

Sanction without Crime:

The Involuntary Treatment of Mentally Ill Offenders – A Hungarian Perspective

1. Introductory Notes

“It is hard to fight an enemy who has outposts in your head.”

(Sally Kempton)

The way how society reacts to and treats mentally ill individuals who commit criminal acts has been an example of the coexistence of two vastly differing approaches throughout human history. On the one side, we often find spurn, repugnance, even disgust. The most significant problem, however, is the general – multiple – stigmatization that is related to insanity and criminal behaviour going hand in hand. On the other side, we can observe the shaping of another attitude to treat mental illness more like actual *sickness* than criminality. (Dósa, 1995, p. 327.)

This implies that the issue has always been in the focus of two fields of science: medicine and law and – for a fairly long period of time – the latter had clear dominance. The efforts of Philippe Pinel, a French psychiatrist had outstanding role in the gradual change of this mentality in the seventeenth century, which was also supported by the view of criminal lawyers that besides retribution and deterrence, aims of pedagogical-remedial nature need to be taken into consideration. (Kovács, 2013, p. 54-55.)

The manifestation of this in criminal legal terms was the formation and spread of measures besides recognised punishments. Involuntary treatment is one of these measures, applied in the case of those individuals whose insanity makes it impossible for them to recognise their criminal act and its potential consequences. These sanctions are therefore – at least in theory – less severe and more humane in nature when compared to punishments.

The reason why it is worth dealing with the topic even today is two-folded. On an overall level, it is the marginalization of the individuals in question, the condemnation, and their defencelessness with regards to the respect and exercise of fundamental rights. On a more specific level, we are forced to face some crucial questions related to criminal law itself. Where are the boundaries between state paternalism and individual autonomy? To what extent are we

entitled to intervene into the core of one's personality, by means of the law, to ensure the protection of the members of society?

In the following article, I intend to introduce the basics of the involuntary treatment of mentally ill offenders from the aspect of substantive criminal law. I will focus on the Hungarian situation, especially the rules related to the possible duration of the treatment, its causes, content, and qualms, besides suggesting an alternative solution for the current problem(s). In addition, I am going to bring into the scope of analysis certain international examples from the European Union to refine and support the depicted picture.

2. The Hungarian Situation

“Between the idea and the reality, between the motion and the act, falls the shadow.”

(T. S. Eliot)

2.1. Theoretical Overlook

When it comes to analysing the length of involuntary treatment, we can witness two distinct types of regulations. One regular arrangement is that the lawmaker does not define the possible maximum length of the treatment. This is justified by the fact that it cannot be predicted how much time the curing process takes and the protection of the citizens requires the state to isolate potentially dangerous individuals from the rest of the society. (Finkey, 1914, p. 451.) However, the other set of rules focus on the principle that measures shall not be more severe than punishments. Therefore, the time frame of the sanction applied in case of a mentally ill offender shall not exceed that of the equivalent punishment that would be imposed in case of sanity.

In the Hungarian legal system, both approaches became determining in different eras. The former Codex of Criminal Law (Law 4/1978) was based on the first view and the duration of the treatment could only be dependent on its necessity (i.e. until the healing process became complete). In 2010, however, the provision was modified and an attempt was made to bring the second line of argumentation into the legal theory and practice (Law 80/2009). Nevertheless, in the new codex of 2012 (Law 100/2012), the lawmaker has turned back to – or rather “fled back” to – the shelter of the former ruling. The current regulations are as follows:

“Section 78. Involuntary Treatment in a Mental Institution: *(1) A person engaged in a violent crime against the person or in a punishable criminal offence that endangers the public*

shall be subjected to treatment in a mental institution if he cannot be prosecuted due to his mental condition, and there is reason to believe that he will commit a similar act, if the same crime carries a penalty of imprisonment of one or more years. (2) Involuntary treatment in a mental institution shall be terminated if it is deemed devoid of purpose.”

2.2. The Viewpoints of Analysis

I take the view that the core point of examining the measure should be based on the basic principles and purposes of criminal law. In this regard, the doctrine of the rule of law, its formal aspect, the legal certainty and most specifically, the *nulla poena sine lege certa* principle must be considered. The latter refers to the requirement of each sanction in criminal law (both punishments and measures) to be determined precisely and foreseeably. (Tóth, 2013, p. 534.) It is worth mentioning that there is an opposing view in criminal legal literature, which suggests a restrictive interpretation of the requirement of “clearly defined law” to punishments only. (Szomora, 2013, p. 260.)

But we shall look through this question with the help of another important idea: namely, that the mentally ill offender – resulting from the measure applied – shall not get into worse situation than due to the punishment in the case of sanity. Self-evidently, if the offender was punishable, the imposed imprisonment would certainly have to comply with the conditionality of predictability. (Belovics – Gellér – Nagy – Tóth, 2014, 5th Chapter)

It is also worth thinking over that according to the current provisions, it would be possible to keep an individual in a mental health institution – which is part of the penal institution system in Hungary – for the rest of his life without a verdict declaring the defendant guilty and prescribing deprivation from personal liberty for a certain period. (Since culpability – which is an essential element of the realisation of crime – is conceptually impossible related to an insane person, the verdict must contain acquittal and the measure will be applied because of the state of mental illness. However, the decision of acquittal shall also include clear-cut provisions for duration when “imposing treatment” on the individual).

3. An Improvement for the Future – A Turning Back to the Past

“Our moral responsibility is not to stop the future, but to shape it; to channel our destiny in humane directions and to ease the trauma of transition.”

(Alvin Toffler)

3.1. Domestic Focus

When depicting an existing problem or contradiction in the legal system, the question naturally occurs: How is it possible to (re)correct it? We can either suggest a “new” solution or an idea that was present in the regulation of the measure before – for the realisation of which attempts may have been made already. But whichever option we choose, it is necessary to take a closer look at the previous rulings in order to form a well-grounded proposal, which takes into account the specific national and historical features of development.

In the present case, due to the modification of 2010, which can be viewed as an existent example of a better-established settlement, this has even greater relevance. As mentioned before, the aim of the change was to eliminate the defect of the criminal codex in connection with the undetermined sanction and the related violation of legal certainty. According to that, the treatment could not last longer than the maximum term the criminal offence carried according to the law. Subsequently, if the treatment is still necessary after this term, the person subjected to involuntary treatment shall be transferred to a civil psychiatric institution along with the insurance of required steps for security. (Law 80/2009)

As a result, this ruling cannot be considered as an explicit opposition to the provisions of the current codex. Quite the opposite. It can be seen as a golden mean between the two edges: the undefined duration and the exact determination of the possible length. Based on that, only the upper limit of the time frame is fixed, within which the individual can be kept in a correctional mental health institution (i.e. within the penal system). Apart from this, the duration of the treatment was (and would still be) dependent on the “necessity criteria”, which means that if the patient is deemed recovered after an examination by two medical experts, the treatment must be terminated. This regulation could fulfil the requirement of the protection of society on the one hand, and could better comply with the prerequisite of legal certainty on the other.

3.2. International Focus

When looking through certain European examples, two issues occur inevitably. One is obviously the length of the treatment, while the other – closely connected – is the system of criteria based on which the measure can be applied (how restrictive or permissive its elements are). A more general question, however, is about integrating the rules of involuntary treatment into the body of criminal law or administrative law. Naturally, the regulations of the different states depict a quite colourful, patchwork-like picture.

We can see that the proposed solution on duration in the Hungarian situation is most akin to the present rulings of the Spanish and the Portugal codex. (Placement and Treatment of Mentally Ill Offenders, 2005, p. 197-205.) However, when it comes to both the term of the measure and the system of criteria, we find that the Austrian and the German approach is closest to the currently existent Hungarian model. (Deutsches Strafgesetzbuch 63-64. §, Österreichisches Strafgesetzbuch 20-21. § 63. §)

The conditions required are complex and restrictive, therefore it is only possible in case of the most severe offences to apply the sanction. We shall acknowledge that this is justified by the *ultima ratio* (i.e. “final means”) role and nature of criminal law. In these terms, criminal legal provisions shall only come into focus when no other sphere of law has the capacity to settle an issue comprehensively.

Nevertheless, there are instances, such as the French model, which represent a different viewpoint and regulate the involuntary treatment in the sphere of administrative law. (Salize – Dressing, 2004, p. 385.) This can be supported by the idea that if insanity is in fact an illness, then the offender’s criminal act can only be considered its manifestation in the outside world or, in other words, its symptom and the individual shall not be made responsible for that by means of a criminal sanction. (Fehér, 1989, p. 633.) We cannot forget about the fact, however, that the placement among the rules of substantive criminal law – and also criminal procedural law – means extra guarantee and safeguard in terms of the protection of the defendants’ fundamental rights. (Vokó – Lajtár, 1997, p. 18-21.)

In addition, in some countries a “mixed model” has been introduced, which combines the previous two approaches, for example in the United Kingdom. (Green, 2010, p. 4.) In this case, the application of the measure is based on the rules of criminal (procedural) law, while the execution happens according to sanitary provisions falling into the scope of administrative

law. This may be relevant because this way the function of mental institutions as prison substitutes – which is also in issue in Hungary – could significantly be reduced.

4. Summary

*“In matters of justice, there is no difference between large and small problems,
for issues concerning the treatment of people are all the same.”*

(Albert Einstein)

In general, it can be stated that – after observing some European models and taking a closer look at the Hungarian situation – we can witness numerous solutions with regards to the placement of involuntary treatment in different spheres of law, the underlying system of conditions, and the duration of the sanction. As long as the criteria are as restrictive as in Hungary, which suggests that only the acts of the most dangerous individuals will be sanctioned, the integration of the relevant rules into criminal law seems to be appropriate, also with regards to the aforementioned *ultima ratio* principle. However, this also requires the basic principles of this branch of law, including the criteria of clearly defined regulations, to be taken into consideration. Therefore, it seems to be more rational and justifiable to gear the length of the treatment to the maximum term of the deprivation from liberty prescribed in the criminal codex for the underlying criminal offence. Nonetheless, when it comes to the implementation of the sanction, it might be worth thinking over to place the relevant institutions – along with the proper security steps and still as separate entities – into the sanitary organisation system in order to decrease their potential prison-substitute nature.

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