

"Legal Issues of the Protection on Patients Rights in Croatia"

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Abstract:

Problems of democratization in transitional countries include development in the protection of human rights. Progress in protection of patients' rights is important part of democratization. Therefore authors of this paper describe legal ways of this protection before legislation on patients' rights and authors' vision of the deficiencies of the very recent Law on the Protection of Patients' Rights in Croatia. As the espied deficiencies might have widest importance in the protection of patients' rights this paper has intention to share this experience with other legal systems and to learn more about the deficiencies on the protection of the patients' rights.

Process of democratization brings the recognition of human rights, which means enabling possibilities of legal protection and prevention of the violation of those rights.

In 1990, the Republic of Croatia started its own way of democratization and establishment of the efficient way of prevention of the violation of human rights as well as their legal protection. Protection of the patients' rights includes the protection of the human rights of the most vulnerable category of the citizens – the weakest one to resist and to protect themselves. Therefore we consider the recognition and the protection of patients' rights the most important elements for estimating the level of democracy in a certain community.

With the new Patients' Rights Protection Act¹, despite of numerous deficiencies and wrong solutions, Croatia has done one step more on its road of reaching efficient legal protection of the human rights. That Act makes Croatia one of those European and world countries which solved the patients' rights legislation by separate act. Regardless of all the objections, we consider the Patients' Rights Protection Act a big step in protection and promotion of the patients' rights in Croatia.

¹ Published in Official Croatian Bulletin- Narodne novine, 169/04.

Before exposing our analysis of the Patients' Rights Protection Act we should point to the previous legislation on patients' rights.

The Republic of Croatia inherited legislation from former Yugoslavia and after the "Liberation war" it started with reforms of the whole system and the health care system too.

The problems of the patients' rights were only barely touched in the Health Care Act, some of the rights were mentioned in the Criminal Code², and compensation for the damages was regulated by the general rules of the Civil Law³.

The Croatian Criminal Code in its article 115 protects the right on health by incriminating refusal and limitation of the health care. Criminal liability falls upon a physician or dentist who failed in implementation of the measures for the patients protection according to the rules of medical profession, as well as in the case when they caused damages by negligence⁴. There is a legal obligation proscribed in The Health Care Act on written form of consent before every invasive medical procedure⁵.

Described situation was in dissonance with the basic human rights and liberties (with patients rights as a part of that group) as proclaimed and protected in the Croatian Constitution⁶. The protection of health and healthy life of every person and citizen of Croatia as one of the basic values of the Croatian legal system are guaranteed in the Constitution. Citizens, state and public organizations are given the constitutional duty to dedicate special care to those values.⁷

But how to accomplish the proclaimed, protected right to the health, healthy life and care if the patient doesn't know which his basic rights and obligations in the health care system are, or how to implement them in practice, in the first place?

² Published in Narodne novine 110/97, 27/98, 50/00, 129/00, 11/03, 190/03, 105/04.

³ Articles 1045.-1110., Obligatory law Act, published in Narodne novine, 35/05.

⁴ Article 240. of Criminal Code, Narodne novine, 110/97.

⁵ Article 241. of Criminal Code states that any physician undertaking medical treatment without the patient's valid and informed consent would be sentenced with fine or 6 months imprisonment, unless such medical treatment was done to avoid aggravation of the patient's health or if without such medical treatment the patient's life would be endangered. There is no criminal offence if such treatment was done without explicit written informed consent of the patient who is unconscious or incapable of judgement and there are no members of his close family or at least legal representative who could give such consent for him.

⁶ Article 21. of the C. Constitution points to the right on life of every human being, while article 22. describes universal duty not to violate person's liberty and personality.

⁷ Croatian Constitution, Part III, Basic liberties and rights of person and citizen, Section 3. Economic, Social and Cultural rights, article 69., Narodne Novine br. 56/90, 8/98, 124/00, 41/01. Article 58. of the Constitution guarantees to every citizen right to the health care. There are many more references to the human rights in the Croatian Constitution, such as article 3., 14., 20., 23., in which rights to the life, equality, dignity, and liberty of the free will to decide. There is also Article 57. providing the right on freedom, privacy, secretness of private data, including right on claim in Article 18.

Although, the right to damages for bodily injury, aggravation of health or death occurred in relation with medical treatment are regulated by general rules of the Croatian civil law, the court claims against physicians or medical institutions are really rare.

We consider the ever-present patient's fear of not being able to accomplish any kind of the future health care if he «dares» to speak up and ask for his patient's rights, to be one of the reasons for such situation. This trend is slowly changing in recent years⁸.

The Health Care Act of 1997 does not explicitly mention the patients as one of the part of the health care system. Instead, “the right’s and obligations of the citizens in obtaining the health care” are rather imprecisely regulated in the Chapter V⁹. The situation hasn’t changed much to the better with the new Health Care Act of 2003.¹⁰

Once more, there is no mention of the patients. Instead, in the Article 21 the rights and duties of persons in obtaining health care are numbered. Some of the mentioned rights are the right to equal ness of all persons in obtaining health care, freedom of choice of a physician, right to the equal health care of the standardized quality, right to the first aid and emergency care if needed, freedom of choice between more of the possible medical interventions, the right to be fully informed and advised. There are also the right to refuse medical treatment, the right to replace the physician, the right to accept or to refuse the surgical intervention on the body, the confidentiality of the data concerning the state of person’s health as well as religious rights during hospitalization. All the mentioned rights are, however, difficult to accomplish in practice, because The Health Care Act fails to provide it with legal mechanisms of implementation. There is no equitable sanction in the whole Health Care Act to provide practical implementation of the articles concerning rights and obligations.

Duties of the person are rather aridly described. They are limited to the duty of withholding to the physician’s advices, making sure that every person is personally responsible for not following physician's orders. There is also duty to obey the “house rules” of the medical institution while hospital sided. There is no right to complaint in the Health Care Act of 1997, or in Health Care Act of 2003.

That is, in our opinion, in dissonance with Article 22 of the Health Care Act of 2003, which denotes persons right to ask the protection of his rights (directly or in a written way) from a

⁸ Despite small number of published judical sentences, between 1995 - 2000., only before the first degree Civil court of Zagreb, 149 claims were brought against physicians or hospitals from Zagreb area, see Klaric P., " Odstetno pravo", Zagreb, 2003.

⁹ Articles 26, 27, 28, 29 of The Health Care Act, Narodne novine, 1/97.

¹⁰ Published in Narodne novine, 121/03.

physician or the principal of the health institution. They had an obligation to act upon the person's complaint and to inform him/her about the results within 8 days.

If the person wasn't content with the taken measures, he could have asked the protection of his rights with the Minister of Health, Medical association or the Court. We take this situation in previously mentioned context of the patient's fear of possibly negative consequences of his complaint.

It remains an open question why a person's right to complaint, as one of the basic rights according to the international Conventions and Declarations¹¹ wasn't conjoined with the rest of the person's rights in obtaining the health care according to The Health Care Act.

In Croatia, nowadays, there is only few court decisions based on the violation of patient's rights against the health institutions or physicians¹².

In the beginning of 1999 a civil initiative appears, founding The Croatian Association for the Protection of the Patients' Rights, lobbying for the separate legislation on the protection of the patients' rights in Croatia.

The first draft of such legislation was actually made in the late 2002 through The Croatian Association for the Protection of the Patients' Rights project. So, the civil society initiative gave a significant contribution to the process of recognizing and protecting the patients' rights in Croatia.

Only a couple of days after the new patients' rights legislation came upon the force, the Request for estimating its concordance with the Croatian Constitution was made. Recognizing inside that fact more problems than it is recognized in the general public, in this part of the paper the authors will unfold some of our second thoughts and arguments from the said Request regarding The Patients' Rights Protection Act. Our goal is to approach our experiences to those who are still preparing the separate legislation on the patient's rights making our experience possibly helpful to them.

The deficiencies of the new legislation on the patients' rights in Croatia could be viewed from a couple of aspects.

¹¹ UN General Assembly's "Declaration on human rights", 1948, " WHO's Declaration on promoting patients' rights in Europe for countries-members of EC" 1994, Amsterdam.

¹² Examples of judicial decisions in medical law, mainly damages from medical malpractice, see Crnic I.,- "Odstetno pravo"- zbirka sudskih rjesidbi odgovornosti za stetnu i popravljajnu stetnu s napomenama i propisima, Zagreb, 2004.

The Patients' Rights Protection Act in some of its articles directly discriminates the patients, violates the human dignity, and in some articles the patients' rights is not recognized as human rights.

The meaning of some of its articles is in dissonance with the protection of the patients' rights and implementation of some of its articles is not guaranteed because some of its articles simply lack the basic legal structure.

In our opinion, the article 4 of The Patients' Rights Protection Act is in dissonance with the Croatian Constitution, more precisely with its articles 3 and 14, which forbid discrimination of any kind.

In article 4 of The Patients' Rights Protection Act, patient is directly discriminated by selected legal expression and his rights are protected as if "he was a human being"¹³. We consider such selected expression, which directly discriminates the patients, inadmissible because it offends the patients' human dignity.

We've selected this example because here we recognize the possibility of the inadequate translation of the international legal acts in native speaking language and therefore the acceptance of totally inadequate legal expression. We find adequacy of the selected legal terms an important element to which should be paid special attention. Croatian language is famous for it's richness of expressions and selected legal term not only is it not inadequate to Croatian language, it also represents direct patients' discrimination. Therefore it is in dissonance with the Croatian Constitution, but also with international legal acts on human rights, which Croatia has incorporated in its legal system¹⁴.

Furthermore, we consider the article 8 of The Patients' Rights Protection Act¹⁵ contrary to the articles 3, 14, 20, 21, 22 and 23 of the Constitution.

¹³ Article 4 of The Patient's Rights protection Act states: " The principle of humanity of patient's rights protection is accomplished by:

- respecting patient as a human being
- insuring the rights on patient's physical and mental integrity
- protecting the patient's personality, including the respect for his privacy, views, moral and religious convictions.

¹⁴ "International pact on civil and political rights" 1966 with added Protocols, "European Convention on protection of human rights and basic liberties", 1950 with Protocols 1, 4, 6, 7, 11, 12 and 13. Croatian Parliament ratified "Convention on human rights and biomedicine" with added Protocols, published in Narodne novine, appendix- international agreements, 13/03.

¹⁵ Article 8 of The Patient's Rights Protection Act states: "The patient has the right on complete information on:

- his medical condition, including medical assessing of the results and outcomes of the specific diagnostic or therapeutic treatment.
- recommended treatments and medical checks with dates of their publication
- advantages and risks of undertaking or not undertaking recommended medical checks and treatments
- his right on deciding about recommended medical checks and treatments
- possible substitutions for recommended treatments
- development of the undertook medical treatments
- the future medical care
- recommended lifestyle
- his rights from medical insurance and actions needed for assessing these rights".

The right on information in said article is defined only by word »complete« information, and we consider such a solution incomplete and insufficient. Such an incompleteness directly imperils the human right on information and freedom of choice. It is incontestable that an information that is given out of time or late deprives patient of his right on decision, endangering the liberty of making a decision, which is contrary to the article 22 of the Constitution.

The quality of decision becomes questionable, since the quality of decision depends on information. If the decision is made without full, timely information, the decision could be significantly different. There is also an element of forced decision-making, contrary to the article 23 of the Constitution.

Since endangering the patient's right on decision and information certainly represents putting into danger the patients' life itself, in our opinion, the article 21 of the Constitution - which protects the right on life, is violated.

The Croatian Association for the Promotion of the Patient's Rights informed The Croatian Government, The Ministry of Health and Social Care as well as Croatian Parliament about the possible consequences of such incomplete definition of the patients' right on information. We take this fact solely, as well as the fact that this version of the Act was passed, as the violation of the article 20 of the Constitution. Because of all previously said, we think that by omission of one single word the whole Act loses it's main meaning.

The omission of the word «timely» in defining the term «information» is crucial for the patient's rights protection. On the other hand, the legislator and the proposer of the Act didn't accept repeatedly proposed and written amendment, making clear that they consider it is possible to protect the right on information even without explicitly including and specifying the right on information by word «timely».

Quite differently, we think that if the definition of the right on information is incomplete there is no legal protection at all. The right on information should be specified in time, because timely information is the only information that guarantees obtaining the right on decision. This is of vital importance for the patient who has to decide whether to accept proposed medical treatment.

Complete, legally correct, full information should be given to the patient in an adequate and intelligible way before or after the patients' consent on the medical treatment.

It is not possible to foresee how Croatian jurisdiction would react in both cases, because as previously mentioned there is barely no examples, but it should be taken into consideration that Croatian patients can't learn about their rights from the Patient's rights Protection Act,

and there is no systematic education on patients' rights at medical or law schools. There are only a couple of persons who show an active academic approach to this topic.

In the beginning of 2004 in an inquiry even 100 % of the questioned patients couldn't have count at least two of the patients' rights. In the same inquiry 100% of the medical staff couldn't have count four of the patients' rights¹⁶. It is necessary to mention that there is a low level of consciousness about the ways the court protection of the human rights in Croatia could be achieved.

We think that it is important to point out that, correlated with bad experiences from communistic days, there is a very low sense for asking the legal protection of human rights in Croatia.

As an example, we got the formal answer on our question, from The Public Attorney Office (Number: A – 365/04, from 7th September of 2004) that there was only one (1) case of charging with the accusation of treating patients without due consent in Croatia for period from 1st January 1998 to 31st December 2003, according to the article 241 of Croatian Criminal Code.¹⁷

That answer should be discussed in consideration of results of pilot study¹⁸ where 61.7% patients who were operated in general anaesthesia denied that gave their consent on operative treatment, which is obligatory by Croatian legislation.

According to the Article 9 of Patients' Rights Protection Act there is a patient's right to be informed by physician only on demand¹⁹.

It is not necessary to mention that not every patient can speak, because of other reasons why that article is not in accordance with international acts on human rights and patients' rights.

It is obvious that making the right on information to be conditioned by demand is denying that right on information is basically human right.

We consider even more important that the Article 9 is more likely threatening one than protecting one. In consideration of repressive legal system, still recorded by Croatian people, and paternalistic relations in healthcare system, **this article encourages patients not to ask for their rights.**

¹⁶ Rusinovic - Sunara D.M.A. M.D.,- Lugovic G., M.A.,- prof. Belicza B., Ph.D., M.D.-Liovic J., nurse,- Radovancevic Lj., Ph.D.,M.D, Croatian Association for Patients' Rights, Split, Croatia, Congress Proceedings, 15th World Congress on Medical Law, Sydney, Australia, page 934.-940., 1-5 August 2004.

¹⁷ Public Attorney's Office official response No. A-365/04, September 7th, 2004.

¹⁸ See 16.

¹⁹ Article 9 of The Patien's Rights Protection Act states: " The information from Article 8 of this Act must be given to the patient by medical worker directly providing the patient with certain form of medical care, on patient's spoken demand".

Related with the abovementioned fact, the aggression to the right on information is direct attack on patients' right on decision and could have very extensive consequences on patients' life or health. Among other observations of The Patients' Rights Protection Act, we consider the importance to notice that long expecting right on claim is more likely denied to Croatian patients by failed definition of Committees on Patients' Rights Protection in Articles 30 and 32 (further Committees), which are considered to be guarantees of practical implementation of the patients protection as described in the Act²⁰.

We consider the description of Committees in opposition with Croatian Constitution, as it is noted in the Constitutional Claim on the Patients' Rights Protection Act. According to this Act, Committees are named by political bodies of local government from "patients, nongovernmental organizations and experts on the field of the protection of patients' rights". At the same time, the criteria and procedure for nominations are not defined and no other description of the persons who should be members of said Committees is given. It is obvious that an expression "patient" has no meaning in definition of the person. According to Croatian Constitution, international Declarations and even the Patients' Rights Protection Act, patient has not to be defined by his age, sex, nationality, mental health, legal competency...etc. and the member of the Committee on Patients' Rights Protection should have mental and legal competency and should not be minor.

There is no definition from which nongovernmental organisation should come a person who is going to be named a member of the Committee on Patients' Rights Protection.

That means that even very "misappropriate" nongovernmental organisations could propose their members, and they could be nominated, and decide about patients' rights even if having no formal knowledge on the matter.

More than that, Croatia had no experience on patients claims, no experience in protection of human rights, there are no medical schools, not even law schools, teaching on patients' rights, there is no defined approaches to the legal protection, promotion or recognition of patients' rights.

It means that there are no experts on the field on the protection of patients' rights in Croatia. According to Patients' Rights Protection Act in this very moment Croatia should have at least 21 of them.

We consider that number to be too much.

²⁰ Mentioned articles define the membership and function of the body with the prime task of protecting the patient's rights in very unprecized and intangible manner. We consider this an inadequate legal regulation with the main consequence- impossibility of practical implementation of legal solutions. The further consequence, in our opinion, is unfortunately a complete denial of patient's basic rights legal protection.

CONCLUSION

During several recent years we can note a big progress of recognition and protection of patients' rights in Croatia. Civil nongovernmental organizations and civil initiatives give their contribution to it, as those one resulted with Patients' Rights Protection Act adopted by parliamentary procedure in December of 2004. Despite many deficiencies and doubts, we are sure that adoption of the separate legal act on patients' rights is going to improve the protection of human rights to health care consumers from day to day. We consider this to be an important condition for protection and prevention of the violation of the human rights in general. Therefore, this review is an admission to the development of democratic sources in Croatia, as well as "constructive critics" of the existing legislation on patients' rights.

As there are so many countries in Europe, Asia, Africa and South America waiting for legislation on patients' rights, we hope that this paper with Croatian experience will contribute to their will in looking for the model of legislation on the protection of all human rights, including patients' rights, which will be up-to-date and the most efficient one.

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