

FORCIBLE MEDICAL INTERVENTION AS A VIOLATION OF ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ROK DACAR

University of Maribor, Faculty of Law, Maribor, Slovenia.
E-mail: rok.dacar@um.si

Abstract The European Court of Human Rights has on multiple occasions considered the question of whether an act of forcible medical intervention constituted a violation of Article 3 of the European Convention on Human Rights. It found that it did not if the applicant could not prove he dissented to the medical intervention being carried out, if the act was one of medical necessity or if the medical intervention was necessary for obtaining evidence for use in criminal proceedings. However, national authorities must follow strict rules both in the determination of whether forcible medical intervention will be carried out and in its methods of execution.

Keywords:

medical
necessity,
inhuman and
degrading
behaviour,
force,
consent,
evidence

1 Introduction

This article explains the case law and general rules laid down through it by the European Court of Human Rights (henceforth: the Court) concerning the question whether an act of forcible medical intervention constitutes a violation of Article 3 of the European Convention on Human Rights (henceforth: the Convention). It will offer the reader some relevant theoretical background on Article 3 of the Convention, the term forcible medical intervention and the connections between the two. The article will continue with an overview of the most important judgments regarding acts of forcible medical intervention where the applicant claimed a violation of Article 3. The last section of the article will analyze the Court's reasoning in those judgments and will summarize the general rules the Court laid down to answer the questions whether and under what conditions Article 3 prohibits an act of forcible medical intervention.

2 Article 3 of the European Convention on Human Rights

Article 3 (prohibition of torture and of degrading treatment or punishment) of the Convention “enshrines one of the fundamental values of the democratic societies making up the Council of Europe” (*Soering v. United Kingdom*, 1989, para. 88). Article 15 of the Convention lists Article 3 as one of the Convention's non-derogable provisions, meaning it cannot be breached even in “time of war or other public emergency threatening the life of a nation” (European Convention on Human Rights, 1950, Article 15/1). Therefore, even the direst of circumstances will not justify a breach of Article 3. The Court has (deliberately) avoided giving an exact definition of what constitutes torture, degrading treatment or punishment. However, its jurisprudence establishes that acts of torture are those causing severe physical or mental pain or suffering and that are intentionally inflicted, with the aim of obtaining information (e.g., brutal forms of interrogation) or as a means of punishment (e.g., water boarding, deprivation of sleep). On the other hand, certain actions do not rise to level of resulting in a breach of Article 3, for example “ill-treatment, which is not torture, in that it does not have sufficient intensity or purpose, will be classed as inhuman or degrading behaviour” (Reidy, 2002: 16). Inhuman acts in most cases cause some degree of physical or mental pain that is not of such intensity to qualify as torture, while degrading acts are acts that “arouse in its victims' feelings of fear, anguish and inferiority, capable of humiliating and debasing them” (Reidy, 2002: 16).

Therefore, we can conclude that acts of torture are more intense as compared to acts of degradation or inhuman behaviour and accordingly cause a greater degree of physical and/or psychological pain and must also be intentionally inflicted. The Court has not drawn a red line separating acts of torture from acts of inhuman or degrading behaviour, choosing instead to examine both the issues of intent and the level of physical and psychological pain caused by an act on a case-to-case basis.

3 Forcible medical intervention

An exact definition of what forcible medical intervention is does not exist. However, it can be described as medical treatment without the consent of the person being treated. As a rule, adults with full mental capacity have the right to refuse medical treatment. Yet, if certain conditions are met, an act of forcible medical intervention can be imposed on them. Most of these cases involve forcible medical intervention being imposed on individuals whose liberty was limited because they were, for example, detained, imprisoned, or admitted to psychiatric institutions.

3.1 Forcible medical intervention and the Convention

Forcible medical intervention, under certain conditions, can constitute a breach of the rights and liberties accorded to individuals by the Convention, namely Article 3 and that part of Article 8 that sancifies the right to private life. Violations of Article 8 were found in *Fyodorov and Fyodorova v. Ukraine* – unlawful psychiatric examination and diagnoses of chronic delusional disorder –, *Storck v. Germany* – forcible medical treatment on an arbitrarily detained applicant –, *Shopov v. Bulgaria* – absence of a regular judicial review of the compulsory treatment¹ (European Fundamental Rights Agency, 2020: 24). An act of forcible medical intervention is only allowed under the Convention if it is “necessary for the fulfilment of a legitimate aim, typically the protection of the rights of others or of the individual concerned and his or her health (Reidy, 2002: 24). Case law interpreting what constitutes forcible medical intervention is sparse. The existing case law does shed light on the conditions that must be satisfied for an act of forced medical intervention to constitute a violation of Article 3.

¹ This paper only examines forcible medical intervention from the perspective of Article 3 and therefore omits further explanation concerning Article 8.

4 Case Law

The following section will analyse the Court's most important judgments that examined whether an act of forcible medical intervention constituted a violation of Article 3.

4.1 Jalloh v. Germany

A drug deal involving A. B. Jalloh, who took two tiny bags from his mouth and exchanged them for money, was spotted by plain clothes policemen, who proceeded to arrest him. Subsequently, Jalloh swallowed a tiny bag. Jalloh was taken to the prosecutor who ordered he be given an emetic to regurgitate the bag. Refusing to take the emetic voluntarily, Jalloh was held down by four police officers while a doctor inserted a tube through his nose and administered an emetic solution. Jalloh then regurgitated a small bag containing 0.22 grams of cocaine. He was later charged with drug trafficking and the bag of cocaine was used as evidence in court proceedings.

The Court reiterated that “*a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading*” (*Jalloh v. Germany*, 2006, para. 69) if the medical necessity is convincingly shown. Since the aim of the forcible administration of emetics was to obtain evidence this was not a case involving medical necessity. Even so “the Court has found on several occasions that *the Convention does not, in principle, prohibit recourse to a forcible medical intervention that will assist in the investigation of an offence*. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny” (*Jalloh v. Germany*, 2006, para. 76). The administration of emetics was not necessary, as the “authorities could simply have waited for the drugs to pass through his system naturally” (*Jalloh v. Germany*, 2006, para 77). Furthermore, the alleged criminal offence was not a serious one, as it was *prima facie* clear, that the quantity of drugs Jalloh was hiding in his mouth could only be small. The procedure caused Jalloh physical and psychological pain and invoked in him feelings of inferiority, humiliation, and debasement. The Court found that the German authorities violated Article 3, as the forcible administration of emetics in the context of the case constituted an act of inhuman or degrading behaviour.

4.2 Bogumil v. Portugal

Bogumil was detained at Lisbon airport after arriving from Rio de Janeiro as several packages of cocaine were found in his shoes. He informed the authorities that he swallowed another package. Subsequently Bogumil was taken to a hospital, where he underwent a surgery that removed the cocaine pack from his stomach. It was unclear whether Bogumil gave consent for the operation. He claimed to have experienced severe physical distress on account of the surgery.

Bogumil's rights under Article 3 clearly would not have been violated had he in fact consented to the operation. Bogumil claimed he did not consent while the Government claimed he did. The matter was further complicated because Bogumil signed a written consent form only for an endoscopy but not for the operation. Finding adequate consent on the specific facts of the case, the Court noted that "it can not establish that the applicant gave his consent for the medical intervention in question. However, nothing indicated that he explicitly refused the operation he was about to be subjected to" (*Bogumil v. Portugal*, 2008, para. 76). The Court's line of reasoning established a *fiction of consent*, that lasted as long as the applicant did not prove beyond reasonable doubt, that he did not consent to the medical intervention taking place and that it was *ergo* forcibly executed. Concerning the surgery, the Court noted (*Bogumil v. Portugal*, 2008, para. 77) that the '*decision to perform surgery had been made by medical staff due to a possibility of the cocaine package rupturing and Bogumil dying of cocaine poisoning*'. Furthermore, the surgery was not performed with the purpose of gathering evidential material. The surgery not only was routine but Bogumil did not suffer any serious health effects. Based on that rationale, the Court ruled there was no violation of Article 3. The Court found a violation of Article 6; however, that violation was unrelated to the medical procedure.

4.3 R.S. v. Hungary

R.S. was detained on suspicion of driving under the influence of alcohol and drugs. He was forced to take a urine test via a catheter. R.S. claimed this constituted a serious intrusion into his physical integrity and constituted degrading and inhuman behaviour (ECHR Press unit, 2020: 12).

In paragraph 57 the Court reiterated that a ‘*forcible medical intervention is not per se a violation of convention rights, even if it is meant to produce evidential material*’. The authorities are however obliged to convincingly justify why such an intervention was necessary. When deciding whether a forcible medical intervention is necessary, the *authorities must take the following factors in consideration* “the extent to which a forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the manner in which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available, and the effects on the suspect’s health” (*R.S. v. Hungary*, 2019, para. 58).

In this case the evidence obtained via the forced catheterisation could have been obtained in a less intrusive manner by taking a sample of the applicant’s blood. R.S. was subjected to “to a serious interference with his physical and mental integrity, against his will...in a manner, that caused both physical pain and mental suffering” (*R.S. v. Hungary*, 2019, para. 72), without any consideration being given to the possible risks the procedure posed. The Court concluded there had been a violation of Article 3, as R.S. was subjected to inhuman and degrading behaviour.

4.4 Dvořáček v. the Czech Republic

Dvořáček was prosecuted on several occasions for sexual offences against minors and was confined to psychiatric hospitals on several occasions. In 2007, the Olomouc Court ordered him to undergo protective sexological treatment instead of the outpatient treatment a Prague Court had ordered previously. He was confined to the Šternberk psychiatric hospital for a period of 10 months. Dvořáček first gave his consent to undergo an anti-androgen treatment – which would also reduce the time of his incarceration – but later changed his mind. He claimed having suffered fear of castration and hospitals, humiliation, and loss of dignity as well as a negative effect of the treatment on his sex life with his partner.

The Court reiterated that the applicant “had to face a difficult choice between an anti-androgen treatment that would reduce the time of his incarceration and treatment by psychotherapy and sociotherapy with the prospect of longer confinement only” (*Dvořáček v. the Czech Republic*, 2014, para. 102). The Court also noted that the ‘*medical staff found anti-androgen treatment to be a therapeutic necessity* and that

it was not possible to establish, beyond reasonable doubt, that Dvořáček was forced to undergo the procedure'. The court found Article 3 had not been violated.

4.5 **Herczegfalvy v. Austria**

The applicant, a Hungarian refugee, served a prison sentence in Austria, during which he threatened and assaulted numerous prisoners, guards, and a judge. He was placed under guardianship and confined to a mental health facility, where he remained for six months until his conditional release. He claimed he was, with the consent of his guardian, subjected to forced feeding, forced medical procedures, and handcuffed to bed for two weeks.

The Court found that it “is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary, by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3, whose requirements permit no derogation” (*Herczegfalvy v. Austria*, 1992, para 82). The Court also found that as a ‘*general rule a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading of no derogation*’ (*Herczegfalvy v. Austria*, 1992, para. 82). Since the forcible medical procedures were employed under the standards of medical necessity, Article 3 was not violated.

4.6 **Nevmerzhitsky v. Ukraine**

Nevmerzhitsky was detained in the Kyiv Regional Temporary Investigation Isolation Unit between 1997 and 2000 on charges of several acts of white-collar crime. While in the isolation unit, he went on a hunger strike and was forcibly fed with the use of a mouth widener and a rubber tube inserted in his throat.

The Court found that the *medical necessity had not been demonstrated clear enough by the Government*. Furthermore, the method used in the process of forced feeding was considered *extremely invasive and unnecessary*. Accordingly, there had been a violation of Article 3.

5 Conclusion

Synthesising the reasoning of these cases allows us to identify the conditions that must be satisfied before an act of forcible medical intervention will not constitute a violation of Article 3.

If the person who underwent a medical procedure gave his (true) consent, an act of forcible medical intervention can *per definitio* not exist as the act was not executed forcibly. The Court extended this reasoning by stating that the applicant must prove beyond a reasonable doubt that he did not consent to the medical intervention; he must affirmatively prove his dissent. If the applicant fails to meet this evidentiary burden, the Court no longer has to consider either the necessity of the medical intervention or the means used. If the applicant does sustain the burden of establishing beyond a reasonable doubt that he dissented to the procedure being carried out, the Court then (and only then) must rule on whether the forcible medical intervention carried out was required out of a medical necessity. If such a necessity existed, the forcible medical intervention does not constitute a violation of Article 3. We can extrapolate from the case law that medical necessity exists if, without the forcible medical intervention, the life or health of the person who underwent a medical intervention would be at risk; for example, due to the possibility of a cocaine bag rupturing in the stomach and causing death by cocaine poisoning. However, even in such a case, the forcible medical intervention utilized must be proportionate, meaning it must achieve the goal with as little discomfort for the person it is performed on as possible.

The absence of a medical necessity does not automatically mean there was a violation of Article 3. A forcible medical intervention for the purpose of gathering evidential material can, in some cases, be in accordance with Article 3. For no violation to exist, the forcible medical intervention must be duly justified; that is, there must be compelling reasons for its necessity. The use of forced medical intervention to obtain evidential material will violate Article 3 if that same evidence can be gathered in less intrusive ways. A blood test, for example, would be less intrusive than a forced insertion of a catheter. Furthermore, the nature of the forcible medical intervention must be considered in the context of the gravity of the crime. Here, the Court appears to use a sliding scale. While a very intrusive, forcible medical intervention with the aim of obtaining evidential material of a less serious criminal offence (e.g.,

quantities of drugs used for self-purposes and not distribution, minor theft, loitering) would constitute a violation of Article 3, the same intervention may well be legal and accordance with Article 3 in the case of a serious criminal offence (e.g., murder, rape, arson). In assessing whether the forcible medical intervention was necessary, the Court considers the following criteria: the extent to which a forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the methods by which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available, and the effects on the suspect's health.

An act of forcible medical intervention, even in cases where a violation of Article 3 is found, does not constitute an act of torture, but rather only an act of inhuman or degrading behaviour. Pain resulting from the forcible medical intervention typically is not intensive enough to be considered as torture and furthermore is not the goal, but rather the by-product, of the act.

References

Court Cases

- Bogumil v. Portugal, application no. 35228/03, 2008.
Dvořáček v. the Czech Republic, application no. 12927/13, 2014.
Herczegfalvy v. Austria, application no. 10533/83, 1992.
Jalloh c. Germany, application no. 54810/00, 2006.
Nevmerzhitsky v. Ukraine, application no. 54825/00, 2005.
R.S. v. Hungary, application no. 65290/14, 2019.
Soering v. United Kingdom, application no. 14038/88, 1989.

Legal Sources

- Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, retrieved from <https://www.refworld.org/docid/3ae6b3b04.html> (5 December 2020).

Secondary Sources

- Brosset, E. (2013). Le consentement en matière de santé et le droit européen, *hal*, retrieved from <https://hal.archives-ouvertes.fr/hal-00872135/document> (26 November 2020).
Cour européenne des droits de l'homme – Unité de la Presse (2020). *Santé*, retrieved from https://www.echr.coe.int/documents/fs_health_fra.pdf (4 December 2020).
European Fundamental Rights Agency (2017). *Involuntary placement and involuntary treatment of persons with mental health problems*, retrieved from https://fra.europa.eu/sites/default/files/involuntary-placement-and-involuntary-treatment-of-persons-with-mental-health-problems_en.pdf (28 November 2020).

Reidy, A. (2002). *The prohibition of torture - a guide to the implementation of Article 3 of the European Convention on Human Rights*, retrieved from <https://rm.coe.int/168007ff4c> (27 November 2020).