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Article

Involuntary internment vs. Illegal retention in patients with serious mental disorder

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ABSTRACT

Even though a good attitude towards therapy and adherence are key to an effective treatment, in certain circumstances the use of coercive actions in people with mental disorders is the only way to prevent serious harm to the patient and to others. The choice to use coercive measures, such as involuntary internment, is a challenge for doctors, since not only do they have to deal with the patient and their relatives who are in a highly emotional situation, but there are also complex legal regulations. To defend the rights of patients in these difficult situations, and to avoid legal consequences for clinical staff due to illegal acts, it is essential that staff are familiar with all of the relevant legal rules and procedures. Further studies are warranted to obtain clear conclusions regarding differences between involuntary internment and illegal retention.

Internamiento involuntario vs. Retención ilegal en pacientes con trastorno mental grave

Palabras clave
Retención ilegal
Enfermedad mental
Internamiento involuntario
Psicología jurídica
Trastorno mental grave

RESUMEN

Aunque una buena actitud hacia la terapia y el cumplimiento de la misma son claves para el éxito del tratamiento, en ciertas situaciones el uso de medidas coercitivas en personas con trastornos mentales es la única forma de prevenir daños graves al paciente y a otras personas. La decisión de utilizar estas medidas, como el internamiento involuntario, es un desafío para los médicos, ya que tienen que lidiar no solo con la voluntad del paciente y de sus familiares, que se encuentran en una situación emocional desbordada, sino también con el conocimiento de la normativa vigente, especialmente complejas. Para proteger los derechos del paciente en estas situaciones difíciles y del personal clínico, es esencial que el mismo conozca los límites de su actuación en el marco del procedimiento legal. Por ello, se necesitan más estudios en la materia, que ofrezcan conclusiones contrastadas con respecto a las diferencias entre el internamiento involuntario y la retención ilegal.

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The right to freedom of movement is one of the fundamental rights of the individual. This is recognized in Article 13 of the Universal Declaration of Human Rights (Organización de las Naciones Unidas [United Nations], 1948), which states that "everyone has the right to freedom of movement and residence within the borders of each state" and that "everyone has the right to leave any country, including his own, and to return to his country". The International Covenant on Civil and Political Rights (Organización de las Naciones Unidas [United Nations], 1966), Article 12.3 states that this right "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". One of these restrictions applies when a person affected by a serious mental disorder (SMD) has difficulties in self-control and presents behaviors that constitute a risk to him- or herself or others. It is in these cases when a court may issue a committal order (Barrios, 2012).

This right (to freedom of movement) is also a fundamental right in the Spanish Constitution, framed within the broader right to personal freedom. In 1983 the Spanish Civil Code was reformed with Law 13/1983 of October 24, 1983, which mainly involved two advances. On the one hand, it repealed the 1931 Decree *on the care of the mentally ill*. On the other hand, it establishes the limits of incapacitation and guardianship (BOE No. 256, October 26, 1983) (Fernández & Eugenia, 1998). This reform includes in its Article 211 the minimum regulations on internment, establishing that "The internment of a presumed incapacitated person will require prior judicial authorization, unless reasons of urgency make the adoption of such a measure necessary, which will be reported to the Judge and in any case within a period of 24 hours. The Judge, after examining the person and hearing the opinion of a physician appointed by him or her, will grant or deny the authorization and will inform the public prosecutor of the facts, for the purposes provided for in Article 203. Without prejudice to the provisions of Article 269.4, the Judge, ex officio, will request information on the need to continue the internment, when he or she considers it appropriate and, in any case, every six months, in the same manner as provided in the preceding paragraph, and will agree on the continuation or not of the internment". This reform is of transcendental importance because it considers the person with SMD as a subject with rights.

Subsequently, Law 1/2000 of January 7, 2000 of Civil Procedure, in its Article 763 section a, entitled Non-voluntary internment due to mental disorder (BOE no. 7, of January 8, 2000), explains in section 1 that "the internment due to mental disorder, of a person who is not able to decide for himself, even if he or she is subject to parental authority or guardianship, will require judicial authorization, which will be obtained by the court of the place where the person affected by the internment resides. The authorization shall be prior to such internment, unless a reason of urgency makes the immediate adoption of the measure necessary. In this case, the person in charge of the center where the internment has taken place must report it to the competent court as soon as possible and, in any case, within twenty-four hours, for the purpose of proceeding to the mandatory ratification of such measure, which must be made within a maximum period of seventy-two hours from the time the internment comes to the knowledge of the court. In the cases of urgent internment, the competence for the ratification of the measure will correspond to the court of the location of the center where the internment has taken place". Said court must act, as the case may be, in accordance with the provisions of section 2 of Article 757 of the present Law, where it is specified "With respect to minors, this legislation indicates that the internment will always be carried out in a mental health establishment appropriate to their age, after a report from the services of assistance to the minor".

In practice, there has been increasingly widespread use of the concept of involuntary commitment, based on the consideration that the judicial intervention that applies Article 763 ensures an additional guarantee in admissions of a primarily welfare nature, furthered by the lack of alternative resources and the absence of support mechanisms that allow people with SMD to make their own decisions regarding their admission to medical institutions or residential centers. Thus, as has been denounced by various operators, including the *Comité Español de Representantes de Personas con Discapacidad* [the Spanish Committee of Representatives of Persons with Disabilities] (CERMI), involuntary institutionalization has become an ordinary measure of care for people with disabilities (Ferreirós, 2013). This circumstance—due in part to the workload of the operators involved, but also to a benevolent attitude towards its adoption that is justified in the welfare of the affected person—has resulted in a judicial activity in many cases mechanical or routine in which the least demanding interpretation possible of the requirements contained in Article 763 has been chosen (Cuenca, 2015). The Constitutional Court (CC) in its judgment 132/2010 of December 2 considered Article 763—or to be more precise its paragraph 1—to be "formally" unconstitutional because, despite implying a limitation of the fundamental right to personal freedom, it does not have the rank of an organic law but of an ordinary law. In any case, the CC—appealing to the need to avoid a "normative vacuum"—has established the organic nature of this article, since 12 August 2015, rectifying the ground of declaration of unconstitutionality, according to paragraph 1 of the 1st additional disposition of this law, in its wording given by Art. 2.3 OL 8/2015 of 22 July (Barrilao, 2013).

Prior to authorizing or ratifying the internment that has already taken place, in accordance with the law, the court shall hear the person affected by the decision, the Public Prosecutor's Office and any other person whose appearance it deems appropriate or who is requested to appear by the person affected by the measure. In addition, and without prejudice to any other evidence it deems relevant to the case, the court shall itself examine the person concerned in the internment and hear the opinion of a medical practitioner appointed by it. In all the proceedings, the person affected by the measure of internment will be able to have representation and defense in the terms indicated in Article 758 of the present Law. In any case, the decision that the court adopts in relation to the internment will be subject to appeal (Barrilao, 2013).

On the other hand, Article 763, paragraph 4, establishes that "the internment will express the obligation of the physicians attending the interned person to report periodically to the court on the need to maintain the measure, without prejudice to the other reports that the court may require when it deems it pertinent. The

periodic reports will be issued every six months, unless the court, in view of the nature of the disorder that motivated the internment, indicates a shorter period. Once the respective reports have been received, the court, after taking, as the case may be, such actions as it deems necessary, will decide whether or not to continue the internment. Without prejudice to the provisions of the preceding paragraphs, when the physicians attending to the person interned consider that it is not necessary to maintain the internment, they shall discharge the patient, and shall immediately inform the competent court".

Consequently, if a person affected by SMD did not have an order of internment issued by a court, his or her right to freedom of movement would be intact. It is necessary to remember that people, in spite of their mental illness, have the cognitive and volitional capacity to assume the decision of internment, and if this is not the case, it could lead to deception, making the internment invalid and incurring a crime against freedom, established in Article 163 of the Penal Code (CP) (Veiras & Carrera, 2009). Therefore, any individual, professional, administrator of an institution or entity that dictates or maintains the involuntary internment of a person with full right to freedom of movement, could incur, if all the typical elements are fulfilled, a crime of illegal detention (BOE No. 281, of May 24, 1995). Institutions dedicated to mental health or psychosocial recovery have internal regulations for their users, which include rules on when they may or may not leave the institution. These internal regulations would not be applicable to persons with the right to freedom of movement intact.

Unlawful detention

In Spain, Organic Law 10/1995 of November 23, 1995, of the Penal Code, in its Title VI, within the "Crimes against freedom", dedicates Chapter I, "Illegal detentions and kidnappings" (BOE No. 281, of May 24, 1995), to the typification of the crime of illegal detention, in Article 163, considering as the active subject of the same the "individual who imprisons or detains another, depriving them of their freedom". The penalty established for such conduct is imprisonment of four to six years.

For this crime to exist, it is not necessary for the detention to be carried out by force or violence, other means of commission being admissible, such as, for example, the use of deception to deprive the person of liberty. Detention is also illegal (Art. 167) when it is carried out by a public official when said "public official or authority, whether or not there is a criminal cause, agrees, practices, or prolongs the deprivation of liberty of any person and does not recognize said deprivation of liberty or, in any other way, conceals the situation or whereabouts of said person, depriving them of their constitutional or legal rights", with the conduct of the "individual who has carried out the acts with the authorization, support, or acquiescence of the state or its authorities" being equally criminalized.

The person responsible for the crime of illegal detention can be sentenced to prison for 4 to 6 years, the limits of the sentence depending on the different circumstances in which the detention took place (Art.163 Penal Code). If the person who commits the crime is the authority or public official, the penalty will be applied in its highest degree and the person responsible may be disqualified from the exercise of his profession for 8 to 12 years (Art. 167.3). On the other hand, the private individual who, outside the cases permitted by law, detains a person in order to immediately present him/her to the authorities, will be punished with a sentence of 3 to 6 months (Art. 163.3). The crime of kidnapping, which involves the illegal detention of a person demanding a ransom or the fulfillment of some condition for his or her release, such as a mental health professional making some demand of an interned patient in order to grant permission to leave, is punishable by imprisonment of 6 to 10 years (Art. 164), with such penalty being able to be increased or decreased depending on the circumstances in which the crime was committed (BOE No. 281, of May 24, 1995). In summary, if a patient who does not have a court order for internment is simply forbidden to leave, it is a crime of illegal retention, but if conditions are also imposed in order to release the patient, it would be a crime of kidnapping, involving an even heavier sentence.

As legal concepts related to detention, which can also be carried out in the field of involuntary internment, we can cite Article 169 of the Penal Code, when it punishes anyone who: "threatens another with causing them, their family, or other persons with whom they are intimately linked a wrongdoing that constitutes crimes of homicide, injury, abortion, against freedom, torture and against moral integrity, sexual freedom, intimacy, honor, patrimony, and socioeconomic order". This means that if a patient who does not have an internment order is told that he/she will not be allowed to leave the institution, as a form of coercion or to achieve any objective, the offense of threats is being committed. The offense of threats according to the mentioned precept is punished with imprisonment from 1 to 5 years, if the production of the damage the threat consists of is conditioned (for example, demanding an amount of money to avoid the damage or demanding to do something), or from 2 to 6 years of imprisonment if no condition is imposed (Art. 169. 2). The penalties will be graduated according to the circumstances surrounding the commission of the crime and will be aggravated if carried out by telephone or any other means of communication, or when directed against a crowd of people. Threats to cause harm to another that do not constitute a crime are also punishable by imprisonment of 2 months to 2 years or a sentence of 12 to 24 months (Art.171.1).

On the other hand, the Penal Code, under the heading *of coercion*, in Article 172, defines this criminal modality as the action of preventing, with physical or psychological violence, a person from doing what the law does not forbid him to do. It also includes the act of forcing a person to do what he does not want to do, whether it is to do something just or unjust. If what is prevented is freedom of movement outside the legally established cases of detention, the crime committed will be that of unlawful detention. The penalty applicable to the crime of coercion is imprisonment of 6 months to 3 years, or a sentence of 6 to 24 months, depending on the seriousness of the coercion or the means used in the commission of the crime.

Voluntary discharges in very seriously ill patients

In daily practice in mental health care centers, it is possible that any user may request discharge for various reasons, either because of disagreement with the treatment being provided, for religious or

ethical reasons, due to wanting to undergo another treatment in another center, or for any other reason. In these cases, the immediate question that arises is how we should act in these circumstances, and it is also questionable whether we have any obligation to these patients, especially the serious ones.

In the case in which the patient decides not to undergo or continue with a treatment appropriate for his or her health going against medical or psychological criteria, the doubt arises as to whether the patient should not be allowed to endanger his or her own health or whether this should be allowed even when we know the danger that the lack of follow-up or medical treatment entails. These doubts become more acute in cases of very serious patients in whom the absence of treatment can have irreversible consequences. It should be remembered that poor adherence to treatment has direct repercussions in terms of increased relapses and worse evolution of the recovery process of the person with SMD (Lluch, Fornés, & Giner, 2010). And the lack of awareness of symptoms, especially delusions, anhedonia, and negative symptomatology, together with low adherence may be factors related to suicide, since currently the percentage of suicides among people with schizophrenia is around 10% (Sher & Kahn, 2019).

In these cases, there are two fundamental rights confronting each other: the right to life and physical integrity and the right to freedom and autonomy of the will. Which of these should be given priority? The Code of Medical Ethics establishes respect for the patient's refusal of a diagnostic test or treatment (Article 12). For its part, the Code of Ethics of Psychology, states in Article 7 that 'The psychologist shall not perform, nor contribute to practices that violate the freedom and physical and psychological integrity of individuals. Direct intervention or cooperation in torture and ill-treatment, in addition to being a crime, constitutes the most serious violation of the professional ethics of psychologists. The Law regulating patient autonomy of 2002 legally recognizes the patient has a wide range of rights in the care process, including the right to decide freely, after receiving adequate information, among the available clinical options, the right to refuse treatment, except in the cases determined in Law 41/2002, of November 14, related to patient autonomy and rights and obligations regarding clinical information and documentation, whose Article 21 establishes the right not to accept the prescribed treatment and to request voluntary discharge. It thus provides that if a patient refuses to receive treatment and no alternative treatments—even palliative ones—that can be administered in the center can be offered, voluntary discharge must be proposed if the patient has not requested it, and it must be granted even if it is against the technical criteria (BOE No. 274, of November 15, 2002).

When it comes to voluntary discharges, the information given to the patient is fundamental. In a situation in which the patient is endangering their own life or aggravating their pathology, it is essential that they make a conscious decision, which should involve the psychologist informing the patient in a completely comprehensible way about the treatment and therapeutic alternatives, or the absence of these alternatives, and about the possible psychological consequences of not undergoing treatment and voluntary discharge. This information is intended to give the patient the maximum perspective on the scope and consequences of the decision to be taken, whether to continue with treatment, not to follow it, or to undertake another alternative.

One element to take into account when requesting voluntary discharge is the state of awareness of the person with respect to the illness. Studies reveal a direct relationship between *insight* and treatment compliance, i.e., the lower the illness awareness, the lower the adherence to treatment and vice versa (Bitter et al, 2015); and consequently, low illness awareness is linked to lack of adherence to antipsychotic medication (Kim et al, 2020, Soldevila-Matías et al 2021, Lui et al, 2021, Hsieh et al 2022).

Therefore, with respect to the possibility of requesting voluntary discharge in serious patients, the laws speak to us of the fact that if during the course of the internment in voluntary regime the person suffers a worsening, it will directly affect the validity of their consent when requesting voluntary discharge. In addition, if such deterioration may entail a detrimental risk to their health, the consent to discharge has repercussions on the psychologist or other mental health professional attending them, and a request may be made to the court for a change in the regime of internment from voluntary to involuntary. On some occasions it is also observed that in sentences imposed on persons with SMD who have committed crimes, the court sends them to serve their sentences in mental health centers. In this regard, it is important to emphasize that judges cannot impose the internment of patients if mental health professionals evaluate and report that such internment may be contraindicated. When the judicial decision to send the person to a mental health center is taken without technical reports that support such a decision, the court could incur in a crime of reckless judicial prevarication. Such a sentence could be challenged by means of an appeal, which the patient should be informed of so that they can exercise their rights. The psychologist in his/her duty to comply with the Code of Ethics must know the rights of his/her patients and inform them if he/she considers that they may be being violated, as well as guide them towards the best solution that is in his/her power.

Conclusions

Despite the fact that Europe is the region of the world with the most abundant regulations on mental health (Barrios, 2010), human rights in this area continue to be of concern to professionals in the sector because we have not managed to achieve full respect for them. In the case of mental health residences, whose users do not have a detention order, nor are they legitimately deprived of their liberty, holding them against their will implies assuming a responsibility with potential criminal consequences for those responsible for the center who order the detention and for the individuals who carry it out. Illegal retention in its different variants—from subtle comments such as " residents must respect the center's timetable and be here before closing time", to other more worrying expressions such as "you leave here when the psychiatrist allows it"—is a burden on our institutions in terms of achieving an environment respectful of the rights of persons residing in institutions for the treatment of mental illness. Spanish legislation is advancing, increasingly respecting their rights, as is the case of Law 8/2021, of June 2, reforming civil and procedural legislation to support people with disabilities in the exercise of their legal capacity (BOE No. 132, of June 3, 2021), which also

includes people with mental disabilities. However, it is still necessary to legislate more explicitly against coercive intervention models in mental health. Psychological professionals who observe unlawful detention of patients have a duty to oppose these practices. If, despite their opposition, those responsible for the centers do not cease their actions, any civically responsible psychologist should report the acts, so as not to be an accomplice.

It is very difficult to obtain empirical data on such sensitive issues. There is not a great abundance of accessible research that denounces these situations, or that measures their incidence with reliable methodology, and consequently we do not know the real extent of the problem. Therefore, in order to improve the protection of human rights in facilities for people with severe mental disorders, it is desirable to increase the knowledge of the magnitude of this problem. We consider it necessary to expand research in this field, through interviews with users and former users of the facilities, as well as workers and former workers of the same, in order to provide a clearer picture of the situation to public administrations. With evidence on the incidence of the problem, the administrations can decide with greater awareness of the prevention and control measures that could be adopted to prevent this from continuing to happen, ensuring that this more respectful and civilized future will one day arrive, saving the people who reside and will reside in our mental health care centers from many injustices.

Conflict of Interest

The authors declare that they have no conflict of interest related to the current study.

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