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Changes in the Legal Framework of Psychiatry: A Move Towards Non-Coercive Mental Health Services?

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Changes in the Implementation of Laws Related to Psychiatry by Court Decisions - Seen on the Background of the Report of the Council of Europe "Ending Coercion in Mental Health: the Need for a Human Rights-based Approach"

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In recent times the German Supreme Court, the German Constitutional Court and the European Court of Justice rendered important decisions, all of them in favour of persons with mental health conditions or psychosocial disabilities. For this reason, I decided to present some of these decisions to you. I will broaden the perspective of my presentation with regard to the report, dated 22nd May 2019, of the Committee on Social Affairs, Health and Sustainable Development of the Council of Europe with the title: Ending coercion in mental health: the need for a human rights-based approach[1].

I.

One of the key topics presented in the report of the Council of Europe is the implementation of laws related to psychiatry. The implementation is not in line with a human rights-based approach, which is compatible with the United Nations Convention on the Rights of Persons with disabilities (CRPD). Amongst 36 countries, including 35 Council of Europe member States and Israel, "the only countries that report a decrease in the use of coercive measures are Finland and Germany,

[1] Committee on Social Affairs, Health and Sustainable Development, Report | Doc. 14895 | 22 May 2019 Ending coercion in mental health: the need for a human rights-based approach, download available on Council of Europe, Parliamentary Assembly http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=27701&lang=2

following legislative changes and targeted programmes to reduce the use of coercion in psychiatry."[2]

The report was discussed by the Parliamentary Assembly of the Council of Europe in its debate on 26 June 2019. As a result, the Parliamentary Assembly adopted unanimously by its 90 participants[3] a resolution[4] - followed by a recommendation[5] to the Committee of Ministers. In paragraph 2 of the recommendation "the Assembly reiterates the urgent need for the Council of Europe, as the leading regional human rights organisation, to fully integrate the paradigm shift initiated by the United Nations Convention on the Rights of Persons with Disabilities into its work regarding the protection of human rights and dignity of persons with mental health conditions or psychosocial disabilities. It thus calls on the Committee of Ministers to prioritise support to member States to immediately start to transition to the abolition of coercive practices in mental health settings."[6]

According to point 1 sentence 2 of the Resolution: "Even in countries where so-called restrictive laws have been introduced to reduce the recourse to such measures, the trend is similar, indicating that such laws do not seem to produce the intended results."[7] Contrary to this conclusion, I am convinced that laws do not produce anything by themselves at all. The laws are just the legal basis, for two types of actors – seen in a generalized sense - who would be able to contribute ending coercion in mental health:

1. The actors in the health sector, those who implement the laws.
2. The actors in the justice system, whose task it is to control the implementation of the laws.

The only actors from the justice system mentioned in the resolution as stakeholders - for future actions to improve the current situation - are police officers and law enforcement agencies[8]. Furthermore the curricula of higher education institutions, in particular those schools of medicine, law and social work, shall be reviewed to

[2] See footnote 1 page 8 point 8
[3] Download of the Voting List available on Council of Europe, Parliamentary Assembly, http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7545&lang=2&cat=8
[4] Download of the Adopted Resolution available on Council of Europe, Parliamentary Assembly, http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7545&lang=2&cat=8
5 Download of the Adopted Recommendation available on Council of Europe, Parliamentary Assembly, http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7545&lang=2&cat=8
[6] See footnote 5
[7] See footnote 4
[8] See footnote 4, Adopted resolution point 7.5

ensure that they reflect the provisions of the United Nations Convention on the Rights of Persons with Disabilities."[9]

But what about judges who are already doing their job on all levels of the justice system in a country? The important role of courts in surveying the implementation of laws related to psychiatry – in the light of a human rights-approach - is mentioned neither in the report nor in the resolution nor in the recommendation of the Council of Europe. In my opinion this is regrettable. In Germany the German Institute for Human Rights as National CRPD Monitoring Mechanism includes trainings for judges on this topic.

Laws, custom, propriety and morals are part of social power structures in a country. According to Professor Bolten in his „Einführung in die Interkulturelle Wirtschaftskommunikation," - Introduction to Intercultural Business Communication, - these social power structures can be compared to sand dunes.[10] The foundations of these sand dunes, mandatory laws and legal regulations, are relatively stable. They will be replaced only if other rules turned out to be more plausible and relevant. In contrast, the areas at the top of the sand dunes, the non-binding behavioural rules like custom, propriety and morals, change more often. And - let me amend Prof. Bolten's metaphor of the sand dunes: the judges are the guards and vanguards of the foundations of the sand dunes, the laws.

For me the metaphor explains why it takes time to fully implement new rules in a country. The time needed for change depends on the legal foundation already existing in a country: whether there is a weak or a stable basis for new rules. I worked for eight years as a Resident Twinning Advisor for the European Union in Albania, Croatia and Turkey. For Croatia it was no problem to adept the Acquis communautaire of the European Union, quite contrary to Albania and Turkey.

II.

Regarding Germany, Margret Osterfeld and Martin Zinkler just handed in a paper to Melbourne Social Equity Institute for the book: "Legal, Policy and Practical Responses to Restrictive Practices in Health Care and Disability Settings: Controlling Conduct", to be published in Routledge's Biomedical Law and Ethics series in Australia. The title of the paper is: The Court, the Law and German Psychiatry´s Slow

[9] See footnote 4, Adopted resolution point 7.5
[10] UTB GmbH 2. Auflage, 2015 S. 85

Approach towards Human Rights. I dare say this is the view from inside the German health system, focussing on what is wrong, to see the glass half empty and not half full. But at least, we have an approach towards human rights! In the paper mentioned before you will find an overview about the history of psychiatry in Germany, from Prussian 1794 Psychiatry law to today's legal and economic basis in German Mental Health Care.

1. Federal Supreme Court

Today in Germany the decisions of lower courts on justifications for involuntary placements are strictly controlled by the Federal Supreme Court, Germany's highest court of civil and criminal jurisdiction. The Federal Court of Justice was instituted on 1 October 1950 and has its seat in Karlsruhe. One of its main responsibilities is ensuring the uniformity of the law and its further development.

The Council of Europe points out in the resolution: "..the notion of risk of harm to oneself or others remains a strong focus in justifications for involuntary placement and treatment."[11] This type of justifications is placed under particular scrutiny by the Supreme Court. One of the landmark decisions of the Supreme Court - XII ZB 58/12 - dated 5 March 2014[12], starts with the headnote:

> Zur Feststellung, für einen Betreuten bestehe aufgrund seiner psychischen Krankheit die Gefahr, dass er sich selbst tötet oder erheblichen gesundheitlichen Schaden zufügt, genügt nicht die formelhafte Behauptung einer ohne die Unterbringung bestehenden Selbstschädigungsgefahr. Vielmehr müssen objektivierbare, konkrete Anhaltspunkte für eine akute Suizidgefahr oder den Eintritt eines erheblichen Gesundheitsschadens vorhanden sein.
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> Translation by author:
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> To determine that a client is at risk of killing himself or causing significant damage to his health due to his mental illness it is not sufficient to make the formulaic assertion that without hospitalization there would be a risk of self-

[11] See footnote 4 point 2

[12] See http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=dc47a07a1cd978dbe8d18b39da1d9be4&nr=67258&pos=2&anz=3&Blank=1.pdf

harm. Rather, there must be objectifiable, tangible indications of an acute suicide risk or the occurrence of significant damage to health.

In the reasons of the decision the Supreme Court indicates:[13]

> Die Prognose einer nicht anders abwendbaren Suizidgefahr oder einer Gefahr erheblicher gesundheitlicher Schäden ist Sache des Tatrichters (Senatsbeschlüsse vom 22. August 2012 - XII ZB 295/12 - FamRZ 1705 Rn. 4 und vom 13. Januar 2010 - XII ZB 248/09 - FamRZ 2010, 365 Rn. 15). Sie baut im Wesentlichen auf der Anhörung des Betroffenen und der weiteren Beteiligten sowie auf dem nach § 321 FamFG einzuholenden Sachverständigengutachten auf.
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> b) Nach den Feststellungen der Instanzgerichte ist eine geschlossene Unterbringung der Betroffenen nach diesen Maßstäben nicht zu rechtfertigen.
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> Zwar leidet die Betroffene, wie die Instanzgerichte in Übereinstimmung mit dem Sachverständigengutachten festgestellt haben, an einem behandlungsbedürftigen schizophrenen Residuum.
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> Weder das Amtsgericht noch das Landgericht haben aber konkrete Umstände für die Annahme aufgezeigt, die Betroffene werde sich erheblichen gesundheitlichen Schaden zufügen, wenn die Unterbringung und die in ihrem Rahmen beabsichtigte Medikation unterbleiben. Das schriftliche Sachverständigengutachten, dem sich die Instanzgerichte angeschlossen haben, führt zu der Gefahr eines erheblichen gesundheitlichen Schadens lediglich aus, dass die Betroffene bei Absetzen der Medikation dazu neige, planlos mit dem Zug ins Ausland zu fahren oder wiederholt bei verschiedenen Krankenhäusern hilfesuchend vorstellig zu werden. Weder der mündlichen Anhörung der Betroffenen und der weiteren Verfahrensbeteiligten noch dem sonstigen Akteninhalt lassen sich konkrete und objektivierbare Anhaltspunkte für den Eintritt eines erheblichen Gesundheitsschadens oder die erhebliche Verschlimmerung oder weitere Chronifizierung der Krankheit der Betroffenen entnehmen. Diese ergeben sich auch nicht aus den in den vorangegangenen Unterbringungsverfahren eingeholten Sachverständigengutachten und ärztlichen Zeugnissen.

[13] See footnote 12 point 10-14

> Die bloße Wiedergabe des Gesetzeswortlauts des §1906 Abs.1 Nr.1 BGB liefert keine ausreichende Begründung für die Unterbringung. Auch im Fall einer wiederholt untergebrachten Betroffenen darf sich die Begründung nicht auf formelhafte Wendungen beschränken, sondern muss die Tatbestandsvoraussetzungen im jeweiligen Einzelfall durch die Angabe von Tatsachen konkret nachvollziehbar machen.
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> Translation by author regarding the central issue:
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> The written expert opinion followed by the courts of appeal, regarding the danger of a considerable damage to health, only notices that the party concerned when discontinuing the medication tends to go aimlessly abroad by train or repeatedly seeks help at various hospitals.

For the Supreme Court this behaviour does not demonstrate objectifiable, tangible indications of an acute suicide risk or the occurrence of significant damage to health.

This decision of the Supreme Court illustrates a standard problem in legal systems when experts are involved. Laws consist of sentences. Sentences consist of words - determinate terms and indeterminate terms. For example the wording “acute suicide risk or the occurrence of significant damage to health” is full of indeterminate terms: acute - suicide – risk – occurrence - significant - damage - health. In the end it is up to the judge to decide whether a certain situation can be subsumed under this wording or not. But he or she has the right, to appoint a psychiatric expert and to raise questions to get support to take his decision. In several cases judges take this possibility to put more or less the whole burden on the expert and thus get rid of the workload; they accept a short expertise mainly repeating the wording of the law.

This is not only a problem in the health sector but in all sectors where a judge might need the expertise of an expert. According to my experience this problem does not exist only in Germany, but in a lot of other countries. Its importance is illustrated by the fact that it is in the focus of the European Enlargement Process due to its importance for the proper functioning of the legislative system. For example an EU funded project concerning the relation of judges and experts was implemented in Turkey around 2014 / 2015.

Seen on this background I highly appreciate the straight course of the German Supreme Court regarding the precise analyse of the situation of clients as basis for a fair and just judgement, which the Court regularly calls for. One of the latest decisions

in a civil case, XII ZB 280/18, dated 9. January 2019[14], was related to a woman with paranoid schizophrenia. According to the appellate court she was running the risk to become homeless, whereas the Supreme Court for a variety of good reasons did not share this opinion and came to the opposite decision.

2. Federal Constitutional Court

The German Federal Constitutional Court in Karlsruhe was established 70 years ago, in 1949. It does not serve as a regular appellate court from lower courts or the Federal Supreme Courts on violations of federal laws.

But any person may raise a constitutional complaint that his or her constitutional rights have been violated by the state, especially by a court decision.

The court has the competence, among others, to set aside judgements or to refer the case back to the court to which they were originally allocated. Regarding the cooperation of judges and experts, the jurisdiction of the Constitutional Court is focused on constitutional issues. For example on 2 February 2019 – 2 BvR 2406/16[15] - the Constitutional Court set aside a decision of the appellate court in Celle in the case of a longstanding placing in a psychiatric hospital and set up a detailed list of criteria, especially the need to take into account the length of the placing.

Furthermore the Constitutional Court has the power to declare laws or parts of them to be unconstitutional and thus void - or to request additional provisions from the legislator. This can be illustrated by the decision of the Constitutional Court' regarding mechanical restraints (called fixation in Germany)[16] already mentioned by Margret Osterfeld. Bavaria had to insert new provisions regarding fixation in its legislation whereas Baden-Württemberg had just to update its Act regarding Assistance and Protective Measures for Persons with Mental Illnesses.

3. The Court of Justice of the European Union

Since the establishment of the Court of Justice of the European Union in 1952, its mission has been to ensure that "the law is observed" "in the interpretation and application" of the Treaties. As part of that mission, the Court of Justice of the European Union interprets European Union law at the request of the national courts

[14] See http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=XII%20ZB%20280/18&nr=91899
[15] See https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/02/rk20190207_2bvr240616.html
[16] BvR 309/15 and 2 BvR 502/16 – dated 24.07.2018 – see https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/07/rs20180724_2bvr030915.html

and tribunals. I would like to present to you the Judgment in Case C-621/15 N. W and Others v Sanofi Pasteur MSD and Others, dated 21 June 2017[17]. This decision might become relevant regarding forced electroshocks. They can cause potentially irreversible damage to health, as mentioned in the Resolution[18] and in the Report of the Council of Europe[19] without providing information about a scientific consensus.

The press release No 66/2017of the Court regarding the Judgment[20] goes as follows:

“Between the end of 1998 and the middle of 1999 Mr J. W was vaccinated against hepatitis B using a vaccine produced by Sanofi Pasteur. In August 1999, Mr W began to present with various troubles, which led to a diagnosis of multiple sclerosis in November 2000. Mr W died in 2011. Earlier, in 2006, he and his family had brought legal proceedings against Sanofi Pasteur to obtain compensation for the damage they claim Mr W suffered due to the vaccine. The case was sent before the cour d’appel de Paris (Court of Appeal, Paris, France), which observed, inter alia, that there was no scientific consensus supporting a causal relationship between the vaccination against hepatitis B and the occurrence of multi multiple sclerosis. It held that no such causal link had been demonstrated and dismissed the action.

The French Cour de cassation (Court of Cassation), before which an appeal against the judgment of the Cour d’appel de Paris was brought, asks the Court of Justice whether, despite there being no scientific consensus and given that, under the EU directive on liability for defective products, the injured person is required to prove the damage, the defect and the causal relationship, the court may base itself on serious, specific and consistent evidence enabling it to conclude that there is a causal link between the defect in a vaccine and that there is a causal link between the vaccine and the disease. Reference has been made in particular to Mr W’s previous excellent state of health, the lack of family antecedents and the close temporal connection between the vaccination and the appearance of the disease.

In today’s judgment, the Court holds that evidentiary rules allowing the court, where there is not certain and irrefutable evidence, to conclude that there is a defect in a vaccine and a causal link between the defect and a disease on the basis of a set of evidence the seriousness, specificity and consistency of which allows it to consider,

[17] See http://curia.europa.eu/juris/document/document.jsf?text=&docid=192054&doclang=EN
[18] See Footnote 4 Point 3
[19] See Footnote 1 point 15
[20] See https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-06/cp170066en.pdf

with a sufficiently high degree of probability, that such a conclusion corresponds to the reality of the situation, are compatible with the Directive. Moreover, excluding any method of proof other than certain proof based on medical research, could make it excessively difficult in many situations or, where it is common ground that medical research neither confirms nor rules out the existence of a causal link, impossible to establish producer liability, thereby undermining the effectiveness of the Directive and its objectives, which are to protect consumer health and safety and ensure a fair apportionment between the injured person and the producer of the risks inherent in modern technological production."

This judgement was criticised in Ärzteblatt, the German newspaper for doctors, as "very problematic, understandable in human terms, but wrongly seen from the perspective of science."[21]

I am a lawyer and not a scientist in the field of medicine. Nevertheless I have the idea that the decision of the European Court of Justice might pave the way for a successful damage claim concerning forced electroshocks.

Let me conclude:

Changes in the implementation of laws related to psychiatry by court decisions following a human rights-based approach can be an important contribution to end coercion in Mental Health. These decisions are based on an ongoing dialogue on Law and Mental Health. Let us continue this dialogue!

[21] Impfschäden: Urteil des Europäischen Gerichtshofes schafft keine neue Evidenz, 27. Juni 2017, see https://www.aerzteblatt.de/nachrichten/76614/Impfschaeden-Urteil-des-Europaeischen-Gerichtshofs-schafft-keine-neue-Evidenz