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When tying up becomes inhumane and degrading treatment

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In many countries, restrictive interventions on patients with intellectual disabilities have come under increased scrutiny following abuse scandals with long-term tying to beds and/or isolation to prevent self-harm or aggression.[1] Still, there is an ongoing debate whether restrictive practices can be justified or not. From a legal perspective, it is fair to say that restrictive interventions such as tying patients to beds undermine patient autonomy and fundamental human rights. This has been confirmed in a recent decision: a tragic case ruled by the European top court, the European Court on Human Rights in Strasbourg. This high-profile ruling may affect the practice of restrictive measures in Europe, and hopefully contribute to decreasing and even annulling such intrusive interventions on persons with intellectual disabilities.

The case

An 8-year-old orphan with intellectual, physical and speech disabilities was placed in a state-run rehabilitation center in Macedonia. Four years later the boy, named *LR*, was discharged on the basis of findings made by the medical personnel concluding that his continued stay and treatment would not be justified. It would even worsen his condition because the staff could not communicate with him since he was deaf and unable to speak. Later, the patient was transferred to another clinic in the country. After transfer, the patient's legal representative lodged a criminal complaint against the director of the rehabilitation center, accusing the staff of inhuman and degrading treatment by tying *LR* to the bed by his leg with a rope described as being long enough to enable him to reach the corridor. This situation prevented him from escaping the institution and occurred for nearly two years, during the night and during longer periods at daytime when the staff were occupied with other patients. Since he had not been provided with appropriate care, his health deteriorated.

[1] Notorious examples in the Netherlands are Jolanda Venema (1988) and Brandon (2011), chained and in long-term seclusion; the UK scandal at Winterbourne View hospital Bristol (2011); sixty days fixation in forensic clinic Taufkirchen, Germany (2014).

Unfortunately, the case was not successful at national level. In appeal, the court confirmed the first-instance ruling that the restrictive measure was aimed at preventing escape from the institution and preventing self-harm. Therefore, the measure could not be concluded as an act of unlawful use of force. That questionable decision was challenged at the European Court of Human Rights at Strasbourg. Earlier this year, this Court annulled that decision, holding unanimously the inappropriate placement and ill-treatment of the patient as a violation of the prohibition of inhuman and degrading treatment, a core right protected by the European Convention on Human Rights.[2] Apart from financially compensating the patient (€18,000), the State of Macedonia and its health professionals had to reconsider the use of restrictive measures in health institutions.

Inhuman and degrading treatment in the health care sector

What can be concluded from this case is that the Court declared the European Convention on Human Rights applicable to the healthcare sector. Torture and inhuman and degrading treatment are not restricted to forced feeding or 'waterboarding' of prisoners, but may also occur when patients do not receive necessary health care, as prescribed by medical doctors. Moreover, the care provided should be 'adequate', of good quality, and available on time. Failure to provide proper care to vulnerable categories of patients (prisoners, children, disabled persons, etc.) may thus result in inhuman and degrading treatment. The European Court therefore interprets the Convention as creating a positive State obligation to act adequately, in order to respect the Convention's rights. That approach is not new and has been applied on several occasions, in relation with other Convention's rights such as the right to life, and private and family life.

Despite the prohibition of inhuman and degrading treatment, the Court did not rule out restrictive measures as such. Tying up the patient for 'safety reasons', namely preventing the risk of running away, can be taken into account. But since it concerned a minor, the impact and frequency of the measure (nights and often during the day), over a long period of time (for nearly 2 years), and without consultation or evaluating the appropriateness of the measure, in an institution unfit for persons with intellectual disabilities, the Court is not convinced that under the described circumstances tying him to the bed was the least intrusive

[2] *LR v. North Macedonia* (ECtHR 23 January 2020), application no. 38067/15, available at https://hudoc.echr.coe.int/.

measure available. It appeared that the measure was a consequence of the inappropriate placement of *LR*. Under these circumstances, and the absence of adequate care, Macedonia is responsible for the inappropriate placement and failed to provide *LR* with appropriate care, which resulted in inhuman and degrading treatment.

Comment

The *LR*-case is one of the tragic cases the Court had to deal with. Given the appalling living conditions and poor treatment, this was the only reasonable outcome. Unfortunately, the circumstances of LR are not unique. Other countries have also been struggling with the unlawful use of restraint in health care, reflecting the need for guidance to medical practitioners on human rights obligations. In the United Kingdom, for instance, the Equality and Human Rights Commission presented a 'Human rights framework for restraint'(2019), clarifying the principles for the lawful use of physical, chemical, mechanical and coercive restrictive interventions in line with the European Convention of Human Rights.[3] Such a framework is intended to be used as a 'basis for building consensus and consistency on the use of restraint' and 'to evaluate compliance of law, policy and practice on restraint' with the Convention (p.3).

Other experiences emphasize the need for transparency by imposing standardized reporting (frequency, duration, type, trends, etc.) of restrictive practices, to enable monitoring and assessing its practices, and to recommend alternative options to reduce the use of restrictive practices.[4] But transparency is not an aim in itself, transparency on monitoring and reporting contribute to accountability, i.e. keeping health professionals responsible for human rights violations. Accountability is key to public trust as it assumes that reporting and monitoring will help to reveal poor practices and eliminate the use of restrictive practices in case of persons with intellectual disabilities.

[3] Equality and Human Rights Commission (2019) 'Human rights framework for restraint',
[4] E.g., the new Dutch Act on Care and Coercion (*Wet zorg en dwang*, Wzd 2020),