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Civil law enforcement of the rights of the patients with mental disorders: Ukrainian legislation and international practice

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Abstract

There is a need to determine the patient's condition in the process of establishing legal relationships with the medical institution, as well as guaranteeing their human rights. The issue of guaranteeing the rights of patients with mental disorders has become particularly acute, which has led to the relevance of this study. For this reason, the objective of the article is to determine the status of the patient with mental disorder in civil law relationships, between him and the medical institution by examining the respective legal literature, the jurisprudence of the European Court of Human Rights and the Acts. national and international legal. In the course of the study the following methods were used: dialectical, structural and systemic, analytical and synthetic, analytical and synthetic, comparative and legal, formal and legal, sociological. The study found that reform of existing legislation has led to a new regulatory policy in the area of healthcare. There are no specific rules in civil law that determine the status of the patient with a mental disorder, as well as the possibilities and methods of protection of their rights. Furthermore, mental health services, given their details, need to be further regulated at the legislative level.

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Keywords: patient with mental disorder; protection of rights; personal non-property rights; medical institutions; legal regulation.

Aplicación de la ley civil de los derechos de los pacientes con trastornos mentales: legislación ucraniana y práctica internacional

Resumen

Existe la necesidad de determinar el estado del paciente en el proceso de establecer relaciones legales con la institución médica, así como garantizar sus derechos humanos. La cuestión de garantizar los derechos de los pacientes con trastornos mentales se ha vuelto particularmente aguda, lo que ha llevado a la relevancia de este estudio. Por esta razón, el objetivo del artículo es determinar el estado del paciente con trastorno mental en las relaciones de derecho civil, entre él y la institución médica mediante el examen de la literatura legal respectiva, la jurisprudencia del Tribunal Europeo de Derechos Humanos y los Actos jurídicos nacionales e internacionales. En el curso del estudio se utilizaron los siguientes métodos: dialéctico, estructural y sistémico, analítico y sintético, analítico y sintético, comparativo y legal, formal y legal, sociológico. El estudio encontró que la reforma de la legislación existente ha llevado a una nueva política reguladora en el área de la atención médica. No existen reglas específicas en el derecho civil que determinen el estado del paciente con trastorno mental, así como las posibilidades y métodos de protección de sus derechos. Además, los servicios de salud mental, dados sus detalles, deben regularse aún más a nivel legislativo.

Palabras clave: paciente con trastorno mental; protección de derechos; derechos personales no de propiedad; instituciones médicas; regulación legal.

Introduction

According to Art. 12 of the International Covenant on Economic, Social and Cultural Rights (1966), everyone has the right to medical care and medical care in case of illness. This human right is also reflected in Part 1, Art. 49 of the Constitution of Ukraine (1996), according to which everyone has the right to health care, medical assistance and medical insurance.

The issue of public health and the improvement of health care is one of the global problems of mankind. The implementation of legislative measures aimed at creating appropriate conditions for effective and accessible to all citizens medical care is an extremely important task for Ukraine, whose population is in unfavorable socio-economic conditions. The society and the State are responsible to present and future generations for the level of health and preservation of the gene fond of the people of Ukraine; they should ensure the priority of health care in the State, improve working conditions, education, living and recreation, health care system, solve environmental problems and the introduce a healthy lifestyle. The issues related to the legal regulation of public health in Ukraine have been studied by many scientists. However, a number of problematic issues need more detailed research.

Modern reforming of the health care system faced certain collision. On the one hand, radical changes, as well as new technologies in medical sphere have resulted from the expansion of knowledge, treatment methods that enable the provision of effective medical services. On the other hand, the question arose of determining the status of a patient in legal relations with a medical institution, as well as guaranteeing his (her) rights. Particularly acute is the question of ensuring the rights of patients with mental disorders. So, the aim of this scientific work is to compare to compare legal means of protection of the rights of patients with mental disorders in Ukraine and other European countries based on of the study of relevant regulatory acts.

1. Theoretical basis

The theoretical basis for the research is the international and European acts, which regulate the issues of patients' rights protection, in particular:

- Convention on Human Rights and Biomedicine (1999);
- European Charter of Patients' Rights (2002);
- Recommendations of the Committee of Ministers to States Parties regarding the legal protection of persons suffering from mental disorders forcibly placed as involuntary patients (2005);
- Un Principles for the Protection of persons with mental illness and the improvement of mental health care (1991);
- WMA Declaration of Lisbon on the Rights of the Patient (1981).

In the course of the research the works of the scientists, who have considered the issues under consideration, were examined. For example, Herbert E.G.M. Hermans (1997) determines two levels of relation between

a patient and health care provider: horizontal and vertical ones. The horizontal level is the ground for the civil right of a patient to receive appropriate treatment. The vertical level is the basis for the interaction between a patient and government, or an authorized body authority to implement policies in medical sphere. Naturally, there are international documents, which regulate general issues of provision of medical services to the patients and the protection of their rights, but at the same time each EU State should adopt their own legal acts that would govern specific situations.

Brendan D. Kelly (2016), having studied the concept of ‘natural’ rights, considers that the latter provides a solid backdrop to our appreciation of the late emergence of a recognition that those with mental illness were at risk of their rights being trampled upon, with often interminable detentions in unsuitable Asylums across Europe. It was not until well into the 20th century that specific laws were enacted across Europe to protect those with mental illness from abuse. These had their roots in the Universal Declaration of Human Rights (1948) and culminated in the United Nations Convention of the Rights of Persons with Disabilities (2006).

The object of the work of Martin Dlouhy (2014) is to study the mental health policies in seven Post-Soviet countries: Bulgaria, the Czech Republic, Hungary, Moldova, Poland, Romania, and Slovakia. The author says that the processes, which took place in the 1990s led to the substantial changes in mental health policy formulation, passing new legal acts, which enshrine the rights of patients, including those with mental disorders, and improve the provision of medical services.

As for Ukrainian scientists, D. Chernushenko (2014) states that the patients treated in psychiatric institutions or seeking help should be protected by the same legal and ethical rules as patients with any other illness in accordance with international health standards. At the same time there are some disadvantages of the concept of “capacity”, which consists of two criteria: medical criteria (chronic, persistent mental disorder) and psychological one (awareness of the importance of their actions and (or) their guidance). The combination of these two aspects gives rise to legal uncertainty in legislation, promotes subjectivity in understanding the problem and thus creates the conditions (both material and procedural) for violations of rights of the patients with mental disorders, as well as creates grounds for human rights violations using a psychiatric diagnosis.

D. Molchanov (2015) considers people with mental disorders to be the most vulnerable segment of the population. The recent amendments to the Code Civil Procedure of Ukraine have improved the access to justice for this category of citizens. Article 300 of this legal act stipulates that an application for review of a decision to declaration a person legally incapable may be filed by the person himself (herself). Besides, Part 6 of the same article of

the CPC, which restricts the term of the decision to limit civil capacity or incapacity for two years, is also designed to protect the interests of legally incapable or partially incapacitated persons. However, these changes cannot be considered complete, as the legislator has not made appropriate changes to Article 42 of the Civil Code of Ukraine, which also regulates the procedure for restoring legal capacity. Currently there is a conflict in the legislation, because the Civil Code of Ukraine states that the resumption of civil capacity takes place only at the request of the guardian or tutorship and guardianship agency.

2. Methodology

Research methods are determined by the theme of the research, its goal and objectives. The methodological basis for the article is a set of philosophical, general scientific and special scientific methods, which provided an objective analysis of the subject.

In the course of the study the following methods were used: dialectical method helped to clarify the nature of relations arising in the process of civil regulation of the rights of patients with mental disorders in Ukraine, substantiation of basic concepts, study of legal phenomena in the context of their development and relationship.

The structural and systemic method was applied to characterize the features of civil regulation of the rights of patients with mental disorders in Ukraine and worldwide.

The analytical and synthetic method was helpful in analyzing scientific and normative sources, establishing their features and value in regulation of relations in the area of ensuring the rights of the patients with mental disorders.

The comparative and legal method was used for the purpose of comparative analysis of the norms of Ukrainian law, international and European standards in the area of ensuring the rights of the patient with mental disorders.

With the help of formal and legal method the provisions of regulations governing the relations in the studied area were examined.

The sociological method was applied when considering the case law concerning the protection of the patients' rights.

Such categories and methods of formal logic as concept, definition, proof, judgment, analysis, synthesis, comparison, generalization was also widely used.

3. Results and Discussion

Reforming current legislation has led to the new regulatory policy in health care. There are no specific rules in civil law, which determine the status of a patient with mental disorder, as well as the ability and methods to protect his (her) rights. Besides, medical services for the protection of mental health, given their specificity, need additional regulation at the level of legislation.

In many countries, the right to provide medical assistance to a patient is based on the rights set out in the Constitution, while forming a vertical legal relationship between a State and a patient. But an important role in protecting the rights of patients is played by civil courts, which determine the rights of patients, since it would be impossible in administrative detention.

The practice of contractual regulation is applied in the Netherlands; the Civil Code of 1995 contains a provision on medical contracts. Another legal mechanism exists in Finland, where the regulation of patients' rights protection is carried out through the application of the norms of the Law «On the Rights of the Patient» (Hermans, 1997: 15).

In Ukraine, the patient acts as a subject of civil law relations. Since 2018, every Ukrainian has entered into an agreement with a family doctor, which specifies the rights and obligations of the parties. Despite the broad legal framework and the gradual development of medical law, patients' rights are not sufficiently guaranteed at the level of legislation and not all legal acts comply with international standards.

One of the first normative acts, which were seen through the concept of the patients' natural rights were the United States Declaration of Independence 1776 and the French Declaration of the Rights of Man and the Citizen 1789. It was not until the twentieth century that the first specific European laws were adopted to protect persons with mental disorders from abuse. The first regulatory act was the Universal Declaration of Human Rights, adopted in 1948 (Kelly, 2011).

The Lisbon Declaration on the Rights of the Patient, adopted much later – in 1981 by the World Medical Association for the Rights of Patients, says about guarantees, autonomy and fair treatment of a patient, and also lists the rights that each patient should possess.

In 1991, the General Assembly adopted Resolution 46/119 «Principles for protection of people with mental disorders and the improvement of mental health», the main provisions of which represent the rights to access to mental health care, to human and respectful treatment. All people with mental disorders have the right to live, to work and to receive treatment in

the community to the extent possible. Mentally disabled should be well-resourced and agencies to consult with mental health professionals should be neutral.

In 1997, the Council of Europe adopted the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. The provisions of the Convention define the basic principles on patients' rights: an equal access to medical care and protection of the right to informed consent, privacy and the right to information.

The European Union Charter of Patients' Rights (2002) is of recommendation nature, nevertheless it lists and interprets the rights of patients, and therefore it serves as a good guide for the health system of other states.

These international legal acts, and many others that directly relate to the rights of patients, demonstrate the importance of the issue under consideration not only in specific countries, but also at the global level.

The Law of Ukraine «Fundamentals of the legislation of Ukraine on health care» (1992) states that everyone has natural inalienable and permanent right to health protection, based on which it can be concluded that no one is allowed to restrict this right.

It should be noted that so far there remains an unresolved issue regarding the rights of patients with mental disorders, to whom compulsory medical measures are applied. In 2015, the Ukrainian Helsinki Human Rights Union initiated a public examination of the situation with the observance of human rights in psychiatric institutions. It was defined that 1 700 000 people were under psychiatric observation. During the examination it was determined that the current legislation does not contain obligations for the regulation of activities related to the implementation of international documents in the field of human rights. Based on the results of the examination it was noted that respect for human dignity, patient's equal rights and opportunities are not proclaimed the main value in the management of psychiatric institutions, and there are no measures to prevent discrimination. Besides, existing regulations do not protect patients from the arbitrariness of the health care institution.

Based on statistical indicators of the number of hospitalized by court orders, the Union suggested that in some regions there is bad faith on the part of medical workers during the provision of this type of medical services. Doctors do not take into account the informed consent of the patient to hospitalization and recommend a person who is not able to understand the significance of his (her) actions to sign the consent to treatment, but at the same time they have no intention to apply to court with an application for involuntary commitment (Helsinki Human Rights Union, 2016).

Mental health legislation is needed for protection the rights of people with mental disorders who are a vulnerable and defenseless group.

The Law of the World Health Organization «On the Protection of Mental Health» (2018) defines the basic principle that can be taken into account during the formation of legislation on mental health. These standards are not legally binding for other states, but they reflect international agreement on what should be proper regulation in the field of mental health care (World Health Organization, 2018).

In some Eastern European countries, for example, in Poland, Romania, and Slovenia, there are problems connected with the violation of rights of individuals, who suffer from psychological disorders.

In Moldova, the National Mental Health Program had been operating, which policy was aimed at reducing the level of mental illnesses among the population, by placing people with mental illnesses in families and in the community. Thus, the State tried to pay as much attention as possible to the rights of this category of people, marking them as patients with special status.

More than once one could observe violations of mental patients' rights in different countries, since they are constrained from society and there is no control and protection of their rights. In Hungary, an incident was recorded in 1997, when some people were placed in cells that were made of a metal frames, or supporting clothes or wire meshes were installed over their beds (Knapp, McDaid, Mossialos & Thornicroft, 2007). In 2000, a similar situation occurred in one of the medical institutions in England. Patients were in the cold, while not having appropriate clothing (Dlouhy, 2014).

According to the World Health Organization (WHO), the United States of America ranks third among the countries that face the greatest mental health problems and mortality in patients with mental illness. Having a rational legislative approach, the mental health system of Germany is one of the leading countries in terms of treatment and integration in the field of mental health, despite the general gap in treatment of people with mental illness in Europe (Rodríguez-Cauro, 2017).

According to the Preamble to the Indian Constitution, the State is obliged to ensure equal treatment and equality of opportunity and status to all citizens. Every person with mental illness has the same fundamental rights as all other people, in particular, including the rights enshrined in the International Covenant on Civil and Political Rights and the rights recognized in the Declaration on the Rights of Disabled Persons. Besides, it has been determined that discrimination on the basis of mental illness is not allowed and the right to be recognized as a person before the law should be granted to mentally disabled individuals (Poreddi et al., 2013). It

should be noted that the role of the family in the rehabilitation of patients is much higher than coercive measures, so the State, given the number of populations, as well as the lack of qualified health workers, creates the most conditions for ensuring the rights of mental patients.

During the interview in New Zealand, one in five interviewed patients reported that they had experienced discrimination more than once from other students, teachers or lecturers in terms of education or training (Debbie Peterson Mental Health Foundation, 2005).

In 2007 a new Mental Health Act (1983) was introduced, which that defined mental disorder as «mental illness, severe dementia or significant intellectual disability». The provisions of this Law stipulate that the patient's consent to treatment is obligatory, unless the patient cannot consent, and the psychiatrist believes that the treatment is necessary to protect the patient's life, to restore his health or to alleviate his or her sufferings. The Law specifies two types of patients with mental disorders – voluntary ones, who asks for a doctor's permission in cases he (she) wants to leave medical institution and forced ones (Kelly, 2016).

Article 3 of the Law of Ukraine «Fundamentals of the Legislation of Ukraine on Healthcare» (1993) determines that the patient is a natural person who applies for medical care and/or who receives such care. Thus, people to whom the indicated measures are applied or those who receive psychiatric assistance have the status of patients who are in need to be provided with additional rights due to the following circumstances.

According to Article 7 of the United Nations General Assembly Resolution on the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991), the decisions on involuntary admission of a person to a psychiatric institution should be passed by a judge with the establishment of temporary borders for such an admission. The Resolution states that involuntary admission or detention of patients should initially take place over a short period of time, determined by national legislation, for examination and prior treatment before considering such hospitalization by a supervisory authority, such as a court or other independent and impartial body.

The provisions of Article 4 of the Recommendations of the Committee of Ministers to States Parties regarding the legal protection of persons suffering from mental disorders forcibly placed as involuntary patients, no. R (83) 2 Adopted by the Committee of Ministers on February 22, 1983 at the 356th meeting of the Deputy Ministers, determines that the decision on detention should be made by judicial or other relevant authorities determined by the law. In case of emergency, the patient can be immediately hospitalized and retained in the institution by the decision of the doctor, who must immediately inform the competent judicial or other authorities, which

should make their decision. It also states that every decision of a competent judicial or other authority must be made for medical reasons and by means of summary and quick procedure.

The decision of the Constitutional Court of Ukraine dated from June 01, 2016 no. 2-rp/2016 (2016) determined that judicial control over the admission of an incapacitated person to a psychiatric institution is the necessary guarantee for protection of his (her) rights and freedoms enshrined in Articles 29 and 55 of the Constitution of Ukraine. After an independent and impartial consideration of the issue of admission of an incapacitated person to a psychiatric institution the court should decide on the legality of limiting the constitutional right of such a person to liberty and security.

Nowadays, there are more than eighty psychiatric medical institutions operating in Ukraine, where over two thousand people are observed every year. According to the data of the Prosecutor's office, in the course of half a year on average there are more than sixty acts of prosecutorial response and more than seventy medical workers are held accountable. It should be noted that, despite this practice, the rights of patients remain unprotected. Violations of such rights were recorded: the right to information, the right to receive medical services, the restriction of the rights to personal development. Moreover, human rights are violated: patients are limited in nutrition, material and everyday support (Molchanov, 2015).

It should be noted that the current Civil Procedure Code of Ukraine (2004) was amended, and now Chapter 10 determines that court directly resolves the issue of summons of a person in respect of whom the case is tried taking into account his (her) health status. Besides, the court may order an examination to determine the actual ability of a person to take part in court proceedings and to provide his (her) explanations on the case in person. The court may also decide on the participation of the person in the session via video conference in the psychiatric institution, where he (she) is held.

Analyzing the current legislation of Ukraine, it should be noted that incapacitated persons cannot independently exercise property and personal non-property rights, perform their duties and bear legal responsibility for their actions.

Article 39 of the Civil Code of Ukraine (2003) defines the reasons and procedure for recognizing a person with psychological disorders as having no legal capacity, but does not in any way indicates the presence of other rights of this category of patients. Thus, it is necessary to provide Chapter 21 of the Civil Code of Ukraine with the article, which will incorporate the right of this category of patients to correspondence, the right to access telephone calls, and the right to receive free legal assistance. Guarantee these rights

will help to avoid situations when a person is wrongly diagnosed, as well as to prevent abuse on the part of medical officers in this area. Indeed, according to Article 29 of the Constitution of Ukraine (1996), every person has the right to personal freedom, therefore, violation of this right should not be allowed, despite the psychological state of the patient.

Mention should also be made of the rights of minors who are forcibly provided with psychiatric care. In Ukraine, the Procedure for the provision of psychiatric care to children is approved by the Order of the Ministry of Health Care of Ukraine of May 18, 2013, no. 400. Part 3 of clause 3.5 of this Provision determines that in the absence of parents or legal representatives, an admission in a psychiatric institution is carried out by decision (consent) of the guardianship and trusteeship authority, which can be appealed to court. But the question is who can appeal the decision if the child has no one, and the guardianship authorities initiated the involuntary placement in a medical institution. In our opinion, law enforcement agencies, for example, a juvenile justice department, which would supervise the legality of such matters, should be additionally reported. This practice will help to protect each child from abuse on the part of employees of guardianship and medical institutions.

In Europe, the practice of protecting human rights by an ombudsman has been long operated. Norway was the first country, which introduced a post of a commissioner or ombudsman in 1981, with statutory powers to protect children and their rights. In 1997 the European Network of Ombudspersons for Children was found – a non-profit association of independent institutions for protection of children's rights. We should agree with the committee's recommendation that each state needs an independent human rights institution, which will monitor and will be responsible for protecting of children's rights (European Network of Ombudspersons for Children, 2018).

Strengthening the protection of the rights of children suffering from psychological disorders is not only the problem of Ukraine. Bulgaria has never conducted epidemiological studies on children's mental health problems, and therefore no assessment was made of the number of children who may need specific mental health services, as well as the nature of their disorders or mental health problems. Therefore, there are no specific norms in the legislative framework, which can protect personal non-property rights of this category of children. Mental health services are decentralized and are provided through organizations delegated by a State.

Maintaining patient's contact with the outside world is important not only to prevent abuse, but also in terms of therapy. Patients should have the right to send and to receive correspondence, the right to access telephoning and the right to be visited by their families and friends. The right to confidential communication with a lawyer should also be guaranteed and an access to justice should be available.

Additional attention should be paid to other categories of patients who, having a special status, cannot adequately defend their rights. These are people who are detained, as well as patients with incurable diseases. It is necessary to create conditions, in which this category of patients will not lose social cohesion, and legislation will direct forces to protect their rights.

On February 27, 2018, the European Court of Human Rights published the decision in the case of *Shatokhin v. Russia* (no. 50236/06) (2018), in which it found a violation of the requirements of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms because of the solitary confinement camera, despite the recommendation of his psychiatrist about not applying such a measure. The actions of the administration were deemed illegal and thereby violated the patient's right to access to medical care.

In the case of *Winterwerp v. the Netherlands* (1979), the applicant complained that, having being a patient in a psychiatric clinic, he was not able to manage his property, to participate in property management processes through a representative. What the European Court pointed out is: «Whatever the justification for depriving a person of unsound mind of the capacity to administer his property, the guarantees laid down in Article 6 para. 1 (art. 6-1) must nevertheless be respected. Although mental illness justifies some of the restrictions associated with the right to appeal to court, these restrictions cannot be expressed in the complete absence of such right».

Conclusions

There are many different relationships in society, among which medical legal relationships occupy a special place. Legal relations are the result of the requirements of the law on relations between different subjects of medical relations. They have a number of features that together make them similar to the other types of social relations. Thus, there are some features of legal relations, which are characteristic to medical legal relations. Besides, we can name the following features of civil law relations, which are particular to the provision of medical care:

1. legal equality of the parties, which are the patient and the medical institution;
2. the patient's free choice of doctor and the methods of treatment;
3. the existence of subjective civil rights and obligations, which cannot be violated;

4. legal relations for the provision of medical care are governed by the rules of civil law and the contract.

One can see the trend in many European countries that the state policy is aimed at creating a clear mechanism for protecting the rights of patients with mental disorders. But, despite all international principles and standards, there are countries in which the rights of this category of patients remain formally regulated. This is evidenced by the numerous appeals of patients or their representatives.

The special nature of legal relations with patients who have mental disorders lies in their uncertain status in civil law relations. Rehabilitation measures should be applied to each patient with mental disorders; it is necessary to create a program within which these people can exercise their rights as patients and individuals, for example, such as the right to education, the right to work, etc. Restrictions on the legal capacity of this category of persons should not affect their right to proper medical services, as well as their status as patients.

At present, the work is carried out in Ukraine to reform the legal regulation of public health. However, despite the measures already taken to improve the legal status of patients with mental disorders in Ukraine, there are still many problems that require further legal regulation. Therefore, it is advisable to combine the efforts of lawyers and health professionals to solve the problems that exist in the area of health care in Ukraine.

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