Medical Coercive Measures Under the Albanian Legislation and their Application to Criminally Irresponsible Individuals

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Abstract

Individuals, who are characterized by mental disorders and manifest them in a criminal behavior, cannot be subjects to the same punitive regime provided for other subjects of criminal offenses. Neither penitentiary institutions nor civilian psychiatric hospitals are suitable for these individuals; the former, because they are conceived only for that category of subjects who culpably violate criminal norms; second, because, since psychiatric hospitals have therapeutic purposes, they are not suitable for controlling the social risk of irresponsible subjects.

Any decision of irresponsibility due to mental state brings a certain consequence, namely the dismissal of the case and the imposition of coercive measure. The defendant, due to his social danger, may undergo outpatient treatment or compulsory treatment in a medical institution.

The following manuscript analyzes the importance of medical coercive measures provided by the criminal legislation and at the same time, their importance in the treatment of irresponsible persons, perpetrators of criminal offenses. It tries to give an overview of the different orientations that characterize the issue in question, to underline the conclusions reached by jurisprudence and at the same time to reason not only on the basis of applicable norms, but also on the basis of perspective and opportunity for reform, seeking to develop points of reflection and avoid unreasonable discussions.

Keywords: *medical coercive measures, compulsory outpatient treatment, compulsory treatment in a medical institution, psycho-social care, psychiatric hospital.*

Introduction

The problem of social risk, rather than an indisputable problem related to the category of socially dangerous individuals, essentially constitutes a problem that has to do with guaranteeing social protection, specifically for the treatment of these individuals.[1]

Through coercive measures, the socially dangerous subject is prohibited or prevented from committing criminal offenses. It is necessary to distinguish the coercive measures that are applied after the commission of a criminal offense from an irresponsible person, in the sense of article 46 of the Albanian Criminal Code and article 239 of the Albanian Code of Criminal Procedure from unvoluntary treatment given pursuant to law no. 44/2012 "On mental health", in order to prevent persons suffering from a mental illness to have aggressive behavior before they commit a criminal offense.

Medical measures are different from punishments[2] because they are not a consequence of a punitive trial, but a consequence of a judgment on dangerousness, not on criminal responsibility but on the probability of recidivism in the future.[3] Since they provide for a

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reduction of the rights or personal freedom of the subject, their implementation is not conceived in the function of punishment, but it is an inalienable consequence of a measure with another purpose. Consequently, if the punishment is stipulated and placed in proportion to the fact that occurred, the coercive measure is logically indefinite, but in proportion to the social danger, as such it ends when the social danger ends.

Compulsory outpatient treatment as a medical coercive measure

Compulsory outpatient treatment intends to leave the person free under the care of the family or the respective guardian, who undertakes to treat him/her in an ambulatory or hospital condition. This type of measure is given mainly for criminal misdemeanor or for those criminal offenses that are not characterized by social danger, or when the latter has disappeared.

Compulsory outpatient treatment should always be based on the current state of mind and as long as no other more severe measures are needed.[4]

In imposing the measure of compulsory outpatient treatment, the court must be very careful, so that the treatment is not neglected, since in this case the person is not deprived from liberty and his treatment is carried out in a free state.

In other words, the person to whom has been given such a measure must be assigned a family caregiver in order to follow him continuously and make sure that the subject undergoes medical therapy correctly. In any case the appointment of compulsory outpatient treatment cannot be given if the person does not have proper care from a family member. Other circumstances that the court must take into account in addition to the appointment of a guardian, are both economic and physical opportunity, proven and guaranteed before the court. In the absence of family members,[5] as a guardian to follow at the same time the person himself and the treatment, the court cannot decide otherwise than the hospitalization in a psychiatric hospital, especially in cases of a temporary stabilized condition. Thus the main difference between outpatient treatment and hospitalization in a psychiatric hospital lies in the fact that the mental state of the irresponsible individual is permanently stabilized. In this way there is no reason why a person should be "deprived from his liberty", but it is sufficient only the existence of treatment and its non-discontinuation.

In revoking and changing the medical measure of compulsory treatment in a medical institution to the measure of compulsory outpatient treatment, the courts often reject the request of the person on the grounds that in some cases he is not an integral part of the family tree. From this point of view the law has not made any provision for the appointment of a guardian, who will supervise the person who undergoes treatment as determined by psychiatric experts. Some courts also accept persons outside the family tree as guardians. In other decisions, the court requires the existence of economic opportunity to be proven and not only declared by the family members, but without determining the concrete evidence that the court needs to consider the request.

It is a mistake to think that in order to impose the most appropriate medical measure, the court should suffice with the act of expertise, but it should also take into consideration other evidence which sheds light on mental health, which is reflected in the behavior of the person in the community where he lives.[6] An exception is made only in the case when the act of expertise stands as the only evidence, a case in which the court must accept it without any doubt.

The decision of the court to change the medical measure from hospitalization in a medical institution to compulsory outpatient treatment must in any case be justified, with the relevant arguments, why the conditions of treatment in a medical institution have ended and the person must be treated in outpatient treatment. The court should also refer to the act of expertise and in no case should decide differently from what the psychiatrists have prescribed.[7]

The medical measure should be revoked in any case when the conditions and the need for safety are absent, being replaced by the measure of compulsory outpatient treatment. These conditions are always based on the assessments and statements of experts, specifically on improving the mental state of the person.[8]

Outpatient treatment, as a coercive measure is executed in the residence of the irresponsible person due to mental state who has committed the criminal offense. When the relevant specialists or a relevant institution are missing near the place of residence, he is accompanied in any case to the institutions of the nearest district, according to article 45 of law no. 8331, dated 21.04.1998 "On the execution of criminal decisions", as amended. When there are obstacles in the execution of the compulsory outpatient medical measure, the prosecutor orders the compulsory execution by the state police and, if there's the case, submits a request to the court to change the outpatient medical measure to a more severe measure, hospitalization in a medical institution.

Compulsory treatment in a medical institution as a coercive measure

This medical coercive measure is given by the court for persons declared irresponsible, against whom the criminal prosecution has not started or the trial has been terminated under article 387 of the Albanian Code of Criminal Procedure. It is thought that this measure does not apply to persons who have lost the ability to understand and control actions as a result of a transient illness, because at the moment of recovery from this disorder, the subject regains mental abilities and no longer poses a risk to society.

Compulsory treatment in a medical institution is applied to persons who due to their mental condition have not been aware of the importance of the criminal offense they have committed and have not been able to control their actions or omissions.[9] The implementation of these measures by the court is an important tool of the Criminal Code and aims to prevent the commission of other criminal offenses by the mentally ill.

In case of dismissal of the litigation because of the irresponsibility due to mental condition, it is always given the medical measure of compulsory hospitalization in a psychiatric hospital for a period of not less than 2 years according to the Italian Criminal Code. According to this code, the minimum duration of hospitalization in a medical institution is not less than 10 years for offenses punishable by life imprisonment.[10]

On one hand, compulsory treatment in a medical institution, is considered as an opportunity to keep irresponsible and dangerous persons under control, and on the other hand, there is a discussion regarding the real possibility of imposing this measure.[11] The Code defines the treatment of a completely irresponsible perpetrator in the form of compulsory isolation in a specialized institute in accordance with the vision that the irresponsible person is seen as a necessarily dangerous subject and that the only medical treatment is isolation from the rest of society.[12]

The Albanian judicial practice, has encountered a problem regarding the conditions of imposing medical measures, specifically that of compulsory treatment in a psychiatric hospital. The persons declared by the court as irresponsible in the absence of medical institutions, were sent for treatment to the prison hospital. Taking into account law no. 8331, dated 21.04.1998 "On the execution of criminal decisions" and the order of the Minister of Justice no. 329, dated 15.01.2009 "On the categorization of institutions for the execution of criminal decisions", as amended, the prison hospital is considered a security prison and not a medical institution.

Therefore, the Albanian High Court[13] has ruled that the law has been wrongly applied and the person has been unjustly deprived of his liberty, living in the conditions of a prisoner even though he is not such. In the same decision, the court expresses the opinion of the expert for imposing the most appropriate medical measure, emphasizing that according to article 46 of the Criminal Code, the only condition for the application of the medical measure is the irresponsibility of the person who committed a criminal act. The article in question

has not made any determination whether these measures are given to persons who are of great social danger or for any kind of offense.

Courts go beyond the content of the article when placing the emphasis on social danger, which is not required by article 46 of the Criminal Code. The court on itself does not have the means to determine the mental state of the person and necessarily seeks the help of psychiatric experts, who in addition to the mental state determine the need for treatment or isolation. The opinions of the expert often constitute a decisive evidence for the resolution of the case, but like all other evidence they are subject to judicial review, especially in cases where they must be analyzed within all of the evidence administered by the court. The court cannot take over and cannot play the role of the expert nor give it a predetermined value.

The medical measure of treatment in a medical institution must be reviewed by the court in any case after the expiration of the one-year period, as per article 46, paragraph 2 of the Criminal Code. In the review session, the court, with the help of experts, once again re-evaluates the mental state of the person, the progress of the disease, but above all the conditions of the existence of social danger. This reassessment is done for the sole reason that if the situation is improved and the person no longer shows danger, the need of this measure no longer exists and therefore the court is obliged, in accordance with the law, to apply another more lenient measure. The re-evaluation is done on the basis of the appeal of the party, but also mainly by the court where the acts are found.

The execution of the medical measure is done upon the request of the prosecutor. In case the person is locked up in a penitentiary institution, the execution of the medical measure is done by the body where the person is convicted. While in cases when the person is free the execution is carried out by the state police.[14]

Psycho-social type custody measures

An institution that needs special attention and that in many countries of the world is in itself a coercive measure imposed by the court in the full sense of the word, is the placement in custody in psycho-social centers.[15]

In itself this measure has all the effects of the coercive measure and is imposed by the court in the following cases:

1. as an initial measure for persons who have committed not very serious criminal offenses that present a controllable social danger without the need for enclosure in a medical institution;

2. to persons who have stayed for a certain period of time in a closed structure, when the social danger enters the limits defined in point 1, while waiting for the extension or revocation of the measure.[16]

The implementation of the psycho-social custody measure must be supervised by the court and as such can be no other than temporary. In this type of measure, the personality of the irresponsible person is monitored with special care, despite the importance of the criminal offense and the fact that the perpetrator is free. Here we are faced with the fact that these irresponsible sick subjects need appropriate therapy and a preventive measure for not committing other acts in the future. Psycho-social type of custody is not a coercive measure, but a complexity of mandatory psychotherapeutic interventions of a preventive nature.

Supervision of the irresponsible subject is closely related to a disease condition that necessarily requires medical intervention. Otherwise stands the supervision of the mentally responsible author on parole, who is free and mostly agrees to cooperate with the guardian. Irresponsible persons in custody are difficult persons who undergo treatment and in this sense it is not only necessary the need of a guardian, but also the existence of a medical observation.[17]

Another model of the Nordic countries is that of placing these persons in private institutions authorized and controlled by the state.[18]

Actually psycho-social custody measures are not provided in our Criminal Code, but referring to the practice of other countries, they have resulted to be quite effective in dealing with the above-mentioned subjects. Currently, these subjects, i.e. those who have committed a criminal offense under the conditions of intoxication or use of narcotic and psychotropic substances, are not subject to any kind of rehabilitative measures, but only to imprisonment, the same as other subjects. In these types of persons, quite vulnerable, manifestations of mental disorders have been observed during the execution of the sentence, precisely because of the lack of specialized treatment.

Reasons for the closure of the judicial psychiatric hospitals in western countries

In Italy and other countries of Western Europe, the psychiatric hospitals, where mentally ill individuals who have committed crimes, but are legally irresponsible for their actions, are kept under medical measures, or individuals with lower mental balance who need medical treatment, are moving towards closure. In order to have a clear picture on the reasons why these institutions are closing, we should list a number of weak points of the application of this system in practice. Anyway, what results to be the main reason of closure has to do with the fact that this particular type of treatment of this category of subjects, in itself, lost its remedial and rehabilitative function.

First of all, the forced closure in a psychiatric hospital is contrary to constitutional principles, such as the right to health and the respect for human dignity.[19]

Secondly, the forced closure in a psychiatric hospital is linked with the principle of flexibility that leads the restrictive measures, so that a certain measure can be appropriate for the therapeutic needs of the subject, in other words to the medical treatment which the latter must undergo.

Also, the forced closure in a psychiatric hospital does not respect the principle of proportionality, considering the specific circumstances of each case in respect of freedoms and human rights. The importance of this principle has been emphasized many times by the European Court of Human rights, in the interpretation of the provisions of the European Convention on Human Rights.

This measure in the same time violates the principle of distinctness between the sentence as a punishment and restrictive measures.

This enumeration can't be claimed to be exhaustive. It is limited in the appearance of the main indicators and rules to which any reform of criminal law have to undergo.

Year 2015 marked in most European countries the end of psychiatric hospitals.[20] The completion of this stage should be accompanied with the construction of suitable structures to hold this category of subjects, who were at the stage of execution of these measures. In principle, it was estimated that these new structures should totally be under medical management.

This category of subjects should be admitted to these institutions under the criterion of territoriality, in other words, the institutions closer to the place of residence or stay.

Another condition regarding these new structures was the inclusion of the professional staff made up of psychiatrists, psychologists, nurses and educators. On the other hand, persons who are not characterized by social dangerousness would receive mandatory outpatient treatment, while being nearby their families.

Conclusions

The Albanian penitentiary system needs a profound reform and restructuring of institutions that house irresponsible individuals. Currently in Albania there is no institution of the type of forensic psychiatric hospital, leaving the treatment of this category in the prison hospital or in the hospital of Kruja, based on social risk. These two institutions are conceived as penitentiary institutions and accommodation of these subjects constitutes another constitutional violation.

These subjects are not considered convicted and in the conditions of the impossibility of the state to provide service according to the provisions of the law, they have the right to request outpatient treatment. Practically, this cannot happen, as many of them have committed extremely serious crimes such as those against life, health or sexual freedom.

We are of the opinion that it is the time to provide in the Criminal Code a new coercive measure, in addition to compulsory outpatient treatment and compulsory treatment in a medical institution, that of psycho-social type of care. The provision of this measure would be particularly effective in treating those subjects who have committed a criminal offense under the conditions of intoxication or use of narcotic and psychotropic substances, as has resulted from the practice of other countries.

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Recommendations

The definitive closure of psychiatric hospitals will set lawyers and politicians facing each other, in order to overpass the complexity of criminal system and of medical intervention in full respect of human rights and fundamental freedoms.

For a full analysis of this issue associated to irresponsibility because of mental state, it's important to examine the penalties to which undergo the irresponsible individuals.

Although at the time of their creation, medical measures were presented as a model of progress and openness to human sciences, in a short time they showed their authoritative nature and resulted in a failure.

This happened for many different reasons.

First of all, in legislator's point of view, while the punishment should have a retributive and preventive function, the medical measures were intended to have a specific preventive function (at least theoretically), as they were finalized by the treatment and rehabilitation of a socially dangerous subject. Medical measures, given to irresponsible individuals, or half responsible, but socially dangerous, were applied individually or uphold the sentence, giving rise to a dual sanctioning system. The doctrine of criminal law considers medical measures more severe than the authentic imprisonment sentence.

Medical measures are contrary to the principle of lawfulness in defense of the personal freedom, because of the fact that they are indeterminate in term, being on time for as long as lasts the social dangerousness, as well as of the fact that they are exposed to a great degree of uncertainty.

In practical terms, it is important to note that medical measures cannot be simply implemented because of the current lack of specialized institutions, such as the psychiatric hospital of Elbasan, but also because of the fact that outpatient treatment in many districts is almost impossible.

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