
THE CHALLENGES AND OPPORTUNITIES IN LAW

UKRAINIAN CASE UNDER THE CONDITIONS OF WAR

Edited by
Tomas Davulis
Ligita Gasparėnienė

The Challenges and Opportunities in Law Ukrainian Case under the Conditions of War

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Ukrainian Case under the Conditions of War

— MONOGRAPH —

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CHAPTER 1

Personal Non-Property Rights to Life, Health and Medical Care in Ukraine New Challenges during Martial Law

ABSTRACT

In the 21st century, people expect their countries' health authorities to ensure that their right to universal access to quality health care is exercised, including in the event of health emergencies (e.g. pandemic), and the opportunity to live safely in a healthy society. within the realities of war, access to quality medical care is even more difficult. The war in Ukraine, which has been going on since 2014, has led to healthcare-related problems in the temporarily occupied territories, and with the onset of a full-scale Russian invasion of Ukraine, these problems have only intensified and become global. The full-scale invasion of Ukraine by the Russian Federation has led to mass migration of refugees both within Ukraine and to other countries. In the temporarily occupied territories, the population's access to medical care is limited. It is reported that some health care facilities are being closed because there are no medical staff left due to their evacuation, the number of events dangerous to life and health has increased significantly, and there is a threat of epidemics. The main purpose of the presented study is to analyze international and national standards of human rights in the field of health care in Ukraine and identify problems of their implementation and protection in martial law.

The research is based on the analysis of international and national legal acts, statistical indicators, court decisions and materials, and the comparison of positions of scientists on the published results. It is also planned to conduct a brief sociological survey among

residents of the western regions of Ukraine and internally displaced persons who moved to the western regions of Ukraine on 24 February 2022.

Keywords: inalienable human rights, patients, health care in Ukraine, right to life, right to health, medical care, war, martial law

Introduction

Issues of personal non-property rights of an individual are extremely relevant due to the active development of social relations. Personal non-property rights constitute an absolute value and form the basis of spirituality, which enables the full realization of the principles of civil society.

Personal non-property rights are an important component of the total scope of rights of every person. The well-being of each of us depends on what the scope of personal non-property rights will be and how they will be enshrined in legislation.

These non-property rights, such as the right to life, health and medical care, are of particular importance for the entire civil society, both in Ukraine and in other countries. The question arises about what everyone expects from the authorities in the field of health care of their countries. People want these authorities to guarantee their right to universal access to quality health care without fear of financial hardship. They also seek to have effective protection in the event of health emergencies and the opportunity to live safely in a healthy society, where health care actions and relevant public policies contribute to improving life in a welfare economy. People are increasingly demanding that health care authorities in their countries meet the above-mentioned aspirations. Only under the condition of the existence and application of proper mechanisms of legal regulation of the health care sphere, a person can exist, feel safe and develop.

The war in Ukraine, which has been ongoing since 2014, became one of the reasons for the disruption of health care problems in the temporarily occupied territories, and with the beginning of the full-scale invasion of the Russian Federation on almost the entire territory of Ukraine, these problems only intensified and took on a global scale.

From now on, the research on personal non-property rights to life, health and medical care, as well as on new challenges that arose in this area during the martial law in Ukraine, is relevant.

The conducted study demonstrates that traditionally (during the last decades) “the declaration of priority of personal non-property relations in the system of the subject of civil law, which is aimed at the development of the constitutional prin-

ciples of ‘anthropocentrism’ and is reflected in the subsequent text of civil legislation” is dominant (Ruslan Stefanchuk, 2008). However, the new challenges facing humanity (the COVID-19 pandemic, the military actions of the Russian Federation on the territory of Ukraine) call into question the time-tested ideas of people-centrism (therefore, human rights are decisive and everything else must be subsequent to them), instead, we put forward in the first place the need to balance the rights of an individual and the need of the society as a whole to live in a safe environment. Perhaps the approach is justified when universal human values, to which life and health belong, are a factor which an individual, states and collectives must “obey” when observing their rights. In the presence of this approach, it is quite legal to limit the rights of everyone in the interest of the society (these approaches can be called value-oriented).

I. Methodological Principles of Regulation of Personal Non-Property Human Rights in the Sphere of Health Care in Ukraine

The allocation of personal non-property rights as part of the subject of private (civil) law has a certain genesis and is the result of progress from ideas about property, natural rights, the development of the concept of human rights and humanity in general to the need to single out a separate group of non-property rights and their inclusion in the subject of civil law.

There is no exact information about when the protection and the actual definition of personal non-property human rights first appeared in legal literature. However, most scientists are inclined to believe that the first mentions can be traced back to Ancient Rome.

Svyatoslav Slipchenko (2018) notes: “The development of teachings on personal non-property rights in European countries can be conventionally divided into three stages” (p. 240). The researcher believes that the period from the French Revolution to the Second World War should be included in the first stage, when at first in France, and later in some other countries of the continental legal system, personal non-property rights were established for a person. The basis of this approach was John Locke’s doctrine of natural rights (Locke, translated by Sodomora 2020, p. 7). At that time, a general principle of personal protection was formed in Europe and a search for a mechanism for legal regulation of personal non-property relations was instigated.

The second stage, according to S. Slipchenko, started after the Second World War. It is characterized by a general humanistic vector of the development of

personal non-property rights. It was during this period that the general idea of their non-property character and inalienability was rooted. International standards for the protection of human rights were approved and national legislations of European countries were formed.

The third stage, according to the scientist, began in the 1980s. It is connected with a change in ideas about civil turnover, about the relationship between intangible goods and their carrier, about the mobility of boundaries between property and personal non-property interests.

There is no single approach in court decisions. Property rights often arise in relation to non-property goods, therefore, courts recognize them as property and apply the relevant legislation. This applies both to the decisions of the national courts of European countries and the European Court of Human Rights. In particular, the decision of the European Court of Human Rights in the case of *Van Marle v. Netherlands* recognized that the right to a business reputation can be property (*Van Marle and others v. Netherlands*, 1986). The German Federal Supreme Court in the *Marlene Dietrich* case also recognized the rights to use the name and image of a natural person as property (*Marlene Dietrich, Bundesgerichtshof*, 1999).

This study deals only with objects (non-property goods) that are capable of satisfying only personal non-property interest (life, health, personal integrity, etc.), so they have no economic importance and, depending on this, only personal non-property rights arise.

The concept of personal non-property rights of an individual gained its greatest development in the second half of the 20th century. It was covered at the constitutional level and in many international legal documents.

Regarding the development of personal non-property rights in Ukraine, until 2004, the Civil Code of the Ukrainian USSR (1963) continued to operate in Ukraine, which protected only those individuals whose non-property rights were related to a property interest, at a time when non-property relations, which were not related to property, were not protected, and were not settled. Only with the adoption of the Civil Code of Ukraine (2003), which contains Book Two “Personal Non-Property Rights of an Individual,” the legal regulation of personal non-property rights became systematic. Including Articles 281-290 of the Civil Code of Ukraine (2003), rights in the field of health care were systematically regulated.

It was the adoption of the new Civil Code of Ukraine in 2003 that ensured the most comprehensive branch development of constitutional provisions. At the same time, civil legislation not only incorporated most of the mentioned human rights into its content, transferring them to the category of personal non-property, which gave them the character of private law, but also ensured their effective implementation and comprehensive protection by the compensatory and restorative method

based on legal equality of the parties. None of the civil codes of the post-Soviet countries contains as large a volume of norms relating to personal non-property rights as the Civil Code of Ukraine (2003). Having singled out the personal non-property rights of natural persons in the structure of the Civil Code, Ukraine became one of the first countries that gained independence after the collapse of the union state and implemented the specified provisions.

In the Civil Code of Ukraine (2003), all personal non-property rights, depending on the purpose, are divided into personal non-property rights that ensure the natural existence of an individual and personal non-property rights that ensure the social existence of an individual.

The first group includes: the right to life, the right to healthcare, the right to an environment safe for living and health, the right to freedom, the right to personal integrity, the right to the integrity of personal and family life. In Ukraine, these rights are guaranteed by the Constitution of Ukraine (1996, p. 27, p. 32). Personal non-property rights acquire wider development in branch legislation, in particular in civil law.

The second group includes the rights of an individual to a name, respect for dignity and honor, inviolability of business reputation, personal life and its secrecy, the right to privacy of correspondence, telephone conversations, telegraphic and other correspondence, the right to inviolability of the home, the right to freedom of residence and movement, the right to freedom of literary, artistic, scientific and technical creativity. In Ukraine, these rights are guaranteed by the Constitution of Ukraine (1996, p. 28, p. 31). The Civil Code of Ukraine (2003) additionally enshrines the right to a name (Article 294), inviolability of a business reputation (Article 299), individuality (Article 300), freedom of association (Article 314), etc.

It is also possible to take the order of emergence of personal non-property rights as a basis for their classification: those that belong to natural persons from birth and those that belong to them by law.

The list of personal non-property rights belonging to a person is not exhaustive, in particular in the field of health care. According to the Constitution of Ukraine, a natural person has the right to life, healthcare, the right to an environment safe for living and health, the right to freedom and personal integrity, the right to the integrity of personal and family life, the right to respect for dignity and honor, the right to secrecy of correspondence, telephone conversations, telegraphic and other correspondence, the right to inviolability of the home, the right to freedom of residence and movement, the right to freedom of literary, artistic, scientific and technical creativity.

The systematic interpretation of the content of Article 270 of the Civil Code of Ukraine (2003) makes it possible to divide all personal non-property rights of an

individual in the field of health care, depending on their place in the sources of law, into the following groups:

- personal non-property rights of natural persons that are constitutional (in particular, the right to life, the right to health care, the right to an environment safe for living and health, the right to freedom, the right to the integrity of family life, the right to medical care);
- personal non-property rights of natural persons, which are regulated by the Civil Code of Ukraine (in particular, the right to information and the confidentiality of information on one's health, the right to blood and organ donation, the rights of a natural person undergoing treatment in a health care facility);
- personal non-property rights of natural persons regulated by other acts of legislation (for example, the right to consent, to safety during medical intervention, the right to an individual approach during treatment);
- personal non-property rights of natural persons, which are not regulated by the legislation of Ukraine, are protected in accordance with the rule on the non-exhaustive nature of such rights (in particular, the prohibition of discrimination and protection during scientific research).

Now, almost twenty years after the adoption of the Civil Code of Ukraine (2003)—the content of which is no longer sufficient to regulate personal non-property rights even in the field of health care in their modern understanding and perception of realities—it does not define the concept of a personal non-property right; instead, it indicates its features.

Personal non-property rights belong to every natural person by birth or by law. Personal non-property rights of an individual have no economic meaning. Personal non-property rights are closely related to an individual. An individual cannot waive personal non-property rights, nor can they be deprived of these rights. A natural person owns personal non-property rights for life (Civil Code of Ukraine, 2003, Article 269).

Also, the issue of personal non-property rights belonging to the sphere of civil law is debatable. Lilia Fedyuk (2006) notes: “The views of scientists on the problem of legal regulation of personal non-property relations by civil law are not unambiguous during the entire period of research on this issue” (p. 10).

The majority of scientists define personal non-property law as private non-property goods, in particular, those “deprived of property content, inextricably linked to the subject of civil law, recognized by society, and therefore protected by civil legislation” (Kharitonov, 2003, p. 171). As Ruslan Stefanchuk (2016) notes: “The rights of an individual as a human being have superseded his/her rights as an owner, as a subject

The enduring Ukrainian conflict since 2014 has cast global legal frameworks into a crucible of challenges and prospects. This collective monograph, composed by twelve erudite scholars across twelve chapters, delves deep into law's interface with warfare, spotlighting Ukrainian dynamics.

From healthcare's human rights conundrums during martial law, dissected in Chapter 1, to the emergence of molecular genetic testing's role in criminal proceedings, elaborated in Chapter 2, the legal landscape transforms under wartime duress. Chapter 3 navigates criminal law's adaptation amidst conflict, while Chapter 4 scrutinizes the tax information exchange's integration challenges post-war.

Corruption's nexus with military realities takes focus in Chapter 5, followed by Chapter 6 illumination of Ukraine's criminal justice evolution during all-out war with Russia. Chapter 7 interweaves war's aftermath, victimology, and human rights, employing a holistic human rights lens.

Chapters 8 and 9 scrutinize military justice reform and property rights' protection, both bearing war's imprints. Intellectual property law's transformation amidst conflict is unravelled in Chapter 10. Chapter 11 unpicks real estate law complexities, and Chapter 12 questions the Ombudsman's efficacy under martial law.

With precision, this monograph navigates Ukraine's legal labyrinth during conflict, underscoring challenges and avenues. It offers a profound perspective on how law dynamically engages with war's crucible, emerging resilient and transformed.