Forensic standardizations in torture and death in custody investigations

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Abstract: Torture and death in custody have incurred rapid development as juridical subject in recent years in Europe, with the implementation of the European Convention of Human Rights. Evaluation of sufferance severity, which is the consequence of pathology with chronic evolution, the predictability of decompensation of a subclinical pathology, and translating these medical information on a scale measuring the severity of detention consequences, are all challenges for the modern detention healthcare system, in which most allegations of torture are due to lack of appropriate medical treatment administered to inmates. Where ethics are concerned, the main data difficulties are addressed in ethical conflicts between officials and experts of the parties and also between experts and judiciary officials who handle cases of torture or death in detention; this is why standardization is very important in such cases both in clinical expertise and in autopsies or exhumations. Discussions: We must improve the forensic expertise methodology, the process of collecting data with statistical purposes, and sound evaluation criteria, all in a strong connection with the need for a balanced legal framework applied in the case of civil compensations granted after death in custody, and the binique relation between medico-legal expertise and case investigation has to be standardized.

Keywords: torture, death in custody, lack of adequate medical treatment, ethical conflicts, forensic standardizations, civil compensations, capacity of detention

Introduction

This study focuses on a worldwide topic of interest: death in custody, which has incurred rapid development in recent years in Europe, with the implementation of the European Convention of Human Rights (ECHR) juridical procedures as reference juridical mechanism in the European Union [1].

After a thoroughly review of the professional specific literature, Article no. 2 from E.Conv.HR – “The Right to Life” and Art. 3 – “Prohibition on torture and inhuman or degrading treatment or punishment,” were chosen as starting point of this analysis.

In order to fall under Art. 3, the determined “treatment” applied to a person must exceed a certain “level of severity”: the point from which the sufferance produced to a person is sufficiently severe to be qualified as inhuman, degrading treatment or even torture must be determined. Therefore, the necessity of setting a minimum level of severity is once again underlined [2].

The estimation of the minimal level necessary for one treatment to be considered degrading is relative, and it depends especially on the duration of the treatment, its physical and mental consequences and, sometimes, also on age, sex and health condition [2].

In this context, lack of appropriate medical treatment for one detainee can mean a treatment which is contrary to the provisions of Article 3 of the Convention. In the case of mentally ill persons, in order to establish standards incompatible with Article 3 these individuals’ vulnerability and inability in some cases to complain coherently or at all about the way they are affected by a particular treatment should be considered [2]. The characteristics of forensic expertise in these situations are given by the lack of contradictoriness both at medico-legal expertise’s level and at juridical level; the equality of arms principle (derived from the right to a fair trial – Art. 6 of E.Conv.HR, which gives the right to have own party expert) cannot be applied in this field because many national legislations in EU do not give detainees the right to have their own forensic expert of the party. The juridical decision is being unilaterally made because these rights are considered non-justifiable at present, due to their constitutional positive orientation [3, 4].

This feature is procedurally balanced in some juridical systems, by using the expertise system involving independent experts, where two different expertise’s reports are needed to recommend the temporary discontinuance of detention due to medical reasons.

In case of degrading treatment, the offended person has the duty to prove this violation, which is hard to do in numerous national legislations, especially by persons who are in the custody of the authorities and who do not have access to an independent forensic expert [5].
According to these articles, there are two fundamental principles derived:
• A “negative” and a “positive” obligation of the state – in the case of detainees, state responsibility is engaged [2]: first, a negative responsibility consisting in not using an excessive use of force [6]; second, a positive responsibility: the state has to protect the vulnerable individuals. The goal of the positive obligations under Articles no. 2, 3 and 8 of E.Conv.HR is to provide basic health services and support for vulnerable individuals [2].
• The obligation of an effective investigation [2] – going further with the assessment, the effective investigation in the case of torture or death, essentially includes the medico-legal expertise or autopsy or, in certain circumstances, may involve directly an exhumation (e.g. in the case of convicts who initially have another cause of pathological death ascribed or who have not been autopsied). However, each of the situations requires different strategies [6].

Materials and Methods

The article was written based on the experience of the author, who performed 30 autopsies on suspected deaths in detention (out of which, later on, in some cases the ECHR ruled that there were violations of Article 2 of the Convention), 5 cases of prisoners’ exhumations which had already been autopsied and 50 new forensic expertise in cases of allegations of torture and/or death in prison due to violence or lack of adequate medical treatment.

All these categories of cases were compared with similar cases in the ECHR rulings which stated that Article 2 and/or Art. 3 of the E.Conv.HR had been violated; standard cases of ECHR case-law that can be used as models and areas where weakness of forensic evidence made the assessment of the case difficult or impossible to probate in court, were identified and correlated with the data contained in reports of European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and ECourtHR decisions (Fig. 1).

The novelty of this study is that the legal concept establishes a correlation between the capacity of detention (as defined by the ECourtHR) and the traditional models of clinical medicine assessment of work capacity or adaptive capacity, establishing the degree of disability trying to contribute to standardization of the influence of forensic expertise on the temporary discontinuance of detention on medical grounds.

Evaluation of severity, which is the consequence of suffering pathology with chronic evolution, the predictability of decompensation of a subclinical pathology and translating these medical information in a scale measuring the severity of suffering are a challenge for the modern healthcare system, in which most allegations of torture are due to lack of adequate medical treatment administered to inmates.

There are currently no standards for medical and forensic expertise for the allegations of torture or death in custody cases by the fault of the authorities, so this study trics to define the main criteria for assessing allegations

Fig. 1. Decisions of ECourtHR in the last five years (June 2012) regarding violations of Art. 2 (gray) and Art. 3 (black) – number of decisions to one million people per nation [12, 37]
of torture in both clinical and forensic terms, in order to foreshadow the construction of a diagnostic guide for cases of torture and death in custody applicable in the EU.

The present article establishes standards and procedures to be followed in case of allegations of torture, regarding either living or deceased prisoners, in addition to the classical criteria of conduct of a forensic expertise or autopsy and sources of error that can affect expertise results (flawed survey data, laboratory test reports issued by unaccredited laboratories).

Results
Temporary discontinuance of detention due to medical reasons

In Romania, the main cases that raise the question of discontinuing detention due to medical reasons are the following two:

- The prisoner suffers from an affection that cannot be treated within the penitentiary medical network. The solutions in these cases are almost exclusively administrative, the prisoner being registered, under security watch, in a hospital with adequate equipment.

- The second situation is when the prisoner suffers from a severe pathology, with short-term adverse vital prognosis. In many of these cases, there are major difficulties to set a minimum level of severity which would permit the discontinuance of detention.

The two medical situations described above not only have different practical solutions, but also bring up extremely complex ethical problems [7]. The last category has an alternative criteria system, as a prisoner may be qualified unsuitable for detention even though his/her vital prognosis is not threatened on short term.

The relaibility of this category of expertise is sometimes relative, especially in the cases of prisoners with short-term adverse vital prognosis, when the expert doctors cannot accurately state the date of death. This difficulty of foreknowledge may be in the disadvantage of some of the prisoners, who either may not benefit from the discontinuance of detention, or may experience an aggravation of their health condition, or even more, may die during the procedure of expertise, which on average lasts at least two months as per the current legislation [6, 8].

This lack of accuracy may be fatal for a prisoner who suffers from two or more conditions, which separately do not reach the severity level needed for discontinuance of detention, but nevertheless lead to his/her death, through complications determined by the associated pathology.

In the cases of prisoners with motion disabilities, a person is permanently needed to help them with their primarily needs. Same motion disabilities appear in the cases of very old prisoners, who are also mentally disturbed due to ageing – no age limit for imprisonment is set in many countries [6, 9].

Another unique category is represented by prisoners with cecity, which are not adapted to living in detention or prisoners infested with HIV or suffering from cancer in intermediate stages [3, 4].

In this direction, the European Council’s Torture Prevention Committee made recommendations regarding the necessity of creating some legislative instruments that would permit temporary discontinuance of detention in cases of very old persons, of those who suffer from very severe illnesses or disabilities, or those in the coverage area of the capacity to support the detention [6]. But until now some penal procedure codes do not contain any reference to these cases.

In terms of ECHR case-law regarding the decisions to sanction the states that violated Art. 3 of the Convention in the case of prisoners, a true juridical encyclopaedia can be written, but some cases are particularly important, as they constitute references points in the construction of the modern juridical scaffold for protecting the dignity of persons who are in detention conditions [10, 11].

The following are some of the reference cases mentioned above:

- Kudla v. Poland (2000) mentioned for the first time “the rights of every prisoner to detention conditions in compliance with human dignity and his/her rights to not being subject to a level of sufferance exceeding the practical needs of the detention conditions” [2, 9, 12];

- Keenan v. UK (2001) stated for the first time the obligation of the state to take necessary measures to protect the persons in its custody and to prevent their death [12];

- Anguelova v. Bulgaria (2002) referred to the obligation of the state to provide the prisoners with appropriate medical care to prevent their death [12];

- Mousel v. France (2003) introduced the term “a prisoner’s suitability for detention” (capacity of detention, la capacité à la détention-fr) to define a level of sufferance incompatible to human dignity [9, 12];

- Matencio v. France (2004) talked about the obligation of accelerating the procedure of temporary discontinuance of detention [12];

- In the case of Huylu v. Turkey (2006), the fact that the lack of adequate medical care may constitute a violation of the Convention was stated for the first time [12];

- Gagiu v. Romania (2009) was convicted for the first time for violation of Art. 2 and Art. 3 of the Convention, because the provisions regarding detention environment specified under Art. 3 were not observed and no adequate medical care was
provided to protect the life of the prisoner. This lead to his death and there was no investigation regarding the case after that [9, 12];
- In the case of Eugenia Lazar v. Romania (2010) and Baldovin v. Romania (2011), the state was convicted for infringement of Art. 2 of the Convention, in terms of procedure, because the Court noticed the necessity to extend the jurisdiction of coordinating medico-legal expertise to private institutions and/or other independent experts [12, 13].

In most of these cases, assessments performed by medico-legal experts constituted the base of some infringements of Art. 2 and Art. 3 of the ECHR Convention.

Independent medical experts’ all-importance is also shown by the fact that the person who brings forward allegations of infringements of Art. 2 and Art. 3 of the Convention must prove the violation [14].

This is very hard to do in some of the national legislations, due to both the lack of access to an independent expert who is in fact limited either by the authorities or by the experts’ lack of independence, and the urgent character of finding the presence of some traumatic lesions, which may cure in a few days [5, 13].

It can be stated that there are two stages in the expertise procedures dedicated to setting the suitability for detention:
- First, setting the prisoner’s level of health and his/her pathology and
- Second, the evaluation of compatibility between a severe pathology and keeping that person, who is subject to expertise, in detention, which requires of the forensic expert to have a deep understanding of the real penitentiary’s environment.

This procedure must be performed on a regular basis; the periodicity interval in different European jurisdictions varies between three and six months. However, this periodicity is relative because the prisoner may interrupt his/her treatment before the term given by the expert report, in order to aggravate his/her health condition and thus benefit from a new extension to the temporary discontinuance of detention.

We may say that the danger of relapse represents the most important juridical argument against the temporary discontinuance of detention due to medical reasons; in spite of the fact that the conclusions of the forensic expert report are in favor of temporary detention discontinuance, the final decision belongs to the judge.

In this context, the term “a person’s suitability for detention” or capacity of detention (la capacité à la détention-fr) is very specific, because it is the only highly-specialized notion in the medical profession which defines a level of sufferance non-compatible with human dignity; nevertheless, the suitability for detention is a term with no practical application in some EU states’ legislation, due to lack of standard procedures for assessing this capacity/suitability [15, 16].

Death in custody and forensic pathology practice

In cases of pathological deaths, in which the prompt and adequate medical treatment could have saved the detainee, the principal features which are examined are the following:
- The medical history of the case, if there is one and if it was acknowledged [17];
- Establishing the correlation between the medical symptomology of the detainee and his/her access to specialized medical consultation [2, 18–20];
- The adequacy degree of the medical treatment in relation to the clinical state of the prisoner and the real severity of his/her illness [2, 18];
- The causes which led to the tardiness and/or the inefficiency of the medico-pharmacological treatment in terms of failure [18, 19].

Is Art. 3 of the ECHR violated by permanent detention [9]?

In case of autopsy, the fundamentals that need special attention are the following:
- The necropsy findings have to be correlated with those of the case investigation, the latter currently representing the absolute ruling [21–23].
- It is recommended that the paraclinical investigations should be as complete as possible; on the other hand, they depend upon the Forensic Services equipment and the competency level of the forensic certified laboratories [23].

The adequate interpretation of the traumatic injuries production mechanism is also very important because:
- It can be changed afterwards by other medico-legal commissions hierarchical superior [24, 25] and interpreted by national courts and even reinterpreted by international courts [25];
- It can be affected by an incomplete case investigation [22, 23].

As for the medical certificate of death, special attention should be paid to the cause of death, especially in the case of death occurring during or as a consequence of a certain action performed by state representatives such as arrest, punishment or immobilization of the detainee (prone position has a disputed role in the determination of death [26–28]).

However, there are additional difficulties in few situations such as the following:
- In the case of children or very young prisoners, without any pathological background [6, 17, 29, 30];
- When death occurs during the arrest, transportation, right after the arrest or in the first hours/days after the arrest [18, 22];
- When death occurs due to beating the detainee in reflex areas (e.g. carotid sinus reflex) [18, 22, 23];
- During a state of an extreme psychological excitation state of mind or delirium [20, 22, 23, 31, 32];
− As a consequence of a positional asphyxia caused by prolonged immobilization of the prisoner in a certain position (e.g. prone or hogtie restraint position) [22, 30];
− When there are minor traumatic injuries which do not explain the cause of death or different age traumatic injuries, including those produced at some point in the physical immobilization by using pain compliance [22, 33];
− When death is preceded by severe physiological privations of the detainee (lack of water, food, sleep) associated with immobilization of the prisoner in non-physiological positions or torture by water boarding, beating, electrocuting, burning, stripping prisoners naked [33, 34];
− When the inquiry results are altered [6, 22, 23].

In case of exhumed corpses, there are three main issues [23, 30]:
− Complete diagnosis of the traumatic bone injuries and, if possible, of the soft tissues as well;
− Correlation between the exhumation findings and the medical data and/or the initial necropsy data;
− Causal deductions concerning the cause of death (they have a certain degree of presumption, especially when the exhumation does not offer essential information apart from the preliminary cause of death and the forensic logics follows symmetry of information from the survey) [10, 11, 23].

Ethical aspects

Applying the principle of equality of arms and the adversarial principle, which are derived from Art. 6 of the E.Conv.HR, the forensic examination of inmates or the autopsy or the exhumation of a detainee who died during detention, is a very delicate legal medicine subject, which requires many precautions whenever drawing conclusions for both official experts and for those of the party (in countries where legislation permits experts of the party).

As for ethics, the main difficulties regarding data emerge in the form of ethical conflicts between officials and experts of the party and also in conflicts between experts and judicial officials who handle cases of torture or death in detention.

Ethically, the issue is very complex and susceptible of dynamic approaches and different interpretations due to different positions of the experts involved in this type of expertise and also due to authorities’ reluctance towards this category of cases, mainly determined by the sanction of the civil servants whenever allegations of torture or death in prison for which authorities are at fault are proven.

Discussion

The conclusions are divided into five sections, each emphasizing delicate facets of the topic – forensic expertise methodology, the process of collecting data in statistical purposes, and sound evaluation criteria, all in a strong connection with the need for a balanced legal framework to be applied in case civil compensations granted after death in custody.

1. The first aspect is the forensic expertise methodology in case of death in custody that has to be upgraded:
− The forensic medical expert has to be provided with all the medical information concerning the medical background of the detainee;
− The autopsy has to be performed on fresh corpses, compulsory in the case of all detainees (including those in the hospital);
− Case investigation results have to be taken into account both at the moment of autopsy or at short while afterwards, even in the situation of apparently pathological deaths;
− For this category of deaths there granting access to a certificated laboratory is compulsory in order to perform toxicological and complex thanatochemical tests (particularly in the case of a death preceded by physiological privations);
− The forensic report of autopsy has to be standardized;
− It is recommendable that a mixed team of experts, including both independent or international certified specialists should carry on a forensic autopsy, at least in high profile cases or when the cause of death is controversial, in cases where very young prisoners or a suspect death are involved;

A few absolute objectives need to be settled for this type of forensic expertise:
− If there are external or internal signs of physical torture, through physiological privations, lack of medical treatment, etc.
− If the prompt and adequate medical treatment could have saved the life of the prisoner, including psychiatric care;
− If there were psychiatric emergency predictors (for suicide, violence or other type of psychiatric disorder);
− If there are necropsic elements which could plead for homicide or murder;

Subsequent objectives (related to the investigation and forensic expertise) are as follows:
− If the principle of proportionality was violated during physical restraint that uses pain compliance (meaning that there was an excess of violence administered by state representatives)
If there were medical or organizational solutions which could have been used to foresee death; this could be deducted from the investigation as well.

2. The next result regards the process of collecting data on death during detention. This has to be carefully standardized and improved:

- There are numerous forensic and penitentiaries’ institutions which do not make data concerning death in custody public;
- However, the quality of data collections introduced in studies and the processing of these data has to be improved because most of the statistics so far have been using data offered by these institutions. But most of the data are not statistically valid since the methods used for collecting and processing them are elementary;
- A scientific statistical–mathematical–experimental assessment of the errors of framing post-torture deaths in pathological deaths or accidents could offer a more objective image of the causal map of death in the case of death in custody. This would be far better than the present official statistical studies (e.g. an alcohol or drugs intoxication, a homicide can be dissimulated in accidents or suicides, while many deaths declared as sudden death or suicides could have serious penal implications or implications in the medical malpractice area);
- When classifying death in custody and data analysis, the place of death (while detaining the prisoner, transportation, temporary arrest, permanent detention, etc.) has to be kept in mind.

3. The third aspect is the insufficiency or inefficiency of the assessment criteria that require introducing certification in this area as well because the fact that violating the Article 2 of E.Conv.HR may represent a superior stage of a potential torture (Art. 3) has to be permanently considered.

Certifying forensic experts who carry on expertise in such cases should be a globalized, international practice, at least within the European Union borders, since the required time for creating this body of experts is a problem. Such cases may require a sophisticated prosecution strategy and the international community should implement the lessons learned from existing hybrid mechanisms in order to develop new models that are capable to bring justice in a more effective and efficient manner.

Also, the management of detention facilities should include a certification of the institution, such as the hierarchy procedure for hospitals; this certification should be performed in accordance with international standards [35]. Mind that the implementation of ISO 26000 standards under custody circumstances needs special awareness.

The legal procedures in such situations have to be performed by certified institutions as well and the assessment has to be objective, beyond the local cultural specific.

4. The fourth finding is connected to the need to clarify the legal framework that regulates civil compensations granted after torture or death in custody [36].

Finally, it must be mentioned that death in custody implies a biunique relation between forensic expertise and case investigation, the two being interdependent, especially under the circumstances of a torture-death association.

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