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## THE JUDICIAL USE OF PSYCHONARCOSIS IN FRANCE\*

J. P. Gagnieur

J. P. Gagnieur, Commissaire du Gouvernement in the Financial Section of the Judicial Courts of Paris, recently presented a brief account of the legal controversy which arose in Paris during the last year as a result of the admissions made by a criminal while under the influence of sodium pentothal. (See: "The Judicial Use of Psycho-Narcosis in France," Jan.-Feb. 1949.) Upon the final disposition of the matter with the acquittal of the court's medical expert of all charges arising out of his investigation, Magistrate Gagnieur has prepared a comprehensive paper discussing the various questions brought about by the forensic use of psychonarcosis. The Journal feels fortunate in presenting the views of Magistrate Gagnieur, whose background as a graduate of the Institute of Criminology at Paris and as a former Public Prosecutor and criminal investigator, specially qualifies him to discuss this subject.—EDITOR.

Psychonarcosis is a psychiatric means of investigating the subconscious and the memory. It chiefly consists in making use of the dim period which precedes or follows sleep provoked by a barbituric (pentothal, nesdonal, evipan, sodium amital, etc.). In fact, when an anaesthetic is given slowly, the effects it successively produces disclose two main stages: First, during the cerebral phase, the will is inhibited; then the reflexes, during the medullary phase; in the course of the awakening the reverse process is to be observed. It is then theoretically possible to limit the effects of an anaesthetic to the sole inhibition of the will by slowing up the sleeping, or the awakening process.

It is a well-known fact that the patient who undergoes an anaesthesia before being operated, shows frequently an exceptional loquacity at the time when the drug begins to affect him, and does not yet, however, act completely. It was then normal to study how to make use of this phenomenon in order to investigate the human mind.

After the few experiments which Freud's disciples carried out, this matter was seriously taken up again for the first time in England by Professor J. Stephen Horsley who showed the valuable benefits which psychiatry and psychoanalysis could derive from the practice of narco-analysis.

Its use has been expanding ever since; few psychiatrists could assert that they never used it; in France it has been particularly studied by Professor Delay. It is recognized that, in many

\* We wish to make it clear right now that the chemical and physiological means used by the methods which aim to weakening the will and according to reliable witness would be in practice in certain Eastern European countries, having nothing in common with the purposes of narcoanalysis. In the former case, the point is to determine a secondary condition in the course of which the indicted becomes very liable to suggestions and then accuses himself of fancy crimes in order to obey the indicters' will; while psychonarcosis, far from producing an effect of suggestion upon the patient, strives on the contrary to bring to light his true personality, and its sole aim is the research of truth.

cases, as it liberates the subconscious, it allows a speeding up to a considerable extent in the course of a psychoanalysis; it also often facilitates the medical diagnosis and has in some cases a curative effect.

But does it enable one to obtain precise disclosures on a point which the subject resolutely wants to keep concealed? Does it allow a complete inhibition of the will? The experts do not agree on this point, nor on the efficiency of the results obtained to date by extending the dim period at the beginning of the awakening by means of a very slow intravenous injection of a solution of penthotal.

Professor Delay and the majority of psychiatrists assert that psychonarcosis is not able to check the determined will of concealing a precise point, while Dr. Scharlin, chief of the neuro-psychiatric department of the Regional Hospital Department of Besançon, gives the following results of about a hundred experiments which have been undertaken under conditions similar to these which are met with in judicial matters. In 12% cases the results prove completely satisfactory; for instance, a miner subjected to narcosis said the following: "It's queer your stuff; makes one talk all right; the murderers need to be mighty careful with you!" In 30% cases the examination is only able to obtain precisions on secondary details, as the will controls the important answers; finally, in about 60% cases, the results are completely negative.

Furthermore, it is necessary to take into account the risks of affabulating and the suggestible condition of the patient during the experiment, but these obstacles may be dealt with. The expert conducting the examination is able to take simple precautionary measures which everyone dealing with juvenile delinquents is familiar with, and so to avoid any risks of suggestion. At any rate, in all cases, the truthfulness of the confession must be controlled by a magistrate. This is so much more a must when confession is obtained under narcosis. The danger of affabulation, which even exists outside examinations under narcosis, is greater in this case, but a qualified magistrate may easily evade it.

In France, psychonarcosis has never been used for obtaining a suspect's confession, except in a few experiments which have no judicial value;<sup>1</sup> on the other hand, the expert physicians have frequently used it in order to establish their diagnosis. As a matter of fact, so far as the detection of malingering is con-

<sup>1</sup> We have noted that the European edition of the New York Herald Tribune printed lately that truth serum has been used in New Orleans, and has led to an admission by the offender (March 1949).

cerned, the well-being which the malingerer feels, as well as the even incomplete sluggishness of his will, are sufficient to cause him to commit negligences while imitating the symptoms of his pretended disease which, in the absence of admissions, will inform the expert.

Our readers know already that French Justice has been confronted with such a case, and that the so-called Cens, who indicated he was an aphasic and whose malingering had been established by Dr. Heuyer, following an examination under narcosis, has prosecuted the latter under the charge of assaults and violation of the professional secret.

The Court of the Seine has acquitted Professor Heuyer on every count, but with a prudent wisdom it did not decide about the lawfulness, or the opportunity of using psychonarcosis. It just establishes that even when this use should be forbidden the principle of the restricted interpretation of the penal texts would allow no penalty. The Court establishes no distinction between psychodiagnostic and examination under narcosis, contrary to the opinion generally admitted. It is nevertheless true that the judgment states precisely: "Dr. Heuyer had no intention at all to take advantages of the period of asleeping or awakening of the so-called Cens in order to proceed to an examination (which, besides, could not bear any value) concerning the actions with which he was charged".

But the context shows that the Court wanted to establish that Dr. Heuyer had remained "within the limits of the mission devolved upon him". He had not to search after admissions, and had he obtained any—with or without penthotal (and experience proves that this assumption is not unfounded)—these admissions would have been deprived of any judicial value, as they exceeded the limits of his duty.

Besides, had the court meant to condemn the use of examination under psychonarcosis, it may be supposed that it would not have used a simple parenthetical clause, when the reasons it alleges for releasing him would have applied under any circumstances. Therefore, the problem of the judicial use of psychonarcosis remains set as a whole. In order to study it we shall leave aside the purely technical difficulties which narcoanalysis meets at present. In fact, the methods used are only efficient so far as the narcodiagnosis is concerned, and practically, there are only a few cases when the examination under narcosis leads to interesting results.

It seems however that the present techniques could be improved by further psychological and chemical research, which

would introduce more efficient narcotics and also better methods for preparing and examining the subject.

Therefore, it is worth discussing the use of narcoanalysis on the grounds of principles<sup>2</sup> and very generally on the question of the lawfulness; but we again want to make clear that, though they have been raised by the decision in which this article originates, we shall not examine the problem of the limits to be assigned to the physical interference of the expert physician, nor the problem of the scope of professional secret; these matters are important enough to become the subject of a separate study.

### CONTROL OF EVIDENCE

Narcoanalysis may be used towards two basically different ends: To obtain confessions, or to control the statements of an indicted man and check the truth of a testimony. In the latter case it seems to be no longer a "truth-serum" but rather a means of checking up evidence.

Practically, even when they are honest, the witnesses frequently make errors, which, in some cases, might be disclosed by an examination under narcosis. But what should be said about the increasing number of false witness? The oath to speak the truth loses very much of its value in the sight of certain witnesses. This is not only a consequence of the crisis in morality which follows war, but also of the fact that the oath, according to French law, is deprived of its religious nature. We have even seen the case of quasi-professional witnesses, particularly in the course of the trials for treason and collaboration.

If psychonarcosis were to give him this power, would the magistrate have the right to check the truth of doubtful testimonies? According to the French Law, to give evidence is compulsory for any person summoned before the court. It is a duty for them to appear before the magistrate or the Court, and to take oath to speak the whole truth. If they fail to appear, or refuse to take the oath, they are fined; and if they bear false witness, they become liable to much more severe penalties.

Therefore, the law grants no liberty to the witnesses—except this of not bearing their testimony spontaneously. The consequences of false evidences are too rigorous for the defendant and society for every possibility to be worked out in order to avoid it. However, the necessity of knowing the truth has led to deprive the witness of the right of refusing to bear evidence.

It is then not exaggerated to say that the witness of an offence

<sup>2</sup> The French Ministry of Justice has not yet sent instructions on that subject. It cannot therefore be considered as resolved in the facts.

is no more the master of his own memories. He owes them to the magistrate. The law gives the judge the right to demand that these memories be related to him, and the witness cannot by any means fail to meet this requirement.

Therefore the use of psychonarcosis in this case seems to raise no objection on fundamentals. At the very moment when he makes the oath the witness alienates his liberty, according to the demands of law. Practically, this point has never been raised, to our knowledge, and it seems that it never will, so long as no better results will be obtained. It is nevertheless true that the use of examination under narcosis appears to us in this case completely lawful.

#### NARCODIAGNOSIS AND NARCOEXAMINATION

We shall now examine the problem of the lawfulness of the use of narcoanalysis on an accused, and we shall successively study its two main aspects: Lie detection, and the search of admissions or information related to the circumstances of the offence.

A basic difference between these two assumptions has been established. Mr. Donnedieu de Vabres, professor of penal law of the Law School of the University of Paris, who has given evidence in the trial *Cens vs. Hewyer*, in favor of the psychodiagnosis, has proposed the following distinctions:

- A. The experts, appointed to discover a deception, and who normally use psychonarcosis in this case, on medical grounds, should by no means deprive themselves of part of their weapons because they are appointed by law.
- B. Deception is a lie aggravated by fraud, the use of which is unlawful; it exceeds the limits of the simple lie, the use of which must be acknowledged to the defendant.
- C. The purpose of the psychodiagnosis is not to seek out information related to the main issue of the suit; therefore it does not deprive the accused of his usual means of defense.

In this way psychonarcosis would be lawful, but with the only purpose of disclosing deception. In fact, the Court did not withhold this distinction, and it seems it was right, and that the use of psychonarcosis must be either admitted or rejected without deciding separately on the psychodiagnosis.

As a matter of fact, it is possible to answer in the following way to the three arguments which Mr. Donnedieu de Vabres has brought up:

- a) —The physician who uses psychonarcosis in order to detect deception on one of his patients acts towards a curative end which no longer exists if he is appointed by judicial authority. Now it is this curative purpose which justifies the interfering of medicine with the moral or physical integrity of the human being.

- b)—The difference between a malingerer who says nothing, and a liar who deceives the magistrate, is not evident on practical grounds; theoretically, it is hardly conceivable that certain lies could possibly be legitimated and not others, on account that they materialize, not through simple words, but by means of physical or mental attitudes. If it is true that the malingerer bases his false statement on a staging—in fact, the imitation of certain symptoms intended to deceive the expert medical officer—one does not see clearly how his behavior would be found more faulty than this of the simple liar who, in order to deceive the judge, pretends to talk quite frankly. The intellectual stand of the liar and this of the malingerer are identical; the only difference lies in the muscles used to materialize them.
- c)—It is accurate that the purpose of the psychodiagnosis is more limited than that of the examination under narcosis, but their basic principle are identical. The point is to check the will of the subject; and their results may be compared. The delinquent will be prevented from defeating the action of justice, which was his only aim. The means he uses, simulation or lie, is only a matter of opportunity.

There is therefore no difference in principle between the use of psychonarcosis in order to detect malingering, and its use in order to get the truth from the defendant himself.

We shall now look at the problem in its comprehensive aspect.

#### PSYCHONARCOSIS AND HUMAN LIBERTY

By tradition, the defendant has a right to lie, or at least, not to speak the whole truth in order to reserve his own defence. He is never compelled to accuse himself, and there are few people indeed who, like St. Thomas, deem that the delinquent owes the whole truth to his judge. This point apparently would bear something shocking, and demanding from the defendant that he accuses himself would mean to require real heroism from him.

It is true that, though it is not a duty for him, the defendant may however confess, which he would no longer be able to do by use of psychonarcosis, as the admission bears only a moral value when it is spontaneous.

Practically, the aim of psychonarcosis is not to obtain confession, in the juridical and moral meaning of the word. Its purpose is to find out if the offence has left traces in the memory and subconscious or the examined person. Does this research interfere quite inadmissibly, as sometimes alleged, with the respect of the human being?

At the very moment when the Western World, reviving the traditions of Christian civilization, puts the stress upon the importance of the human person, the respect due to it, and the intangible nature of its rights, it is more and more widely ad-

mitted that its liberty is severely limited. Besides any philosophical argument, it is recognized that any act performed freely involves necessary results which are not free, as they no longer depend on the originator of the initial act. The man who presses the trigger of a revolver has no possibility of holding back the bullet, nor to wash out the finger prints, etc. The man who acts freely, in doing so estranges his liberty so far as all the compulsory results of this act are concerned.

The task of police is to trace back from the discovery of these necessary results the initial free act. But any act leaves in the psychism of his originator necessary after-effects, which may be compared to its physical consequences. The memory escapes the will in the same way as the grooves of the rifling on the projectile shot from the gun. To trace back the crime from the memory is the same as to trace back the criminal from the grooves or from the finger prints. In each case, the point is to start from the compulsory results of an act in order to discover this act.

#### PSYCHONARCOSIS AND HUMAN DIGNITY

It is nevertheless certain that, though both problems are theoretically similar, their investigating ground can in no way be compared. In one case, it is a matter of purely material signs, and in the other, the problem is to do violence to the memory and subconscious of the human person. Is the memory closely enough related to what constitutes not the liberty but the dignity of man to prohibit any investigation in this field?

In fact the memory seems to be a component part of the self, but not of the personality of which it is only the support. An animal submitted to psychonarcosis would theoretically show the same reflexes as a man. Conversely, it is indisputable that even the total amnesic do retain their human dignity. It would therefore be inaccurate to locate in memory or in the subconscious what remains the intangible privilege of man.

The outrages against human dignity do not therefore result from the kind of examination the subject may be submitted to. Would they then rest in the fact of imposing upon him this examination without his consent?

In a deception case, in practically every possible hypothesis, the deceiver, due to his own simulation, forbids himself to give a valid approval. As a matter of fact, in a majority of cases, madness is simulated, and it is hardly conceivable to request the consent of an insane person or of anybody appearing to be insane.

Furthermore, it is the undoubted interest of the expert phy-

sicians not to let the person being examined know about the nature of their investigations, which would really make their task more difficult.

It seems therefore useless to raise the point of the assent in this case; either the psychodiagnosis will practically never be possible, or it is to be admitted that it can validly be replaced by the order from the legal authority, and in this case the physician acts upon the order of the judicial authority and his position cannot admit any criticism. This is sufficient to justify the use of the psychodiagnosis in the course of all psychiatric examinations, as well as in all the cases when the physician has to discover a simulation.

On the contrary, in the case of an examination on fundamentals, the subject is quite in a position to give or refuse his assent, at least theoretically. Because the fact of refusing his assent to be examined under narcosis would naturally throw discredit upon his denials, and the right, which would be acknowledged to him, to accept or reject narcoanalysis, would have but a small practical significance, the suspect's assent can therefore never be considered as free, neither in this case, nor in the case of the psychodiagnosis. In this case, once more, psychonarcosis could only enter the field of practice once it is admitted that the judicial authority can replace the free assent of the subject.

#### LAWFULNESS AND OPPORTUNITY OF NARCOEXAMINATION

It appears finally that the use of psychonarcosis does not interfere with the essential rights of the human being, and that it is lawful under the condition of acknowledging the society the right of defeating the suspect's will upon certain points, and not leaving him totally free to choose his means of defence.

Then it is no more human liberty which is interfered with, as we have shown that the goal to which the examination under narcosis aims is beyond the scope of this liberty, but it is one of man's liberties which would be limited in this way—just the same as that of keeping the secret of his correspondence, owning an inviolable residence, or even coming or going; the seizure of letters, the searchings, and detention on suspicion, as they do not break the intangible principle of human liberty, do strangely limit the use of man's liberties.

This points to one of the aspects of the difference generally admitted between human liberty and man's liberties. On one hand, no interference with human liberty is to be admitted. On the other hand, the problem is quite different when the limits which the requirements of social life set to the human liberties

are at stake. This conflict may be observed daily in all fields, and may only be solved in weighing the seriousness of the hindrance brought to the exercise of man's liberties against the importance of the social interest at stake.

No discussion is possible about the first point mentioned. The use of psychonarcosis, as it deprives the indicted from choosing freely his means of defence, constitutes a heavy restraint. To try to escape punishment by lying is an attitude as old as this world itself, and very likely a natural bent of human mind.

In contrast it is the interest of society to dispense justice rightly, that is, to see the innocent at large and the guilty punished; but this is not a vital interest, and many famous civilizations of the past might easily be quoted, which have coexisted with lamentable judicial customs. There are very few examples that a reform of justice ever determined a reform in morals; it must be acknowledged that the reverse was more frequently observed, no matter how disagreeable this finding may be to a jurist.

The notion of social interest is only of a secondary importance in this discussion. The sentence is not passed in the name of social interest, but in the name of justice. Any theory would be vain which would not be based upon a definition of the moral and philosophic foundation of the idea of justice.

Very briefly, and with a rough approach, which we beg the reader to pardon, it seems possible to classify into two main categories the different schools from which the present legislations draw their inspiration, as well as the reform drafts under study.

For one group, justice and repression are synonymous expressions, or almost so. An offence has been made, it must be punished. The delinquent must receive a just punishment. But the offence has to be proved all the same. It is the prosecutor's job to produce the proof, and that of the indicted to fight it. In this way the judge becomes the referee of a struggle in which the opponents fight with equal weapons, as to favour one of the parties to the case would interfere with the rights of his adversary. From these principles are issued the rules of procedure familiar to the Anglosaxon countries and some features of which are to be traced in the French penal code, as well as in the legislations which it inspired. For instance, the Belgian constitution, article 7, foresees distinctly not only the respect for the physical and moral integrity of the individual, but also his supreme right to defend himself without restraint against any proceedings which society might institute against him.

In this case, the use of psychonarcosis could not be admitted. It would alter the balance in that sort of modern "judicial duel" between the defendant and society, which recalls so oddly the game of cops and robbers which we played in the days of our boyhood.

On the contrary, for others, who take for their own part Pascal's words "punition of sin, error", the aim which men assign to the action of their justice must not fundamentally be the punishment of the moral offence of the delinquent. The estimate of the gravity of this offence, which may differ so widely in the case of offences apparently similar, would require the knowledge of the psychology of each delinquent which undoubtedly will always remain beyond human possibilities, and the magistrates, as they try to individualize the sentences they pronounce, have no illusions on the lack of strictness in the results they secure.

Furthermore, the lawfulness of such a punishment might even be matter of discussion. It could be maintained that man's conscience is by nature the reserved ground which escapes other men's grasp, and that any interference in this domain would break the principle of the respect due to the human being.

In this way, for the French school and many others, as the resolutions carried out at the congress of San Remo draw their inspiration from the same ideas, justice has to perform above all a curative work; and its main purpose should be, not the punishment of the delinquent, but his reeducation. The notion of punishment, if this argument was carried to its extreme logical consequences, would then appear merely as one means amongst others used towards the reformation and social readjustment of the offender.

The action of justice would then become similar to some kind of social prophylaxis which would justify the use of the appropriate means of detection. The decision made by the magistrate would benefit as much the delinquent as society, and the purpose of the judge would be not to punish but to cure all such people as would show an anti-social behaviour. In this case the interest of the indicted would justify the use of psychonarcosis in the same way as in medicine the interest of the patient.

The present French legislation, which stands between these two limits, does not apparently provide convincing arguments on the ground of principles, and the jurists' opinions differ widely. Therefore the greatest importance should be conferred to the examination of the practical consequences of the judiciary use of penthotal.

In fact, the narcoexamination obtains too rarely valuable results to contemplate its use at present. And even if a super-pentotal were perfected, it would be necessary to undertake systematic research in order to train experts capable to avoid or baffle the chances of suggestion or affabulation. It is doubtful that this may be contemplated in the near future.<sup>3</sup>

On the contrary, narcodiagnosis has already widely stood the test of experience. Through its use, not only have malingerers' schemes been brought to light; also the sincerity of patients who did not show all the clinical symptoms of the illnesses which they pretended to have has been revealed, and without it these people would have very likely been the victims of errors in diagnosis from the expert physician. Striking instances of this case may be found in the proceedings concerning injuries to workmen, or road accidents. These traumatisms are sometimes followed by strange sequels which do not seem to be linked with any definite located lesion and which, as such, would have chances not to be recognized by the experts, who are always inclined to suspect malingering from the patients they examine. One of the most striking examples which can be quoted is that of a blindman whom the experts said to be a malingerer, when the use of pentotal revealed his real blindness.

In this way, psychodiagnosis does not only allow to detect malingering, but is also a valuable help to the sincere man. Owing to it, justice will not make so many errors, and many will undoubtedly be of the opinion that the magistrate will never be too much fit against the risk of judicial errors, and also that the care to avoid the conviction of the innocent is worth whatever penalties offenders may incur which they deserve.

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<sup>3</sup> Psychonarcosis may also be used in the course of psychiatric or psychoanalytic examinations, the purpose of which is to learn the real motives which prompted the offender's action. The problem in this case may be compared, and its use justified in the same way as in the case of a narcodiagnosis.