OPINIONS ON THE LEGAL SIGNIFICANCE OF THE RIGHT TO HEALTH

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Abstract: *The legal significance of the right to health care, in particular and of other fundamental rights in general, on the one hand unknown to citizens and on the other hand known, minimized or ignored by state authorities and institutions, will certainly lead to abuses of law coming from the latter, abuses that cannot be tolerated by the rule of law.*

Keywords: legality, consent, medical act, abuse of rights, legal protection

1. Introduction

The existence of the rule of law is conditioned by the recognition, application and respect for the fundamental rights and freedoms of the human beings, as the common legal heritage of mankind is considered to be made up of all of these values, recognized in the international relations field.

By human rights we generally refer to the inherent rights of human nature, without which we could not live as human beings.

Human rights and fundamental freedoms allow us to develop and make full use of our human qualities, intelligence, gifts and conscience, to respond to our spiritual, and other human needs. They spring from the growing longing of the people for a life in which the dignity and value of each is respected and protected.

Today, a parallel, but complementary consecration of the protection of fundamental rights and freedoms is identified, through binding legal instruments both internationally, in the form of human rights guaranteed by treaties, conventions and international

pacts, and also nationally, in the form of citizen rights, guaranteed by constitution and laws.

2. The right to health care in national regulations

The Romanian Constitution regulates and at the same time includes the right to health care in the category of fundamental rights, defined in the field literature as

"those subjective rights of citizens, essential for their life, freedom and dignity, indispensable for the free development of human personality" [2].

Since the Constitution regulates and guarantees them as fundamental rights of all citizens, their exercise is left to the free choice of every citizen; in no way is the coercion exercised by state authorities or institutions allowed, moreover, from a legal point of view they cannot have the significance of obligation.

Commonly, health [3] is defined as the condition of an organism in which the functioning of all organs is done normally and regularly.

We believe that health is a complex concept

with several aspects that include the emotional, intellectual, physical, social and spiritual dimension. Health means much more than the absence of disease; it is a process that contributes to the well-being and balance of the body.

As such, taking into account the above, we appreciate that the right to health care is a complex, ambivalent right, characterized by a substantial and a procedural component [4]. It represents, at the same time, a right-claim, the state having the general positive obligation to effectively guarantee it, provided in paragraph (1) of art. 34 of the Romanian Constitution, an obligation that is completed by the constitutional provisions of art. 20 paragraph 1), and the obligations stipulated in the international human rights treaties to which Romania is a signatory.

In addition to the constitutional consecration, the right to health care finds legal guarantees in the provisions of Law no. 46/2003 on patient rights [5], as well as in Law no. 95/2006 on health care reform [6].

We specify that the category of beneficiaries of the right to health includes both the sick and the healthy person who uses health services [7].

For the purposes of Law no. 46/2003, health care means medical services, community services and services related to the medical act, and medical intervention means any examination, treatment or other medical act for the purpose of preventive, therapeutic or rehabilitation diagnosis.

We draw attention to a legal argument that confirms that the exercise of the right to health is not mandatory, as identified in the provisions of art. 13 of Law no. 46/2003, namely: *“The patient has the right to refuse or stop a medical intervention by assuming, in writing, the responsibility for his decision; the consequences of refusing or stopping medical acts must be explained to the patient”*.

It is natural that for any diagnostic or therapeutic medical intervention the informed consent of the patient is required

[8], only in this way the right to self-determination of the citizen is respected, the doctor acting as his advisor.

3. The right to health care in international regulation

In order to develop and deepen the framework established by the European Convention on Human Rights, which enshrines, in very general terms the legal basis for the general field of human rights, including some of the essential rights in the field of medicine and bioethics (right to life, right to physical integrity or the right to privacy, for example), the European Convention for the Protection of Human Rights and Dignity of the Human Being from the Applications of Biology and Medicine, the Convention on Human Rights and Biomedicine have been issued. Signed in Oviedo on the 4th of April 1997, it is the binding international document providing the overall legal and ethical framework for medicine and scientific research from a human rights perspective.

Several factors can be identified that justify the need for the Convention on Human Rights and Biomedicine, considering, particularly, the intensification of the medical disputes and related issues the European courts are facing, such as the patients' rights.

It undoubtedly follows that state actions and measures must not violate a person's right and freedom to bodily autonomy and informed consent, as enshrined and guaranteed by Articles 2 and 5 of the Convention on Human Rights and Biomedicine, while protecting the dignity of all human beings and guaranteeing to all, without discrimination, respect for integrity and all the other fundamental rights and freedoms in the field of medicine. As such, in accordance with the provisions of art. 2 „*The primacy of the human being*”, the interest and well-being of the human being will prevail over the exclusive interest of society or science: „*The interest and good of the human being must prevail over the*

sole interest of society or science” [9], following that in Chapter 2 „Consent”, art. 5 „General rule” to be assessed that a health intervention may be carried out only after the individual concerned has given his or her free and informed consent: „A health intervention may be carried out only after the subject has given his free and informed consent. This person shall receive prior information on the purpose and nature of the intervention, as well as on the consequences and risks. The data subject may at any time freely withdraw his or her consent” [10].

Informed consent [11] has emerged as a fundamental deontological norm in major medical codes such as the Hippocratic Oath, the 1948 Geneva Declaration, or the International Code of Medical Ethics, since 1949. For the first time, this consent has been legally established in the United States in 1905 by the Minnesota Supreme Court, in the *Mohr vs. Williams* cause. The patient must know that the doctor will act only for his own good, as stated in the Geneva Declaration, respecting his right to self-determination. According to the Charter of Human Rights, „every adult and mentally healthy person has the right to self-determination”.

At the same time, in the light of the dominant conception of full respect for human rights, found in the national and international legal regulations, it should be noted that the right to health protection is a key right of the individual, vital for the manifestation of a dignified existence. In this regard, Article 12 of the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, recognizes that the individual has the right to the highest attainable standard of physical and mental health, which in no case imposes a certain mandatory behaviour regarding the medical acts, such as forced acceptance, or under the rule of coercion or fear of vaccination, thus risking a counterproductive effect: „The States

Parties to the present Covenant recognize the right of every person to the enjoyment of the highest attainable standard of physical and mental health”[12].

With regard to the significance of the choices and decisions made in the field of medical interventions based on personal assessment in accord to one's own value system and unaltered internal convictions, it can be emphasized that there is no legal basis for compulsory vaccination or the discrimination of people who do not want to be vaccinated; in this sense the Council of Europe adopted, at the beginning of 2021, in the context of the Covid-19 pandemic, a report entitled „COVID-19 vaccines: ethical, legal and practical considerations”, which emphasizes in points 7.3.1 and 7.3.2, the optional and voluntary nature of vaccination, as well as the prohibition of any discrimination based on citizens' options and choices regarding vaccination, a duty incumbent on Member States and the European Union: „To be ensured that citizens are informed that vaccination is not mandatory and that no one is under political, social or other pressure to be vaccinated if he does not wish to do so [13]. It is ensured that no one is discriminated due to the fact that they have not been vaccinated, because of possible health risks or because they do not want to be vaccinated” [14].

Moreover, on national and international scale, a large number of medical professionals consider that the act of vaccination should be and should remain a preventive, optional medical act, as there is no sufficient and reasonable guarantee against its risks or adverse reactions; there is a real possibility for the person being administered the vaccine to endanger his or her life, health and physical or mental integrity.

As stated above, vaccination cannot become an obligation nor can any coercion be exercised in the sense of accepting the act under any governmental or organizational oppression, otherwise it would interfere

with the specified articles and the right to privacy, to physical integrity and respect for freedom of thought and conscience.

It can be considered that the legal basis for the imperative of the autonomy in medical interventions of any kind, including the administration of a vaccine, is based on a number of fundamental human rights and freedoms, among which the right to privacy, provided in Article 8 of the European Court Convention of Human Rights [15] deserves a considerate analysis, as this right can be explicitly invoked to protect the patient's right to refuse medical treatment. From this perspective, full autonomy must be provided, symbolizing the moral and legal right of patients to make their own decisions, which must not be affected or prevented from functioning by external events, such as physical or emotional coercion or even deprivation of essential information.

4. Conclusion

We believe that the right to health, materialized in the medical act, must always start from the informed consent, namely the informed consent of the patient in connection with medical interventions that may have unpredictable consequences. Regarding the moment of obtaining the consent, this must come after the patient is informed according to his capacity of understanding, in a clear way and with direct reference to the medical act to be performed, communicating any useful information in order help the patient make an informed decision.

Informed consent, obtained in compliance with legal provisions, guarantees both the

legal protection of the provider of medical services and the rights of the patient. The knowledge held by the doctors and the beneficiaries of the medical act, of the particularities of the informed consent, in most cases, can prove to be the best advocacy in a potential litigation between them.

There is another important aspect that caught our attention, namely: never in history has anything by force been imposed on citizens, with good outcomes. If the right to health care is a right, then citizens must be allowed to enjoy it in complete freedom. If this right is to become an obligation, then it must be fully motivated and regulated by domestic and international law. Moreover, this right transformed into an obligation also involves risks which must be assumed by some instance, as this assumption is no longer the patient's because he will moreover no longer give his consent.

One last aspect inherent in the issue addressed and which today arouses national and international interest, is outlined around the side effects and severe side effects caused by Covid-19 vaccines. From this perspective, we consider necessary the existence of specific programs to compensate for injuries due to vaccination, that reflect and ensure the compensation of unjustified damage resulting from vaccination, in accordance with art. 24 of the Convention on Human Rights and Biomedicine. Although necessary, such programs do not yet exist. Even if existent, their availability should in no way be a premise or justification for reducing safety and efficiency standards.

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