

**Commentary**

## **Mental Health Policies in Brazil: The Case of Judicial Asylums**

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### **Abstract**

The experience of people with psychopathologies in society has been discussed for many decades. Throughout history, the "madmen" isolated from the community started to be treated as if they were sick. Then appeared the judiciary asylums, the fusion of two disciplinary institutions, the prison and the psychiatric hospital, as a result of the increase of crimes in society, with the intention that the "criminal madmen" could receive the due treatment to their problem. This article aims to present a historical basis of the reality of many patients hospitalized in Hospitals of Custody and Psychiatric Treatment, as well as some criticisms made on the subject, through bibliographic research through articles, books, codes of the current legal system, and websites of scientific relevance to the theme.

**Keywords:** Psychopathologies, Asylum, Custody Hospital, Prison, Public policies

### **Introduction**

The experience of the person with psychopathologies in the midst of society has been discussed for many decades. The "madmen", as they were called at the time, the poor, tramps, convicts, and "alienated heads" were isolated from society in the old leper colonies.

Over time, the madmen came to be treated as if they were sick. Two disciplinary institutions merged, the prison and the psychiatric hospital, as a result of the increase in crimes in society, and so the judicial asylums emerged in order that the "criminal madmen" could receive the proper treatment for their problem.

The objective of this article is to present a historical basis of the reality of the many patients hospitalized in Hospitals of Custody and Psychiatric Treatment, as well as some criticisms made on the subject.

The methodology used was bibliographic research through articles, books, codes of the current legal system, and websites of scientific relevance to the topic.

In Brazil, when the discussions about madness were increasing, it became necessary to create an adequate place for the hospitalization of people with mental disorders. In 1841, through Decree n° 82, D. Pedro II instituted the first psychiatric hospital, Hospício de Pedro II. However, with the development of society and, consequently, the increase in inequality and criminality, it was noted that there wasn't an ideal place for "criminal madmen" to be hospitalized. Thus, the Lombroso Section was created at the National Hospital of the Alienated, in Rio de Janeiro, where they would be treated and not punished. After seventeen years, in 1921, the first Judicial Asylum was established in Rio de Janeiro. With the reform of the penal legal system in Brazil, the asylum was renamed as Hospital of Custody and Psychiatric Treatment.

Currently, our legal system determines that people that are considered non-imputable should be hospitalized in Custody Hospitals or, in their absence, in another appropriate establishment. However, there is a lot of criticism in the literature on this subject because, despite the name change, the situation of the people hospitalized there is completely precarious. Patients suffer several kinds of abuse and often spend their entire lives hospitalized.

They tend to become invisible, forgotten. As a result of that, there is an Anti-Asylum Movement, which has existed since the end of the 20<sup>th</sup> century and gave rise to the Law 10.216, the Psychiatric Reform Law, which includes the necessary improvements. However, this is still a very controversial subject.

Based on the information gathered through the articles indicated in the bibliographic references, as well as national inspection reports, it was found that the idea of creating a judicial asylum is a good proposal, but for the Hospitals of Custody and Psychiatric Treatment to reach their real functionality and for the irregularities that have occurred until today to stop, it is necessary to have public policies and professionals willing to deal with new projects.

### **Criminal Legal Order**

In the current Brazilian criminal legal order, regarding the causes of exclusion of illegality, the Penal Code determines in its art. 23 that "there is no crime". On the contrary, when considering the causes of exclusion of culpability (arts. 26, caput, and 28, § 1, for example), it determines that the author is "exempt from penalty". In addition to the concept of crime, it specifies that, for the act to be considered a crime, it needs to be a typical, illicit or

unlawful fact, according to articles 23 and 26 of the Penal Code. That means that the agent must, besides committing an act that is described as a crime in criminal law - which brings together the elements of willful or negligent conduct, the result, the causal nexus, the objective imputation and the typicality -, also commit an act that contradict the norms of the legal system.

Some scholars, such as Bitencourt, also consider culpability as an element of the crime, while others consider it only as a presupposition for the application of the penalty. Culpability, in its turn, concerns the possibility of applying a penalty to the attributable subject, and includes the awareness of the illegality, imputability and enforceability of a different conduct.

For the subject to be considered imputable, it is not enough that he understands the illegality of his acts, but also that he has the ability to command and control his instincts. The subject must have physical, psychological, moral and mental conditions to know that he is committing an illicit act. In Brazil, everyone is considered imputable under the criminal law, unless legal provisions determine otherwise.

In its article 26, the Penal Code determines that the person who, due to mental illness, incomplete or retarded mental development, and extreme alcoholic intoxication resulting from a fortuitous event or force majeure, is unimputable or semi-imputable, that is, is unable to distinguish an illicit action from a licit one and to command and control their actions at the time of the act, thus being unable to be responsible for their actions.

In order to assess the agent's non-imputability, the biopsychological system criterion is taken into account, as noted in articles 26, caput, and 28, § 1. Moreover, causality, chronological, and consequential requirements are considered. The diagnosis on the mental integrity of the accused is always made by the forensic psychiatrist, at the order of the judge.

As non-imputable agents who commit crimes are not able to answer for their acts, articles 96 to 99 of the Penal Code establish preventive security measures, as the dangerousness of the agent is assumed. However, for the security measures to be applied, it is necessary that the agent is non-imputable, considered dangerous for society and has committed an act described in the Penal Code.

Our legal system establishes two types of security measures: detention, which means hospitalization in Hospitals of Custody and Psychiatric Treatment; and restrictive security measures, which includes ambulatory care.

Besides security measures, there are also precautionary measures. In the case of the non-imputable or semi-imputable agent, the provisional internment precautionary measure will be applied in the event of crimes committed with violence or serious threat with a risk of reiteration, as provided for in item VII of article 319 of the Criminal Procedure Code. However, unlike security measures, the precautionary measure of provisional hospitalization has a therapeutic character.

For Amaral and Silveira [1] provisional hospitalization has a therapeutic character, aiming, therefore, at the anticipation of the security measure in cases where there is a possibility of recidivism. Thus, the hospitalization can only occur in judicial asylums, hospitals or specialized clinics, as

in these cases the agent does not need punishment or re-education for life in society, but psychological and psychiatric treatment.

There is great criticism and difficulty in applying the precautionary measure of hospitalization because, in addition to it being applied only for those who commit crimes with violence or serious threat, there is also great difficulty in finding vacancies in custody hospitals. Moreover, there is not a maximum period for this measure to end, and the patient may be hospitalized for the rest of his life.

## Judicial Asylums

With the development of the imperial society in Rio de Janeiro, even before psychiatry was established as an area of medicine, the presence of people considered insane in the social environment started to bother the citizens. Thus, doctors began to demonstrate the need for a place where they could stay and receive treatment, according to the Cultural Center of the Ministry of Health of Rio de Janeiro. In 1838, in a report from the Health Commission of the Medical Society of Rio de Janeiro, there was the first initiative that suggested in a clear and objective way the creation of a proper space for people with mental illness.

As the patients were hospitalized at Santa Casa da Misericórdia along with patients with other diseases and received precarious care, doctors at the time believed that a place for the treatment of this specific population was necessary. It would not promote violence, but only adequate and efficient treatment. It should also be located far away from the city center and the doctors would be able to act in the way they thought best: "this professional was surrounded by the image created by science and by the psychiatry specialization, which gave them the ability to speak for the madman, to act on their behalf and to cure them".

However, on the other hand, one of the most common arguments used by the doctors was that it was necessary to have a place for the treatment of these patients where, in addition to medicine, physical and moral actions were applied. These topics resulted in the production of articles by academics of the time [2].

In 1838, the projects for the creation of the first psychiatric hospital in Brazil began. After three years of debates and adjustments, on July 18, 1841, Dom Pedro II, through decree n° 82, established the first psychiatric hospital in Brazil, in the city of Rio de Janeiro. After its opening, some records show that cities such as São Paulo, Recife, and Porto Alegre, among others, also adopted this measure and established psychiatric hospitals of their own (Cultural Center of the Ministry of Health of Rio de Janeiro).

In Hospício de Pedro II, as the first psychiatric hospital was called, the doctor was the center of the institution. It was designed to be grandiose and was managed by the Santa Casa de Misericórdia, which, after a few years, gave rise to much criticism about its efficiency. Decree No. 142 A, of January 11, 1890, detached the psychiatric hospital from the administration of the Santa Casa, and, after a month, through Decree No. 206 of February 15, 1890, it was determined that medical and legal treatment should be provided to those

patients. It then became the National Hospital of the Alienated, which had two colonies installed on Ilha do Governador (Cultural Center of the Ministry of Health of Rio de Janeiro).

In the 19<sup>th</sup> and 20<sup>th</sup> centuries, when more questions and debates on criminality, inequality and application of laws were raised, crime began to be seen as a natural cause of the human being, that is, the individual who committed a crime was a criminal because he was born that way. This created a link between criminality and mental disorders [3].

Thus, three concepts that categorized criminals with mental disorders were created: "monomania", "degeneration" and "born criminality". Over the years, they were studied and developed, and they were also what determined the beginning of discussions on the need for judicial asylums.

Monomania was the first concept that mixed madness and mental alienation. Based on monomania, the second concept, degeneration, emerged. It states that any criminal act could be a symptom of a mental disorder. Finally, the theory of the born criminal was developed, which believes that the individual was already born as a "bad" person.

As a result, in the course of criminal proceedings at the time, individuals considered to have mental disorders would have nowhere to go to receive the proper treatment, as the psychiatrists at the psychiatric hospitals did not accept the "criminal madmen". As a result, the non-imputable criminals were acquitted, as they could not go to the common prison system and were not accepted in psychiatric hospitals. This resulted in a need to create judicial asylums, where only "criminal madmen" would be hospitalized, so that they could receive adequate treatment.

We can see that the author confirms it in the following terms [2]:

*[...] What was found, both in the legislation referring to criminal madmen and in the social destiny that continues to be reserved for them, was precisely the complex superposition of two models of social intervention: the juridical-punitive model and the psychiatric-therapeutic model.*

It was only in 1903, through Decree No. 1132, that the "Lombroso Section" was inaugurated at the National Hospital of the Alienated, where natural-born criminals would stay. Then, after seventeen years, in 1921, the first Judicial Asylum was created in Rio de Janeiro. In 1950, it was renamed as Heitor Pereira Carrilho Judicial Asylum and, in 1986, with the penal reform in Brazil, it became the Heitor Pereira Carrilho Hospital of Custody and Psychiatric Treatment.

### **Hospitals of Custody and Psychiatric Treatment - HCTP**

Currently known as the Hospitals of Custody and Psychiatric Treatment – HCTP, they are prison hospitals intended for the adequate treatment of criminals diagnosed with mental disorders. They also attempt to aid the individual's reintegration into society, but there is no punishing intention.

However, what we will see later does not occur. It is believed that we currently have judicial asylums with a different name, but the same philosophy. On the social

invisibility of inmates in society, Michele Amorim explains that:

*According to the results obtained through a bibliographic survey, it was verified that less than 25% of the individuals in security measures in the HCTPs in 2011 would not need to be hospitalized, either because they already have the security measure with the danger suspended by a process of discharge, the security measure is extinct, the hospitalization occurred without judicial process, or even because they were discharged or progressively released from justice [4].*

Which demonstrates then that many of these individuals "disappear" when entering the HCTPs.

Later in the article, AMORIM [4] also mentions Valter Alencar Penitentiary Hospital, which was opened in 2004 in the city of Altos-PI to provide ambulatory treatment. However, despite being called a hospital, it is not included in the National Registry of Health Establishments (CNES) of the Unified Health System (SUS) and it is not part of the municipal, state, or federal health network. It is not, therefore, under control, evaluation, regulation, and audit of public administration bodies.

Thus, despite the name change and the protection laws created over the years, currently there are still many traces of the judicial asylums in the daily lives of those who live in Hospitals of Custody and Psychiatric Treatment.

### **Mental disorders and prison**

As can be extracted from the Penal Code, in article 41 and article 96, item I, and in the Criminal Procedure Code, article 682, in the absence of a custody hospital, the convict can be allocated in an appropriate establishment that guarantees custody. However, that place is usually a penitentiary, where, like custody hospitals, adequate treatment is not offered to those with mental disorders.

The lack of health professionals such as psychologists and psychiatrists to treat the convict, along with the difficulty of encouraging the individual to carry out the treatment, are impediments to an effective mental health treatment.

In addition to those who are considered criminals with a mental disorder, there are those without a medical diagnosis who, as a consequence, stay in penitentiaries incarcerated along with common criminals. This causes a big problem between criminality and mental disorders.

Mental disorders are strongly linked to crimes and recidivism. In other words, people with mental disorders are more likely to commit crimes and repeat their acts. In addition to that, people with severe mental disorders are prone to greater violence during illicit acts.

The Brazilian government seeks to enforce policies to improve the prison environment for these convicts, but many difficulties are encountered, such as the lack of resources and people who want to perform this type of work.

### **Anti-Asylum Movement**

According to CAVALLI [5], Marco Aurélio Soares

Jorge, psychiatrist and doctor in public health, analyzes that “asylums were not built with the aim of treating, but rather of excluding those who did not fit in with what was thought to be a normal citizen”, because in many cases hospitalizations were seen as the serving of a sentence, and did not have the goal of treating and reintegrating the patient into society.

At the end of the 20th century, health researchers started discussions about the efficiency and methods of asylums. Starting there, the anti-asylum movements began, pioneered by the Italian psychiatrist Franco Basaglia, who was also responsible for one of the most striking criticisms of the movement.

In 1979, when Franco visited the Colônia judicial asylum, located in the city of Barbacena-MG, he immediately held a press conference and declared “Today I was in a Nazi concentration camp. Nowhere in the world can you witness a tragedy like this” [6].

With Law 10.216/2001, better known as the Psychiatric Reform Law, it was understood that, finally, the conditions in which the patients of these institutes lived would improve, but that did not happen. Therefore, there is still a lot of criticism on the subject, not only by health professionals, but also by legal professionals.

One of the criticisms is that, since the law was created, many asylums have been closed, but there aren't new options of places where the patients could be taken, so many have started to live on the streets or have returned to their families, most of whom were unable to afford caring for someone with mental disorders at home, which affected the family system.

These places are also considered a violence against the individual, because, as mentioned earlier, in many cases they are seen as places where the sentence imposed by the Magistrate will be applied, and not as a location where the person will be treated and reintegrated. In addition to being kept locked, the patients may be submitted to treatments without his authorization or authorization from his legal guardian. Thus, these places do not bring benefits to the individual, they only aim to punish them for the crime committed.

“The worst of the psychiatric hospital with the worst of the prison”: this is how a report published in 2015 by the Federal Council of Psychology in partnership with the Brazilian Bar Association (OAB) defines Brazilian judicial asylums. Another report published in 2019 found that several human rights violations were identified, seemingly indicating practices of torture and other cruel, inhuman and degrading treatment, in addition to allegations of rape, gender violence, religious intolerance, vexatious searches used as an institutional method and the imposition of religion as a therapeutic method, besides the lack of physical structure of the places.

In this entire process, it is easy to verify that the professionals of the multidisciplinary teams, who are responsible for the clinical follow-up of these patients, lack a complement of knowledge that would allow them to receive relevant information to improve treatment conditions. If this training were up to date, many of these professionals, besides being able to offer better conditions in the treatment of these patients, could transform the reality of these health spaces,

since we know that, in addition to prejudices, there is a perception that ambulatory care units and places for mental health treatment are not kept in appropriate conditions and do not favor working relationships and training for doctors, psychologists, nurses and other employees.

One of the possibilities to increase the knowledge of these professionals, thus improving working conditions and better qualifying the team to work in these hospitals and clinics, would be the Permanent Education in Health (EPS) Policy, which aims to change working relationships and train professionals by problematizing their daily routine. For this, the knowledge of the entire team is used, as it can and should be shared with the other members of the group of professionals. This process can take place at times when the whole team could come together to make powerful exchanges considering the problems faced daily, or even in a conversation circle after an event during which something relevant for the knowledge of the other employees happened. This process could bring the professionals closer to the team and improve their working conditions, given that everyone will profit from the constant training that happens in their daily routine.

Several factors cause these problems. First, there is the prejudice that society has in relation to people with mental disorders, which impairs the interest in the implementation of public policies to increase investment in custody hospitals, physical structure, trained professionals, and in the structuring of multidisciplinary teams that include not only health professionals, but also legal professionals. In Brazil, there is much more attention and investment in public penitentiaries.

Perhaps, also, due to the need for a review of the Penal and Criminal Procedure Codes, given that the law itself indicates the custody hospitals as a place for serving the sentence and not as a place for treatment and reintegration, as can be extracted from, for example, Title V, Chapter I, Section I: Deprivation of Liberty Penalties, article 41, which provides: “The convict who has a mental illness must be taken to a hospital of custody and psychiatric treatment or, failing that, to another appropriate establishment”, causing the possibility of wide interpretation by the competent persons.

If HCTPs were territorialized, through the execution of the sentence with Magistrates of Criminal Executions Courts specialized in mental health, and the use of the CAPS, CRAS and CREAS institutes, the reintegration and treatment of the convicted individual with a mental disorder would occur in a more efficient and effective way.

On the other hand, there are studies that indicate that the existence of asylums is necessary, because although they are not considered ideal, they are still a space that offers treatment to individuals with mental disorders who have committed an illicit act.

As a result of the above, the Anti-Asylum Movement Day was established. It is currently on the national calendar on May 18 and it aims to fight for people with mental disorders, reminding society that they also have rights, emotions and feelings, with the aim of complying with the Law.

## Final considerations

As extracted from the reading of this article, over the years there have been major changes in the treatment given to people with psychopathologies. It is possible to analyze in chronological order how they were treated in the early 20th century and how they are treated now, along with the changes made to the Brazilian Legal Order.

The changes that took place were quite significant, but some questions arose during this work: were these changes enough for psychiatric patients to be treated with dignity? Would there still not be possibilities to further improve the conditions of these patients?

At first, psychiatric hospitals were not designed to actually perform the necessary treatment for the patients, but rather to carry out a social “cleansing”, as it were the black, the poor, and the “alienated minds” who were considered crazy. After a while, with the development of society, there was a large increase in crime and social inequality, which required a separation between the considered “criminal madmen” and the people who were only considered “insane”. The solution chosen was the creation of judiciary asylums.

Despite the proposal of them helping to reintegrate these people into society, this did not happen, since the mentality of punishment remained the same. Moreover, despite the creation of institutions with different names over the years, proposing reintegration into society and improvement in the patient's mental health, this has never happened and, even today, the so-called Hospitals of Custody and Psychiatric Treatment are still precarious places, where patients suffer abuse in different ways, whether physical, mental, or emotional.

Finally, for there to really be an improvement in the treatment of people with psychopathologies, it is necessary to have investments and capable and willing professionals, as well as public policies, a reform in the Brazilian Legal Order and a revision of the Anti-Asylum Law, with the presence of representatives from the judiciary, psychology, psychiatry, social assistance and others in the health area, so that the changes really face the difficulties and improvements needed for these patients.

## Conflicts of Interest

The authors certify that there is no conflict of interest with any financial organization regarding the material discussed in the manuscript.

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