OPINION

of 17th January 2013
of the French Contrôleur general des lieux de privation de liberté
concerning unjustified stays in Units for Difficult Psychiatric Patients (UMD)

1 - The fundamental right according to which nobody can be arbitrarily deprived of liberty obviously applies to persons suffering from mental illness (European Court of Human Rights, 24th October 1979, *Winterwerp v. The Netherlands,* no. 6301/73). The latter cannot be deprived of liberty unless three concurrent conditions are satisfied: the illness shall be indisputable; the mental disorder must be of a kind or degree warranting compulsory confinement; finally, "the validity of continued confinement depends upon the persistence of such a disorder" (European Court of Human Rights, 5th October 2004, *H.L. v. The United Kingdom*, no. 45508/99, § 98).

However, respect for fundamental rights is not solely a matter of the existence or absence of compulsory confinement measures. It should also include, in cases where such measures are taken, the means implemented in order to protect patients from danger to themselves and to other people: such means should be proportionate to the identified danger. The respect due to the dignity of the person may be entirely disregarded in case of inappropriate use of unnecessary means of physical restraint, for example, or unnecessary placement in a special institution not warranted by the patient's condition. Moreover the reasoning followed by the national judge of penal affairs can be transposed on this point: the judge supervises the transfers between institutions "with regard to its nature and the significance of the effects thereof upon prisoners' situations (Conseil d'Etat [French Council of State], Assemblée [Combined Court], 14th December 2007, *Garde des sceaux* [French Minister of Justice] *v. M. M.A.*, no. 290 730). It is necessary to pay attention to the nature and effects of placing a patient in an institution, when the conditions prevailing in the latter are different from those which would be the rule elsewhere.

2 – Furthermore, there exists a special category of psychiatric institutions, referred to as "Units for Difficult Psychiatric Patients" (UMD / "*Unités pour malades difficiles*"). The law (Public Health Code [C*ode de la santé publique*] article L. 3222-3) provides for the placement of persons subject to psychiatric treatment within them "when they present a danger for other persons of such a nature that the necessary treatment, surveillance and security measures can only be implemented in a specific unit." In such scenarios, the prefect is responsible for making a committal decision according to the procedure of committal to psychiatric treatment at the request of a representative of the State (*admission en soins psychiatriques à la demande du représentant de l'Etat*), - formerly "Hospitalisation by court order" (*hospitalisation d'office*)-, in most by transfer from an ordinary psychiatric hospital. The regulations (article R. 3222-1 of the same Code) provide that UMDs shall implement "intensive therapeutic procedures and special security measures adapted to the patient's condition": that is to say that the transfer of a patient from an ordinary specialised institution to a Unit for Difficult Psychiatric Patients has significant effects upon that person's situation, insofar as it considerably increases the constraints placed upon them.

Unjustified maintenance of patients in units for difficult psychiatric patients therefore constitutes an infringement of their fundamental rights.

3 - Yet, cases still occur of patients being thus maintained in units of this kind without any justification, due to release procedures that remain a dead letter.

The conditions of release from Units for Difficult Psychiatric Patients are defined under articles R. 3222-5 and R. 3222-7 of the Public Health Code. Within these units, the medical treatment committee (defined by the code) is responsible for assessing whether the conditions provided for committal are no longer met, in other words whether the danger presented by the patient is no longer of a kind warranting a stay in a UMD. In scenarios of this kind, it has to refer the case to the prefect of the department in which the unit is based or, in the case of Paris, to the Metropolitan Police Commissioner, who issues a decision ordering the patient's release.

There are four possible forms of such release:

- Either the treatment is brought to an end, or treatment is provided in a form other than full hospitalisation;
- Or the patient is transferred to a health institution catering for patients suffering from mental illness;
- Or the patient is returned to their institution of origin;
- Or, in the cases of prisoners, they are returned to a penal institution.

When release is ordered in the form of return to the institution of origin, which is the most frequent case, the latter institution then has to admit the patient within a deadline of twenty days of the prefectoral decision ordering the patient's release from the unit for difficult psychiatric patients.

In order to guarantee this return to the institution of origin, paragraph 2° of article R. 3222-2 of the Code provides that the dossier handed over to the prefect of the department in which the UMD is based, for the purposes of implementation of the order for committal to the latter unit, shall include in particular "a commitment signed by the prefect of the department of the establishment in which the patient is hospitalised or held or, in Paris, by the Metropolitan Police Commissioner, to subsequent hospitalisation or imprisonment of the patient within their department once again".

4 – In spite of the existence of these entirely unequivocal provisions, the Chief Inspector of Places of Deprivation of Liberty has been led to ascertain, in the course of inspections conducted in units for difficult psychiatric patients, as well as by means of cases referred to him in writing, that patients are maintained in UMDs in spite of the opinion - or successive opinions – issued the medical treatment committee and notwithstanding orders issued by the prefect of the department in which the unit is based for the release of the patient from the UMD and their return to the health institution of origin.

The reasons for this deadlock which, as has been pointed out, disregards patients' fundamental rights, are of two kinds: in the first place, arising from disregard of the provisions of the Public Health Code; and, in the second place, from the difficulty of determining and imposing the institution of origin to which the patient is to be admitted on their release from the UMD.

5 – As far as the first scenario is concerned, certain cases have been ascertained in which the patient's institution of origin purely and simply refuses to readmit the patient – in general on the grounds that the latter has committed acts of violence against staff or other patients; or again that the institution considers that it has "fulfilled its side of the bargain" by agreeing to admit a patient released from the UMD "in exchange" for the committal of one of its patients to the latter unit[1] - in agreement with the prefect of the department.

[1] Situation resulting from the negotiations mentioned below in section § 6.

Although it is of course understandable that spontaneous apprehensiveness can arise among staff who may, at one time or another, have been confronted with both verbal and physical assault on the part of the patient committed to the UMD, it is nonetheless unacceptable for such past acts, which sometimes occurred several years previously, to be used to justify refusal of readmission to the institution of origin. Indeed, this amounts to disregard – and moreover on the part of professionals - of the benefits of the therapeutic treatment implemented within the UMD[2] and to calling into question the validity of the opinion issued by the medical treatment committee, which is composed, in accordance with the Public Health Code, of a doctor possessing the status of health inspector and three hospital psychiatrists not practicing within the UMD. In other words, although such fears may be natural, they are groundless.

6 – The second scenario involves specific situations which make determination of the institution "of origin", to which the patient is to be admitted on their release from the UMD, a complex matter. There is no current text enabling the resolution of such difficulties, which are manifested in real negotiations between the heads of UMDs and regional health agencies in order to find an appropriate institution which agrees to admit the patient. In particular, cases of this kind arise when:

- patients have been hospitalised for many years in one or several UMDs; it is possible for the patient's institution of origin to have changed insofar as their family ties have successively moved between several different departments[3];
- when the medical treatment committee considers that, although the patient can be hospitalised within the traditional framework of psychiatric treatment, this treatment cannot take place in the patient's institution of origin, in most cases because relations between the patient and the psychiatrists and nursing staff are too tense.
- when a court order has been issued with regard to the patient prohibiting them from staying in the department in which their institution of origin is located.

7 – In each of these different scenarios, the absence of any authority in a position to determine and impose the institution to which the patient should be committed on release from the UMD leads to such release being dependent upon the uncertain results of the negotiations conducted, rather than upon the sole condition determined by the Code of Public Health, that is to say that the patient no longer presents any danger for other people warranting special treatment.

When the UMD and the ARS (regional health agency) do not succeed in finding an institution to admit the patient in spite of numerous formalities of a time-consuming nature, certain patients are maintained in UMDs, without any medical justification, for periods of several months, or even several years[4].

8 – Unjustified maintenance of this kind infringes the patient's fundamental rights in several different regards.

On the one hand, although these patients are in most cases assigned to units with reduced security measures in preparation for their release, the fact nonetheless remains that their psychiatric state of health no longer calls for the implementation of special security and surveillance measures as mentioned under article L. 3222-3 of the Public Health Code.

---

[2] Cf. for similar disregard of an assessment of the Chief Inspector of places of deprivation of liberty of 15th February 2011 concerning certain modes of hospitalisation by court order (*Journal officiel* of 20th March 2011).

[3] A situation was thus submitted to the General Inspectorate involving one person, initially hospitalised in French department A and then committed to a UMD located in another department B on a long-term basis, whose parents resided nearby the UMD in order to be present, who was then committed to another UMD for a break-off stay. The aged parents returned to department A, from which they originally came. There are grounds for considering that the institution of origin was successively that of department A, then that of department B, and finally that of department A, since the patient had no family or other ties constituting a connection with department B.

[4] By way of illustration, among the cases referred to the General Inspectorate, one patient is maintained in a UMD, while the medical treatment committee has been calling for their release **for more than two and a half years**.

On the other hand, committal to a Unit for Difficult Psychiatric Patients in most cases leads to their being moved far from their families and, therefore, incurs considerable expense for families who wish to visit their hospitalised relation; their unjustified maintenance in UMDs therefore infringes the right to respect of their family life, which also numbers among fundamental rights.

Finally, the unwarranted prolongation of a particularly restrictive stay compromises the person's chances of proper rehabilitation under conditions of life and treatment which are as normal as possible.

In addition, these patients are maintained in UMDs, without any medical justification, while other patients, who present a danger for other people according to the meaning of article L. 3222-3 of the Public Health Code, remain hospitalised in ordinary general psychiatric wards, due to a shortage of UMD places.

9 – For these reasons, it is recommended that the public authorities should, by means of a circular: on the one hand recall that, when prefects issue orders bringing UMD stays to an end, these shall at the same time be followed by orders from the prefect of the department of the institution of origin, readmitting the patient to the latter, such orders naturally being binding upon the institution, with the latter becoming liable for any failure to act with regard to the patient and their close relations; on the other hand, define a procedure enabling the regional health agency concerned (or the central administration in case of several different agencies), to which this point is duly referred in good time by the management of the UMD, to fulfil the task of immediately determining, in case of doubt, the institution to which the patient is to return, the essential criterion to be followed in this regard being the capacity for rehabilitation of the patient, in particular with regard to their family ties; the prefect of the department which has thus been determined shall then issue the required order.

Although it may be admitted that organisational necessities may stand in the way of the transfer of a patient from a UMD to an ordinary institution, after the medical treatment committee has pronounced its decision, it is incumbent upon the authorities to implement the latter within reasonable time in order to ensure that patients' fundamental rights are respected. Such is not always the case at the present time.

10 – For its part, the General Inspectorate will remain vigilant with regard to persons subjected to constraints which their state of health does not justify.

Jean-Marie Delarue