Habeas Corpus: Supervisory Mechanism of Involuntary Commitment

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Acknowledgments: The authors would like to express their gratitude to Judge of Law Tiago Santos for reviewing the content of this article, and to Digital Marketing Developer Flávia Cid Nunes, for the technical illustrations.

Abstract

Habeas corpus is a measure available to any citizen in the enjoyment of their political rights, and to patients with psychiatric illness, who may request it to the court of the area in which the patient is detained. This procedure aims to put an end to illegal deprivation of freedom, and it includes two types of *habeas corpus*: preventive and liberatory. *Habeas corpus* and the appeal of the decision are two supervisory mechanisms of involuntary commitment, which is regulated by the Portuguese Mental Health Act. This article provides a brief description of the provisions and mechanisms regarding the application of involuntary commitment, as well as its supervisory mechanisms. In the clinical psychiatric evaluation conducted, it was concluded that the provisions for the commitment and involuntary treatment were not fulfilled. In summary, it is worth noting the existence of two supervisory mechanisms of involuntary commitment – appeal of the decision and *habeas corpus,* essential for ensuring the rights of citizens.

Keywords: *Habeas corpus*, Involuntary commitment, Portuguese Mental Health Act.

Introduction

1. Involuntary commitment

In Portugal, involuntary commitment (IC) is regulated by the Portuguese Mental Health Act (PMHA), Law n.º 36/98 of July 24. Although it regulates IC, the PMHA was developed with a broader scope, aiming to establish the general principles of mental health policies on a national level, which include: providing care in the community, selecting the least restrictive treatment setting possible, enabling professional multidisciplinarity, implementing the commitment in general hospitals, developing psychosocial rehabilitation programs in the community and establishing partnerships with the mixed participation of the ministries of health, social security and employment (Xavier & Carvalho, 2007).

Subsequently, these aspects were complemented by Decree-law n.º 35/99, of February 5, and included in the latest National Mental Health Plan 2007-2016 (Ministry of Health, 2008).

1.1. Provisions.

In Portugal, IC always entails formalization by a court, and is only allowed if (and when) it is the sole way to apply necessary treatment, and it should be replaced by outpatient care as soon as possible.

In order to apply for IC, it is necessary that one of the following two conditions or provisions (Article 12, PMHA) be confirmed:

"*A person suffering from a serious mental disorder, who by virtue of this condition creates a situation of danger to legally protected rights of relevant value, whether their own or those of others, of a personal or patrimonial nature, and refuses to*

submit to the necessary medical treatment may be involuntarily committed to an appropriate institution";

"*A person suffering from a serious mental disorder who lacks the necessary discernment to evaluate the meaning and implications of consent, may be involuntarily committed in cases where the absence of treatment can result in a significant deterioration of their condition*".

1.2. Eligibility to petition for commitment.

IC may be petitioned by (Article 13, PMHA):

a) *Legal representative of the person suffering from a mental disorder* (ex: parents, legal guardian of the minor, guardian of an interdicted person, …)
b) *Any person eligible to apply for their interdiction* (ex: spouse, curator of a disabled person, any successive relative)
c) *Public health authorities* (director-general of health, regional health delegates, county health delegates);
d) *Public Prosecution Service*;
e) *Any physician, during a (medical or surgical) hospital stay or in consultation, may communicate to the competent public health authority;*
f) *Clinical director of the institution where voluntary commitment occurs.*

The application for commitment (Article 14, PMHA) should be made in writing without special formalities, addressed to the competent court with the description of the facts upon which the request for commitment is made, and, if possible, it should be accompanied by elements which can aid the decision of the judge (ex.: psychosocial and psychiatric reports).

The application is addressed to the district judge of the area of residence of the committed patient, and the entity competent for the proceedings is the local criminal

court of the respective area or, in its absence, the general competency court, according to the Decree-law n.º 86/2016, of December 27.

1.3. Application procedures.

IC may be initiated in two ways: by common process or by emergency commitment.

Common IC is used when the provisions of Article 12 of the PMHA are verified and it does not require resorting to emergency commitment (Figure 1). If IC is decided, the commitment is executed by the Psychiatry Department of the committed patient's area of residence, if necessary with the aid of the police in order to escort the committed patient to the hospital.

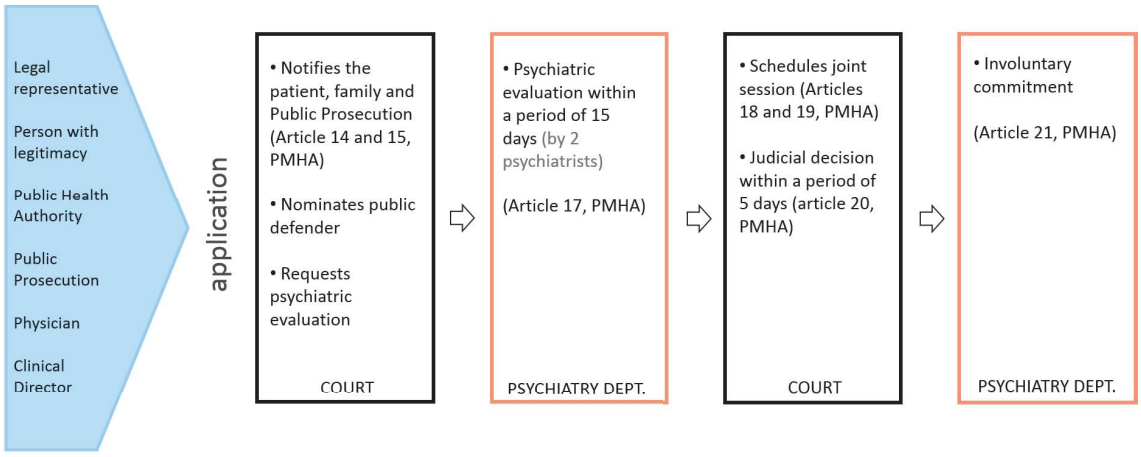

Figure 1. Procedures for the application of involuntary commitment by common process, according to the PMHA.

Emergency IC is used when there is imminent danger to legally protected values, particularly due to an acute deterioration of the person's state (Article 22, PMHA), and the provisions of Article 12, paragraph 1 of the PMHA are verified (Figure 2).

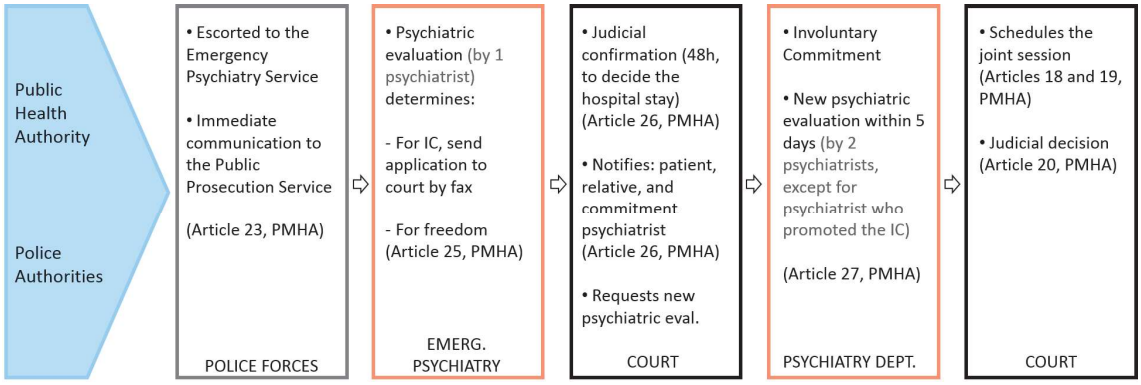

Figure 1. Procedures for the application of involuntary commitment, according to the PMHA.

The location of the IC is usually in specialized psychiatric services, according to the patient's area of residence.

The duration of IC is not defined in the PMHA, however, it should be immediately suspended in cases where the patient voluntarily accepts the treatment, and this replacement by voluntary care, or by involuntary outpatient care, should be communicated, by the commitment psychiatrist or clinical director, to the court (Article 33, PMHA).

The commitment ceases by clinical decision when the provisions which gave rise to it terminate (clinical discharge is given by the clinical director of the institution in which the patient is committed) or by judicial decision (Article 34, PMHA). It is mandatory to conduct a judicial review two months following the beginning of the (common or emergency) commitment, or on the decision to extend it (Article 35, PMHA).

During the commitment, the patient's right to freedom is restricted, but their remaining rights stay unchanged (ex.: right to vote, communication with family, visitation, access to lawyers and authorities, sending and receiving correspondence, religious worship and confidentiality).

2. Supervisory mechanisms of involuntary commitment

During all the proceedings inherent to IC, the rights of the patient are ensured, and it is worthy of mention that there are two mechanisms for the patient to contest the IC decision:

2.1) *Habeas corpus.*

2.2) Appeal the decision.

2.1. *Habeas corpus.*

Habeas corpus is an expeditious procedure with the purpose of preventing or terminating the illegal deprivation of a person's freedom. In Latin, the expression means "*you may have the body*", and it emerges to ensure freedom as a fundamental right, recognized in the Constitution of the Republic of Portugal of 1976, last reviewed in 2005 (8th amendment made by Law n.º 1/2005, of 12.08).

Habeas corpus is included in the general law – Code of Criminal Procedure (CCP) (Article 219 et seq., CCP) and in a special law - PMHA (Article 31, PMHA). Therefore, the PMHA is applied and, in cases that are not contemplated therein, the CCP is applied, in a subsidiary manner, according to the provisions of Article 9 of the PMHA (Figure 3), with the existence of two types of *habeas corpus*: preventive and liberatory.

Preventive *habeas corpus* occurs when a person is threatened with the deprivation of their freedom, and interposes this procedure in order to not have this right withdrawn.

Liberatory *habeas corpus* occurs after detention, in which the detainee requests the return of their freedom, when their situation of detention offends the right that is constitutionally guaranteed to them.

In the PMHA, *habeas corpus* by virtue of illegal deprivation of freedom is a measure available to a *person suffering from a mental disorder* committed under an involuntary regime, who may petition the court of the area where they are committed for immediate release. This supervisory mechanism allows to react against the illegal deprivation of freedom resulting from the judicial decision. Its provisions include:

a) A period of 48 hours having elapsed since the deprivation of freedom, in order to issue the decision regarding whether detention should or should not be maintained,

b) The deprivation of freedom was conducted or ordered by an incompetent entity,

c) The deprivation of freedom was motivated outside the cases or conditions stipulated in the PMHA.

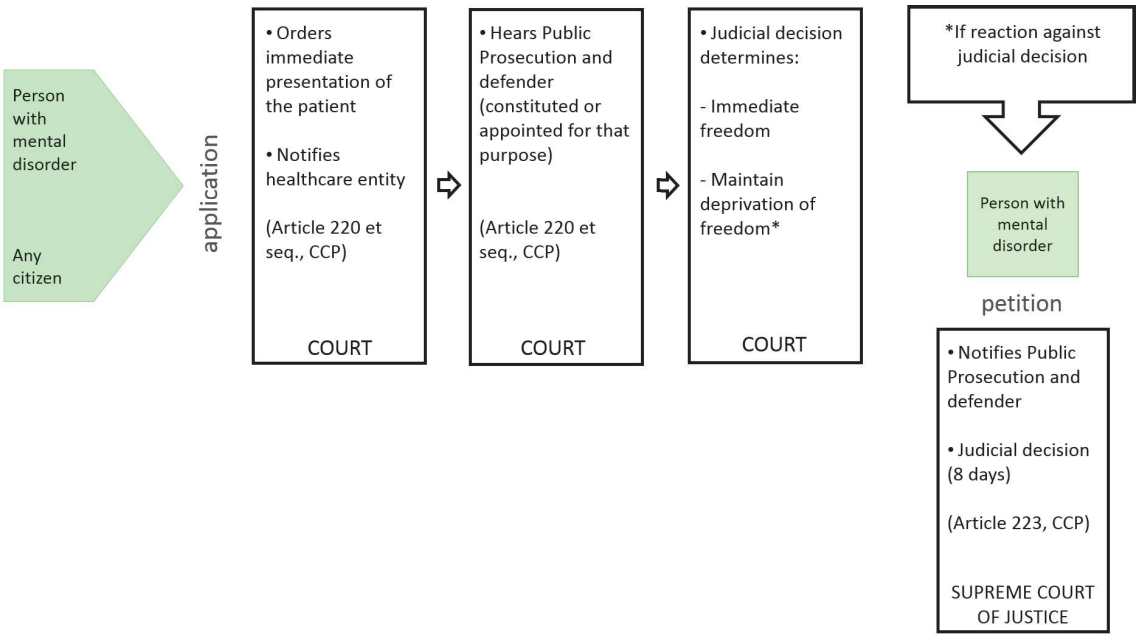

Figure 1. Procedures for the application of *habeas corpus*, according to the CCP.

In these cases of *habeas corpus*, exemption from fees is maintained, and "*any authority that illegally obstructs the submission of the application or its referral to the competent court*" is punishable by a penalty provided for in the Code of Criminal Procedure (Article 220, paragraph 3, CCP).

In case of a reaction against the judicial decision, the petition is sent to the President of the Supreme Court of Justice (Article 223, CCP).

2.2. Appeal the decision.

In addition to the mechanism of *habeas corpus*, the PMHA includes the possibility to appeal the decision (Article 32, PMHA) to the competent Court of Appeal (Coimbra, Évora, Guimarães, Lisbon and Oporto).

According to Article 9 of the PMHA, the appeal of all decisions is maintained, with the PMHA referring to Article 399 et seq. of the CCP, which states that judicial decisions can be subject to appeal, with the exception of situations in which the impossibility to appeal is expressly stated.

The following may appeal the IC decision: the person being committed, his or her public defender, relatives, the Public Prosecution Service, the legal representative of the person being committed and public health authorities (Article 13, PMHA).

Practical case

In addition to the description of a practical case of applicability of *habeas corpus* as a supervisory mechanism of IC, bibliographic and internet searches were conducted using the keywords "*habeas corpus*", "involuntary commitment", "portuguese mental health act".

1. Practical case: applicability of habeas corpus

Identification: 38-year-old examinee, female, single, teacher, committed to a psychiatry service.

Reason for evaluation: The clinical psychiatric evaluation was requested by the court to the then-named National Institute of Forensic Medicine, alleging that, during the proceedings, the exemption of the psychiatrists who initiated the IC had been questioned.

Summary of clinical history: The examinee had been attending psychiatric consultations since the age of 18, due to reactive symptomology after the loss of her mother. For the last two years, because of a conflictual relationship maintained with her assistant psychiatrist, the examinee proceeded to file a public complaint against him. Afterwards, the psychiatrist, alleging a diagnosis of Emotionally Unstable Personality Disorder *(F60.3, ICD-10) with delusional ideation of persecutory content and lack of insight,* claims social dangerousness, due to which the examinee should be subject to clinical psychiatric evaluation.

As a result of this evaluation, the examinee is involuntarily committed to a mental health institution. Three days after being committed, the examinee made the application for *habeas corpus* by virtue of considering it to be an illegal deprivation of freedom. The judicial decision was favorable to the application, ordering the immediate release of the examinee and the request for the clinical psychiatric evaluation that motivated this exposition.

Since then, due to anxious symptomology, the examinee has been attending private psychiatry and clinical psychology consultations, and has not been prescribed any psychopharmacological medication to date. The examinee reports the episode she

was subjected to with visible emotion and feelings of indignation and revolt, since, in her opinion, there were no medical or psychiatric reasons to justify the measure applied to her.

Psychiatric-forensic evaluation: The psychiatrists who conducted the present clinical psychiatric evaluation, after collecting all necessary elements to evaluate this case, both in terms of previous history (including those related to the neuropsychological evaluation of personality), and those determined through mental examination, concluded that the examinee exhibits only affective symptomology, interpretable in the context of *Adjustment disorder with anxiety* (F43.22, ICD-10), strictly related to the facts of which she claims to have been a victim. In this clinical psychiatric evaluation, the examinee was subjected to a personality evaluation according to the *Eysenk Personality Inventory* (which shows low levels of neuroticism and high levels of extraversion) and the *Minnesota Multiphasic Personality Inventory* (with moderate levels on the scales of paranoia and psychopathic deviate), which show that the examinee does not suffer from a personality disorder. Nonetheless, according to the psychiatrists who conducted this clinical psychiatric evaluation, it is recommended that the examinee maintain regular psychiatric consultations, which she claims to have maintained of her own volition. In accordance with the foregoing circumstances, the provisions in Article 12, paragraph 1 or 2, of the PMHA are impaired, that is, the examinee does not suffer from severe mental disorder. In addition, there are no clinical psychiatric reasons that justify treating the examinee under an involuntary regime.

2. Practical case: critical analysis

The present case constitutes a situation of violation of the principle of proportionality, in its aspect of necessity, regarding the commitment measure applied.

The examinee alleges that the deprivation of freedom – the IC – is motivated outside the conditions provided for by the PMHA. Therefore, the aspect of necessity is questioned, since there was application of a commitment measure that need not be applied. The evidentiary hearings, which include the present clinical psychiatric evaluation, thus prove that:

- The examinee suffers from "*Adjustment disorder with anxiety (...) and not a Personality disorder"*, with no confirmation of the presence of psychotic symptoms, which could, in fact, constitute the need for treatment under an involuntary regime.

- The examinee maintains regular psychiatric monitorization, which she sought voluntarily, and maintains critical ability for her clinical situation.

We begin by emphasizing that the situation does not fulfill the provisions for IC, that is, the fact that the examinee suffers from a personality disorder does not configure the provision, legally required for involuntary treatment under Article 12 of the PMHA, alleged by the psychiatrist: *"a person suffering from a serious mental disorder who lacks the necessary discernment to evaluate the meaning and implications of consent"*. In the present case, the application for the emergency IC was conducted by the assistant psychiatrist, and sent to the Public Health authority. The examinee was escorted by the police forces to the emergency psychiatric service, and after the incorrect evaluation by the emergency psychiatrist who determines the IC, based on the clinical report of the assistant psychiatrist, the IC was initiated and subsequently confirmed by the court, under the terms of Article 26 of the PMHA.

With respect to the negative aspects, it is worth noting the lack of professional ethics displayed by the assistant psychiatrist who, due to his bad relationship with the examinee, made an application with clinical information that was untruthful. In

addition, the clinical psychiatric evaluation conducted by the psychiatrist of the emergency psychiatric service was also incorrect and skewed by the clinical information provided by the assistant psychiatrist, since the examinee did not exhibit psychotic symptoms and, thus, the presence of the diagnosis of *Personality Disorder* did not meet the criteria for the determination of this treatment measure. Evidently, we are dealing with a medical error, punishable by the Code of Ethics of the Portuguese Medical Association, where, in a paternalistic doctor-patient relationship, the doctor exercises their authority and power in the relationship with the patient, basing it on a relationship of "dominance" by the doctor and "submission" by the patient.

Regarding the positive aspects, there is the fact that the examinee was provided with the possibility to submit the application for *habeas corpus* on the third day of her commitment, and that the procedures for the implementation of *habeas corpus* occurred in strict compliance with the CCP, with the judicial decision determining the immediate release of the examinee.

As clinicians, the interest of the present practical case is focused mainly on the importance of recalling the existence of *habeas corpus* – an exceptional provision designed to guarantee individual freedom against abuse of authority; and recalling the legal mechanisms underlying *habeas corpus*; as well as the need to safeguard the responsibility of the medical act.

Conclusion

This practical case, infrequent in medical-legal psychiatric practice, refers to one of the supervisory mechanisms in the process of IC. In the clinical psychiatric evaluation conducted by two psychiatrists other than those who conducted the first

evaluation that would justify the commitment, it was concluded that the provisions for IC were not fulfilled (Article 12, paragraph 1 or 2, PMHA).

In conclusion, the supervisory mechanisms for IC – appeal of the decision and *habeas corpus* – are provided for in the PMHA, and this monitorization is essential to ensure the rights of citizens.

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