The exercise of medical activities in respect of detained[1] persons

Medical-ethical guidelines of the Swiss Academy of Medical Sciences

I. Preamble

The participation of doctors[2] in coercive measures exercised by the police, in particular during the deportation of illegal aliens from Switzerland, has given rise to serious public concern. With a view to responding to the expectations of the different circles involved, the Swiss Academy of Medical Sciences (SAMW) has drawn up guidelines for doctors who might be asked for their active co-operation in this sensitive domain, in which the boundaries of ethical behaviour may easily be overstepped. More generally, specific aspects of the medical treatment of persons in police custody or held in a prison establishment have also been examined.

The fact that there exist in Switzerland various codes of criminal procedures and cantonal regimes for the execution of sentences does not facilitate the establishment of such guidelines. If the detained person suffers from a mental disorder, the complexity of the laws on guardianship – currently under revision at the federal level – further complicates the situation.

Concerning the last point it must also be noted that unfortunately there is a severe lack in penal institutions[3], appropriate – in the sense of the Swiss Penal Code (SPC) – for the accommodation of such persons, as well as a lack of suitably trained medical (and socio-*therapeutic*) personnel.

Against this complex background, the SAMW now submits guidelines which, while being largely inspired by international recommendations for the provision of care to detainees, make no claims to have dealt with the subject in an exhaustive way. In particular, the general question of means of restraint in the psychiatric domain or of emergency measures in somatic medicine, are not treated. However, the SAMW has already set up a new subcommittee to draft guidelines concerning persons deprived of their liberty for the purpose of receiving assistance on purely medical grounds (in the sense of art. 397a and ss., Swiss Civil Code).

The SAMW is fully aware that part of these guidelines on the exercise of medicine in respect of detained persons is concerned with tasks incumbent on the administrative and executive authorities, as well as on the legislators of our country. Where this is the case, they can only be applied conditionally and mainly serve the purpose to make known the views of the medical profession on this subject.

II. Guidelines

1. General principles; concept of refusal for reasons of conscience

1.1 The basic ethical and legal principles guiding the exercise of the medical profession, in particular the regulations on patient's consent and confidentiality, are also applicable to detained persons.

1.2 However, in this context, a doctor is often subjected to constraints relating to security and the maintenance of public order, even though his primary goal should always remain the welfare and dignity of the patient. The practice of medicine under such conditions has its specificities insofar as the doctor has an obligation to serve both the interests of the detainee and those of the responsible authority[4], while these interests may be in part conflicting.

1.3 Fitting in with these constraints may sometimes run counter to the doctor's personal convictions (whether in the context of a long-term contractual activity or in an isolated instance). The doctor should therefore be in a position to act in accordance with his conscience and the principles of medical ethics, and refuse to give an expert opinion or treat a detained person, except in an emergency.

2. Conditions of examination

2.1 In order to create an atmosphere of trust, the doctor should endeavour to preserve the usual conditions and dignity of a normal doctor-patient relationship.

2.2 A suitable room should be provided for the medical examination of the detainee. The examination must take place out of the sight

1 In these guidelines, "detained persons" (as opposed to "persons deprived of their liberty" in the sense of art. 397a and ss of the Swiss Civil Code) are persons deprived of their liberty on the basis of a decision by a police or judicial (including military) authority or detained upon a court order based on the federal law on coercive measures as regards aliens legislation.

2 For simplicity's sake, the male designation is used for both genders throughout these guidelines.

3 "Institutions" in the sense of these guidelines are: police stations, remand custody establishments, prisons, detention facilities for persons awaiting deportation, administrative detention centres.

4 "Responsible authority": prison administration, judicial authorities, police authorities.

and out of the hearing of third persons, unless otherwise requested by the doctor concerned or with his explicit consent.

3. Expert activities and situations

3.1 Except in times of crisis or in an emergency, a doctor should not simultaneously act as a physician treating a patient and as an expert delivering his opinion.

3.2 Before a doctor becomes active in his capacity as an expert, he shall tell the person to be examined in clear and unmistakable form that the results of the examination will not be subjected to the obligation of medical confidentiality.

4. Disciplinary punishment

When a doctor is asked to evaluate whether a detainee may or may not be submitted to a given disciplinary measure, he shall give his opinion only after the order to execute the measure has been issued. His evaluation thus follows, as a second step, if necessary in the form of a veto, pronounced on the basis of purely medical criteria.

5. Equality of treatment

Detained persons are entitled to the same level of medical care as persons living in the community at large.

6. Coercive measures decided and applied by the police or prison authorities

6.1 When informing the responsible authorities on potential risks and consequences to the health of a detained person of a coercive measure decided by the authorities (e.g. compulsory evacuation from lodgings, deportation, etc.), the doctor shall exercise due caution, after having obtained, if possible, all relevant data from the medical history of the detainee. In particular, he shall take into account the intended means of transportation, the expected duration of transport, and the safety and restraint measures, if any, that will be applied.

6.2 He shall always request the presence of a health professional if the physical or mental health state of the detained person makes this necessary, or if the severity of the measures to be applied for the purpose of restraint, or the safety measures per se, represent a potential risk to the health of the detainee.

6.3 If the doctor is called up to a detained person awaiting the application of a coercive measure, he shall adopt a neutral and professional attitude and inform the detainee that he is at his disposal and that no medical procedure will be applied without the detainee's consent (with the exception of the situations outlined under point 7.3).

6.4 Should the doctor reach the conviction that the means required to carry out the measure (e.g. gagging, tight and long-lasting binding, so called 'swallow position', with hands and feet handcuffed on the back in opisthotonus position, etc.) represent an immediate and serious health hazard for the patient, he shall notify the responsible authorities immediately, informing them that he will not assume medical responsibility over the case if they do not renounce the intended measure, and that as a result he cannot lend them his support.

7. Agreement to a medical treatment or to a coercive treatment

7.1 As in any medical situation, a doctor, whether issuing an expert opinion or dispensing a treatment, shall carry out a diagnostic or therapeutic measure only if and after the detained persons has given his informed consent.

7.2 Any medication, in particular psychotropic drugs, shall therefore be administered to detained persons only after they have given their consent, and only on the basis of a strictly medical decision.

7.3 In the case of an emergency, and based on the same criteria as those applied to persons that are not detained, the doctor may forfeit a patient's consent in cases where the patient is not in full possession of his capacity of discernment, due to a major psychiatric disorder, and represents an immediate danger for himself or for third persons (cumulative conditions). In such a case, the doctor shall ensure that the patient will be granted an adequate short and long-term medical follow-up (namely in the form of a temporary transfer to a psychiatric clinic, for instance in cases where an order of deportation cannot be carried out for medical reasons).

7.4 Doctor's resort to instruments of physical restraint can only be foreseen for a few hours at the most. In all cases of such restraint, the responsible doctor is obliged to regularly check if it is correctly applied and continue to be justified; he shall re-assess the situation at regular short intervals.

8. Infectious diseases

In the presence of an infectious disease, the detained person's autonomy and freedom of movement can be limited only to the same extent and according to the same criteria as those applying to other population groups living in conditions devoid of privacy (e.g. the military, holiday camps, etc.).

9. Hunger strike

9.1 In case of a hunger strike, the detained person should be repeatedly informed by the doctor, in objective fashion, about the possible risks of long-term fasting.

9.2 After the full capacity of discernment of the concerned detainee has been established by a doctor unconnected with the institution, the

decision to go on a hunger strike shall be medically respected, even if this represents a considerable health risk.

9.3 If the detained person on hunger strike falls into a coma, the doctor shall proceed according to his conscience and professional duty, unless the detainee concerned has deposited explicit instructions for the case of a loss of consciousness which might lead to his death.

9.4 The doctor confronted with a hunger strike shall maintain a strictly neutral attitude towards the different parties involved and shall endeavour to avoid any instrumentation of his medical decisions.

9.5 Despite the expressed refusal of food intake, the doctor shall make sure that food is offered every day to the detainee on hunger strike.

10. Confidentiality

10.1 Medical secrecy should be observed according to the same legal provisions as those applicable to persons who are not detained (art. 321 SPC). In particular, keeping patients' files should be the doctor's responsibility. The conditions of examination described under point 2 are also applicable.

10.2 However, the lack of privacy characteristic of a prison environment, which may sometimes last for years, as well as the fact that prison or police staff frequently take over the function of a guarantor or even of an assistant in the treatment of prisoners, may result in the necessity of an exchange of medical information between health care and security personnel.

10.3 In such a situation, the doctor shall endeavour to answer legitimate queries by security personnel after having obtained the detainee's consent.

10.4 If the detained person opposes the disclosure of relevant data and if this could result in an impairment of the safety of third persons, the doctor may ask the competent authority to be released from his obligation to confidentiality, if he considers it his duty to inform third persons, in particular those in charge of the case and security personnel (art. 321, paragraph 2 SPC). In such a case, the patient shall be informed of the fact that cancelling of medical confidentiality has been requested in his case.

In exceptional cases, if the life or the physical integrity of a third person is seriously and concretely endangered, the doctor may decide by himself to depart from medical confidentiality and directly inform the relevant authorities or the endangered third person.

11. Filing a complaint on suspected abuse

11.1 Any sign of physical assault found during the medical examination of a detained person shall be duly recorded.

11.2 In his report, the doctor should clearly distinguish between, on the one hand, the patient's allegations (i.e. circumstances which led to the lesions) and complaints (i.e. his subjective sensations), and, in the other, the objective clinical and paraclinical findings (size, location and specific characteristics of the lesions, X-rays, laboratory findings, etc.). If the doctor's training and/or experience allow it, he should indicate whether the patient's allegations are consistent with his own medical findings (e.g. the alleged date of the lesions and the colour of the haematomas).

11.3 This information should be forwarded without delay to the authorities responsible for supervising the police and the prison administration. The detainee has the right to obtain a copy of the corresponding medical reports at any time.

11.4 If the detainee formally refuses the forwarding of such information, the doctor shall consider the opposing interests carefully and, if necessary, proceed as under point 10.4.

12. Doctor's independence

12.1 Whatever his conditions of employment (civil servant, employee, or private contractor), the doctor should always be in a position of complete independence from the police or prison authorities. His clinical decisions, as well as any assessment of the state of health of detained persons, should be based solely on medical criteria.

12.2 In order to guarantee the independence of doctors, any hierarchical or even direct contractual relationship between them and the management of the police or penal establishment where they work should in future be avoided.

12.3 Nursing personnel shall take medical instructions only from the doctor in charge of a detainee.

13. Training

Any health professional working regularly with detained persons should in the future benefit from special training in the objectives and functioning of different places of deprivation of liberty, as well as the way to deal with potentially dangerous and violent situations. Ethnic and socio-cultural knowledge is also important.

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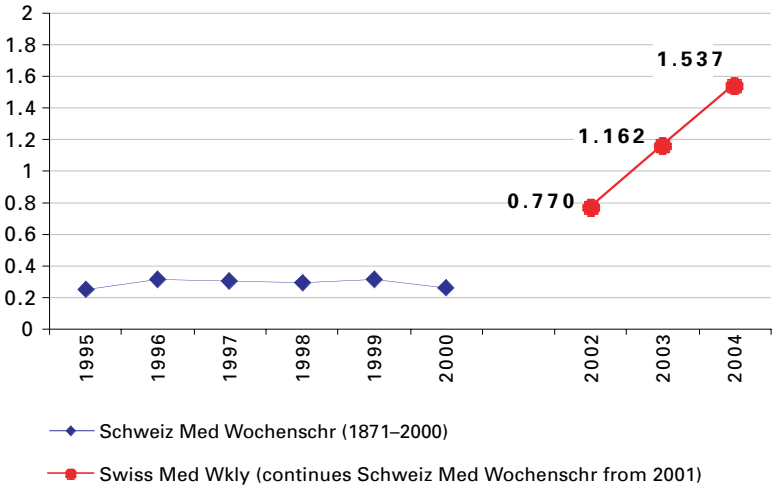

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