Dr. Shmuel Wolfman,

Ethics and Psychiatry - Bioethical Dilemmas in Involuntary Hospitalizations of the mentally ill.

1. Introduction:

Involuntary medical treatment may conflict with many modern legal systems which give seniority, priority, special attention and legal provisions to the human rights and people autonomy.

Involuntary hospitalization of mentally ill patients, which includes also involuntary treatment is, allegedly, a much more sever breech of human rights and dignity, as it breeches not only the autonomy of the patient, but more so, his/her freedom. The right for freedom and the basic right to free movement are essential elements in all modern legal systems and are considered major social and legal values. Consequently depravation of freedom and limitation of the basic right to free movement should be considered major breech of constitutional law according to all major modern legal systems.

On the other hand, however, in the case of a mentally ill patient, who cannot differentiate good from wrong or is totally incompetent to bear criminal responsibility, however endangers his surroundings and/or himself/herself, sometimes there is no other way but to involuntary hospitalize and treat such person in a locked psychiatric ward, with the hope that the treatment shall bring the patient to some kind or remission and reduce his\her dangerousness. Certainly there are times when there is no other alternative for society to protect itself against a delusional paranoid schizophrenic patient who truly believes that certain people are chasing him/her and have the intention and capability to harm or even kill him/her. His/her response may be a "natural" one; try, in return, to harm even kill those imaginary chasers.

In fact the problem of mentally ill people is a very ancient one and had been dealt with by mankind since the very first day. In old times, mentally ill or "crazy" "lunatic" people used to be at the lowest end of society and when performing dangerous deeds or even when perceived by their surroundings as potentially dangerous, could find themselves incarcerated in deep basements of old fortresses or in deep caves until their anonymous death.

The 20th century, however, especially the second part, brought to many societies the awareness for people's rights, especially mentally sick people, as reflected in legislation of mental acts and statutory provisions in different legal systems.

As legislation is always hindering after events and inferior to the reality in the sense that even the best and widest statutory provisions cannot cover the wide spectrum of human behavior and cannot provide for each individual case that may be brought before the judiciary, there are many cases that the judiciary has to decide on cases that the statutory provisions did not forecast.

In such cases every judge or head of a statutory tribunal for involuntary hospitalization, may use his/her own moral and ethical values for decisions, whether or not to deprive freedom of the mentally ill, or to enforce treatment, in individual cases.

This paper shall address some of the ethical dilemmas that the judiciary may have to cope with, when debating whether or not to involuntary hospitalize or involuntary treat mentally ill patients.

As bioethics still poses more questions than giving straight forward answers, there may be quite a few questions still left open after reading this paper.

2. Statutory provisions for involuntary hospitalization of mental patients.

Different legal systems have different statutory provisions for involuntary admissions, hospitalizations and treatment of the mentally ill. In most western legal systems the initial aim of the legislator is to balance between the goal to protect society and the mentally ill himself against dangerousness to self or to others, vis-à-vis the need to preserve the constitutional rights of every person, including the mentally ill, for freedom and autonomy.

We can find old English statutes from the 18th century, such as the "Madhouse act" of 1774 authorizing the royal college of physicians to grant licenses for houses for the "lunatics". Managing such a "house" without a license would cost the owner a tremendous fine. Admission to a "madhouse" required certification signed by a doctor, and lists of detained residents became available for public inspection. The old English term used for a mental institution was "Lunatic Asylums". The mid 19th century changed the statutory arrangement to the "Lunacy Act" of 1845 which authorized the detention of "lunatics, idiots and persons of unsound mind" in a "madhouse". This act together with additional county statutes governed the treatment – as much as we can call it a treatment in modern terms – and the management of mental institutions.

The above statutes were replaced toward the end of the century by the "Lunacy Act" of 1890 which has set the procedures for involuntary hospitalization by specialized Justice of Peace or magistrate who have been authorized to issue such an order for a period of one year, which later could be renewed.

The modern legislation in the Anglo-American legal systems as well as in many of the continental ones, set conditions and provided terms for involuntary admissions and hospitalizations of mentally ill patients, that are guided by the two, sometime conflicting, interests; the aim to protect society (and the mental patients himself) against the dangerous consequences of uncontrolled disease phenomena vis-à-vis the aim to protect the freedom and autonomy of the sick person.

As the writer of this paper serves as chairman of mental health statutory tribunals for involuntary hospitalizations (in some countries it may be referred to as

mental health courts), in Israel, the statutory provisions shall refer to the Israeli mental act, as a model that has many common denominators, in many aspects, with the statutory arrangement in many other countries.

The Israeli statute for The Treatment of The Mentally Ill of 1991, provides for the urgent involuntary admission of a mentally ill person, when he/she fulfills the following terms:

1. He/she is diagnosed with a mental disease

2. His/her judgment is severely impaired

3. He/she may present immediate dangerousness for self or others.

The statute provides also for non urgent involuntary admission of the mentally ill, in which case the patient can appeal to the statutory tribunal before he is taken against his will to the mental hospital. Such non urgent admission can take place when the first two above terms are fulfilled, namely the person is mentally ill and, as a result, his/her judgment is severely impaired, however the additional terms should fulfill any of the following criteria:

a. He/she may present non-immediate dangerousness for self or others (*for instance a schizophrenic person who is very quiet and has no violent record who starts verbal violence and expresses sever threats towards his family, or a sever diabetic patient who refuses to take his medication due to paranoid delusions that his doctors want to poison him/her*).

b. The person cannot take care of his/her own basic needs

c. The person causes to his surrounding major and significant mental suffering in a way that prevents his surroundings from carrying daily regular life.

d. The mentally ill person harms and damages severely, property (of self or others).

The authority for the initial civil (contrary to the criminal psychiatric admission that shall be referred to later) involuntary admission (both, immediate or non-immediate admissions) of a person who meets the above criteria, is the hands of a specialized senior psychiatrist whose authority is rooted in the above mental health statute and his position is termed as "The District Psychiatrist". In other legal systems a hospital doctor, a social worker, or even a police officer may involuntarily admit a person who is in a psychotic state, endangering other people or self. The initial admission order, be it the district psychiatrist in Israel or any other authorized person in other legal system, is time limited and further hospital detention has to be approved by the judiciary, be it a mental health court or any other form of a statutory tribunals.

The patient himself can appeal against his/her involuntary admission or the hospital request to prolong his/her detention to the mental health court or the statutory

tribunals. In some legal systems the patient may have a second chance to appeal against the tribunal decision by applying to the court of appeal and in some cases such appeals shall be discussed also in a third round in the Supreme Court.

The first judiciary instance, however, to decide whether or not to accept an appeal of the patient against the medical decision to involuntarily hospitalize him/her, is the mental health court or, as it is in Israel, the psychiatric statutory tribunal which is termed as "The District Psychiatric Committee in accordance with the Statute for the Treatment of the Mentally Ill".

The chairman of the committee, or the judge in the case of the mental health court, has to examine all evidence and circumstances concerned with the involuntary admission of the said appellant and decide whether all necessary medical and legal terms have indeed been met to legally justify the forced detention of the patient in the closed psychiatric ward.

As above mentioned, such decision should take into consideration two major conflicting interests – the safety of the patient and society versus the basic constitutional right for freedom and autonomy. Also one has to bear in mind that as much as civil involuntary admissions are concerned, the subject is not a criminal whose freedom can be deprived according to the criminal law and he/she have never been charged for breeching criminal codes. The only reason for the act of involuntary admission and detention of a patient in such psychiatric ward, is the psychiatric disease that causes the sick person to become dangerous for self or for others.

Therefore one can imagine that since the judiciary in charge of involuntary admissions is dealing with human suffering (both, of the patient as well as his/her surroundings) due to a mental disease, such judiciary may face quite a few situations where, besides the simple or sometimes complicated medical findings, there are other human considerations that complicate the judicial decision. Such situations create bioethical dilemmas which call sometimes for creative, our of law decisions, in cases where the statutory arrangements have not provided for, since the legislator could not envisage all varieties of human behavior, especially not behavior of mentally ill patients.

3.Bioethical dilemmas in civil involuntary hospitalization

One of the major areas in involuntary hospitalizations of mental patients that present bioethical dilemmas to the judiciary is the area of impaired judgment of people whose diagnosis is not a strict mental disease, but rather an emotional disturbance, personality disorder, or any other behavioral disorder which causes them to behave in a way that endangers themselves or others.

One of the situations which is not defined – according to the DSM IV[1] - as a mental disease but rather as a behavioral disorder is the state of Anorexia Nervosa. Anorexia, which is more prevalent in adolescents and young women, is concerned to be a dangerous state where young girls may starve themselves to death. Yet according to the mostly accepted psychiatric classification – the DSM IV – anorexia is not defined as a psychiatric disease and is classified under eating disorders.

There is no dispute about the sever impairment of judgment of the anorectic, as a girl who weighs only 33-35 Kg. may look in the mirror and see an overweight lady (and it's not a vision problem). Many of those girls refuse treatment, definitely not a forced one. Yet when it comes to the question of involuntary admissions for treatment of this life threatening condition, such act may not fit entirely into the legal picture. The reason for that is that most of the statutes that authorize involuntary hospitalization and forced treatment require that the person shall be diagnosed as suffering from a mental disease. As anorexia is not defined as such in the mostly acceptable clinical classification, the anorectic patient does not, allegedly, fulfill the legal terms for an involuntary admission order.

When such an appeal comes to the mental health tribunal or mental health court, and the anorectic girl[2] claims[3] against the forced treatment and the hospital detention, the judge has the option to take the strict approach of absolute verbal adoption of the law and decide to release the girl on the ground that she does not meet the legal criteria for involuntary hospitalization[4]. Such a decision may by far endanger the girl's life, as she'll most probably continue her obsessive starvation until body systems shall suffer irreversible damage and collapse, so that she'll enter a terminal phase.

On the other hand the judge can choose another option, decide to deny the girl's appeal and approve the involuntary hospital detention initial order, on the ground that the sever impairment of judgment, though focused only on the body image, can still be considered a major psychiatric disturbance that stands the terms set by the law for involuntary hospital confinement.

---

[1] DSM IV = The Diagnostic and Statistical Manual of Mental Disorders (DSM) is the standard classification of mental disorders used by mental health professionals in the United States and is a major source of reference in many other countries.

[2] Since the anorexia phenomena have a significant prevalence in young girls, the discussion shall refer to a girl as a representing model of the syndrome.

[3] In most western legal systems the patients are represented before the mental health court or the statutory tribunals, by lawyers from the legal aid, who are provided by the state. So in fact when referring to appeals and claims of mental patients to be released from the hospital detention, it refers usually to claims raised by the lawyer representing the patient.

[4] The question whether or not anorexia is classified as a disease is relevant also for other legal areas, such as medical care and insurance coverage, as some insurance companies refused to cover treatment for anorexia, claiming it is not a disease but merely eating disorder.

My own approach in such cases is to look at the broad clinical picture and judge such cases in a functional way rather than to stick categorically to DSM definitions.

The aim of the legislation is to save the mentally ill, whose judgment is severely impaired, from his/her self dangerousness. As anorexia represents a severe damage to judgment, it can be deducted that this is one of the cases the legislator had in mind when giving the power to the authorities to involuntary hospitalize and treat such patients who jeopardize their own life as well as jeopardizing the safety of others.

The dilemma of the judiciary in this cases is rooted neither in the legal nor in the medical arena. Such a dilemma is a bioethical one which involves moral, philosophical, educational and perhaps even religious values about the importance of life and maybe even about the question whether life has a sacred value so that life should be preserved at any cost, even when the person involved does not want to live[5].

Indeed we can see different approaches of different legal systems and even within the judiciary in such systems, regarding the right of society to paternalism over the anorectic patient who endangers his/her life through intended starvation. The law in Israel is not clear enough in the definition of a mental disease[6] and indeed judges can stick to the medical classification as expressed in the DSM IV and hold that anorexia is not a mental disease but merely an eating disorder and release such girls to die at home. Others may put heavier weigh on bioethical considerations and hold that the sever impairment in judgment, regarding their body image, entails a psychiatric disorder and therefore deny the appeal and maintain the forced treatment as a part of the involuntary hospitalization[7].

The question of forced medical – even non psychiatric - treatment on mentally ill patients, may pose additional bioethical dilemmas to the judiciary, especially for treatment that are bound to a written and signed informed consent. Such is the case of a psychiatric patient in need for surgery or hemodialysis who refuses treatment due to

[5] It should be noted that in most of the cases the anorectic girls do not have the intention neither the will to die. They want to correct their body image which looks too fat in their eyes and do not agree that they can easily come to a no return point where the irreversible damage can turn into lethal situation beyond their control.

[6] All the law requires is a "mental disease" without defining what is a disease or which kind of a disease it meant or whether a mental disorder and different mental disturbances can also be considered as included in the statute.

[7] In fact when the tribunals or mental health courts find that the anorexia is a part of a broader mental disease, they can always find medical and legal grounds to leave the patient in the involuntary hospitalization and reject his/her motion. Also it is worth to mention that most of the appeal judges in Israel found the legal construction to approve the hospital detention of the anorectic girls. One of the judges, however, in the court of appeal did release anorectic girls from involuntary hospitalization and as far as the author of this paper knows, at least one of those girls died later.

his/her paranoid ideas that the doctors want in fact to hurt him/her. Obviously the outcome of failure to perform such surgery of hemodialysis can be severe jeopardy to the patient life. A similar case can be envisaged with a psychotic mother who comes to the delivery room and the doctors diagnose a fetal distress which could be alleviated only by caesarian section surgery, yet the mother to be, refuses to sign an informed consent and refuses at all any surgical intervention.

It seems that in these cases there will be more scholars and judiciary experts that shall approve the forced medical intervention since there is an obvious threat to life of the patient[8].

The above cases that present life threatening situation to the psychiatric patients, may lead to another bioethical dilemma of the judiciary presiding on involuntary hospitalizations issues: the "normal" suicide.

According to many hospital protocols, in most of the countries, when a patient is brought to the emergency department after an attempted suicide, the attending psychiatrist is called for consultation to rule out a psychiatric disease or any other mental disorder. In light of the imminent danger, the tendency of many doctors is not to take a chance and involuntary hospitalize the patient, at least for a few days, so that he/she could be treated - more importantly be supervised – in a sheltered environment that can prevent any further attempts.

When such a patient appeals to the judiciary against the forced detention in the hospital and is not found to be in an active psychotic state, it may pose a serious bioethical dilemma to the presiding judiciary, especially when circumstances point towards a further attempt. Take for instance the case of a financial breakdown or a deep love disappointment when the person looses all motivation to live and even is open enough to say so. He may also claim that he/she is the only owner of self and own life and nobody has the right to enforce such life on him/her.

If the medical psychiatric examination of such a patient, cannot reveal a clear cut psychiatric diagnosis, than the judiciary is left with a heavy weight bioethical dilemma, whether or not to approve further detention of the potential, even imminent, suicider in the sheltered closed psychiatric ward environment.

Forced psychiatric treatment may pose another set of problems in the bioethical field even in non life threatening situations, when such treatments are defined as special treatments that are bound to informed written consent of the patient or his guardian. Such is the case of ECT[9]. Take for instance a patient who is involuntary

---

[8] Or in the case of the mother to be, an obvious threat to the life of the fetus or an obvious threat to a defect that shall make his/her life severely handicapped and miserable.

[9] ECT = Electro Convulsive Therapy which was given in the past mostly to depressed or bipolar patients and nowadays is given also in psychotic diseases. Contrary to the past, this treatment is performed nowadays under general anesthesia or at least under potent sedatives that cause

hospitalized due to severe drug resistant schizophrenia and the doctors believe that the only way to stabilize his/her condition and bring him/her to a certain degree of remission that may enable him/her to get back to normal life, is through ECT. Yet the patient refuses to sign the written consent and has no official guardian to substitute his/her signature.

Indeed avoidance of the ECT treatment shall not endanger the patient's life, however there is no question that the prolongation of the involuntary locked psychiatric ward detention of that patient, is not serving the patient benefit – the contrary is true. The bioethical dilemma of the judiciary who may have to deal with such question is obvious. Can we enforce paternalism on such patients that do not understand that ECT treatment is for their own benefit?[10] Should we exercise that paternalistic approach assuming that at the end of the day the patient may thank us when he is released from hospital and back to his previous ("normal"??) life?

Here too, the judiciary may have two options:

1. Sticking to the regulations that call for written consent of the patient and rule that forced ECT cannot be performed

2. Rule for involuntary ECT treatment as part of the involuntary detention and other involuntary treatment modalities such patient may be treated with, while in the forced hospital stay.

As we see it the dilemma is not only a legal one but rather a bioethical dilemma[11]. The question here is to what extent should society exercise paternalism

---

complete amnesia of the event. Still this procedure is involved with significant fear by some patients and sometimes it may have a negative – though mostly reversible - effect on memory.

[10] In fact we can broad this question to every case of children who refuse to get injections and the parents hold them screaming while the nurse injects the drug. Here, too, the patient – the child – does not understand that the treatment is for his/her own benefit and will get him out of his/her diseased state. Indeed, for injections, not like for ECT, we do not need a written consent. However any medical treatment needs the patient's consent which is usually a tacit consent given by behavior. Still in the case of children the assumption is that their discretion and judgment regarding the medical situation is impaired – hence the practice of paternalistic approach. Is it not – in analogy – similar to the mental patient case???

[11] In two different court-of-appeal cases given recently in Israel, two judges gave opposite opinions. In one case the presiding judge held that since the purpose of involuntary hospitalization is to treat the patient – not just detain the patient in a locked psychiatric ward - ECT is one of the treatment options. As much as the entire hospital stay and treatment can be carried out without and even against the patient's will, so is also the ECT treatment. Another judge held that ECT is not just another treatment since it calls for a written consent and therefore held that such treatment should not take place without the written consent of the psychotic patient.
The outcome of such ruling is that the patient may stay almost indefinitely in the closed psychiatric ward as his disease is not responsive to medications, his delusional and paranoid thoughts continue to drive him into violence and his dangerousness continue to be in full strength.

over the mentally sick person. This is basically a bioethical issue which involves social and constitutional perceptions regarding the basic right for autonomy and the question whether the autonomy of the twisted mind psychiatric patient can be considered a real autonomy.

4.Bioethical dilemmas in criminal involuntary hospitalization

The criminal involuntary admissions deal with the person who committed a criminal offense and when charged is found by court as either, due to mental disease, not being able to differentiate between good and bad at the time of the offense and/or is in such a dissociated state at the time of the hearing, that he is found incompetent to stand trial.

In such a case the defendant is released from criminal responsibility and is sent, instead to prison, to a locked psychiatric ward for treatment.

There are quite a few philosophical and bioethical issues involved in such involuntary hospital detention, since the modern social perception is that the aim of the detention is not for punishment, since the offender had no real criminal intention[12].

On the other hand there is no social debate that society should be protected against crimes even when the offenders are driven by psychotic states. Therefore there is no debate whether or not to involuntary hospitalize and treat such persons, so as to alleviate the threat from society.

One of the major dilemmas in the criminal involuntary hospital detention of the mentally ill is the duration of such detention.

There are minor criminal offenses that bring a dangerous mental person to hospital detention and even after a long period – much longer than the period of prison he would have served if he was competent to stand trial – he is still psychotic and still needs the sheltered environment of the locked psychiatric ward.

On the other hand there are cases of psychotic persons who perform severe crimes, such as murder or rape, who after a relatively short period of involuntary hospital detention, for which they have been sent to by a court order, are stabilized, their delusions are not expressed anymore, they do not hear commanding voices and their dangerousness, according to their treating physicians is lessened to a degree that the doctors recommend their release from hospital.

Some legal systems provide for such cases in a way that enables the prosecution to resume legal proceedings. This practice is exercised especially in cases when the

[12] A basic requirement in the criminal law is that the offender has "Mens Rea", a bad thought or criminal intention. Obviously no such Mens Rea can be referred to a person who is driven by mental illness delusions to perform the offense he was charged for.

offender has been sane and competent at the time of the criminal offense, but became incompetent only at a later stage, towards the beginning of the trial.
However when dealing with the mentally ill that at the time of the offense could not differentiate between good and bad, the resumption of legal proceedings shall not bear any actual results[13].

The question of the duration of hospital detention of a psychotic criminal offender is basically a legal question however it does carry bioethical and philosophical questions and dilemmas.

The legal philosophy and the modern social perception is that the hospital detention of the psychotic criminal, is not a substitute for punishment, since the sickness is to blame-not the person.

On the other hand, if one of the reasons for imprisonment of criminals is to give the public peace of mind[14] by knowing that dangerous criminals are incarcerated behind closed bars, how come that a murderer or rapist can walk free after a relatively short hospital detention, only because his doctors managed to stabilized his disturbed mind? How would the public be able to trust the legal system when the hospital detention model for psychotic criminals is in fact a revolving door?

Another aspect of this dilemma is long hospital detention periods for minor offenders that would have been freed from prison long ago, had they been sane, charged and sent to prison by court. In such cases when the treating physicians find that the person is still psychotic and may be dangerous, he/she may spend very long periods, maybe even many years, in hospital detention, when such long periods have no proportion to the severity – or "inseverity" – of the offense.

Indeed different legal systems and courts dealt with this questions and offered different kinds of solutions[15]. However since at the end of the day the individual

---

[13] Since he/she shall not bear in any case, any criminal liability, as there was no understanding or discretion at the time of the offense.

[14] There are quite a few arguments in the basis of the rational for punishment of criminals, such as discouraging future crimes and potential criminals, revenge, etc. However one of the major arguments is to ensure peace of mind for society that dangerous criminals are kept away behind bars.

[15] The Israeli Supreme Court set the rule that the length of hospital detention of criminal offenders should be proportionate to the severity of the offense. Still the court itself, when finding a defendant not competent to stand trial, rules for psychiatric hospital detention but do no set the length of such detention, which should be determined by the medical condition. That condition is examined periodically by the mental health tribunal (court) which decides whether or not to prolong the hospital detention.
Other legal systems provide different solutions, however all systems face bioethical dilemmas when debating when to release a detained psychotic offender, due to the almost endless spectrum of human variations of the clinical state and clinical evaluations of such mentally ill persons.

particularities and circumstances of a particular patient may differ and vary from case to case, there are still cases where the judiciary is faced with such bioethical as well as social and philosophical dilemmas when dealing with the question whether to prolong the hospital detention of a minor offender or whether to release from detention a major offender after a short hospital stay, merely due to his/her medical improvement.

5.Conclusions:

This paper presents a sample of different bioethical dilemmas of the judiciary when dealing with the question of involuntary hospital detention.

As the spectrum of human variations of "normal" minds and certainly of "twisted" minds of psychiatric patients is so wide, it is easy to understand that the spectrum of bioethical dilemmas shall be a very wide spectrum as well.

Bioethics is one of the areas where there may be more questions than answers, as the different considerations involve moral, personal, educational, cultural and religious values.

One of the most important aspects of bioethics is the ability to recognize and identify the problematic areas and act with full understanding and empathy towards the feelings and values of the other person.

Understanding the dilemmas shall not cause such dilemmas to vanish and they shall continue to follow us as long as mankind exits.

However by understanding the dilemmas, the judiciary presiding in psychiatric cases – both mental health court and statutory tribunals as well as appeal courts - may alleviate some of the harsh consequences of legal rulings on the psychiatric patients.