

The surgical castration of detained sex offenders amounts to degrading treatment¹

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[Sexual Offender Treatment, Volume 5 (2010), Issue 2]

Abstract

In its report on its recent visit to the Czech Republic, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the Council of Europe calls for an immediate stop to the surgical castration of detained sex offenders on the basis that this intervention, carried out comparatively frequently in the Czech Republic, "amounts to degrading treatment".

This evaluation should have repercussions on respective activities in Germany and other countries where surgical castration is still used in the treatment of sex offenders. This paper therefore reports data on the use of surgical castration with sex offenders in Germany from the last decade and outlines shifts in the validation of its use during recent German history.

Key words: surgical castration, CPT, human rights, sex offender, inhuman or degrading treatment

The Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the European Council has heavily criticised the number of surgical castrations undertaken on detained sex offenders in the Czech Republic. In section II.10 of the report on the recent ad hoc visit of the CPT to the Czech Republic from the 21st to the 23rd October 2009, it is stated: "The CPT reiterates its view that surgical castration of detained sex offenders amounts to degrading treatment." The CPT demands the bringing of "an immediate end to the application of surgical castration in the context of the treatment of sex offenders. Pending its abolition, a moratorium on its application should be imposed without delay" (www.cpt.coe.int/documents/cze/2010-22-inf-eng.htm) (emphasis in original; last visited 08/09/2010).

The role of the CPT

The history of Human Rights Conventions in general, and the history of the CPT in particular, including its relationship to the European Court of Human Rights (ECtHR), its function, its standards and its working methods, have already been reported in detail in *Recht & Psychiatrie* (Pfäfflin 2005). It is also reported there that neither torture, nor ill-treatment (i.e. inhuman or degrading treatment) are tolerated within the sphere of influence of the ECtHR and the CPT. The conclusion that a practice "amounts to degrading treatment" is the strictest that the CPT has at its disposal.

To "amount to" indicates no more than to correspond to. The CPT, which stresses the importance of cooperation with the states it visits, far more strongly than the United Nations Committee on Anti-Torture (UNCAT), normally leaves the final evaluation that something is either torture or ill-treatment to the decision of the ECtHR.

What the CPT implements regarding the use of surgical castration with convicted sex offenders in the Czech Republic will inevitably have an affect on the application and evaluation of this method of

treatment both in Germany and in other countries which still provide for this form of "treatment". Once a procedure is qualified as torture or ill-treatment, where the latter includes the inhuman and the degrading treatment or corresponding actions of punishment, then this evaluation is valid not only for the state in which such a procedure has been denounced, but for all states within the sphere of influence of the ECtHR.

Earlier judgments of the ECtHR, in which certain interventions were judged or condemned as degrading, are worth mentioning here as examples:

1. Body searches carried out weekly in a high security prison for no special reason (ECtHR decision from 4th February 2003 (final 4th May 2003), Lorse et al. ./ Netherlands, no. 52750/99 (from section 72ff.), as well as ECHR decision from 4th February 2003 (final 4th May 2003), van der Ven ./ Netherlands, no. 50901/99 (from section 60ff.).
2. Unnecessary stripping of the handcuffed complainant carried out by the police following his arrest for the purpose of a body search (ECHR decision from 22nd February 2007 (final 22nd May 2007), Wieser ./ Austria, no. 2293/03 (section 40f.).
3. Corporal punishment, although not carried out in public and only with minimal physical suffering due to the institutionalisation of the use of violence, and the way in which the punishment was applied (ECHR, decision from 25th April 1978 Tyrer ./ United Kingdom, no. 5856/72 (from section 30ff.). Section 34 stated that the ECtHR considers it to be irrelevant that birching was carried out due to a court order following an act of violence by the plaintiff. The ECtHR also regarded it as irrelevant that birching shortened the period of time spent in prison. It further declared that "The fact that one penalty may be preferable to, or have less adverse effects, or be less serious than another penalty does not in itself mean that the first penalty is not 'degrading' within the meaning of Article 3 (art. 3))." These statements appear to be particularly significant, especially with regard to the argument that surgical castration would shorten the sex offender's period of imprisonment.

The Czech Government's Reaction

Although the Czech government had already been called upon to discontinue the practice of surgical castration, following the ad hoc visit of the CPT from the 25th March to the 2nd April 2008 (<http://www.cpt.coe.int/documents/cze/2009-08-inf-eng.pdf>; last visited on 8th September 2010), it did nothing of the sort. The practice was continued, even after the most recent visit of the CPT to the Czech Republic from 21st to the 23rd October 2009. As with the previous visit, the CPT commission was refused access to patient records, and in their answer to the Commission's report the Czech government has emphasised the lack of any alternative to the beneficial effects of surgical castration of offenders with regard to their rehabilitation. If there was not the possibility of surgical castration, they argue, sex offenders would possibly have to be kept under lock and key for life (<http://www.cpt.coe.int/documents/cze/2009-09-inf-eng.pdf> and <http://www.cpt.coe.int/documents/cze/2010-23-inf-eng.htm>; last visited on the 8th September 2010).

Data from Germany

As early as the run-up to the CPT's visit to the Czech Republic I had been asked about the latest available data from Germany concerning the surgical castration of sex offenders. As no new statistics had been published since the work of Wille and Beier (1989, 1997), and as the investigations of these two authors had been based on spot tests from two federal states, North Rhine Westphalia and Schleswig-Holstein, I began a survey with the relevant associations (regional medical associations, district governments, etc.) under the *law governing voluntary castration and*

other treatment methods (KastG) of the 15th August 1969 (BGB1. I, 164). The aim was to find out how many applications for voluntary castration under KastG had been made in the ten years between 1998 and 2007, how many had been accepted and how many rejected, and finally how many were still pending. This information also interested me as Wille had telephoned me following the publication of each new edition of the Handbook on Psychiatric Assessment, originally edited by Venzlaff and Foerster, and attempted to convince me that I should revise the critical evaluation of surgical castration in the chapter on sexual offences. I initially had to edit the chapter by Schorsch in the first edition of this handbook for the second edition following Schorsch's death (Schorsch & Pfäfflin 1994). Here, amongst other things, it is stated that "the mutilating effect of this procedure is more akin to a settling of scores with these people than a therapy", and that "the problem is not so much the undisputed 'crime prophylactic effectiveness' of the operation, which is still carried out up to five times a year in the German Federal Republic (Metzner, 1990), but rather its basis which is very much connected to the talion principle" (loc. cit., p. 362) - formulations which I updated in the corresponding chapters of the new editions of the book, for which I was then solely responsible (3rd edition 2000, 4th edition 2004).

The result of the survey carried out in the spring of 2008 was that in the ten years between 1998 and 2007, a total of 38 requests or applications were made nationwide for voluntary surgical castration in accordance with KastG. Of these 14 were decided on positively and 6 were rejected. The remaining 18 requests were either withdrawn or not followed up by the applicant, or were still being processed. Thus in the decade referred to, 1.4 applications per year were decided on positively. Whether the surgical castration was carried out or not in every case following the approval, was not recorded by the competent authorities. In general, an applicant can withdraw his application at any time without giving a reason, and does not have to act upon the approval of his application.

Regional differences were especially remarkable. In the area of eight regional medical associations there was not one single application and accordingly no decision. By contrast, half of all approved applications came from one single federal state which is far from the most populous. The results were worth including in the new edition of the handbook (Pfäfflin 2009). This year, when others again approached this medical association, it reported smaller numbers and when confronted with the signed and sealed data provided by myself in the spring of 2008, was not able to explain how these figures had been reached.

Evaluation of Treatment Outcome

Whilst in the public debate on sexual offences the demand for surgical castration, if not for more draconian measures, flares up with almost every new accordingly serious offence, the psychiatric and criminological literature has remained silent on this matter. It does regularly confirm the crime prophylactic effectiveness of the operation (e.g. Krueger et al. 2009), and notes that castration was carried out coercively in the past and so tries to distance itself from it. It must always be remembered just how arbitrary and indiscriminate the practice of earlier castrations was, not just with sex offenders, but also with other psychiatric patients. Even Langelüddeke's (1963) data, which had prepared the ground for the KastG, is particularly confusing, as I was able to demonstrate based upon the evaluation of several hundred files of the bio-criminological collection centre in Hamburg dating back to Nazi times (Pfäfflin 1988). In this context, I have also described the role of several protagonists of the German Society for Sex Research which at the end of the NS period actively promoted the surgical castration of sex offenders, as happens in the Czech Republic today.

If somatic intervention comes off well in Schmucker's (2004) meta-analysis on the effectiveness of the treatment of sex offenders, it must always be kept in mind that in democratic times this

intervention almost never took place without many years of psychiatric, psychotherapeutic and psychopharmacological treatment prior to it, and thus cannot be assessed in isolation (Berner et al. 2007). The same is valid, incidentally, for the evaluation of medication which inhibits the sex drive (Koller 2008), the relapse-preventative power of which, by the standards of evidence-based medicine, has not yet been sufficiently proven (Eher et al. 2007).

Even though we may be dealing with uncomfortable insights, it seems to me that we cannot fully dismiss the fact that lying behind the surgical castration of sex offenders, whether compulsory, as used to be the case, or on a voluntary basis, as is now the case, there are two principles which, based on current standards, conflict with humane treatment.

The first of these principles is the ancient oriental talion principle from the time of Hamurabis, the principle of an eye for an eye, a tooth for a tooth as described in the 2nd Book of Moses, chapter 21, verses 23-35. If thieves have their hands chopped off, this is undoubtedly effective as a prophylactic against the possibility of subsequent thefts. Even if the argument for surgical castration does not explicitly draw on this figure of retribution, but is thoughtfully worded and aimed at the protection of both the offender and of possible further victims and society, it cannot really shed this background, and at best only blank it out. In particular it must be remembered that in the case of a middle-aged offender who, for example, has been plagued since his youth by sexually deviant fantasies dangerous to others, the motive for his activities does not simply lie in his "sex drive" or in his hormonal control, but rather in the deviant content of his fantasies. For this reason even the proponents of the surgical castration of sex offenders point to the necessity of additional psychiatric or psychotherapeutic treatment.

Even if sex offenders voluntarily demand surgical castration, it still does not mean that the act is not punitive. For these demands might on the one hand subjectively be seen as a possibly milder form of punishment compared to long-term imprisonment, or on the other might be due to an auto-aggressive act in which masochistic tendencies or self-punishment are involved. It should be mentioned here that dispensing with surgical castration does in no way require the obligatory long-term commitment of sex offenders, as there are also a number of other effective treatment methods.

The second principle is a veterinary one, namely the knowledge that castrated young animals such as cattle horses or pigs are easier to manage and control than their non-castrated fellow creatures. I do not know enough about veterinary medicine to be able to judge whether the castration of stallions, bulls and boars has the same effect as it does with foals and calves, and whether, like geldings and bullocks, they then become tamer. With animals you do not normally wait until they are fully grown before intervention. In KastG, however, there is a minimum age of 25, in other words a point at which, as already outlined, the deviant fantasy world can already have developed and established itself to the point where it is largely no longer dependent upon hormonal control. What is involved in therapy here is the bringing about of changes on the specifically human level of language and emotions.

Conclusion

I believe it is a major step forward that the CPT has for the first time assessed the use of surgical castration with sex offenders as amounting to degrading treatment, and I can only hope that the CPT withstands the objections of the Czech government, and that this assessment will later also be confirmed by the ECtHR.

Currently, many people are appalled, not only in the West, but also in countries in the East, by extreme forms of corporal punishment, e.g. the stoning of adulteresses. We find it hard to believe that in an enlightened world people are still being treated in this way. In our schools relatively simple forms of corporal punishment are forbidden. A teacher today who uses a cane or even boxes a schoolchild's ears, as was quite usual in my schooldays, would immediately find himself on the public pillory of the internet, and almost equally speedily in front of a judge. With regard to physical violence and corporal punishment, society today has become far more sensitive, and it must also show this sensitivity towards criminal offenders. Should it allow itself not to act in this way with respect to inhuman or degrading treatment, society would very soon lose all credibility.

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Footnote


¹ First published in German in *Recht & Psychiatrie* 28, 2010, 179-182. Online: http://psychiatrie.de/data/pdf/e5/0b/00/rp_04_2010_179.pdf

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