A New Perspective on Safety Measures Imposed on Mentally Retarded Criminal Offenders

**Iuliana HUNEA¹, Tatiana IOV²,
Simona Irina DAMIAN³,
Nona GÎRLESCU⁴,
Anton KNIELING⁵,
Diana BULGARU-ILIESCU⁶**

¹Ph.D student in Pathophysiology at the University of Medicine and Pharmacy "Gr. T. Popa" Iași, Romania; MD in Forensic Medicine, Institute of Legal Medicine Iași, Romania. zamisnicu.iuliana@gmail.com

²Ph.D, University of Medicine and Pharmacy "Gr. T. Popa" Iași, Romania; MD in Forensic Medicine, Institute of Legal Medicine Iași, Romania

³Chief of Scientific Works PhD, University of Medicine and Pharmacy "Gr. T. Popa" Iași, Romania; MD in Forensic Medicine, Institute of Legal Medicine Iași, Romania. simona.damian@umfiiasi.ro (corresponding author)

⁴Ph.D student in Forensic Medicine & Assistant Professor at the University of Medicine and Pharmacy "Gr. T. Popa" Iași, Romania; MD in Forensic Medicine, Institute of Legal Medicine Iași, Romania. nona.girlescu@yahoo.com

⁵Associate Professor PhD Faculty of Medicine, University Gr. T Popa, Iași, Romania & Faculty of Law of Al. I. Cuza University from Iași, Romania; MD in Forensic Medicine, Institute of Legal Medicine Iași, Romania. tony_knieling@yahoo.com

⁶Professor PhD, Faculty of Medicine, University Gr. T Popa, Iași, Romania & Faculty of Law of Al. I. Cuza University from Iași, Romania; MD in Forensic Medicine, Institute of Legal Medicine Iași, Romania. bulgarudiana@yahoo.com

Abstract: Safety measures are both a way of isolating the person who committed a criminal offence from society, with the purpose of protecting citizens, and at the same time a form of protection for the perpetrator, against whom the most appropriate measures are taken - from from the point of view of the the criminal justice system - in consideration of their particular situation. Among the categories of perpetrators to whom safety measures are addressed, those with mental retardation represent a specific category in that, unlike other psychically ill offenders, their degree of perceiving the consequences of their actions and their own guilt is extremely low, and sometimes it is even impossible for them to understand the significance of their own deeds. The present article aims to highlight the specific elements of safety measures imposed on mentally retarded criminal offenders from a theoretical perspective, analyzing the concepts of deviance and delinquency by correspondence with irresponsibility.

Keywords: *Safety measures; mental retardation; offender; irresponsibility; deviance, delinquency, criminal offence.*

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Introduction

Social conformity is a fluid concept, because what is considered to be conformity in a certain type of society and at a certain moment in time may not be considered as such in another society or in another time frame (Branc, 2008). However, conformity will always mean a behavior that does not give rise to negative reactions from the other members of society, a behavior that is positively accepted and sanctioned, a behavior of social integration and interrelating with others.

Therefore, everything that is rejected, criticized, marginalized is not in compliance with standards. What does not conform is deviant from norms. The more these standards are adopted by a larger group of individuals, the more important they become in a society, so that the rules that govern them go beyond simple moral, religious, and ethical norms (Frunză, 2016; Sandu, 2012), sanctioned only socially, and they become legal norms. The more important the right that is infringed by the deviant behavior, the harsher the rules that defend the right and sanction the deviance are. The most serious antisocial behaviors are sanctioned by criminal law, and the deviance thus becomes a criminal offence.

Delinquency is fought by making the perpetrators responsible for their actions, which is the purpose of criminal sanctions, more precisely of criminal punishments, which aim to making the offender aware of the gravity of his actions and to re-educate him in order to prevent the commission of new crimes. In order to get there, it is necessary for the offender to be able to understand the purpose of the sanction, why he was sanctioned, and the behavior that is required of him in the future. When this capacity for understanding is diminished due to mental illness, the criminal law applies the principle of proportionality, and the punishment is replaced by a safety measure.

When, however, the perpetrator completely lacks discernment and is completely irresponsible, as in cases of severe mental retardation, the question arises whether the application of safety measures still finds its justification in terms of purpose and whether deferring him to the criminal justice system is the optimal reaction of society, a question that we will try to answer in the following article.

I. Deviance and delinquency, forms of deviation from the normative and cultural social model. Conceptual delimitations

I.1. The concept of deviance

Every human action is governed by socially accepted norms, norms according to which individuals direct their actions towards their determined goals, but through behaviors with predictable purpose for other members of society, built by social consensus (Unguru, 2019). Deviance denotes nonconformity, violation of social norms and rules; deviating from these norms projects the transgressor in the sphere of deviance. In other words, deviance can be defined as lack of adherence to the normative and axiological model of the group, manifested by an atypical behavior, which violates the normative prescriptions and the institutional requirements. The diversity of cultural norms and values, depending on the axes of space and time, prevents the attribution of traits such as universality and homogeneity to human behavior, therefore the concept of deviation is very wide. Deviance operates with terms that cover a range of behaviors from excentric to dysfunctional, which are part of the area of delinquency and mental disorders.

Deviant behavior can be understood in two ways: on the one hand, from a substantial point of view, it is the product of the functional inability of the individual to comply with socially and legally accepted norms, an inability caused by physiological or mental abnormalities, and from a situational point of view, the subject's behavior may be perfectly normal in another context, but incompatible with the standards of the group in which the behavior is actually manifested.

Deviant behavior can be anti-normative, as a rebellion against the social order, or non-normative, as a behavioral incoherence that violates norms, specific to the asocial or mentally ill individuals. Starting from here, in understanding and explaining deviant behavior, two major currents were imposed: determinism (which aims to understand the cause of deviant behavior from the position of the external observer) and phenomenology (which aims to identify the motivation of this behavior from the position of the deviant's own optics).

Precisely because, as we mentioned above, the concept of deviance is difficult to define, a series of criteria for defining deviance have been proposed in the literature (Turliuc, 2007): statistically (the majority dictates normality, according to Emile Durkheim's (2002) theory: "the normal type is confused with the average type"), normative (the deviation implies a

violation of social norms); medical (deviant individuals are those who, due to physical or mental deficiencies, do not possess the ability to comply with social norms, meaning what Talcott Parsons showed: “the disease is the only form of legitimate deviation, the individual being incapable of exercising their social roles normally ”(Parsons & Lidz, 1972), since psychically ill patients without discernment do not have the ability to distinguish between good and bad, between moral and immoral); the criterion of social reaction (the opprobrium that the act generates among members of society).

I.2. Delincvență și infracționalitate

Delinquency / criminality are also a form of social deviance, but because they affect the most important values and social relations, they are protected by criminal laws and are sanctioned at an institutionalized level, by the state (Huidu, 2010). The difference between deviance and delinquency lies in the infringed norm and the sanction drawn. The sanction, in case of deviance, is a social reaction materialized in labeling, exclusion, public outrage, critical attitudes, reproach, etc. In the case of delinquency, the reaction comes also from the social control institutions, and the sanction is criminal in nature.

Antisocial acts that seriously harm the values protected by the law are regulated by criminal law as crimes. Thus, art. 15 Penal Code defines the crime as "the act regulated by the criminal law, committed with guilt, unjustified and imputable to the person who committed it" (art. 15 Penal Code).

It follows, therefore, that in order for an act to be considered a crime, it must cumulative fulfill the following four conditions: incrimination, guilt, imputability and anti-legal character. As a consequence, if the deed regulated by the criminal law was committed under the conditions of any general impunity cause, provided by art. 23-31 Penal Code (physical restraint, moral restraint, non-imputable excess, minority, irresponsibility, complete involuntary intoxication, error, fortuity), the deed does not constitute a crime.

II. Lack of discernment (irresponsibility)

The forensic practice highlights the fact that of those who commit antisocial acts, a high enough percentage suffer from mental retardation so that to draw attention. From a legal point of view, the person without discernment is not guilty from a criminal standpoint criminally and irresponsibility is a cause of impunity: “The act provided by the criminal law,

committed by the person who, at the time of committing it, could not account for their actions or abstention to act, or they could not be in control of their acts, either because of a mental illness or for other causes, is not imputable" (art. 28 Penal Code).

The Penal Code (art. 17 paragraph 1) provides that the deed is not a crime if it has not been committed with the form of guilt required by law. Responsibility generates guilt, which in turn leads to liability, and the severity of the punishment depends on the degree of guilt. Guilt, as the sole basis of criminal liability, can be either intent, fault, or exceeded intent (art. 17 paragraph 2 Penal Code). The act is committed intentionally when the perpetrator foresees the result of his actions and pursues that result or when the offender foresees the result of his actions, does not pursue but he accepts the possibility of its occurrence. The deed is committed with criminal fault when the perpetrator foresees the result of his wrongful act, but does not accept it, assuming without cause that it will not occur, or when he does not foresee the result of his deed, though he should and could have foreseen it. Exceeded intention occurs when the deed, consisting of an action or inaction committed intentionally, produces a worse result than the one pursued.

Considering the way legal texts are drawn when defining the forms of criminal guilt ("provides", "pursues", "accepts", "could"), it follows that the main criterion in defining guilt is discernment. Therefore, the assessment of responsibility depends on the assessment of the mental capacity of the perpetrator to ascertain the character and consequences of the crime committed.

III. Forensic expertise - the only evidence to prove discernment

Psychiatric forensic expertise represents the document with probational value that determines the presence of discernment, which is drawn up as a result of the technical-scientific activity specific to forensic institutions, which consists in diagnosing the mental state of the offender. In each case, the objectives of the forensic psychiatric expertise may be different, adapted to the special case of the person who committed an act punishable by criminal law, but as general objectives, any forensic psychiatric expertise aims to attest the following: if the person has or does not have any mental disorders and their current diagnosis; to exclude the simulation or dissimulation of a mental condition; to attest the current psychic capacity of the offender and whether the subject can be criminally investigated or tried; to attest the mental capacity of the offender at the time he committed the

criminal act; to attest the degree of discernment with respect to the deed committed; to provide recommendations of the safety, medical or educational measures that need to be imposed on offenders, according to the Penal Code, depending on the prognosis of the mental disorders they suffer from and the assessment of their degree of social danger.

Specifically, the forensic psychiatric expertise establishes: if the subject is allopsychically, temporally and spatially oriented f; if, objectively, based on functional explorations, the existence of a mental illness is of such a nature as to affect his ability to discern the consequences of his action or to control himself; if they have mental illnesses, what it's displacements are and which objective examinations confirm them; the extent to which mental illness affects discernment; if, in correlation with the concrete circumstances of the crime, there are grounds for concluding that at the time of committing the deed the person acted without discernment or with diminished discernment; if medical measures are required, what they are and for what purpose they should be imposed; the degree of social danger presented by the perpetrator (depending on security measures already imposed).

When the prosecutor or the court have doubts about the presence of discernment (of the suspect or the defendant) at the time of the crime, as well as in all cases of murder, homicide, manslaughter, killing or harming a newborn or a fetus by the mother, and of crimes committed by minors aged between 14 and 16 years, establishing discernment through forensic psychiatric expertise becomes an imperative required by law (art. 184 Penal Code). The person without discernment will not be held criminally liable, because irresponsibility is a cause of impunity. Persons who have committed criminal offences with discernment will be sanctioned with punitive criminal penalties (art. 53-55 Penal Code), and for those without discernment (irresponsible) the court will order medical safety measures (art. 109-110 Penal Code), with the purpose of precluding any social danger and establishing an adequate medical treatment scheme.

Art 109 Penal Code provides: "1. if the perpetrator, due to an illness, including that caused by chronic alcohol or other psychoactive substances, presents a danger to society, he may be obliged to undergo medical treatment until he is recovered or until his condition improves sufficiently that he will no longer pose any danger. ; 2. when the person for whom this measure was taken does not follow the treatment, medical hospitalization may be arranged; 3. if the person obliged to treatment is sentenced to a penalty that implies incarceration, the treatment is carried out during the execution of the punishment "(art. 109 Penal Code). Correlatively, art. 110

Penal Code states: “when the perpetrator is mentally ill, a chronic consumer of psychoactive substances or suffers from an infectious contagious disease and presents a danger to society, the measure of hospitalization in a specialized health care unit may be taken, until he is healed or until he is improved, until any state of danger is avoided”(art. 110 Penal Code).

By social danger, the legal literature (Storm, 2017) understands the ability of an action or inaction to bring about the infringement on social values defended by criminal law and to make it necessary for a punishment to be ordered. The concept of social danger has both a generic and a concrete meaning. Generic social danger refers to the social danger of all crimes of a particular type (eg, murder crimes). The generic social danger is assessed by the legislator at the time of incrimination, in relation to a complex of elements common to all such acts and is reflected in the legal limits of the punishment. The concrete social danger refers to the social danger of a certain act and is evaluated, in each case, by the prosecutor and the court, which can conclude that the act does not present the degree of social danger of a criminal offence, but that of an administrative offense, either presents the social danger of a criminal offense and should be sanctioned as such, with a criminal punishment, established within the legal limits. When establishing the degree of social danger, the mode and means of committing the deed are taken into account, the purpose pursued, the circumstances in which the deed was committed, the result produced or that could have occurred, as well as the person and conduct of the perpetrator. The social danger of the act and the social danger of the perpetrator constitute criteria for individualizing punishments.

The social danger of the criminal act does not overlap with the notion of the social danger of the perpetrator; the Italian positivist school of thought also understands, by social danger, the person's ability to commit a crime.

IV. Persons that suffer from mental retardation

IV.1. General considerations

In the category of persons without discernment, who are not criminally responsible for the acts they committed, those with mental retardation are a special category, as mental retardation is a psychic underdevelopment of a defective, permanent and nonprogressive character, originating in the early stages of the ontogenetic development of the individual. The main feature of mental retardation is the global delay in the

development of the intellect, of the thought and especially of the abstractization and generalization ability of the individual.

Depending on the IQ, according to the Diagnostic and Statistical Manual of Mental Disorders (DSM V) (APA, 2013), mental retardation may be mild - IQ = 50-69, moderate - IQ = 20-49, or severe - IQ <20. According to International Statistical Classification of Diseases and Related Health Problems (ICD-10) (WHO, 2004), mental retardation may be mild - IQ = 50-69, moderate - IQ = 35-49, severe - IQ = 20-34, or profound - IQ <20.

Mild mental retardation is the most common form of mental retardation, people suffering from this illness have the mental age, as adults, of a child between 7 and 10-12 years old; people are able to learn written language and acquire the knowledge equivalent to the first 4 elementary classes, but at a much slower pace compared to neurotypicals; they are able to qualify for a simple job, which allows them to carry out an independent productive activity, so that they can reach social autonomy and self-management capacity, but they have the inability to predict all the implications of their acts and actions, which somewhat imposes, to a certain extent, on the ability to assume full responsibility for their conduct.

Moderate mental retardation implies that people, as adults, have a mental age similar to that of a child between 3 and 6-7 years of age; they manage to acquire spoken language, but are not able to write; they are self-serving at an elementary level, they are incapable of self-management, they can perform unskilled work under supervision (they have a social semi-dependent status); they are incapable of properly assessing the reality and, therefore, the consequences of their actions; more frequently than those with mild mental retardation, they have malformations, and also neurological, sensory, somatic, trophic or endocrine disorders.

Severe mental retardation implies that the affected persons have a predominantly vegetative existence; as adults they have a mental age that does not exceed the sensory-motor stage (under 2 years) and do not have the ability to express themselves through language; they are totally socially dependent, do not identify the feeling of fear, so they are unable to protect themselves from the physical dangers that threaten their life; they have grave and obvious neurological, sensory, somatic or endocrine symptomatology; they frequently have dysmorphic facies, with numerous facial-cranial malformations and unfocused eyes; disease resistance is low and as such the average life span of these persons is below the general statistical limits.

From the educational point of view, we can distinguish three categories of people with mental retardation: educable - they can learn simple things in an institutionalized school environment, but they do not progress beyond the 5th grade level; trainable - they can learn the daily self-care routine, but very few will learn to read and write; non-trainable - they are totally dependent and require long-term care, usually in an institutionalized setting.

IV.2. Lack of self-censorship mechanisms

According to criminological theories (Bentham, 2007; Merton, 1957; Sutherland & Cressey, 1970), criminogenic tendencies are generally common to all individuals: biological, psychological, and psychosociological. The difference between people with mental retardation and those responsible from a legal point of view, who commit antisocial acts, is that the former do not realize the social danger and the consequences of their actions, passing from intention to act under the impetus of impulses unrepressed by self-censorship mechanisms, due to the lack of social adaptation skills. Thus, a disruptive and aggressive behavior is born, which replaces the communicative language. Deviation, in their case, appears as a phenomenon of social maladjustment or nonintegration, generated by the conflict between their needs and what society has to offer them.

The jurisprudence of criminal courts shows that persons with mental retardation commit criminal offences in the following circumstances: they are used as "instruments" by persons who, in this way, aim to avoid their own criminal liability; the model of the social micro-group in which they developed was one that promoted deviant behaviors, which they imitated; in other contexts, unrelated to their psychological condition, largely explained by the Cohen's general theory of passing from intent to action (Cohen, 1965), the theories that explain particularities of passing from intent to action (Douglas, 1926), or the strategic theory (Cusson, 2005) etc. From the Italian positivism, which is represented by Cesare Lombroso, Raffaele Garofalo, Enrico Ferri, to the current dynamic criminology, it can be concluded that the explanation of the criminal phenomenon lies in a multitude of factors.

Currently, the most widely accepted are the theories that explain criminal behaviors occur based on either general or particular models, and the dynamic theories (the theory about abstention and the strategic theory). The general model of passing from intent to action (the tree model) belongs to the American sociologist Albert Cohen (1965). He

emphasizes the influence of social factors on deviance, forming a theory of delinquent subcultures. Cohen (1965) conceives the deviant act as a succession of events in which the individual always has the opportunity to choose the direction, depending on the external factors and his own emotions and experiences. The graphical representation of this theory is that of a main road with multiple adjoining smaller roads, as the branches of a tree.

The particular model of transition from impulse to action was developed by Etienne de Greeff (1946), who argues that the road to crime goes through three stages: that of ineffective assent, when criminal impulses spontaneously enter the area of the conscious mind; the stage of formulated assent, which is contradictory with any hesitation; the crisis stage, in which the decision was taken, and what remains to decide are only the details of the action itself. According to the author of this theory (De Greeff, 1946), the road to crime can be stopped at any stage, through the action of internal inhibition and the mechanisms of censorship, which may eventually be stimulated by external circumstances.

For Pinatel (1952), passing from intent to action is explained by the combined action of the four essential features that make up the core of criminal personality: egocentrism, a versatile personality, aggressiveness, indifference. Walter Reckless (1967) proposed the dynamic theory of detention, which states that non-deviance resides in the existence of an external social structure of restraint, as well as in an internal buffer, both with the role of ensuring compliance with legal and social norms. Another criminological theory, Maurice Cusson's Strategic Dynamic Theory (2006), is built on four elements: behavior, results, rationality, conflicts. He considers that the offender is a rational type, who lucidly calculates the benefits and risks involved in the criminal act. He denies the past or causal explanations of his actions, focusing on the purpose, in the sense of the proposed result.

All these theories, however, are based on accountability, which is based on discernment, and become largely inapplicable to the mentally retarded, so the criminal justice system established for these offenders a system of specific measures, adapted to their special medical condition.

V. Involuntary commitment and safety measures - old and new critics

Regarding mentally retarded persons, one question seems to be justified: do safety measures provided by the current Penal Code adequately answer both purposes which should be served by ordering them, namely preventing any social danger that the perpetrator might pose and also

helping to improve the offender's state of health? Regarding the first aspect, we consider that the offender's isolation from society and the commitment to a psychiatric hospital, as well as the establishment of a security measures for an indefinite period of time is an exaggerated coercive measure, which creates the premises of "life commitment", viewed by M Foucault (1988) as the "great enferment" of those individuals, which is contradictory to the normative demands.

Under these conditions, the safety measure, which initially seemed easy and favorable to the perpetrator who suffers from mental retardation, becomes harsher than the punishment applied to an offender who is completely liable and guilty for committing the same offence or even a more serious one. By comparison, the latter is not permanently deprived of the chance of being released upon executing his punishment and he also has the benefit of conditional release, compensatory appeal or leniency measures, such as amnesty and pardon.

The idea that by involuntary commitment the danger of recidivism is eliminated is abusive to this category of perpetrators, compared to typical perpetrators, because the danger of recidivism is also not eliminated by imprisonment in the case of the latter, a situation which is not considered ground for "life imprisonment". Ervin Goffman (1961), an important representative of the anti-psychiatric movement, introduced the notion of "total institution", which he defined as a workplace and / or residence where a large number of individuals, with an identical situation, are isolated from society for a considerable period of time, they lead together a secluded life, which is formally administered by other people. To exemplify the idea of total institution, Goffman refers to prisons and psychiatric hospitals. Those in the psychiatric hospitals develop institutional personalities, that are suitable only for the organizational environment, in relation to which they feel fully safe and secure.

According to antipsychiatrists (Dan, 1994), the patient who is taken out of his usual environment (family, surroundings, occupational environment), where he manifests himself authentically, and hospitalized in a specialized environment, with a carceral setting, is subjected to manipulative treatments, that, instead of curing the disease, do nothing but maintain it. Neuroleptic medication deprives the patient of his freedom of expression, forbidding him any right to a discourse, which, contrary to appearances, has a meaning that must be deciphered, an idea supported by the phenomenological current. In turn, psychotherapy (psychological or psychoanalytical therapy), beyond its manipulative content, is a form of treatment that creates the very illness that it claims to remove. By

institutionalizing the disease, official psychiatry is deeply repressive, according to antipsychiatry.

Therefore, the commitment of the mentally retarded for an indefinite period, justified by the purpose of improving the danger posed by the offender, can be regarded as a justification for condemning them to definitive isolation from society. There can be no certainty that the mentally retarded offenders committed in psychiatric hospitals and against whom such security measures have been ordered will still commit criminal offences, as there is no certainty that the criminals, after being released from penitentiaries, will become honest citizens. In other words, the criterion of the social danger posed by the offender, which is considered in maintaining involuntary commitment for an indefinite period (until the person's state of health improves) appears to be exaggerated and discriminatory compared to the situation of the offender who is deemed responsible for his actions, which could be an abuse of right on the part of society to sanction criminal offenders and isolate them (Ignătescu, 2013a), considering that the principle of equity requires a balanced treatment (Ignătescu, 2013b) of the different categories of persons who commit criminal offences.

Without positioning ourselves on the extremes of the discourse against security measures imposed on people with mental retardation, we admit that some of the criticism that we will present as follows is objective and justified.

As a criticism regarding the legality of the safety measure of involuntary hospitalization for an indefinite period, until the state of health of the offender improves, can be criticized as being unconstitutionality, since in our opinion it violates provisions of the fundamental law, respectively of art. 16 paragraph 1 - "Citizens are equal before the law and public authorities, without privileges and without discrimination" - and of art. 124 paragraph 2 - "Justice is definitive, impartial and equal for all".

A second criticism concerns the somewhat utopian character of the purpose pursued by involuntary hospitalization: obtaining an "improvement" of the condition of mental retardation, which is an unlikely end to be achieved, as this affection represents a psychological underdevelopment of a defective, permanent and non-progressive character, which affects the development of the intellect, the thought and, in particular, the abstractization and generalization. In other words, by committing them to psychiatric hospitals, the illness (that was the reason why the anti-social act took place) cannot be removed. Regarding the problem of the danger posed by the offender to society, we show that the danger is not suppressed,

countless being the cases in which such persons committed a crime during hospitalization.

As a social-economic critique, we show that social reintegration, through social, productive and self-management activities for the patients with mild mental retardation, is preferable to maintaining hospitalization, which implies substantial costs for the state's budget.

Conclusions

In conclusion, we consider that the legal norms governing the safety measure of involuntary commitment can be reconsidered by a multidisciplinary commission, comprised of judges, prosecutors, psychiatrists, forensic doctors, sociologists, psychologists, anthropologists, integrity counselors, social workers, etc., who can analyze the opportunity of replacing, in some cases and according to the assessment of the patient's health, the safety measure of involuntary commitment with other measures, such as: schooling or professional qualification courses for those who have the intellectual capacity to participate in such activities, correlated with understanding that the biological age is not consistent with the mental one and the applicable treatment must be appropriate for the mental age of the offender; training these persons in carrying out activities necessary for self-management; the gradual reintegration of such offenders back in their families through periodic leave of absence granted by the hospital and the development of recreational activities outside the institutionalized framework.

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