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Forced Psychiatric Treatment and Protection against it in Germany in 2013

For years, people in Germany who act like they are radical antipsychiatry activists have said that in this country, psychiatric violent (forced) treatment has been forbidden. Unfortunately, this is not true.

The cause of the confusion is that different judgments of the Federal Constitutional Court of Germany, which, in individual cases, denied psychiatrists the right to use violent treatment because of its substantial violation of the patient's fundamental right to life and physical integrity. The court called this long-time practice illegal and demanded a new legal basis (see Lehmann, 2013a). In addition, the UN Convention on the Rights of Persons with Disabilities forbids legal discrimination against people with disabilities (including psychiatric diagnoses). Just like people without psychiatric diagnoses, they have the right to refuse unwanted medical interventions.

In Germany, we have three legal regions referring to psychiatry: the national criminal law for forensic psychiatry (law region A), the national guardianship law (law region B), and the 16 different laws on forced psychiatric commitment of the 16 German states (Bundesländer) (law region C). In 2011, two forensic psychiatry cases were of special importance, when the Federal Constitutional Court prominently criticized the lack of clarity regarding "insight and the ability to consent" and stated that there was a lack of clear formalities for balancing the appropriateness and proportionality of interventions with fundamental rights. The decisions of the Federal Constitutional Court ruled on the practice of forced psychiatric commitment in the Bundesländer. Violent psychiatric treatment in response to stated danger to others was ruled no longer possible; forced psychiatric commitment could not no longer be interpreted automatically as permitting forced psychiatric treatment (see Steinert & Borbé, 2013). In 2012, the Federal Court of Justice of Germany decided that these restrictions must also be applied to the guardianship law.

Meanwhile, single Bundesländer reformed their laws on forced psychiatric commitment (or are currently in the process of doing so) in order to maintain the legality of violent treatment. The guardianship law was also reformed; carers can only agree with violent treatment if

- “... 1. the person placed under care cannot recognize the necessity for the medical measure or act following this insight due to a mental illness or a mental disability,
2. it was tried before to convince them of the necessity for the medical measure,
3. the medical coercive measure for their benefit is necessary (in the context of the commitment in accordance with section 1) in order to avoid a threatening substantial health damage,
4. the substantial health damage cannot be avoided by another measure which is reasonable the person placed under care, and
5. the expected benefit of the medical coercive measure outweighs clearly the expected impairments...” (BGB [German Civil Code] § 1906, section 3).

Therefore, people with psychiatric diagnoses have – in the words of the law – like all other patients, a right to self-determination, including the right to information about all medical and care measures, as well as a general right to medical treatment and protection from damage, including the right to refuse a treatment.

Probably it can be argued endlessly whether the reformed law really reflects progress regarding the fundamental rights of people with psychiatric diagnoses, or whether it is only a formal legal adjustment to the UN Convention on the Rights of Persons with Disabilities and to the newer jurisdiction in order to safeguard the psychiatric claim to power (cf. Deutsches Institut für Menschenrechte, 2012; Lehmann, 2013b; Marschner, 2013).

For myself, from the perspective of humanistic antipsychiatry, the combination of the legality of psychiatric violent treatment with the expected benefit seems most interesting. This benefit, according to the Central Ethic Commission of the German Federal Medical Society, is determined by the moral concept of the patient. The patient's perspective must not simply be replaced by an 'objective view' and medical discretion; if the 'illness' impairs the patient's assessment regarding the usefulness of a medical intervention, it would then be relevant to consider "... the patient's moral values they would have (or had previously) in a condition of ability to give consent in case they were not impaired by illness" (Zentrale Ethikkommission bei der Bundesärztekammer, 2013, p. A1336).

People who want to effectively protect themselves legally from violent psychiatric treatment can do this in Germany since 2009 by creating advance directives. In that year, the German guardianship law was reformed and a provision ("Advance directive for health care", § 1901a) included that an adult considered capable of consent has the right to affirm in writing "independently of the type and stage of an illness" whether he or she "assents or disagrees with treatments, diagnostic procedures or medical interventions that are not immediately at hand at the time of this declaration" (cited in Ziegler, 2013).

Germany obviously has the most progressive legislation safeguarding psychiatric advance directives. It should make it possible to protect yourself against the ongoing violent administration of psychiatric drugs and against unwanted psychiatric investigation (with all limitations regarding the difference between law and justice and the fact that the totality of all possible human conflicts cannot be solved all-encompassing in advance by a written statement). Particularly regarding the currently acquisition of electroshock machines in German psychiatric hospitals all over the country (Falkai & Gruber, 2012), people in Germany should not hesitate to get active.

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