MEDITATION IN MEDICINE: COMPARATIVE ANALYSIS OF UKRAINIAN AND FOREIGN LEGISLATION

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ABSTRACT

Throughout a lifetime, a person negotiates with others people, comes into disputes with them (conflicts) that accompany him in certain periods of life and that need to be resolved. The range of conflicts is very wide: from domestic (conflicts in the family) to geopolitical conflicts between countries, etc. Today it is obvious to everyone that the number of disputes (conflicts) which arise in a medical institutions is high because of the sphere of health protection covers the human life and health. Part of these conflicts can be resolved pre-trial by providing explanations with the doctor's side or by involving the mediator. The non-judgmental resolving of the conflict by dint of the using the mediation procedure helps the parties to enter on a new level of relations and it is the driving force of the development of humanity. Together with that in Ukraine unlike the countries of Europe, America, Australia, etc., the institution of mediation has not received legislative consolidation. So the solution of the medical conflicts by involving mediators in Ukraine and control their activity at the level of the law requires a conceptual research. Adoption of November 3, 2016 by the Supreme The Council of Ukraine as the basis of the draft Law of Ukraine "On Mediation" (registry No.3665) (hereinafter-the draft law), is an important step in the formation and development of the Institute of Mediation in Ukraine, but its norms are not devoid of certain contradictions and disadvantages. The purpose of the article is to determination of the problems of using mediators in the medicine, which have not found proper regulation in the draft law about mediation of Ukraine. The method of comparative law analysis and others dialectical methods of cognition revealed imperfection of the control of the medical conflict through the application of the norms of the draft law on mediation and proposed new rules of this draft law. The research objective is creating proposals for improving mediation process in medicine as a conceptual framework for improving the quality of Ukrainian legislation. The foreign regulation legislation of the mediation process has been considered in generally. Analysis of it allowed us to conclude that lawmakers of foreign countries are more carefully approaching the control the mediation process in general and in medicine in particular. It is proved that the draft law Mediation needs to be finalized because its norms are general and do not take into account peculiarities of conflict resolve in various spheres of humans´ life in general and in medicine in particular. Changes to the draft law, which are generalized norms of foreign legislation in the field of mediation, have been proposed.

Keywords: Mediation, Medical Dispute (Conflict), Mediator, Alternative Dispute Resolve, Dispute (Conflict).

INTRODUCTION

During the enforcement of rights of patient rights in medical institutions, in particular at the provision of paid services always there is a risk that the patient will have not been satisfied with their quality. Medical disputes (conflicts) are connected with protection health and human life, and thus they are one of the most hard legal disputes practice. Their specificity is that they use in medicine a special medical terminology, which is sometimes not understood by the patient.

Formal consideration of a complaint by a medical institution with the following application to the guilty person of disciplinary punishment, might not to be able to satisfy the patient whose health, in his opinion, was caused harm, and he asks for the protection of rights in court. In addition, for the protection of their rights the patients also refer to the European Court of Human Rights.

For example, in the case of Panteleyenko against Ukraine (application No. 11901/02) the applicant complained, in particular, for disclosure of the confidential information regarding his mental condition and psychiatric treatment during the trial. For example, in the case of Panteleyenko against Ukraine (application No. 11901/02) the applicant complained, in particular, for disclosure of the confidential information regarding his mental condition and psychiatric treatment during the trial. The European Court of Human Rights has established that receiving of the confidential information from the psychiatric hospital about the applicants´ mental condition and the appropriate treatment and disclosure it in open hearings of a case in court was an interference with the applicant's right to respect for his private life. The court conceded that there has been a violation of Article 8 (right to respect for personal and family life) of the Convention (Sprava, 2006). In the case of Konovalova against Russia (application No. 37873/04) the applicant complained about the unauthorized presence of medical students during birth of her child, arguing that she did not give written consent to observation and was almost unconscious when she was told about such arrangements The court held that there had been a violation of Article 8 (right to respect for personal and family life) of the Convention (Sprava, 2017).

It is well known that the judicial protection of the rights of the patient can continue a long time-months and years. Therefore, in order to resolve disputes (conflicts) in general and in medicine in particular, in Australia, Germany, USA, France, Switzerland, etc., the mediation process is legally fixed as an alternative non-judicial mechanism for settling disputes. With the mediation, the patient and the medical officer resolve the dispute and do not allow further escalation of the conflict. Mediation increases the patient's confidence in medicine and improves the image of a particular medical institution. In Ukraine, the process of mediation is not received a legal registration. The draft law which was adopted as a basis needs to be finalized because it has controversial provisions. The judges of the Supreme Court of Ukraine also have the same opinion. So, the process of mediation in medicine must begin with its legislative settlement (European Parliament and the Council, 1995).

Problems of legal regulation of mediation in Ukraine are the subject of the scientific researches of scientists (Gulyaeva, 2001). With the adoption of the draft law as a basis by the Parliament of Ukraine the number of researches has increased. In particular, Mazaraki has analysed the directions of the law regulation of the mediation procedure in Ukraine and she came to the conclusion that the draft law on mediation should become the subject matter of a civil

discussion with the involvement of foreign subjects of discussion (Mazaraki, 2016). In addition, foreign researchers also investigate mediation problems. Smith and Smock (2008) have proven mediation as an art form, incorporating intuition, subtlety, and vision. Yet it is also a craft with transferable tools, defining tasks, and management challenges (Smith and Smock, 2008). Reuben Baron and David Kenny also provided the first specific compilation of analytical procedures appropriate for making the most efficient use of the moderator-mediator distinction both separately and in terms of a broader causal system that includes both moderators and mediators (Baron and Kenny 1986). At the same time Ukrainian legal science needs a further scientific research in this area.

METHODOLOGY

The goal of the article is to determine the problems of using mediation in the medicine, which did not find proper regulation in the draft law on mediation of Ukraine. The task of the research is to develop proposals for improvement the process of mediation in medicine as a conceptual framework for improving quality legislation of Ukraine. The method of comparative law analysis and others dialectical methods of cognition revealed imperfection of the resolve a medical conflict through the application of the norms of the draft law on mediation and proposed new norms of this draft law.

RESULTS AND DISCUSSION

In Ukraine, as of January 2018 there is no special law on mediation. In November 2016, Ukraine adopted project of it, which has a limitations because it does not meet the requirements of the society regarding the settlement disputes (conflicts) in general and in medicine in particular. Analysis of foreign legislation has shown that mediation laws in Europe have been adopted at the end of the 20^{th} century at the beginning of the XXI centuries. For example, the European Union adopted Directive 2008/52/EC (European Council) on some aspects of mediation in civil and commercial affairs (Directive 2008/52/EC of the European Parliament…).

At the same time, despite the absence of a special law in Ukraine the development and establishment of the mediation institute in Ukraine are promoted by the public associations (for example, the Scientific-educational centre of mediation at LLC "*Znannya*" of Ukraine), law practitioners, as well as scientists who carry out scientific researches in this area and so on.

The content of the term "*mediation*" is disclosed in the laws of foreign states. Like this, in Article 2 of the Act of Mediation of Malta states that "*mediation*" is a process in which the mediator facilitates talks between the parties to help them reach out the resolve agreement on the dispute. Article 1 of the Romanian Law on Mediation and the organization of the mediator profession has established that mediation is an additional one way of resolving conflicts through reconciliation with the help of the third person who specializes as a mediator, in conditions of neutrality, justice and confidentiality. In accordance with Section 2 (1) of the Unified Mediation Act, mediation is a process in which the mediator facilitates communication and negotiations between the parties to help reach a voluntary agreement regarding their dispute. According to Article 2 draft law-mediation is an alternative (out-of-court) dispute resolve method by which two or more parties of the dispute try within the structured process with the participation of the mediator, to reach an agreement to resolve their dispute.

That is, mediation is an alternative way of resolve disputes with involving the mediator. Its task is to establish and assist to create a constructive dialogue between the parties to the conflict (dispute) in order to find a mutually beneficial solution for these parties to the conflict. Unlike the formal legal process sides of the mediation decide on their own dispute (conflict). One of the main concepts of mediation is the voluntary nature of the process mediation and the mutual agreement of the mediation parties.

That is, the application of the mediation process in medicine will contribute to the fact that the patient will be heard and listened, dialogue and analysis of his complaints will take place, maybe he will get an apologizes from the side of the medical staff, etc., which in general will contribute to reducing social tension and restoring confidence to medicine. Through the mediation process partnerships will be maintained between the patient and the health facility, the conflict (dispute) will be resolved quickly and will stop at the level of satisfaction of interests and needs of the patient. The work of medical staff will have been monitored, the image and reputation of the medical institution will preserved, and also its competitiveness in the market of medical services will improved, etc.

At the same time, it should be remembered that any conflict may arise from the cause of misunderstandings, the lack of an elementary culture of communication, etc. and lead to unpredictable consequences for the patient. The conflict is better to warn than to treat it in a court. However, the application of the mediation process to resolve the conflict should be done in compliance with the basic principles of the mediation.

Having research the norms of the laws of foreign countries regarding mediation, we will conclude that, as a rule, the first principle of mediation in the text of the law is the principle of voluntariness (voluntary participation of parties in the process of mediation). In particular, this Article 4 of the Kazakhstan Law on Mediation, Article 3 Law of Belarus on mediation, article 4 of the Republic of Moldova Law on Mediation and others like that. The text of the draft law on mediation is no exception-this principle is reflected in Articles 4 and 5.

Summarizing the norms of the laws of foreign countries, we make the conclusion that the main theses of the concept of voluntary mediation process are: the prohibition of any pressure on the mediation side which to conduct or terminate the process mediation; making a decision about the start, stop and end of the process mediation only by mutual consent of the parties to the mediation, and noting it in the contract of the mediation; independence (at own discretion and by mutual consent) of the parties to organize the procedure of mediation, in particular, to choose a mediator, on its own discretion to dispose of their material and procedural rights, set, reduce or increase the size of the requirements, determine the circle of the discussion issues (topics) regarding the settlement of a dispute; prohibition of violation constitutional rights and the interests protected by the law of mediation sides and third sides.

For example, in Article 5 of the Kazakhstan Law on Mediation established that the condition of participation in the mediation procedure is the mutual voluntary expression of will parties, which is reflected in the mediation contract. According to article 5 of the Law of Bulgaria on mediation parties are involved in the mediation procedure with their own goodwill and can leave it at any time. According to article 5 of the Law of Lithuania on mediation in civil disputes, the sides of civil dispute can agree about the nature and procedure for conducting mediations, indicating a set of rules or a way the establishment of individual rules for mediation provided in a condition of mutual consent. According to article 46 (1) of the Romanian Law

Concerning Mediation and mediation profession organization, the mediation agreement should not contain conditions which violating the law or public order, otherwise it is inoperative. Article 5 of the draft law on mediation provides that the principle of voluntary participation in mediation also extends to the mediator and others mediation participants, since nobody has the right to enforce them to do it in any way to get involved in the mediation process.

An equally important concept for the development of mediation is compliance the principle of confidentiality of mediation information, which is enshrined in the text of the foreign laws and a draft law, and provides security of legal relations and information which is used in the mediation process. Consequently, this concept contributes to the emergence of trust in the mediation process and its results from the parties of the dispute, and the limits of non-confidentiality are defined in the contract mediation.

However, in order to protect the interests of the child, the country interests, as well as warning or stopping a crime, the disclosure of confidential information is allowed in cases specified by law.

For example, under article 7 Directive 2008/52/EC, mediation should be carried out in a manner which save a confidentiality, the Member States are obliged to ensure that except in cases where the parties agree otherwise, neither mediators, nor a persons involved in the administration of the mediation process will not be compelled to testify in civil or commercial courts or processes or arbitration proceedings relating to information arising from the mediation process or in a connection with it, except in the following cases:

1. When this is necessary for the paramount considerations of the state policy of the corresponding Member State, in particular, if it requires for security protecting the interests of children or preventing physical or psychological harm of person's health.
2. When disclosing the content of the contract arising out of mediation is necessary to implement or enforce this contract. A similar rule is contained in article 15 of the draft law.

In addition, the draft law provides that information on mediation is confidential if the mediation parties have not agreed otherwise in writing.

However, "*in cases where the mediator received from one of the parties' information which relating to a dispute or mediation procedure, he may disclose this information to the other participant. However, if the party informs the mediator this information in condition of non-disclosed it to the other party, this information is not disclosed to the other side of the mediation"* (Article 9 of the draft law).

We believe that this version of the draft rules is debatable, since the case when in the process of resolving the dispute there are complicated issues which require the involvement of the relevant specialists, the mediator only with the consent of the parties may contact a specialist in a particular area of relations (Blanpain & Engels, 2001). Also for the purpose protection of the interests of the child, state interests or in other cases, the mediator should contact the competent authorities with the corresponding application, etc. In this regard, we offer to supplement the draft law with the provision: "*The mediator must warn to participants in the mediation process about the duty to keep confidentiality information. If necessary-insist on signing an agreement about not disclosure of Information"* (Confidentiality Agreement).

Additional principles on which the formation and development of the institute of mediation is based, are: independence, neutrality and impartiality of the mediator, equality,

honesty and cooperation of the parties to the mediation process, which are also contained in the texts of the laws of foreign countries and the draft law. To the main concepts of the development of the institution of mediation in foreign countries and in Ukraine is the formation of the composition of mediators. So, in the text of the laws of foreign countries, as well as of the draft law, a special attention is paid to detailed criteria for admitting to the profession of mediator. We pay attention that foreign law provides the mediator authority on professional and unprofessional basis.

As a rule, in accordance with foreign legislation and the draft law the mediator is a physical person. The Legislation of the EU states contains rules of granting access to the profession of mediator to foreigners citizens of countries European Union, which have a document on mediation qualification, received in one of the countries which is a member of the European Union, under the conditions established by law. Also separately in the text of the law there are requirements to third-country nationals who completed their mediator training courses abroad, or have received mediator qualification abroad and want to be a mediator in these countries. For example, it is article 8 Law of Romania Concerning mediation and mediation profession organization.

Article 16 of the draft law also stipulates the requirements for persons who have the desire to be a mediator, in particular: the mediator may be a person who has reached 25 years of age, has higher or vocational education and has passed professional mediation training, which should include 90 academic hrs of the elementary education, including at least 45 academic hrs of training practical skills. Having analysed the text of the draft law, we believe that the requirements for the person who are the mediator need to be clarified. Like this, the order of passing training can be set by the Ministry of Justice of Ukraine. In addition, taking into account the fact that the person should receive a complex knowledge of the conduct of negotiations, knowledge in the area of psychology, conflictology, law, etc., quantity hrs of training needs to be increased. For example, in Austria it is theoretical part of the courses is 200 hrs, and practical 100 hrs. Number of hrs can be increased depending on the sphere of mediation (respectively 300 and 200 hrs) In this case, every 5 years a mediator must attend courses of the mediation and provide proof of their passing.

We draw attention that in the second part of article 16 projects are provided cases in the presence of which a person cannot be a mediator, namely: stay in the civil service, recognition by its court of a limited capacity or incapacitated, with a formed or previous criminal record etc. Such are requirements are also contained in the vast majority of foreign laws (for example, Art. 9 of the Kazakhstan Law on Mediation, article 7 Romanian Law Concerning Mediation and organization of mediator profession, art. 131-5 CPC France, etc.). In addition, the provisions of the draft law on special training Mediators (Article 17 of the draft) is debatable and needs to be clarified. For example, in parts of the ratio of categories "*professional training*" and "*special preparation "*, the procedure of accreditation by associations of mediators of physical programs and legal entities that will carry out special training for mediators, the order of promulgation of provisions concerning requirements of such programs, etc.

The existence and order of conducting the Register of Mediators is facilitate and ensure carrying out the mediation process in each country. For example, in Kazakhstan according to Art.14 each organization of mediators keeps its registry professional mediators who carry out mediation in the territory of this country. In Malta, The Malta Mediation Centre keeps the

registers and information about the nominees Mediators (Act of mediation of Malta on December 21, 2004).

According to article 18 of the draft law for conducting the register of mediators are carried out by the "*association*" of the mediators, organizations that provide mediation and/or conduct mediation training. That is to say, there may be several registers, only if such registers form the general register of mediators of Ukraine. At the same time, the subject of the maintenance of such a register is not clear from the text of the project. In addition, in our opinion, it requires more detailed information, which is included in the register of mediators (for example, possession of foreign languages, knowledge of international law, etc.).

CONCLUSIONS

A step towards the implementation of the mediation process in Ukraine is made The Verkhovna Rada of Ukraine adopted a draft law on mediation. Adoption of this project as a law will lead in Ukraine to European formation of a balanced system for resolving conflicts (disputes) in an extrajudicial way and which will take into account the wishes and interests of the citizens of the society. The success of mediation in medicine depends on a qualified mediator, requirements to whom are fixed at the level of law, and depends on enshrined democratic norms concerning the procedure for his actions in the process of mediation.

The benefits of Mediation in Medicine: fast and out-of-court order of dispute resolution (conflict), security and maintaining positive contact with the patient, increasing confidence in medical institution, preservation of partnership, implementation of the monitoring the work of health workers, preserving image and reputation of the medical institution, etc. Therefore, the adoption of a high-quality law in Ukraine about mediation will contribute to the rapid resolving of the dispute (conflict) in medicine. It is well known that any disease is better to prevent than to treat it. Therefore, the conflict in medicine is better regulated by a mediator than treat him to court.

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