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PROBLEMS OF LEGAL REGULATION OF MEDICAL SECRECY IN THE LEGISLATION OF THE RUSSIAN FEDERATION

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Here are noted differences in the legal and medical understanding of the content of medical secrecy. Criticized normative consolidation of regulation of medical secrecy associated with a large list of exemptions from the rule to keep medical secrecy, as this situation allows not only the variability of interpretation, but also – that is more dangerous – the possibility of administrative discretion by the subject of interpretation.

Argued that medical secrecy is often represented by the enumeration of the data that constitute it, that does not express the essence of the considered phenomenon, and therefore occurring normative definition of medical secrecy cannot be considered a scientific definition.

The necessity of regulation of such special kind of secrecy as reproductive secrecy is substantiated in the article.

Keywords: medical secrecy, personal data, protection of medical secrecy, reproductive secrecy, the circle of persons obliged to keep medical secrecy.

It is obvious that the problem of ensuring patient confidentiality acquires special significance in modern life – when electronic document workflow gets increasing distribution, and the threat of leakage of any information about a person, including personal data, to the Internet is more than real. Taking into account uncertainty and some legal "fuzziness" of the category of "personal data" under which, in accordance with the provisions of paragraph 1 part 1 article 3 of the Federal Law of the Russian Federation No. 152-FL from July 27, 2006 "On Personal Data" [4], is defined "any information directly or indirectly relating to an identified physical person (the subject of personal data)", the greatest danger, in our opinion, represents a threat of the dissemination of information about the health of the person. Information that has been traditionally being classified as medical secrecy and (or) patient confidentiality. The greatest threat because the lack of legislative regulation of a certain group of public relations complicates their protection, and in some cases, makes it virtually impossible to protect them.

So, the first problem: the unresolved issue on the ratio between medical secrecy and patient confidentiality. In the Soviet and post-Soviet legislation the institute of patient confidentiality was not fixed; and in the legislation of the Russian Federation of a new period of Russian statehood the term of "medical secrecy" first appeared in the Basics of the Legislation on Public Health Care from July 22, 1993 No. 5487-1 [1], which become invalid in connection with the adoption of the Federal Law No. 323-FL from November 21, 2011 "On the Basis of Health Protection in the Russian Federation" [5]. In accordance with the provisions of article 61 of the Basics of the Legislation on Public Health Care, patient confidentiality was constituted of information regarding seeking medical help, the health of a citizen, the diagnosis of its disease, and other information obtained during examination and treatment. This provision has been fully interpreted in the norms of part 1 article 13 of the new, mentioned above, Federal Law "On the Basis of Health Protection in the Russian Federation". Under part 2 of this article it is prohibited to disclose information constituting medical secrecy, including after the death of a person, by persons to whom they became known at training, the performance of job, official and other duties, except as required by law. At that, according to part 3 article 13, with the written consent of a citizen or his legal representative it is permitted to disclose information constituting a medical secrecy to other citizens, including officials, for medical examination and treatment of the patient, conducting medical research, and its publication in scientific journals, use in the educational process and for other purposes.

Just as before, the provision of information constituting a patient confidentiality, without the consent of the individual or its legal representative may be: for the purpose of medical examination and treatment of a citizen, who as a result of its condition is not able to express its will; with the threat of the spread of infectious diseases, and mass poisonings; at the request of an inquiry and investigation body, a court in connection with the investigation or judicial examination, at the request of a body of penal system in connection with the execution of a criminal penalty and monitoring the behavior of conditionally convicted person, sentenced one, whose sentence is delayed and a person released on parole; in the case of medical care to a minor, as well as to minors under the age established by part 2 article 54 of the Law (minors, drug addicts, over the age of sixteen, and other minors over the age of fifteen years), to inform one of its parents or other legal representative; in order to inform the authorities of the Interior on the admission of a patient, in respect of which there is sufficient reason to believe that the damage to its health has been inflicted as a result of illegal actions; in order to conduct military medical examination at the request of military recruitment offices (principally new provisions are contained in the Concept of a federal system of training of citizens of the Russian Federation to military service for the period up to 2020 [6]), HR services and military medical (flight medical) commissions of the federal executive power, in which federal law provides for military and equivalent to it service; in order to investigate an accident at work and occupational diseases; in the exchange of information between medical organizations, including posted in medical information systems, in order to provide medical care taking into account the requirements of the legislation of the Russian Federation on personal data; for the implementation of accounting and control in the system of compulsory social insurance; in order to monitor the quality and safety of medical activities in accordance with this Law..

Let us recognize that the list of exceptions from the rule to store medical secrecy is more than wide. And it's enough for some concern from the standpoint of protecting the rights of citizens in the matter of preserving patient confidentiality. In addition, the list of reasons is inaccurate from a legal point of view: any norm containing the word form "there are *reasonable grounds to believe*" is knowingly unlawful, since it allows not only the variability of interpretation, but also – what is more dangerous – the possibility of administrative discretion by the subject of interpretation.

And what is interesting, the Russian legislation stubbornly continues to evolve in this direction: in volume the rule itself is much smaller than the exceptions applied to it. Of course, the definition of patient confidentiality in two lines

is not the only example, we have already called the norms of the RF Federal Law "On Personal Data", there is one more: in accordance with paragraph 1 article 1 of the Federal Law No. 149-FL from July 27, 2006 "On Information, Information Technologies and Protection of Information" [3], information is facts (messages, data) regardless of their presentation form. On the one hand, an explanation can be given to such "non figurative" definitions of legal categories. On the other hand, often such explanation lies not in the legal field, but in the philistine one: "everything cannot be settled, and the law should spell out only general provisions". But let's be honest: perhaps it makes sense, at least, to try maximally regulate the areas of public relations, in which the violation of citizens' rights entails the greatest threat to the security of an identity (including informational one).

In article 2 of the Federal Law of the Russian Federation "On the Basis of Health Protection" the legislator has enshrined more than twenty (!) definitions, including: health, health protection, medical care, medical service, medical intervention, prevention, diagnostics, treatment, patient, medical activity, medical organization; pharmaceutical organization, a medical professional, pharmaceutical worker, hospital physician, illness, condition, underlying disease, concomitant disease, the severity of a disease or condition, the quality of medical care. And all of them are disclosed, to a greater or lesser degree of detail, but neither patient confidentiality, nor medical secrecy. An exception, however, was made: compliance with patient confidentiality was named one of the principles of health protection (paragraph 9) article 4 of the Law).

Turning to the field of professional regulation, may be called the Code of Ethics of the Russian Physician (adopted by the 4th Conference of the Association of Physicians of Russia, November 12, 1994) [10] and the Code of Medical Ethics of the Russian Federation (approved by the All-Russian Pirogovsky Congress of Physicians, June 7, 1997) [9], which also have indicated the need to respect patient confidentiality, but there is no explanation of the concept. There are several articles in section IV of the Code with "speaking" name "Patient confidentiality". According to the first of these, every patient has the right to maintain personal secrets, and a doctor, as well as others involved in the provision of medical care, is required to maintain patient confidentiality, even after the death of the patient, as well as the fact of seeking medical help if the patient does not order otherwise. The secrecy extends to all information obtained in the course patient treatment (diagnosis, treatment methods, prognosis, etc.). And already in the third article appears the category of "medical information". Note that the list of authorities and officials to whom it may be disclosed is much narrower than that presented

in the Russian legislation. In accordance with article 3 medical information about a patient may be disclosed: first, by the clear written consent of the very patient; second, on a reasoned request of the of inquiry and investigation bodies, prosecutor's office and court; third, if maintaining of the secrecy significantly threatens the health and live of the patient and (or) other persons (serious infectious diseases); fourth, in case of bringing to the treatment of other professionals to whom this information is professionally needed. The physician must ensure that persons involved in the treatment of the patient also observe professional secrecy. Persons who are entitled the access to health information are required to maintain the confidentiality of all information received about the patient. Patient confidentiality must be respected during the process of research, teaching students and raising of physicians' qualification. Demonstration of a patient is possible only with its consent (4-6 of section IV of the Code of Medical Ethics of the RF). There is also no corresponding definition in international acts: for example, the International Code of Medical Ethics of 1949 [11] contains a provision that "a doctor should keep patient confidentiality", but does not disclose it anyhow, believing, apparently, in its obvious understanding.

In the medical literature patient confidentiality, in its most general form, is understood as a deontological requirement to health workers not to disclose information about a patient. In works one way or another affecting this issue, patient confidentiality is often represented by listing of its constituent data, which does not reflect the essence of the phenomenon under consideration and therefore cannot be considered scientific definition [14, 79; 15, 31; 16, 12]. However, some works offer rather knowledge-intensive definition of patient confidentiality as the responsibility of medical staff to keep in secret any information about the patient received in the course of diagnosis, treatment or other means, the disclosure of which could cause moral, material or physical damage directly to the patient or a third persons [17, 30]. We consider literate the definition of medical secrecy given by O. V. Bogoslavskaya: "Medical secrecy – is a protected by federal law, non-public information, as a totality of information about the health of a citizen, as well as any other information obtained in its examination and treatment, which have become known to a health care professional in force of performance of its professional duties, which represents the actual or potential value for the patient (an individual) and other interested parties (relatives and relatives-in-law, heirs), the disclosure of which could cause harm to these individuals, and in respect of which appropriate measures to preserve the confidentiality have been taken" [12, 24].

The range of persons responsible to keep patient confidentiality can be defined through an analysis of the Law's provisions. Due to the patient's right of preserving patient's confidentiality in seeking and getting medical care the responsibility to keep information that constitutes patient confidentiality is applied, first of all, to medical staff (physicians, sick attendants, nurses, registrars), and pharmaceutical workers. On a par with medical and pharmaceutical workers, the persons to whom the information is given in the manner prescribed by law are required to comply with patient confidentiality (and, therefore, liable for its disclosure). And, therefore, in respect of such persons (for example, military commissioners, investigators, judges, employees of health insurance companies), it would be more appropriate to talk about medical secrecy. Moreover, that term takes place in the Russian legislation: in accordance with part 2 article 15 of the Family Code of the Russian Federation from 29 December 1995, No. 223-FL [2], the results of a survey of a person entering into marriage constitute medical secrecy and may be communicated to the person with whom it intends to enter into marriage only with the consent of the person that has passed the survey. Do not absolutely clear the logic of the legislator, who has applied in the Family Code of the Russian Federation the term of "medical mystery", but in the norms of the Russian Federation "On the basis of health protection" – "patient confidentiality". It is thought that the use of different definitions in the formulation of one and the same concept is legally incorrect.

Given the magnitude of the problem concerned, we consider it necessary to draw attention to another aspect of it: the need for regulation of such a special type of secrecy as reproduction one. First time the notion of reproductive rights was used at the International Conference on Population and Development, held in Cairo in 1994 [18] as well as at the IV World Conference on Women, held in Beijing in 1995 [19]. By results of the conferences was concluded that reproductive rights are part of human rights, and are based on the recognition the rights of couples and individuals to decide freely and responsibly on the number of children and when to birth children, including the right to make decisions about procreation without discrimination, threats and violence, as well as recognition of the right to obtain relevant information. The category of reproductive rights also covers the right to enjoy the benefits of scientific progress, which implies the right to have access to new, safe, effective and affordable technologies in the field of childbirth. Thus, the right to use the methods of assisted reproductive technologies (hereinafter - ART) is recognized internationally and is part of the broader category of reproductive rights.

However, the question of how to regulate the dissemination of information about the done ART medical procedures, persons involved in them, the actual origin of a child born in this way, and so on in the Russian legislation is practically not settled, with the exception of the Order of the Ministry of Health of the Russian Federation from February 26, 2003 "On the Use of Assisted Reproductive Technology (ART) in the Treatment of Female and Male Infertility" [8]. Prior to its adoption the order of the USSR Ministry of Health from May 13, 1987 "On the Extension of Experience in the Application of the Method of Artificial Insemination with Donor Sperm for Medical Reasons" was in force [7]. In contrast to the pre-existing document, the current Order of ART says only that donors do not assume parental responsibilities with respect to a born child, but does not include any provisions to preserve reproductive secrecy. Annex to this Order set appropriate samples of statement of obligation for spouses and donor. According to these statements, the spouses pledged not to establish the identity of the donor, and keep the secrecy of conception of their child through artificial insemination. In turn, the donor took the pledge not to identify the recipient, as well as the child born through fertilization of the women by his genetic material.

K. Kirichenko proposes to use the term of "reproductive secrecy", and believes that the rules specifying the legal regime of reproductive secrecy should be introduced to the national legislation. Under the reproductive secrecy he understands a totality of information about the real origin of a child conceived and/or carried and born with help of ART [13, 97-103]. This can include information about the use of this or that technology, information about the identity of a donor, surrogate mother, and so on. Such information may become known to medical professionals, staff of agencies for surrogate mothers recruitment, to a donor or surrogate mother, to relatives of prospective parents and to other persons. There is no doubt that the information constituting reproductive secrecy are particularly valuable for both persons recorded as parents of a child born through ART and for the child, because disclosure of the information can cause enormous harm to child's mental health.

The article touches on only some of the existing problems in the analyzed sphere of social relations. And every one of them deserves a more detailed analysis in a separate study.

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