DOI 10.26807/rfj.v2i8.226



# The beginning of a new era in mental health. A paradigm change: The Argentine Case

## *El comienzo de una era en salud mental. Cambio de Paradigma: El Caso Argentino*

**Iris Edith La Salvia**
Suprema Corte de Justicia de la Provincia de Buenos Aires
**City:** Buenos Aires
**Country:** Argentina

Original article (research note)
RFJ, No. 9, 2021, pp. 320-345, ISSN: 2588-0837

**ABSTRACT:** This paper aims to go through the radical transformation produced in Argentine Republic's legal and health system in the approach to mental illness, based on the paradigm changes that slowly but effectively it was installed from the Mental Health Law 26,657. The drastic replacement of a system with paternalistic criteria for that of the dignity of risk, the recognition of the person autonomy with mental illness in the exercise of their rights with due assistance, interdisciplinary treatment, the interaction between the institutions of the system health and the restrictive nature of hospitalization measures as a final ratio in cases of severe and imminent risk. The objective is to share this route in order to reflect on how society considers mental illness and the need to complete the evolution of the new paradigm in pursuit of the integration of all people through knowledge as the only useful tool to dethrone the preconceptions and ignorance that traditionally postponed the subject.

**KEYWORDS:** Mental health, capacity, human rights, safety, mental illness.

**RESUMEN:** El presente trabajo propone recorrer la radical transformación producida en el sistema jurídico y sanitario de la República Argentina en el abordaje de la enfermedad mental, a partir del cambio de paradigma que lenta pero efectivamente se instaló a partir de la Ley de Salud Mental 26.657. La drástica sustitución de un sistema con criterio paternalista por el de la dignidad del riesgo, el reconocimiento de la autonomía de la persona con padecimiento mental en el ejercicio de sus derechos con la debida asistencia, el tratamiento interdisciplinario, la interacción entre las instituciones del sistema sanitario y el carácter restrictivo de las medidas de internación como última ratio en los casos de riesgo grave e inminente. El objetivo es compartir dicho recorrido a fin de reflexionar acerca de la forma en que la sociedad considera a la enfermedad mental y la necesidad de completar la evolución del nuevo paradigma en pos de la integración de todas las personas mediante el conocimiento como la única herramienta eficaz para destronar los preconceptos y la ignorancia que tradicionalmente postergaron el tema.

**PALABRAS CLAVE:** Salud mental, capacidad, derechos humanos, seguridad, enfermedad mental.

## INTRODUCTION

As in all branches of the hard and social sciences, at some point in their evolution, whether by exhaustion or overcoming, new conditions are produced, new knowledge is acquired that leads to a modification of the paradigm used until now. Fortunately, in recent times, from international regulations to the prevailing conceptions in society, this transformation has been reaching one of the most neglected areas in the framework of health and law; that of mental illness.

The Argentine Republic, like most of Latin America, has had an uncertain and fickle course in this matter. Its institutions and norms since colonial times in the River Plate - inherited from Western culture, where the Greeks established the dichotomy between the irrational and the rational - rarely adopted specific measures for the mentally ill, with few residences created for this purpose.

Although some asylums had already emerged in Spain in the 15th century and London Bethlem Hospital began to specialize early on in the treatment of mental illness, in the River Plate during the colonial era, this did not happen, and the mentally ill always depended on social charity and some religious orders that were responsible for their accommodation and care. At the same time, the most aggressive were usually locked up in the standard cells of the Cabildo. However, from the 17th century onwards, movements emerged in Europe that threatened to segregate the mentally ill, and these spread until the beginning of the 19th century.

In Argentina, on the other hand, during the 20th century, monovalent hospitals began to emerge, promoted by alienist doctors, designed for the treatment and hospitalization of the mentally ill in a free social environment -not a prison- and later on. Then, in some units of the prison service, the establishment of wards and then specialized psychiatric institutes, to house mentally ill people who had been declared not guilty of mental illness in the framework of criminal proceedings. All societies in different times feared the mentally ill, perhaps the unpredictability of their behaviour, the spectacular nature of some events, added to excessive and distorted dissemination, can influence the attitude that society assumes in these cases. However, without a doubt, ignorance is the basis of all apprehensive and segregated behaviour towards them.

It can be seen even though in the total number of homicides, those committed by insane persons are under-represented, being, per case, in the area of the city of La Plata, Argentina - where the Supreme Court of Justice of the province of Buenos Aires has its seat - barely 0.5% of the total number of verified cases (Folino et al., 2008). Then a proportion similar to that reported by other countries; 1% in the United States (Lamb and Talbott, 1986) and consistent with figures from other latitudes such as Copenhagen (Gottlieb and Gabrielsen, 1990); Sweden (Lindqvist, 1986); Finland (Eronen et al., 1996); Canada and England (Côté and Hodgins, 1990), 1%; Italy where the same can be seen in the research of Casarino et al. (1978) and Bandini, Gatti, Traverso (1983).

In Brazil, the research of Dr Paulo O. Teitembaum (2009) aimed at estimating the baseline rate of relapse of male and female psychiatric patients released after security measures at the Forensic Psychiatric Institute of Porto Alegre, during ten years between 1994 and 2004, is noteworthy. It showed an overall result of 32 per cent of post-external relapses, characterizing it as the recording of - at least - one police incidence of criminally sanctioned behaviour.

This research also showed that the discharge implemented progressively had a protective effect, with an increased probability of survival without recurrence. These results also led to not stipulating a minimum duration for the measure, since it was found to be more efficient to adapt it to the particular evolution of each patient. Also, accompanied by a follow-up of the patient when he or she was discharged, carried out by the judge and the judicial institution and trusts, favouring a quick and flexible decision making to control the risk factors more quickly. Then, since in many cases the relapse was due to

a delayed reaction of the system in detecting the risk factors, and deficiencies in offering support, because of not providing regular psychiatric care, medication and hospital places.

It was caused by a lack of interest in investment by the State in the training and implementation of professionals and health service environments for the evaluation and management of risk factors. In all cases the research confirms what Mulvey had already indicated in 1994 when analysing the prevalence of violence among the mentally ill; *the absolute risk when compared to the general population is shallow, only a small proportion of violence in society can be attributed to mental illness*.

The fear, even though it is unjustified and extends to the civil sphere concerning the actions and exercise of rights by the person who has a mental illness of a particular entity. Also, it has delayed the evolution in the treatment that society gives them and has determined that only in recent years, already in the 21st century, Argentina can celebrate a change of paradigm in the conception of the mentally ill, which finally respects their dignity and autonomy in both the civil and criminal law spheres.

The Constitution of the Argentine Republic not only regulates the process of creating and applying laws and the functioning of state bodies. In its first part, it makes declarations, recognizes rights and establishes guarantees, which limit individuals and the State, to safeguard the rights it considers fundamental.

Article 75, paragraph 22, provides that specific international instruments that have already been enacted and those that will be adopted in the future by the National Congress -the Legislature- have constitutional hierarchy and must be

understood as complementary to the rights and guarantees that they recognize (CRA, 1853). It is how they should be included in the subject, from the Minimum Rules for the Treatment of Prisoners (UN General Assembly, 1957). Also, to the treatment of persons with disabilities set out in the Declaration of the Rights of Disabled Persons (UN General Assembly, 1975), and more specifically in the case of mental illness, the European Convention on Human Rights (1953) article 5 regarding the cases in which the deprivation of liberty is appropriate in the case of mental derangement, subject to due process. In the American sphere, the American Convention on Human Rights (the judgments of the Inter-American Court and the work of the Commission are relevant).

In line with international standards, the American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities is of primary application - the first American international legal instrument that addresses this group explicitly.

Subsequently, on 17 December 1991, Resolution 46/119 (1991) adopted a more specific document entitled Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

The following resolution 46/120 dealt with Human rights in the administration of justice. On 13 December 2006, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities, ratified by Argentina through Law 26.378 in June 2008, constituting the highest international instrument on the subject incorporated into Argentine legislation. However, we had to wait until 2010 to see the promulgation of the National Mental Health Law No. 26,657 -and wait until 2013 to have its regulatory decree 603/13- a

significant rule in that it implied a change of paradigm in the field of Mental Health.

## 1. MENTAL HEALTH PARADIGM SHIFT

This law prompted a series of changes and brought new alternatives to the mental health perspective, which are still under development. One of the highlights of the law is the establishment of different restrictive conditions of confinement in mental health institutions, within a temporary context of imminent risk assessment.

Considering in its article 2 an integral part of it, the international norms, principles and documents it cites, it leaves no doubt about the contemplation of the right to mental health in relevance to human rights (National Mental Health Law No. 26,657, 2010). On the other hand, in addition to establishing forms of control and installing an interdisciplinary approach, it also commits the State in aspects such as budgetary improvement in mental health to provide adequate assistance (art. 32 of the National Mental Health Law No. 26,657 (2010) progressively sets a percentage that will reach 10 per cent of the budget allocated to health by the State).

Therefore, the impact of the law within the normative, institutional and social universe is increasing, associated with the change of paradigm. The previous paradigm that governed mental health with a regime of guardianship, paternalism and dependence, very similar to the regime of minority, was abandoned, and the new parameters now included in the recent Civil and Commercial Code of the Nation - Law 26.994 (2015).

The change started slowly since the National Constitution reformed in 1994 - under Art. 27 of the Vienna Convention (1969) on compliance with treaties - by

incorporating those ratified by Argentina, making the situation more flexible, by giving rise to the jurisprudence of the courts receiving more ductile criteria based on the law of conventions.

It is how the "Tufano" and "RMJ" or "Duarte" rulings issued between 2005 and 2008 by the Supreme Court of Justice of the Nation, applying criteria from the European Court of Human Rights and the conventions on the rights of persons with disabilities and the American Convention on Human Rights, came about.

Within this progressive harmonization, the Mental Health Law (2010) consolidated the tendency to recognize the legal capacity with support instead of its total substitution by the guardian, while the principle "pro homine" or pro persona -art. 3 Convention on Persons with Disabilities- regulated the international issue, the reports of the UN High Commissioner for Human Rights resulting from the thematic study on the interpretation of the convention were analyzed, and it was accompanied by policies in the legislative branch -art. 75 inc. 23- and reception in the judicial branch. Nevertheless, the definitive modification would be installed from the new law of mental health.

**1.1. National Act 26,657**

In addition to the tendency to maintain the patient's autonomy, as well as his or her family and social ties in the environment, it imposes interdisciplinary treatment, provides for active State interference in mental health care measures and the creation of new care arrangements, allocating a mandatory budget. It reinforces respect for human rights through review bodies. It incorporated 152 ter into the previous Civil Code then in force and replaced with 43 ter that of the original 482

of the previous code. It regulated in a more detailed and precise manner the issue of involuntary internments.

**1.2. Regulatory Decree 603/2013**

As a novelty, the regulatory Decree 603/2013 (2013) provides for the advance directives of the patient or legal representative on mental health. -art. 7 (k), as well as the application of informed consent. It specifies the exceptional nature of restrictions that limit visits, correspondence and any other contact with the outside world and its environment for the patient -art. 14- urging to provide community referrals to patients who do not have relatives or friends; it promotes the creation of care devices for addictions and mental health, pointing out in art. 10 that the devices established by law must include persons deprived of their liberty under the terms of art. 34 paragraph 1 of the Argentinean Criminal Code. (CP, 1922)

Article 20 defines "certain and imminent risk" as the contingency or proximity of damage that is already known to be real, specific and unquestionable, and which threatens or causes harm to the life or physical integrity of the person or third parties. It does not include, as clarified by the decree, the risks derived from attitudes or behaviours that are not conditioned by mental illness. (Regulatory Decree 603/2013, 2013)

The security forces that come into contact with a situation of specific and imminent risk due to an alleged mental illness must intervene, trying to avoid damage, reporting it immediately and collaborating with the health emergency system. The implementing authority and the Ministry of Security will jointly draw up a protocol for action and training in this regard. The transition to new care services in community

facilities and public and private general hospitals is also regulated. -(Regulatory Decree 603/2013, 2013)

### 1.3. Judgments representative of the new paradigm handed down by higher courts

In a brief review, we must highlight the ruling of the Supreme Court of Justice of the Province of Buenos Aires (2014) on May 7, 2014, accepting the new paradigm, followed by the ruling in the same sense on July 8 of the same year. Then, a new path was taken in the jurisprudence in favour of the new parameters on disability and legal protection of people affected by mental pathologies.

The first of these is case C 115,436 "Z, A. M Insania" (2014) and was brought based on the extraordinary appeal of inapplicability of the law filed by the Incapacity Adviser, alleging a violation of article 3 of the Civil Code (2015), article 28 of the National Constitution (1853) and article 152 ter - law 26,657 (2010) - as well as the plexus of conventionally enshrined rights and constitutional hierarchy recognized for persons with intellectual disabilities.

The Court considered that it was absurd to evaluate the facts and evidence in this case since a new interdisciplinary evaluation of the victim was required under the parameters set out in Law 26657 and based on the time that had elapsed since the ruling declaring her incapacity due to schizophrenia on February 28, 1997.

Similarly, in dismissing the petition, the judge considered that the ruling that consolidated the current legal relationship was not based on an interdisciplinary examination and did not set a time limit for validity or re-evaluation and

that the mere passage of time did not per se impose a duty to re-evaluate the person declared incapable.

The SCJBA, with the rapporteur's vote of Minister Luis Genoud, considered that the appeal of the Advisor should be allowed. It is because:

> The Convention for Persons with Disabilities and the Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities incorporated into our domestic law by-laws 26,378 and 25,280 marked a paradigm shift in the concept of persons with disabilities, based on autonomy and dignity (...) Thus the CDPD, Article 3 establishes as a principle the respect for inherent dignity, individual autonomy, including the freedom to make one's own decisions and the independence of persons -inc. a)-; it expressly regulates that the States parties undertake to ensure and promote the full exercise of all human rights and fundamental freedoms of persons with disabilities without any discrimination based on disability (...) It reaffirms the right to recognition as a person before the law and legal capacity on an equal basis with others in all aspects of life. Declares that States parties shall ensure that in all actions concerning the exercise of legal capacity, adequate and sufficient safeguards are provided to prevent abuse under international human rights law. (...) The aim is to achieve full respect for the dignity of every person, with particular emphasis on cases where the vulnerability exists, such as, in the present case, those resulting from lack of full mental health. The Inter-American Court of Human Rights has affirmed that the Court cannot fail to rule on the individual attention that States owe to persons suffering from mental disabilities because of their particular vulnerability ...any person in such a situation is entitled to special protection because of the special duties whose fulfilment by the State is necessary to satisfy the general obligations to respect and guarantee human rights; it is not enough that States refrain from

violating the rights, it is imperative to adopt positive measures (CTDH 4-VII-2006 Ximenes Lopez c/Brasil). (Case 115.436, 2014)

Accordingly, Minister Genoud said:

It cannot be denied the right recognized by article 152 ter of the Civil Code in a text ordered by law 26.657 (...) because as the explanatory statement of the 100 Rules of Brasilia on access to justice for people in a condition of vulnerability, to which the CSJN adhered, points out Agreement 5/2009 of 24-II-2009 the judicial system must be configured for the active defence of the rights of people in a condition of vulnerability (...) In the new paradigms that are being drawn up concerning vulnerable groups, Gonzáles Granda expresses that there is still much effort to be made in the area of mental disability due to mental illness because it affects one of the most socially vulnerable groups and consequently one that is most in need of help and protection, mainly because of the social stigma that has always accompanied this type of suffering (...) Law 26. 567 is part of the new concept of mental health, which has been referred to as the social model of disability (‘ ). In this context, article 1 of the Act states that its purpose is to ensure the right to the protection of mental health of all persons and the full enjoyment of the human rights of persons with mental illness in the national territory (...) and declares that mental health is a process determined by historical, socio-economic, cultural, biological and psychological components, the preservation and improvement of which involves a dynamic of social construction linked to the realization of the human and social rights of every person - art. 3- (...) Respect for the social model, the authors explain, implies that the person should not be deprived of his or her possibility to choose and act.

The application of the system created by the UN Convention for persons with disabilities must be guided by the principle of the dignity of risk, that is, the right to move and live in the world, with all the dangers and the possibility of making mistakes. In contrast to the tutelary and assistance paradigms that have been based on the dichotomy of the capacity for enjoyment and the exercise capacity, without respecting the latter under the excuse of protecting people with disabilities from the dangers of life in society. Based on such principles, the criterion of the elevation cannot be shared when denying Mrs Z. the possibility of a new interdisciplinary evaluation in terms of art. 152 ter of the CC, As we have described, the main focus of the Chamber's decision is to consider that Law 26657 does not apply to the case in question because it was issued after the decision that declared the incapacity of the plaintiff. We agree with the Deputy Attorney General when he warns that a psychiatric pathology is a dynamic, provisional and perfectible concept, and its evolution is linked to other factors that go beyond pharmacological treatment. The aim was to ensure that personal reality was reflected in the declared and protected legal situation to the extent that the person needed it. It can only be deduced from an interdisciplinary evaluation of each particular situation at a given time - art. 5 law 26.657. In this case, as the Deputy Procurator shows, Z was acquiring skills and abilities (...) the evolution that can be observed in the mental framework of the perpetrator, - duly evaluated - could lead to a new judicial ruling that limits the incapacity he currently possesses. Bearing in mind the new mental health paradigm recently established by law, which is based on the constitutional and conventional guidelines referred to above, this possibility justifies making room for the request of the representative of the Public Prosecutor's Office. Consequently, if this opinion is shared, the appeal for the inapplicability of the law must be made, and the decision appealed against (art. 289 CPCC). The orders will be sent to the original instance so that an interdisciplinary team can

> proceed to evaluate Mrs A.M.Z. (art. 152 ter CC, y RC 3196/11). (Case 115.436, 2014)

Ministers Soria, Kogan and Hitters adhered on the same grounds, and thus the sentence allowed the Advisor's appeal appealed the decision and sent the orders to the instance for an interdisciplinary team to evaluate the cause.

In similar terms, the SCJBA, in a ruling of July 8, 2014, this time with the vote of Minister Soria followed by Ministers Genoud, Pettigiani and Kogan in the extraordinary appeal of inapplicability of law filed by the Advisor of Incapacity against the ruling of the Family Court of Morón that confirmed the decision of the judge who declared the incapacity of ERE due to insanity, considering unconstitutional art. 152 ter of the CC, by rejecting the request for re-evaluation made by the Advisor.

In this ruling, Minister Soria recalled that: "the laws that aim to delimit personal aptitudes for the ownership or exercise of a right, to establish the legal status or regime that corresponds to certain legal situations, are of immediate application" (Judgment of July 8, 2014). It is the case with the rules that, as in the present case, deal with the status and capacity of persons -Ac. 45,304 sentence of 10-III-1992-. Here too, the Advisor's appeal was granted, the ruling was appealed, and the case was referred to the Court to evaluate Mr E.R.E., by an interdisciplinary team and to establish a system of representation and support and safeguards following the rules mentioned above (art. 152 ter CC, and RC 3196/11). Then, having issued the highest provincial Court, it is clear that its scope is expanding by following the guidelines of its jurisprudence, thus multiplying the importance of this paradigm shift that is being consolidated in this area.

The Supreme Court of Justice of the Nation has also applied the new standards developed from the mental health law 26.657 related to the security measures of article 34 paragraph 1 of the Criminal Code. It is highlighted by the ruling in "Antuña, Guillermo" on 13XI-2012 (Corte Suprema de Justicia de la Nación, 2012) in which, following the grounds of the Attorney General, the treatment standards established by the National Mental Health Law were considered applicable, especially art. 6 without distinction to any health service aimed at people with mental illness, whatever their legal nature (criminal or civil regime), citing the precedent of rulings 331:211 and resolution 1370/2008 file 2317/08 of 17/6/2008 aimed at ensuring compliance with such standards in the Central Psychiatric Service for men of the Federal Prison Service.

In this ruling, it was considered that according to the doctrine that emerges from rulings 139:154, 328:4832 and 331; 211 the decision of compulsory psychiatric confinement should be a process with all the procedural guarantees against arbitrary imprisonment or confinement (...) and should evaluate the opportunity for confinement, its limitation in time and the conditions of its execution - Rulings 331:211 considering 13. When the security measure is the one regulated by paragraph 1 of the Penal Code, to the general requirements must be added the requirement of proof, with the standards of evidence and of contradiction typical of the penal process.

In the case, it was considered that these guarantees had been violated since, on the sole basis of a report by a single forensic doctor, the judge had dismissed the case and ordered the accused to be admitted to the psychiatric unit of the Federal Prison Service, 48 hours after the victim's complaint had been filed and the investigating judge's decision. As a result, the

procedure did not meet the standard of due process stipulated for the imposition of psychiatric confinement measures, in violation of article 18 of the National Code (2015).

Consequently, sharing the grounds and conclusions of the Attorney General, the complaint was upheld, declaring the extraordinary federal appeal admissible and revoking the contested sentence, returning the proceedings to the Court of origin so that a new one could be issued following the law (Ministers Ricardo Lorenzetti, Juan Carlos Maqueda, Raúl E. Zaffaroni and Carlos S. Fayt voted).

## 2. THE NATION'S NEW CIVIL AND COMMERCIAL CODE

The evolution that had been seen since the change of paradigm was completed with its reception in the new Civil and Commercial Code of the Nation - Law 26.994 (2014) that ascribed to the new paradigm the capacity of law was limited concerning facts, simple acts or determined legal acts -art. 22 - and what is more important, by regulating the capacity of exercise - art. 23 - which recognizes every human person and which can only be expressly limited by the Code and in a judicial sentence, indicating in art. 24 the classification of persons who can be reached by such limitation to the exercise of their rights.

Article 31 is particularly important as it establishes the general rules governing the restriction of the exercise of capacity, which is attached to the social model of disability and establishes a minimum nucleus of guarantees, referring in particular to the regulation of specific legislation, Law 26.657 in this case.

Article 31(a) presumes the overall capacity to exercise a human being, even when he or she is confined to a care facility, and is supplemented by the following paragraphs, which are transcribed here because of their importance (b) limitations on capacity are exceptional and always imposed for the benefit of the person; (c) State intervention is always interdisciplinary, both in treatment and in the judicial process; (d) the person has the right to receive information through means and technologies appropriate to his or her understanding; (e) the person has the right to participate in the judicial process with legal assistance, which must be provided by the State if he or she lacks the means; (f) priority must be given to therapeutic alternatives that are less restrictive of rights and freedoms. Article 32 states that the judge may restrict the capacity for certain acts of a person over 13 years of age who suffers from a permanent or prolonged addiction or mental disorder of sufficient seriousness, provided that he or she considers that the exercise of his or her full capacity may result in damage to his or her person or property. (Law 26,994, 2014)

About such acts, the judge must designate the necessary supports provided for in Article 43, specifying the functions with reasonable adjustments according to the needs and circumstances of the person. The supports must promote autonomy and favour decisions that respond to the preferences of the protected person. By exception, when the person is unable to interact with his environment and express his will by any appropriate means or format and the support system proves ineffective, the judge may declare the incapacity and appoint a guardian.

Registration in the Civil Status and Capacity Registry is decisive because, from that moment, the validity of the acts performed is established according to the regulations of the

code and the provisions of the respective sentence. Up to this point, the most relevant aspects of the system implemented by the new code in this area and to illustrate better the differences between the old model and paradigm and the current one, the most critical items in the Table 1 are as follows.

**Table 1:** Comparison between the previous Civil Code, the New Code and Law 26.657

| **COMPARISON TABLE** | | |
|---|---|---|
| **Previous Civil Code** | **New Code CC** | **Law 26.657 Current Paradigm** |
| Paternalistic paradigm.<br><br>Declared person<br><br>incapable was subject to protection with restrictions on his autonomy to exercise his rights. | | The paradigm of the dignity of risk. |

| | | |
|---|---|---|
| In 1968, Law 17.711 began to make the original system more flexible through the 152 bis disqualification of a capable person with the limitations imposed in the CC and the sentence that disqualified him. | | The 26.657 in this line incorporated the 152 ter to the old CC for the disabled or incapacitated. It demands limit 3 years and interdisciplinary evaluation that should specify limited functions and acts trying the possible minor affectation of personal autonomy. |
| Replacement model in the decision making. | Assistance model and support (Articles 31 and 43). | Assistance and support model. |
| | | Art. 7: Less restrictive therapeutic alternative. |
| | | Art. 8: Interdisciplinary care. |
| | | Art. 8: Ambulatory with a dynamic approach. They are reinforcing ties. |

| | | |
|---|---|---|
| | | Art.10: Informed consent. |
| | | Art. 11: Promoting inclusive actions. |
| Prisoner of personal freedom<br><br>when it is feared that using it will harm or injure another. | Article 41 of the Special Law applies. | Art. 14: Restrictive criterion of Interdisciplinary Admission.<br><br>They are maintaining ties. |
| | | Art. 15: Brevity of hospitalization. |
| | | Art. 20: Certain and imminent risk of hospitalization is exceptional. |
| | | Art. 23: Discharge, externalization or exit decided by the health team without judicial authorization, except in cases 34. |
| | | Art. 27 and 28: General hospitals. |
| | | Art. 29: Irregularities are obligations of the team. |
| | | Art. 30: Priority is given to family containment. |
| | | Art. 32: Fixed budget item. |

| | | |
|---|---|---|
| | | Art. 35: Compulsory census of boarding schools. |

**Sources:** Old Civil Code (law 17.711, 1968), Civil Code (2015) and National Mental Health Law (law 26.657, 2010).

**Own elaboration**

As can be seen at first sight in the comparison of both systems, the change of paradigm has been established in favour of the person and the exercise of his or her capacity, far from the system that assimilated him or her to the regime of minority, it prioritizes his or her voice. It will, contemplates support and ways of assisting him or her to maintain his or her autonomy and recognizes him or her in the criterion of the dignity of risk, the right to make mistakes that any human being has.

That exaggerated protection that paradoxically culminated in leaving him voiceless and helpless has been abandoned. However, in the institutions and the mentality of the operators and above all in society, there is still much to be done, because the law can impose a new paradigm relatively immediately, however, overcoming the resistance and preconceptions of human beings is a task that requires continuity and consistency.

The incorporation of interdisciplinary teams is also an aspect to be studied in-depth because it does not mean that several members of a team with different specializations act in parallel or divide their tasks, but rather the search for a joint contribution and exchange of opinions coming from the different knowledge and areas of expertise that each member contributes. Much remains to be done; through protocols, the highest institutions of the judiciary are implementing

coordinated action by magistrates and operators in the civil and criminal spheres, so that there is no longer that blatant division that excluded from the social sphere those mentally ill persons admitted to the criminal system for committing crimes and subject to security measures.

It also remains to ensure that extra-mural institutions are integrated so that the prison service's specialised psychiatric units are not necessary and that all persons can receive consistent and coordinated assistance in their treatment, making it more feasible and less challenging to move from the maximum measure of confinement (internment), which is applied restrictively to the most severe cases, to the trial discharges that may culminate, by appropriate therapeutic accompaniment and containment during their stay, to externalisation and cessation of the internment that is a further step for the person with mental illness.

## CONCLUSIONS

Many aspects have been carried out, the tendency to reduce or eliminate large monovalent hospitals in favour of primary mental health care in general hospitals is maintained and deepened, but everything that remains to be done will be possible thanks to the evolution and development of a new paradigm that has already been installed and that fortunately contemplates health and mental illness with another look, an inclusive and humane vision, following the dignity that we all have essentially and basically for the fact of being human.

**REFERENCES**

Alonso Sainz, O. and Orlandelli, S. (2011). *Ley Nacional de Salud Mental Nro. 26.657, comentarios interdisciplinarios*. Buenos Aires: Ediciones Centro Norte.

Archivo General de la Nación. (1999). Instituciones de la Sociedad de Beneficencia y Asistencia Social (1823-1952), tomo I. Buenos Aires: Documentos Escritos.

Bandini, T., Gatti, U. and Traverso, G. B. (1983). Omicidio e controllo sociale. I risultati di una ricerca. Milán: Franco Angeli Editore.

Casarino, L., et al. (1978). La Criminalità dei malatti di mente. *Rassegna di Criminologia*, 11.

Congress of the Argentine Nation. Penal Code. Law 11.179]. (1922).

Constitution of the Republic of Argentina. Const.]. (1853).

Côté, G., and Hodgins, S. (1990). Co-occurring mental disorder among criminal offenders. *Bulletin of American Academy of Psychiatry and the Law*, 18, pp. 271-281.

Council of Europe. (1953). European Convention on Human Rights.

Dirección Nacional de Salud Mental y Adicciones. (2018). *Abordaje de la Salud Mental en Hospitales Generales*. Buenos Aires: Secretaría de Gobierno de Salud. Presidencia de la Nación.

Eronen, M., Hakola, P and Tiihonen, J. (1996). Mental disorders and homicidal behaviour in Finland. *Archives of general psychiatry*, 53, pp. 497-501.

Folino, J., et al. (2009). *Estudios sobre homicidios. Perspectivas forenses, clínica y epidemiológica*. La Plata: Librería Editora Platense.

Gallo, E. R. (2002). *Historia de la beneficencia en el Buenos Aires colonial*. Buenos Aires: Editorial Corregidor.

Gottlieb, P. and Gabrielsen, G. (1990). Psychiatry The future of homicide offenders: Results from a homicide project in Copenhagen. *International Journal of Law and Psychiatry*, 13(3), pp. 191-205. DOI: https://doi.org/10.1016/0160-2527(90)90015-U

Kraut, A. (2006). *Salud Mental. Tutela jurídica*. Buenos Aires: Rubinzal Culzoni.

La Salvia, I. (2011). Las concepciones de la enfermedad mental y el discurso psiquiátrico sobre la locura en Argentina. *Nuevo Derecho, Revista Universidad de Envigado*, 6(8), pp. 135-154.

La Salvia, I., Folino J. and Van der Wolf, M. (2008). Sistemas forenses de Salud Mental comparados; Holanda/ Argentina. *La Ley Revista*.

Lamb, H. R. and Talbott, J. A. (1986). The Homeless Mentally III: The Perspective of the American Psychiatric Association. *JAMA*, 256(4), pp. 498–501. DOI: 10.1001/jama.1986.03380040072032

Lindqvist, P. (1986). Criminal homicide in northern Sweden 1970-1981: alcohol intoxication, alcohol abuse and mental disease. *Int J Law Psychiatry*, 8(1), pp. 19-37. DOI: 10.1016/0160-2527(86)90081-6

Ministerio de la República Federativa de Brasil, la Organización Panamericana de la Salud (OPS) y la Organización Mundial de la Salud (OMS). (1990). *Principios de Brasilia para el desarrollo de la atención en salud mental en las Américas.* [Conference].

National Executive Branch. Regulatory Decree 603/2013. [Decree]. (2013).

National Supreme Court of Justice. (2012). Case 12.434. Law of 28 November 2012. Citation online: AR/JUR/59256/2012.

OMS. (1990). *Declaración de Caracas de la OMS y OPS para la reestructuración de la atención psiquiátrica dentro de los sistemas locales de salud*.

Pavarini, M. (1999). La tutela social de la locura. *Revista de Ciencias Sociales*, (13).

Supreme Court of the Province of Buenos Aires (2014). Case 115.436 (Z, A. M Insania).

Supreme Court of the Province of Buenos Aires. (2014). Judgment of July 8, 2014.

Teitembaum, P. (2009). *Tasa basal de recidiva de los pacientes liberados post medidas de seguridad del Instituto Psiquiátrico Forense de Porto Alegre, Brasil entre 1994 y 2004*. La Plata: Facultad de Ciencias Médicas Universidad Nacional de La Plata.

The Senate and the Chamber of Deputies of the Argentine Nation National Civil and Commercial Code. Law 26.994]. (2015). BO of August 1, 2015.

The Senate and the Chamber of Deputies of the Argentine Nation. National Law on Mental Health. [Law 26.657]. (2010). B. O. of December 3, 2010.

UN. (1957). UN General Assembly of 31 July 1957.

UN. (1969). Vienna Convention on the Law of Treaties was signed in Vienna, Austria.

UN. (1975). UN General Assembly of 9 December 1975.

UN. (1991). *Principles "Protecting the mentally ill and improving mental health care.* Res. 46/119.

UN. (2003). *Progress made in ensuring the full recognition and enjoyment of human rights by persons with disabilities*. Report of the General Assembly.

Ventura Mas, S. (2006). La respuesta judicial ante la enfermedad mental. *Estudios de Derecho Judicial*, (92), pp. 105-12.

Vezzetti, H. (1993). *La locura en la Argentina*. Buenos Aires: Paidós.

**Received:** 27/02/2020

**Approved:** 28/12/2020

**Iris Edith La Salvia:** Relatora Letrada de la Suprema Corte de Justicia de la Provincia de Buenos Aires

**Email:** correoiris@gmail.com

**City:** Buenos Aires

**Country:** Argentina

**ORCID:** https://orcid.org/0000-0002-6129-1214