

Analysis of Patients' Consent Right in a Surgery
-Triggered from the social event that a parturient
in Yulin jumped off a tall building-

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I . Introduction

The recent “Event that a parturient in Yulin jumped off a building on 8.31” in Shaanxi Province has aroused strong doubts and deep reflections from all fields. In this case, Mrs. Ma’s first baby was waiting for delivery after she was pregnant for forty-one week. After being checked by doctors, it was found that the head of the baby was too large and the risk of vaginal delivery was relatively high. Thereafter, the medical personnel responsible for the delivery of this woman introduced Ma and his family members in this situation. After examining the results, it was suggested that cesarean section was better. However, Mrs. Ma’s husband and parents all advocated spontaneous delivery, and signed the Informed Consent Letter of the parturient patient. Through the nursing record sheet of Yulin First People’s Hospital, it was found that the parturient got out of bed several times and required cesarean section around 5:50p.m. due to the unbearable pain. However, when the medical staff asked Mrs. Ma’s family for their opinions on caesarean section, Mrs. Ma’s family members refused the suggestion. After that, Mrs. Ma went out of the delivery center twice to discuss with her family members for caesarean section. The family members still disagreed. At 8:00pm, Mrs. Ma jumped off the building and died. Although the authorities eventually identified the reasons and gave satisfactory results to all parties, we believe that this incident could have been avoided, because the focus of the incident is on whether the women should take caesarean section and who should exercise the final consent. In case of emergency, the patient’s operation should be preconditioned by the signature and consent of family members or relatives. Why a parturient with full civil capacity can’t freely choose to give

birth to a baby although her life is seriously threatened? Why doctors can't exercise special disposal right in such emergency? Since the right to life is an indispensable right for a person to be treated as a human partner,¹⁾ it is necessary for us to rethink the ownership of patients' right to consent to surgery. Through the analysis of the relevant legal documents formed by China, it is found that, for a long time in China, patients' right of consent in a surgery has formed an exercising mode of "consent priority is given to others while their own consent is only regarded as a supplement". From the legal point of view, this is an irrational level inversion. Because of the restraint of medical system and the conflict between doctors and patients, this kind of exercise mode of patients' right of consent in a surgery is neither appropriate for our country, nor can fundamentally solve the current tense relationship between doctors and patients, so we should regard patients' life as priority. And the ownership of patients' consent right in a surgery should be determined in a rational manners according to different situations, and the ownership of patients' consent right should be rationally ascertained.

II. The development of patient's right of consent in surgery and its dilemma in China

From the perspective of the root of rights, the ideological basis of patients' informed consent right lies in emphasizing the irreplaceability of individual.

1) A. J. M. Milne(1999), *Human Rights and Human Diversity - Philosophy of Human Rights*, translated by Xia Yong, Zhang Zhiming, Beijing: China Encyclopedia Press, p.158.

Based on the hypothesis of a rational person, patients have the right to decide what to do and what not to do without infringing upon the legitimate rights and interests of the state, the collective, and the third party. Medical behavior, which means patients take risks with their own bodies, is related to their life, health, and their fundamental rights and interests. Therefore, doctors should fully respect patient's personal wishes and allow them to participate in the process of medical treatment. With the patient having a fully understand of their own situation and listening the professional guidance from doctors, they should decide on their own treatment options and implement their real sense of personal autonomy. From the content of rights, as a compound right, patients' right to informed consent is consist of the right to know and the right to self-determination. The right being informed refers to the right that patients should know the condition of the disease, the plan of diagnosis and treatment to be adopted, and the risks and alternative measures in the process of medical treatment. The right of consent refers to the right of patients with independent evaluation ability in diagnosis and treatment, or the right to decide freely on the choice of medical plans made by their close relatives when they lose the ability of independent evaluation.

Without the right of being informed, the exercise of the right of self-determination will become dependent on others; without the right of consent, the exercise of the right of being informed will become nothing. Therefore, the right of being informed is the premise and basis of the right of self-determination, and the right of self-determination is the judgment and choice of the right of being informed. They are closely related and cannot be separated. From the perspective of human's natural rights, patients' right to informed consent belongs to the general personality right. Personality right is recognized by law, with personality interests as the object, the civil subjects enjoy the basic

rights equally, and the patients' right of informed consent, which implies the patients' personality rights of "under the non-compulsory state and after hearing the instructions of the doctors and their own wishes, they can choose or reject the available diagnostic and therapeutic measures", and this right can only be manifested in the relationship between doctors and patients. This is a sign of a fundamental distinction from other kinds of personality rights. Although in practice, there is a close intersection between the right of life and health and patients' right of being of informed, it's not appropriate to simply recognize that "the right of being informed is a kind of indirect power since it is derived from the right of life and health. When there are conflicts between them, the right of living should be given priority".

1. The patients' consent right in a surgery during the period of administrative order

In the March of 1951, the State Council of policy in China (renamed the national Council in 1956) promulgated the Provisional Regulations on the Management of Hospital Clinics. The 17th article of the Regulations stipulates that "When a hospital clinic carries out a major operation on a patient or a critical condition and requires special emergency treatment, it can only be carried out after obtaining the consent and signature of the patient and his or her relatives. As for minors, or patients who are unconscious and have no relationship with others, their consent may not be required, but the person in charge of the hospital clinic and the surgeon responsible for the operation shall sign and testify to the situation." This is the first time that the government

stipulates the patients' right of consent to the operation in the form of laws, which stipulates the two situations of "major operation" and "critical condition". The right of consent to the operation is granted to "patients and their relatives". Obviously, the right of consent to the operation here belongs to the patient himself and his relatives. Both consents are required before the operation can be performed on the patient.

By 1956, the State Ministry of Health issued documents to cancel this provision, and then gradually formed a system in practice that patients need to be signed and consented by the leadership of the working unit. Under this system, if patients want to be hospitalized, they need to open letters of introduction from the unit. After arriving at the hospital, doctors define their work as a political task organized by the organization. The treatment of patients depends entirely on loyalty to the Party while they are not proficient in performing the surgery. Moreover, patients can not object to the results of treatment, otherwise they may be regarded as counter-revolutionary. Although the consent right of patients during this period was stipulated by the national Council, we can not see the attributes of administrative regulations, but see the attributes of administrative instructions in the era of planned economy.

2. The patients' right of consent to surgery in the period of administrative legislation

In the April of 1982, Chinese Ministry of Health promulgated the Hospital Work System, which stipulates in paragraph 6 of article 40 that "before the operation, the patient's family members or units must sign the consent (surgery

on the surface of body doesn't need to be signed). When the emergency operation is too late to seek the consent of the family members or organs, the doctor in charge may sign it, and it shall be carried out with the approval of the chief medical officer, the president of the hospital and the vice president of the department.” In the February of 1994, the State Council promulgated the Regulations on the Administration of Medical Institutions, which stipulates in Article 33 that “When a medical institution carries out operations, special examinations or special treatments, it must obtain the consent of the patient and obtain the consent and signature of his family members or relatives; when it is unable to obtain the patient's opinion, it shall obtain the consent and signature of the family members or relatives; and when it is unable to obtain the patient's opinion, it shall be unable to obtain the cones in the absence of family members or relatives, or in other special circumstances, the physician shall propose a medical treatment plan, which shall be implemented after obtaining the approval of the person in charge of the medical institution or authorized person. It is undeniable that these regulatory documents on patients' right to consent to surgery has not only obtained great benefits to the development of national medical and health undertakings in the early period of reform and opening up in China, but also play a very good exemplary role in the later medical and health legislation. It can be seen from the law that Article 10 of the Code of Medical Record Writing (Trial Implementation) promulgated and implemented in 2002 is basically the same as Article 33 of the Regulations on the Administration of Medical Institutions implemented in 1994. These three representative legal documents show a common point, among which the provisions on the right of consent to surgery of patients in China belong to the category of administrative legislation. There is still a big gap between them and the status of the criminal

law and other departmental laws. The administrative nature of the laws and regulations also makes it more difficult to deal with disputes related to this.

3. The patients' right of consent in a surgery during the legislative period of the NPC

In the July of 2010, the Tort Liability Law of the People's Republic of China, which is regarded as the basis of guaranteeing citizens' rights, was formally promulgated and implemented. Article 55 of the Law stipulates that "During the provision of medical care, the medical staff shall explain the illness condition and relevant medical measures to their patients. If any operation, special examination or special treatment is needed, the medical staff shall explain the medical risks, alternate medical plans and other information to the patient in a timely manner, and obtain a written consent of the patient; or, when it is not proper to explain the information to the patient, explain the information to the close relative of the patient, and obtain a written consent of the close relative." This marks that the issue of patients' right to consent to surgery has been formally brought into the scope of law to adjust. The promulgation and implementation of this Law marks that disputes about patients' right to consent to surgery have become legal, which is a historic progress. Article 56 stipulates that if the patient or his close relatives are unable to obtain the opinions of the patient or his close relatives due to emergency situations such as rescuing dying patients, the corresponding medical measures can be implemented immediately with the approval of the person in charge of the medical institution or the authorized person in charge. Although the special disposition right of doctors in

emergency cases is stipulated, it is still preconditioned by the fact that "the opinions of patients or their close relatives cannot be obtained", that is to say, if they can be obtained, they should be dealt with according to the opinions obtained.

III. Triple interpretation of the impropriety of patients' right of consent in a surgery

As for society no matter at any time, the drawbacks of a system can not be used as a reason to hide the goodness of conscience, since there are still morals, conscience and responsibility.²⁾ Looking back on the development and change of patients' right to consent to surgery since the founding of China, it has been making a difficult progress. In the early days of the founding of the People's Republic of China, because of the planned economic system, and the low level of productivity, the whole society lays special emphasis on the role of collective in the survival and development of individuals, which makes the working unit have absolute voice over everything of individuals. This provision is reasonable in the case of low level of productivity development at that time. Since the 1990s, with the establishment of the socialist market economic system in China, the level of social productivity has been improved qualitatively, and the provisions on the right of patients to consent to surgery in the medical field have also been cancelled. However, the preconditions for patients to obtain the

2) Ruan Zhanjiang(2007), We must not let the shortcomings of the system obscure the goodness of conscience. Legal Daily, p.3.

consent of their close relatives or relatives are still retained, which are mainly embodied in The Regulations on the Administration of Medical Institutions and other norms. In our country, the right of informed consent of patients led by the patriarchal mode of law was first seen in the administrative regulations promulgated by the State Council and the regulations issued by the Ministry of Health. Patients' wishes should be respected in medical activities, and consent and signature of family members or relatives should be obtained. However, there is no responsibility for infringement of the right of informed consent. The Law of Licensed Doctors, which came into effect in 1999, is the first law concerning the right to informed consent. It requires that patients or their families be told the truth about their illness. When medical personnel violate the obligation to explain, they should bear administrative and criminal responsibilities. The Regulations on the Treatment of Medical Accidents, which came into effect in 2002, clarified the contents and matters needing attention of doctors; the Law on Tort Liability for Travel in 2010 the Law on Tort Liability for Travel in 2010 and the Basic Standards for Medical Record Writing specified the subject of signature and consent under various circumstances. In addition, the right to informed consent was also stipulated in some normative documents, such as the Measures for the Management of Medical and Beauty Services and the Regulations on the Management of Family Planning Technical Services. Today, some of these Provisions are out of date, contrary to the original intention of the constitution to respect and protect human rights, not in line with the provisions of the general principles of civil law on the protection of private rights, and not in line with the original intention of the national medical legislation to protect the health of citizens.

Looking at the current legislation on patients' right to informed consent in

China, we can see that: firstly, the provisions of patients' right to informed consent in China have experienced a process from administrative regulations and departmental norms to law. The gradual increase of its legal effect and the steady improvement of its legal status reflect the increasing emphasis on the individual autonomy under the patient's right to know in our country. Secondly, the provisions of the patient's right to informed consent in our country have gone through a process from rough to delicate, from incomplete to relatively complete. The gradual refinement of the right content makes the risk liability based on the doctor-patient relationship have a clear division. The effective exercise of patients' right to informed consent and the effective fulfillment of doctors' obligation to explain and inform also effectively alleviate the contradiction between doctors and patients to a certain extent. Thirdly, the provisions of patients' right to informed consent in our country stipulate that the medical party should be responsible for infringement and damage. Less attention has been paid to the burden of civil liability and more emphasis has been placed on administrative and criminal liability. Before the enactment of the Tort Liability Law, the determination of its civil liability is usually based on the relevant civil laws and judicial interpretations such as the General Principles of Civil Law.

1. From the perspective of human rights, patients' right of consent in a surgery violates human's right of freedom

Kant, a German philosopher, pointed out in his *Western Theory of Human Rights* that "there is only one natural human right, that is, the inherent freedom

of human beings”.³⁾ From this point of view, everyone is born free. Here we externalize it into human rights and extend it to patients’ right to surgery. Individuals have the right to choose whether or not to perform surgery on their own body. However, under current regulations, even if the law stipulates that citizens have certain rights but does not stipulate the proper defensive power of the right. Unfortunately, the right will not be exercised normally without defensive measures. In fact, the defensive power of rights is aimed at all social subjects other than the subject of rights. Although it is not absolutely non-interference, it is not allowed to be interfered in most cases, including citizens, social organizations and various state organs. After careful analysis of the contents of Article 33 of the Regulations on the Administration of Medical Institutions, it is found that besides the consent of the patient himself, the consent of his family members or relatives is also required. Even in special circumstances, the doctor in charge proposes a disposal plan, which can be implemented only after obtaining the approval of the person in charge of the medical institution. From the perspective of individual rights, this provision has broken through the basic rights boundaries and violated the patient’s right of free choice. Because it is stipulated by law, it makes this illegal provision legalized. From a legal point of view, 33 articles contain three layers of meaning, and the three layers of meaning are irreversible progressive relations, rather than parallel relations. Once there is a situation of whether to perform surgery on the patient himself, the article should be selected layer by layer according to the article. If the upper layer of provisions can achieve the purpose, it will not continue to choose. Only the upper layer of provisions can not be implemented. Only in the

3) Kant(1994), *Scientific Introduction to Rights, Western Human Rights Theories (Part I)*, Chengdu: Sichuan People press Society, p.188.

present situation can we enter the next level of choice. Because it is a legal mandatory provision, patients themselves can not be changed. This one-size-fits-all principle stipulation is the "right of consent"⁴⁾ at the cost of patients' lives, which will eventually deprive patients of their basic right of free choice.

2. From the perspective of civil law, it violates patients' right of informed consent

According to Article 110 of the General Principles of Civil Law, "natural persons enjoy the rights of life, body, health, portrait, name, honor, reputation, privacy and marital autonomy". Current provisions on patients' right to consent to surgery violate patients' right of being informed of their own lives and health. The right of being informed and consent in medical care around the world was first seen as a legal reference in the California Court of Appeal of the United States in the trial of *Salgo v. Leland Stanford* case. Finally, it was explicitly stipulated by law that the World Medical Conference was held in Portugal in 1981. In the Lisbon Declaration adopted at the same time, each country has formulated corresponding legal norms according to its own national conditions, which further makes the right of informed consent of patients in specific medical treatment have a general and clear provision.⁵⁾ As far as our country is concerned, there is no provision on the right to informed consent in the current general principles of civil law and relevant laws and regulations. One reason is that we have been influenced by the philosopher Hippocrates' comments for a long time. In practice, in order to stabilize

4) Hu Xiaoxiang(2007), Does China have compulsory medical rights, *Journal of Nanjing Medical University* (Social Science Edition), (4), p.272.

5) Li Xiaoni(2003), On the Obligation of Doctors to Inform and Explain, *Medicine and Philosophy*, 24 (4), pp.16-17.

patients' emotions and urge treatment, we usually try to conceal patients' condition. Another reason is that the legal nature of patients' right to consent to surgery is still controversial. The mainstream legal attributes of patients' consent to surgery are empowerment theory, domination theory and contract theory. Authorization theory holds that the consent signed by the patient and the hospital is the authorization for the possible harmful acts of the hospital during the operation;⁶⁾ Dominance theory holds that the consent right of the patient during the operation is a form of domination of his own right to health,⁷⁾ the patient has exclusive right of health in the world; The contract theory holds that the consent to the operation is a contract. The text specially produced the patient's condition, including the operation plan, the possible operation risk, the recovery after operation and the review plan, etc., It is regarded as an offer,⁸⁾ and the signature of the patient after the explanation of the doctor's instructions is regarded as a promise, and the act based on the offer and commitment is a contract act. On the contrary, the natural person's right of life and health can not be authorized to others in exercise. The right of domination is an absolute right of individuals and a right to live. Although the right can be abandoned, according to the provisions of the criminal law, other people can not deal with the right to life and health of others in a legal way. Although the contract is closest to the nature of the patient's right to consent to surgery, it still can not solve the problem. Doctor's exemption clause and the possibility to change the operation plan in case of emergency do not meet the necessary conditions for the conclusion of a valid contract.

6) Chen Jianbo, Hu Wangwei(2004), Is it lawful for others to sign the operation on their behalf, *Medicine and Society*, (1), pp.50-51.

7) Hu Zongyuan, Cai Wei(2002), A brief talk on the nature of surgical signature, *Lawyer World*, (6), p.32.

8) Chen Honggang(2004), Legal Significance of Operative Consent, *Journal of Central South University for Nationalities* (Humanities and Social Sciences Edition), (2), p.112.

3. From the 33th article of the Regulations on the Administration of Medical Institutions, the provisions on the special handling right of doctors are inappropriate and there is artificial circumvention

This can be seen from the provisions of Article 33 of the Regulations on the Administration of Medical Institutions. After deliberating on the 33th article, we can get the following legislative logic: when patients can correctly express their meaning, doctors should obtain the dual consent of patients and their families or relatives; if patients are in coma or have other inaccurate expressions of personal meaning, then their families or relatives should decide to perform surgery. Obtain the consent of the patient's family members or relatives; if the patient's family members or relatives are not present and other special circumstances occur, the patient's attending doctor should propose a special case disposal plan, and implement the doctor's special disposal right after obtaining the approval of the person in charge of the medical unit. From this, we can see that 33 provisions concerning the doctor's special disposition right lie in the third sequence, and the third sequence is certainly prohibited when the first and second sequences can achieve the purpose. According to the medical practice of hospitals at all levels, 99% of patients are accompanied by family members or relatives. Even in the case of the third sequence, doctors will not actively exercise their special disposal rights. Instead, they choose to carry out necessary medical treatment for patients and identify the identity of patients so as to ensure that after finding relatives or relatives, they will follow the first and second order. The prescriptions listed above make the utilization rate of the doctor's special

disposition right negligible. The doctors' choice of closing the gap between doctors and patients is related to the tense doctor-patient relationship in our country for a long time. The deeper reason is that the seemingly mandatory clauses are "reasonably circumvented" by doctors in practice due to the improper provisions of 33 articles.

IV. The way of sorting out patients' right of consent in a surgery in China

1. Replace "relatives" with "close relatives" and specify the applicable order

Generally speaking, in Chinese society, maternal "family members" often refer specifically to her husband or mother-in-law families. Therefore, hospitals often choose husband or even "mother-in-law family members" to sign the agreement. As far as China's law is concerned, there are not many legal provisions using the term "family members". The Hospital Work System in 1982 and the Regulations on the Administration of Medical Institutions in 1994 are two rare administrative regulations which use the term "family members" frequently. However, the two regulations do not define who are the eligible subjects of "family members". The most common legal term similar to the term "family members" is "close relatives", which can be found in Article 55 of the Tort Liability Law on Medical Matters enacted by the National People's Congress and its Standing Committee. This article is not suitable for explaining to the patient

himself when it comes to special examination or treatment in medical activities. When the situation is concerned, it is necessary for the medical staff to make explanation to the close relatives of the patients and to obtain the written consent of the close relatives. After comparing and analyzing the three legal documents of different ranks, and according to the general legislative principles, it can be seen that the Tort Liability Law is formulated by the National People's Congress. When the application of the upper law conflicts with the lower law, the higher law should be superior to the lower law. Therefore, the Tort Liability Law should be better than the Hospital Work System and the Medical Institutions Management Regulations. Therefore, "close relatives" should take precedence over "family members" in the application. According to Article 12 of the Supreme People's Court's Opinions on Several Questions Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (Trial Implementation): "Intimate relatives include spouses, parents, children, brothers and sisters, grandparents, grandchildren and grandchildren", this provision makes the scope of "family members" clear in the legal level. However, there is also a key issue in interpreting the results, if there are different opinions among the subjects of the same sequence, who has the primary decision-making power? This can be dealt with according to the patriarchal consanguinity concept widely believed by the people since ancient times, that is, in non-emergency situations, the same sequence is determined by the principle of "whether there is consanguinity proximity of consanguinity tightness of actual life". Therefore, the first sequence of the right to decide "close relatives" is in the order of mother's parents, children, spouse, husband's parents and the second order. They are brothers and sisters, grandchildren, grandchildren, grandparents and grandparents.

2. Clarify the connotation of the patient's "relatives"

In fact, as far as the legislator intends to see, the term "relative" refers to the basic term of other people except close relatives. According to the principle of "whether or not there is blood relationship distance of blood relationship tightness of actual life" summarized above, the identification of "relative" is based on the "tightness of actual life" to determine the "Yulin parturient falling down event" on the premise that the patient's condition is not urgent. For example, because of the presence of close relatives, it does not involve the issue of "relatives", but because it is a problem in legislation, it is also necessary to clarify here. Since it is judged by the "real life tightness", the hospital can immediately start the "doctor's special disposition right" if the "close relatives" cannot be contacted at the first time because there is no real life tightness between the two. In this case, Xiao Zhijun was the cohabitant of pregnant woman Li Mou and the father of the fetus. In the case of abdominal infection of pregnant women, Xiao Zhijun had no money for treatment, the hospital decided to provide treatment free of charge, and Xiao Zhijun refused to sign the operation. After three hours of dispute, the pregnant woman died. From ordinary people's point of view, the life of pregnant women has been in a high risk. As Xiao Zhijun refused to sign, the hospital can urgently use the doctor's special right to deal with the patient's condition and perform the operation. As for Xiao Zhijun's behavior, it can be judged by law on the basis of this principle.

3. Enforce the special disposal right of doctors and provide national guarantees

In practice, even if the patient is in an emergency, the doctor seldom uses the special right of disposal granted by law. The doctor's essential mentality is to avoid possible medical risks and unnecessary troubles, such as the event happened in Yulin. The patient got out of bed twice because of unbearable pain and failed to communicate with his family members. The doctor should make a judgment on the patient's behavior. That means, the doctor should have determined that whether the patient is in an emergency or not and whether the doctor should start the doctor's special disposal right. It is believe that the doctor has never done this thinking. The doctor's thinking is to let the family members of the patient make the decision whether to operate or not. This practice, regardless of the patient's physical feelings, is undoubtedly to cut off the dialogue between doctors and patients. For this reason, doctors need to be able to improve their medical outlook and sense of responsibility, and dare to enter the heart of patients. Including the modification of the treatment plan and the progress of each step of treatment, we should communicate with patients in time, observe and listen to patients' feelings.⁹⁾ Therefore, it should be made clear in law that the doctor's special disposal right is irreversible. Once the patient's condition is in an emergency, the doctor should start the special disposal right according to professional judgment, because once the patient is sent to the hospital, the risk of his life and health would be transferred to the hospital, in its life in an emergency, the family's judgment is obviously at a disadvantage

9) Du Zhizheng(2017), Clinical Judgment: Based on the Real World of Patients, *Medicine and Philosophy*, 38 (8A), p.5.

compared with the professional judgment of the doctor. This can be learned from the relevant provisions of the Medical Law: Emergency Surgery Regulation promulgated by the United States, which stipulates that when a patient is facing a life threat or his body is faced with serious disability, he or she should be treated without the consent of the patient himself or anyone else.¹⁰⁾ In order to eliminate the psychological risk burden of the doctor, it is necessary for him or her to do so. For patients with special disposal rights, hospitals can imitate the establishment of consultant physician medical system in Britain, and the care group is responsible for the patients.¹¹⁾ Considering the situation of our country, we can explore the responsibility of national guarantee in emergencies and purchase compulsory medical liability insurance for doctors by hospitals.¹²⁾

4. Amend the 33th Article of the Regulations on the Administration of Medical Institutions

After clarifying the connotations of “relatives”, “related persons” and “doctors’ special disposal rights”, it is necessary to amend Article 33 of the Regulations on the Administration of Medical Institutions. The amended article can be expressed in the form of law: “Before performing the operation, doctors should explain the situation to patients. If they need to obtain consent, they should obtain the consent of patients and sign them without the consent or signature of close relatives. Before operation, lawyers, spouses or relatives can be entrusted in

10) Feng Yuzhi, Chen Nannan(2014), Legal Thoughts on the Subject of Surgical Signature in Medical Records. *Lantai World*, (5), p.8.

11) Niu Zhimin, Feng Yuzhi(2011), National Ethical Basis for Substituting Consent for Emergency Medical Treatment, *Medicine and Philosophy*, 32 (1), p.30.

12) Yu Tongxiao, Tian Kan, Zhou Chengyi(2017), Comments and Enlightenment on “Patient Autonomous Rights Law” in Taiwan, *Medicine and Philosophy*, 38 (8A), p.72.

writing to sign on their behalf under specific circumstances; if the patient is unconscious or incapable of civil conduct at the time of admission, the doctor should explain the situation to the close relatives or relatives of the patient, obtain their consent and sign it; Under the circumstance that it is inappropriate to tell the patient about the situation, doctors can inform the patient's close relatives of the illness, urge the patient's close relatives to sign the consent form, and then be recorded by medical staff; when the patient is in an emergency, the doctor's special right of disposal in an emergency is priority, and can not seek the opinions of others, immediately carry out the operation. Article 33 of the revised Regulations on the Administration of Medical Institutions absorbs part of Article 10 of the Regulations on Medical Record Writing, revises the written expression of the original three aspects, and increases the content from the original three aspects to five aspects. Adding the clauses of "patients can entrust their lawyers, spouses or relatives to sign in writing before the operation in place of themselves under certain circumstances" and "close relatives or relatives can be informed to sign consent if there are circumstances that are inappropriate to explain to patients due to the implementation of protective medical measures". We believe that the relationship between patient's autonomous decision-making power and doctor's right to treatment should be fully combined. In view of patient's interests, we should adhere to the priority of doctor's professional judgment. Therefore, this article is clear at the end of the article. The doctor's special right of disposal emphasizes the exercise of the doctor's special right of disposal in emergencies. "When the patient's condition is critical, the doctor has exclusive and special right of disposal."

5. Establishment of pre-medical instruction system

Patients' pre-medical instructions refers to a kind of arrangement and instructions made in advance by patients who have the ability to decide what kind of medical care they will receive when they lose the ability to express in the future. There are two situations for patients to exercise the right of prior instructions: one is to appoint others to exercise the right of informed consent on behalf of patients in the future, the other is to make decisions directly on the possible medical risks in the future. This reflects full respect for patients' right to self-determination. In executing this right, the patient should not only have the ability to identify himself, but the designated agent should also have the ability to identify. The Mainland of China can learn from the relevant systems in Hong Kong. The Law Reform Committee of Hong Kong recommends the introduction of "Pre-set Medical Instructions", i.e. Book treatment arrangements for coma or deterioration of illness before awakening, including whether to receive blood transfusion, life maintenance or other treatment, even oral instructions have legal effect. Even if the family objected, the doctor could only follow the patient's medical instructions. In our country, if the establishment of the system of pre-medical instructions restricts the abuse of the right to informed consent, the scheme or agent designated by patients through pre-medical instructions would be the optimal choice, but the content of pre-medical instructions can not violate legal norms or professional ethics. If patients abuse the system of medical instructions, such as euthanasia, medical staff can make appropriate intervention.

V. Conclusion

The era we live in is the mother of thought, and practice is the source of theory. In the great Hippocratic era, as long as the doctor thought from the patient's point of view, and the real intention is to maximize the interests of patients, he could carry out treatment for patients without informing, and they could even deceive patients. Under this patriarchal medical model, there is a friendly and trustworthy relationship between doctors and patients. However, with the change of times, the relationship between doctors and patients has gradually become vague, and the pursuit of interests has also been alienated. Maintaining the relationship between the two sides depend more on the rule of law. The intervention of legal norms has become an important tool to measure the rights and obligations of both sides. But looking back on the past, what remains unchanged is the patient's health and life hidden under the patient's right to consent to surgery. If there are drawbacks in the system, and if the system is rigidly implemented, the loss of the patient's life and health can be harmful. Patient's right of consent to surgery originated in the traditional soil of our country, which was in line with the social development and progress at that time, but the system also kept pace with the times, otherwise it would lead to the social tragedy like "A parturient woman in Yulin jumped off the building". In order to avoid such tragedies, the current system of patients' right to consent to surgery urgently needs to be established in the design of the system, people should pay attention to the vital interests of both doctors and patients, make the system adapt to the current social system and form, and earnestly safeguard the system that regard the life and health of patients as the core content, this is of great significance to make Chinese people kind and healthy.

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국문초록

환자의 수술동의권의 이성적 귀납 —“위린(榆林) 임신부 추락자살 사건”을 중심으로—

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중국에서 이른바 “위린(榆林) 임신부 추락자살 사건”이 발생하자 이론계와 실무계는 환자의 수술동의권의 귀속에 대하여 다시 고려하여야 한다는 목소리가 나왔다. 본 연구에서는 이 사건에서 핵심으로 되는 환자의 수술동의권에 관한 이론과 제도를 분석하고 그 발전을 모색하였다. 즉, 환자의 수술동의권제도가 행정지령시기와 행정입법시기 및 인민대표대회 입법시기에 서로 다르게 적용되었다는 중국특색의 경험을 가지고 있다.

그 중 가족이나 관계자가 동의할 권한을 가진다는 것을 핵심내용과 전제로 하는 권리행사제도는 다음의 문제점을 가지고 있다. 먼저, 인권적인 시각에서 보면, 현재의 환자 수술동의권은 사람의 자유권에 위배된다. 둘째, 민법적 시각에서 현재의 환자수술동의권은 환자의 알권리를 침해한다. 셋째, 「의료관리조례(医疗管理条例)」에서 보면, 의사의 특별조치권이 의료사고를 의도적으로 회피한다는 의심쩍음이 있다. 그러므로 상기의 분석과 존재하는 제도의 폐단에 기초하여 환자의 수술동의권제도가 본래의 목적으로 회귀하게 하기 위하여, 환자의 수술동의권제도의 합법적이고 합리적인 개선을 모색이 필요하다. 또한 환자에 대한 더 많은 인권적 배려와 관심을 실현하기 위하여, 첫째, ‘가까운 친척’을 ‘친척’으로 바꾸고, 수술동의권자의 순위를 명확하게 하기 위하여, 긴급한 상황이 아닐 경우에는 동순위를 ‘혈연관계의 유무→혈연관계의 가까움 정도→실제 생활의 밀접도’의 원칙으로 확정할 필요가 있다. 둘째, 환자의 ‘관계인’에

대한 의미를 ‘가족’과 ‘관계인’ 등으로 바꿀 필요가 있다. 셋째, 의사의 특별조치권을 통한 의사의 강제의료행위에 있어 국가적 담보가 필요하다. 즉, 긴급한 상황에서 국가가 그 책임을 담보하는 것이다. 병원은 의사에게 강제의료책임보험을 가입하는 방법도 있을 것이다. 넷째, 이상의 세 개 방안에 기초하여 「의료기관관리조례(医疗机构管理条例)」 제33조의 개정은 물론, 관련 법률에 대한 개선도 동시에 이루어져야 할 것이다.

핵심주제어: 의료, 환자수술, 동의권, 귀납, 임신부추락자살사건, 중국

Abstract

Analysis of Patients' Consent Right in a Surgery
-Triggered from the social event that a
parturient in Yulin jumped off a tall building-

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The incident that a parturient jumped off a window of a hospital raised people's reconsideration regarding the assignment of Patient Surgery Consent Right. Since the establishment of People's Republic of China, this thought experienced three development phases: Administrative Instructions, Administrative Legislation, and the Legislation of National People's Congress. Based on the consent of family members or interested parties, the right of consent mode, is violating not only the Patient's right of free choice and informed consent, but the right of doctor's special handling right. The author believes under non-emergency circumstance and the same kinship sequence, the Consent Right shall be assigned by the rule of rational reasoning, which presumed from blood relationship to the closeness of kinship and to closeness relation in actual life. In addition, author believes the right assignment shall be placed with the perspective of family members, interested parties and doctor's special disposition, the law shall be amended from above mentioned aspects accordingly.

Key words: medical treatment, patient surgery, consent right, reasonable sorting out, an event of a parturient jumped off a tall building, China