FROM DE SECURITY MEASURE TO THE SECURITY OF THE MEASURE:

From violence towards the respect of dignity of persons with mental disorder in the penal system

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Madness is a language used to exercise social control based on the conctruction of what is normal and what is abnormal. This control, traditionally destined to the segregation of the diffents, has not suffered important changes at present, in spite of the advances of medical science and pharmacology (Carrara, 1998). The result of this systematic action is the marginalization and segregation, to which the mental suffering which these persons already go through has to be added (Monteiro, 2015).

If the same analysis is realized in the criminal juridicial context, it is perceived that it does not escape the described logic, especially when what Zaffaroni calls *the duality of the penal treatments* is established and a differentiated penal control is exercised according to the legal category of the subject who committed the crime: friend or enemy, equal or different, or, as the author prefers, "the penl repression was always exercised in a different mode, depending on whether the addressees were equals or strangers*"* (Zaffaroni, 2006, p. 1.122). In effect, the positivist school, creator of the security measure, was a great motivator of the unequal treatment put in practice by Penal Law, which considered a delinquent as somebody biologically inferior and affirmed that Penal Law acts in favour of the criminal and not of society, as it should. At present, unfortunately the same exclusive penal approach of the Nineteenth century is maintained, against all the achievements of human sciences, medicine and Law, especially in aall refering to human rights (Monteiro, 2015).

The existence of the security measure makes evident that Penal Law has clearly two weights and two measures: the *equals* have access to the rights and guarantees of the national and international juridicial system, while the *differents,* those with mental disorders, are seen as dangerous, as threats – not as humans – and, as a consequence, are seen and treated by Law in the same deterministic way of the last centuries.

The mental patients who committed crimes are a population that suffers from multiple victimizations: First for beloing to the poorer social classes, and then for suffering a mental health problem and not having access to an efficient treatment of mental health, more so as persons deprived of freedom, and finally, as persons subdued to forced medication. In compliance with the security measures they are victimized again, once the treatment prescribed in the norm is done according to the ancient and inefficient madhouse model. The management of this process, which the proper Organic Comprehensive Penal Code (COIP) understands as health treatment, for strange reasons is not under the competence of the Health Ministry of the doctos, but still under the inexistent Judges of Penitentiary Guarantees.

In the Republic of Ecuador, the COIP contemplates exclusively the involuntary commitment to a psychiatric hospital as security measure, and does not demand the creation of Hospitals for Guardianship and Treatment, or Juridicial Hospitals, as they are called in Italy. Taking into account that the number of public institutions on mental health is quite reduced in Ecuador, with the majority of these being private philanthropic institutions[1], the patients with security measures are destined for attention exclusively to two

1 Ministerio de Salud Pública. *Modelo de Atención de Salud Mental, en el marco del Modelo de Atención Integral de Salud (MAIS) – con enfoque familiar, comunitario e intercultural*. Ecuador: MSP, 2014, pp. 20-23

locations in all the country: the Hospital Julio Endara in Quito and the Instituto de Neurociencias in Guayaquil (MSP, 2014, pp. 20-23).

The application of the security measure assumes the existance of an unfair criminal action – typical and illicit – committed by a subjet not guilty, an aspect that implies that one cannot talk about crime considering the absence of on of its elements, being guilty. Understanding that the cause of exclusion of imputability is the presence of a mental disorder, it is then that the danger a person represents can be verified, and, as a consequence, a security measure should be applied. About this specific point, the second paragraph of the article 76 of the Organic Comprehensive Penal Code (COIP) prescribes that the psychiatric report should confirm the necessity and duration of the measure. In this case, it is understood that the danger is real and should be verified by a psychiatric expert.

Unfortunately the Ecuatorian legislator was not concerned about specifying the term of compliance of the measure, once there is no procedural or substantial norm that regulates how the involuntary commitment should be finalized. Strictly truthful, not even a responsible authority was designated for the execution of the security measure and far less a control mecanismo designed. What can be deduced from the systematic interpretation of the devices of the COIP, whith an analysis of its *disposición transitoria vigésimo primera* is that the responsibilty lies with the Judge of Penitentiary Guarantees.

Given the lack of temporary limits of application of the security measure provided for, the COIP is limited to establishing that the psychiatric report which argues the necessity of the measure should establish its duration as well. Though the Constitution of Ecuador does not foresee to restrict the life sentence, the article 59 of the COIP imposes a limit of fourty years for the sentences privative of freedom, which would make the anology with the security measures very appropriate, as a minimum that could be guaranteed.

One has to take into account that there is no space in the Constitutional State for such a discriminatory treatment. This would imply the forced recognition that the Penal Code is on top of the Constitution and of the normative international parameters on human rights. Constitución y de los parámetros normativos internacionales sobre derechos humanos. What can be observed is an offence of the principles of the Constitutional State of Rights and Justice, which guarantee the respect for the dignity of human beings without exception, and without any discrimination (Monteiro, 2015).

This way, the principles of proportionality and of equality, fundamental for a Constitutional State, are flagrantly violated, once a person is imputable, understands his/her acts and choses them freely, even when this person commits a serious crime, such as a homicide or a violation, he/she hasa the right to all penal guarantees (a known and regular punishment, a progressive system and conditional freedom amongst others); and, at the same time, the non-imputable person, not understanding his/her acts, and not being free to chose the behaviour without concern about the seriousness of the crime, a small robberty or a homicide, receives the same penal response, a security measure of involuntary psychiatric commitment for an undefined period. Ary Queiroz Vieira Júnior alerts particularly about this issue which “we should analyse the excessive disproportionality, reonalidad, report and repudiate the unfair discrimination which is made between imputable and non-imputable, which impedes from knowing which are the limits of State action in the execution of the preventive measure the subject will comply with” (Queiroz, 2007, p. 5).

Regarding the administered health treatment, recently on 25 July 2014, an important modification took place in Ecuador affecting the references to mental health treatments, which was adopted through the Model of Mental Health Attention and the National Strategic Plan on Mental Health, both initiatives of the Ecuatorian Ministry of Public Health. The model of mental health attention implied the recognition that the access to

mental health is seen from a focus on human rights and the consequences is that the State has the obligation to make viable the exercise of the same. Mental health is an inalienble instrument for the effect of citizenship and citizens should be its co-responsible promoter, as social participation is one of the principles that guide State action, but not as the only responsible actor, the individual should be responsible about the proper mental health, together with the family and society. Nevertheless, there is no provision that the mentioned model of attention is to be applied to persons with mental disorder who committed a crime, which represents, once again, an unjustified discrimination.

The World Health Organization (OMS) makes the following recommendations about the attention on mental health: reduce the number of psychiatric hospitals, establish community services on mental health, create mental health services in general hospitals, integrate mental health in the primary attention on health, collaborate with the informal community services on healt, promote self-care and the intersectoria and intrasectorial collaboration.[2]

Similarly, the Declaration of Caracas recognizes that the conventional psychiatric attention, meaning the admission to a hospital, is not compatible with the respect of the patiences` human rights and that the submission of the persons to this predominant form of treatment, instead of constituting a help for their resocialization, decreases their capacity to live in society (OMS, 2008)[3]. Such criticism reaffirmed the argument that psychiatric hospitalization, as occurs with the persons subject to the security measure, is not capable of treating or recovering these persons.

At the same time the Interamerican Commission of Human Rights (CIDH) indicates that the international human rights organizations recognize that the psychiatric hospitals violate these rights and realize an inefficient work on the treatment of mental diseases (CIDH, 2001).

In the frame of the security measure in Ecuador, one can observe some challenging questions. The first on is the lack of control and accompaniment of the compliance of these measures, which can be observed throught the fact that the 88% of the persons admitted actually in the city of Quito do not have sentence that imposes this measure. Out of these, 65% entered during the last two years and 35% are long-term for more than three years, with special attention to 9% of these persons with security measure for more than ten years without culminating their process.

Another point to be stressed is the centralization of the attention, 61% of the persons subject to securty measure in the Hospital Julio Endara come from other provinces. This scenary generates two principal consequences: one is the gradual loss of social and family links, and this loss impacts directly on the postponement of the involuntary commitment, once the subject loses the references of affective contact, and, in contraposition, does not have anybody who claims his presence in the world outside the hospital.

Finally, it cannot be argued in favour of these persons staying under arrest for an indefinite period, subjects to an inefficient treament, as is known, without even having been guilty of their acts. Hence, the obliged conclusion that, in order to be coherent with the principle of equality and non-discrimination, and all the othes present in the constitution, the State has the obligation to administer mental health treatment to Ecuatorian citizens subject to security measure according to the current model. In other words, the Ecuatorian State is not authorized to administer to these persons health treament that, as is known,

2 Organización Mundial de Salud. *World Organization of Family Doctors. Integrating mental health into primary care: a global experience*. Suiza: OMS/WONCA, 2008. (OMS, 1990, p. 1)

3 Íbid.

generates violations of their human rights and is not appropriate to achieve the aim of the security measures: “overcome the mental disord and social inclusion” (art. 76, COIP).

In effect, if the security measures have as objective the treatment of the desease, as well as make viable the social integration of the persons, the State has to use the most efficient means for it. The response was given by the State through the Model of Attention of Mental Health and should be applied without restrictions to all persons actually subject to the psychiatric institutionalization in Ecuador.

In this context, it is worth analyzing the experience of the Program of Comprehensive Attention to the Judicial Patient (PAI-PJ) of the State Court of Law of Minas Gerais, in Brasil, an initiative created in the year 2000 to accompany the criminal processes in which the defendant suffers from mental disorder, offering tecnical resources to help the judge in the diverse procedural phases with the objective to individualize the application and execution of the security measures. The project acts, hence, in an intersectorial manner, intermediating between the action of the criminal judge and the public health and social assistance network, and offers at the same time individualized clinical, social and juridical accompaniment to the patient for each case through an interdisciplinary team.

The program promotes the comprehensive accompaniment of the person with mental disorder with an interdisciplinary and intersectorial approach, individualizing the juridicial measure, promoting the re-establishment of the social links and garanteeing the access to resources and rights. Since the year 2000, 755 persons passed through the program and have received treatment till the extinction of links with the criminal justice system. Through this treatment, which is in conformity with the international standards on mental health, the rate of reocurrence is 2% in crimes of minor type and against patrimony, without any register of reocurrence in crimes with violences against persons[4] compared to 70% of reocurrence in the “normal” penitentiary population, a fact that contradicts the already traditional and prejudicial conception that the persons with mental disorder are dangerous. (Barros-Brisset, 2010, 116-128)

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