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THE PROTECTION OF PATIENT'S RIGHTS AND FUNDAMENTAL FREEDOMS BASED ON THE ASSESSMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

The patient is a user of health care services, whether healthy or sick[1], or a person in contact with the health system seeking attention for a health condition[2]. So it is a vast necessity to emphasize that the human right to health is vital to all aspects of a person's well-being and especially life, and enjoying this right is crucial to the realization of many other fundamental human rights and freedoms. It means that every woman, man, youth and child has the human right to the highest attainable standards of physical and mental health, including reproductive and sexual health, equal access to adequate health care and health-related services, adequate standards of living, equitable distribution of food, access to safe drinking water and sanitation without any discrimination. Specifically, the following types of discrimination are prohibited: related to the race, color of skin, sex, language, religion, political and other opinions, social and national origin, incomes, birth, physical and mental incapacity, condition of health, sexual orientation and any other civil, political, social status[3].

The Council of Europe, which is actually one of the oldest and biggest international organizations of the European region, prioritizes the promotion of the fundamental human rights and freedoms in the European region. Additionally the Council of Europe has other special prominences, particularly creating legal standards, fostering democratic development, the rule of law and cultural cooperation between its member states. That's why the aim of the Council of Europe is to achieve a greater unity between its members to safeguard and realize the ideals and principles, which are their common heritage, and facilitate their economic and social progress[4].

Consequently, for achieving its aims, the Council of Europe adopted the European convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") in Rome on 4 November 1950, which is an international treaty on the protection of fundamental human rights and freedoms in the European region and was put into force on 3 September 1953. It is absolutely necessary to mention that all member states of the Council of Europe are projected to ratify the Convention at the earliest opportunity because they are already signed parties to the Convention.

The Convention is the only international human rights instrument providing a high degree of individual protection. The signatory parties to the Convention are obliged to secure all the rights mentioned in the Convention within their jurisdiction. Particularly it concerns the following rights: right to life (Article 2), prohibition of torture (Article 3), prohibition of slavery and forced labor (Article 4), right to liberty and personal security (Article 5), right to a fair trial (Article 6), no punishment without law (Article 7), right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), right to marry (Article 12), right to an effective remedy (Article 13), prohibition of discrimination (Article 14).

The Convention has several Protocols, for instance, Protocol No 1 of 20 March 1952 guarantees the protection of property, the right to free elections, right to education, Protocol No 7 of 22 November 1984 states the procedural safeguards relating to expulsion of aliens, the right of appeal in criminal matters, compensation for wrongful conviction, the right not to be tried or punished twice, Protocol No 13 of 3 May 2002 prohibits death penalty.

The Republic of Armenia has signed the Convention on 25 January 2001 and has ratified it on 26 April 2002 and by this action the Republic of Armenia acknowledges the jurisdiction of the European Court of Human Rights (hereinafter referred to as "the Court") thus undertaking the obligation of protection of human rights in its territory by bringing the national legislation in line with the clauses of the Convention[5]. As an international document the Convention has its specific place in the hierarchy of legal acts of the Republic of Armenia as it binds to respect the human rights and fundamental freedoms intended mostly to protect and defend them.

According to the Convention, the Court was established in Strasbourg on 18 September 1959 as an international judicial body, the principal aim of which is to exercise control over the observance of the Convention clauses by the signatory parties. This is the first reason that member states are bound to take into account and execute the final decisions of the Court.

It is necessary to underline that cases may only be brought against one or more States that have ratified the Convention and any applications against third States or individuals will be inevitably declared as inad-

missible. Besides, cases may only be brought to the Court after domestic remedies have been exhausted; in other words, individuals complaining of violations of their rights must first have taken their case through the courts of the country concerned, up to the highest possible level of jurisdiction. In this way the State itself is given the first opportunity to provide redress for the alleged violation at national level.

It is necessary to mention that the rights and freedoms provided by the Convention are unavoidably related to health. As a basic human rights treaty, the Convention contains some provisions related to human rights and fundamental freedoms to health. The Convention guarantees for patients exceptionally the following rights and fundamental freedoms: right to life (Article 2), prohibition of torture (Article 3), right to liberty and personal security (Article 5), right to a fair trial (Article 6), right to respect for private and family life (Article 8), freedom of expression (Article 10), right to an effective remedy (Article 13), prohibition of discrimination (Article 14). Based on the abovementioned in the filed of health the Court has given its assessment on the violation of some articles of the Convention.

In this connection, the Court has considered that the first sentence of Article 2(1) of the Convention enjoins the State not only to refrain from intentional and unlawful deprivation of life, but also to take appropriate steps to safeguard the lives of those that are within its jurisdiction (positive obligation)[6], to protect the life of human being against the risk of illness[7]. These principles apply also to public health sector. The aforementioned positive obligations therefore require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients who are under the care of the medical staff, whether in public or private sector, can be determined and those responsible made accountable[8].

Accordingly, the Court noted that the lack of medical care, especially the failure to inform the applicant on his or her HIV diagnosis, the failure to provide timely antiretroviral treatment, to monitor for infections, lack of qualified medical staff in the detention facilities, and refusal of treatment in a specialized hospital have had amounted to inhuman and degrading treatment and there had therefore been a violation of Article 3 of the Convention[9].

In another case the Court found that, in determining the scope of state obligations under Article 8 of the Convention, the right to private and family life must be practical and effective, and therefore access to medical files (on gynaecological and obstetric treatment in this case) containing personal data must be allowed. Also, the Court determined that the cost and arrangements for making the photocopies from these files will be borne by the individual making the request and the facility must present compelling reasons for refusing to provide copies. Accordingly, with regard to Article 6(1) of the Convention, which states the right to a hearing before a tribunal, the Court found that the limitations on access to the medical files and records under the Health Care Act of 1994 of the Ministry of Health of Slovakia created a disproportionate burden on the individual in trying to develop an effective case for litigation, and therefore Article 6(1) of the Convention had been violated[10].

In accordance with the Reports by the European Committee for the prevention of torture and inhuman or degrading treatment or punishment, prisoners, while in custody, should be able to have access to a doctor at any time, irrespective of their detention regime. The health care service should be organized in such a way as to enable requests to consult a doctor to be met without undue delay. A prison's health care service should be able to provide at least regular out-patient consultations and emergency treatment (of course, in addition there may be a hospital-type unit with beds). Further, prison doctors should be able to call upon the services of specialists. Out-patient treatment should be supervised, as appropriate, by health care staff; in many cases for provision of follow-up care it is not sufficient to depend upon the initiative to be taken by the prisoner.

Also the direct support of a fully-equipped hospital service should be available, in either a civil or prison hospital. Whenever prisoners need to be hospitalized or examined by a specialist in a hospital, they should be transported with the promptness and as required by their state of health[11].

As an equivalent to general medical care, prison health care service should be able to provide medical treatment and nursing care, as well as appropriate diets, physiotherapy, rehabilitation or any other necessary special facilities, comparable to those provided to patients outside the penitentiary establishment. Provision of care in terms of medical, nursing and technical staff, as well as premises, installations and equipment, should be geared accordingly. There should be appropriate supervision over the pharmacy and medicines distribution. Further, the preparation of medicines should always be entrusted to qualified staff (pharmacist/nurse, etc.). A medical file should be compiled for each patient, containing diagnostic information, as well as an ongoing record of the patient's progress and of any special examinations he/she has undergone. In case of a transfer, the file should be forwarded to the doctors in the receiving establishment. Further, daily registers should be kept by health care teams, in which particular incidents relating to the patients should be mentioned. Such registers are useful in terms of providing an overall view of the health care situation in the prison, at the same time highlighting specific problems which may arise. The smooth operation of a health care service presupposes that doctors and nursing staff are able to meet regularly and to form a working team under the authority of a senior doctor in charge of the service.[12]"

Very often the Court observes at the outset that Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits, in absolute terms, torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct[13]. It reiterates that ill-treatment must

attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim[14].

The Court observed that the detention of a person who is ill may raise issues under Article 3 of the Convention and it could not be ruled out[15]. Although this Article cannot be construed as laying down a general obligation to release detainees on health grounds, it nevertheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty by, among other things, providing them with the requisite medical assistance[16].

The Court has also emphasized the right of all prisoners like patients to conditions of detention which are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not expose them to distress or hardship of an intensity exceeding the unavoidable level of suffering which is inherent in detention, and that, given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing the requisite medical assistance[17].

Recently patient rights and fundamental freedoms guaranteed by the Convention were protected by the Court with the application of the above mentioned principles in the case against the Republic of Armenia[18]. Particularly the Court noted at the outset that it is undisputed that Ashot Harutyunyan (hereinafter referred to as "the applicant") suffered from a number of serious illnesses, including acute bleeding duodenal ulcer, diabetes, diabetic angiopathy and a heart condition. At the time of his admission to the detention facility, only the applicant's ischemic heart disease and diabetes were noted, but no record was made of his acute bleeding duodenal ulcer or diabetic angiopathy. In any event, about a month and a half after he was placed in detention the applicant was examined by a surgeon, during which it was noted that the applicant also suffered from acute bleeding duodenal ulcer and surgery was recommended. Following this recommendation, the applicant was transferred to a hospital for prisoners. The Court observes, however, that the Armenian Government's allegation that the applicant was actually operated on is not supported by the materials of the case. In particular, both the applicant's hospital medical file and the discharge certificate said nothing about any operation on the applicant. It is hard to imagine that such a vital piece of information would have been omitted from those documents. The Court is therefore not convinced by the Armenian Government's allegation and concluded that the doctor's recommendation, which could potentially have improved the applicant's state of health, was not followed and this was without any valid reasons.

On the other hand the Court noted that the Armenian authorities made certain efforts to meet the applicant's health needs by hospitalizing him on two occasions. However, the Court agreed with the applicant that nothing suggests that these efforts had, as alleged by the Armenian Government, a stabilizing effect on his health. In particular, as regards the applicant's stay at the hospital for prisoners, it is true that some treatment, including haemostatic therapy of ulcer, was given. It is also true that, while the applicant's discharge certificate was silent on any improvement in his state of health, it was, nevertheless, noted in his medical file that he was being discharged in satisfactory condition. However, only a few days after his discharge from the hospital the applicant was once again hospitalized, this time at the medical unit of the detention facility, since his state of health deteriorated. Furthermore, the above discharge certificate explicitly stated that the applicant had to undergo regular medical check-ups. This suggests that the applicant's treatment, even if possibly useful, nevertheless cannot be said to have been successful to the extent that it made any further medical supervision unnecessary. As regards the treatment received by the applicant at the medical unit of the detention facility, the Court pointed out that the applicant was transferred there and was under regular observation. However, his medical file does not contain any further records. It is notable that soon after the records stopped, the applicant's lawyer applied to the authorities with a request that the applicant be provided with regular medical check-ups, which remained unanswered.

The Court noted that the applicant's medical file did not contain a single record of any medical check-up or assistance provided to him by the medical staff of the detention facility. It therefore does not find the Armenian Government's allegation to be convincing. The Court further noted that the discharge certificate, which explicitly required that the applicant undergo regular medical check-ups, did not make such check-ups dependent on the applicant's initiative. The detention facility's medical staff therefore had the duty to carry out such check-ups irrespective of whether the applicant himself asked for this. It is clear that the applicant was in need of such regular medical care which was, however, denied to him during the mentioned period. The Armenian Government's argument that the medical unit of the detention facility was sufficiently staffed is therefore irrelevant, given that no regular medical care was provided specifically to the applicant.

Thus, as already indicated above, the applicant was clearly in need of regular medical care and supervision, which was, however, denied to him over a prolonged period of time. All the complaints in this respect lodged by the applicant's counsel either remained unanswered or simply received formal replies. The applicant's verbal requests for medical assistance were also to no avail. In the Court's opinion, this must have given rise to considerable anxiety and distress on the part of the applicant, who clearly suffered from the effects of his medical condition, which went beyond the unavoidable level of suffering inherent in detention, and by the Court's assessment there has accordingly been a violation of Article 3 of the Convention on account of the failure to provide the applicant with requisite medical assistance in the detention facility.

[1] Տե՛ս Declaration on the Promotion of Patients' Rights in Europe, WHO, Amsterdam March 1994 - http://www.ethique.inserm.fr/ethique/Ethique.nsf/397fe8563d75f39bc12563f60028ec43/901e922bf0f1db42c12566ac00493be8?OpenDocument
[2] Տե՛ս Online Glossary, European Observatory on Health Systems and Policies - http://www.gfmer.ch/SRH-Course-2010/glossary/P.htm
[3] Տե՛ս Cf. Assemblée Parlementaire du Conseil de l'Europe, "Droit des n?erlandophones aux soins m?dicaux ? Bruxelles et dans les municipalités néerlandophones environnantes", document 10009, 1er octobre 2002.
[4] Տե՛ս Statute of the Council of Europe, London, 05.05.1949, Article 1(a).
[5] Տե՛ս Judgments of European Court of Human Rights against Republic of Armenia at http://www.echr.coe/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/
[6] Տե՛ս L.C.B v. the United Kingdom, Application no. 24413/94, Judgment of June 09, 1998, § 36.
[7] Տե՛ս Berktay v. Turkey, Application no. 22493/93 (Sect. 4) (Fr), Judgment of March 01, 2001, § 154.
[8] Տե՛ս Calvelli and Ciglio v. Italia [GC], Application no. 32967/96, Judgment of January 17, 2002, § 49; Erikson v. Italy, Application no. 37900/97, Decision of October 26, 1999; Powell v. the United Kingdom, Application no. 45305/99, ECHR 2000-V, Decision of Mai 04, 2000; Mahmet Işıltan v. Turkey, Application no. 20948/92, Commission decision of May 22, 1995, DR 81-B, p. 35).
[9] Տե՛ս Yakovenko v. the Ukraine, Application no. 15825/06 (Sect. 5) (Eng), Judgment of October 25, 2007, §§ 90-101.
[10] Տե՛ս K.H. and Others v. Slovakia, Application no. 32881/04 (Sect. 4), ECHR 2009, Judgment of April 28, 2009, §§ 59-69.
[11] Տե՛ս The 3rd General Report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) - CPT/Inf (93) 12, points a. 34-37.
[12] Տե՛ս The 3rd General Report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) - CPT/Inf (93) 12, points b. i) 38-40.
[13] Տե՛ս Labita v. Italy [GC], Application no. 26772/95, ECHR 2000-IV, Judgment of April 06, 2000, § 119.
[14] Տե՛ս Ireland v. the United Kingdom, Application no. 25, Judgment of January 18, 1978, § 162; Costello-Roberts v. the United Kingdom, Application no. 247 C, Judgment of March 25, 1993, § 30; Dougoz v. Greece, Application no. 40907/98 (Sect. 3), ECHR 2001-II, Judgment of March 06, 2001, § 44.
[15] Տե՛ս Mouisel v. France, Application no. 67263/01 (Sect. 1), ECHR 2002-IX, Judgment of November 14, 2002, § 38.
[16] Տե՛ս Sarban v. Moldova, Application no. 3456/05 (Sect. 4) (Eng), Judgment of October 04, 2005, § 77; and Khudobin v. Russia, Application no. 59696/00 (Sect. 3), ECHR 2006-XII (extracts), Judgment of October 26, 2006, § 93.
[17] Տե՛ս Kudła v. Poland [GC], Application no. 30210/96, ECHR 2000 XI, Judgment of October 26, 2000, § 94.
[18] Տե՛ս Ashot Harutyunyan v. Armenia, Application no. 34334/04, Judgment of June 15, 2010.

ԱՄՓՈՓՈՒՄ

Պացիենտի իրավունքների և հիմնարար ազատությունների պաշտպանությունը՝ համաձայն Մարդու իրավունքների եվրոպական դատարանի գնահատումների

2001թ. հունվարի 25-ին ստորագրելով և 2002թ. ապրիլի 26-ին վավերացնելով 1950 թվականի նոյեմբերի 4-ին Հռոմում ընդունված Մարդու իրավունքների և հիմնարար ազատությունների պաշտպանության մասին եվրոպական կոնվենցիան՝ Հայաստանի Հանրապետությունը պարտավորություն ստանձնեց միջոցներ ձեռնարկել հնարավորինս նվազեցնելու իր տարածքում մարդու իրավունքների և ազատությունների ոտնահարման դեպքերն ու հնարավորությունները: Այդ իրավունքների ու ազատությունների գերակշռող մասն անխուսափելիորեն առնչվում է նաև առողջապահության ոլորտին: Համաձայն Մարդու իրավունքների եվրոպական դատարանի՝ կոնվենցիայով պացիենտին երաշխավորվում են կյանքի իրավունքը, խոշտանգումների և անմարդկային վերաբերմունքի արգելումը, անձնական ազատության և անձեռնմխելիության իրավունքը, արդար դատաքննության իրավունքը, անձնական և ընտանեկան կյանքը հարգելու իրավունքը, արտահայտվելու և տեղեկատվության ազատության իրավունքը, իրավական պաշտպանության արդյունավետ միջոցի իրավունքը, խտրականության արգելումը:

РЕЗЮМЕ

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