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THE RIGHT OF AN INDIVIDUAL TO MEDICAL ASSISTANCE: SOME THEORETICAL AND PRACTICAL ASPECTS

ПРАВО ФІЗИЧНОЇ ОСОБИ НА МЕДИЧНУ ДОПОМОГУ: ДЕЯКІ ТЕОРЕТИКО-ПРАКТИЧНІ АСПЕКТИ

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The peculiarities of the legal regulation of the right to medical assistance have been studied. It was established that the constitutional basis of the right of an individual to medical assistance is the Art. 49 of the Basic Law. The right to medical care in the civil legislation of Ukraine has occupied an important place among the personal non-property rights of an individual, which ensure its natural existence, and covers a complex of rights: the right to provide medical care; the right to choose a doctor and choose treatment methods in accordance with his recommendations; the right to refuse treatment.

It was found that the basis for the emergence of medical care relations is the will of the patient (legal representative), his informed consent to the use of methods of diagnosis, prevention and treatment. Consent to the provision of medical care in accordance with international standards must be «informed», as well as be voluntary, competent, valid and timely. The informed consent for medical intervention correlates with the duty of medical personnel to provide complete, accurate and understandable information about the patient's condition, treatment plan and methods, etc.

It has been established that transplantation, which is closely related to the donation of organs, tissues, and cells obtained from both living and deceased donors, occupies an important place among the newest medical methods of treatment. The adoption of a number of normative legal acts in the field of transplantology became the next stage of bringing national legislation into line with the legislation of the European Union, gave impetus to the further development of the donation and transplantation system in Ukraine, and thus expanded the range of medical care by methods that could not be performed before due to the imperfection of the legislation.

It has been found that the legislator, when normalizing the relations that arise in connection with the refusal of medical intervention, within the limits of several normative legal acts, applies different legal constructions («coming of age», «acquiring full civil legal capacity»), creating a competition of legal norms.

It has been proven that the right of a person to medical assistance is normatively fixed and guaranteed by the legislation of our state, which is developing and improving. At the same time, a number of issues in the researched field of relations need to be effectively resolved by making appropriate changes to the current legislation.

Key words: right to medical assistance, medical assistance, medical service, medical institution, informed consent to medical intervention, transplantation, donation.

Досліджено особливості правового регулювання права на медичну допомогу. Встановлено, що конституційною основою права фізичної особи на медичну допомогу є ст. 49 Основного закону. Право на медичну допомогу в цивільному законодавстві України посідає важливе місце серед особистих немайнових прав фізичної особи, що забезпечують її природне існування, та охоплює комплекс прав: право на надання медичної допомоги; право на вибір лікаря та вибір методів лікування відповідно до його рекомендацій; право на відмову від лікування.

З'ясовано, що підставою виникнення відносин з надання медичної допомоги є воля пацієнта (законного представника), його усвідомлена згода для застосування методів діагностики, профілактики та лікування. Згода на надання медичної допомоги відповідно до міжнародних стандартів має бути забезпечена «інформаційно», а також бути добровільною, компетентною, дійсною, своєчасною. Інформована згода на медичне втручання корелюється з обов'язком медичного персоналу надати повну, точну та зрозумілу інформацію про стан пацієнта, план та методи лікування тощо.

Встановлено, що вагоме місце серед новітніх медичних методик лікування посідає трансплантація, яка тісно пов'язана з донорством органів, тканин, клітин, отриманих як від живих, так і від померлих донорів. Ухвалення низки нормативно-правових актів у сфері трансплантології стало черговим етапом приведення національного законодавства у відповідність до законодавства Європейського Союзу, дало поштовх подальшому розвитку системи донорства та трансплантації в Україні, а відтак розширився спектр медичної допомоги методами, які через недосконалість законодавства не можна було раніше виконати.

З'ясовано, що законодавець при унормуванні відносин, які виникають у зв'язку з відмовою від медичного втручання, в межах декількох нормативно-правових актів застосовує різні юридичні конструкції («повноліття», «набуття повної цивільної дієздатності»), породжуючи конкуренцію правових норм.

Доведено, що право особи на медичну допомогу нормативно закріплене і гарантується законодавством нашої держави, яке розвивається та удосконалюється. Водночас низка питань у досліджуваній сфері відносин потребує свого ефективного вирішення шляхом внесення відповідних змін до чинного законодавства.

Ключові слова: право на медичну допомогу, медична допомога, медична послуга, медична установа, інформована згода на медичне втручання, трансплантація, донорство.

Formulation of the problem. The declaration by the Constitution of Ukraine of a person, his life and health, honor and dignity, inviolability and security as the highest social value determined the need for proper legal protection of the right to medical assistance, and the medical reform, which continues at the current stage, requires close cooperation of the legislator, representatives of the scientific community, as well as advice from practical workers.

In view of this, clarifying the specifics of the legal regulation of the right to medical assistance, identifying certain problematic issues of the implementation of the researched right acquires particular acuteness and relevance.

The state of this problem development. The rights of patients in the field of health care, including the right to medical care, have always attracted attention, being the subject of numerous scientific investigations by leading legal scientists, in particular, S. B. Buletsa, A. S. Dvornichenko, I. Ya. Senyuta, V. O. Sakalo, R. O. Stefanchuk, S. H. Stetsenko, and others. However, with a sufficiently large interest of scientists in the researched problem, certain theoretical and practical

aspects of legal regulation, as well as the exercise of the right of an individual to medical assistance, have remained debatable in the future.

Presentation of the main material. The constitutional basis of the right of an individual to medical assistance is the Art. 49 of the Basic Law, according to which everyone has been guaranteed the right to health care, medical assistance and medical insurance. At the same time, the state creates conditions for effective and accessible medical care for all citizens [1]. The purpose of the constitutional consolidation of rights in the field of health care, including and the right to medical care is connected with the declaration of certain social achievements and, in connection with this, the establishment of legal grounds for a citizen to demand from the state the specific social and legal guarantees and legal mechanisms for their compliance.

The right to medical care is also enshrined in the civil legislation of Ukraine (Article 284 of the Civil Code of Ukraine [2]), where it has occupied an important place among the personal non-property rights of an individual that ensure its natural existence. The basis of personal non-property relations in the field of medical care is the intangible inalienable goods of the individual – life, health, dignity, inviolability, etc., which are protected and defended by the society and the state.

The Law of Ukraine "Basics of the Legislation of Ukraine on Health Care" (hereinafter – Basics) defines medical care as the activity of professionally trained medical workers, aimed at prevention, diagnosis and treatment in connection with diseases, injuries, poisoning and pathological conditions, as well as in connection with pregnancy and childbirth (Article 3) [3].

The right to medical assistance in the form in which it is formulated in the construction of Art. 284 of the Civil Code of Ukraine, consists of a set of the following rights: the right to provide medical assistance; the right to choose a doctor and choose treatment methods in accordance with his recommendations; the right to refuse treatment.

An individual has the right to provide him with medical care, which follows from the inalienable right to life, provided for in the Art. 27 of the Constitution of Ukraine and the Art. 281 of the Civil Code of Ukraine. The provision of medical care to an individual who has reached the age of fourteen is carried out with his consent (the part 3 of the Article 284 of the Civil Code of Ukraine). Thus, it follows from the stated provision of the Civil Code of Ukraine that the basis for the emergence of relations for the provision of medical care is the will of the patient, his informed consent for the use of methods of diagnosis, prevention and treatment.

Consent to the provision of medical care in accordance with international standards, in particular the Declaration on the Development of Patients' Rights in Europe (1994), must be "informed". The existence of the criterion of informed consent to medical intervention is emphasized by the norm of the Article 43 of the Basics.

The informed consent to medical intervention is a valid right of the patient, the meaning of which is the possibility to determine the limits of intervention in one's own body, to refuse any intervention of other persons in the sphere of his health, to independently choose a subject who can be a provider of medical services, to demand from the other persons not to prevent either seeking medical help or exercising the right to refuse to preserve one's own life and health, and the right to apply for compulsory protection in the event that such violations occur [4, p. 9].

The informed consent to medical intervention is correlated with the obligation of medical personnel to provide complete, accurate and understandable information about the patient's condition and treatment plan. Only a perfect legal construction, aimed at harmonizing the legal relationship between the patient and the medical worker, serves as a guarantee of quality medical intervention, which aims to save lives and improve the health of patients due to the influence of internal and external factors on their bodies.

As a general rule, the patient independently decides on medical intervention. However, for a certain group of patients (minors, incapacitated), the state provides additional guarantees of protection and defence of their life and health, which indicates special care for them.

To date, the majority of normative legal acts in the field of health care, which concern both general and special issues of medicine, contain provisions on informed consent, which is an adequate factor in the realization of the patient's rights, a moral and legal regulatory form of the doctor's activity [5, p. 73].

At the same time, it is worth noting that the written form of the relationship between the medical worker and the patient is a reliable protection in case of conflict situations. In addition, a patient who is informed in writing (documented) when providing him with medical care at the same level as the attending physician assumes responsibility for the treatment process (compliance with the regimen and doctor's prescriptions), which directly has a positive effect on the treatment process [6, p. 612]. Therefore, informed consent should be considered not exclusively as a formal medical form, but as a process that ensures respect for the integrity and individuality of each person through the provision of consent based on the choice of the best possible treatment and medical interventions [7, p. 212].

The importance of the informed consent to medical intervention has been repeatedly emphasized in its decisions by the European Court of Human Rights (hereinafter – EC of HR). Thus, in the case of "Ksoma v. Romania", the EC of HR stated: "The State is obliged to take the necessary regulatory measures to ensure that doctors will consider the possible consequences of a planned medical intervention on the physical integrity of patients and will inform patients about these consequences in advance in a way that will give patients the opportunity to provide the informed consent. If the anticipated risk becomes a reality, and the patient was not properly informed by the doctors, the State can be directly held responsible in accordance with the Art. 8 of the Convention" [8].

The patient's informed consent to medical intervention is not the only criterion for the legitimacy of the use of methods of diagnosis, prevention or treatment related to the impact on the human body. The consent to the provision of medical care must also be: *voluntary* (the patient's decision in the absence of any external factors that would indicate the involuntary nature of such consent); *competent* (making a decision in conditions of really available and understandable knowledge for the patient about the future medical intervention) [9, p. 165–166]; *valid* (received from a person with legal capacity or his legal representatives, in no case under duress or by deception); *timely* (must be received before surgery, diagnosis, use of new drugs and methods of prevention and treatment) [6, p. 610–611].

The domestic legislation provided for cases of medical delivery without the informed consent of the patient or his legal representatives in order to save the patient's life. However, such cases are more exceptions than stable medical practice and are allowed in conditions of extreme necessity and must be: *legally justified* (applied only on the basis of law); *personalized* (to be applied to a specific patient); *one-time* (distributed only for this clinical case and only under the condition of necessary need, i.e. finding a person in an emergency); *temporary* (restriction applies only for the period of time when the person is in an emergency) [10]. It is worth noting that after the improvement of the patient's condition, it is advisable to obtain the so-called "delayed" informed consent for further treatment [11, p. 38].

A component of the right to medical assistance is the right to freely choose a doctor. The patient's ability to

choose a doctor has been regulated within the framework of the Law of Ukraine "Basics of the Legislation of Ukraine on Health Care", but there is a regulatory diversity in approaches: on the one hand, the patient can choose any doctor, but on the other hand, the choice is full of obstacles. Therefore, after comparing the norms of the Basics, as well as the corresponding provisions of the Law of Ukraine "On State Financial Guarantees of Medical Services of the Population", which regulates the procedure for providing medical care at the expense of the State Budget of Ukraine under the program of state guarantees, we can make the conclusion: 1) when providing medical care under the medical guarantee program, the patient's right to freely choose a doctor is limited to the choice of a primary care doctor; 2) when providing medical care outside the program, free choice must be ensured on the basis of the Art. 6 and 38 of the Basics [12, p. 201–202].

From the provisions of the point "d" of the part 1 of the Art. 6, the part 2 of the Art. 38 of the Law of Ukraine "Basics of the Legislation of Ukraine on Health Care" also implies the right to choose a health care institution, the essence of which is that every patient has the right, when his condition justifies it, to be admitted to any medical institution of his choice, if it is able to provide the appropriate treatment.

If it is necessary to provide one or another type of medical care to a patient and it is impossible to provide it in the health care institutions of Ukraine, the citizens of Ukraine may be sent for treatment abroad.

An equally important component of the right to medical care is the right to choose treatment methods, which can be exercised by an individual only within the limits recommended by a doctor (the part 2 of the Article 284 of the Civil Code of Ukraine). The legal form of such a choice is, in particular, the provision by the patient (legal representative) of the voluntary informed consent to medical intervention or refusal of treatment.

The transplantation, which is closely related to the donation of organs, tissues, and cells obtained from both living and deceased donors, occupies an important place among the newest medical methods of treatment. The reform of transplantology and donation became the part of the medical reform taking place in Ukraine. The adoption of a number of legal acts (Law of Ukraine "On the application of transplantation of anatomical materials to humans" dated 05/17/2018 No. 2427-VIII, Law of Ukraine "On the safety and quality of donated blood and blood components" dated 09/30/2020 No. 931-IX, etc.) have become the next stage of bringing the national legislation into line with the legislation of the European Union, have given an impetus to the further development of the donation and transplantation system in Ukraine, and as a result, the range of medical care expanded using methods that could not be performed earlier due to the imperfection of the legislation.

The right to refuse treatment is one of the most difficult to implement, which is due to a number of reasons, primarily the fact that the form of the refusal of medical care has not been legally established. Thus, the legislator in the part 3 of the Art. 43 of the Basics enshrined the doctor's right to receive written confirmation, if it is impossible to receive it – to certify the refusal with a relevant act in the presence of witnesses. Considering the lack of a unified approach in our legislation regarding the registration of the refusal of medical intervention, it is necessary to agree that the refusal made precisely in writing is the most legally correct and justified option, since in this case the doctor removes responsibility for the consequences of the patient's refusal to provide medical intervention help. Therefore, a medical institution that has chosen a model of a written form of refusal must independently develop such a form, in which it is appropriate to specify in detail information about the patient's diagnosis, the course and prognosis of the development of the disease, the fact that the patient is familiar with the forms of medical intervention, the reasons for which he refuses medical treatment intervention, consequences of refusing the proposed medical intervention, etc.

If the right to medical assistance is granted to a person who has reached the age of 14, then the right to refuse treatment, in accordance with the part 4 of the Art. 284 of the Civil Code of Ukraine, has an adult capable of acting, who is aware of the importance of his actions and can control them. At the same time, the part 4 of the Art. 43 of the Basics provided for the right to refuse treatment for a patient who has acquired full civil legal capacity and is aware of the importance of his actions and can control them. As we can conclude, the legislator in the mentioned legal acts applied the different legal constructions: "coming of age" and "acquiring full civil legal capacity". According to the part 1 of the Art. 34 of the Civil Code of Ukraine, a person becomes an adult at the age of eighteen, and the part 2 of the Art. 34 of the Civil Code of Ukraine provided an opportunity for an individual to acquire full civil legal capacity before reaching the age of majority. Thus, the provisions of the part 4 of the Art. 284 of the Civil Code of Ukraine excluded from the circle of subjects who have the right to refuse medical intervention, persons who are not of legal age, but have acquired full civil legal capacity. In such a case, taking into account the existence of a discrepancy between regulatory and legal acts, which is caused by the competition of norms, the provisions of the Law of Ukraine "Basics of the Legislation of Ukraine on Health Protection" shall be applied as a regulatory and legal act of special legislative regulation.

According to the provisions of the part 5 of the Art. 43 of the Basics, in the case of medical intervention for a minor, the refusal is given by his legal representatives, and in the event that it may have serious consequences for the patient, the doctor must inform the guardianship authorities.

Conclusions. The problem of legal regulation and exercise of the right to medical care as a personal non-property right is extremely relevant today. A person's right to medical assistance is normatively established and guaranteed by the legislation of our country, which is on the stage of developing and improving. At the same time, a number of issues in the researched field of relations need to be effectively resolved by making appropriate changes to the current legislation. Otherwise, such a state of affairs will become a significant obstacle to the realization by individuals of other personal non-property rights in the field of health care.

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