Human Rights, Health Care, and Coercion in Norwegian Health Law

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1 Introduction

An important principle of health law and health ethics is that healthcare should be provided with the patient's consent. Respect for autonomy – the obligation to respect the decision-making capacities of autonomous persons – is usually regarded as one of the four main principles of medical ethics. However, this principle may be overridden in cases of emergency. In such situations, health personnel are lawfully obliged to provide any essential healthcare they consider to be of vital importance according to the principle of beneficence. This applies when the patient is incapable of providing consent, and also if the patient objects to treatment. It may thus also be considered as some sort of a “rights provision”.

Outside of emergency situations, the provision of healthcare without valid consent requires a stricter basis in law. This follows from the principle of legality relating to, inter alia, interference with the right to liberty and private and family life. This principle is not a statutory provision in Norwegian national law, being enshrined, however, in the provisions of the European Convention on Human Rights; see, for example, Articles 5 and 8 of the convention, which are part of Norwegian and Nordic law (see Section 2.2 below).

All the Nordic countries have mental health Acts that provide the authorization to use coercive measures on strict terms within the field of psychiatry, albeit outlined...
somewhat differently.3

In some of the Nordic countries, there is also an opening to isolate and detain a person with a disease dangerous to society. In this case, as well, the criteria for isolation must be strict, and detention must be used as a last resort, in order to comply with the European Convention on Human Rights. This is demonstrated by the Enhorn case, where the Swedish authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant’s right to liberty.4

In 1994, it was discovered that Enhorn, who is a homosexual, was infected with the HIV virus. In response, the county medical officer issued instructions to the applicant constraining his conduct in order to prevent him from spreading the HIV infection. When the authorities were alerted to the fact that the applicant was not complying with these instructions, and had transmitted the virus to a 19-year-old man, the County Administrative Court ordered that the applicant be compulsorily isolated for: up to three months pursuant to Section 38 of the 1988 Infectious Diseases Act. A psychiatric report on the applicant noted that he “suffered from a paranoid personality disorder and from alcohol abuse. He was considered to be completely void of a sense of being ill and also lacked awareness. The combination of a sexual orientation towards younger men and a possible alcohol related neuro-psychological functional impairment, from the infection-spreading viewpoint, was deemed disadvantageous.” As a result of the confinement order, the applicant was in total isolation for approximately one and a half years.

The European Court of Human Rights acknowledged having “only to a very limited extent ruled on cases where a person has been detained in order to prevent the spreading of infectious diseases”. Therefore, it established new criteria to assess whether or not a detention was lawful, asserting that a detention is lawful where the spread of the disease is dangerous to public health and safety, and where that detention is used as a last resort. According to the Court, these criteria ensure that the law complies with the principle of proportionality and is free from arbitrariness. In this case, the Court held that HIV does indeed constitute a danger to public health. However, the Court also said that it was not possible to conclude that the repeated confinement orders were employed “as a last resort” because the Swedish government had not provided “any examples of less severe measures which might have been considered for the applicant during the period 16 February 1995 to 12 December 2001, but were apparently found to be insufficient as regards safeguarding the public interest”. In addition, the overall duration of the confinement orders showed that “the authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant’s right to liberty”.

4 Court judgment, 23 January 2005.