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People with Mental Health Conditions in The Face of Argentine Criminal Law

The Rules of Non-Imputability and the Necessary Reform in Light of International Treaties and Law 26557

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Abstract

The new paradigms in mental health established by international conventions and legislation on the matter in Argentina (law 26557) have not been effectively received in the criminal sphere. This is so since interdisciplinary treatment is not applied for the purposes of determining the non-imputability of people (art. 34 of the Penal Code of Argentina), following the old slogan of psychiatry, nor is the dignity of the person respected. Who suffers from a mental illness? This has determined that in practice provisional or security measures result in the person who suffers from a mental illness and faces the criminal law, spending more time under said law than would have corresponded to him for the crime against him Impute. Human rights and the principle of conventionality require us to modify the matter.

Keywords: National Mental Health Law; Argentine Penal Code

Abbreviations: CCCN: Civil and Commercial Code of the Nation; IACHR: Inter-American Commission on Human Rights.

Introduction

In terms of civil law, in order to address this issue we must start from the following premises: first that the right to health is a human right and second that the mental health patient needs greater protection because he is a vulnerable person.

The rights to health and its preservation [1] have constitutional anchoring since they are implicitly recognized in art. 33, and explicitly in 75 Inc. 22 of the National Constitution of Argentina [2], which accepts human rights treaties with constitutional hierarchy [3]. From this it can be inferred that in Argentina the right to health has constitutional protection and is established as a fundamental right of the human being, which exceeds and surpasses the distinction between public and private law since it crosses the entire legal system transversally.

Preliminarily, we must emphasize that, in accordance with the "Principles for the Protection of the Mentally Ill and the Improvement of Mental Health Care" [4] (hereinafter Mental Health Principles), adopted by the General Assembly of the United Nations in its Resolution No. 46/119 of December 17, 1991, a person may be admitted as an involuntary patient when it is proven that he or she suffers from a serious mental illness, that his or her judgment is impaired, and the fact that he or she is not admitted or retention in a psychiatric

institution could lead to a great deterioration in his condition (Principle 16, paragraph 1).

As a consequence of this legislation and the regulatory norms that were issued for the purposes of implementing the system of so-called "involuntary judicial confinements", the number of patients institutionalized by court order grew significantly. This is due to the fact that the internment order came from a complaint made before a court or due to the fact that those initiated as voluntary, police or emergency, necessarily later became judicial. In addition to this, the skyrocketing increase in drug and alcohol consumption has similarly caused an exponential growth in this risk for people for themselves or for third parties, due to the crises that these substances cause in the human psyche.

In the above context, an arduous debate arose about the compatibility between the dejudicialization of hospitalizations and the protection of institutionalized patients, the latter purpose that has been enshrined by the international legislation in force in our country [5]. In this context, some sectors have proposed the creation of specific review bodies made up of legal, health and community members who do not have these qualities [6]. Likewise, the creation of intermediate organizations that allow the treatment of these people without reaching institutionalization and hospitalization in monovalent hospitals, but rather care at halfway houses, shelter homes, rehabilitation farms, etc.

Now, dejudicialization should not be detached from the judicial doctrine supported by the Supreme National Court, which establishes that "the law must exercise a preventive and protective function of the fundamental rights of the person with mental suffering, with the activity playing a preponderant role for this purpose." Jurisdictional [7]". Taking into account the situation described, it was necessary to specify the role played by the Judiciary in the processes of involuntary psychiatric hospitalizations, determining whether such function fulfilled the requirements imposed by the regulations protecting the fundamental rights of interned persons - which must be interpreted in a comprehensive way - or, where appropriate, the need to design a new system that would provide said protection.

All this leads us without a doubt to a minimum thesis: the patient in the orbit of civil law deserves broad protection since as a patient he is a vulnerable person. To this we must add that as a patient with mental illness he must also be considered a weak party, which makes him doubly vulnerable or a hyper vulnerable or highly vulnerable person, who without a doubt must be protected by the State in general and by the Judiciary in a particular way.

Now, when the person with mental illness is in conflict with the criminal law, we find other protection orders, since the criminal law does not seek to care so much for the sick victimizer but rather for the victim and the entire society.

In addition to this, it faces an ancient norm such as art. 34 of the criminal law of the Penal Code of the Argentine Republic [8] (which is reproduced in almost all the penal codes of Latin America), in which the principle of conventionality with human rights treaties and especially the treaty of the people with mental illness, according to which the approach must be interdisciplinary and not merely forensic psychiatric.

All of this encourages us to delve deeper into this issue from the perspective of both rights – civil and criminal – always thinking about the protection of people with mental illness.

The Protection of Mental Health in The Civil Area

The mental sufferer, until not long ago, was forgotten by the legal system; The National Constitution was not effective for this highly vulnerable age group; However, it was already a right that was more than recognized and protected at the international level, which was reflected in the Declaration of Caracas (Organization of American States, 1990), and the Principles for the Protection of the Mentally Ill and the Improvement of Care of Mental Health (United Nations, 1991) [4], which undoubtedly mark a milestone in the recognition of human rights in favor of mental patients.

These principles for the protection of the mentally ill meant a Copernican, paradigmatic, revolutionary change in favor of the fundamental freedoms, rights and dignity of the person with mental conditions, which ended up being consecrated in Argentina with the sanction of Mental Health Law 26,657 of 2010 [9] and later in the Civil and Commercial Code of the Nation (CCCN) [10].

This mental health law has been conceived as a necessary instrument to protect the rights of those subjects who experience a condition related to their mental health. The latter are especially vulnerable subjects, who often face situations of stigmatization, discrimination and marginalization, thus increasing the probability that their rights will be violated. Hence, it is framed in the protection of Human Rights, understood as a key dimension in the design, development, monitoring and evaluation of Mental Health programs and policies. These include, among others, the rights to equality; to non-discrimination; to dignity; respect for privacy and individual autonomy, information and participation (art. 7 law 26,657).

It is worth emphasizing the terms set forth in the legislative foundations of said regulations, which express: "Nowadays, the problem of mental health-disease is seen as a relevant problem for public health and requires being addressed both in its specificity and in an integral way as an inseparable part of the Right to Health and Human Rights in general of all people."

It defines mental health as a "process determined by historical, socio-economic, cultural, biological and psychological components, whose preservation and improvement implies a dynamic of social construction linked to the realization of the human and social rights of every person." (art. 3). As we see, mental health is no longer a "biological" concept but is understood as a process determined by multiple factors [9].

Specifically, it is clarified that people with problematic drug use, legal and illegal, - a great scourge of recent times - have all the rights and guarantees established in the law under comment in their relationship with health services and, as such Similarly, addictions are required to be addressed as an integral part of mental health policies (art. 4) [9].

However, the care of people with mental health conditions must be provided by an interdisciplinary team made up of psychologists, psychiatrists, social workers, nurses, occupational therapists, among others (art. 8) [9]. The solely psychiatric conception of mental health ends with interdisciplinary care where not only elements of psychiatry but also social conditions, etc. are taken into account. Along these lines, the law tells us about the new modalities of approach that must be gradually included in the treatment of mental patients such as: community operators, therapeutic companions, family and group psychotherapists, rehabilitators and facilitators of socio-labor, cultural activities, artistic and recreational. Likewise, the law promotes continuous training and training of interdisciplinary mental health teams, a matter of vital importance since it refers to "interdisciplinary diagnosis."

Among other actions, the institutional transformation of the mental health system is proposed, built on two major pillars: on the one hand, demanicomalization, deinstitutionalization and dejudicialization of patients suffering from mental disorders; and on the other hand, the approach to mental health problems at all levels of care, as an integral part of general health services and from an interdisciplinary perspective (art. 8, law 26,657); placing special emphasis on the rights of mental health patients [9].

To achieve these objectives, the gradual transformation of mental health institutions and services has been established and the creation of new institutions such as halfway houses, day hospitals, etc. and the admission to general hospitals of people with mental illness for short periods. , such as the prohibition of the creation of asylums or monovalent institutions of prolonged confinement, public or private, an issue that to this day has not been duly completed by the national State or the provincial governments; which actually harms the social reintegration of people with these conditions.

To order the hospitalization of a patient, an interdisciplinary and comprehensive evaluation or diagnosis is required with the signature of at least two professionals, who must necessarily be a psychologist or psychiatrist (art. 20 of national law 26,657). In the event that the patient is in crisis or certain and imminent risk for himself or for third parties, it is necessary - after a certain period - for the judge to order the maintenance of said hospitalization, so when supplying the will of the patient who is not in a position to give it, we call it involuntary hospitalization.

From the reading of arts. 20 and 21 of Law 26657, it can be noted that the hospitalization is carried out by the medical team and subsequently communicated to the judge and the review body within a period of ten (10) hours, who can authorize or deny the hospitalization or, where appropriate, require reports extensions. It can also order hospitalization ex officio when, given the requirements established by law, the health service responsible for coverage refuses to carry it out.

As we see, this legislation today replicated in the Civil and Commercial Code of the Nation – aims to ensure that people's mental health is decidedly a health issue that should not be judicialized. Those cases are safe in which the judge, in the absence of the possibility of giving consent, the person who is in crisis with risk to himself or third parties, needs to continue with said treatment for a prolonged period. The idea is that in those cases crisis, and given the impossibility of the patient himself being able to give consent for voluntary hospitalization, it is the judge who orders it, with the sole purpose of providing protection to said patient.

Along the same lines, when your treating team in the health field considers that the patient has overcome said crisis and can continue with outpatient treatment, they must order the discharge and communicate it to the civil judge for the purposes of his knowledge.

In short, both admission and discharge are ordered by the interdisciplinary health team and the judge only intervenes in the cases mentioned above: patient crisis, impossibility of giving consent and prolonged period, the primary axis of

which must be the cessation of the internment.

Mental Health Versus Criminal Law

Although Argentine Law No. 26,657 on Mental Health recognizes the right to the protection of mental health of all people and the full enjoyment of their human rights, it has not addressed the issue when said people with mental illness have a conflict with the criminal law. On the subject, it only makes a simple reference to the fact that expulsion in these cases must be ordered by the criminal judge (art. 23 law 26657) [9]. This is so because if the internment order has been made by the criminal judge, only he is authorized to order discharge, evaluating where appropriate the opinion of the treating team and the experts appointed (who should not only be psychiatrists) within the scope of the criminal judge.

In effect, said regime has remained intact until today and is identical to that provided for in the Argentine Penal Code of 1921. Thus, art. 34 Inc. 1 of the Penal Code. Today in force, in its second paragraph it establishes that "…in case of alienation the court may order the confinement of the agent in a mental hospital from which he will not be released except by judicial resolution, with a hearing from the Public Ministry and after the opinion of experts who declare the danger disappeared. of the patient harming himself or others. …" We consider that this norm deserves a new interpretation in light of the principle of conventionality and the special protection that the person with mental illness deserves. This is so, since the standards of conventionality that the country must comply with within the criminal system imply the need to understand the procedural subject in the field of criminal law from their situation of vulnerability, to adjust certain rules of procedure related to their particularities [8].

However, the indefinite and indeterminate confinement of certain people continues to be based on a principle foreign to medical science and any approach that is based on psychiatric science: dangerousness. Through this concept, crime often ends up being psychiatized, attempting to transform hospitals into hidden prisons. There the cruelty is usually greater than in penitentiary establishments because the condemned person knows that one day he will serve his sentence and leave, but this does not happen to people declared "unimpeachable" since their "dangerousness" is usually disposed of once and for all and forever. The worst thing is that behind this "label" their indefinite confinement is often enabled, during which the suffering that the loss of their freedom entails is usually added to that of their family, their property and even their own dignity.

The bad concept of "dangerousness" in the field of mental health, used almost exclusively by Positivist Criminology, Criminal Law and the Patronage Law, has practically not been used by the Civil Code. This term was introduced in article 7 of law 22914, which says "Clinical History. The Establishment Management will prepare a medical history for each hospitalized hospital, which will contain, as accurately as possible, the personal data, the verified examinations, the diagnosis and prognosis, the indication of the danger index attributed to it, the advisable regimen for their protection and attendance, periodic treatment evaluations, and hospitalization and discharge dates [11]".

The Mental Health Law changed the topic of "dangerousness" to the so-called "certain and imminent risk", between articles 20 and 25 of law 26657 [9] referring to involuntary hospitalizations, that is, those that are carried out without consent of the person. The text included in them begins by exposing the only criterion that enables mental health teams to indicate an involuntary hospitalization: the certain and imminent risk, for themselves and/or for third parties, determined in relation to the person evaluated. It is a notion that refers to the imminence of harm and the subjective certainty or conviction reached by the health team regarding the occurrence of said harm in the event of not intervening peremptorily with an indication for hospitalization. Regarding this notion, the Regulations of the Mental Health Law specify: "Certain and imminent risk is understood as that contingency or proximity of damage that is already known as true, certain and indubitable that threatens or causes harm to life." or physical integrity of the person or third parties. This must be verified through a current evaluation, carried out by the interdisciplinary team, whose basis must not be reduced exclusively to a diagnostic classification. "Risks derived from attitudes or behaviors that are not conditioned by a mental illness are not included [12]".

As we mentioned, article 23 of the National Mental Health Law [9] is the only norm that refers to the criminal system, pointing out that although discharge, discharge or exit permits constitute powers of the health team that do not require authorization from the judge, this article indicates that hospitalizations that take place within the framework of the provisions of article 34 of the Penal Code are exempt from this provision. Ergo, when the hospitalization has been ordered by the criminal judge, only said judge can order his release, since the social good is at stake [8].

In short, when a person with a criminal condition is faced with the criminal law, it is not an issue that strictly concerns the right to health of the person subjected to proceedings, but, if you will, a social interest in the prevention of events. Crimes that may be committed by people suffering from mental illnesses.

The lack of adequacy of art. 34 of the Argentine Penal Code to the international parameters that governs mental health

Article 34 of the Argentine Penal Code establishes that the following are not punishable: 1° He who was not able at the time of the act, either due to insufficiency of his faculties or due to a morbid alteration thereof or due to his state of unconsciousness, error or ignorance of a non-attributable fact, to understand the criminality of the act or to direct his actions.

In case of alienation, the court may order the confinement of the agent in a mental hospital, from which he will not be released except by judicial resolution, with a hearing from the public ministry and after the opinion of experts who declare that the danger of the patient harming himself has disappeared or to others.

In other cases in which a process is acquitted on the grounds of this section, the court will order the detention of the same in an appropriate establishment until the disappearance of the conditions that made it dangerous is verified [8].

The first paragraph of the subsection states the elements that are considered when determining the non-punishability of an act, while the following ones pronounce on the security measures to be applied from the declaration of non-imputability (or a provisional measure before said decision). We consider that the norm has words in its language that should be discarded in light of international treaties on human rights and mental health, such as "dangerousness", "confinement", "insanity".

In effect, the provisional detention established in the criminal procedure system will be legitimized when the greater rigor that its execution requires can be justified in some way. And this is so, mainly, since the judicialization of the conflict in an area like this entails a greater impact on the patient's rights, because here coercive hospitalization stands as the only legally provided measure.

Furthermore, the criminal judge retains a leading role in this jurisdiction since expulsion decisions are within the sphere of his competence, without prejudice to the fact that his decisions should be endowed with greater legitimacy. That is, they should be based on the opinion of the treating doctors and interdisciplinary expertise where appropriate, in accordance with international parameters on the matter.

In effect, the Principles for the Protection of the Mentally Ill and the Improvement of Mental Health Care incorporated into the positive order in force by the national laws (26,657) and the Province of Córdoba (9,848), and considered by the Supreme Court of Justice of the Nation as the most complete instrument in this matter [7] regulates the fundamental rights of every person with some degree of mental illness. This document specifically refers to people with such conditions who have committed a criminal offense and who are therefore subject to a process in this area. In this regard, it expressly establishes that such people "…must receive the best available mental health care, as stipulated in principle 1 above. These principles will be applied in your case to the fullest extent possible, with the few modifications and exceptions that may be imposed by the circumstances. No modification or exception may impair the rights of persons recognized in the instruments indicated in paragraph 5 of principle 1 above" (which refers to the civil, political, economic, social and cultural rights recognized in the UDHR, PIDESyC, PIDCyP, and the Principles for the Protection of Persons Subjected to Any Form of Detention or Imprisonment).

In short, the criminal judge, faced with the commission of a typical and illegal act by a person with a mental illness that prevented him from understanding the criminality of the act and directing his actions (addictions having been equated with these illnesses, art. 4 of Law 26,657), must adapt its actions – to the greatest extent possible – to the international parameters in this matter [9].

Security Measures

Continuing with the analysis of art. 34 of the Penal Code let us think that the commission of a criminal act generates two forms of criminal reaction: the imposition of a penalty or the application of a security measure [8]. Penalties constitute the application of a sentence against an act that is considered harmful to social order. They express a social reproach to the act and the author and mean for him the restriction or suppression of the legal rights of which he is the holder, which frequently takes the form of deprivation of liberty. They are reserved for imputable subjects, as retribution for a guilty act, that is, the penalties are based on the guilt of the author.

On the other hand, the declaration of non-imputability encompasses those situations in which the commission of an illegal act has been confirmed, but in a context such that the corresponding legal reproach cannot be made against the person. Frequently this happens due to reasons of mental illness of the person in question, which at the time of commission of the act prevented him from understanding the criminality of his act and/or adapting his conduct to the understanding of said criminality. Said declaration of non-imputability may entail – we would say in a situation where there is risk for oneself or for third parties – the application

of a security measure.

In this order, the issuance of security measures appears linked to the non-punishability of the author, that is, in case of lack of capacity for guilt, either due to insufficiency or morbid alteration of his faculties, or due to state. of unconsciousness, error or ignorance of fact not attributable. They constitute a legal consequence, different from the penalty, which are considered in legal doctrine as "curative" in nature, where an eminently therapeutic purpose is noted, aimed at improving the mental health of those not responsible. Frequently, the modality that this therapeutic purpose acquires is that of compliance with the security measure in the context of confinement, whether in mental institutions or psychiatric penitentiary units, and with the aim of carrying out treatment.

The purpose of these measures is to carry out a curative treatment, but even in these times some criminal magistrates consider that they are ordered due to the so-called "dangerousness of the person" and that its cessation will be, according to the Code, subject to the "cessation of said dangerousness" (we should speak of certain and imminent risk for oneself or for third parties, which differs diametrically from dangerousness). While through punishment the law specifies its prevention interest by exclusively considering the degree of guilt demonstrated by the active subject of a crime during his participation in the act, security measures have - on the one hand - a socialization function, education or treatment of the "dangerous" subject (who suffers from a mental illness) and - on the other hand - protection of the community.

In that order, taking into account its purpose of preserving the person and the safety of third parties, the scope of this type of state interference is not adapted so much to the crime committed but to the personal conditions of the person to whom it is applied, reason for which it must depend and be proportional to the demonstrated "dangerousness" and not to the criminal scale of the crime that was at the time attributed to the person declared unchangeable.

Security measures can be applied even in cases in which the defendant is acquitted after it is determined that the state of intoxication that caused the temporary indemnification was voluntary. In this line of thought, the penal doctrine still considers that "when it deals with the declaration of non-imputability due to a disturbance that is not momentary or episodic, and it is evaluated that it constitutes a behavior that can be repeated over time, the freedom of the non-imputable person It would constitute a danger for society and for the subject himself. It is then considered that the carrying out of the punishable act has revealed the dangerousness of the subject, from which the decision to deprive the person not responsible in terms of a security measure necessarily follows, especially when from civil regulation, the norm provides Likewise, the mental confinement of a person due to the sole danger of harm to himself or third parties, without the need for the prior commission of a crime…"[13].

It has also been said that "The concept of dangerousness accounts for a category that does not sanction a subject for the infraction he committed but for the action he may commit. This concept implies a value judgment about the actions of a subject, and it is not possible to endorse it through a psychological-expert task. This concept forces us to reflect from the ethical point of view and from the scope of the disciplines with interference in the field of mental health, in the sense of the impossibility of "predicting" the future actions of a subject, the intensity and the asocial nature of the same. . Proceeding in this way would imply a subjective value based on prejudice and stigmatization…"[14].

In another order and as a condition for the cessation of security measures, the Penal Code stipulates verification of the disappearance of the conditions that made it "dangerous" to the person for themselves or for third parties, through an expert opinion and subsequent judicial resolution based on said opinion. Hence, the duration of the security measures will be subject to the disappearance of the danger, to the "healing effect" experienced by the person on whom it has been imposed, hence they are of indefinite duration. And it is precisely in this temporal indeterminacy where the most substantial difference between security measures and penalties as a penal reaction lies. It is there where the problem of the lack of proportionality between the possible temporary duration of the security measure imposed and the harmful act committed is circumscribed.

There is no doubt that with the security measures imposed on the convicted person, the perpetrator of a crime, Criminal Law attempts to forge a balance between the interests of state protection and the interests of freedom of the defendant.

Without prejudice to this, even today the misnamed "dangerousness of the subject" is the pertinent justification for coercing the freedom of the subject.

Now, if these measures are based on the premise that it is not an order to restrict the freedom of the subject, but rather that they are made for the sake of prevention and the "idea of curative treatment", the most relevant issue lies in think that these measures should never exceed the penalty imposed, in accordance with the provisions of the jurisprudence of our country. It is contradictory or unrelated to the protection of human rights that involuntary internment is - without justification - greater than the penalty that would have been imposed for the illegal act committed.

On the other hand, the standard determines that these will last until "the danger of harming oneself or others has disappeared, or until the disappearance of the conditions that make it dangerous is verified", and it may happen that once reached that limit, and the judge having lost legitimacy to maintain the deprivation of liberty, the mentally ill person could still be classified as dangerous and it would be necessary to continue with state intervention, resulting in sine die hospitalization.

In this regard, the national doctrine has questioned the temporal indeterminacy of internments, doctrinaires of the stature of Zaffaroni-Alagia-Slokar, have expressed that "The so-called security measures for people incapable of crime who are involved in a criminalized conflict, particularly when It is an asylum confinement, they imply a deprivation of liberty for an indefinite period of time, which does not differ from a sentence other than in its lack of maximum limit and, therefore, due to the total disproportion with the magnitude of the legal injury caused...Having in the current legal provisions of psychiatric law, it is not rational to maintain that a person, by chance of having put the agencies of the penal system into operation, is subject to that power with the possibility of suffering an indeterminate sentence, which may even be perpetual [15].

In this sense, Dr. Aída Tarditti addresses the issue in one of her booklets, and proposes as a palliative in order to avoid the prolongation of hospitalizations sine die, the application of the "analogy in bonam partem, such as the extension of the rules of conditional sentencing and conditional release, suspending the execution of probationary confinement with the obligation to carry out treatment under the supervision of a responsible family member, for example, or of a governmental institution or not, provided that, the Hospitalization circumstances have changed and it is therapeutically advisable to replace it with other alternatives. We thus see how the norm examined does not withstand analysis if it is studied through the prism of the rights recognized in the National Constitution, the other international pacts of constitutional hierarchy incorporated into our normative plexus after the constitutional reform of 1994, with the Law of Protection of Mental Health No. 26,657, the Convention on the Rights of Persons with Disabilities, its Optional Protocol issued by the United Nations, and with the Principles for the protection of the mentally ill and the improvement of mental health care issued by the UN General Assembly, by resolution 46/119 of December 17, 1991, with Art. 34 inc. 1st., in the face of international guidelines regarding security measures and their cessation…"[16]

Now, although our Penal Code, in theory, assumes guilt for the act committed and not for the guilt of the author, as we expressed above, in judicial practice measures are imposed on the accused not for what he does but for what he does. what is it. It is based on authorial criminal law, not act, with the main object of examination being the dangerousness of the accused based on his personal conditions and in studying the evolution of the mental illness he suffers from, without the measure being related to or recognizing as a limit the criminal offense committed by the defendant. This is how our Supreme Court of Justice of the Nation has expressed itself in the recognized Tufano ruling, when it states that "the weakness structural legal situation suffered by people with mental illnesses - in themselves vulnerable to abuse - creates true "risk groups" in terms of the full and free enjoyment of fundamental rights, a situation that generates the need to establish effective regulatory protection, aimed at the rehabilitation and reintegration of the patient into the family and social environment while today no one denies that psychiatric hospitalizations that are unnecessarily prolonged are harmful and entail, in many cases, marginalization, exclusion and mistreatment and it is not uncommon for them to lead to a " avoidable hospitalism. In this reality, the law must exercise a preventive and protective function of the fundamental rights of the person with mental suffering, with jurisdictional activity playing a predominant role. Institutionalized patients, especially when they are coercively confined - without distinction as to the reason that motivated their hospitalization - are holders of a set of fundamental rights, such as the right to life and health, defense and respect for dignity, to freedom, due process, among many others. However, it becomes undeniable that such people have a particular status, since they are holders of fundamental rights with certain limitations derived from their legal status. seclusion. Faced with such an unequal circumstance, the rule must be the recognition, exercise and special safeguard of those rights from which the legal duties of the taxpayer - be it the State or individuals - are derived and which allow, in turn, to promote their compliance. (...) the principles of legality, reasonableness, proportionality, equality and judicial protection of the conditions of forced confinement, -whether by penalties, security measures or mere preventive and precautionary hospitalizations of people without criminal conduct, often based on presumed dangerousness. and as an instance of treatment - are currently strengthened and consolidated in the National Constitution (arts. 16, 17, 19, 33, 41, 43 and 75, incs. 22 and 23), international human rights instruments with constitutional hierarchy (art. 25, Universal Declaration of Human Rights; art. XI, American Declaration of the Rights and Duties of Man; arts. 7, 8 and 25, American Convention on Human Rights; arts. 7, 9, 10 and 14, International Covenant on Civil and Political Rights; art. 12, International Covenant on Economic, Social and Cultural Rights) and other agreements in force for the National State (Inter-American Convention for the Elimination of all Forms

of Discrimination against Persons with Disabilities, approved by law 25,280 and in force since December 14 September 2001)" [17].

In short, the permanence of an ancient norm such as article 34 of the Argentine Penal Code (1921) cannot mean that the general principles that illuminate the new paradigm in mental health can be neglected or omitted. Furthermore, judicial control of the security measures imposed on adults who cannot be held responsible for mental illness, in accordance with art. 34 Inc. 1 of the Penal Code must be carried out specifically taking into account the criteria that, inspired by international guidelines, guide the specific regulations.

Let us think that the mental health law not only guarantees the exercise of the human rights of people with mental illnesses linked to health services. It also highlights the main objective of these hospitalizations to recover and preserve the patient's health and not a prolonged hospitalization over time, especially if the treating health team considers that the situation of certain and imminent risk that determined the hospitalization has ceased.

We understand that there must be a turning point here, and dangerousness must then act as a limit to state intervention. This is so, since the constitutional guarantees in the criminal process seek to ensure that no person can be subjected by the State, and especially by the courts, to an arbitrary procedure or punishment. Consequently, the deprivation of liberty must not only occur for causes and methods classified as legal, but also, they must not be arbitrary, and must be compatible with the ideas of reasonableness, predictability and proportionality. Thus, the author of the illicit act must be punished for the act committed and not for his pathological condition, which the criminal measure such as the one analyzed, as a manifestation of a criminal law of the act and not of the author, must establish in the act. The limits of its intervention, and it cannot be an indeterminate measure. Thus it has been said that "...the so-called security measures for people incapable of crime who are involved in a criminalized conflict imply a deprivation of liberty for an indefinite period that does not differ from a sentence except in its lack of maximum limit and, therefore, due to the total disproportion with the magnitude of the legal injury caused..."[18]

A review of the legal doctrine allows us to note that the adoption of these measures has deserved criticism from legal specialists for violating constitutional rights, principles of criminal law and values intrinsic to the legal system, among them, the principle of legality and confidentiality, equality before the law, proportionality, criminal law of act and human dignity [19].

Finally, and addressing perhaps the most discussed in light of international regulations, it is to expect that the experts or the treating team make a prognosis of "cessation of dangerousness."

Based on the jurisprudence of the Inter-American Commission on Human Rights (IACHR) in the case of Fermín Ramírez vs. Guatemala: ...the assessment of the dangerousness of the agent implies the judge's assessment of the probability that the accused will commit criminal acts in the future, that is, it adds to the accusation for the acts carried out, the forecast of future events that will probably occur ... It is unnecessary to consider the implications, which are evident, of this return to the past, absolutely unacceptable, from the perspective of human rights... (IACHR Series C No. 126). In a State that proclaims itself as a rule of law and is premised on the republican principle of government: ...the Constitution cannot admit that the State itself assumes the power—superhuman—to judge the very existence of the person, their life project and the realization of the same, regardless of what mechanisms it intends to do so, be it through reproach of guilt or neutralization of dangerousness, or if preferred through punishment or through a security measure (see rulings 328:4343, 329:3680, 332:1963).

Let us add to everything that has been said that one of the main postulates of the directives established by Law 26657 - in addition to de-manicomialization and de-judicialization - is that the approach to the person who suffers from a mental health condition is addressed by an interdisciplinary team. , eliminating the psychiatrization of the problem. These interdisciplinary teams of the health system are responsible for proposing the most appropriate place to comply with the hospitalization measure (in the event that this has been filed by the Judge in the terms of Article 34, paragraph 1). of the Penal Code). Likewise, in the case of people declared unresponsive for whom the Judge has not ordered hospitalization, the interdisciplinary teams of the health system are responsible for evaluating the most appropriate treatment, and may indicate hospitalization only when there is informed consent or, in its defect, certain and imminent risk for itself and/or for third parties, being able to discharge when it has already been overcome (all in the terms of Law 26657).

In conclusion, when it comes to a measure of confinement within the framework of article 34, paragraph 1 of the Penal Code, once the non-imputability has been determined - or, where appropriate, the dismissal - rather than establishing an adequate and proportional security measure, the Judge Criminal Court should refer the proceedings to the Civil and Commercial Judge on duty in order to carry out the corresponding monitoring and control of legality. In these cases, it will be done thinking only about the protection of

the person who suffers from a mental health problem in light of Law 26557, and where appropriate the health care team must order discharge when the patient's crisis is overcome (that is, that there is no longer a risk to oneself or third parties) [20].

In some provinces of Argentina, such as Córdoba, the Supreme Court has issued a series of Regulatory Agreements on the "Practical instructions for the assessment of certain and imminent risk in mental health in cases of criminal intervention", the last being AR 1823 Series A from 09/22/2023.

Conclusion

Despite the time of the issuance of national law No. 26,657, the lack of adaptation of Argentine criminal regulations to the spirit and nature of it is still notable, prioritizing safety criteria over health criteria.

In this framework, we warn of the lack of application of the law by the operators of the Judicial Branch, which leads to a serious violation of rights, since these people remain housed in the so-called psychiatric prisons, monovalent hospitals or therapeutic communities, the majority of the times for a longer time than they would have been in jail if they had been indictable persons. They are spaces in which the fundamental principles of the National Mental Health Law are not respected, having revealed isolation practices, lack of follow-up in pharmacological treatments, absence of interdisciplinary approach strategies, among others. Furthermore, care is provided by professionals who barely respect the law on patient rights and mental health.

Legislation on mental health, with all the achievements that its sanction means, places us before a greater challenge. It is to promote and truly make possible a profound transformation of the system that governs the field of Mental Health today with clear and profound protection from the perspective of human rights, of the subject with mental illnesses, whether it is protected by civil law or faced by criminal law.

To achieve this, it is necessary that the rules of the Argentine Penal Code adapt to the mental health law and international treaties, taking into account the dignity of the person who suffers from a mental health problem in the face of the proportionality of the measures taken by the criminal jurisdiction when there is a declaration of non-imputability, and the need for its referral - when appropriate - to the civil judge.

It is the mission of the Judiciary to ensure compliance, and to establish itself as guardian of the human rights of people with mental illness, creating legal criteria and guidelines that support thoughtful and well-founded resolutions that put the health of the inhabitants in its proper place, always failing in these cases with a perspective of vulnerability.

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