Õiguskantsler

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Rules on restraining patients

Dear Minister of Health and Labour,

I ask that legal clarity be established as soon as possible for situations where a patient needs to be restrained during the provision of medical care. The Chancellor of Justice has received several justified questions and complaints in this regard.

Current law allows restraining a person during the provision of a healthcare service only for the provision of involuntary psychiatric care in a hospital psychiatric ward. Undeniably, there is a need to establish clear legal rules also for other situations where the safety of doctors and nurses assisting a person cannot be guaranteed or the person themselves cannot be assisted otherwise. Even a person who is normally calm and of a clear mind may, for example due to poisoning, develop a mental state where their behaviour endangers themselves or others. In the patient's best interests and in the spirit of medical ethics, in these situations the patient's freedom of movement needs to be restricted so as to prevent the person from harming themselves or hindering the provision of medical care. Medical practitioners must be able to do their work with a peace of mind and observe the principles of medical ethics without being afraid of violating the law or someone's rights and running into disputes. In order to be able to lawfully restrain a patient who endangers themselves and medical practitioners even outside the provision of psychiatric care, the law must establish sufficiently comprehensive, easily understandable and implementable rules which take account of fundamental rights of patients.

Detailed justifications

The principle of voluntariness is observed in Estonia in the provision of healthcare and social services. Only in exceptional cases can someone be committed, for example, to a special care home, a psychiatric or an infectious diseases hospital.[1]

[1] Kolk, T, Truu, M. Põhiseaduse § 20 kommentaarid, p 51. – Ü. Madise jt (toim). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. (Comments on § 20 of the Constitution. Constitution of the Republic of Estonia. Annotated edition). 5., täiend. vlj. (5th revised edition) Tartu: Sihtasutus Iuridicum, 2020 (https://pohiseadus.ee/sisu/3491/paragrahv_20).

This means that under the current law, as a rule, a person is free to decide whether they wish to treat themselves and with which healthcare provider they want to do so. The law also allows a patient to stop treatment and leave the healthcare provider (Law of Obligations Act § 772(2)).

A person's freedom of movement during the provision of a healthcare service may only be restricted in a few exceptional cases laid down by law. This possibility is offered by the Mental Health Act, which allows provision of involuntary psychiatric care to a person, as well as the Penal Code in combination with the provisions of the Mental Health Act, which enable imposition of coercive psychiatric treatment in cases laid down by law. Sections 4−5 of the Communicable Diseases Prevention and Control Act lay down involuntary treatment of a person carrying an infectious disease in certain cases.

The law clearly and unequivocally stipulates that in the provision of a healthcare service a person's motion and extent of movements may be restricted and the person restrained (held by force, strapped, or the like) against their consent only in the provision of involuntary psychiatric care (§ 14 Mental Health Act). Involuntary psychiatric care may be provided to a person only in a hospital psychiatric department (§ 11 Mental Health Act) and, depending on the length of treatment, either on the basis of a decision by psychiatrists or under a court order. In other cases, a person's freedom of movement may only be restricted with their own consent.

The Constitution of the Republic of Estonia describes the conditions under which a person may be deprived of liberty against their will. Protection against the arbitrary deprivation of liberty is an important safeguard for every free individual. Therefore, this may take place only in accordance with the procedure laid down by the Constitution and law.

The legal literature notes that the condition imposed under § 20(2) of the Constitution, i.e. "except in the cases and pursuant to a procedure provided by law", affords protection on the level of statutory law to the permissible exceptions for deprivation of liberty, in other words the possibilities and procedure for deprivation of liberty must be laid down by law. In terms of importance of the rights and freedoms of people and the best possible protection, this constitutional provision protecting the freedom of movement must be interpreted narrowly: any kind of deprivation of liberty which lacks a legal basis in the form of statutory law is unconstitutional.[2]

The Chancellor's attention has been caught by several incidents where medical practitioners have said that it was extremely difficult or even impossible to provide medical care to a patient without restricting their freedom of movement. These are situations not involving involuntary psychiatric care or treatment of infectious diseases. Nevertheless, people in these cases needed medical care not provided in a hospital psychiatric department but in the case of which, for example due to a patient's behaviour caused by a psychiatric disorder, the medical practitioners believed that the patient's own life and health as well as that of other patients or medical practitioners was endangered. These cases have also been covered in the media.[3]

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[2] Kolk, T, Truu, M. Põhiseaduse § 20 kommentaarid, p 14. – Ü. Madise jt (toim). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. (Comments on § 20 of the Constitution. Constitution of the Republic of Estonia. Annotated edition). 5., täiend. vlj. (5th revised edition) Tartu: Sihtasutus Iuridicum, 2020 (https://pohiseadus.ee/sisu/3491/paragrahv_20).

[3] Haigla sidus 93aastase memme voodi külge kinni (Hospital strapped a 93-year-old woman to the bed) − *Põhjarannik*, 21.01.2016; Psühhiaatriapatsient vigastas Valga haiglas 12 inimest (Psychiatric patient injured 12 people in Valga hospital) − *Eesti Rahvusringhääling*, 23.03.2017; Mida ta elus valesti tegi, et surm nii kaua tuleb? (What did they do wrong in life so that it takes the death so long to come?) − *Postimees*, 05.02.2019.

Next, some examples of these problems. During the inspection visit to the sobering-up facility of the law enforcement bureau of the North Prefecture of the Police and Border Guard Board, the Chancellor's advisers saw how intoxicated and aggressive people were bound with special textile straps so that medical nurses of the facility could check their health and provide the necessary medical care.

During the inspection visit to Valga hospital, a patient in the internal medicine department was locked in the isolation room and another patient in the ward was bound to the bed with restraining straps.[4] The head of Valga Hospital conceded that restriction of people's liberty at a hospital where no inpatient treatment for infectious diseases or psychiatric care is provided is not permitted. At the same time, they explained that the need to restrain a patient and restrict their liberty may arise, for example, when a psychiatric patient has somatic complaints or when a patient develops a psychosis following anaesthesia. Valga Hospital was concerned how, in these cases, the protection of the rights and safety of the patient with psychiatric problems as well as those of other patients and staff can be ensured. The hospital believes that lawful solutions for such situations should be laid down.

The Chancellor of Justice (as well as the Riigikogu Social Affairs Committee and the Ministry of Social Affairs) was contacted (the petition sent on 23 August 2017) by an attorney-at-law who described the treatment of a person receiving the special care service and having a profound intellectual and multiple disability in the North Estonia Medical Centre (PERH). The person was operated on and after this the hospital considered it unavoidable to strap the patient temporarily to the bed. The representative of the Medical Centre explained that, in case of a direct and clear risk of self-harm by a patient, and if other measures to prevent the risk are insufficient, the patient's arms are fixed. However, this is done only in exceptional cases, for a short period and to the least possible extent, based on a doctor's orders and by informing the patient's next of kin. The representative of the Medical Centre emphasised that it is absolutely essential to have a debate about the necessity of applying means of restraint because, after all, means of restraint are applied to protect the patient's life and health and to ensure safety during the provision of a healthcare service.

Instances of restraint and restriction of patients' liberty described above were clearly not in line with applicable legal norms. However, the concern expressed by the representatives of Valga Hospital and the North Estonia Medical Centre can be considered fully justified.

When providing healthcare services, even a patient who is otherwise completely calm and of a clear mind may develop a mental state, for example, due to poisoning or severe intoxication, when their behaviour endangers themselves or others – e.g. they remove from their body the necessary equipment for treatment (e.g. cannulas or a probe), try to injure themselves or others. For this reason, in the patient's best interests and in the spirit of medical ethics, in certain situations medical practitioners need to restrict the patient's freedom of movement so as to prevent the person from harming themselves or hindering the activities of healthcare providers.

By establishing rules, the state must ensure that those in need of assistance can be treated in medical institutions in a manner which is safe for themselves and others. Medical practitioners must be reassured that their own life and health and that of patients are not at risk in the healthcare facility. At the same time, medical practitioners must be able to do their job with a peace of mind and observe the principles of medical ethics without being afraid of violating the law or someone's

[4] See the Chancellor's inspection visit of 9 November 2017 to Valga Hospital (the Chancellor's letter of 11 April 2018 No 7 - 9/180489/1801732, classified for internal use, also forwarded to the Ministry of Social Affairs).

rights and running into disputes. The state cannot make medical practitioners take the risk that, in the absence of appropriate regulation, they will go against the law in carrying out their work.

Certainly, a broader discussion (including with the participation of medical professionals) is needed about whether, in the situations described, the medical practitioners would have acted correctly, ethically, humanly and in the spirit of the Constitution by blindly complying with the law. That is, the medical practitioners should have followed the current procedure, which prohibits restraining a person in such a situation, and thus left the person without medical care. In any event, the question may be asked whether, in such situations, the restriction of a person's rights as a result of controlled and lawful restraint applied to the extent necessary is more harmful to a person than leaving them without assistance.

After the inspection visit to the sobering-up facility of the law enforcement bureau of the North Prefecture, I recommended that the Ministry of Social Affairs should find a solution to the problem that would be in compliance with the Constitution. The Ministry of Social Affairs replied that it considers the solution to be guidelines to be developed in cooperation between the Ministry and medical professionals. I sent a letter[5] to the Ministry of Social Affairs, in which I stressed that it was worthy of recognition that the Ministry had started to look for solutions, but I recalled that restrictions on people's fundamental rights (including restraint and restrictions on freedom of movement) must be regulated by a law according to the Constitution. The Constitution does not allow the grounds or procedures for restricting a person's freedom of movement to be determined in any guidelines or other document instead of statutory law. The distinction is substantive and important in terms of protection of fundamental rights. A law is adopted in a prescribed public procedure, it is promulgated by the President of the Republic, published in the *Riigi Teataja* and subject to constitutional review. Laws can only be amended in public procedure in the Riigikogu, not overnight and covertly. Such important issues cannot be decided by a minister, the Government of the Republic or anyone else instead of the Riigikogu. There was no (and cannot be) any legal basis for the issuance of these guidelines. Moreover, the guidelines may create a false picture of a legally correct solution. To date, no suitable legal framework has been established for action in the instances described above.

Thus, if a person needs to be restrained against their will for medical reasons, a solution in accordance with the Constitution must be created for this. In this way, medical practitioners could be convinced that, if restraint is necessary in the interests of a patient, it can be carried out according to clear norms and in a legally correct manner. This means that there must be a clear legal basis for restraint and a specific procedure and precautions must be laid down to help prevent possible abuses.

The cases mentioned above show that the need to restrain a person during the provision of healthcare services may arise in different situations and in a number of circumstances in which asking for informed consent from the person themselves is not feasible in practice for various reasons. Among other things, for example, because a person is not able to give consent. In that case, it is not reasonably possible to follow the rules laid down in §§ 766−767 of the Law of Obligations Act. These provisions primarily govern the obtaining of consent for the provision of healthcare services, not the restraint of a person. There are also no specific norms and guarantees in the Law of Obligations Act, on the basis of which the safety of involuntary restraint can be ensured and which would rule out abuses.

[5] See the Chancellor's letter of 1 March 2019 to the Ministry of Social Affairs 7-7/181233/1901111.

It is therefore necessary to establish a clear legal basis in current law, as well as a specific procedure and precautions, in order to avoid the arbitrary use of restraint as a measure that severely restricts the fundamental rights of an individual. When establishing such rules, the appropriate solution can hardly be supplementing or clarifying the provisions of the Law of Obligations Act. Rather, such rules – as well as the rules on psychiatric care – should be laid down predominantly in laws governing relations in public law, such as the Health Services Organisation Act. One option worth considering is finding a solution, for example, by amending the provisions of the Mental Health Act – by allowing a person receiving a healthcare service to be restrained against their will due to their mental disorder not only during the provision of involuntary psychiatric care in a hospital psychiatric ward.

It is important that the regulation created should be clear, easy to implement and, at the same time, protect the fundamental rights of patients. The law could, among other things, set out who and when can decide on the use of means of restraint, and how monitoring and documenting the status of a person under restraint and measures against possible abuses are ensured.

In my letter to the Ministry of Social Affairs (letter No. 7-7/181233/1901111 dated 1 March 2019), I stressed that healthcare providers who have experience in restraining people outside the provision of psychiatric care and, thus, a clear understanding of the extent to which measures restricting a person's freedom and personal integrity are needed in the field of medicine, must inevitably be involved in drawing up such rules.

Constitutional solutions to situations of concern to medical practitioners should be found by medical practitioners, officials and legal experts of the field together. To this end, I ask the Ministry of Social Affairs to prepare the necessary legal provisions as soon as possible so that the XV composition of the Riigikogu would be able to establish them soon, if desired.

Yours sincerely.

/ signed digitally/

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