

# PROVISION OF FORCED PSYCHIATRIC CARE IN THE CONTEXT OF INTERNATIONAL NARRATIVES

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**Abstract.** *The authors have accomplished analysis of national and international legislation, which regulates the provision of forced psychiatric care regarding the observance of the rights of persons suffering from mental disorders. The specifics of cases of forced medical care's provision in the context of the compliance with the Convention on the Protection of Human Rights and Fundamental Freedoms have been studied. The consequent impact of forced psychiatric treatment on human rights has been highlighted. The approach to the treatment of persons with mental disorders focused on guaranteeing the protection of such persons and ensuring their rights has been studied. Methodology. The authors of the article have used a combination of general and special scientific methods of building and carrying out scientific research, in particular, the formal and logical method, the formal and dogmatic method, analysis and synthesis, interpretation of legal norms, the method of comparative legislation, the systemic and structural method.*

*Results. It has been established that the restriction of personal freedom in the form of forced hospitalization for providing medical care is possible, if persons pose a danger to themselves or others due to mental disorders. The authors have established cases of rights violations of persons with mental disorders (to freedom and personal integrity, to privacy, the right not to be tortured, etc.). The need to use the least restrictive measures while determining treatment approaches has been substantiated. The authors have defined the main areas of reform, which should include the fight against social isolation and inequality by influencing social determinants of health.*

**Key words:** *organization of psychiatric care's provision, coercive measures of medical nature, protection of rights, mental disorders, psychiatric care, human rights.*

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## 1. Introduction

Preserving and strengthening the mental health of the population is an important factor in the development of society, since the mental state of a particular person affects the effectiveness, the choice of a specific behavior, decision-making, physical health, etc. It should be noted that the global burden of mental illnesses in the world is currently increasing among other diseases, which leads to disabilities and other negative consequences that burden both the sick person himself and his / her relatives, family members and the state.

The most common mental illness in any country and especially in low-income countries is depression, which is predicted to occupy the third place by 2030 among the causes of mental disorders and increase stigmatization and discrimination in society against the mentally ill people [1].

The Law of Ukraine "On Psychiatric Care" defines mental disorders as disorders of mental activity rec-

ognized as they are according to the International Statistical Classification of Diseases, Injuries and Causes of Death valid in Ukraine; and severe mental disorder as a disorder of mental activity (obscuring consciousness, impaired perception, thinking, will, emotions, intellect or memory), which deprives a person of the ability to adequately perceive the surrounding reality, his / her mental state and behavior [2]. It is worth noting that the legislation regulating forced treatment of psychiatric disorders mostly uses the concept of "mental and behavioral disorders" only in relation to the most serious disorders.

At the same time, the indicated law establishes the duties of executive authorities and local self-government agencies for the organization of providing psychiatric care, defines legal and social guarantees for the protection of persons suffering from mental disorders, establishes the legal status of institutions providing psychiatric care, medical

employees and other experts who provide psychiatric care.

## 2. Research methodology

The article uses a combination of general and special scientific methods of building and carrying out scientific research.

The formal and logical method made it possible to present scientific ideas in a certain sequence. The formal and dogmatic method contributed to reveal current provisions in regard to the concepts of "mental disorders" and "severe mental disorders". The method of analysis and synthesis was used to determine the system of organizational forms of providing psychiatric care in a forced manner. The method of interpretation of legal norms contributed to the analysis of current departmental national and international legislation. The method of comparative legislation in combination with the system and structural method assisted to characterize the world experience of judicial protection of the rights of persons with mental illnesses.

## 3. Results

The governments of the Member States of the Council of Europe signed the European Convention on Human Rights in 1950. Its purpose is to ensure and develop human rights and fundamental freedoms. Signing and ratifying the Convention obligates each State to ensure full implementation of its provisions in domestic law, policy and practice. The Convention establishes the obligation to respect human rights and enshrines the main guarantees of ensuring the rights: the Art. 2 "Right to life: no one shall be deprived of his life intentionally", the Art. 3 "Prohibition of torture: no one shall be subjected to torture or to inhuman or degrading treatment or punishment", the Art. 5 "Right to liberty and security: no one shall be deprived of his liberty", the Art. 8 "Right to respect for private and family life" [3]. The specified legal prescriptions are the basic ground for the protection and security of the rights and interests of persons suffering from mental disorders and requiring medical assistance.

According to the Principles for the Protection of Persons with Mental Illness and the Promotion of Mental Health, adopted by UN General Assembly Resolution 46/119, a person may be involuntarily admitted to a psychiatric institution as a patient, if he has a mental illness and if:

a) there is a serious threat of direct or imminent harm to this person or to other persons as a result of this mental illness;

b) the refusal of hospitalization or the detention of a person, whose mental illness is severe and mental abilities are weakened, in a psychiatric institution may lead to a serious deterioration of his health or make it impossible to apply appropriate treatment, which can be carried out only if hospitalization in a psychiatric institution in accordance with the principle of the least restrictive alternative [4].

Coercive measures in Ukraine like in most European countries for the purpose of providing medical assistance to persons with mental disorders are possible only with their voluntary consent. The possibility of applying such measures in court is being considered, if there is no consent.

The key role in ensuring the protection of persons suffering from mental or behavioral disorders is played by the European Court of Human Rights (hereinafter referred to as the ECHR). It should be noted that there is a significant number of lawsuits to the ECHR regarding violations of the rights and interests of persons with mental illnesses. Taking into account this circumstance, Ukraine has adopted a number of regulatory legal acts that ensure the rights of sick persons to access to justice, that guarantee protection against medical arbitrariness and the observance of rights while applying coercive measures of a medical nature. The basic national standards of treating persons with mental illnesses in regard to forced treatment are determined by the norms of material and procedural civil and criminal law, the Fundamentals of Health Care Legislation, the Law of Ukraine "On Psychiatric Care", the Rules for the Application of Coercive Measures of Medical Nature in Special Institutions for the Provision of Psychiatric Treatment and by some other by-laws.

We should note that the right to health and proper medical care is not directly recorded in the norms of the Convention on the Protection of Human Rights and Fundamental Freedoms. However, the ECHR actively applies Articles of the Convention in its decisions, which may include the right to adequate medical care.

Thus, the ECHR in the case of *Fernandes De Oliveira v. Portugal* in terms of the Art. 2 of the Convention "Right to Life" [3] considers the substantive positive obligation of the State as requiring the latter to adopt rules obliging both private and public hospitals to take appropriate measures to protect the lives of patients. This positive obligation also requires the creation of effective independent judicial system so that the cause of death of patients under medical care either in the public or private sector can be established and to prosecute the guilty party [5]. However, it should be emphasized that violations of the State can be recognized only in case of failure to ensure adequate protection of patients' lives by the appropriate regulatory framework. At the same time, such reasons as medical mistake or other actions of medical employees of a subjective nature, which led to a person's death, cannot indicate the failure of the State to perform its obligations.

At the same time, the provision of necessary medical assistance and the creation of opportunities for the treatment of concomitant diseases are indicators of ensuring the right to life of a person with mental disorders. The results of the inspection often indicate not rare cases of failure to provide the necessary somatic treatment to patients who have been

receiving treatment in psychiatric care facilities for a long time. Thus, a patient addressed to the members of the monitoring group during a monitoring visit in May 2020 to the Municipal Enterprise “Ostrozka oblasna psykiatrychna likarnia” of the Rivne Regional Council, who complained about the lack of medical care due to her diagnosis of cancer. It was established during the examination of the medical documentation that the patient was scheduled for a planned surgical intervention, but the institution did not provide her with the access to treatment. According to the results of the response, the patient was sent to the appropriate health care institution for surgery and the provision of appropriate treatment [6].

Appeal for protection on the basis of the Art. 3 “Prohibition of torture” of the Convention [3] is mainly carried out in terms of ensuring the right to medical assistance for persons whose liberty is limited (prisoners and persons with mental or behavioral disorders who are in medical institutions undergoing compulsory treatment).

Thus, the case of *M.S. v. Croatia* (2015) is a good example, where the applicant complained of ill-treatment during her stay in a psychiatric hospital. According to the applicant, she was tied to the bed with straps tightened around her ankles and wrists after the forced hospitalization, a powerful drug was forcibly injected and she was kept in this condition all night. As a result, the applicant felt pain in her back and left leg for a long time. The room was small and there were no windows. The next day, the applicant was transferred to another ward, where she was forcibly detained for other thirty days. She filed complaints within administrative procedure in handwritten form, since there were no other opportunities for defending herself. The applicant alleged, by providing arguments in the exhaustion of national means for legal protection, that the state institutions in Croatia were not functioning properly, which was one of the reasons for the failure to act on her complaint about ill-treatment in the hospital. Grounding its decision the Court has indicated that the Art. 3 of the Convention enshrines one of the most important values of a democratic society – prohibition of torture or inhuman or degrading treatment or punishment regardless of the circumstances or behavior of the victim. As a result of considering the case, the Court recognized that the applicant was subjected to inhuman and degrading treatment in violation of the Art. 3 of the Convention [7].

The right to liberty and security of person is guaranteed by the Art. 5 of the Convention [3]. Forced treatment measures are often associated with the placement of a person with mental illness into a medical institution that limits to a certain extent his / her liberty and integrity. At the same time, it is important to achieve a reasonable balance between the use of forced treatment measures and the guarantees of basic human rights.

Deprivation of liberty in accordance with clause (e) Part 1 of the Art. 5 of the Convention has a dual

function: on the one hand, a social function of protection, and on the other, a therapeutic function, which is related to the individual interest of a person of unsound mind in receiving an appropriate and personalized form of therapy or a treatment course [8].

Effective protective guarantees against arbitrariness must be ensured in proceedings for involuntary admission to a psychiatric facility, taking into account the vulnerability of persons suffering from mental disorders and the need to provide very compelling reasons to justify any restriction of their rights.

The issue of providing opportunities for persons with mental illnesses to make decisions about their treatment and to give consent for medical measures is always relevant. It should be noted that the Law of Ukraine No. 2205-VIII [9] amended in 2017 some legislative acts related to the provision of psychiatric care, according to which hospitalization of a person recognized as incapable in accordance with the procedure established by law may be voluntary – at his / her request or with the informed written consent. We support the opinion of scholars regarding the consent of an incapable person about the ambiguity of the situation: on the one hand, a person is recognized as one who, as a result of a mental disorder, could not realize the meaning of his / her actions and / or control them (i.e., is incapable) according to the conclusions of experts, and on the other – he / she is deprived of “voluntary” consent to treatment [10]. Therefore, the consent of an incapable person to treatment can be questioned by interested parties and appealed in court.

If such a person is unable to make a request or give informed written consent due to his / her health, hospitalization in a psychiatric care facility is possible only on the basis of a decision of the guardianship authority, which must be issued no later than 24 hours from the time of the appeal of a legal representative of the incapable person. Such a decision can be appealed, including to the court. Consent to hospitalization is recorded in the medical documentation under the signature of the person or a legal representative and a psychiatrist [2].

However, the Commissioner’s monitoring of institutions for the provision of psychiatric care revealed the facts of treating patients with mental disorders who did not give consent for hospitalization and without a corresponding decision of the guardianship authority or the court [11], which is the violation of the Art. 4 of the Convention on the Protection of Human Rights [3] and the Art. 14 of the Convention on the Rights of Persons with Disabilities (“Liberty and security of the person”) [12].

In general, it can be assumed that the more coercion a person with mental disorders experiences, the worse the clinical outcome can be. A study observed that approximately 10% of the voluntarily admitted patients reported that they had felt forced into admission during negotiations with the hospital staff. Even

patients who considered their hospitalization justified continued to experience anger with regard to their admission as a result of the damage caused by coercive elements and the consequent loss of autonomy [13].

The terms of staying on forced treatment and its monitoring need to be strictly observed. A person who was hospitalized into an institution for the provision of psychiatric care in a forced manner must be examined by a commission of psychiatrists at least once a month from the time of hospitalization. If it is necessary to continue forced hospitalization for more than 6 months, the representative of the institution providing psychiatric care must send an application to the court for the continuation of such hospitalization. Petitions to terminate forced hospitalization may be sent to the court by a person who was involuntarily hospitalized or by his / her legal representative every 3 months from the time the court makes a decision on the continuation of such hospitalization [2]. For example, a person in the UK placed for forced treatment or this person's guardian has the right to appeal under the Mental Health Act. If there is no appeal against the forced hospitalization decision within 6 months, the case is automatically reviewed by the Mental Health Tribunal, which is an independent judicial agency empowered to monitor people placed to psychiatric institutions [14].

The ECHR in terms of the Art. 8 "Right to respect for private and family life" [3] takes the position that mental health should also be considered as an important part of private life related to the aspect of moral integrity. Medical intervention against a person's will constitutes an interference in his / her personal life and, in particular, in the right to physical integrity. Forced treatment of mentally ill patients may in some cases be justified in order to protect the patient and others. However, such decisions should be made against the background of clear legal guidelines and the possibility of judicial monitoring [15]. Mental stability in this sense is an important factor in realizing the right to respect for private life. The State is entrusted with the duty of creating adequate opportunities for people with mental disabilities to participate in various processes taking into account their individuality and unique needs.

#### **4. Conclusion**

The analysis of national legislation and caselaw through the prism of international legal guarantees regarding the protection of persons suffering from mental disorders and who are subjects of coercive measures of a medical nature gives reason to draw the following conclusions:

1. Persons with mental or behavioral disorders belong to a vulnerable category of the population and cannot adequately protect their rights and interests under all circumstances. Therefore, the task of the state is to guarantee the provision of quality medical care to such persons, as well as to create appropriate conditions for their protection.

2. The mental capacity of persons with mental disorders should not affect the scope of their legal capacity, namely the understanding that all people regardless of their abilities and other characteristics deserve full and equal respect as individuals.

3. The legislation of Ukraine allows cases for restricting personal freedom in the form of forced hospitalization for the provision of medical care in case if persons pose a danger to themselves or others due to mental disorders.

4. Providing forced treatment to a person with mental disorders is closely related to the possibility of violating his / her rights (to freedom and personal integrity, to privacy, the right not to be tortured, etc.). Therefore, forced treatment of persons with mental disorders is considered as an extreme measure that can be used when it is impossible to solve the problem with less burdensome actions.

5. There must always be grounds for using forced treatment measures, as well as procedural requirements must be met. In case of taking groundless and unjustified coercive measures of a medical nature a person has the right to demand compensation for the caused material and moral damage.

6. Ukrainian legal regulation of the observance and protection of the rights of persons suffering from mental disorders is carried out in accordance with fundamental international principles. However, the provision of a protection mechanism in the process of providing psychiatric care to such persons needs its improvement.

Therefore, coercion in the provision of medical care, in particular, restriction of the rights of persons, isolation, forced administration of drugs, detention of persons in closed inpatient wards and forensic medical institutions, should be used only as an emergency of critical need and if there are appropriate grounds.

There is an emerging evidence base for the proposition that optimizing human rights is inherently therapeutic and contributes to healing. In this framework, the WHO has launched the Quality Rights Programme for improving quality of care and implementation of core articles of the Convention on the Protection of Human Rights and Fundamental Freedoms [16].

We believe that the main areas of the reform should include tackling social isolation and inequality by affecting the social determinants of health, such as the quality and stability of home conditions, work, income, support, relationships and participation in society. Involving people with experience of serious mental disorders into organizations dealing with issues related to forced mental health treatment can be a powerful impact for changes and can lead to better clinical outcomes. Political, legal and social changes in this direction must influence practice in the field of mental health and social care to significantly improve the perspectives for fulfilling lives and ensure the protection of rights for people with psychosocial disabilities.

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