

SOME LEGAL ASPECTS OF PSYCHOSURGICAL TREATMENT—WITH PARTICULAR REFERENCE TO THE REMOVAL OF CRIMINAL TENDENCIES*

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I. *Introduction*

A psychosurgical treatment may be applied in various fields and it is used for removing criminal tendencies of offenders. On this treatise I will deal with some legal aspects of psychosurgery in general, in special reference to this sphere of application. The legal aspects as I mention here will be limited to the area of criminal law, because there is no civil law problem which seems to be worth paying special attention as to the performance of contracts or the compensation for damages, in connection with psychosurgery.

A psychosurgical operation on a criminal which intends to remove his criminal propensities is a subject of great interest and concern to us criminologists. In this regard, a criminal sentenced to imprisonment and are serving his prison term has the civil liberty restrained, but in no other way he should be arbitrarily subjected to any treatment against his will. That is to say, the general principles of psychosurgical treatment applicable to ordinary citizens must be complied with the treatment of a criminal, and also it will suffice to do so.

In order to justify a medical treatment given to a patient, including a surgical operation, the following two requirements must be met.

- (i) The giving of the medical treatment in question must be proper and reasonable in the light of the generally accepted idea of medical treatment.
- (ii) There must be the consent given by the patient or a person representing him, of his own volition.

Let me call the first requirement the "proper medical treatment" and the second requirement the "consent of the patient."

II. *Proper Medical Treatment*

The wording "proper medical treatment" is an expression so much simplified that it is likely to be interpreted in many different meanings, but its actual meaning is as follows; for

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example, a heart transplantation should not be performed, except where there are adequate equipments and facilities suitable for the operation as well as highly qualified competent medical doctors and their assistants. It is not of such a nature that it may be performed by anyone, at any time and at any place. A certain highly reliable authority on thoracic surgery asserted that not more than ten institutions in Japan could meet such requirements at the time of August 8, 1968 when the first heart transplantation in Japan was performed. If a medical treatment requires such a high standard of personal skill and physical facilities, the places where it can be performed in the meaning of "proper medical treatment" are extremely limited. The more dangerous the medical treatment is, the fewer are the cases in which its performance is deemed proper. Since, in a psychosurgical operation, the cutting of brain seems to require special skill and delicate attention, it will not be permissible for an inexperienced doctor to perform it by himself at his option, even though the life of the patient may not thereby be much threatened.

Furthermore, suppose that the giving of the medical treatment in question may cause unfavourable results. Medical treatments are often accompanied by this sort of risk, but the performer of the operation is permitted in many cases to run such a risk, even when he is conscious of its existence beforehand. The treatment may produce unfavourable results without any fault on the side of the doctor. Even when unfavourable results come out later, he is not to be held responsible unless there was some particular fault on his part. In short, in giving such a medical treatment, it is permissible to run the risk of producing such results. Here the theory of permissible risk (*erlaubtes Risiko*) which has come to be emphasized in recent times in German law is useful for the solution of this problem. In order for the risk to be a permissible one, however, it is, of course, necessary to obtain the "consent of the patient" as mentioned later, but, aside from it, some medical treatment must be worth running such a risk. For this, the medical treatment employed for that particular case must be one of the best of all the methods of treatment considered appropriate. When there are more than one method which may be applied to that case and all of them are expected to have equally good effects, the doctor should select the least risky method. He must not be allowed to take an unnecessary risk. But, it is not advisable for a doctor to become recessive and take temporizing measures, being carried away too far by his eagerness to ensure the safety of the life of a patient; he is permitted to employ a risky method of treatment only in case where better results can be expected by such a method. Of course, it is impermissible to select a risky method, motivated by simple interest of a medical doctor, in cases where it is expected that other methods incurring no risk will produce almost equally good effects. Such a treatment should be regarded as running an unnecessary risk, however valuable it may be as a medical study. In cases where an unnecessary risk has produced an unfavorable result, there is no alternative but to admit fault on the side of the doctor.

III. *Consent of the Patient*

(a) Medical treatment in general

The consent of the patient is required for all medical treatments in principle. Usually, before giving a medical treatment, it is necessary that the medical doctor should get the consent of the patient who has the full comprehension of the essential points of the situation

in which he is to receive the treatment. When a patient has capacity not enough to consent or refuse, there must be a substitute for his consent. In such a case, it is conceivable that a close relative might give his consent on his behalf, but the consent, even if given by a close relative, is not easily made effectual. If the patient is an infant who has almost no capacity to comprehend the true meaning of the situation, the consent of a person in parental authority over him may sometimes have the same effect as that of the patient himself, but, generally speaking, the consent of a person in parental authority cannot be accepted simply because the patient is a minor. This point must be considered quite substantially, being separated from the provision of the Civil Code which provides for the sake of a minor that all juristic acts can be done with the consent of his legal representative. Considering substantially, even when the patient is a minor, his consent must be obtained in cases where his judgement may be taken reliable according to the common sense of society. If the patient is a minor, his consent may not be considered sufficient in many cases. So in such cases, the consent of his close relative will serve the purpose as a subsidiary.

When a patient is in an unconscious condition and his will cannot be ascertained, we can actuate the theory of so-called "presumptive consent." In this case, it does not mean to presume the real will of the patient and so even if it is later found that the treatment already given was against his will, it is not to be adjudged, for that reason, that the treatment was done without consent. In cases where, the consent of a patient is naturally expected to be in existence, it may be said without ascertaining his actual will that the so-called presumptive consent has already been given. On the contrary, no medical doctor is allowed to give any medical treatment to a patient when the latter does not consent nor is the presumptive consent considered applicable. No treatment may be forced on the patient who refuses to receive it, no matter how much benefit it may seem to give to the patient. In rare cases, some patients are firmly determined never to receive any surgical operation. And, some of those who have almost never been ill in the past hate common injections, even if they don't refuse them entirely. Even among medical doctors, we find some who hate protective inoculations so much that they have never inoculated before. For a patient like this, no medical treatment can be employed against his will, however useful it may be seen from medical standpoints. Even when it is clear that the condition of the patient will come to be worse without the treatment concerned, it is impermissible to give the treatment by suppressing the will of the patient.

(b) Saving the attempted suicide

There is only one exception to this rule. The exception is the case in which we have to save a person who has attempted to commit suicide. In this case, even if he wants to kill himself and refuses all treatments required for his existence, we are permitted to give the medical treatments necessary to keep him alive. Frankly speaking, the theoretical extension of this exceptional rule would make it impossible for me to maintain the above stated conclusions. On the contrary, if we stick more rigidly to the principle that it is up to the patient to decide whether he will receive the medical treatment or not, we will naturally be unable to make an exception for saving attempted suicides. In other words, the theoretical grounds for making it exceptional are very slender, but it is made exceptional in the light of the public sentiments of the present age. According to the public sentiments, only for the purpose of saving attempted suicides, it is considered permissible to give a medical treatment

even against their will. Though we do not have any theoretical grounds for making it an exception, it is regarded as such in actual society. In spite of the fact that there is a certain treatment which the patient should naturally be considered to receive from the common sense of medical science, he may possibly refuse to receive it. But theoretically, the refusal in such a case is an act similar to a suicide, though he has no direct intent to kill himself. The refusal of medical treatment by a patient may not always incur his death, but the more serious his illness is, the nearer comes the act of refusal to the act of suicide. It is just nothing but committing suicide rather slowly. Therefore, if the patient should be allowed to exercise his own free will as to whether to refuse it or not, it is a natural product of the theoretical reasoning that he should also be allowed to kill himself. Conversely, if it is not illegal to give the medical treatment to save the life of a person, against his will, who attempts to commit "suicide" in its original meaning, it is reasonable to think that it should also be permitted to give the medical treatment to a person refusing it whose act is almost equal to committing, so to speak, a slow suicide. But, the thought now prevailing in society is not in line with such a reasoning. It makes an exception only in favour of saving an attempted suicide.

It is a supreme command in society that the suicide is wrong and that anyone who attempts to kill himself should be checked from doing so. This is not a product of rationalism but rather a belief based on religious doctrines. This may directly derive from Christian thought which abhors all acts against nature as they are against Divine Providence, but, indirectly, it may also be regarded as the creed that has been created unknowingly by human beings to preserve their own species. Since the thought which upholds the denial of suicide as a golden rule is deeply rooted in human minds, they do their best to secure the life of even a dreadfully deformed baby at the time of its birth, notwithstanding that it seems to be sure to confront big misfortunes in the future.

(c) Consent and free will

Consent in the true sense of the word must be based on the so-called free will. As a matter of course, the word "free will" does not used here in the metaphysical sense but in a sense commonly accepted in our society. It is necessary that the declaration of intention should not be made by force, threat or cheating. Therefore, in case a doctor wants to perform some risky operations including psychosurgical treatments or, though not risky, to accord such treatments as people in general do not like (both types of treatment are hereinafter to be called simply as "risky medical treatments"). It is required to obtain the consent of the patient who can understand the nature and consequences of the treatment. In such a case, it is almost inconceivable that any forcible or threatening method is used in order to obtain his consent. There might possibly arise a case of cheating, when a doctor does not fulfil his obligation of giving explanations to the patient fully.

The consent must be given of the patient's own free will, but this does not mean that the consent must be based on his purely spontaneous will. Doctors are allowed to refute and persuade patients. As a practical problem, the most earnest persuasion would probably be required for such risky operations as the heart transplantation, because there have been only a few precedents and experiences before. When a patient is inclined to undergo such a risky operation, he expects the good results of the operation on the one hand, while on the other, he is conscious of its risk. The patient decides whether to undergo or not, after weighing

those two elements on a scale. Therefore, if the doctor should understate the risk accompanying the operation or overstate the expected favourable results of the operation in his explanations to the patient, there might arise the problem of cheating the patient. Needless to say, when a patient makes a decision as to whether he should undergo the proposed treatment or not, he will consider also over the results expected to arise from his refusal of the treatment. When a patient weighs the risk involved in the operation against the result to be obtained by the operation, the result which the patient expects in such a way has a decisive importance. Such being the case, doctors are under obligation to explain necessary matters to the patients as to enable them to make proper judgements.

In some cases, however, explanations may prove harmful to the medical treatment itself. So, in such a case, the intentional omission of explanation should not be interpreted as an unlawful cheating, despite the above-mentioned obligation of doctors. For example, as it is in practice in Japan, there is a general consensus among the public that we must conceal the true name of the disease from those who are getting cancer, because it is considered to serve the purpose of treatment not aggravating the condition of patients. For this reason, such an omission or an act of concealment must be said, from the legal standpoint as well, to be "socially appropriate" (*soziale Adäquanz*). In short, it may well be considered that a doctor has the obligation to give explanations to a patient on condition that the explanations are not harmful to the patient. When the doctor must avoid giving explanations to the patient, it is a matter of course that the doctor should be required to explain to those who are deemed to be in a position to protect the interests of the patient on his behalf.

More careful consideration will be required when a risky medical treatment is given to a prisoner than when it is given to an ordinary free citizen. For avoiding the suspicion of infringement upon human rights, there is no reason, essentially, why any distinction should be made between a prisoner and an ordinary citizen, but since people often tend to doubt whether a prisoner has expressed his will freely, special caution must be taken when prisoners are to undergo the risky treatments.

In recent years, the organ transplantation is gradually getting popular and an increasing number of doctors want to utilize the internal organs of prisoners under death sentence, particularly in view of the fact that the U.S.A. has had such experiences. If this were possible, it would make it easier for doctors to get the organs necessary for the transplantation. For the specialists in this field, this seems to be an attractive area, but under the present condition of Japan, it seems almost impossible to put such an idea into practice. There is a great difference between the United States of America and Japan in the public sentiment toward the heart transplantation, even when the heart is transplanted from an ordinary citizen, as is demonstrated by the fact that while in the United States the heart transplanation has been conducted scores of times, we have had only one experience in Japan. It goes without saying that this is not because there is a difference between the two countries in the state of development of medical science but because the peoples have different eyes for the operation. In contemporary Japan too much criticism tends to be aroused about every event and the public won't take a wider view of the matter. From a purely rationalistic viewpoint, the aforesaid experiences of the United States on the executed prisoners are something we should learn from them.

If a prisoner sentenced to death wishes, of his free will, to be of service by making his organs available in the interests of the society, it would be more rational to comply with his

desire, instead of just making him die in vain. It would not be infringing upon the human rights of the prisoner, but the actual situation in our society is that such a rationalistic thinking is driven away by a groundless sentimental repulsion. Therefore, though the use of a prisoner's organ must theoretically be possible, the prison authorities of Japan would not readily cooperate in it, being afraid of public reactions.

IV. *Psychosurgical Treatment*

The psychosurgical treatment of criminals neither contradicts with the theories mentioned above nor makes an exception to them. This is applicable to those who are under physical restraint as well as to those who are not under such restraint, but, especially in the former category, a careful consideration is required. In either category, it is necessary to stress the following two points:

(a) There is a controversial problem in performing a psychosurgical operation on a mentally disturbed person, even when he is an ordinary citizen in free society. So the doctors are required to obtain the consent of the patient after giving him full explanations, even in cases where the supporters of the operation consider the patient really suitable for it. In the case of a mentally disturbed criminals, the psychosurgery is intended not only to be beneficial for the patient but also, in some aspects, for the public safety, and in this sense, it may sometimes serve for a higher purpose than a mere medical treatment for the patient. If we can suppose that a patient will become harmless for the society by undergoing the operation and that the result itself will do good for him as well, the state of things may be quite plain and simple. But there is room for divergence of opinion as to this point. Social defence often conflicts with the rights of individuals. I cannot but think that, so long as we do not have a special legislation, it will not be permissible to perform surgical operations on the mentally disturbed criminals against their will, in order to make them harmless. Under the present law, the psychosurgical operation can not be performed even on a criminal with brutal tendencies against his will, as is the case with the castration of a sexual offender. As such an operation requires the consent of the patient, the doctor is naturally under an obligation to give explanations to the patient. Here the doctor should tell the patient before the operation, not only the expected favorable results such as the extinction of explosive tendencies in the case of an epileptic or the extinction of feeling of uneasiness in the case of serious anxiety neurosis, but also some subsidiary ill effects such as a loss of spontaneity or of emotional delicacy which might be caused by the operation.

(b) Since the patient who undergoes the operation is mentally disturbed, the formal consent of the patient cannot be always admitted as his real consent. For example, the consent given by an idiot cannot be of any legal significance, in whatever form he may give it. Likewise, the consent of a person who is remarkably in a confused state of mind is also to be denied. Generally speaking, those who do not have the mental capacity under the Civil Code are to be denied their capacity to consent. Even if their capacity is a little better than that, so far as it does not yet reach the standard of a normal adult, their consent cannot be adequate as such. In these cases, it is necessary to obtain the consent of the person exercising parental power over them or that of the person supplementing or representing their will. The consent given by these persons, however, may not be accepted, if it is deemed objectively inappropriate

for the patient. Since the operation has an important bearing upon the human rights of the patient, no other person has the right to approve the medical treatment which would infringe upon the rights of the patient, be it may in the sense of representation or supplementation of the patient's will. It is a prerequisite to the act of approval that it must be of such a nature as is to be justified by the consent of the patient, and it should be construed that the declaration of intention by the person exercising parental or protective power will be effectual in the sense that it supplements or represents the will of the patient only when his consent is inadequate or insufficient.

V. *Summary and Conclusion*

In legal aspects, the psychosurgical treatment must comply with the rules of general surgical treatment. It can only be given, therefore, with the consent of the patient. In order to make it a truly valid consent, the person who is to consent must understand the essential points of the situation in which he is to be treated, so the doctor has the obligation to give explanations to the patient in advance. He is allowed, however, to omit such explanations, so far as they are harmful to the medical treatment concerned. As regards the psychosurgical operation, special consideration should be given by the doctor in giving explanations to the patient for obtaining his consent, telling him the full details not only of the favourable results expected by the operation, but also of the risk and subsidiary ill effects which are liable to accompany the operation. And, since the patient who is to undergo the operation is not mentally normal, it is necessary, when the doctor intends to obtain his consent, to obtain the consent of the person who is entitled to represent or supplement the will of the patient. The psychosurgical treatment for a mentally disturbed criminal is in most cases performed with intent to make him harmless for the society, and, therefore, the treatment in such a case is not necessarily given for the benefit of the patient. If such an operation is against the will of the patient, it cannot be performed in the absence of special legislation, even though it may serve for the purpose of social defence.