

УДК 342 951:61.05

Iryna Zharovska

Lviv Polytechnic National University,
Doctor of Law,
Professor of the Department
of Theory of Law and Constitutionalism
el. mail irazhar@ukr.net,
ORCID 0000-0003-3821-8120

Mariana Shchyrba

Lesya Ukrainka Volyn National University,
Doctor of Law,
Associate professor of the Department
of Theory and History of State and Law
e-mail: mariannashchirba@gmail.com
ORCID 0000-0002-6579-6893

THEORETICAL AND LEGAL STUDY OF THE PRINSIPLE OF ACCESS TO THE HEALHT CARE

<http://doi.org/10.23939/law2022.33.047>

© Zharovska I., Shchyrba M., 2022

The aim of the article is to analyze the theoretical aspects of the implementation of the principle of accessibility in the field of health care.

One of the most important in the life of man and society is the field of health care. The principle of access to health care has been shown to be crucial to ensuring a patient's legal status, and is set out in many international instruments. International law defines the basic standards of accessibility to health care, which provide financial, territorial, professional and information accessibility.

Access to health care is one of the basic principles of law status of patients, has a comprehensive nature, covering the availability of medical care and availability of medicines and other medicines, which is widespread enshrined in international, regional and national law.

The following criteria of accessibility are singled out: financial (equal access to quality services regardless of economic ability to pay for medical services, having regard to comprehensive, efficient and safe medical care, acts as a reflection of the degree of social security of the person, at the same time economic margin is determined by the best interests of the patient); territorial (expressed in the possibility of physical access to health care facilities, medical specialists of the required profile, medical services and facilities); professional (possibility of access to quality care that meets the needs of the patient, directly related to the professionalism of specialists and others medical staff); informational (provides access) to information related to the patient's health, medical measures that conducted, and those that a person needs to maintain and restore health, taking into account the statistics of their effectiveness and side effects, information about the possibility of using the latest advances in medicine, etc.).

Key words: patient, health care, principles, accessibility, accessibility criteria.

Formulation of the problem. The ideological basis for this should be to ensure the comprehensive development of man and citizen as individuals on the basis of a certain legal status, especially the legal

status of individual entities, including patients. It should be noted that the legal status of a person in general is one of the most important political and legal categories, which is inextricably linked with the social structure of society, the level of democracy, the rule of law. The category of the legal status of a person for a rather short period has confidently entered both the scientific circulation and the provisions of the legislation of Ukraine. However, the problem of determining the legal status of the patient has not been the subject of general theoretical jurisprudence.

One of the most important in the life of man and society is the field of health care, so there is a need to determine the place of the legal status of the patient in the theory of law. This issue is also relevant to the demand for this status for all individuals, as the declared sphere of public relations is basic, because it affects every person living in society (each of us sooner or later becomes a patient). The field of health care is characterized by a particularly sensitive legal relationship, because the patient is usually a sick person who needs care, care, effective qualified medical care, so the legal provision of this area is especially important for awareness of human dignity and functioning of the human body.

Given that the legal status of patients is a complex category that reflects the full range of their relationships with society, the state, the issue of theoretical and legal research of the legal status of patients is extremely relevant today.

The state of the study. General theoretical and methodological aspects of the legal status of the patient and its elements were revealed by such scientists as: S. Bostan, N. Bortnyk, O. Vasylchenko, T. Garasimov, I. Zharovska, V. Kovalchuk, M. Kostytsky, I. Lychenko, T. Mikhailina, N. Onishchenko, N. Ortynska and others. However, a comprehensive legal analysis of the principles of patient rights was not conducted.

The aim of the article is to analyze the theoretical aspects of the implementation of the principle of accessibility in the field of health care.

Presentation of the main provisions. The principle of access to health care is crucial for ensuring the legal status of the patient, and it is defined in many international documents. Thus, Art. 25 of the Universal Declaration of Human Rights states that “everyone has the right to a standard of living adequate for the health and well-being of oneself and of one's family, including food, clothing, housing, medical care and necessary social services, in particular, the right to insurance in case of illness, disability, old age”.

The International Covenant on Economic, Social and Cultural Rights (Art. 12) normatively establishes “the right of every person to the highest attainable standard of physical and mental health, while recognizing, among other things, the obligation to create conditions that provide medical help and medical care in case of illness for everybody”. The Charter (Constitution) of the World Health Organization states that “having the highest attainable standard of health is one of the fundamental rights of every human being”.

Basic principles in the field of health care is the principle of accessibility covers financial, territorial, professional and information criteria. We should consider in more detail each of them.

The financial criterion of accessibility provides equal access to quality care regardless of the economic ability to pay for medical services, taking into account comprehensive, efficient and safe medical care.

The results of the surveys showed that most Ukrainians pay for medical services outside the official funds. 69 % of respondents stated that such payments were systematic and another 24 % indicated that they had carried out the same actions, but did not indicate their regularity. So, in general, only 6 % indicated that they do not commit the above-mentioned practice.

Also, institutions that introduce “official payments”, which are in fact quasi-formal payments and are mostly represented in Ukraine by “charitable contributions”, do not take into account whether patients

are solvent, as well as their age and professional peculiarities. Respectively, it makes it impossible to “equalize” the chances of all citizens of the country to receive help. After all, the payment for medical care can lead to the impoverishment of some vulnerable groups of patients, for example, minors, disabled persons, pensioners, patients with specific diagnoses, and so on.

Particularly critical is the fact that the prevalence of informal payments results in the patient's disenfranchisement: he/she is deprived of the opportunity to protect him/herself from illegal actions of physicians and health authorities. The lack of relations in the legal dimension makes it impossible to protect and safeguard the rights and freedoms of the patient and radically reduces the level of protection of his/her life and health. Therefore, significant changes are needed in both legal regulation and mental national perception. Health care policy should change informal patient payments into a major source of health care revenue.

An important issue is the limits of financial accessibility. There are many medical procedures and methods that serve as assistive technologies and cannot significantly affect the patient's health, but at the same time are very expensive. The Declaration of Madrid on Professional Autonomy and Self-Regulation, adopted by the World Medical Assembly, prohibits actions in which the unwarranted use of medical equipment “would increase the cost of medical care to such an extent that it becomes inaccessible to patients in need” [1]. International norms also define the duty of the physician to actively avert the reduction of the quality of treatment, while establishing the main criterion for determining the limits of financial costs for medical care – his/her most important duty is to represent the interests of the sick and injured (contrary to society's requirements to reduce costs), so as not to endanger the patient's health or life [2]. Therefore, it is the responsibility of the medical staff to identify opportunities to minimize the cost of medical services so as to fully provide full and professional care.

The International Code of Medical Ethics has stated that a physician should not allow financial interests to influence the free and independent execution of professional decisions in the interests of patients [3]. At the same time, the issue of financial accessibility needs to be explored through the prism of the economic provision of medical staff. The seventh of the Twelve Principles of Health Care Organization for any national health care system [4] stipulates that the moral, economic and professional independence of the physician must be guaranteed. The appropriate economic support creates opportunities for improving the knowledge of medical staff, self-development, the introduction of innovative tools in medical practice, raising the level of professional technology and more. It is proved that the main factor that determines the limit of financial costs for medical care is the interest of patients. Therefore, it is the responsibility of the medical staff to identify opportunities to minimize the cost of medical services so as to fully provide full and professional care.

The next criterion of accessibility is territorial. Territorial accessibility is not formal access to medical services, but the provision of quality services necessary to preserve and restore the health of patients. This principle must be taken into account in the legal policy of the state in the field of health care. This is the only way to ensure an extensive system of health care bodies, taking into account the regional and local peculiarities of patients. Territorial accessibility of primary health care branch, in our opinion, is very important because it involves prevention, diagnosing the disease, directing to branch specialists and more. Failure to provide access to primary health care branch can result in seeking help too late, which will be fatal to the patient's health.

Recommendation of the Committee of Ministers of the Council of Europe to member states on improving the distribution of health care in and out of hospitals № R (80) 15 proposes to provide for “concentration or coordination of charitable and health care services in the local bloc, thus encouraging decentralization of help and rationalization of its structure” [5].

The highest level of manifestation of this problem is seen in the different levels of accessibility of rural and urban residents. This is recognized by the WHO, pointing out that a large difference in mortality is observed between the contingents of rural and urban populations, as well as between different regions and within one state. Among the reasons for this situation is the territorial unavailability of health care. For

example, 82 % of the patients we surveyed indicated that they considered the health care facility they needed to be territorially accessible. However, among the rural population, this indicator is almost halved.

The policies in the field of ensuring the proper social and economic existence of rural residents include, in particular, high-level local government, infrastructure formation, and job creation. And one of the key tasks is to provide rural residents with proper health care and physical access to specialized facilities. In general, targeted rural development programs should involve health care authorities in modernization processes.

The quality of medical care is declining against the background of high workload of health professionals, which results, among other things, in too long queues for specialists, due to which the patient spends a lot of time and physical resources. According to the State Statistics Service, in 2018 more than 16 % of households claimed the impossibility of access to a health professional in medium-sized cities due to too long queues [6].

The professional criterion provides the opportunity to access quality care that meets the needs of the patient. In other words, accessibility is directly related to the professionalism of specialists and other medical staff.

International norms place special emphasis on the obligation of physicians to prioritize the quality of medical services. The WMA states in the Regulations on the Availability of Medical Care that “physicians, in particular, should commit to being a guarantor of high-quality health care and must not allow certain factors that affect the availability of medical care to jeopardize its quality” [7].

To our question “Assess the level of professionalism of your family doctor according to the scoring system?” almost half rated it at four, and 26 % of respondents put a three (!).

The problem of professionalism is complex. However, the problem of access to medical care for people in prisons is particularly acute. Indicative for Ukraine is the case of “Temchenko v. Ukraine”, in which the court found that the applicant needed specialized medical examination and inpatient treatment at a medical institution. However, the authorities did not take any measures to ensure such treatment in a timely manner. In turn, the European Court of Human Rights found admissible “complaints under Article 3 of the Convention on the Inadequacy of Medical Treatment in Detention, a complaint under Article 13 on the lack of domestic remedies in connection with the above complaint under Article 3 of the Convention” [8]. The case of “Kharchenko v. Ukraine” [9], which was also considered by the ECtHR, is quite similar.

Information criterion. Information openness is no less important criterion of accessibility than those already considered. These include access to information about the patient's health, medical procedures and those that a person needs to maintain and restore their health, statistics on the effectiveness and side effects of such procedures, information about the possibility of using the latest advances in medicine, etc. As stated in the Declaration of Lisbon on the rights of the patient (1981), which is now considered the main document in this field, one of the patient's rights is the right to agree or refuse treatment after receiving the necessary information.

With regard to the enshrinement in national law of the obligation of competent medical staff and medical institutions to provide complete information (all information about the patient's identity), the relevant provision is in Art. 32 of the Constitution of Ukraine, item e of Art. 6 and Art. 39 of the Law of Ukraine “Fundamentals of the legislation of Ukraine on health care”, part 5 of Art. 23 of the Law of Ukraine “On Information”, the decision of the Constitutional Court of Ukraine № 5-zp of October 30, 1997. Access to information provides for the patient's right to read the relevant medical documentation, which contains all available data in the relevant medical institution of his/her state of health, medical history, possible risks due to the disease or treatment, as well as information about the medical staff, especially the attending physician (his/her education, qualifications and competence), data on medical services and their alternatives, etc.

Conclusion. Access to health care is one of the basic principles of the legal status of patients, which is widely enshrined in international, regional and national law. It is comprehensive, covering the

availability of medical care and the availability of medicines and other medical devices. International law defines the basic standards of accessibility to health care, which provide financial, territorial, professional and information accessibility.

It is grouped that the international legislation defines the basic standards of accessibility of medical care, which provide financial, territorial, professional and information accessibility. The financial criterion of accessibility provides equal access to quality care regardless of the economic ability to pay for medical services, taking into account comprehensive, efficient and safe medical care. Financial accessibility is predominantly determined by the state chosen health care financing; it is argued that the policy in the field of financial accessibility should be studied through the prism of economic support of medical staff. The territorial accessibility criterion should take into account the diversity of the health care system, taking into account the regional and local peculiarities of patients' residence and the rural and urban peculiarities of patients' residence. The professional criterion provides the possibility of access to quality care that meets the needs of the patient to specialists of the appropriate level and profile and in the priority of the quality of medical services. The information criterion includes access to information on the patient's health, medical procedures and those that a person needs to maintain and restore their health, statistics on the effectiveness and side effects of such procedures, information on the possibility of using the latest advances in medicine, etc.

REFERENCES

1. *Madrydska deklaratsiia stosovno profesiinoi avtonomii ta samoupravlinnia* [Madrid Declaration on Professional Autonomy and Self-Government]: mizhnar. dok. vid 01.10.1987 / Vsesvitnia medychna asotsiatsiia. Baza danykh "Zakonodavstvo Ukrainy" / VR Ukrainy. URL: http://zakon3.rada.gov.ua/laws/show/990_025 [in Ukraine].
2. *Deklaratsiia stosovno nezalezhnosti ta profesiinoi svobody likaria* [Declaration on the Independence and Professional Freedom of Physicians]: mizhnar. dok. vid 30.10.1986 / Vsesvitnia medychna asotsiatsiia. Baza danykh "Zakonodavstvo Ukrainy" / VR Ukrainy. URL: http://zakon5.rada.gov.ua/laws/show/995_326 [in Ukraine].
3. *Mizhnarodnyi kodeks medychnoi etyky* [International Code of Medical Ethics] : mizhnar. dok. vid 01.10.1949 / Vsesvitnia medychna asotsiatsiia. Baza danykh "Zakonodavstvo Ukrainy" / VR Ukrainy. URL: http://zakon4.rada.gov.ua/laws/show/990_002 [in Ukraine].
4. *Dvanadtsiat pryntsyviv orhanizatsii okhorony zdorovia dlia bud-yakoi natsionalnoi systemy okhorony zdorovia* [Twelve principles of health care organization for any national health care system]: mizhnar. dok. vid 01.10.1963 / Vsesvitnia medychna asotsiatsiia. Baza danykh "Zakonodavstvo Ukrainy" / VR Ukrainy. URL: <http://zakon3.rada.gov.ua/laws/show/990> [in Ukraine].
5. *Rekomendatsiia Komitetu ministriv derzhavam-uchasnytsiam stosovno pokrashchennia rozpodilennia medychnoi dopomohy v likarniakh ta poza likarniamy* [Recommendation of the Committee of Ministers to member states on improving the distribution of health care in and out of hospitals]: mizhnar. dok. vid 14.11.1980 No. R(80)15 / Rada Yevropy. Baza danykh "Zakonodavstvo Ukrainy" / VR Ukrainy. URL: http://zakon5.rada.gov.ua/laws/show/994_076 [in Ukraine].
6. *Statystychnyi zbirnyk "Samootsinka naselenniam stanu zdorovia ta rivnia dostupnosti okremykh vydiv medychnoi dopomohy"* [Statistical collection "Self-assessment of the population's health status and the level of access to certain types of medical care"]. Derzhavna sluzhba statystyky Ukrainy: ofits. veb-sait. URL: http://www.ukrstat.gov.ua/druk/publicat/kat_u/2019/zb/03/zb_snsz2018pdf.pdf [in Ukraine].
7. *Polozhennia shchodo dostupnosti medychnoi dopomohy* [Regulations on the availability of medical care]: mizhnar. dok. vid 01.09.1988 / Vsesvitnia medychna asotsiatsiia. Baza danykh "Zakonodavstvo Ukrainy" / VR Ukrainy. URL: <http://zakon5.rada.gov.ua/laws/show/990> [in Ukraine].
8. *Rishennia YeSPL u spravi "Temchenko proty Ukrainy"* [ECtHR judgment in Temchenko v. Ukraine] (Zaiava No. 30579/10) vid 16.07.2015. Baza danykh "Zakonodavstvo Ukrainy" / VR Ukrainy. URL: http://zakon.rada.gov.ua/laws/show/974_a83 [in Ukraine].
9. *Rishennia YeSPL u spravi "Kharchenko proty Ukrainy"* [ECtHR judgment in Kharchenko v. Ukraine] (Zaiava No. 40107/02) vid 10.02.2011. Baza danykh "Zakonodavstvo Ukrainy" / VR Ukrainy. URL: http://zakon.rada.gov.ua/laws/show/974_662 [in Ukraine].

Ірина Жаровська

доктор юридичних наук, професор кафедри теорії права та конституціоналізму
Національний університет “Львівська політехніка”.

Мар'яна Щирба

доктор юридичних наук,
доцент кафедри теорії та історії держави і права
Волинський національний університет імені Лесі Українки,

ТЕОРЕТИЧНО-ПРАВОВЕ ДОСЛІДЖЕННЯ ПРИНЦИПУ ДОСТУПУ ДО МЕДИЧНОЇ ДОПОМОГИ

Метою статті є аналіз теоретичних аспектів реалізації принципу доступності у сфері охорони здоров'я.

Однією з найважливіших у житті людини та суспільства є сфера охорони здоров'я. Доведено, що принцип доступу до медичної допомоги є вирішальним для забезпечення правового статусу пацієнта, і він викладений у багатьох міжнародних документах. Міжнародне право визначає основні стандарти доступності медичної допомоги, які забезпечують фінансову, територіальну, професійну та інформаційну доступність.

Доступність медичної допомоги є одним із основних принципів правового статусу пацієнтів, має комплексний характер, охоплює доступність медичної допомоги та наявність ліків та інших лікарських засобів, що широко закріплено міжнародним, регіональним та національним законодавством. Авторами виокремлено наступні критерії доступності: фінансовий (рівний доступ до якісних послуг незалежно від економічної спроможності оплатити медичні послуги, з урахуванням комплексної, ефективної та безпечної медичної допомоги, виступає відображенням ступеня соціальної захищеності особи), в той же час економічна доступність визначається найкращими інтересами пацієнта); територіальний (виражаються в можливості фізичного доступу до закладів охорони здоров'я, медичних спеціалістів необхідного профілю, медичних служб та закладів); професійний (можливість доступу до якісної допомоги, яка відповідає потребам пацієнта, безпосередньо пов'язана з професіоналізмом спеціалістів та іншого медичного персоналу); інформаційний (забезпечує доступ) до інформації, пов'язаної зі станом здоров'я пацієнта, проведеними медичними заходами та тими, які необхідні особі для підтримки та відновлення здоров'я, з урахуванням статистики їх ефективності та побічних ефектів, відомостей про можливість застосування останніх досягнення медицини тощо).

Ключові слова: пацієнт, охорона здоров'я, принципи, доступність, критерії доступності.