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Psychiatry

PLEASE ALLOW TRUE SELF-DECISION UNDER MACAO LAW

Man Teng Iong*

Abstract: According to Macao's mental health law, mentally ill patients have a right to accept or refuse diagnostic and/or therapeutic intervention, except in cases of compulsive hospitalization or in emergency situations where non-intervention is likely to create serious risks to patients or to others. As these patients may lack the capacity to make healthcare decisions, their health rights are eventually exercised by tutors who are legally appointed. This paper indicates a problem of current procedure: a potential risk of making a wrong decision by tutors, against the true will of mentally ill patients, who would not make the same decision when capable. The decisions made by tutors may not fully express the true will of mentally ill patients. It implies a significant impact on self-decisions and a reduction of autonomy.

This paper proposes a binding nature of prior will in Macao, since a prior will is only taken into account and may not be respected in actual circumstances, as well as the use of Psychiatric Advance Directives in Macao, to resolve the existing problem outlined above. These two proposals are very important in empowering the autonomy of mentally ill patients to make their own healthcare decisions according to a true prior will. The proposal of implementation with facilitation, education and legal support, of which Macao Health Bureau plays an important role, is also critical for practical use of Psychiatric Advance Directives.

Keywords: Psychiatric Advance Directives; Mental Disorder; Self-decision; Autonomy; Macao Law

* **Legal Advisor and Notary in the Macao Health Bureau, and Academic Staff in the Faculty of Law of the University of Macao (China); Junior Researcher of the Research Centre for Justice and Governance of University of Minho (Portugal); Ph.D. Student of the School Law of University of Minho (Portugal); Master in Juridical Sciences in the Faculty of Law of the University of Macao (China) and Bachelor in Law in the Faculty of Law of the New University of Lisbon (Portugal). Email: manteng.iong@gmail.com.**

1. INTRODUCTION

Before the transfer of sovereignty over Macao, from Portugal to China, in 20th December 1999, the mental health law in Macao (Decree-Law n. 31/99/M) had come into effect from 12th July 1999 and has not been changed since then. Prior to Macao's mental health law, there had been no legal document regarding policy for the protection of mentally ill patients. The law aims at filling the existing gap by defining the rights and duties of people with mental disorders and by clarifying the regimes of compulsory and urgent hospitalization². This is why some general principles were created, to protect and promote mental health, and to regulate the compulsory hospitalization of those with mental disorders³.

This paper demonstrates, in sections 2 and 3, an existing problem regarding the right to informed consent of mentally ill patients and its influence on self-decisions and autonomy of those patients. In section 4, this paper proposes a legally binding nature of the Prior Will to enhance patient autonomy and self-decisions relating to their healthcare. It proposes, in section 5, the use of Psychiatric Advance Directives (PADs) and their implementation with facilitation, education and legal support.

2. FINDING OF A PROBLEM

Among the rights of mentally ill patients, mental health law in Macao defines a specific right regarding informed consent, namely the right to *'Decide whether to receive or refuse the proposed diagnostic and therapeutic interventions, except in cases of compulsory hospitalization or urgent situations where non-intervention is probably to create serious risks for the patient or for others'*⁴. Ignoring detail explication, as to the two exceptions, the mentioned right *'is exercised by legal representatives when the persons with mental disorder do not have discernment to assess the meaning and scope of the required consent'*⁵.

According to the Macao Civil Code, people with mental disorders can be either interdicts or disqualified persons⁶ depending on whether the mental disorder is serious or not⁷. The people with serious mental disorders (interdicts) are not

1 About this law, see <http://bo.io.gov.mo/bo/i/99/28/declei31.asp> (Portuguese version) and http://bo.io.gov.mo/bo/i/99/28/declei31_cn.asp (Chinese version) (accessed 26 March 2018).

2 Preamble of the law.

3 Article 1.

4 Article 4/1/c).

5 Article 4/3.

capable of governing neither themselves nor their property⁸, while those with mental disorders (disqualified persons) only cannot manage their property⁹. There is a gap in the legal definition of 'interdicts', individuals with serious mental disorders, and 'disqualified persons', patients with less severe mental disorders. Interdicts are represented, while those disqualified are only assisted as they still have capacity to exercise certain rights.

When mental health law in Macao requires that the right to informed consent *'is exercised by legal representatives when the persons with mental disorder do not have discernment to assess the meaning and scope of the required consent'*¹⁰, it is understood that those persons are interdicts and should be represented, in order to exercise the mentioned right, instead of being assisted.

The legal representatives should be tutors prioritized in the following order: (1) spouses of interdicts; (2) person designated by their parents or progenitors who exercise the father power; (3) progenitors of interdicts; (4) their adult sons appointed by court; (5) persons of marriage in fact¹¹. Legally appointed tutors may help and exercise interdicts' ability to capacity and right to informed consent.

With legally appointed tutors comes the risk of errors in healthcare decision making concerning the patient. Numerous factors can affect the communication and relationship between tutor and patient and can result in outcomes undesired by the patient. If people with serious mental disorder (interdicts) were capable of exercising their right to informed consent at that moment, they would have made a different healthcare decision, not the decision made by tutors on their behalf.

3. INFLUENCE TO SELF-DECISION

Informed consent requires at least two elements: understanding, including information disclosure by physicians and patient's comprehension regarding the disclosed information; and voluntary consent¹². It is presumed that

6 The term 'disqualified person' corresponds to the term 'desabilitado' in Portuguese.

7 Articles 122/1 and 135 of the Macao Civil Code.

8 Prata 2011, p. 797.

9 About this point, see <http://www.inr.pt/content/1/71/regimes-interdicao-inabilitacao-tutela> (accessed 27 October 2018).

10 Article 4/3.

11 Article 126/1 of the Macao Civil Code.

12 Entidade Reguladora da Saúde 2009, p. 3-4.

physicians give the same information to patients and their tutors, and all of them have the same understanding about the provided information, but they can make different healthcare decisions. Tutors accept certain treatments while patients reject those same treatments.

In cases where decisions made by tutors do not correspond with patients' choices (those with serious mental disorder, interdicts), their rights to informed consent are often not respected. This sheds light on the misrepresentation and sometimes abuse of power that is possible with legally appointed tutors, instead negatively affecting the patient's capacity and autonomy.

4. PROPOSAL OF BINDING NATURE ON PRIOR WILL

The only way to let people with serious mental disorder (interdicts) make a true self-decision, is the making a prior will, similar to an advance directives, before losing their decision-making capacity¹³. Contrary to Portugal¹⁴, there is no law, in Macao's legal framework, regulating advance directives and binding nature of a prior will.

Indication can be found regarding prior will in Macao Law. Under the Protection of Human Rights and the Dignity of the Human Being in the face of the Applications of Biology and Medicine (Decree-Law n. 111/99/M, 13th December), a prior will, about healthcare intervention, should be taken into account when a person is not in a condition to express his/her willingness at the time of the intervention¹⁵. Physicians in Macao only need to take into account a patient's prior will, such as advance directives, regarding healthcare treatments. Taking into account is not the same as respect, because the first does not have binding nature and refers to purely to consideration of someone's will. Respect implies an obligation to follow that patient's prior will. According to Macao Law, physicians are only punished when they do not consider a patient's prior will (e.g., neither read nor touch the advance directives)¹⁶. They can make healthcare decisions which are suitable for patient

13 If a person has been a mentally ill patient from his birth, it is clear that he has no condition to make a prior will and the only solution is that his tutor makes a healthcare decision in his representation.

14 In Portugal, there is a law (Law n. 25/2012, 16th July) regulating advance directives under the forms of living will and durable power of attorney and defining a binding nature on prior will.

15 Article 8/2. About this law, see <http://bo.io.gov.mo/bo/i/99/50/declei111.asp> (Portuguese version) and http://bo.io.gov.mo/bo/i/99/50/declei111_cn.asp (Chinese version) (accessed 21 July 2018).

16 An explication concerning the patient's prior will in Macao, see Long 2017, p. 25-27.

clinical situations, even though the decisions are made against a patient's prior will. As these decisions do not represent the patient's will, acceptance of this situation implies a reduction of autonomy. Legislation regarding the binding nature of a prior will, in Macao, is necessary for enhancement of autonomy for those with serious mental disorder (interdicts).

The decisions, consisting in this kind of document, represent the person with serious mental disorder, interdict's own decisions and advocacy of patient autonomy. In cases where such prior wills are not completed, the healthcare decisions, made by tutors, are for patients' benefits.

5. PROPOSAL OF THE USE OF PSYCHIATRIC ADVANCE DIRECTIVES

5.1. Definition

In addition to the binding nature of prior wills to empower patient capacity, this paper proposes and promotes the use of Psychiatric Advance Directives – *written documents or oral statements that allow adults with decision-making capacity to declare their treatment preferences and/or to designate proxy decision makers to act on their behalf should they be deemed incapable in the future of making informed choices on their own*¹⁷. PADs permit patients to indicate their preferences in varying potential scenarios in the future, when they may not have the capacity for informed consent.¹⁸

Similar to advance directives, there are two forms of PADs: instructional directives and proxy directives. The former refers to documents or statements in which those with decision-making capacity declare their preferences regarding mental healthcare treatments, for a future time when they cannot make an informed consent. Proxy directives relate to documents or statements by which the mentioned person designate an attorney to make the healthcare decisions on their behalf for the same situation in the future.

The healthcare decisions, made by either of the two forms, represent the will and decisions of person with serious mental disorder (the interdict). In instructional directives, people with decision-making capacity only declare their treatment preferences earlier while still making their own decisions. Although proxy directives identify the designated attorney and decision

17 Zelle, Kemp & Bonnie 2015, p. 278. About the two forms of PADs, see Srebnik & La Fond 1999, p. 920.

18 Khazaal, et al. 2014, p. 1.

maker, the healthcare decisions are still made by the patients as they choose and give their attorneys instructions regarding treatment preferences.

PADs intend to help mentally ill patients decide their own mental healthcare¹⁹. The decisions made in this way represent their true healthcare decisions given that the patients' informed decisions are made while capable and autonomous and/or appoint surrogate decision-makers in the moment of competence (with a sufficient discernment to assess the meaning and scope of their consent) for the period of incompetence in the future.

5.2. Advantages

An advantage of using PADs is enhanced autonomy²⁰, as they guarantee informed decisions regarding the healthcare treatments of people with mental illness, before becoming incompetent, or in the alternating periods of competence and incompetence. The exercise of prior autonomy is very important for making an informed choice in mental healthcare treatments – PADs can empower mentally ill patients and demonstrate a basic respect of their humanity²¹.

PADs can also reduce involuntary or coercive treatments (such as taking medicine for mental health, involuntarily)²² because physicians should respect a patient's willingness, or rejection of, those treatments, even if such a choice could worsen clinical prognosis. Less coercion of intervention implies more autonomy and self-determination for the mentally ill patients.

Sometimes PADs can avoid patient's negative behaviours against doctors, such as argument, disagreement or violence, in a situation where doctors disrespect the dictates contained in PADs and choose the treatments that they think better and suitable for his/her clinical situations.

PADs can be a useful tool for improving communication between patients and physicians and incorporating patient preference²³. They can increase a patient's sense of control²⁴ and shorten patient's hospital stay²⁵. Using them

19 Elbogen, et al. 2007, p. 283.

20 Zelle, Kemp & Bonnie 2015, p. 278.

21 Olsen 2017, p. 266.

22 Swanson, et al. 2008, p. 255; David 2017, p. 2.

23 Wilder, et al. 2010, p. 380-385; David 2017, p. 2.

24 Elbogen, et al. 2007, p. 266.

25 David 2017, p. 2.

routinely may help facilitate physicians in making healthcare treatments correspondent to patient preferences.

5.3. Implementation with Facilitation, Education and Legal Support

Should physicians be obliged, in the future, to respect the prior will in Macao, other questions regarding practicability of PADs will emerge. Do laymen with physical and mental capacity know how to make PADs without any assistance? Do physicians or staffs without any education know how to provide assistance to the people who want to make PADs? How can physicians and those who want to make PADs know the exact meaning of some legal terms contained in the PADs without any legal support?

For practical use of PADs in Macao, one needs to resolve these questions in addition to the necessity of legislation, regarding a binding nature of PADs, given that people with capacity who want to make or complete them will desist to do so when facing difficulties. In USA, especially in Virginia, some approaches are suggested to be employed, in order to successfully translate PADs into actual use, such as one-on-one education and facilitation by licensed staff, one-on-one education and facilitation by peers, and group education and facilitation²⁶.

Facilitation is an effective method to ensure that PADs contain useful information about patient treatment preferences, in addition to helping them overcome obstacles to complete PADs²⁷. It is essential to increase the rate of completing PADs, increase satisfaction with treatment services and improve patient working alliance with their physicians²⁸. This is called Facilitated PADs – *‘a form of directive in which a trained facilitator helps the service user document his or her preferences and thus create a final document’*²⁹.

Before the use of PADs, the process of making this kind of advance directives can help patients recognize and articulate their preferences³⁰. When they have decision-making capacity and have first contact with PADs, it is very important to educate them with legal support regarding what are PADs, and why and how to complete them and their use in the future. An integration of

26 Zelle, Kemp & Bonnie 2015, p. 8-9.

27 Swanson, et al. 2006, p. 1950.

28 Ibidem.

29 Khazaal, et al. 2014, p. 2.

30 Wilder, Elbogen & Moser 2010, p. 383.

legal support, into education of completing PADs, is essential to improve rates of their execution³¹. Educational interventions, with legal support, should be made not only for patients, but also for healthcare providers or physicians.

Who should play the role for facilitation, education and legal support to people who want to make or complete PADs in Macao? This responsibility must lie with the Macao Health Bureau. It is a governmental department which should promote the enhancement of autonomy by allowing mentally ill patients to make true self-decision. Only the Macao Health Bureau has the human and economic resources to boost the facilitation, education and legal support for the practical implementation of PADs.

6. CONCLUSIONS

According to this, the issues of patient capacity and decision making, in the mental health law of Macao, can be resolved in two ways. Legislation for the binding nature of prior will is necessary for implementation of PADs and essential for enhancement of autonomy. Promotion of the usage of PADs, by the Macao Health Bureau, is critical for the population to be aware of PADs and informed. Facilitation, education and legal support by the Macao Health Bureau is also relevant for practical implementation and high rates of PAD usage.

Currently, people in Macao supportive of PADs are concerned that their prior will may not be respected by physicians in the future. They fear clinicians making decisions that are best for them and not the patient. This is not a good scenario for promotion of PADs in Macao.

This study demonstrates important information for the Macanese legislator: patient's self-decision should prevail over his/her health or life. It means patient's prior will should be respected by physicians, even if the decisions to be made are not the most appropriate for patients' clinical situations. It is necessary to emphasize that patients and people in Macao can make their own healthcare decisions with the right tools provided.

31 Srebniak & La Fond 1999, p. 920.

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