MEDICAL ETHICS AND THE ROMANIAN LAW. SURROGATE DECISIONS REGARDING LIFE-SAVING MEDICAL INTERVENTIONS

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Abstract

Romanian doctors who encounter controversial surrogate decisions such as refusal of life-saving interventions react differently from an ethical perspective. Some do not take into account the surrogates' rejection of treatment, while others respect and abide by the surrogates' decision and withhold the refused procedures, forgoing their ethical responsibilities. In this article we will defend the ethical position that doctors should consider and, therefore, thoroughly evaluate the surrogate decisions in cases where the medical intervention is life-saving and the benefits for the patient are significant and certain.

The doctors who choose to obey the controversial decisions of surrogates usually invoke the Romanian medical law. In the following we argue that in today's Romanian medical framework there is a conflict between ethical (professional) obligations and the some of the legal provisions and we provide two ethical arguments, one principlist and one contractualist, that prompt for the overriding of refusals which concern life-saving interventions.

Keywords: surrogate decisions, life-saving interventions, medical law, medical ethics, professional obligations, principlism, contractualism.

By reason of their immaturity, minors lack moral autonomy, being, thus, unable to make their own decisions. Therefore, parents are expected to make medical decisions in the minors' place. Also, due to different causes, e.g. drugs, anxiety, illnesses, the decision making capacity of some adults may be impaired either totally or just partially. According to medical ethics, when dealing with incompetent adults, the doctors are expected to doubly insure their medical decisions and actions, in order to respect their ethical obligations, even though by acting according to these ethical commandments they overrule their patients' options.

From an ethical and legal point of view adults are allowed to refuse treatment, unless they do not have the competence to take decisions. When dealing with competent patients, despite the fact that certain refusals may appear as irrational or controversial, doctors have the ethical and legal obligation to respect the patients' decisions, as patients have the moral and legal right to refuse medical treatment or interventions. If patients comply with the requirement of competence, their moral autonomy grants them the power to refuse even what is in their best interests. This is the widely accepted ethical standard of autonomy in evaluating patients' decisions.

Manuscript received: 22.11.2013
Accepted: 06.12.2013
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Even though we acknowledge that certain autonomous decisions are subject to irrationality, we assume here, as a premise, the idea that the decisions of autonomous patients should be obeyed by doctors, only if the patients fulfill the standards of autonomy as they have been classically understood in medical ethics, i.e. as a capacity to choose intentionally, in an informed manner and without coercive influence [1,2].

We also assume that in certain cases all that incompetent adults are able to choose is a health care proxy capable of deciding on their behalf and representing them in the relation with the doctors. Yet, the surrogate decision maker must, in her/his turn, fulfill the three above mentioned conditions which define the autonomy of the patient. However, the fact that the surrogate is autonomous does not necessarily imply that the decision made cannot be controversial. In what follows we will try to argue that it is in the best interest of the patient that doctors should always contextually assess these substitutive decisions.

If in the case of the minors autonomy is not presupposed, and a surrogate decision maker, usually the parents or guardian is always needed when confronted with the medical system, adults' competence is generally presumed by doctors.

Situations in which doctors are confronted with controversial decisions made by the patients are signs which point to a possible lack of competence of the patients,

thereby entailing an ethical obligation to evaluate their competence.

The obligation to evaluate the competence of the patient is not explicitly stipulated for by the Romanian legal regulations. Therefore it is debatable whether the doctors by themselves are legally responsible for deciding upon the competence of their patients in borderline cases, e.g. when the patients seem competent, but due either to external influences such as drugs or medications or to internal psychological conditions, their competence can be affected. The Romanian code of medical deontology states that only decisions made by patients who are mentally disabled or suffer from a disease or similar reason, should not be obeyed by doctors [3]. In case the patient cannot express her/his will and there is an emergency situation, then the legal provisions instruct the medical staff to infer the consent of the patient from a previous expression of her/his will [4].

Yet, the ethical obligations of doctors require the evaluation of the competence of their patients [5]. However, the necessity of this evaluation cannot be limited to obvious cases of lack of decision capacity due to mental illnesses or mental disability. Rather, from an ethical point of view, it should be exercised in every encounter with a patient, as it should also be exerted when dealing with surrogate decision makers [6], even though the Romanian legal provisions do not impose any evaluation of the surrogates' competence. In our view, the surrogates' medical decisions concerning the persons they are responsible for require more consideration and imply the choice and use of one of several standards of decision making, as well as the legitimate grounding of that particular choice.

The main ethical problem regarding competent surrogates is that *they are not patients*. Therefore, their consent "is not a species of consent" [7] because the patients have never „expressly abandoned their rights to decide" [7]. That means first of all that they enjoy a different kind of autonomy from that of the patients. Generally, doctors who obey controversial surrogate decisions implicitly understand the autonomy of the surrogates as identical to the patients' decisional autonomy. That is why the decision made by the closest relative or by the legal representative is regarded as being identically worthy as the patient's decision. Still, its value is not identical with the value of the patient's decision, and, hence, each surrogate decision should be evaluated by doctors[8, 9].

If neither the autonomy of the surrogates, nor the value of their decisions totally supersedes the patient's autonomy and decisional value, the question that arises concerns the prerogatives of patient-representation. In other words, in which way do surrogates represent patients?

The medical ethics literature has established several principles in the process of surrogate decision-making: the advanced directives principle, the best interests principle, the substituted judgment principle [8,9]. These principles have been established such as to fit different cases. Still, in certain cases, these principles become conflicting, as in the cases when surrogates refuse life-saving treatment. In these cases, the freedom of choosing between using either the best interests principle or the substituted judgment principle could lead to opposite decisions.

Yet, when dealing with different contextual medical situations, in which surrogates decide for the refusal of life-saving treatment and the benefits for the patient are significant and certain, the doctors are confronted with one more difficulty: that of evaluating whether the principle chosen by the surrogate while legitimating his/her decision, concerning the medical state of the patient they represent, has been rightfully used, or not. However, certain rules of precedence have been established as guideline for overcoming this difficulty. One of these rules proposes establishing the precedence of a *valid* advanced directive [9]. Still, certain arguments have been provided against this rule [9].

But even though the medical ethics literature has established several principles in the process of surrogate decision-making, the Romanian legal framework contains certain ambiguities concerning the standards of surrogate decision making. Thus, the Romanian law no. 46/2003 regarding patients' rights explicitly endorses in article 17 the best interests principle as the guiding rule surrogate decision making. If doctors consider that the refusal of any treatment is against the best interests of the patient, they can override the surrogate's decision and refer the case to a committee formed by two doctors for outpatients and by three doctors for inpatients.

On the other hand, the law no. 95/2006 regarding the reform in the healthcare domain does not stipulate any standard for surrogate decision making [10]. But because this law states that only legal representatives or the closest relatives can make surrogate decisions, it is usually invoked by professionals in the Romanian medical framework, when they obey controversial surrogate decision. The fact that this law does not endorse any standard for surrogate decision making, allows doctors to invoke the fact that any decision made by a competent surrogate has to be obeyed, without any exceptions. According to the same law, the emergency situations are the only exceptions to the requirement of patient or surrogate consent. We consider that the inconsistency between the two laws leads to infringements of ethical obligations. Therefore, in the following we will try to demonstrate that legal inconsistency contravenes the professional ethical obligations of doctors and we will try to argue using two arguments that pertain to the contemporary general requirements of medical ethics.

At least two arguments developed by different theoretical approaches to medical ethics support our claim: a principlist argument and a contractualist argument. As it is deducted from the case of Jehovah's Witnesses' refusal of blood transfusion for their children, the principlist approach has labeled this case as paradigmatic for surrogate decision

making [11].

An European perspective upon the principlist approach is proposed by Raanan Gillon, who coined the "four principles plus scope approach". This perspective clearly stands against the acceptance of surrogates' refusal of life saving treatment and advocates that this type of decision should be overridden by the doctors. He grounds his view on the argument that the case of Jehovah's Witnesses' refusal of blood transfusion for their children falls outside the scope of the principle of autonomy [11]. Namely, what parents regard as important and consistent with their own religious convictions should be edged out by what society regards as the child's best interests.

Tom Beauchamp, the founder of the principlist approach, discussing the case brought forth by Gillon states that the doctors should override the parental refusal of treatment on the basis of a moral *requirement.* He affirms that not only that the doctors are permitted to overrule the parental refusal of treatment, but, rather, they are morally required to do so [12].

In the case of the parents' refusal of their children's treatment, two moral rules derived from two moral principles, that of respect for autonomy and that of beneficence, should be taken into consideration by doctors. But the fact that, in this specific case, the two moral requirements enter into conflict entails a moral dilemma.

The first moral rule involved in this case regards the prohibition *not* to treat the patient when her/his life is at stake and medical intervention is possible. The second rule regards the respect that doctors should have for the parents'/surrogates' decisions. Beauchamp's principlist approach uses specification of universal and general moral principles in order to offer solutions to particular cases. For this case, he proposes, in a form that includes its exceptions i.e., child abuse, child neglect and violation of the child's rights, a specification of the second moral rule [12]. In the evaluation of surrogates' decisions, the respect for the autonomy of the patients is superseded by the standard of the best interest. Irrespective of the convictions of the parents/surrogates, in life saving cases, the refusal of treatment is considered as immoral and, therefore, it should be rejected by doctors. For Beauchamp, the same argument applies to the case in which the surrogate decides for an incapacitated adult and the treatment or intervention is life-saving. In the latter case, the only exception could be a written advanced directive, previously made by the competent patient in which he expresses clear instructions about the refusal of life-saving treatments or interventions in situations that are applicable, which would thus confirm the surrogate's decision [12].

The second argument, the contractualist one, which emphasizes the inadmissibility of the surrogate's refusal to let the child treated, advanced by Rosamond Rhodes [6], is based on the different moral weight and acceptability of reasons which are invoked for the surrogate's refusal of medical treatments or interventions. Rosamond Rhodes argues that in the case of those treatments or interventions which have high chances of yielding good results, their refusal *should be, in all cases, disobeyed by the doctors*. The contractualist approach of Thomas Scanlon [13], differentiates among three types of concentric reasons, starting from a core of reasons which could not be rejected by any reasonable person, continuing with central reasons which could be differently prioritized by reasonable persons and ending up with reasons that others could reject without being considered unreasonable.

Starting from Thomas Scanlon's model of concentric moral reasons, Rosamond Rhodes defines three types of surrogate decisions, according to the outcome of the intervention.

The first category of decisions concerns the medical situations in which the outcomes of treatments are certain but for sure not life-saving or life improving, being rather only life prolonging, but implying adverse effects. In this case, from an ethical point of view, it is recommended that the surrogates opt out treatment and choose palliative care. In this type of situations, no reasonable person could object to this choice.

The second category of decisions regards the situations in which the outcome of treatments are either uncertain, or quite similar. In these cases, the surrogates are entitled to make any decision based on their own assessment of the worthwhile life of the patient they represent. In this kind of situations, equally reasonable persons could choose differently, based on their prioritization of moral reasons.

The third category of decision refers to the medical cases in which the outcome of treatment is certain and assessed as very good. In these cases, the surrogates' refusal of treatment involves the third type of reasons mentioned above, i.e., those which are irreducibly personal and risk to be rejected by other reasonable persons. Moreover, it is not sure that these entirely personal reasons invoked by the surrogates, when deciding for the refusal of treatment, would be shared by the patients themselves, if they were able to decide themselves. In these situations, the ethical obligations of the doctors are to disregard the surrogates' decisions and initiate life-saving interventions. The latter type of decision concerned us the most in this article.

Within this paper, we emphasized a few shortcomings of the Romanian legal framework concerning surrogate decision making, namely the surrogates' refusal of life-saving intervention for the person(s) they represent. We have based our analysis on the fact that the Romanian legal system allows doctors to accept controversial surrogate decisions. In this article we have tried to demonstrate that this type of attitude infringes upon the doctors' ethical obligations. Thus, we have offered two ethical arguments against the surrogates' refusal of life-saving intervention for the person(s) they represent and referred to a legal as well as *ethical* option of overriding surrogate decision, that of appealing to a committee of doctors able to ethically decide upon such controversial medical issues.

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