

КОНСТИТУЦІЙНЕ ПРАВО ТА МУНІЦИПАЛЬНЕ ПРАВО

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CONSTITUTIONAL RIGHT TO MEDICAL ASSISTANCE IN THE CONSTITUTIONS OF FOREIGN COUNTRIES

In the constitutional ensuring of the right to medical assistance in Ukraine are taken into account international and European documents of obligatory and recommendatory character. In particular, during projecting the Section 2 of the Constitution of Ukraine, which includes also an article on the right to health care, international standards on human rights were widely used. The essence of the norms which are recognized as international standards of human rights consists in the fact that they are developed by the best professionals that were working by request of leading organizations such as the United Nations, Council of Europe, the International Labor Organization and others. Applying of relevant developments, issued in the form of conventions, declarations, covenants, conventions and so on, with the creation of constitutions of individual states is not considered as plagiarism, but strongly encouraged. Because in this case, national constitutions will meet the best standards generally accepted in the world, in Europe and so on.

This topic was the subject of scientific interest of such scientists as O. Buchyk, S. Dyuzhykov, Z. Chernenko, H. Varun, K. Swendiman, D. Marrani, E. Leonard and other national and foreign scientists.

Thus, the comparative analysis of fixing exactly constitutional right to medical assistance in the constitutions of various countries has not been implemented, which is the aim this research.

The right on medical assistance got its current consolidation in the constitutions of various countries, including the Fundamental Law of Ukraine.

It is necessary to provide examples to consider the provisions of the Constitution of Ukraine in a comparative context.

First of all, the Constitution of Ukraine advantageously differs from the basic laws of those states that do not have the right on medical assistance. For example, the right on medical assistance is not included in the Constitution of the USA of 1787 but the situation is quite understandable (despite the fact that currently the United States has very developed from the stand-

point of scientific research medicine, and is one of the "pioneers" in the field of medical insurance). Because the original text Constitution of the USA of 1787 generally not contains no provision on human rights – they have appeared in only the so-called Bill of Rights – the first ten amendments to the Constitution of the United States that have been made to it in 1789. The amendments composed of some personal and political rights, and thus social rights, which include the right to medical assistance, completely absent in the U.S. Constitution as group rights (there are no such groups of rights as cultural, environmental) [1].

Much greater interest from this point of view causes the fact that the right to medical assistance does not include the constitution of one of the few that is left in the world, socialist countries – in particular, the Constitution of Sri Lanka. In text of this Basic Law also are not included any social rights [2].

Another socialist country – China – also did not include to the Constitution the right to medical assistance. However, Art. 21 of the Constitution of the PRC of 1982 stating that "the state develops medical and sanitary affairs, contemporary and traditional domestic medicine and pharmacology, encourages and supports the formation of various health institutions by rural collective economic organizations, state enterprises, institutions and quarterly organizations conducting mass sanitary measures" [3]. However, it is not recognized as duty of the state – and therefore it would be wrong to assert that the legal status of a person in China includes corresponding subjective right.

The situation is similar with the Constitution of India of 1949. Namely, in Part III "Fundamental rights" there is no mention about the right to medical assistance. However, the norms of Part IV "Guiding principles of state policy" provides that the state pursues a policy directed, among other, on improving health condition of people [4].

Interesting is the fact that the right to medical assistance is not enshrined in the Constitution of Brunei of 1959 [5]. It is surprising because in this absolute monarchy, very rich in oil, the right to medical assis-

tance is free for all citizens of Brunei – but it is enshrined at the legislative level.

It should be noted that the right to medical assistance began to receive its consolidation at the level of Basic Laws approximately in the middle of the twentieth century, and often are not with exactly the same wording. One of the “oldest” constitutions, which has an indirect mention of the right to medical assistance in its text, is the Constitution of Japan of 1946. According to Art. 25 of the Constitution of Japan, everyone has the right to maintain a minimum level of healthy life, and the state should carry out efforts for progress and the further development of public health [6].

The right on medical assistance got its consolidation also in the Basic Law of the USSR and Soviet republics, it is therefore appropriate to apply to several states – former Soviet republics in order to analyze whether corresponding right still remained in their constitutions.

The Constitution of Georgia of 1995 in Art. 37 combines a number of social and environmental rights, among other, it refers to the fact that everyone has the right to use health insurance as an affordable means of medical assistance. According to part 1 of this article, free medical assistance is provided only under certain conditions and in accordance with the law [7].

The Constitution of Azerbaijan of 1995 in Art. 41 establishes for each right to health protection and medical assistance. Part two of this article stipulates that the state shall take the necessary measures for the development of all forms of health care that are based on all forms of property, guarantees sanitary-epidemiological welfare and creates opportunities for various forms of health insurance [8].

In the Republic of Belarus the analyzed right granted to citizens. Thus, art. 45 of the Constitution stipulate that citizens of the Republic of Belarus are guaranteed the right to health care, including free treatment at public health institutions. It also provides that the state creates conditions affordable for all citizens' medical care [9]. It should be noted that among studied constitutions it is the only Constitution, which limits the range of subjects of the right to medical assistance by the citizens of the state.

Constitution of Russian Federation of 1993 establishes in Art. 41 that “everyone has the right to health care and medical assistance” and that “medical assistance in state and municipal health care provided to citizens free of charge from the funds of the corresponding budget, insurance contributions, other receipts” [10]. Thus, as in the Republic of Belarus, free medical assistance is provided only to citizens, but the rights to medical assistance as one have all persons staying in the Russian Federation.

Attention is drawn to the fact that the regulation of the right to medical assistance of the Constitution of Russian Federation is the closest to similar norms of the Constitution of Ukraine.

A somewhat different approach demonstrates the Constitution of Moldova of 1994 in the art. 36 of the Fundamental Law provided that the minimum level of state medical ensuring is free [11], without reference to the presence or absence of citizenship of subjects of this right.

Very similar norms contains Fundamental Law of Latvia of 1922. It declares that the state protects human health and guarantees everyone a minimum medical assistance [12].

Constitution of the Republic of Estonia of 1992 establishes only the right of everyone to protection of their health, with no mention of the right to medical assistance (art. 28) [13].

In this regard, more detailed looks art. 53 of the Constitution of the Republic of Lithuania, according to which the state takes care of people's health and guarantees medical assistance and services to a person in case of illness. The law establishes the procedure for providing citizens with free medical care in public health care institutions [14]. In addition, Art. 53 unites the right to health care and medical assistance with the environmental human rights.

It should be noted that the last few Basic Laws belong to States – former Soviet republics that are currently members of the European Union. As you can see, the right to medical assistance in their territory is regulated approximately the same way. In connection with European integration aspirations of Ukraine, are of interest also constitutions of other countries – EU members, especially those who (like Ukraine) has a Soviet past.

A special place among them belongs to Constitution of the Czech Republic of 1992. First of all because the text of Fundamental Law does not contain information on human rights – it is located in the following as part of the Constitution, the Charter of Fundamental Rights and Freedoms. Article 31 of the Charter provides that “everyone has the right to health care. On the basis of public insurance, citizens have the right to free medical care and cash benefits to pay for medical services under the conditions prescribed by law” [15].

Secondly, Art. 8 of the Charter concerns the right to integrity and guarantees personal freedom. Part 6 of this Article provides that only the law stipulates in what cases a person may be transferred under medical care in a hospital or kept in it without her consent.

It is also mentioned that about application of such measures must be notified to the court within the period of 24 hours. In turn, the Court has 7 days to decide on the question of placement of a person to the hospital [15]. Such a detailed procedure of regulation of the issue of detention of patients in hospitals, including in psychiatric hospitals are interesting for Ukraine in terms of recently adopted decision of the Constitutional Court of Ukraine on June 1, 2016 № 2-рп/2016 in the case of the constitutional petition of Ombudsman of the Verkhovna Rada of Ukraine on conformity with

the Constitution of Ukraine (constitutionality) of provisions of the third sentence of the first paragraph of Article 13 of the Law of Ukraine "On Psychiatric Care" (the case about the judicial control over hospitalization of incapacitated persons in a psychiatric institution) [16].

The Constitution of Poland of 1997 provides that "everyone has right to health care and to citizens regardless of their financial situation; public authorities provide equal access to health care, financed with the public funds. Terms and scope of these services are determined by law" (Art. 28) [17].

Finally, one of the newest Constitutions in the modern world, the Constitution of Hungary 2011 establishes in Art. XIX, that everyone has right to maintain his physical and mental health, and Hungary must guarantee this through the development of medical institutions, health care and support for environmental safety [18]. Thus, in this Basic Law are established connections between the right to health care and the right to medical assistance and environmental rights.

In conclusion of this short review of norms of constitutions of foreign countries in the part of fixing in them the right to medical assistance (or no mention of it) should be formulated a conclusion – recommendation, which is as follows:

- deserves support the arrangement in the Constitution of Ukraine articles on the right to health, medical assistance and environmental rights one by one. Progressiveness of this approach show examples Georgia, Lithuania, Hungary;

- considering that the decision of the Constitutional Court of Ukraine in case of judicial control over hospitalization of incapacitated individuals to a psychiatric institution has become clearest example of a national judicial activism, and also has marked a significant breakthrough in the protection of human rights in their protection in accordance with the best European standards, and taking into account the uncertainty that still exists in the legislation of Ukraine on legal force of decisions of the single body of constitutional jurisdiction, it is appropriate to consolidate in the art. 28 Constitution, at least briefly, the procedure of the forced transfer of people under medical care in a hospital for keeping them there without their consent. This conclusion is based on experience of the Czech Republic.

As the prospective for the further research we can name numerous problems in this field, covered in the works of the Ukrainian scientists, like [19; 20; 21].

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Анотація

Віткова В. С. Конституційне право на медичну допомогу у конституціях зарубіжних країн. – Стаття.

У статті досліджується закріплення права на медичну допомогу в конституціях зарубіжних країн; здійснюється порівняльний аналіз змісту статей, що закріплюють права на медичну допомогу, у текстах Основних Законів різних країн світу; на основі проведеного дослідження надаються загальні висновки-рекомендації щодо напрямків роботи з удосконалення положень Конституції України згідно з позитивним міжнародним досвідом.

Ключові слова: право на медичну допомогу, право на медичну допомогу в зарубіжних конституціях, закріплення права на медичну допомогу, конституції зарубіжних країн.

Аннотация

Виткова В. С. Конституционное право на медицинскую помощь в конституциях зарубежных стран. – Статья.

В статье исследуется закрепление права на медицинскую помощь в конституциях зарубежных стран; осуществляется сравнительный анализ содержания статей, закрепляющих права на медицинскую помощь, в текстах Основных Законов разных стран мира; на ос-

нове проведенного исследования предоставляются общие выводы-рекомендации по направлениям работы по совершенствованию положений Конституции Украины в соответствии с положительным международным опытом.

Ключевые слова: право на медицинскую помощь, право на медицинскую помощь в зарубежных конституциях, закрепление права на медицинскую помощь, конституции зарубежных стран.

Summary

Vitkova V. S. Constitutional right to medical assistance in the constitutions of foreign countries. – Article.

The article is carried out a study of fixing the right to medical assistance in the constitutions of foreign countries; a comparative analysis of the content of articles fixing the right to medical assistance, in the texts of the Fundamental Laws of different countries is provided; based on the conducted research general conclusions, recommendations on directions of work to improve the provisions of the Constitution of Ukraine in accordance with the positive international experience are provided.

Key words: right to medical assistance, right to medical care in foreign constitutions, fixing of the right to medical assistance, constitutions of foreign countries.