Involuntary Hospitalisation in France: Major Evolution of Legal Aspects

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Involuntary hospitalisation has been legal in France since 1838. The first reform took place in 1990. However, critics postulated that this first reform did not adequately respect the rights of patients. Consequently, further reforms were introduced in 1990. In 2011 further reforms rendered involuntary hospitalisation consistent with European requirements, introducing systematic control by the *Juge des Libertés et de la Détention* (Judge of Freedoms and Detention) for each patient hospitalised without consent. The purpose of this article is to provide a qualitative description of the evolution of the legal concerns surrounding involuntary hospitalisation in France.

Key words: consent to treatment; freedom; hospitalisation without consent; human rights; involuntary hospitalisation; legislation; psychiatric care.

1. Introduction

Psychiatry is a complex and evolving area of medicine. Although there has been a reduction in stigma associated with mental illness in recent years, it remains challenging to understand and respond to mental suffering in a society that emphasises personal success. The serious manifestations of psychiatric disorders, such as disorganised behaviour, delusions and hallucinations, generate concern within society. Many misconceptions and myths surround mental disorders. In particular, they are believed to increase the risk of aggressive behaviour, causing the public to fear for its safety.

Depending on the nature and severity of psychiatric disorders, treatment without consent may be necessary.¹ Beyond the

behavioural manifestations of psychiatric disorders, they can impair cognitive functioning, particularly reasoning and judgement skills.² These disorders can prevent the patient from having the capacity to provide informed consent to psychiatric treatment. Being incapable to consent to treatment is one of two major requirements of involuntary hospitalisation in France; the second is the presence of a psychiatric disorder requiring treatment. Both the diagnosis of psychiatric disorder and the evaluation of capacity to consent to treatment are considered to be medical procedures.^{1,3,4}

A number of relevant studies have demonstrated that the ability to consent to psychiatric treatment is not stable over time; that is, it may change along with other symptoms,

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particularly with improvement in mental status.^{1,5} Individuals may experience psychosis but may not be incapable of providing consent for treatment. Conversely, some studies have demonstrated that the ability to consent does not always improve after treatment.^{1,5} It is possible for a patient to be discharged from an involuntary hospitalisation without any improvement in capacity to consent for treatment, which highlights the need for an appreciation of the complexities of mental illness and the capacity to consent to treatment. Such specific training may not be available to the judiciary.⁶

Although the first legal framework of involuntary hospitalisation in France dates back to 1838, it was not until 1990 that the legislature consolidated the permissible bases for involuntary hospitalisation. These foundations did not comply with European requirements, so the legislature further reformed the law on 5 July 2011. The purpose of this article is to provide a qualitative description of the evolution of the legal concerns surrounding involuntary hospitalisation in France.

2. Legal Evolution from 1990 to 2011

The first significant law concerning psychiatric treatment in France without consent dates back to 30 June 1838. This law is called the ‘Esquirol law’; it entrusted the *Préfet* (government representative for a prefecture) with the power to detain a person in cases where there was a threat against public order or safety. This law lasted over a century and a half without any major change. The ‘Security and Freedom’ law of 2 February 1981 gave the patient the opportunity to contest their hospitalisation through a summary procedure.⁷ However, it was the law of 27 June 1990 that officially established the system of hospitalisation involving three types of admissions. These were free admission, admission at the request of a third party (e.g. member of the family) and admission at the request of the *Préfet*.⁸

2.1. Evolution since 1990

2.1.1. The First Reform in 1990

The law of 27 June 1990 has been described as ‘the only true reform’ since the Esquirol law.⁹ This law defined two different types of involuntary hospitalisation, one at the request of a third party (‘hospitalisation à la demande d’un tiers’) and the other at the request of the *Préfet* (‘hospitalisation d’office’). These have been described by Laffont and Priest¹⁰ as follows:

- to admit someone at the request of a third party, the patient has to suffer from a mental disorder that requires treatment and the patient has been assessed as not being able to consent to treatment. Then he can be legally forced to stay in the psychiatric facility if a third party who cares for him signs a certificate and if two independent physicians, including a psychiatrist, detail the symptoms in two different certificates.
- to admit someone at the request of the *Préfet*, the first two requirements described above (mental illness and incapacity to consent) are required, but in addition the patient must be a threat to the safety of the public. In this case, the *Préfet* plays the role of the third party and two independent physicians, including a psychiatrist, have to detail the symptoms in two different certificates.

In both situations (at the request of the third party or at the request of the *Préfet*), in the case of an emergency, only one medical certificate describing the symptoms is necessary. In this situation, it is understood that the situation is urgent, and waiting to obtain a second and independent opinion would increase risk and delay the process of hospitalisation and treatment.

This law in 1990 took into account Recommendation R (83) 2 of the Committee of Ministers of the Council of Europe, which

dealt with the legal protection of persons suffering from mental disorder placed as involuntary patients, stating that 'a judicial or any other appropriate authority prescribed by law' has to offer the patient a right to appeal such a decision.¹¹ This law introduced additional rigour to the process of involuntary hospitalisation. It helped to enforce the inspection, by the judicial authority, of care facilities receiving patients without their consent, although this inspection was optional. In addition, it created an administrative commission to oversee psychiatric facilities to ensure the protection of patients' rights.

Despite this reform, the extent of the improvement in the treatment of individuals with mental illness was considered inadequate. Here are three examples of the consent to treatment in psychiatry,¹² the psychiatric care of an individual found not to be criminally responsible¹³ and the necessity of releasing a patient when due process is not respected:¹⁴

- the law [No. 2002-203 issued on 4 March 2002] concerning 'patients' rights and the quality of the health system',¹² places consent at the centre of psychiatric care, raising the potential for psychiatric treatment to be found not to respect the rights of patients and the option for a patient to be considered incompetent to consent even though a formal assessment for competency has not been done. Similarly, recommendations by the Council of Europe in 2004 suggested that the competent authority should designate 'an authority, or a person provided for by law, which is distinct from the person proposing an involuntary measure, and can make an independent decision'.¹⁵
- the law [No. 2008-174] of 25 February 2008¹³ was the first statutory provision to reinforce the power of a court to take care of a psychiatric patient by extending the option to any judge involved in a criminal procedure to admit a person

to a psychiatric facility when the person has been held not to be criminally responsible because of a mental disorder, without obtaining the approval of the *Préfet*.

- the decree [No. 2010-526] of 20 May 2010¹⁴ provided that a patient must be released immediately if all the procedural requirements for his or her involuntary admission are not respected.

During the same period of time, the French National Authority of Health (Haute Autorité de Santé – HAS) made recommendations to make the procedure of involuntary hospitalisation more structured. Notably, it recommended that the assessment needed to be more detailed. Specifically, the doctor was required to describe with specificity the symptoms suggestive of mental illness, the behaviours putting the patient at risk, as well as the disorders preventing the patient from providing consent.¹⁶

2.1.2. Criticism of the Law of 1990

Different committees of the French Government and the French Parliament expressed criticisms of the law of 1990. Concerns were raised about the use of the *Préfet* criterion when a third party was not available. This was felt to lead to a stigmatisation of the 'forensic patient'.¹⁷ Others urged a review of the involuntary hospitalisation process because treatment and rehabilitation were not always available for patients.^{18,19} They focused on the potential for abuse of the emergency procedure, as it requires only one certificate, compared to the regular procedure where two certificates are required to ensure the rights of the patients by being assessed twice and independently.^{18,19}

The circumstances of patients who are involuntarily hospitalised were also denounced by Mr Delarue, the General Inspector of Places of Deprivation of Liberty ('Contrôleur Général des Lieux de Privation de Liberté').²⁰ He published an annual report

on his activities including his visits to various psychiatric institutions. On 15 February 2001, Mr Delarue identified various issues in the balance between ‘the requirements of public order, [and] the need for care and consideration of the fragility of the people involved’.²⁰ The main issue was the absence of a concrete opportunity for patients to challenge an involuntary hospitalisation before a judge. Patients were not notified of their rights, including the possibility of appointing someone they trusted and immediate access to a lawyer. Being admitted to a psychiatric facility without consent is highly intrusive by virtue of its restriction of a patient’s freedom. This renders the intervention of a judicial authority in such a matter, in accordance with the provisions of Article 5 § 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, very important – it provides that ‘everyone arrested or detained ... shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release pending trial’.^{21,22}

The other issues raised by Mr Delarue related to abuses arising from certain practices that have accompanied instances of involuntary hospitalisation. The General Inspector deplored forced confinements in seclusion rooms to prevent absconding, exponential growth in the incidence of involuntary admissions for public order disruption risk and prevention of access to hospital resources because of the confinements and the lack of available staff.

The involuntary hospitalisation at the request of the *Préfet* particularly generated criticisms. Concerns were raised because decisions about discharge and privileges depended on decisions by the *Préfet*, who did not interview the patient and relied for his or her decision upon the psychiatric assessment of the physician treating the patient. In addition, at that time, the law in circumstances of emergency gave the power to any mayor to substitute himself or herself for the *Préfet* and to compel admission based on public knowledge

of a patient causing trouble in the community and the ‘opinion’ of any physician that such conduct might be related to a mental condition (this ‘opinion’ was not necessarily based on a one-to-one assessment). Interestingly, the Court of Auditors (‘*Cour des Comptes*’) that controlled the financial aspects of psychiatric hospitalisation acknowledged that involuntary hospitalisation was used sometimes in order to force people to receive treatment even if they did not satisfy the legal criteria for this form of admission.²³

2.2. *From the First Legal Decisions to the Birth of the Law of 2011*

2.2.1. *Constitutional Council Decisions*

In spite of the criticisms described above, the main impetus for changing the law came from two constitutional issues raised by patients. Two decisions from the French Constitutional Council in response to the question of constitutionality have highlighted the need for reform in relation to mentally ill persons who are hospitalised, especially when they do not provide their consent.²⁴

The first decision about hospitalisation at the request of a third party was made on 26 November 2010. It highlighted the need for confidentiality and the freedom to come and go based on the objective of preventing violations to public order as well as the protection of people with mental health disorders, on the basis of Article 66 of the French Constitution, ‘No one shall be arbitrarily detained. The judicial authority, guardian of individual liberty, ensures compliance with this principle as provided by law’. After scrutinising the length of hospitalisation, the Council found that:

individual freedom can be held as saved only if the judge interacts in the shortest possible time ... [and] that, providing that involuntary hospitalization may be extended beyond two weeks without the intervention of a judiciary authority, the provisions of [former] Article L337 ignore the Article 66 of the Constitution requirements; in

addition, neither the requirement for some judges of the judicial authority to periodically visit places where people are treated for mental disorders, or judicial remedies these people have to rescind the hospitalization or to end it, are sufficient to meet these requirements.²⁴

Article L337 of the Code of Public Health allowed the detention of patients in a psychiatric facility based on a medical and a third-party decision without any intervention of a judicial authority was declared unconstitutional.

The second decision, issued on 9 June 2011, regarding involuntary hospitalisation at the request of the *Préfet*, used the same reasoning, declaring unconstitutional former Article L3213-4 of the Code of Public Health.²⁵

To avoid the public disorder that would have resulted from the immediate effects of a provision declared unconstitutional and the resulting release into the community of many unstable patients, the Constitutional Council postponed the requirement for a new legislative work in this area to 1 August 2011.

2.2.2. Birth of the 2011 Law

Following these two decisions by the French Constitutional Council, the law [No. 2011-803 issued on 5 July 2011] regarding the rights and protection of persons under psychiatric care and their support was adopted.²⁶ This law kept the three admissions option (voluntary treatment, involuntary treatment at the request of a third part and involuntary treatment at the request of the *Préfet*, as described above) but made two major modifications:

- the term ‘treatment’ replaces ‘hospitalisation’. This new definition of involuntary hospitalisation acknowledges that involuntary treatment occurs not only in an inpatient setting, but can be continued in an outpatient program if it is necessary;

- a new role is created for the judiciary authority – known as *Juge des Libertés et de la Détention* (Judge of Freedoms and Detention) – for people treated without their consent. Prior to the reform, this judge worked in other facilities with liberty restriction such as jails where his or her involvement is mandatory. Now his or her oversight over psychiatric facilities is mandated by the law, in order to ensure that the rights of patients are fully respected. He or she is obliged to interview patients treated without their consent shortly after their admission and every six months thereafter if they remain in an inpatient unit. It should be noted that patients who are treated without their consent as outpatients are not required to be evaluated by the judge. Therefore, the new provisions constitute a means of controlling involuntary confinement but not involuntary treatment.

What has not been addressed by the reforms is the absence of a clear definition of being capable to consent. Assessing the capability to consent to treatment is a medical opinion.² The French National Authority of Health has established some indicators of the capacity to consent;¹⁶ it must be evaluated in terms of the ability to receive appropriate information, to understand and listen, to reason, to freely express one’s decision and to maintain one’s decision over time. A patient’s hospitalisation without his/her consent will usually be based on suicidal risk or the endangerment of others, an associated intake of alcohol or toxicity, the presence of delirium or hallucinations, mood disorders or the patient’s requirement of complete medical care in a facility.¹⁶

3. Conclusion

The 5 July 2011 law has been promulgated in an attempt to ensure the protection of mentally ill patients. The Judge of Freedoms and

Detention is the central feature of the new legal procedure. Prior to this change, psychiatric hospitals were outside the control of any judicial authority. Visits from prosecutors and investigations from judges were allowed for by the law but this rarely happened. Patients were rarely informed of their rights and psychiatric hospitals did not employ a patients' advocate.

The relative novelty of systematic judicial intervention in psychiatric matters has raised some questions about the practical application of the law. Since the 2011 law, an additional law has been promulgated [No. 2013-869, issued on 27 September 2013],²⁶ making the presence of the patient's lawyer mandatory at hearings, reaffirming the legal aspect of this involuntary hospitalisation procedure and the rights of the patients. This constitutes a significant further step in the protection of the rights of psychiatrically unwell patients.

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