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Custodial Security Measures and Criminal Dangerousness in Spanish Psychiatric Confinement*

Angelo Giraldi

Department of Legal History and Criminal and Criminological Sciences, Faculty of Law, University of Murcia, Murcia, Spain
Email: angelo.giraldi@um.es

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Abstract

This paper examines the existing problems and proposes both a theoretical and practical framework for moving beyond the current models of psychiatric detention in the Spanish legal system. The goal is to establish primarily healthcare-oriented facilities that can adequately integrate security requirements with the therapeutic needs of individuals who are classified simultaneously as dangerous offenders and as patients. The proposal is developed through an analysis of the model of psychiatric detention adopted abroad, which involved a broad process of "sanitization" that has produced positive outcomes while also giving rise to several tensions and challenges.

Keywords

Criminal Law, Security Measures, Psychiatric Confinement, Dangerousness, Prevention, Treatment

1. Introduction

According to Spanish Criminal Law, security measures are an instrument aimed at special prevention and the neutralization of future criminal risks, complementing—or possibly replacing—the traditional punitive response. Their basis is not retribution for the crime committed, but rather the criminal dangerousness of the

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perpetrator, understood as the probability that they will reoffend. This preventive approach is always articulated within the limits imposed by Criminal Law, requiring that dangerousness can only be assessed once the commission of a crime has been proven.

The current Spanish Criminal Code defines security measures as a system aimed at the treatment, control, or containment of individuals who, due to their psychological, addictive, or behavioral circumstances, may present a significant risk of recidivism. Current legislation distinguishes between custodial measures—such as confinement in psychiatric, rehabilitation, or special educational centers—and non-custodial measures, including probation and certain disqualifications.

Their application requires a two-fold assessment: verification that a criminal act has been committed, even when the perpetrator is not criminally responsible (e.g., due to a psychiatric disease), and judicial assessment of criminal dangerousness, based on legal criteria and not merely on conjecture.

Case law and doctrine have emphasized that such measures are subject to the principles of proportionality and strict legality, which, together with the subsidiarity that informs the criminal justice system, impose judicial control in order to prevent their preventive nature from exceeding the limits of *ius puniendi* within the constitutional framework.

Criminal dangerousness constitutes a judgment of probability about the possible repetition of crime by the subject, based on an assessment of their personal circumstances, the context of the act, and their previous history. It is a restrictive and technical concept, which excludes any assessment of lifestyles, beliefs, or expressions that are merely at odds with non-legal social norms.

This notion is in line with the constitutional standards derived from Article 25 of the Spanish Constitution, which requires that any restriction of fundamental rights be based on the commission of a crime and on a strict legal provision. In this way, criminal dangerousness is integrated into the criminal justice system as a category compatible with the principles of the rule of law, while allowing for a proportionate response to specific and proven criminal risks.

The Spanish criminal justice system prior to the 1978 Constitution recognized the concept of social dangerousness, as reflected in the Vagrancy and Delinquency Act (1933, with subsequent amendments) and the 1970 Dangerousness and Social Rehabilitation Act (Campos, 2021: pp. 215-240). This concept allowed for the imposition of detention or correctional measures without the need for a prior criminal offense, based solely on an administrative or judicial assessment that a person was "dangerous to social coexistence." The vagueness of the concept and its use to penalize non-criminal behavior—such as begging, vagrancy, certain forms of marginality, or simple dissent—made it incompatible with the principles of democratic constitutionalism.

The entry into force of the Constitution led to the material repeal of these institutions as they contravened the principle of criminal legality, the prohibition of arbitrary detention (art. 17 of the Spanish Constitution), and the principle of cul-

pability. The 1995 reform of the Criminal Code (also known as the "Criminal Code of the democracy") definitively consolidated this transformation, replacing social dangerousness (Morenilla Rodríguez, 1978: pp. 317-338) with the strictly legal and limited concept of criminal dangerousness.

The transition from social dangerousness to criminal dangerousness (Terradillos Basoco, 1981) represents one of the most significant reforms in contemporary Spanish Criminal Law. While the former allowed for broad and diffuse punitive responses, unrelated to the commission of crimes and based on moral or social assessments, the latter is in line with the principles of the rule of law, limiting security measures to cases in which a punishable act and a reasoned judicial assessment of the risk of recidivism occur simultaneously.

Thus, the current system of security measures constitutes a constitutionally legitimate institution, aimed at crime prevention but anchored in strict material and procedural guarantees. Indeed, the dynamics that characterize Criminal Law, like any complex system interconnected with reality, are not limited to the most famous legal consequences that give it its name. There are not only penalties—or criminal sanctions—but also the punitive power of the state, in its most extreme manifestation, which contemplates other responses to threats that potentially victimize the community.

Security measures are among the most controversial and, in turn, "dangerous" instruments of the modern legal structure, in terms of constitutionally bound respect for personal freedom, dignity, and integrity. If Criminal Law has gone through very varied and heterogeneous periods, this is due to the challenges that society has had to face during different historical stages. While society has recognized the need to defend itself against attacks considered most serious, through penalties of varying scope, it has subsequently realized that repression and punishment are not satisfactory actions in themselves for resolving all kinds of social concerns. Consequently, some manifestations of illegality that constitute a criminally relevant act entail consequences other than penalties, no longer linked to the culpable nature but rather to the "dangerous" nature of the person who committed them.

In other words, the dangerousness manifested by the perpetrator of a criminal act, which materializes in a certain probability of the crime being repeated, receives a security-based response from the legal system, either as a substitute for or in addition to the penalty established by the Criminal Code.

As stated previously, the system of security measures established by the Spanish Criminal Code is only applicable in the case of a criminal act, i.e., an action or omission that, being classified as a crime[1], shows a level of culpability that is annihilated (non-imputable) or reduced (semi-imputable). The concept of "imputability" refers to the minimum requirement for a person to be declared "guilty" or culpable, usually referred to as *mens rea* in common law systems (Díez Ripollés, 2006: pp. 13-34). Being guilty, according to Spanish legislation, not only requires

[1]Regardless of the literal wording of the Code, the application of a security measure when the act is "justified" would constitute an unnecessary intervention by the state's punitive power.

"imputability" (the capability to understand and accept/want to do something), but also *dolus* (malice, fraud, or intention, depending on the case) or *imprudence* (negligence).

Following the amendments introduced by Organic Law 5/2010, which introduced a new non-custodial security measure into the Criminal Code (probation) (Cámara Arroyo, 2012), the model designed by the legal system has undergone a structural distortion in terms of protection against the most serious attacks. Thus, in certain specific criminal cases, it has been expressly established that supervised release—referred to in this case as "post-penitentiary" (Otero González, 2018: pp. 144-197; Díaz Sastre, 2011: pp. 45-56)—may also be imposed on individuals who are considered fully accountable and, therefore, guilty because they meet the regulatory requirements set forth in the Code (Otero González, 2015).

2. Context and Problem Statement According to the Criminal and Prison Legislation in Spain

The conditions for the application of the various security measures provided for in Article 96 of the Criminal Code have remained unchanged since the Code came into force. Specifically, for the application of the measures, Article 95 requires, at the same time, that the individual has committed an act classified as a crime and that, based on this act and the individual's personal circumstances, a prognosis of future behavior can be deduced revealing the probability of criminal recidivism, whether homogeneous (crimes of the same nature) or heterogeneous (crimes of a different nature).

In other words, it is a question of assessing the existence of post-criminal dangerousness, which is the necessary requirement for the application of the security measures regulated separately in Chapter II of Title IV of Book I of the Criminal Code. Before a dangerousness prognosis is made, and except in cases of post-prison probation, the application of any security measure must be preceded by an assessment of the circumstances that justify the exemption from criminal responsibility, in accordance with paragraphs 1, 2, and 3 of Article 20 (Andrés Pueyo, 2013; Morillas Cueva, 2021: pp. 645 et seq.).

As already noted, in order to be subject to a custodial or non-custodial measure, the offender must be declared exempt from criminal responsibility due to a lack of imputability, or guilty with (possibly) reduced punishment due to the application of one of the partial exemptions (*eximentes incompletas*) provided for in Article 21.1 of the Criminal Code. In both cases, whether full or partial exemption, the Code makes express and sole reference to the circumstances that exclude imputability[2], i.e., cases of mental abnormalities and disorders, temporary mental

[2]As this is a rather complex and controversial category, the inclusion of all these cases in criminal responsibility is controversial. For example, with regard to the exemption for alterations in perception, there are doubts as to its legal nature. Therefore, taking into account that what the exemption describes has greater potential than what is ultimately recognized in view of the overall regulation of the causes of "non-imputability", legal doctrine has put forward proposals *de lege ferenda* that go beyond criminal responsibility. Among these, the suggestion to broaden the assessment of these factual circumstances stands out, "not linking them strictly to the biological dimension of the senses—deafness, blindness—but opening them up to perceptual deficits in which various factors may be involved" (Alonso Álamo, 2024: pp. 22-23).

disorder, a state of complete intoxication or withdrawal syndrome, and alterations in perception from birth or childhood.

Following the entry into force of the new Criminal Code in 1995, with regard to the aforementioned hypotheses of non-imputability, the confinement of dangerous prisoners, who deserve to be deprived of their liberty, can be carried out—abstractly—in three different centers, depending on the conditions of the individual (González Collantes & Sánchez Vilanova, 2015). Article 96.2 of the Criminal Code includes, among the security measures involving deprivation of liberty, confinement in psychiatric centers, rehabilitation centers, and special educational centers.

However, beyond mere (and fruitful) theoretical insights, one of the biggest problems to be faced in criminal enforcement is the failure to implement what the legislator itself has designed. Thus, the Prison Regulations (Royal Decree 190/1996), which were approved in implementation of Organic Law 1/1979, on General Prison Matters, have not led to the creation of different centers and, therefore, have prevented the correct application of Criminal Law (González Collantes & Sánchez Vilanova, 2015). In some way, this has constituted a violation of the legality principle.

Through a curious terminological misalignment, Article 183 of the Prison Regulations provides that special centers for the enforcement of custodial security measures, imposed by the relevant courts, are prison psychiatric establishments or units. The formula seems all-encompassing, that is, applicable to all custodial measures mentioned in Article 96.2 of the Criminal Code, although two factors that influence its interpretation must be taken into account.

On the one hand, admission to such establishments or units is reserved for the persons referred to in Article 184 of the Regulations, i.e., detainees with psychiatric disorders[3], persons subject to the security measure of confinement in a prison psychiatric center[4] by application of the exempting circumstances established in the Criminal Code, and other convicts who, due to supervening mental illness (Vizueta Fernández, 2007), are subject to a security measure that must be served in a prison psychiatric facility or unit, in accordance with the provisions of the sentencing court.

On the other hand, with regard to the two remaining centers that appear in the Criminal Code (detoxification and special education), it is clear that the wording of Article 182 of the Regulations already implied that they had not been created. Indeed, assuming that the detention must be carried out in one of the existing (extra)penitentiary establishments (whether an ordinary or psychiatric center), the regulation allows for the possibility of authorizing attendance at specific treatments for drug addiction and other addictions in appropriate non-

[3]This is a broad clause that, to a certain extent, contrasts with the principle of determination that governs Criminal Law in the Spanish legal system.
[4]Article 22 of Royal Decree 840/2011, which establishes the circumstances for the enforcement of community service and permanent location in a prison, certain security measures, as well as the suspension of the enforcement of custodial sentences and the substitution of sentences, confirms that "When the judicial authority agrees to impose a security measure of confinement in a psychiatric prison establishment or unit, the provisions of Articles 183 to 191 of the current Prison Regulations shall apply."

penitentiary institutions, whether public or private, provided that an individual therapeutic and follow-up program is approved. At the same time, detention in special educational centers is pending the possible agreements that the corresponding Prison Administration may enter into with other Public Administrations or private entities, in accordance with the provisions of the last paragraph of Article 182.

Despite the requests of the Prison Supervision Judges, made at their regular meetings, the Prison Administration has not proceeded to create special educational centers. Instead, it has opted to convert some modules of ordinary prisons into special educational centers, providing them with specialized staff through NGOs specializing in the treatment of this type of person, as well as a specific living regime that allows the prison regime to be harmonized with the requirements of the care treatment required by the imposition of this type of security measure (Nistal Burón, 2012)[5].

The two analyzed factors already allow us to place the framework of these considerations in a highly unique situation. Generally, the punitive instruments provided for in criminal law should not be subject to the will—or lack thereof—of not only the prison administration but also private entities when it comes to agreeing on a collaboration agreement. Rather, they should constitute an internal obligation of the legislator itself, so that, while listing and codifying coercive instruments in the broad sense, it also guarantees their implementation and functioning.

Furthermore, with regard to individuals addicted to alcohol, drugs, or toxic and psychotropic substances, attendance at detoxification programs is, in the words of the Prison Regulations, merely a possibility, and it may be the case that, in the absence of available extra-prison centers, the inmate's condition may be delayed (or fail) in being adequately treated (Pardo Cebrián & Calero Elvira, 2015)[6]. In these cases, therefore, the anomaly endorsed by the legislator constitutes nothing more than a breach of the effectiveness of the state's *ius puniendi*, and its choice to provide the Code with a theoretically coherent but actually illusory system of sanctions is rather unfortunate (Massaro, 2021). In any case, the practical inconsistency underlying the application of these Criminal Laws is not an isolated case.

There are many instances in which, while the rationale of substantive Criminal Law is geared toward establishing certain principles, rules, or consequences, the rules governing its enforcement disregard those tendencies or needs (Morillas Fernández, 2022)[7]. However, to a certain extent, the instability of legislative self-

[5]The General Penitentiary Law establishes a mandate for the creation of specific centers for the enforcement of security measures, referred to as social rehabilitation centers (Article 11.c) in relation to Article 1, both of the same Law. Nevertheless, the only specific centers that exist are prison psychiatric centers. There are no detoxification centers or special educational centers in the prison network, despite the long period of time that has elapsed since the implementation of these measures by the 1995 Criminal Code.

[6]It should be borne in mind that timely functional analysis in medical or psychological treatment is a very important factor in preventing recidivism and, above all, in healing or improving the conditions of the illness or addiction from which the patient suffers.

[7]It suffices to analyze, for example, the case of the reform of crimes against sexual freedom, where there is a considerable difference between the "trends" declared by the legislator (which is the first index of the *ratio legis*)—addressing social alarm—and the effects achieved—multiple releases from prison.

references, and the consequent undermining of the ultimate purposes of Criminal Law, should come as no surprise. In this regard, as the most distinguished doctrine reminds us, we must not forget the political nature of the criminal legal system, which manifests itself as an instrument at the service of criminal policy, and is part of the general policy of the State (Morillas Cueva, 2013: p. 4).

Thus, as long as failure to comply with the obligations "imposed" by the legislator is only sanctioned at the political level, it will be difficult to find structural and definitive solutions, which may not be appropriate in the context of the instability caused by the constant interrelation between law and other sciences.

3. Criminal Dangerousness and Social Rehabilitation in the Framework of the Spanish Constitution's Mandate

The field of mental illness or disorders is particularly important for Criminal Law because it defines the different interventions required to achieve its ultimate goal. Accepting the broadest thesis, it should be reiterated that the criminal legal system is aimed at protecting the community from possible attacks which, in very broad (and perhaps inappropriate) terms, represent antisocial behavioral deviation.

In order to achieve the most effective protection possible, it is clear that intervention is necessary not only through "negative" coercive measures (e.g., deprivation of personal liberty) but also through "positive" actions (e.g., psychological treatment, activities for the benefit of the community, exchanges with society, etc.) that can facilitate the recovery of a socially appropriate motivational and behavioral standard.

In other words, when dealing with any individual who commits a criminal act, Criminal Law pursues a dual objective: on the one hand, to protect other members of the community through retributive "punishment," which in the most serious cases corresponds to isolation[8]; on the other hand, to protect the community through the rehabilitation of the offender, who will sooner or later be reintegrated into society. These requirements for social reintegration, which are already enshrined in the Constitution, require greater emphasis when the individual to be "rehabilitated" is not in a mental and psychological state that, by mere and deficient convention, we define as "normal"[9].

In these cases, "resocialization" actions must go through a preliminary or concurrent phase of treatment and assistance, which is carried out in accordance with the findings and indications of medical science and health in the broadest sense. Thus, both individuals who are "capable" of being found guilty (imputable) and those who, for whatever reason, are declared semi-imputable or non-imputable, may need to undergo a period of assistance from the relevant specialists. The re-

[8]In accordance with the guiding principles of Criminal Law, whose proportionality also informs the requirements of culpability.

[9]It should be noted that there is not, nor can there be, unanimous agreement on the definition of the concept of "normality". In this regard, different doctrinal positions have been put forward in relation to the basis of criminal responsibility. A person shall be criminally responsible if they have the minimum mental faculties required to either assess and understand the unlawfulness of the act and act in accordance with the requirements of the legal system, or to be motivated in their actions by normative mandates (Morillas Fernández, 2013: p. 19).

quirements for assistance and treatment are part of the much broader discourse on the motives and purposes that inspire criminal punishment.

The issue of punishment is undoubtedly a central and complex *leitmotif* of Criminal Law, which, given its different facets, should ultimately embrace a "multi-speed" approach (Silva Sánchez, 2006) capable of ensuring the genuine success of social reintegration. In other words, before proceeding with the application or design of any punitive system, it is worth asking whether the perpetrator of the crime deserves to be punished (*an*)—that is, whether their conduct indicates that they need to be socially reintegrated—and at the same time, whether the abstractly established penalty is adequate to achieve that end (*quomodo*)—that is, whether it is capable of achieving effective reintegration—(Giraldi, 2024b: p. 182).

In the case of mental disorders, the second question, inherent in the effective response to criminal behavior, would not have a satisfactory answer if only the repressive criminal punishment model were adopted, which certainly has its effects in terms of general and special prevention[10]. In fact, before the offender can be "rewarded" for their typical and unlawful action or omission, they must understand the wrongfulness of the act committed and its consequences.

Applying a sanction without the offender realizing—or being able to realize—its basis and scope is not only illogical but also uneconomical. For this reason, beyond cases of post-prison probation, the Spanish Criminal Code provides for two different possibilities, depending on whether or not the offender is capable of understanding the illegality of their action.

In the affirmative case (semi-imputable), it is possible to apply both a penalty and a security measure, in accordance with the provisions of Article 99 of the Criminal Code (vicarious system), whereby "the judge or court shall order the enforcement of the measure, which shall be credited towards the penalty." On the other hand, in the negative case (not criminally responsible), only one security measure among those provided for in the Code may be applied, in accordance with the criteria of proportionality that inform both the classification of crimes in the abstract and the determination of the specific legal consequences.

Both cases of concurrent punishment and security measures, and of exclusive application of the latter, are subsequent to the trial-prognosis of criminal dangerousness, which represents a *condicio sine qua non* for the establishment of security measures. The declaration of dangerousness, in the Spanish legal system, must take into account the limits established by the Criminal Code.

Specifically, a prediction of dangerousness (*in the future)* may be declared provided that a criminal act has been previously committed (Art. 95.1.1)[11] and, in addition, that there is a probability that the subject will repeat the same or other criminal conduct, according to the factual circumstances (relating to the act com-

[10]Even before the new Criminal Code came into force, in a study on the preventive nature of Criminal Law, the concept of dangerousness will not really acquire its own entity as an institution of modern Criminal Law until it is systematically linked to a consequence of the crime other than punishment: the security measure (Romeo Casabona, 1986: p. 17).

[11]There seems to be agreement that post-offense refers to the prior commission of an unlawful act, while criminal dangerousness refers to the probability of committing an unlawful act (Silva Sánchez, 2003: p. 126).

mitted *in the past)* and personal circumstances (relating to the offender *in the present*) (Art. 95.1.2).

Actually, beyond these limits, the Code avoids adopting a definition of dangerousness, the concept of which is derived from the various provisions that refer to it, directly or indirectly[12].

4. The Need for Treatment in Psychiatric Confinement: Beyond Penitentiary Models

On the basis of these premises, which are of interest to both Criminal Law and other psychosocial sciences, it seems appropriate to focus attention on the consequences of verifying a legally "extraordinary" mental state, which manifests itself in so-called psychological disorders or anomalies, or in mental disorders, the assessment of which may lead to a declaration of partial or total non-imputability.

The topicality and significance of the legal system's response to these cases of mental instability (or, rather, the need for treatment) are highlighted not only by the constitutional relevance of the protection of individual and collective health, which of course continues to underpin even the most obscure interventions of Criminal Law (Ronco, 2013), but also by its magnitude, as highlighted by recent trends in neuroscience (Peris Riera, 2023: p. 21)[13]. These trends, through commendable attempts to improve the legal and health treatment of the individuals concerned, run the risk of allowing the revival of organic or biological theories[14], now superseded by the multifactorial views that surround and define mental disorders (Pérez Arias, 2019; Pintado Alcázar, 2019). Precisely because of the importance of treating mental illness, also (and above all) in offenders, this work focuses on the response that the criminal justice system reserves for them.

Considering the critical issues that lawyers and medical experts have been pointing out from their respective areas of knowledge, it is proposed to implement, both theoretically and concretely, a process of overcoming the current models of psychiatric detention in prisons, with a view to creating mainly healthcare structures that appropriately encompass the security requirements and care needs of those who are both dangerous prisoners and patients. More specifically, emphasis will be placed on the many critical aspects that characterize the regulation, structure, and operation of judicial psychiatric hospitals, along with the parallel

[12]For this reason, the assessment of dangerousness must always be based on natural concepts and, of course, in concrete relation to the specific case (Borja Jiménez, 2017). The truth is that, with regard to this category, Spanish law only considers criminal dangerousness when it is manifested "in the commission of an act classified as a crime" (Art. 6.1 CP). Therefore, there is no response from Criminal Law in cases of dangerousness *ante delictum*, with the rules of other branches of the legal system being applicable (e.g., art. 763 of the Civil Procedure Law) (Sánchez-Calero Arribas, 2023; Farto Piay, 2023).

[13]Neuroscience, like artificial intelligence, has become a real driving force in the transformation and adaptation of law.

[14]With the empirical support of neuroscience, many authors have leaned toward neo-deterministic positions that are, however, difficult to reconcile with some postulates of criminal culpability (Gil Martínez, 2013; Ramos Vázquez, 2013). Advances in neuroscientific theories, also from a legal point of view, make it possible to identify the cerebral or psychological dysfunctions that affect a subject's ability to determine their behavior or understand its legal implications. However, it is worth pointing out the need to move toward intermediate or moderate models, given the risks of falling into neurological determinism and/or reductionism that could undermine the basis of legal-criminal culpability, as well as, in parallel, the need to avoid excessive dependence on science to the detriment of traditional normative principles (Rodríguez Ferrández, 2024: p. 51).

lack of specialized sections in ordinary prisons.

In this regard, the findings achieved by the Spanish legal system are quite relevant, especially from an international and comparative perspective. At the theoretical level, Spain has introduced significant changes in criminal legislation, which have contributed to reinforcing not only the culpable nature of the declaration of criminal responsibility, but also the need for any security measure to be imposed after the commission of a criminal act.

However, the results and objectives that are abstractly achievable within the framework of the current legal system have not been met. The markedly penitentiary nature of psychiatric establishments, together with the flexibility of existing regulations, has highlighted the lack of attention paid to the medical treatment—and, therefore, the social reintegration—of the "dangerous" individuals concerned. For this reason, it is necessary to consider moving beyond the current models of psychiatric prison confinement in favor of a mixed system, with a focus on healthcare management, that is adapted to the care and treatment needs of those suffering from mental illness.

The treatment of those suffering from mental disorders or mental illnesses is not a straightforward issue, given the hesitant positions not only of jurists but also of professionals working in the medical and psychiatric fields.

From a legal point of view, the contemporary era is perhaps not the most appropriate for strengthening and improving existing control and treatment systems, given the authoritarian and security-oriented impulses that characterize criminal policy today. In this regard, it is worth emphasizing that, on the one hand, Spanish legislation includes significant advances in the area of criminal dangerousness and, on the other hand, that the fascination with current political-criminal trends undermines the objectives and purposes pursued through the treatment of dangerous offenders.

It should be noted that not all countries in Europe have moved away from the structure of a "social" danger assessment, which cannot fully distance itself from a markedly interventionist Criminal Law. Indeed, as is the case, for example, in Italian legislation, among the requirements established for the application of security measures—even the most "invasive" ones—the requirement of a post-offense condition is not indispensable.

Specifically, while the first paragraph of Article 202 of the Italian Criminal Code provides as a general rule (or indication) for the application of security measures to "socially dangerous" individuals who have committed a criminal offense, the second paragraph provides for the possibility that, in specific cases, the same Criminal Law may establish exceptions[15]. Thus, in accordance with the provisions of Articles 49, last paragraph, and 115, last paragraph, of the same Code, a security

[15]Beyond those indicated below, it should also be noted that Italian law provides for other instruments of intervention in the event of a crime, known as preventive measures. The history of these measures, comparable to the Spanish Law on Vagrants and Delinquents of 1933, has raised numerous problems since the Constitution came into force (1948). In fact, not only does the Constitution omit any reference to this type of measure, but compliance with the requirements of legality and the presumption of innocence is highly controversial (Marinucci, Dolcini, & Gatta, 2023: pp. 945 et seq.; Della Ragione, 2020; Palazzo, 2017).

measure may be applied respectively to anyone who has committed an act mistakenly believing that it constitutes a crime (when in fact it does not), and to a person who incites another to commit a crime, when the incitement has not been accepted by the other person. These are what Italian doctrine (Marinucci, Dolcini, & Gatta, 2023: pp. 901 et seq.) refers to as "almost crimes" (*quasi reato*).

It should also be emphasized that, within the same liberal framework that characterizes the criminal system, the so-called preventive Criminal Law cannot be attributed to the security trends that seem to dominate the political scene. The retributive and authoritarian impulses that are largely dominating the social and political sphere run the risk of undermining the usefulness and coherence of the preventive criminal justice system.

Overcoming the repressive models of incarceration provided for by prison legislation must therefore move away from any moral (or moralizing) impulse and strictly adhere to the guiding principles of Criminal Law and the objectives that it seeks to achieve through minimal (but possibly effective) intervention. If the renewed tendencies of disinterest (or obstruction) surrounding the treatment of dangerous individuals are accepted, not only are the primary health requirements not met, to the detriment of the fundamental rights of the offender, but two different harmful results occur for the community.

Firstly, the level of protection afforded to the individual is reduced because repression without "positive" action is not capable of socially reintegrating an individual who will, sooner or later, return to society. Secondly, it causes considerable economic damage by depleting public economic and financial resources to implement a control system that ultimately replicates the same characteristics as ordinary prisons. In other words, if the application of custodial security measures is carried out in the same centers and in the same way as the corresponding sentences[16], it would be better to abandon a useless duplication of resources.

At the executive level, the Spanish prison system for enforcing security measures has several shortcomings, which have been thoroughly highlighted by the most attentive doctrine (Barrio Flores, 2021). Firstly, the inadequacy of the relevant regulatory framework means that the general rules relating to prisons are also applied to psychiatric centers, which have different scopes and objectives from ordinary structures. In the absence of a specific legal status for psychiatric centers, the recruitment of security and treatment staff is carried out in the same way as in other prisons, disregarding international recommendations which, on the contrary, in-

[16]In this regard, the positions of some authors who consider the place where the security measure is to be carried out to be irrelevant should be rejected. Whether a security measure is enforced—in prison or in a psychiatric center or unit within a prison—seems to be a minor issue from a practical point of view. Both places have treatment facilities: less refined in the former; more specific in the latter (Roldán Barbero, 2019). However, the shortage of specialized staff and the presence of inmates with very diverse criminal histories lead to contrary conclusions. See the 1998 Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on Involuntary Commitment to Psychiatric Institutions (available at: https://rm.coe.int/16806cd43b), which was particularly struck by the small number of qualified psychiatric nurses among the medical staff in psychiatric establishments and by the lack of qualified personnel to carry out social therapy activities (in particular, occupational therapists). The development of specialized psychiatric health training and a greater emphasis on social therapy will have a considerable impact on the quality of care. In particular, it will lead to a therapeutic environment less focused on physical and drug-based treatments (§ 43).

voke the need to reinforce the care-giving nature of psychiatric institutions[17].

Furthermore, the multidisciplinary teams provided for in Article 185 of the Prison Regulations are composed of psychiatrists, psychologists, general practitioners, nurses, and social workers necessary to provide the specialized care required by the inmates[18]. Inexplicably, their composition excludes the participation of lawyers and educators (Barrios Flores, 2007), thus favoring the implementation of a bureaucratic-penitentiary model far removed from the field of healthcare.

While in an ordinary prison, the Treatment Board, made up of different specialists, assumes decisive functions in the field of treatment and care, in prison psychiatric wards, it is a regimental body, the Management Council, that is responsible for this task (Barrios Flores, 2007), which is a clear violation of even fundamental rights. In fact, the Management Council operates solely on the basis of economic parameters, as it is purely a management body. It therefore neglects other primary needs, such as those arising from the constitutionally protected right to health care.

The complex and systemic nature of the problem (López Álvarez, Laviana, Saavedra, & López, 2021) is also evident in the lack of decentralization of the only two national judicial psychiatric hospitals (located in the provinces of Alicante and Seville) and in the overcrowding that characterizes them. As is usually the case, financial or administrative barriers often hinder the proper implementation of legislative plans, even the most worthwhile ones.

On the one hand, regardless of the provisions of Article 191 of the Prison Regulations[19], the location of the centers prevents patients from freely enjoying the leave granted to them. At the same time, family (re)integration—which is one of the cornerstones of treatment[20]—is hampered by the difficulty of traveling to the place of internment.

[17]See Report to the Spanish Government on the visit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment to Spain from September 14 to 28, 2020 (available at: https://rm.coe.int/1680a47a78). The philosophy of treatment for forensic patients housed in judicial psychiatric hospitals reflects the lack of institutional and functional separation between them and ordinary prisons. Consequently, this has an impact on the *ethos* and approach that prevail in judicial psychiatric hospitals. It is therefore not surprising that the treatment of forensic patients in both establishments consisted mainly of pharmacotherapy. The chronic shortage of psychiatrists, psychologists, nurses, and occupational therapists affected the level and quality of care provided to patients, resulting in poorly individualized treatment. In addition, the two judicial psychiatric hospitals did not have a specialized therapeutic approach specifically focused on differentiating modules based on the diagnostic profile of patients, their age, or the duration of the security measure (§ 150).

[18]It should be noted that the staffing levels at judicial psychiatric hospitals are not adequate, especially in relation to the inmate population. As of June 2, 2020, the staff assigned to the Alicante judicial psychiatric hospital consisted of seven psychiatrists, although only three psychiatrists were actually working there. There were four positions for psychologists. However, as of October 19, 2020, the actual staff consisted of two psychiatrists and two psychologists. There was not a single psychiatrist at the Alicante judicial psychiatric hospital (one had retired and the other two were on sick leave). As of December 8, 2020, only one psychiatry specialist was on duty (Barrio Flores, 2021: p. 33).

[19]The spirit of the Regulation, which is disregarded in practice, provides that in order to determine the location and design of psychiatric facilities, factors such as therapeutic criteria, the need to promote recreation and leisure activities for inmates, and the availability of sufficient space for the proper conduct of therapeutic and rehabilitative activities must be considered. Likewise, the Prison Administration shall ensure that the territorial distribution of prison psychiatric facilities promotes the rehabilitation of patients through their roots in their family environment, by means of the corresponding agreements and conventions with the competent health administrations.

[20]As established by the 2020 European Prison Rules (available at https://repositori.justicia.gencat.cat/bitstream/handle/20.500.14226/1038/Reglas_Penitenciarias_Europeas_Actualizacion_2020_ES.pdf), all inmates must be guaranteed a visiting regime by their families, third parties, and representatives of outside organizations (§ 24.1).

5. Balancing the Spanish Criminal Law Reaction to Social and Criminal Dangerousness

Spanish legislation on mental disorders or psychological abnormalities, and the resulting security measures, establishes criteria which, from an empirical point of view, favor the establishment of a coherent synergy between punishment and treatment, that is, sanction and assistance. The origin of the contrast between the two extremes of the pairing can be traced back to the needs that justify the exercise of criminal action.

With regard to individuals whose culpability is diminished by the existence of a partial exemption, the criminal sanction is imposed with the corresponding mitigation, but, in the case of dangerous offenders, its execution is not considered sufficient to guarantee that they will not reoffend. At the same time, in cases of non-imputability, the impossibility of making a judgment of reproach prevents the assessment of criminal responsibility and, therefore, leads to the acquittal of the offender.

If the defendant is dangerous, they are considered a risk to the community, as it would not be possible to ensure the necessary protection against possible future attacks that the individual might carry out again, either due to the conditions that led to their non-imputability or due to other circumstances. The link between Criminal Law and reality, although vulnerable due to the need for intermediation by other natural and applied sciences, has to a certain extent imposed the predisposition of a parallel system to criminal sanctions, which could make up for the lack of protection derived from the disproportionate—or unsuccessful—application of the penalties themselves[21].

Thus, the application (exclusive or joint) of security measures can have effects from two different perspectives. On the one hand, in relation to the security demands of the community, the aim is to ensure that dangerous individuals understand the reprehensible nature of their behavior and do not repeat it[22]. On the other hand, in relation to the offender himself, security measures—like penalties—manage to respect the guarantees of proportionality that inform criminal matters, in accordance with the legal requirements established by the constitutional mandate.

It seems appropriate to recall, in the context of this analysis, that the development of a theory relating to the principle of proportionality originated in Germany, based on its application in the national courts with regard to criminal penalties themselves. This led to the development of a "three-stage test", designed to

[21]The legal nature of security measures is controversial. For some, they represent a punishment, as they involve deprivation of liberty or rights applied within the framework of criminal jurisdiction and are linked to the prior commission of a criminal act. Penalties and security measures are different and operate on different levels, since the purpose of Criminal Law in relation to penalties and (criminal) law in relation to security measures is, despite the acceptance of the vicarious system and other peculiarities of its legal regulation in modern codes, very different. Security measures constitute an "evil" for the individual and therefore require a justification which, since it cannot be derived from guilt, lies in the requirement of compliance with a rule of proportionality (Sanz Morán, 2006: p. 1087; Silva Sánchez, 2003: p. 127).

[22]With the particularities that characterize different pathological states, modern Criminal Law relates the person to the action they carry out, their degree of awareness of their behavior, and their possibility of self-determination (Bravo, 2015: p. 43).

explain the peculiarities of the principle in order to ensure its application in practice.

This is a theory known as the "three-step theory"[23], which has enabled the principle to be applied both in the place where it originated and in the rest of Europe (Díez Ripollés, 2003). The first requirement on which the principle of proportionality is based refers to the suitability of the penalty. Suitability is a concept that logically has to do with the purpose for which the action is taken. In fact, a punitive measure can only be suitable if it is consistent with and leads to the fulfillment of the predetermined purpose. It is no coincidence, then, that in Spanish doctrine this requirement is also referred to as adequacy to purpose (Cobo del Rosal & Vives Antón, 1999: p. 84). In the case of penalties, it is very unusual for a sanctioning measure to be inappropriate to the purpose it serves. In fact, if the penalty were not suitable for ensuring the achievement of its objective, the legislative intervention from which it originates would already be inappropriate itself and could even be harmful to the achievement of the objectives of Criminal Law, i.e., ultimately, the protection of the individual and society against the freedom of each of us.

In the case of security measures, a different starting point must be considered, represented by dangerousness and its consequences. There is no doubt that, even in cases of dangerousness and in view of the possible future actions of offenders, the same protection requirements mentioned above confirm the adequacy of the criminal justice system to establish instruments of protection that deprive individuals of their rights.

The second of the three "steps" of German theory consists of the requirement of necessity of the penalty. This criterion for evaluating the penalty refers to its justification in relation to the criminal act that has been committed, taking into account that not all legal rights deserve criminal protection, by virtue of the principle of subsidiarity and minimum intervention that differentiates the criminal sphere from the rest of the legal system. As a general rule, the requirement of necessity is respected whenever the penalty refers to a criminal act whose scope undermines a specific legal right, whether directly or indirectly derived from the Constitution (Vives Antón, 2005; Álvarez García, 1991).

In the case of security measures, the repeal of Law 16/1970, on Dangerousness and Social Rehabilitation, meant the continuation of a system of "control" based on the prior commission of a criminal act, in accordance with the provisions of Articles 6.1 and 95.1.1 of the Criminal Code. For this reason, such measures can only be applied after the existence of damage to or endangerment of a legal right has been ascertained, and thus they comply with the requirements of necessity, provided that the measure agreed upon is the least burdensome among those appropriate for ensuring the social reintegration of the offender.

[23]The "three-step" theory posits the requirement identified by the German Constitutional Court to model the infringement of fundamental rights following the imposition of a penalty. This theory was developed in the *Apotheken-Urteil* case, aimed at analytically defining the various levels of limitation of rights (Scaccia, 2000: p. 285, *sub* note 243; Giraldi, 2020).

The third and final requirement of the principle is proportionality in the strict sense, also called "weighing" (pondering the duration of the penalty). This aspect emphasizes the need for a quantitative assessment of the relationship between the act committed and the penalty imposed. While the aspect relating to the *quomodo* of the penalty has been taken into consideration so far, in order to verify its conformity with the criteria of adequacy and necessity, nothing has been said about the *quantum* that should characterize the sanction.

This is an assessment that is dependent on and chronologically subsequent to the two "stages" analyzed above. In fact, before examining whether the duration of the penalty is proportionate to the offense committed in terms of gravity and severity, it is advisable to verify its suitability and necessity. In other words, it would be inappropriate to focus attention on analyzing the *quantum* of the penalty and then realize, at a later stage, that the penalty—even when weighed quantitatively—does not meet the basic qualitative requirements.

The balance between the severity of the penalty imposed and the significance of the conduct must be assessed while maintaining a balance between the various interests involved. The *quantum* of the penalty to be imposed fully reflects the political and social value inherent in the rule that has been infringed and must therefore respect a certain balance between the sacrifices imposed on the individual and the advantages gained by the community.

In the case of security measures, the Criminal Code resolves the problem of weighing up the options by applying Article 6.2: the measures imposed may not exceed the duration of the imprisonment that would have been imposed if the person had been found "imputable" and, consequently, guilty. According to case law, the duration of the imprisonment must be calculated according to the maximum penalty that can be applied in abstract terms (the maximum duration established by the law). Indeed, it would be illogical to require that the maximum penalty correspond to the maximum eventually chosen by the judge for the specific case (within the limits established by the law), since in some cases proving somebody's culpability in a trial ends up overlapping with the prognosis of dangerousness[24].

The case at hand, relating to the most serious security measure, which corresponds to psychiatric confinement, even though it may meet the requirements of legality and proportionality, is inadequate in terms of specific action, where the lack of human resources, instrumental assets, and detailed regulation undermines the scope that such centers should have. In fact, the centralization of the management of these centers, together with the shortage of specialized personnel to provide care to a large number of inmates, makes existing judicial psychiatric hospitals an insufficient measure—sometimes unsuitable, according to the criteria of proportionality—to achieve their purpose. Decentralizing or making facilities less crowded, for example, could make the confinement more "suitable", as it would

[24]The two judgments of culpability and dangerousness reveal a chronic fragility, perhaps due to the intrinsic bias that leads the interpreter to be influenced by assuming dangerousness to be an indicator of greater guilt. Consider the difficulty of conceiving of an unjust person who is not guilty, as pointed out by the German doctrine of personal injustice (Lampe, 1967: p. 111; Otto, 1975: pp. 539 et seq.).

facilitate the reintegration of individuals into society, which is a constitutionally mandated goal.

6. The Essential Transition to a Shared Management Model in Psychiatric Criminal Confinement

The progress made by Spanish legislation on security measures and its implementation does not go hand in hand. The repeal of the Law on Dangerousness and Social Rehabilitation, the establishment of a post-offense criminal dangerousness regime, the setting of maximum limits on the application of measures, and the adoption of a vicarious system undoubtedly represent successes for the Spanish legal system. Indeed, in the context of the constant move towards a truly guarantee-based Criminal Law, the above-mentioned aspects have the effect of significantly limiting the discretion of the state's punitive power.

However, when it comes to their specific application, the instruments developed leave much to be desired, as they do not guarantee the achievement of genuine and effective prevention, while at the same time undermining respect for the rights, including fundamental rights, of prisoners.

In this paper, the proposal to improve existing structures will be developed through an analysis of the model of psychiatric hospitalization implemented in Italy, where a few years ago the process of converting the former *Ospedali Psichiatrici Giudiziari* (OPG: judicial psychiatric hospitals) into *Residenze per l'Esecuzione delle Misure di Sicurezza* (REMS: residences for the execution of security measures) began.

The creation (or conversion) of these establishments has meant, for the Italian legal system, a radical change in the treatment of "socially dangerous" mentally ill patients (as defined by the Criminal Code itself). On the one hand, the "sanitization" of the REMS has led to beneficial results in terms of the treatment (or improvement) of the mental disorders of the inmates and the requirements for special prevention. In this context, the term "sanitization" refers to the transition from essentially prison-based management of facilities to at least shared management, where healthcare needs are prioritized (healthcare-oriented). On the other hand, there are still conflicting and questionable aspects in the implementation of security measures in the new establishments.

The doctrinal debate has led the legislator to appoint specific committees to study the possibility of reforms[25], especially considering that the response to dangerousness provided by the Italian Criminal Code is quite anachronistic[26]. Like-

[25]See the report of the Committee chaired by Prof. Dr. Marco Pelissero (*Commissione per la riforma del sistema normativo delle misure di sicurezza personali e dell'assistenza sanitaria in ambito penitenziario, specie per le patologie di tipo psichiatrico, e per la revisione del sistema delle pene accessorie*: Commission for the reform of the regulatory system of personal security measures and healthcare in prisons, especially for psychiatric disorders, and for the revision of the system of accessory penalties), appointed on July 19, 2017. Available at: https://www.giustizia.it/giustizia/it/mg_1_36_0.page?contentId=COS119876 (accessed October 7, 2025).

[26]We cannot ignore the fact that the Italian Criminal Code dates back to 1930. Although it has been amended and reformed on numerous occasions, the rationale behind its principles and provisions is now completely anachronistic. For this reason, a large section of legal scholars is calling for a comprehensive recodification process to be carried out, rather than making *ad hoc* amendments to its provisions. To date, many proposals to reform the general part of the Criminal Code have been unsuccessful, although controversial amendments have recently been introduced (Barletta, 2024).

wise, the Italian Constitutional Court has ruled in its recent decisions to set certain limits and criticisms that deserve to be considered when formulating a proposal to remodel the structures and rules currently in place in Spain.

In this context, considering the impossibility of eliminating security measures (Barrio Flores, 2021: pp. 35-36), it is necessary to rethink the structure and functioning of Spanish psychiatric centers that house individuals subject to security measures involving deprivation of liberty. In this regard, taking into account the recommendations of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, forensic psychiatric establishments, such as judicial psychiatric hospitals, should be fully separated from the prison service in institutional and functional terms, given the different spirit and profile of the staff that characterize them.

Therefore, in the opinion of the Committee, these hospitals should be under the responsibility of the National Health System, which is better placed to provide the support needed by both patients and staff. In this regard, it should also be noted that there is an urgent need to increase the presence of psychiatrists, psychologists, and occupational therapists in both hospitals (in Alicante and Seville)[27]. However, *de lege lata*, it is not easy to uphold interpretations that allow psychiatric centers to leave the prison environment.

Indeed, without legislative change, it is difficult to support the positions of those who, emphasizing the literal wording, assert that the Criminal Code does not specify that the internment of dangerous individuals must be carried out in a prison, but rather in a psychiatric center (Etxebarria Zarrabeitia, 2023: p. 99). Although there is no doubt about the term ("psychiatric") used in Article 96.2.1 of the Code, the same text indicates that this is a measure involving deprivation of liberty and, therefore, the intervention of the Prison Administration cannot be ruled out *a priori*.

Furthermore, the Italian experience of "sanitization" of judicial psychiatric hospitals, which will be discussed below, perhaps demonstrates the desirability of a mixed system, where psychiatrists do not also have to be responsible for managing individual and collective security. In order to study a model for reforming the current prison psychiatric system, it may be useful to compare it with the international landscape[28]. In particular, as noted previously, with the recent replacement, in the Italian legal system, of the former *Ospedali Psichiatrici Giudiziari* (OPG) with the new (and still problematic) *Residenze per l'Esecuzione delle Misure di Sicurezza* (REMS).

Following the completion of the reform aimed at replacing civil mental hospitals (Italian Law 180/1978, known as the *Legge Basaglia* after the psychiatrist who promoted it), the Italian Constitutional Court issued a harsh ruling in its renowned judgment No. 253/2003[29]. Specifically, it stated that judicial psychiatric hospitals (formerly known as "judicial asylums") were the only "closed" establish-

[27]See p. 8 of the Report to the Spanish Government on the visit to Spain by the CPT from September 14 to 28, 2020 (available at https://rm.coe.int/1680a47a78).

[28]On the regulation of criminal psychiatric detention in the United Kingdom, France, and Germany, cf. Barrio Flores, 2021: pp. 27 et seq.

[29]Judgment of the Italian *Constitutional Court* No. 253/2003 (ECLI:IT:COST:2003:253), available at http://www.cortecostituzionale.it/.

ments intended for the treatment and rehabilitation of mental illness, also emphasizing that the peculiarities of these pathologies in dangerous individuals require therapeutic intervention measures of the same nature and scope as in other cases of non-dangerous patients.

Thus, assessing the personalistic principle underlying Article 2 of the Italian Constitution, it affirmed that psychiatric detention security measures must pursue both the objectives of containing social danger and providing care for the patient. In the words of the Italian Constitutional Court, a system that pursued only one of these two objectives could not be considered constitutionally admissible[30]. The progressive response of the Italian legislature dates back to 2008, when the Prime Minister ordered the transfer of powers in the area of prison health care from the OPGs to the Ministry of Health and, specifically, to the corresponding regions (health care being a regional matter).

However, the real revolution did not come until the entry into force of Decree-Law 211/2011 and the executive regulation of October 1, 2012, adopted by the Ministry of Health together with the Ministry of Justice. Article 3-*ter* of the aforementioned Decree-Law, with a view to the executive regulation on the replacement of OPGs, establishes the following mandatory guidelines: a) exclusive health management of the new establishments; b) perimeter security and external surveillance, if necessary in relation to the conditions of the inmates; c) as a general rule, assignment to the new facilities of individuals who come from the regional territory where the structure is located.

Annex A of the 2012 executive regulation (Ministerial Decree) outlines the internal management of the new REMS, placing sole responsibility for its implementation with the regional health authorities, while the Ministry of Health retains central oversight. This annex specifies the essential structural, technological, and organizational criteria required for the effective operation of the centers and for the realization of their treatment and rehabilitation goals.

The regulation mandates that structural standards align with sector-specific regulations, including earthquake, fire, and acoustic protection, as well as ensuring electrical safety and the continuity of services. It also requires measures for occupational risk prevention, the elimination of architectural barriers, waste management, and appropriate microclimatic conditions. The centers must feature accessible green spaces that adhere to safety standards based on the type of boarding school.

With regard to housing, the regulation sets a maximum capacity of 20 places per center, with accommodations consisting primarily of single or double rooms, although exceptions for triple or quadruple rooms are allowed, provided that more than 10% of the rooms are single. Each room must have a dedicated bathroom for every two residents, equipped with a shower, and these facilities must be separated from the living areas. Furthermore, at least one bathroom must be spe-

[30]"A system that responded to only one of these purposes (and thus to that of controlling the "dangerous" patient), and not to the other, could not be considered constitutionally admissible" (§ 2 of the "*Considerato in diritto*" section of judgment no. 253/2003 of the Italian Constitutional Court).

cifically accessible to individuals with physical disabilities.

The regulation also stipulates a series of requirements for common areas, which must include a kitchen, pantry, laundry, living and dining rooms, as well as designated spaces for work activities, storage, and staff facilities. This includes separate rooms for clean and dirty materials, staff changing rooms, bathrooms, and spaces for the temporary storage of personal items belonging to patients. Furthermore, provisions are made for areas dedicated to family and legal visits, and for designated smoking zones.

For medical and therapeutic activities, specific rooms are mandated, including medical examination rooms, a doctor's office for team meetings, spaces designed for group activities, and facilities for psychological or psychiatric consultations. In addition, rooms for legal and administrative matters are required.

Technologically, the regulation mandates that centers be equipped with all necessary healthcare devices and safety systems. This includes emergency equipment such as defibrillators, manual ventilation units, and wheelchairs for disabled patients. The centers must also have the necessary tools for psychodiagnostic assessments and the detection of care needs, alongside systems to support leisure, educational, and rehabilitation activities. Security measures, such as locking systems, alarms, and cameras, are also specified.

In terms of staffing, the regulation outlines the requirements for a multidisciplinary team to manage the care of up to 20 patients. This includes a team of nurses, social health technicians, psychiatrists, psychologists, educators, social workers, and administrative assistants, with provisions for staff presence during night shifts and holidays. The overall responsibility for the unit is entrusted to a psychiatrist Medical Director.

Finally, the regulation emphasizes the importance of clear work organization through guidelines that define the roles and tasks of each professional, patient admission procedures, clinical and psychosocial evaluations, the creation of individualized treatment plans, and the management of emergency situations. It also establishes procedures for coordination with other healthcare services and local authorities, particularly for ensuring the social inclusion of patients after their hospitalization ends, and outlines the process for requesting police intervention in security-related emergencies.

The catalog of requirements established by regulation has led to a significant delay in the closure of the old OPGs, which, ignoring the deadline set by law (March 31, 2015)[31], only occurred in February 2017 (Piscopo, 2023: p. 446; Laurito, 2017: p. 285). The positive results of implementing a new model, based on the principles of "sanitization" and "territorialization", which put police and prison interventions in the background, are clearly evident in the statistics published by the National Guarantor for the Rights of Persons Deprived of Liberty in its 2021 report.

[31]The date indicated is provided for in Article 1.1(a) of Italian Decree Law No. 52/2014 and is the result of repeated postponements of the closure of judicial psychiatric hospitals, which was initially scheduled for March 31, 2013.

The official study published and presented to the Italian Parliament highlights the very low percentage of readmissions to REMS after inmates were granted ordinary supervised release permits, or *licenza finale esperimento* (a 6-month permit provided for in Article 53 of the Italian Prison Law[32], granted at the end of detention—in this case, internment—to "test" the subject's recovery). In fact, out of a total of 650 graduates in 2018, 2019, and 2020, only 61 patients (9.38%) have been readmitted to REMS (Giraldi, 2024a: pp. 110-111).

However, the success of the transformation of the former OPGs must be considered partial. It is, rather, an unfinished attempt by the Italian legislature, which has once again sidestepped the doctrinal calls for a comprehensive recodification of the general part of Criminal Law (Donini, 2018). The basis for the assessment of social dangerousness, which is the prerequisite under Italian law for the application of security measures, remains highly controversial, despite the regulatory changes of 2014 (Pelissero, 2014) and the guidance provided in Constitutional Court ruling no. 186/2015, and lends itself to opening the door to reckless neopositivism (Massaro, 2015). Beyond these purely dogmatic problems, the effectiveness of the new REMS continues to be hampered by systemic critical issues arising from the apparently antithetical coexistence of treatment and surveillance measures (cure and custody) (Bertolino, 2024; Mezzina, 2022; Pellegrini, 2021; Nicolò, 2021).

Firstly, the establishment of a perimeter security system has meant that each REMS has had to hire external staff to carry out additional surveillance activities. Secondly, the system of chronological assignment of patients disregards any assessment of the intensity of the social danger they pose. Thus, it may be the case that, while individuals who have committed minor crimes are admitted to the residence, those responsible for more serious crimes are on the waiting list.

Furthermore, in this regard—and this is the main problem with implementing theoretical models that are not accompanied by adequate public spending—it is essential to emphasize the limited capacity of REMS. Whether due to the limited number of places required to ensure effective treatment or the insufficient creation of facilities in different regions, these systemic and persistent problems have been identified.

On the one hand, the limited capacity of the residences favors the heterogeneity of the patients admitted, which means that people with very different levels of dangerousness coexist, making it difficult to treat them together. On the other hand, the lack of places has led to the need to create a waiting list for admissions, which in many cases means temporary imprisonment. Likewise, due to the fragile state of the Mental Health Departments, waiting lists have been instituted for discharges to ensure that extra-penal health care services can take care of individuals who, upon leaving the psychiatric center, still exhibit worrying symptoms of dangerousness.

[32]Italian Law No. 354/1975, on "*Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà*" (Rules on the prison system and the enforcement of measures depriving and restricting liberty).

Precisely because of the problems mentioned above, the European Court of Human Rights recently intervened with its ruling of January 24, 2022 (Sy v. Italy), as did the Italian Constitutional Court with its resolution no. 22/2022. In the first case, the lack of places in the REMS had unlawfully led to the prolongation of detention in ordinary prisons. In the second case, on the other hand, an individual had been released who, for health and public safety reasons, should have remained in a psychiatric center (Fiore, 2023).

7. Results and Future Perspectives

Throughout this work, it has been shown that, except in cases of post-prison probation, the application of any security measure must be preceded by an assessment of the circumstances that justify the exemption from criminal responsibility or its reduction in terms of culpability, in accordance with paragraphs 1, 2, and 3 of Article 20 of the Spanish Criminal Code.

Following the entry into force of the Criminal Code of 1995, in cases of mental abnormalities or disorders, the internment of dangerous prisoners can be carried out, in abstract terms, in three different centers: psychiatric centers, rehabilitation centers, and special educational centers (Article 96.2 of the Criminal Code). However, the current Prison Regulations, approved in implementation of Organic Law 1/1979, on General Prison Matters, have prevented the correct application and implementation of the Criminal Law.

In the context of this peculiar situation, given the importance of the treatment of mental illness, the work has focused on analyzing the most serious consequence established by the legal system in cases where sick individuals have externalized their dangerousness by committing a criminal act. Assuming that the requirements of proportionality that also inform Criminal Law regarding dangerousness are respected, emphasis has been placed on the fact that, despite the progress made by Spanish legislation, its design and implementation do not go hand in hand.

Thus, the structure and functioning of the existing prison psychiatric centers (in Alicante and Seville) continue to fail to respect even the fundamental rights of inmates, due to their centralized location, overcrowding, and lack of staff who can effectively meet the needs of patients. For these reasons, it has been deemed appropriate to formulate a proposal to move beyond the strictly prison-based model for the detention of dangerous prisoners whose mental illness requires adequate treatment, with a view to their social reintegration and the protection of the community.

From a *de lege ferenda* perspective, without allowing political and social trends to revive purely police control, a model of "sanitization" and "territorialization" of judicial psychiatric centers has been analyzed, the advantages and critical issues of which can help prevent the problems that could arise from the formulation of a reform in the Spanish legal system. Specifically, this is the model of psychiatric internment implemented in Italy, where, in February 2017, after a considerable

delay, the process of converting the former *Ospedali Psichiatrici Giudiziari* (OPG) into *Residenze per l'Esecuzione delle Misure di Sicurezza* (REMS) was carried out.

The implementation of these establishments, whose management is entrusted entirely to the health authorities, has involved a significant effort that, to a certain extent, has been a partial success. In fact, although the internment has been geared toward treatment and care needs, there are some systemic difficulties arising from the lack of places, insufficient staff, lack of security services, and the delicate situation of the Mental Health Departments that should collaborate with the REMS in the admission and discharge of "socially dangerous" inmates.

These concerns, together with the continued imprisonment of a large number of individuals who should be admitted to the REMS, have formed the basis for the criticism that has been highlighted in the 2022 rulings of both the European Court of Human Rights and the Italian Constitutional Court. To overcome these critical issues, proposals have been made to modify the criminal discipline of social dangerousness and at the same time, there has been an insistence on the need to remodel the current REMS.

To this end, with a view to a possible reform to be developed in the Spanish legal system within the framework of the United Nations' Sustainable Development Goals, the following aspects should be noted.

Firstly, it must be considered that the system of psychiatric centers (whether entirely health-related or mixed) cannot function properly until ordinary prisons are equipped with the structure of treatment and assistance activities aimed at avoiding the mass admission or transfer to non-prison establishments.

Secondly, the requirements for individuals to be admitted to psychiatric centers should be defined in greater detail through collaboration with local mental health centers, distinguishing—in accordance with the criteria of proportionality—between those who suffer from mental disorders and those who, on the other hand, are affected by behavioral deficits.

In addition, it is essential to decentralize psychiatric facilities so that the social and family reintegration of dangerous individuals can be carried out appropriately. In this regard, it is necessary to invest sufficient resources to ensure that the places offered are adequate to guarantee that unsustainable waiting lists, which are dangerous for the community, are not formed. For example, the reform should implement the creation of more facilities in each region or province, all with a limited number of places, to ensure adequate and reasonable management.

Finally, it would be highly appropriate to establish the obligation of regular meetings between all those involved in the process of treatment, care, and supervision of inmates. At the same time, it is essential to create *ad hoc* training modules for the staff of psychiatric centers and, likewise, for sentencing judges and prison supervisors, with the aim of preventing the transformation of establishments and the use of more ethereal language (from judicial psychiatric hospitals to healthcare-oriented centers) from implying a constant green light when deciding on the application of one security measure or another.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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