



# Fundamental and applied researches in practice of leading scientific schools

ISSN 2708-0994



journal homepage: <http://farplss.org>  
doi: 10.33531/farplss.2020.2.9

## Human rights in the field of health care protection by the European court of human rights

A. Kuchuk

*Sumy State Pedagogical University named after A.S. Makarenko*

### Article info

Received 17.03.2020  
Accepted 30.04.2020

Professor of Law and  
Methodology of Teaching  
Jurisprudence Chair of Sumy  
State Pedagogical University  
named after A.S. Makarenko,  
Doctor of Legal Sciences,  
Associate Professor

*Kuchuk, A. (2020). Human rights in the field of health care protection by the European court of human rights. Fundamental and applied researches in practice of leading scientific schools, 38 (2), 50-53.*

The urgency of the issue studied is stipulated by the need to understand the state of human rights in health care implementation through an analysis of the practice of the European Court of Human Rights. The purpose of the study is to clarify understanding of the content of human rights in the field of health care by the European Court of Human Rights (following the Court's practice on Articles 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms) and to identify ways of improving these rights. The main approach to research on the issue of human rights protection in the field of health care is to systematically analyze the practice of the European Court of Human Rights.

The expediency of adopting a separate protocol to Convention for the Protection of Human Rights and Fundamental Freedoms, the subject matter of which will be human rights in the field of health care, which can be an effective means of protecting human rights in the field of health care, is indicated.

**Key words:** *Convention for the Protection of Human Rights and Fundamental Freedoms; Health Care; Human Rights; European Court of Human Rights; Right to Life.*

### Introduction

The existing system of human rights protection was formed at the beginning of the second half of the twentieth century. Since then, dramatic changes have taken place within society, in particular, the intensive development of science and technology, raising the standard of living of the population, defining human dignity, the rule of law and constitutional democracy as the fundamental values of the system of law of civilized societies. These changes could not but affect the legal regulation of public relations in the health care sector. For example, on March 28-30, 1994, The European Consultation on the Rights of Patients was held in Amsterdam, which resulted in the adoption of The Principles of Patient's Rights, which is linked to the need to develop the principles of health policy in the current context. However, the text of the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950, does not contain human rights in the field of health care. However, the effectiveness of the work of the European Court of Human Rights, which is designed to protect the human rights enshrined in this international treaty, is a factor in addressing it in cases of human rights violations in

the field of health care. Therefore, the analysis of the case law of the European Court of Human Rights will allow us to better understand the nature of the rights under study.

Considering the immanence of the European Court of Human Rights decisions of precedent nature, and considering the fact that the Council of Europe is composed of 47 States, on the basis of the obligation of States parties to Convention for the Protection of Human Rights and Fundamental Freedoms to respect the human rights enshrined in this Convention, as well as enforce the final decisions of the Court in the cases to which they are parties, the analysis of the practice of the Court enables, first, a better understanding of the essence of human rights in the field of health care (based on the doctrine of "living tree", which assumes that Convention for the Protection of Human Rights and Fundamental Freedoms should be interpreted based on the conditions of the present), understand perception of them by the Court. Second, to clarify the legal framework for human rights provision in the health care sector or to determine the direction of the legislation development in 47 countries.

**Volume 38, Number 2, 2020**

### **Analysis of recent researches and publications**

Although Eric A. Posner points to the failure of individual states to fulfill their international human rights obligations (in particular, Libya, Saudi Arabia, and Sudan, United States) (Posner, 2014), the European Court of Human Rights is today an effective means of protecting human rights, although subsidiary (Tumay, 2017).

We can note that the context of human rights in the health care field we have chosen is not the subject of research by scholars focusing whether on the human rights in the health care field (we can emphasize that R.Andorno (2013) concluded that human dignity and human rights standards are mere products of Western culture and are therefore inapplicable to other regions of the world) or on the patients' rights in general (among which we can distinguish the article "Patient rights in EU Member States after the ratification of the Convention on Human Rights and Biomedicine" where the authors "analysed for each ratifying Member State whether and how the ratification of the The European Convention on Human Rights and Biomedicine has influenced patient rights legislation and having divided the 11 Member States into 4 categories depending upon the already existing patient rights legislation (Nys et al. 2007) or the correlation of the Human Rights and Health Law (Andorno, 2005).

The issue of medical error (in the context of violation of patients' rights) is sufficiently investigated. In 2018, Georgian Medical News published the results of the study by a team of authors Buletsa S., Drozd O., Yunin O., Mohilevskiy L. «Medical Error: Civil and Legal Aspect» (Buletsa et al. 2018) where the issues of protection of human rights because of medical error are systematically covered.

Goals of article. The purpose of the study is to clarify the understanding of the content of human rights in the field of health care by the European Court of Human Rights (following the Court's practice on Articles 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms) and to identify ways of improving these rights.

Presentation of main material. An important component of understanding the essence of human rights in health care is to understand the differences between the American civil rights doctrine and the European human rights doctrine. Back in 1980, Rex Martin noted that human rights were viewed through two aspects: "they are claims to something and, as claims on the specific duties of assignable people, they are claims against someone" (Rex, 1980). The state is the addressee of such requests and claims, which has undertaken the obligation to ensure human rights, which are inherent in fundamentality, natural character, inalienability. However, there is a significant difference in the European and American approaches. Thus, the US has ratified International Covenant on Civil and Political Rights only in 1992 but has not ratified to date the International Covenant on Economic, Social and Cultural Rights. The state of provision and content of Economic, Social and Cultural Rights depends on the state of economic development of the state, its financial capabilities, so their availability is linked to the adoption of the relevant legislation by the state. At the same time fixing in Art. 25 of the Universal Declaration of Human Rights (1948) as a constituent of the right to a

sufficient standard of living for food, clothing, housing, medical care and necessary social services is not taken into account, given that the Universal Declaration of Human Rights is a soft law and does not impose international legal obligations, unlike the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, adopted in 1966. Note that Art. 12 of International Covenant on Economic, Social and Cultural Rights (1966) upholds the human right to the highest attainable level of physical and mental health, including, inter alia, "creating conditions that would provide everyone with medical help and medical care in the event of illness".

As it was mentioned, the text of the Convention for the Protection of Human Rights and Fundamental Freedoms does not contain human rights in the field of health care, however, the European Court of Human Rights deals with cases relating to public relations in the field of health care. These cases should be considered through the analysis of decisions according to the relevant articles of the Convention. These are mainly Art. 2 (Right to life), Art. 3 (Prohibition of torture), Art. 5 (Right to liberty and security), Art. 8 (Right to respect for private and family life). We can note that under Art. 8 of the Convention cases of different directions are dealt with, they are often only "externally" related to human rights in the field of health care, for example, the case of frozen embryos (Parrillo v. Italy, application no. 46470/11), the case of the possibility of giving birth at home, and not at hospital Dubska and Krejzova v. Czech Republic, applications Nos. 28859/11 and 28473/12). Similar are the cases under Art. 5 of the Convention, for example, the detention of a person in a psychiatric hospital as a violation of the right to liberty (Zaichenko v. Ukraine (No. 2) application No. 45797/09, Shtukaturov v. Russia, application No. 44009/05). Therefore, the practice of the European Court of Human Rights under Art. 2 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms is the most important to understand the essence. To a greater extent, it is even under Art. 2. This is due to the fact that some diseases are life-threatening. Therefore, failure to provide medical care or improper performance of professional duties by a physician can lead to legal consequences.

According to a settled practice of the Court, if the complaint concerns the failure to provide or improperly provided medical assistance to the person in the place of detention that preceded the death of that person, then the Court shall consider such complaint on the basis of Art. 2, if the death of the person has not occurred, the Court considers the case under Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

It should be emphasized that although the human rights requirements are addressed to the state, the obligation to provide medical attendance and medical services applies not only to public health institutions, but also to private ones. Public authorities are required to enact legislation, enshrining the obligation of health care institutions, both public and communal, and private, to take all necessary measures to protect the lives of patients. The state must establish an effective and independent judiciary allowing to find out the causes of death of the persons who were provided with medical attendance and to call those

responsible to account (Csoma v. Romania, No. 8759/05; Glass v. The United Kingdom, No. 61827/00).

It is advisable to divide the practice of the European Court of Human Rights under this category of cases into two varieties: the first concerns prisoners, the second concerns other people. While in custody, a person is under the full control of the public authority, which should provide such person with medical attention, taking into account his or her state of health. In accordance with international standards, the state should provide persons in detention with regular outpatient consultations and first aid; if there is a need to hospitalize such a person, it must be done as quickly and in a manner as the state of health of such a person requires. The European Court of Human Rights has repeatedly emphasized the need to take measures to protect the health of detainees (Aerts v. Belgium, 61/1997/845/1051; Okhrimenko v. Ukraine, 53896/07; Kudla v. Ukraine). Poland, No. 30210/96; Salakhov and Islyamova v. Ukraine, No. 28005/08).

In the case of Salakhov and Islyamova v. Ukraine (application no. 28005/08) the Court emphasized the importance of the provision worded in the case of Osman v. the United Kingdom (application no. 23452/94), according to which "For a positive obligation of a State under Article 2 of the Convention to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and imminent risk to the life of an identified individual and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk" (European Court, 2013).

At the same time, Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not impose an impossible or disproportionate burden on the authorities. Not every risk to life creates a duty for the public authority to take all necessary steps to eliminate that risk promptly.

Breach of obligations under Art. 2 of the Convention by the state is recognized by the Court if the actions and omissions of physicians go beyond mere error or medical negligence, when medical professionals who violate their professional responsibilities deny the patient immediate treatment, fully aware that failure to provide the first aid endangers the life of a person (case of Mehmet Şent and Bekir Şentürk v. Turkey, no. 13423/09). Error of judgment of the doctor, negligence in coordination of actions of doctors during treatment of the patient are not sufficient for bringing the state to responsibility for fulfillment of its positive obligations under Art. 2 of the Convention (Byrzykowski v. Poland, no. 11562/05).

The detention of a person in custody imposes a duty on the State to adequately guarantee his or her health, in particular by providing him/her with the necessary medical attendance. That provides for provision of the minimum amount of medical observation for timely diagnosis and treatment of the arrested person (Popov v. Russia, No. 26853/04; Mechenkov v. Russia, No. 35421/05). In the case of Popov v. Russia (application no. 26853/04) the European Court of Human Rights stated that the conditions of the applicant's detention, combined with the length of his arrest and his state of health, aggravated by the failure to provide him with adequate medical attendance, constitute inhuman

and degrading treatment (European Court, 2006). In the Court's view, set forth in the judgment in Yakovenko v. Ukraine (application No. 15825/06), failure to provide the applicant with the timely and appropriate medical attendance he required as a HIV-positive and tuberculosis patient, constituted inhuman and degrading treatment within the meaning of Article 3 of the Convention (European Court, 2007).

According to the settled practice of the European Court of Human Rights, Art. 3 of the Convention does not guarantee everyone arrested to be provided medical attendance at the same level as in the best civilian medical institutions. The level of medical services outside the prison and penitentiary institutions may be different, given the inevitability of restrictions on detention facilities, but it must be compatible with the dignity of the arrested person (Aleksanyan v. Russia, application no. 46468/06).

The analysis of the decisions of the European Court of Human Rights in cases of Farbutuhs v. Latvia (Application No. 4672/02), Sarban v. Moldova (Application No. 3456/05), Khudobin v. Russia (application no. 5969/00) indicates the Court's duty to ascertain whether the applicant who was arrested required regular medical attendance, if so, whether it was provided to the necessary extent. If no assistance was provided, did such an inaction reach such a level of cruelty that would indicate a violation of Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms?

A study of the practice of the European Court of Human Rights (among others, the cases of Ireland v. The United Kingdom, 5310/71, Hummatov v. Azerbaijan, 9852/03 and 13413/04, Sarban v. Moldova, 3456/05) allows to conclude that the assessment of the treatment or punishment for compliance with the minimum level of cruelty is taken into account a number of circumstances: "such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim" (European Court, 2007). In addition, these circumstances are taken into account comprehensively. It should also be noted that "It is not the Court's task to determine the accuracy of expert evaluations relating to a specific field of expertise such as medicine and health sciences" (European Court, 2007). In the case of Hummatov v. Azerbaijan (Applications no. 9852/03 and 13413/04) the court found that the medical assistance provided to the detainee was inadequate, on the grounds that the detainee spent his family's finances on expensive treatment at the penitentiary (European Court, 2007).

However, Art. 3 of the Convention does not oblige the State in each case of a serious illness of an arrested person to release him/her from serving his/her sentence or transfer him/her to a civilian health institution. However, the provisions of this article oblige the state to provide in detention facilities such conditions that are compatible with human dignity. The method of execution of punishment cannot subject an arrested person to suffering and humiliation that will exceed the inevitable level of suffering inherent any imprisonment. The state is obliged to take care of the health and well-being of the arrested.

In the case of "D. v. the United Kingdom" (application no. 30240/96), the issue of the deportation of an AIDS patient (the last stage of development) of the applicant to St Kitts

was considered, where he had no close relatives, no friends, no housing, no financial resources, no access to any means of social support. The absence of the ability to receive on St Kitts Island the same medical care which is now available would have hastened his death. The applicant claimed that his deportation would result in suffering and pain in isolation at the last days of his life and, consequently, his death would not only be accelerated further, it would come under conditions that were inhuman and degrading. "He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 (art. 3), his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment" (European Court, 1997) the European Court of Human Rights has recognized violations of Art. 3 of the Convention.

Individual issues such as euthanasia and forced feeding of prisoners should be mentioned.

The analysis of the European Court of Human Rights practice makes it possible to conclude that the Court attaches utmost importance to the right to life, proceeding from the assumption without life the exercise of any of the rights protected by the Convention would be impossible. Therefore, in each case, the Court carefully checks the State's compliance with Art. 2 of the Convention (McCann and Others v. The United Kingdom, 18984/91), not recognizing the persuasiveness of the claim about the negative aspect of the right to life: if not misinterpret the text of Art. 2 of the Convention, it cannot be interpreted as conferring the right to die; neither can it create the right to self-determination, that is, to grant a person the right to choose not life but death (Pretty v. The United Kingdom, 2346/02). In addition, the European Court of Human Rights does not differentiate between assisting a suicide by a physician or by another person.

With regard to forced feeding, the most famous in this context is the case "X v. Germany" (Application No. 10565/83). The applicant was in a penitentiary and had been on a hunger strike. The prison administration applied forcible feeding to him, which, according to the applicant, violated Art. 3 of the Convention. In the opinion of the European Commission on Human Rights, forced feeding had no evidence of the prohibition of Art. 3 of the Convention in this case. The state has a duty to protect the right to life guaranteed by Art. 2 of the Convention, especially if it concerns a prisoner who is completely under the control of public authority. The Convention requires the authorities to take effective action to save lives. The starvation of such a person makes possible the conflict between the right to physical integrity and the right to life, the way out of which is the forced feeding if there is a threat to the life of the prisoner. According to the Court's practice, the forced feeding is not considered as a violation of Art. 3 of the Convention under certain conditions. "The Commission recalls that under German law this conflict has been solved in that it is possible to force-feed a detained person if this person, due to a hunger strike, would be subject to injuries of a permanent character, and the forced feeding is even

obligatory if an obvious danger for the individual's life exists. The assessment of the above-mentioned conditions is left for the doctor..." (European Commission, 1984). Therefore, the purpose of forced feeding is therapeutic, as evidenced by the appropriate conclusion of the doctor or the rescue of the life of the arrested.

### Conclusion

Examining cases involving a breach of the rights in the field of health care and medical services provision by the public authorities, the European Court of Human Rights finds out whether or not there has been a violation of Art. 2 (the right to life) and Art. 3 (freedom from torture) of the Convention for the Protection of Human Rights and Fundamental Freedoms. However, if the victim was killed, the Court first determines the existence or absence of violations of Art. 2, if the victim is alive - the presence or absence of violations of Art. 3. However, given the peculiarities of relations in the field of health care provision, it is appropriate to decide on the possibility of adopting a separate protocol to the Convention, the subject of which will be regulation of human rights in the field of health care sector. This can be an effective means of protecting human rights in the field of healthcare provision.

### References

1. Andorno, R. (2005). The Oviedo Convention: A European Legal Framework at the Intersection of Human Rights and Health Law. *Journal of International Biotechnology Law*, 2, 133-143.
2. Andorno, R. (2013). International Policy and a Universal Conception of Human Dignity. *Human Dignity in Bioethics: From Worldviews to the Public Square* New York: Routledge, 127-141.
3. Buletsa, S., Drozd, O., Yunin, O., Mohilevskiy, L. (2018). Medical Error: Civil and Legal Aspect. *Georgian Medical News*, 3(276), 156-62.
4. Council of Europe (1950). Convention for the Protection of Human Rights and Fundamental Freedoms.
5. European Commission of Human Rights (1984). Case of X. v. Germany, Application no. 10565/83. Retrieved from <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-86040%22%5D%7D>
6. European Court of Human Rights (1997). Case of D. v. the United Kingdom, Application no. 30240/96. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-58035>.
7. European Court of Human Rights (2006). Case of Popov v. Russia. Application no. 26853/04. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-76341>.
8. European Court of Human Rights (2007). Case of Hummatov v. Azerbaijan, Application nos. 9852/03, 13413/04. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-83588>.
9. European Court of Human Rights (2007). Case of Yakovenko v. Ukraine, Application no. 15825/06. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-82987>.
10. European Court of Human Rights (2013). Case of Salakhov and Islyamova v. Ukraine, Application no. 28005/08. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-117134>.
11. Nys, H., Stultiens, L., Borry, P., Goffin, T., Dierickx, K. (2007). Patient rights in EU Member States after the ratification of the Convention on Human Rights and Biomedicine. *Health Policy*, 83, 223-235.
12. Posner, E.A. (2014). *The Twilight of Human Rights Law*. Oxford University Press.
13. Rex, M. (1980). Human Rights and Civil Rights. *Philosophical Studies*, 37, 391-403.
14. Tumay, M. (2017). The Subsidiary Protection of European Convention on Human Rights. *Selçuk Üniversitesi Hukuk Fakültesi Dergisi*, 17(1), 185-214.
15. United Nations (1948). Universal Declaration of Human Rights.
16. United Nations (1966). International Covenant on Economic, Social and Cultural Rights.