercise):

**Partial restrictions** to specific areas of personal autonomy; inability because of prodigality and **incapacity or total incompetence** in extremely critical situations.
b) Judicial measures and the principle of least restricted capacity.

**Personal conditions** to begin a judicial procedure about capacity (ACCC, Articles 22 and 3): drugs and alcoholic addictions, a permanent or prolonged mental impairment of sufficient severity. The risk of damaging to their lives or their property. The absolute impossibility to act and make choices by themselves (f.e. in terminal illness).

**The sentence should be pronounced on:** a) diagnosis and prognosis; b) period when of the situation was manifested; c) personal, family and social resources; d) protection regime, support and promotion of the greatest possible autonomy. e) apply the least restrictive principle of capacity (ACCC).
Elderly with restricted capacity: judicial measures and new guardianship

c) The new guardianships.

Traditionally, “guardianship” was used to describe the substitute decision-making for both person and property.

Now, the new Argentine Civil and Commercial Code recognized new meanings: 
representative and personal assistants, supports, reasonable safeguards. (Articles 32-43 and 100-140).

The Code maintained: guardianship ad litem or temporary guardianship; definitive guardianship; guardianship of the person; conservatorship of property, and full guardianship.
Elderly with restricted capacity: judicial measures and new guardianship

d) Monitoring systems; family role, volunteers to prevent elder abuse.

Guardians, supporters or legal representatives are supervised to ensure that the rights, the will, and the preferences of the adult concerned are respected (cf. Art. 12 section 4 UN CRPD).

Every year, they have to present a complete report at court, specifying all activities performed. The duty of report is individual and its judicial approval only frees who fulfills it (ACC, Art. 130 to 140).
Conclusions

Elder abuse is one of the most important social problems in the world and it has grown together with global aging.

It is: a single or repeated act or omission to the detriment of an older person that harms their physical, mental, or moral integrity and infringes the enjoyment or exercise of their human rights and fundamental freedoms, regardless of whether or not it occurs in a relationship of trust. It may also reflect intentional or unintentional neglect (Inter American Convention on protecting the human rights of older persons, OAS, 2015).
Conclusions

Globally, between 4% and 6% of older people have experienced some form of abuse, causing serious physical injuries and long-term psychological disorders.

Many of those older people are mistreated and abandoned in their own homes, in relatives’ homes, and even in facilities responsible for their care.

Older women are often the most vulnerable of all.
Conclusions

The promotion of personal autonomy and the empowerment of the elderly in dependency situation contribute to eradicate elder abuse.

Argentine Law and the new Inter American Convention instruments:

- Living wills or advance directives,
- Free and informed consent on health matters,
- Intervention of volunteers and social networks,
- Monitoring systems: family role, volunteers and judges to prevent elder abuse and their diffusion by mass media.
Danke Ihnen sehr viel
Merci beaucoup
Thank you very much
Grazie mille
Muito obrigado
非常感謝

Muchas gracias

Prof. Dra. MARÍA ISOLINA DABOVE
Conicet - Universidad de Buenos Aires
isolinadabove@gmail.com

4th Annual World Congress on Adult Guardianship
Erkner, September 14-17, 2016