



TO THE ISSUE OF CONSTITUTIONAL GUARANTEES OF RIGHT FOR MEDICAL ASSISTANCE

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Summary

The article analyzes the existing approaches to the definition of concepts of "guarantees". Types of guarantees are researched. Normative legal regulation of guarantees of the right to medical assistance is researched. Classification of guarantees of the right to medical assistance in the two categories "direct guarantees of the right to medical assistance" and "indirect guarantees of the right to medical assistance" is proposed. As part of this classification, the author gives the definition of each of the categories. It has been suggested that this division is not only scientific but also has practical significance.

Key words: guarantees, guarantees of the right to medical assistance, direct guarantees, mediated guarantees, indirect guarantees, classification of guarantees.

Аннотация

В статье проанализированы существующие подходы к определению понятия «гарантии». Рассматриваются виды гарантий. Исследуется нормативно-правовое регулирование гарантий права на медицинскую помощь. Предложена классификация гарантий права на медицинскую помощь на две категории: «непосредственные гарантии права на медицинскую помощь» и «опосредованные гарантии права на медицинскую помощь». В рамках данной классификации автор дает определение каждой из категорий. Высказывается мнение, что такое деление имеет не только научное, но и практическое значение.

Ключевые слова: гарантии, гарантии права на медицинскую помощь, непосредственные гарантии, прямые гарантии, опосредованные гарантии, непрямые гарантии, классификации гарантий.

Formulation of the problem.

Nowadays there is a significant increase of the part of population that needs constant support from the state, which requires not only the preservation but also a substantial increase of the volume of guarantees for the realization of constitutional rights. D.H. Elnazarov rightly states that the provision of any phenomenon or process is associated with the creation of the necessary conditions for its realization, implementation against it in connection with the specific affirmative action [1, p. 32]. The theoretical resolve of the problem of constitutional guarantees of medical care envisages clarification of the exact scientific meaning of definitions and categories that disclose the problem – namely the concept and classification of constitutional guarantees of medical care, their regulation, etc.

Relevance of the topic. Guarantees of rights and freedoms is one of the topics that will never lose its relevance both in the scientific community and in practice, because as soon as there is a question of the rights and freedoms of man and citizen simultaneously raises the question of their realization [2, p. 23]. According to Art. 3 of the Constitution of Ukraine "Rights and freedoms and their guarantees determine the content and direction of the state.

The state is responsible to the people for its activities. Adoption and ensuring human rights and freedoms is the main duty of the state". From the substance of the article follows the special importance of guarantees of rights and freedoms of man and citizen, and in the context of our research – guarantees of human and civil rights to medical care.

Many scientists such as I.V. Pashina, D.H. Elnazarov, T.Y. Mirskaya, S.A. Avakyan, S.V. Kalashnikov, L.A. Nudnenko, A.S. Mordovets, L.D. Vojevodin, A.V. Danilov, A.A. Uvarov studied the problems of guarantees and only some of them – separately guarantees to medical care.

The presentation of the main research material. The transition from the general to the specific, from the opportunity provided by the legal norm to reality carried out by means of the mechanism of realization of rights and freedoms in which there are distinguished ensuring the rights and actually their realization [3]. Ensuring rights and freedoms implies a system of their guaranteeing which provides their legitimate realization, and if necessary – their protection. This implementation envisages achievement of certain factual result, while these concepts mean, respectively, the implementation of legal opportunities to acquisition of benefit and factual the use of it. Thus,

the characteristics of the subjective right of the individual is also linked with its quality as guaranteeing in its realization because, consolidating subjective rights, law guarantees them by legal means [4, p. 124].

In the scientific literature produced quite a large number of definitions of guarantees that are considerably different. Thus, A.S. Mordovets understands guarantees as the system of the social and economic, political, moral, legal and organizational preconditions, conditions, means and methods that create equal opportunities for the individual to exercise their rights, freedoms and interests [5, p. 311]. L.A. Nudnenko points out that under the guarantees are commonly understood conditions (these are politic and legal regime, the situation, in which the constitutional rights ensured, freedoms, duties performed) and the means (legal mechanism by which the person or public body provide the realization of one or another constitutional right, its protection and recovery), that ensure actual realization and full protection of the rights and freedoms of man and citizen [6, p. 56]. S.A. Avakyan states that guarantees – are physical, organizational, spiritual and legal terms and preconditions that make a reality of implementation of the basic rights and freedoms, execution of duties and rights



of human and citizen and ensure their protection from illegal encroachment and restrictions [7, p. 683]. S.V. Kalashnikov defends the idea that guarantees of rights and freedoms – a set of means, techniques and procedures that create conditions under which a person can actually protect and defend legally prescribed by the Constitution, legislation and applicable law their rights and interests that adhere by the whole society and protected by the state [8, p. 449].

T.Y. Mirskaya notes that concerning the definition of “guarantees the rights and freedoms” there can be two approaches: wide and narrow. Guarantees of rights and freedoms in a wide sense is a system of principles, conditions and means of implementation of rights and freedoms. In a narrow sense, guarantees of rights and freedoms – is legislated procedural rights that ensure realization and protection of other rights and freedoms of the individual [2, p. 27].

In legal theory under the juridical guarantees of individual rights one should understand the system of legal means and methods of protection and defense of human and citizen rights, among which should be distinguished guarantees of protection and guarantees of defense [9, p. 279].

It should be noted that in the system of guarantees of constitutional rights and freedoms is customary to distinguish two types of guarantees: some of them are general in nature, the second – a special [10, p. 235]. The general character have constitutional guarantees, they are universal and cover its influence all spheres of realization of rights and freedoms of citizens. Under the legal guarantees of realization of the rights and freedoms of patients is necessary to understand the system of enshrined by government in the legislative order means and methods, enabling realization of by the individual that is the subject of medical-legal relations, their rights and freedoms in the health sector at general medical practice in particular.

In the scientific literature, it is believed that the legal guarantees are of particular importance in comparison with the general, because their performance can be provided with certainty. It may be

noted that the specificity of functioning of the health system in general, and institutions of civil rights to health care in particular, largely associated with the general guarantees, in a special degree with economic [11, p. 113].

It seems appropriate position of A.A. Uvarov, according to which from the point of view of the functional purpose the constitutional guarantees may be classified as follows: ensuring, stimulating, protective guarantees and guarantees for the defense [12, p. 82].

M.P. Rabinovich and I.M. Pankevych in their study substantiate that the highest guarantee of rights and freedoms of man and citizen is the constitutional order of the state, based on strict observance of the Constitution and laws of Ukraine, the prescriptions of the natural law and the generally recognized principles and norms of international law [13, p. 19].

Article 49 of the Constitution of Ukraine establishes the right of everyone to medical care. Under the provisions of the article state creates conditions for effective and accessible to all citizens medical assistance. In state and municipal health care facilities medical assistance is provided for free; current net of these institutions cannot be reduced. The state promotes the development of medical institutions of all forms of ownership.

In the judgment of the Constitutional Court of Ukraine for an official interpretation of the provisions of the third part of Art. 49 of the Constitution of Ukraine (the case of free medical care) № 10-пн/2002 of 29 May 2002, among other things, is provided, is provided clarification on guarantees of gratuitousness of medical assistance. Some scientists and practitioners consider the requirements of establishment of guaranteed free medical assistance as the only means for compliance with the provisions of the Constitution of Ukraine and their opponents believe this approach is unacceptable, because “to determine this level without violating of the Constitution of Ukraine and irreversible losses for public health is impossible”. One group of specialists sees in hospital cash desks (unions, funds) basic form of protection of the existing health care system; second – allows their work only

under certain conditions; the third – believes that they’re thinly veiled way of enforced collection of fees from the citizens for the treatment, and some scientists require the prohibition of cash desks (unions, foundations) as the main focus of economic fraud.

Cabinet of Ministers of Ukraine Resolution № 955 on 11 July 2002 approved program, providing citizens with state-guaranteed free medical care. This program, developed on the basis of formation of basic indicators of health care spending in the budgets of all levels, defined list of types of medical assistance which is given to the population for free, the volume of free medical care, standards of health care financing 1 resident that provide guaranteed volume of medical assistance. The state guarantees provision of medical assistance provided by state target programs [14].

Within the framework of the Law of Ukraine “On state social standards and state social guarantees” are guaranteed state social standards in health care to which legislators, among other refers list and volume of guaranteed medical assistance in state and communal health protection institutions; standards of provision of medical assistance, including the volume of diagnostic, therapeutic and prophylactic procedures; indicators of quality of providing medical assistance; standards of the preferential for providing of certain categories of the population with pharmaceuticals and other special means; standards for providing inpatient care; standards for providing medical supplies in the state and municipal health care institutions [15, p. 11].

The right to medical care can be significantly complicated in the case of insufficient legislative guaranteeing of medicines and legislative support their turnover. Such a situation might be medical activity of heightened danger, when there is a high probability of causing harm to life and health of patients observable, particularly when using medications (because of “unpredictability” and the lack of control by man). Therefore arises the question of legislative regulation of drug safety issues and about the content of normative legal material in the industry, as for providing drug



safety in the medical practice should lead to patient safety in the realization of the constitutional right to health care [16, p. 94].

Guarantees of right for medical assistance serves a developed network medical institutions, the availability of medical care, development of medicamentous aid [17, p. 296].

Sustainable Development Strategy “Ukraine – 2020” approved by the Decree of the President of Ukraine on January 12, 2015 № 5/2015 noted that special attention should be paid to the safety of human life and health, that impossible without effective medicine. Under these provisions Ministry of Health Care published the draft of Resolution of Cabinet of Ministers of Ukraine “On Approval of the Concept of Reform of health care financing in Ukraine”. In the Concept of reform indicated that within 25 years after gaining independence the government declared the need to reform the system. However, in practice, the main priority of the state policy in the health sector remains the preservation of the existing system. Real reforms in health care in Ukraine, unlike most other post-socialist countries are not conducted. In large part this was due to lack of political consensus on changes to the provisions of Art. 49 of the Constitution of Ukraine. It declared gratuitousness of medical assistance in unlimited quantities and inability to reduce medical infrastructure to provide this assistance. Because of this, in Ukraine to date there is no well-defined volume of state guarantees on providing citizens with free medical assistance. Unlimited by Constitution amount of these guarantees can not be covered only by public finance. Therefore, citizens suffer considerable costs for medical services and drugs. Therefore, citizens face significant cost of paying medical services and drugs.

It is alleged principle of equitable access to medical assistance – access to guaranteed public services have all, who need it. Instead of the Declaration on the Granting of all medical assistance for free, state takes a clear obligation to provide certain amount of medical care. Citizens know exactly what they can get for free, and for that to be paid

– how much, exactly how and under what conditions (official, simple and clear system of co-payment). Medical services under guaranteed package offer providers of all forms of property, receiving payment for services provided from a single national customer [18].

There is no need to restrict the concept of ensuring of legal guarantees of realization of rights of patients only by the health care system and providing medical assistance to population.

Thus, in accordance with Article 80 on Fundamentals of Legislation of Health persons, guilty of violating the law on public health, are responsible under civil, administrative or criminal liability in accordance with legislation. Criminal responsibility is the most severe type of legal responsibility of medical workers for offenses committed by them during realization of professional activities.

It should be noted that cases of bringing of medical workers to justice, and even more sentencing on their conviction in Ukraine are relatively infrequent. However, managers of health care institutions should know about what actions or omissions fall under the criminal law prohibition and for prevention of which behavior of subordinates should direct their efforts.

A.A. Ponkina believes that an important place among the constitutional guarantees of the right to life and health take the constitutional guarantees of the right to receive medical assistance and their consequence – the right to safe medical assistance (the right on safety and medical assistance in connection with medical aid rendering). The safety of patients of medical organizations today is significantly reduced due to the defects of medical care and, above all, medical errors [19, p. 31].

Special guarantees specify the general guarantees and find their consolidation branch legislation. In the field of health care classification of such guarantees can be for various reasons: depending on subjective composition of the right to health and medical care; depending on the type of medical care; depending on designated purpose of guarantees (financial, organizational).

In general, most guarantees are not dependent on the will and desires human and citizen, as they are rooted in

the social and political system, created by the state and society.

However, there are also such conditions and means of provision and protection of the constitutional rights, the use of which depends largely on the citizens themselves, by their own will and desires. Thus, guarantees can be divided into two groups: objective and subjective. According to L.D. Vojevodin, a “the category of objective guarantees should include the conditions and means of exercising the rights and freedoms that are created and used in the protective activity of the society, the state, its bodies and officials. The same means that citizen uses for the protection of rights in its sole discretion, can be attributed to the subjective guarantees” [20, p. 233].

Indeed, the successful implementation of the right to health, to support and strengthen their own health is directly dependent on the personal qualities of a citizen, the degree of his social activities, education, professional preparedness and incomes.

Conclusions. All the aforementioned allowed the author of the study to substantiate own classification of guarantees of the right to medical assistance as follows and give a definition to each of the categories that will have not only scientific, but also practical value:

- 1) direct guarantees to medical assistance;
- 2) indirect guarantees to medical assistance.

In our opinion, direct guarantees of the right to medical assistance – is a system conditions, means, legal mechanisms for ensuring the proper realization determined in the international law, the Constitution of Ukraine and laws of Ukraine the right to medical assistance at the level of the patient as a subject of mentioned right.

To the *direct guarantees of the right to medical assistance*, in our view should be attributed the right to free choice of doctor; free access of patients to medical institutions and medical practices; equal guaranteed access to a choice of health care providers; protection of patients’ rights.

Indirect guarantees of the right to medical assistance – is a set social, economic, political, moral,



legal preconditions, organizational tools, mechanisms for ensuring the proper realization determined in the international law, the Constitution of Ukraine and laws of Ukraine the right to medical assistance, that create equal conditions for realizing this right by patients.

Indirect guarantees are not directly determine the possibility of realization of the right to medical assistance, however cause a significant impact on quality of medical care that provided to the patient.

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