

PRACA POGLĄDOWA
REVIEW ARTICLE

PROTECTION OF PATIENTS' RIGHTS IN THE EUROPEAN COURT OF HUMAN RIGHTS

OCHRONA PRAW PACJENTÓW W EUROPEJSKIM TRYBUNALE PRAW CZŁOWIEKA

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ABSTRACT

Introduction: Currently, there is little attention paid to studying the characteristic features of the protection of patients' rights in the European Court of Human Rights, which is the fact determining the relevance of the scientific research in this area.

The aim: To define the basic rights of patients and summarize the practice of the European Court of Human Rights with regard to protection of patients' rights in order to formulate proposals as to the ways of the current legislation improvement.

Materials and methods: In the research, the practice of the European Court of Human Rights, international standards of justice, scientific publications of leading experts in the field of medical law, current and prospective Ukrainian and international laws were used. The research is based on the organic combination of philosophic approaches, general scientific and special legal research methods.

Review: The standards and mechanisms of ensuring the rights of patients were singled out from a whole number of international legal acts. In the Ukrainian legislation, the list of patients' rights corresponds to the main provisions of the Declaration of Lisbon on the Rights of the Patient and other international legal acts. The protection of patients' rights in different countries varies based on differences in the laws, organization of the healthcare service as well as economic, social, cultural, religious and moral values. Simultaneously, there are common features in the legal protection of patients' rights, in particular appealing to the ECHR. While considering the cases involving protection of patients' rights based on the Articles of the Convention, the Court has developed a number of positive obligations of the state and minimum guarantees, which should be enshrined in national legislations to protect the rights of patients.

Conclusions: The absence in the national legislation of clearly defined concepts of medical law limits the potential of legal protection of the rights of patients and necessitates the development and adoption of a single legal act to efficiently regulate the rights and obligations of the physician and the patient, provide classification of healthcare services, procedures and conditions of the services provision, quality criteria, etc. The prospective Medical Code of Ukraine shall become such a normative legal act, since the need for its development provides prospects for further research in this area. The ECHR practice affects national legal practices, primarily in the information, social and educational aspects, contributes to development and adoption of new concepts, court legal culture and a new reference system to comply with the Convention and Court practices.

KEY WORDS: European Court of Human Rights, medical law, health care, healthcare services, right to life, patients' rights, legal protection, legal proceedings

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INTRODUCTION

The complex and controversial process of reforming the healthcare system in Ukraine, low level of quality of health care and provision of healthcare services to the population against the background of an increase in the citizens' legal awareness of their rights to health care, rise in the level of legal conscience of the citizens and their legal activity, have resulted in the growing number of legal conflicts with regard to medical activities and intensification of legal protection of patients' rights. Some of the conflicts arise from legal relations in the process of health care provision; others are caused by offenses in providing health care. Despite the administrative, criminal or civil nature of legal conflicts determined by the subject of legal regulation, the settlement of a legal conflict and, simultaneously, the most effective means of protecting the rights of patients is legal protection.

By the Constitution of Ukraine, citizens have the right to take a legal action for protection of violated rights. Legal protection of the patient's rights is an option for the restoration of violated rights, which is guaranteed by modern national states. An important role in the legal protection of patients' rights not only in Ukraine but also in many European countries is played by the European Court of Human Rights, which both protects the rights of patients and affects reforming national medical laws and legal proceedings with regard to health care.

THE AIM

To determine the rights of patients under national and international legislation, practice of legal proceedings of cases involving protection of patients' rights in the

European Court of Human Rights in order to formulate proposals with regard to the ways of improvement of the current national legislation and legal practice in this field of public relations.

MATERIALS AND METHODS

In order to achieve the goal, the judgments and decisions of the European Court of Human Rights with regard to protection of patients' rights were analysed. The judgments and decisions were accessed through the official websites of the European Court of Human Rights [1] as well as the Supreme Court of Ukraine, Ministry of Justice of Ukraine, Verkhovna Rada of Ukraine. Moreover, the international medical law and medical laws of Ukraine, Poland, Latvia, Lithuania and Estonia were studied. In the course of the study, the methods of data extract and content analysis were applied. In addition, scientific publications of leading experts in medical law, the current and prospective international and national legislation were used in the work.

The methodology of this scientific publication is based on the organic combination of philosophic approaches, general scientific and special legal research methods. In particular, the system method is used to carry out a system analysis of the current legislation regulating the procedure of proceedings involving protection of patients' rights. The techniques of the logical method allow determining the most common types of violations of patients' rights. The structural and functional method enables revealing the main aspects of proceedings in the European Court of Human Rights of the relevant category. The comparative legal method allows comparing the experience of foreign countries in legal protection of patients' rights. The method of legal modelling is used to formulate proposals in order to improve the current legislation and practice of proceedings involving protection of patients' rights.

The analysis of scientific sources clearly shows that the issues of medical law and the rights of patients were studied by the recognised scholars, namely: V. M. Pashkov [2-9], Ya. F. Radysh [10], S. H. Stetsenko [11], I. Ya. Seniuta [12], M. Derts & T. Rek [13], D. Karkovska [14], L. Paprzytskyi, K. Zghrizek, L. Tsvaak, J. Overall, A. Taylor, B. Toebes, D. P. Fidler, S. Harmon, T. Torrey, M. H. Silver, R. Klein, G. L. Whittier, L. B. Sneiderman, F. J. Girsh, etc. Meanwhile, the issues of legal proceedings involving protection of patients' rights in the European Court of Human Rights have not been given sufficient attention.

REVIEW AND DISCUSSION

The progress of medical science and practice, especially throughout the twentieth century, has resulted in capability of treating some complicated diseases and allowed mankind to learn and regulate subtle biological processes. Meanwhile, not every achievement of the healthcare system has yielded positive results. Though it is impossible as a matter of principle, currently health practitioners have no obligation to ensure recovery, improvement of the quality

of life and increase in life expectancy for sick people. Most frequently these circumstances result in misunderstandings and conflicts between the interests of patients and physicians, which is likely to give rise to further legal conflicts. In this aspect there are significant problems, namely adverse outcomes of medical interventions and defects in healthcare service provision. A characteristic feature of medical profession is existence of a sufficiently large number of reasons for possible dissatisfaction of patients. Even a slightest deviation from the results expected by the patient may provoke a conflict situation. When it comes to life and health, a human's consciousness and emotions are in a particular state. Errors can be made in any human activity; however, they never acquire such social significance in any other field but medicine [12, pp. 177-178].

Recognizing the potential risks and threats to patients that arise in health care, a number of international legal instruments set out the standards and mechanisms to ensure the rights of patients, primarily the Declaration of Lisbon on the Rights of the Patient, adopted by the 34th World Medical Assembly in 1981. The Declaration provides for the following rights of patients: a) the right to choose freely his/her physician; b) the right to be cared for by a physician whom the patient knows to be free to make clinical and ethical judgements without any outside interference; c) the right to give or withhold consent to treatment after receiving adequate information; d) the right to expect that his/her physician will respect the confidentiality of medical and personal information about him/her; e) the right to die with dignity; e) the right to receive or to decline spiritual and moral comfort including the help of a minister of his/her chosen religion.

When studying legal protection of patients' rights, the attention should be paid to the following acts as well: the European Code of Social Security (1990), Declaration on the Promotion of Patients' Rights in Europe (1994), Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (1996), the European Charter of Patients' Rights (2002), Recommendations of the Committee of Ministers of the Council of Europe "On universal access to health care", "On criteria for the management of waiting lists and waiting times in health care", "On caring for people with chronic conditions", etc. In the last decade of the twentieth century, many countries adopted special laws to protect the rights of patients, including Finland (1992), the Netherlands (1996), Israel and Lithuania (1996), Iceland (1997), Denmark and Turkey (1998), Norway (2000), Croatia (2004), Scotland (2011). In addition, many countries have introduced the institution of Health Ombudsman (Patients' Rights Ombudsman), in particular Finland, Austria, Israel, Great Britain, Norway and Croatia [15].

In Ukraine, the rights of patients are provided for by the Constitution of Ukraine [16], the law of Ukraine "Fundamentals of the Ukrainian Health Care Legislation" [17] and the Civil Code of Ukraine [18]. Under the Ukrainian laws, patients have the following rights: the right to life; medical care; freedom of choice; personal integrity; med-

ical information; medical secrecy; tactful attitude, actions and thoughts based on the principles of universal morality from health care providers and pharmacists; admission to them of other health care providers; admission to them of family members, a guardian or a caretaker; admission to them of a notary and a lawyer; admission to them of a minister of their chosen religion to carry out services and religious rites; full awareness and voluntary consent to medical biological experiments; donorship of blood and its components; transplantation of organs and other human tissues as a special method of treatment; artificial insemination and embryo transfer; methods of sterilization; voluntary abortion; change (correction) of sex; independent medical examination; compensation for damage caused to health; legal protection against any unlawful discrimination related to the state of health; appeal against wrongful decisions and actions of medical practitioners, healthcare institutions and bodies.

This list of patients' rights in Ukraine complies with the main provisions of the Lisbon Declaration on the Rights of the Patient and other regulatory legal acts on the rights of patients. Unfortunately, meanwhile there is no special law on protection of patients' rights in Ukraine, regardless of the draft laws registered with the Parliament in 2003, 2007 and 2013. As well, there is a significant drawback in the protection of patients' rights, which consists in the absence of the Ombudsman institution for protection of patients' rights in Ukraine. The need for the introduction of such an institution was stressed by V. M. Pashkov, who clearly expressed that the Patients' Rights Ombudsman institution "is perceived in modern conditions as a necessary element of the national system of human rights protection in the field of health care, a key link in the process of transformation in the countries, which have chosen the path of democracy and rule of law" [19, p.132].

The analysis of the current state of the healthcare system in Ukraine and practice of legal protection of patients' rights has laid grounds for revealing the following potential violations of patients' rights: refusal to provide health care services; unlawful demand for payment of health care service provision, unless specifically stipulated by the current law, or demand for payment of voluntary contributions; infliction of physical or moral damage to a person caused by medical errors; provision of poor-quality health care services, which do not meet the established state standards; surgical intervention, transplantation of organs or other human tissues without consent of the patient or his relatives, in case such a consent is provided for by the current legislation; illegal placement of patients in mental facilities (without the patient's consent or having no reason to consider the patient socially dangerous); violation of the right to privacy (confidentiality) of information about the state of health (medical secrecy); infecting patients with dangerous diseases when providing health care services due to violation of sanitary conditions; health care services provision by a person without appropriate qualification or licence to medical practice, which caused pecuniary and non-pecuniary damage to the patient; non-establishing or

establishing wrong diagnosis to a patient, which resulted in incorrect treatment, unnecessary costs for purchase of medication, refusal from surgical intervention or consent to surgery without proper grounds and needs; insult of the patient by health practitioners (institution); extortion or obtaining unlawful benefits by a physician or other staff as a condition for provision of free health care services provided for by the current legislation; refusal of the doctor to prescribe medication, taking of which is required by the established diagnosis, or prescription of medications, taking of which is not stipulated by the established diagnosis and has no general revitalizing effect. This list is not comprehensive, given the expansion of healthcare services and activities.

However, some researchers draw attention to the violation of the rights of patients due to the lack of early diagnosis for timely detection of certain diseases [20, pp. 1108 – 1113].

The protection of patients' rights in different countries has its own characteristic features, given the differences in legislation, organization of healthcare services, economic, social, cultural, religious and moral values. Simultaneously, there are common features in the legal protection of patients' rights. For instance, in the countries that have adopted the relevant laws, which guarantee the right to choose a horizontal contractual relationship between the patient and the healthcare institution, patients file complaints against doctors with civil courts (in particular, in the Netherlands, Lithuania and France). The use of administrative procedures for protection of patients' rights is more common in the countries which use a vertical type of relationship (in particular Finland, Iceland and Denmark). Moreover, in these countries the obligations of healthcare institutions are provided for by the law on the procedure of healthcare services provision.

The experience of Poland, which has made significant efforts in the area of patients' rights protection, is of particular interest. The Constitution of the Republic of Poland adopted on 2 April, 1997 contains a number of provisions with regard to health care. In addition to the usual rules of non-discrimination, these provisions state that no person may be subjected to scientific, including medical, experiments except by his/her free consent (Article 39); all persons have the right to health protection; public authorities must guarantee all persons, regardless of their financial condition, an equal access to healthcare services to be financed by public funds; the conditions and methods of providing such services shall be provided for by the legislation (Article 68) [21].

For a long time, various legal acts have constituted legal sources for patients' rights in Poland. The absence of an integrated approach and a single legal act has caused significant difficulties in the implementation and protection of the rights of the patient. In 1998, the Primate Non Nocere Association of Patients developed a number of amendments to the legislation. The significant steps taken for optimizing the area of patients' rights protection were as follows: the establishment of the Patients' Rights Office

in 2002 (instead of the Complaints and Requests Office) and adoption of the Law on the Rights of the Patient and the Patients' Rights Ombudsman in 2008 [22]. The law distinguishes between the general and specific rights of the patient. The list of patients' rights is large and contains, in particular, the following rights: the right to health care; the right to information; the right to present to the doctor the opinion on the information received; the right of the patient to confidentiality of information related to him/her; the right to give consent to healthcare services provision; the right to respect for the dignity of the patient; the right to die with dignity; the right to pain relief; the right to access to medical documents; the right to respect for private and family life, etc. The legislative initiatives and measures taken have improved the situation concerning patients' rights in Poland.

Protection of patients' rights in Ukraine, as in any other social state governed by the rule of law, can be carried out in non-jurisdictional (self-protection of rights and legitimate interests) and jurisdictional (according to a special administrative procedure, or general procedure, in court) forms. According to Article 55 of the Constitution of Ukraine, after exhausting all domestic legal remedies, every person has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant.

Over the past decade, legal protection of patients' rights in the European Court of Human Rights has become increasingly important both for Ukraine and other European countries. The significance of the ECHR practice for Ukraine is stipulated not only by the binding nature of its judgments but also by recognition of the Court practices as a source of law in Ukraine by the Law "Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights", which creates increased opportunities for their application at the national level. In addition, the ECHR practice affects the reform and development of the national medical law and legislation of modern countries, serves to protect the right to health and provide for the uniform interpretation of the European law by the states.

It should be noted that the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) makes no direct provision for protection of the right to healthcare as well as of other socio-economic rights. However, filing an appeal to protect this right is possible under several Articles of the 1950 Convention. There is such a practice of the European Court of Human Rights when the following rights are violated, namely: right to life (Article 2 of the Convention), prohibition of torture (Article 3), right to liberty and security (Article 5), right to a fair trial (Article 6), right to respect for private and family life, inviolability of the home (Article 8), freedom of expression (Article 10), Right to an effective remedy (Article 13), etc. [23]. The cases involving protection of patients' rights are considered by the European Court of Human Rights within the framework of the right to life, personal integrity, privacy

and protection against discrimination.

Moreover, in the practice related to the protection of patients' rights the European Court of Human Rights applies a number of Treaties of the Council of Europe, namely: the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine and the Convention on Human Rights and Biomedicine (valid from 1 December, 1999); Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research (valid from 1 September, 2007); Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (valid from 1 May, 2006); European Social Charter (valid from 26 February, 1965); European Social Charter (revised) (valid from 1 July, 1999); European Code of Social Security (valid from 17 March, 1968); European Code of Social Security (revised) (valid from 6 November, 1990); European Convention on Social and Medical Assistance (valid from 1 July, 1954).

The application of the Council of Europe Treaties in the case-law of the European Court of Human Rights is stipulated by the need to take into account the latest achievements in medicine and biotechnology and protect the human rights associated with their implementation. As well this shows a dynamic nature of the ECHR decisions, the existence of complex and unresolved problems in the field of the human rights protection.

Legal protection of patients' rights is primarily related to realization of the right to life. Proper biological and social functioning of a person is impossible without health. The realization of the right to life in full is possible only when the right to health is guaranteed. The right to life is protected by Article 2 of the Convention. In accordance with the established practice of the ECHR, this right is considered violated not only in case of deprivation of life but also when a serious damage to the human body is made, which did not result in death but posed a serious threat to life. First and foremost, the state should refrain from intentional deprivation of a human's life ("McCann and others v. the United Kingdom" [24] – 1995), guarantee protection against arbitrary deprivation of life, death caused when using force by the private person ("Ergi v. Turkey" – 1998; "Yasa v. Turkey" – 1998).

The practice of the European Court of Human Rights with regard to protection of patients, who have suffered as a result of the failure to provide timely, adequate and necessary health care, is of great importance as well. This is especially relevant to persons who are deprived of liberty. The Court agrees that the quality of health care in medical facilities of penal institutions may not always be of the quality provided by the best public healthcare institutions. The Court provides for sufficient flexibility in determining the standards of healthcare in each case [25; 26]. However, the state should care for adequate protection of health and welfare of persons under its control, in particular, by providing necessary and adequate healthcare [27; 28; 29]. Under the general rule, medical treatment should be com-

petent, timely and adequate. The lack of adequate treatment is violation of Article 3 of the Convention, in case it resulted in deterioration of health or other serious consequences. In particular, the issue of the failure to provide healthcare or of untimely, incomplete provision of proper healthcare to the respective category of persons was considered in the following judgments: “Malenko v. Ukraine” [30], “Isayev v. Ukraine” [31], “Visloguzov v. Ukraine” [32], “Kaverzin vs. Ukraine” [33], “Kharchenko v. Ukraine” [34], “Okhrimenko v. Ukraine” [35], “Ukhan v. Ukraine” [36], “Pokhlebin v. Ukraine” [37], etc.

The ECHR also adheres to the position that it is the positive obligation of the state to protect human life from infringement by third parties or from the risk of disease that can cause death. However, this interpretation can only be applied in exceptional cases, given the extent and nature of the damage caused to a person.

The positive obligation of the state is protection of the human life and existence of an effective independent forensic system, which allows establishing the cause of death if it occurred in a hospital or if the patient was under constant and effective control, and responsibility of the medical staff in each case. Article 2 of the Convention provides for the minimum procedural requirements, according to which, in cases the state or its representatives are potentially liable for the death of a person, the circumstances that cause doubts should be subject to effective investigation or scrutiny, which will allow sensitizing the public to the facts and, in the first place, informing the relatives. If nothing indicates that the authorities assessed the evidence arbitrarily, the ECHR can trust the facts established by national authorities [38].

In the context of protection of the right to life, special attention should be paid to the ECHR practice with regard to euthanasia (*Pretty v. United Kingdom*) [39]. In such cases, the Court proceeds from the view that the right to life cannot be interpreted without distortion of its meaning in a way that implies a diametrically opposed right, namely the right to death. Under the Convention, the states are prohibited to allow acts aimed at depriving a human of his/her life.

The ECHR also adheres to the position that cases of death of patients in healthcare institutions should be considered within the shortest time possible (“*Byrzykowski v. Poland*”). In the judgment of 27 June, 2006 in the case of *Byrzykowski v. Poland*, the Court emphasized on the need for prompt consideration of cases involving death of persons in healthcare institutions. The errors made by practitioners should be ascertained fast. Then, this information should be immediately disseminated among the healthcare facility staff in order to prevent repetition of negative experience in the future and guarantee provision of more professional healthcare services to patients. Therefore, the Court held that Article 2 of the Convention was violated, which resulted in conducting improper investigation into the death of the applicant’s wife and damaging the health of his son. However, several judgments of the ECHR drew attention to the fact that the 1950 Convention does not

guarantee socio-economic rights, including the right to free health care, and that complaints about the quality of health care are not in dispute, according to the provisions of the Convention or the Protocols thereto [40].

Against the background of the economic and financial crisis that has spread to most modern states, a high cost of health care and healthcare services, massive impoverishment of the population of Ukraine, special attention should be paid to consideration by the ECHR of the cases related to treatment fees. Thus, in the case (“*Nitecki v. Poland*” (dec.), no. 65653/01, 21 March 2002) [41] the applicant, who suffered from a rare life-threatening condition, claimed that he had no means to treat it. The applicant complained to the Court that the authorities had declined his request to refund the cost of the treatment in whole (The Health Insurance Fund only covered 70% of the costs). The court stated that an issue may arise under Article 2 where it is shown that the authorities of a State put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally. The applicant’s case did not fall under the described situation. Thus, the Court considers that the state is obliged to guarantee the provision of health care to the population in general and, at the same time, takes into account the peculiarities of the relevant domestic law. Cases of rare conditions are not subject to this provision [41].

One of the important positive consequences of the patient’s appeal to the European Court of Human Rights with regard to the protection of violated rights may be just satisfaction (reparation for material and moral damage). Just satisfaction is provided for by Article 41 of the said Convention and is granted by the European Court to the injured party in case of recognition of violation of its provisions and in case of insufficient reparation provided for by the domestic law of the Contracting State. Thus, in the cases “*Draon v. France*”, “*Maurice v. France*” [42], the Court held that there had been a violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights, as after the law had entered into force, the applicants lost the opportunity to claim compensation for one of the major damages, which accounted for a significant amount. As a result of this law application, the applicants were deprived, without additional compensation, of a significant portion of the amount they had claimed for as a compensation for the damages inflicted.

A number of ECHR judgments with regard to the protection of the right to information and confidentiality of information, right to respect for private and family life, right to physical and moral integrity, right to a favourable environmental are also related to the protection of patients’ rights. Such cases are considered based on Article 8 (the right to respect for private and family life). The ECHR pays considerable attention to cases of mental health, especially of the persons deprived of their liberty. Such cases are considered in accordance with Article 2 and Article 3 of the Convention (prohibition of inhuman and degrading treatment). The analysis of the relevant ECHR judgments requires a separate study and is a topical issue of scientific

research. Given that the case-law of courts in Ukraine has no significant experience in consideration of cases of this category, the experience of the ECHR is essential for improving the national health care legislation.

CONCLUSIONS

Having analysed the ECHR practice, we can conclude that the Court have developed such positive obligations and minimum guarantees that should be enshrined in national legislations with the view of protecting patients' rights: the state should guarantee timely, appropriate, qualified and necessary health care (the Court provides a sufficient flexibility in determining the standards of health care in each specific case; cases of rare conditions are not subject to this provision); the state should protect human life from infringement by third parties or from the risk of disease that can cause death (this interpretation can only be applied in exceptional cases, given the extent and nature of the damage caused to a person); the state should ensure the existence of an effective independent forensic system, which allows establishing the cause of death if it occurred in a hospital or if the patient was under constant and effective control, and responsibility of the medical staff; cases involving death of patients in healthcare institutions should be considered within the shortest time possible; the state should guarantee access of the patient to his/her medical records and to the information about the risks to life and health associated with participation in experiments; states are obliged to organise their healthcare systems in the way that the exercise by healthcare providers of their right to freedom of conscience in the professional context should not interfere with the right of patients to have access to the services they are legally entitled to. The analysis showed that in its judgments the ECHR addresses a wide range of issues related to protection of the human right to health and rights of patients. It is vital for the national justice to have several key Court Judgments which would become the basis for this category of cases and, simultaneously, enable considering the domestic experience and Ukrainian legal culture.

The absence in the national legislation of the law on patients' rights limits the potential of legal protection of the rights of patients and necessitates the development and adoption of a single legal act, determines the prospects for further research of this issue. One of the important factors for the reform of healthcare legislation and adoption of the Law of Ukraine "On the Rights of the Patient" is the Association Agreement between Ukraine and the European Union, according to which the Contracting Parties should develop cooperation in the field of health care in order to improve its safety and protect human health as a premise for sustainable development and economic growth. Thus, the creation of a body for protection of patients' rights is obligatory for Ukraine. The ECHR practice affects national legal practices, primarily in the information, social and educational aspects, contributes to development and adoption of new concepts, court legal culture and a new reference system to comply with the Convention and Court practices.

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