International Comparative Jurisprudence 2024 Volume 10 Issue 2
ISSN 2351-6674 (online) DOI: https://doi.org/10.13165/j.icj.2024.12.006

THE RIGHT OF FOREIGNERS TO HEALTH CARE: FEATURES OF THE REGULATION BY THE CONSTITUTION OF UKRAINE AND INTERNATIONAL STANDARDS IN THIS SPHERE

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Received:9 April 2024; accepted: 29 November 2024
DOI: https://doi.org/10.13165/j.icj.2024.12.006

Abstract. This article considers the legal regulation of the right to health protection by the norms of the Constitution of Ukraine of 1996. Particular emphasis is placed on the provisions of Art. 49 of the Constitution of Ukraine and the positive obligation of the state to create conditions for effective and accessible medical service only for citizens of Ukraine. First of all, the article examines the correlations between this provision and the relevant provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. The paper concludes that accessibility of all medical services in the field of health is provided by the ICESCR's right to health care and international obligations of states in this area, and Art. 49 of the Constitution of Ukraine does not correspond to this. At the same time, the article provides examples of gaps in the legislative regulation regarding certain aspects of the right to health of certain categories of foreigners.

Keywords: International Covenant on Economic, Social and Cultural Rights 1996, international law of human rights, right to health care, rights of foreigners, the Constitution of Ukraine 1996.

Introduction

In Ukraine, human health is proclaimed the highest social value, and a number of rights related to health are constitutional, i.e., guaranteed by the Basic Law of the state – the Constitution of Ukraine (1996) (hereinafter – the Constitution). The norms of the Constitution are the basis on which the further legal regulation of human and civil rights, as well as the activities of the state in the field of health care, should be based. At the same time, the Basic Law of Ukraine is characterized by a somewhat inconsistent approach when granting different categories of individual rights and freedoms (Protsenko, 2020).

A different approach to determining the conditions for the exercise of their rights by citizens and foreigners is also prescribed in the basic article of the Constitution on the issue of the right to health – Art. 49. According to this article, *everyone* has the right to health care, medical assistance, and medical

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insurance (Part 1 of Art. 49). At the same time, the state creates conditions for effective and accessible medical care for all citizens (Part 3 of Art. 49). On the one hand, the Constitution guarantees everyone the right to health care, medical assistance, and health insurance. On the other hand, it imposes a positive obligation on the state to take care of the efficiency and accessibility of medical care not for everyone, but only for citizens of Ukraine. Separately it should be noted that the rights and freedoms provided for in Art. 49 of the Constitution may be temporarily restricted under conditions of martial law or a state of emergency, in accordance with Art. 64 of the Constitution.

In the authors' opinion, it is difficult to understand the logic of the construction of this legal regulation, because health care and medical assistance is provided through health protection. Therefore, as part of the right to health care, it must be effective and affordable to all. It is thus appropriate to establish the truth or falsity of the approach prescribed in Part 3 of Art. 49 of the Constitution – namely, whether the state can guarantee only its citizens effective and accessible medical care – by comparing it with the international legal regulation of human and civil rights and freedoms in the field of health.

Here it is appropriate to mention Part 1 of Art. 26 of the Constitution, which is closely related to the topic of this research. According to it, foreigners and stateless individuals who are in Ukraine on legal grounds enjoy the same rights and freedoms, as well as bear the same duties, as citizens of Ukraine, with exceptions established by the Constitution, laws, or international treaties of Ukraine. This article, even if it equates the right of foreigners with those of Ukrainian citizens, does not eliminate the problems mentioned above. In particular, the answer to the question of whether it is possible, on the basis of Part 1 of Art. 26 of the Constitution, to consider that the rights of citizens provided by Part 3 of Art. 49 of the Constitution also apply to foreigners remains unclear.

It should also be noted that in the modern science of international law, the human right to healthcare is widely studied. In this regard, the works of Chapman (2002), Kinney (2001), Leary (1994), Da Silva (2018), Toebes (1999), Tobin (2011), and Yamin (2005) are particularly relevant. However, as a rule, these studies focus more on the content of this right and, for obvious reasons, do not compare it with Art. 49 of the Constitution of Ukraine. In addition, these studies do not focus on the subjects to whom this right is granted and the problems they face. The only exception is refugees, whose rights, in particular in the field of healthcare, are widely and comprehensively studied. Other categories of foreigners are often overlooked by international law scholarship, as it is believed that national regime or health insurance guarantee them the possibility of exercising their rights. However, gaps in the international and national legal regulation of the right to health for certain categories of foreigners may lead to the deprivation of medical care, which, in turn, will harm not only them, but also society as a whole. While conducting this research, the following specific methods of legal science were principally applied: comparative method, formal legal (dogmatic) method, legal interpretation method, and hermeneutic method of law interpretation.

1. The issue of the conformity of Part 3 of Art. 49 of the Constitution of Ukraine with the norms of the International Covenant on Economic, Social and Cultural Rights of 1966

To assess the provisions of Part 3 of Art. 49 of the Constitution, it is necessary to refer to the International Covenant on Economic, Social and Cultural Rights of 1966 (hereafter – ICESCR). It is a fundamental universal international treaty in the field of economic, social, and cultural human rights, involving 172 member states. Art. 12 of the ICESCR specifically focuses on the right to the highest attainable standards of physical and mental health (hereinafter – the right to health). This instrument is constructed as a list of international legal obligations for states regarding economic, social and cultural rights – a framework which allows for the better assessment of the content of Part 3 of Art. 49 of the Constitution. The latter also stipulates the obligation of the state to take care of the efficiency and accessibility of medical care. Ukraine is a party to the Covenant and is, therefore, obliged to comply with its provisions. ICESCR "provides the most comprehensive article on the right to health in international human rights law" (CESCR General Comment No. 14, 2000, § 2). For contrast, it should be added, however, that the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) does not explicitly provide for the right to health; however, the European Court of Human Rights practices the

protection of this right under other articles of the Convention, such as Art. 2 (concerning the right to life); Art. 3 (provides for the prohibition of torture), etc.

It should also be separately stated that the subject of this article is not the question of the nature of economic, social and cultural human rights and their relationship with civil and political rights; the peculiarities of the structure of ICESCR are indicated only because the article examines the responsibilities of the state, and the Covenant states the obligations of states for each right separately. At the same time, it must be noted that in Ukraine, even at the court level, there are cases of misunderstanding the legal nature and legal force of international treaties, in particular ICESCR (Decision in case No. 215/1717/17, 2017)

The study of the content of Art. 12 of ICESCR allowed us to identify a number of markers for compliance, with which Part 3 of Art. 49 of the Constitution should be tested. This is a question of the maintenance of the right provided by Art. 12 of ICESCR and the content of the international legal obligations of the states enshrined in it.

2. The content of the right to health according to Art. 12 of ICESCR and the issue of the compliance of Art. 49 of the Constitution of Ukraine

Regarding the content of the rights provided by Art. 12 of ICESCR, it particularly guarantees the right to health, namely the right to the highest attainable standard of physical and mental health. However, the right to health is considered here in a broad sense, and is not only limited to health care. This fact is emphasized in General Comment No. 14 (2000) (hereafter – Comment No. 14) prepared by the United Nations Committee on Economic, Social and Cultural Rights (hereafter – CESCR).

General Comments are non-binding international legal instruments prepared by the CESCR, based on an analysis of ICESCR Member States' reports, to facilitate the implementation of its provisions. Despite the non-binding nature of these General Comments, it is appropriate to compare their provisions with the provisions of the Constitution, as the Comments are drafted in the spirit of fundamental international human rights instruments and are a dynamic response to the problems, gaps and shortcomings that arise in the application of these treaties.

Inter alia, the CESCR stipulates that "according to the Committee's interpretation, the right to health, as defined in Art. 12, § 1, is not limited to the right to timely and appropriate health care". Further, in Comment No. 14, the other components of this right are enumerated, including safe food, healthy occupational and environmental conditions, access to health-related education and information, as well as the participation of the population in all health-related decision-making (§ 11). In turn, Hendel (2014), having analysed the present-day international legal regulation of the right to health, proved that this right is interpreted broadly. In particular, she stressed that:

> the right to health is a complex and systemic concept including the following: biomedical human rights, the right to medical care, the right to a healthy workplace, the right to a healthy natural environment, the right to prevention, treatment and control of diseases, the right to access medicines, the right to access safe drinking water, the right to information about factors that affect health, etc. (p. 10)

The authors perceive that the approach to understanding the right to health enshrined in Comment No. 14 reflects the idea prescribed in Art. 25 of the Universal Declaration of Human Rights in 1948. In the latter, the right to health care and social services necessary for the maintenance of health and the right to sickness benefits are part of a more general right, i.e., the right to an adequate standard of living. However, in ICESCR itself the right to health and the right to a standard of living adequate are textually divided between individual articles and are more detailed. Nonetheless, their meaningful connection and interdependence are indisputable:

> The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health. (Comment No. 14, 2000)

Thus, Art. 49 of the Constitution, in terms of the scope of the rights provided, does not correspond to the broad understanding of the right to health laid down in Art. 12 of ICESCR. The Basic Law of Ukraine grants everyone solely the right to a disparate triad of objects based on unknown criteria (health care, medical care, medical insurance) instead of granting everyone the right to health – or, at least, part of it, namely the right to health care, as a number of components of the right to health can be deduced from other articles of the Constitution (Art. 27 provides for the right to protect life and health from unlawful encroachments; Art. 43 – the right to proper, safe and healthy work conditions; Art. 46 – the right to social protection; Art. 48 – the right to an adequate standard of living; Art. 50 – the right to an environment that is safe for life and health, etc.). At the same time, the Constitution obliges the state to create conditions for effective and accessible medical care only for its citizens, which is related to health care, medical assistance and health insurance.

It should be noted that, although enshrined in Part 1 of Art. 49 of the Constitution, the approach to determining the scope of rights guaranteed by the Constitution was not, however, reflected in the legislation of Ukraine related to the health issue. For example, in the Law of Ukraine "On Fundamentals of the Legislation of Ukraine on Health Care" of 1992, the right to health care includes a number of components, including, inter alia, qualified medical care. Thus, according to this Law, medical care is a component of health care. In addition, this Law generally reflects the approach of Art. 12 of the ICESCR, as in Art. 6 and Art. 11 it provides for the granting of a wide range of powers in the field of health to individuals, although these powers are not considered as components of the right to health, but as a narrower right – the right to health care.

It is worth mentioning that the authors of a number of comments on the Constitution (e.g., Oprishko, Averianov, Kornienko etc.) have not paid attention to the discrepancy stated above, and have conversely believed that Part 1 of Art. 49 of the Constitution corresponds to Art. 12 of ICESCR. For example, Oprishko et al. (1996) in the *Commentary to the Constitution*, stated that in accordance with Art. 12 of the Covenant "everyone has the right to medical assistance and medical care in case of sickness. This inalienable human right is reflected in the first part of Art. 49 of the Constitution…" (p. 126). Thus, the authors of the abovementioned Commentary did not trace the fundamental international legal obligation of states to recognize the right of everyone to the highest attainable standard of physical and mental health provided in Part 1 of Art. 12 of the Covenant. Moreover, they paid attention only to the measures listed in its § d of Part 2 of Art. 12 – namely, medical assistance and medical care in case of sickness, whose use is necessary for the exercise of this right. Instead, they should have compared the obligations of states defined in § d of Part 2 of Art. 12 of the Covenant and the obligations of Ukraine under Part 3 of Art. 49 of the Constitution, and indicated that they focus on a different range of subjects.

In the same vein, Tatsii et al. (2003), authors of another *Commentary to the Constitution*, noted the following:

> The inalienable human right to life and health, reflected in a number of articles of the Constitution (Art. 5, 27 [the quote probably contains an error, because Art. 5 of the Constitution establishes the form of government of Ukraine and a number of principles for the exercise of power]), was developed in Art. 49 … The content of this article is fully in line with the provisions of the Universal Declaration of Human Rights (Art. 25) and the International Covenant on Economic, Social and Cultural Rights (Art. 12), according to which everyone has the right to medical assistance and medical care in case of sickness. (p. 252)

However, not all researchers are unanimous regarding the full compliance of Part 1 of Art. 49 of the Constitution with the provisions of ICESCR and other acts of international human rights law relating to the right to health. For example, Shekera (2013) also came to the conclusion that the content of Part 1 of Art. 49 of the Constitution is narrower than the content of the right to health enshrined in present-day international legal acts. In particular, he stated that:

> The constitutional right to health care and medical assistance in Ukraine (Article 49 of the Constitution) does not fully comply with basic international legal standards as in international treaties to which the Ukrainian state is a party, this right is considered much more broadly, and includes human social well-being. This imposes additional obligations on the state to create conditions for the realization of this right. (p. 530)

2.1 The content of international obligations in the field of the right to health provided by ICESCR, and equality and non-discrimination as their constituent elements

There are two positive international legal obligations concerning the provisions of Art. 12 of ICESCR: the obligation to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Part 1 of Art. 12); and the obligation to take measures for the full exercise of this right – in particular, measures which would assure all medical services and medical attention in the event of sickness (§ d, Part 2 of Art. 12). As can be seen, both obligations of states are directly related to equality and non-discrimination, a fundamental principle of international human rights law. The latter is a key issue for this study and is further consistent with Part 2 of Art. 2 of ICESCR, which provides for a general – i.e., applicable to all rights under the Covenant – obligation of states to guarantee the exercise of the rights proclaimed in ICESCR without any discrimination in relation to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. A connection between the provisions of Art. 12 and Part 2 of Art. 2 ICESCR is also indicated separately in Comment No. 14 (2000), where it is stated that "States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2)" (§ 30).

In addition, Comment No. 14 of ICESCR's international obligations regarding the right to health clarifies that, as with all human rights, the right to health provides for three categories or levels of obligations for States parties to the Covenant: the obligations to respect, protect and fulfil. The content of each of these obligations is revealed through the principle of equality and non-discrimination. In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all individuals – including prisoners or detainees, minorities, asylum seekers and illegal immigrants – to preventive, curative and palliative health services, abstaining from enforcing discriminatory practices as a state policy) (Comment No. 14, 2000, § 34). This provision turns out to be effective for the current study, as it emphasizes the need to protect certain categories of foreigners, namely: asylum seekers and illegal immigrants.

The interpretation of the content of the obligation on states to protect the right to health in Comment No. 14 (2000) is of particular significance for this study, as it means, in particular, that "obligations to protect include, inter alia, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties" (§ 35). Thus, in this provision, legislative measures and access to health services composed of medical care are linearly linked in a logical manner: the former must provide the latter. That is, Part 3 of Art. 49 of the Constitution does not correspond to the idea laid down in the understanding of Art. 12 of ICESCR.

The obligation to fulfil is closely related to the obligation to protect the right to health, as it requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures towards the full realization of the right to health (Comment No. 14, 2000, § 33). The latter stipulates the following: "to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation" (§ 36). That is, the authors of Comment No. 14 repeatedly pointed out the importance of developing the necessary legislative regulation of the

right to health, which, in the opinion of the authors of the current study, does not correspond to Part 3 of Art. 49 of the Constitution.

Returning to the principle of equality and non-discrimination, it should be mentioned that in Comment No. 14, equality and non-discrimination are also perceived as part of the content of the right to health itself. In particular, in § 12(b), it is stated that "health facilities, goods and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party" (Comment No. 14, 2000), and this rule is considered in the Notes as one of the main elements of the right to health – namely, the accessibility of health care facilities, goods and services. In Comment No. 14, it is specifically explained that the triad "health facilities, goods and services" embodies a broad understanding of the right to health outlined in §§ 11 and 12(a) of this Comment.

Thus, according to ICESCR and Comment No. 14, an international legal act designed to clarify the provisions of the Covenant, the principle of equality and non-discrimination is used in two areas:
- the first is realised via the content of the right to health, in particular, such component as accessibility to everyone;
- the second is the international legal obligations of states in the field of health – namely, those provided for in Part 2 of Art. 2 and Art. 12 of ICESCR's commitment to guaranteeing the right to health without discrimination, recognizing the right of everyone to health, as well as committing to take measures to provide all medical assistance and medical care in case of sickness.

2.2. On the issue of including citizenship among the grounds recognized by international human rights law, discrimination on the basis of which is prohibited

CESCR, in explaining the specifics of the principle of equality and non-discrimination in the sphere of health, often refers to the classic list of grounds on which discrimination is prohibited that is recognized by the international law: race, color, sex, language, religion, political or other opinion, national or social origin, property status, birth or other circumstances. For example, in Comment No. 14 (2000), the content of non-discrimination, which is one of the aspects of access to the right to health, is explained as follows: "health care facilities, goods and services must be de jure and de facto accessible to all … without discrimination on any of the prohibited grounds" (§12(b)). In addition, § 18 reiterates the grounds on which discrimination in access to health services and the means and methods of obtaining them is prohibited. Interestingly, this list is expanded here, compared with the provisions of Part 2 of Art. 2 of the Covenant. Thus, along with the classic components, it includes: physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status.

Similarly, § 19 of Comment No. 14 is related to non-discrimination issues. It assumes that "states have a special obligation … to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health".

Therefore, the above examples from Comment No. 14, and Part 2 of Art. 2 of ICESCR do not directly indicate citizenship as ground of discrimination. It is evident that the list of grounds on which discrimination is prohibited enshrined in Part 2 of Art. 2 of the ICESCR and other acts of the Bill of Human Rights is not exhaustive. At the same time, citizenship cannot unconditionally be included in this list, because a number of rights are granted exclusively to citizens of states in present-day international human rights law. In this regard, an important question arises as to whether the absence of citizenship in the list of grounds on which discrimination is prohibited gives states the right to ensure the right to health, or to certain components of it, exclusively to their own citizens.

A negative answer to this question can be given based on the provisions of CESCR General Comment No. 20 (2009) on "Non-discrimination in economic, social and cultural rights (Art. 2, § 2, of the International Covenant on Economic, Social and Cultural Rights". This Comment clearly states that "the Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless

persons, migrant workers and victims of international trafficking, regardless of legal status and documentation" (§ 30).

In its turn, the position of Comment No. 20 is enhanced by the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966 (hereinafter – ICERD), which, incidentally, chronologically preceded ICESCR, and was developed by the United Nations Committee on the Elimination of Racial Discrimination (CERD) in its General Recommendation XXX on discrimination against non-citizens (hereinafter – the Recommendation, 2005). Thus, according to ICERD, States parties undertake to prohibit and eliminate racial discrimination in all its forms and ensure the equality of every person before the law without distinction as to race, colour, or national or ethnic origin, especially in the exercise of certain human rights. Inter alia, this rule applies to rights in the economic, social and cultural spheres – in particular, the right to health care and the right to medical assistance.

The Recommendation bridges the gap that may arise due to the fact that ICERD discloses the concepts of discrimination and equality through a list, albeit inexhaustive, of factors. However, there is no direct mention of citizenship among the latter. Thus, the Recommendation contains a fundamental principle, according to which:

> Art. 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social, and cultural rights. … States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognised under international law" (Recommendation, 2005, § 3).

Based on the above and other principles of international law, the Recommendation derives the following proposition that to "ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative, and palliative health services" (§ 36). It is especially relevant to the current study that the Recommendation enshrines a clear indication of the obligation of states not to restrict non-citizens' access to health care, because Part 3 of Art. 49 of the Constitution does not correspond to this provision. In addition, the presence in the cited General Comments and the Recommendation of certain provisions on non-discrimination on the grounds of citizenship indicates that, despite the spread of Art. 12 of ICESCR and Art. 5 of ICERD, in the practice of states there have been cases of the restriction of foreigners' rights to health, and the states should pay attention to this aspect.

In this regard, it is important to note that the Durban Declaration on the Elimination of All Forms of Racial Discrimination, adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, South Africa, August 31–September 7, 2001), highlights that "xenophobia against non-nationals, particularly migrants, refugees, and asylum-seekers, constitutes one of the main sources of contemporary racism" (Declaration of World Conference, 2001, § 16).

Taking into account that the present-day international human rights system includes a number of rights granted exclusively to citizens of states, citizenship cannot be included in the list of "anti-discrimination grounds" established in international human rights law – namely, race, color, sex, language, religion, political or other opinion, national or social origin, property status, or birth. However, in view of the above, it can be proposed that citizenship be included among the other features for which discrimination is prohibited in the regulation of certain areas of public relations, such as measures to eliminate racial discrimination, economic, social, and cultural human rights. Incidentally, Ukrainian legislators have already followed this path in defining discrimination in the Law of Ukraine "On the Principles of Prevention and Counteracting Discrimination in Ukraine" of September 6, 2012. In particular, this is considered to represent a situation in which a person and/or group is restricted in recognizing, realizing or exercising rights and freedoms in any form established by this law on various grounds, among which the law clearly states citizenship, except in cases where such a restriction has a legitimate, objectively justified purpose and the ways to achieve it are appropriate and necessary (Art. 1). Moreover, healthcare

(Article 4) is within the scope of this law, and the Verkhovna Rada of Ukraine is recognized as an entity endowed with the authority to prevent and resist discrimination (Art. 9).

3. The state of regulation of the right to health by the Constitutions of other states

General Comment No. 15 of the UN Human Rights Council on "The position of aliens under the Covenant" (1986), although it concerns the International Covenant on Civil and Political Rights, emphasizes that many states are characterized by the unsatisfactory constitutional regulation of the rights of foreigners. In particular, this document notes that:

> A few constitutions provide for equality of aliens with citizens. Some constitutions adopted more recently carefully distinguish fundamental rights that apply to all and those granted to citizens only, and deal with each in detail. In many States, however, the constitutions are drafted in terms of citizens only when granting relevant rights (§ 3).

In view of this, the authors consider it necessary to study the regulation of the right to health by the constitutions of other states. This begins with the Constitution of France, as the constitutional law of this state has largely set the standards of the legal regulation of human rights. Currently, France has a package of constitutional acts consisting of: the Constitution of France of 1958 (as amended in 2008), the Declaration of the Rights of Man and of the Citizen of 1789, the Preamble to the Constitution of France of 1946, and the 2004 Charter of the Environment. Human rights are regulated by the Declaration of the Rights of Man and of the Citizen of 1789 and the Preamble to the Constitution of France of 1946, and according to the latter "it (The Nation) shall guarantee to all, notably to children, mothers and elderly workers, protection of their health". In addition, the Charter for the Environment of 2004 proclaims that "each person has the right to live in a balanced environment which shows due respect for health" (Art. 1). Thus, compared to the norms of present-day international human rights law, these acts proclaim the right to health in a narrower sense, but extend it to everyone, without reservations regarding citizenship.

It is also appropriate to study the approaches to guaranteeing the right to health applied in the Constitutions of newly created states, as they have had the opportunity to build national human rights legislation taking into account the latest international legal standards in this area. Thus, the Transitional Constitution of the Republic of South Sudan 2011 introduced a separate section II – the Bill of Rights – which provides that "all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill". In addition, the article of the Constitution of South Sudan on "Public Health Care" stipulates the obligation of the state to provide citizens with free primary health care and emergency medical care.

The 2007 Constitution of Montenegro also provides for the right of everyone to health protection, and, in particular, the right of children, pregnant women, elderly people, and people with disabilities to health protection from public revenues, if they do not exercise this right on some other grounds (Art. 69).

The provisions of the Fundamental Law of Hungary 2011 are also exemplary from the point of view of this research, although a number of other provisions, including those relating to human rights, have been widely criticized. The aforementioned law proclaims that:

> Everyone shall have the right to physical and mental health. Hungary shall promote the effective application of the right referred to in § (1) by an agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organising safety at work and healthcare provision, by supporting sports and regular physical exercise, ensuring the protection of the environment. (Art. XX).

Proceeding from the above, the wording of the right to health enshrined in the Basic Law of Hungary is as close as possible to the wording of Art. 12 of ICESCR. Moreover, unlike the Constitution, the state undertakes to organize health care, and this is one way to promote the right to health.

The 1991 Constitution of Romania guarantees the right to health care without special instructions to the subjects to whom it applies (Part 1 of Art. 34), and provides for the obligation of the state to take measures in the field of hygiene and public health (Part 2 of Art. 34). Other issues related to health care should be regulated by law (Part 3 of Art. 34). A similar approach to the regulation of the right to health is applied in Moldova, whose Constitution of 1994 provides a guarantee of the right to health protection (Part 1 of Art. 36), regulation by a special law of the structure of the health care system (Part 3 of Art. 36), and the gratuitous nature of the minimum state health insurance (Part 2 of Art. 36).

The constitutions of other states bordering Ukraine use an approach somewhat similar to that implemented in the Constitution. Namely, they extend the right to health care to all, but, at the same time, they establish the positive obligation of the state to provide effective and accessible medical care only to citizens. However, this obligation is associated with the gratuitous nature of public medicine, and this circumstance makes legal regulation that is differentiated by subject composition in such a way more justified. Thus, the Constitution of Poland of 1997 guarantees everyone the right to health care, but the state undertakes to ensure only citizens equal access to state-funded medical services (Part 1, 2, Art. 68). Similarly, the 1992 Constitution of Slovakia traditionally grants the right of everyone to health care, and the right of citizens to free medical care provided on the basis of health insurance (Art. 40).

The approach of Belarus to the constitutional regulation of the right to health care is significantly different to the above examples. The Constitution of 1994 guarantees the right to health care exclusively to citizens of Belarus, including free treatment in state health care institutions (Part 1 of Art. 45). In addition, the state creates conditions for sufficient medical care for all citizens (Part 2 of Art. 45) and ensures the right of citizens to health care by developing physical training and sport, taking measures to improve the environment, developing opportunities for the use of fitness institutions, and improving health and occupational safety (Part 3 of Art. 45).

In the aforementioned constitutions there is a tendency to allocate a separate article with a special focus on the right to health care, which, in the vast majority of cases, is given to everyone. In the same articles, a number of constitutions define the obligations of states to promote the exercise of this right by individuals. However, the responsibilities of the state related to free public health care/assistance should be performed exclusively in relation to its citizens.

The Constitution of Ukraine also provides free medical care in state and municipal health care facilities, as stipulated in the second sentence of Art. 49, Part 3. However, in this case the legislator does not specify the range of subjects to whom this free assistance may be granted. This was also not done in the interpretation of the second sentence of Part 3 of Art. 49 of the Constitution of Ukraine by the Constitutional Court of Ukraine (CCU) in Decision No 10-rp/2002 of 29 May 2002 in the so-called "Case on Free Medical Care", which explained the extent to which state and municipal medical institutions should provide free medical care. It is worth remembering that, in accordance with Art. 150(2) of the Constitution of Ukraine and Art. 7(1)(2) of the Law of Ukraine "On the Constitutional Court of Ukraine" of July 13, 2017, the CCU is authorised to officially interpret the Constitution of Ukraine, and, in accordance with Art. 151^2 of the Constitution of Ukraine, its decisions are binding and final and cannot be appealed. In particular, considering this case, the CCU had to clarify the possibilities and methods of direct payment by patients for medical care provided to them in the state and municipal health care institutions of Ukraine. The question of determining the range of subjects to which the second sentence of Part 3 of Art. 49 of the Constitution of Ukraine applies was not included in the constitutional petition. As a result, in its final conclusions on the case the CCU indicated exclusively citizens. Thus, the Decision stated that:

> the provisions of Part Three of Art. 49 of the Constitution of Ukraine "in state and municipal health care facilities medical care is provided free of charge" should be understood as meaning that in state and municipal health care facilities medical care is provided to all citizens regardless of its volume and without their previous, current or subsequent payment for such care. (Decision No. 10-rp / 2002, 2002)

However, it should be emphasized that the Ukrainian deputies who appealed to the CCU in this case, first, inaccurately conveyed the content the Constitution of Ukraine in the relevant submission, noting that "the right to health care, medical assistance and health insurance is an inalienable right of *the citizen of Ukraine* [emphasis added], which is recorded in Art. 49 of the Constitution of Ukraine" (Constitutional submission of People's Deputies of Ukraine, 2002, § 1). Secondly, along with the terms "citizen" and "citizens of Ukraine", terms such as "population", "population funds", and "patients" were also used which, according to their content, are broader than "citizens of a particular state". Moreover, the CCU itself in Decision No 10-rp/2002 used the above list of terms, and also noted that in the phrase

> "medical care is provided free of charge" the last word in the context of the whole Art. 49 of the Constitution of Ukraine means that *the individual* [emphasis added] receiving such care in state and municipal health care institutions, should not reimburse its cost in the form of any payments or in any form, regardless of the time of medical care. (Decision No. 10-rp / 2002, 2002, Item 4, § 1).

In the authors' opinion, such a juggling of concepts indicates that people's deputies and judges, by focusing on the issue of the possibility of direct payment for medical care provided to patients, did not pay attention to the definition of categories of individuals entitled to free medical care. Such negligence in the official interpretation of the Constitution of Ukraine enshrined in a legally binding document (decision of the CCU) can lead to serious consequences. After all, the position of the CCU regarding the fact that "in state and municipal health care facilities medical care is provided to all citizens regardless of its volume and without their previous, current or subsequent payment for such care" (Decision No. 10-rp/2002, 2002) actually means that, for example, foreign citizens and stateless persons permanently residing in Ukraine cannot count on free medical care, although, in fact, according to the current legislation of Ukraine, certain categories of foreigners are entitled to it.

4. Features of the regulation of the right to health care of foreigners provided by the legislation of Ukraine

Similarly to the provisions of the Ukrainian Constitution, national Ukrainian legislation in the field of health care also does not always guarantee certain categories of foreigners access to and efficiency of medical care. Particularly, this is the case with payment for medical care regulated in the Law of Ukraine "On State Financial Guarantees of Medical Care" 2017 (hereinafter the Law "On State Financial Guarantees"). This particular law is the cornerstone of the medical reform which has been taking place in Ukraine since 2018. First of all, it should be noted that according to Part 1 of Art. 4 of this Law, the state guarantees full payment from the State Budget of Ukraine for necessary medical services and medicines provided during emergency, primary, secondary (specialized), tertiary (highly specialized), and palliative medical care, as well as medical rehabilitation, medical care for children under 16, and medical care in connection with pregnancy and childbirth to the following categories of individuals:

- citizens of Ukraine;
- foreigners permanently residing in Ukraine (the authors would like to emphasize that according to § 6, Part 1 of Art. 1 of the Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons", 2011, in Ukraine a foreigner is a person who is not a citizen of Ukraine and is a citizen (subject) of another state or states);
- stateless persons permanently residing on the territory of Ukraine;
- persons recognized as refugees or persons in need of additional protection.

Thus, in Ukraine, not only citizens but also other categories of individuals receive the right to free medical services. The state also provides payment for medical services and medicines granted during emergency medical care to foreigners permanently residing in Ukraine, as well as stateless individuals permanently residing on the territory of Ukraine under the condition of further compensation of their full value by said persons. At the same time, medical services and medicines related to the provision of other types of medical care are paid for by these categories of individuals at their own expense, via voluntary health insurance, or through other sources not prohibited by law (Part 2 of Art. 4 of the Law "On State Financial Guarantees").

The authors deliberately separated the list of individuals who receive free medical services in order to show that the legislator did not regulate the issue of payment for medical services and medicines by foreigners and stateless individuals temporarily residing in Ukraine. However, this issue is extremely important as this category of individuals includes a large number of foreigners who come to Ukraine, such as foreign students and migrant workers.

It is clear that the issue of payment for medical services rendered is resolved at the expense of medical insurance, which, according to the Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons" of December 25, 2011, must be available to almost all persons who come to Ukraine for temporary residence. Thus, in accordance with Art. 5 of the Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons", a valid health insurance policy is included in the list of documents on the basis of which a temporary residence permit is issued. However, due to the variety of types of health insurance, a foreigner may be denied a temporary residence permit. In particular, the Administrative Court of Ukraine considered case No. 320/6677/23 on the refusal to issue a temporary residence permit to a Russian citizen who had been living in Ukraine since 2019. The grounds for the refusal were that, in the opinion of an employee of the State Customs Service of Ukraine, the insurance policy submitted by the citizen – "Agreement on Voluntary Medical Insurance and Accident Insurance during Travel or Stay in Ukraine", which provided coverage of medical and other expenses and accident insurance – was not a valid health insurance policy. However, the Sixth Administrative Court of Appeal of Ukraine, having considered the case materials, ruled that the insurance policy provided by the plaintiff met the requirements established by the immigration legislation of Ukraine, as it provided for coverage of medical expenses, including emergency medical care, emergency inpatient or outpatient medical care, and medical evacuation, treatment and observation provided by state and departmental medical institutions in Ukraine (for more information on this case, see Resolution in case No. 320/6677/23, 2023).

It should be taken into account that only foreigners and stateless persons who perform military service in the Armed Forces of Ukraine, the State Special Transport Service, and the National Guard of Ukraine under a contract are not required to have a valid health insurance policy. The legality of their temporary residence in Ukraine is confirmed by the military ticket of a private, sergeant, or sergeant major (part 19 of Art. 4 of the Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons", 2011). At the same time, returning to the topic of the article, neither the Law of Ukraine "On Military Duty and Military Service" nor the Regulation on Military Service in the Armed Forces of Ukraine by Foreigners and Stateless Persons, approved by the Decree of the President of Ukraine on the 10 June 2016, clearly regulate the conditions and procedure for providing such individuals with medical care in Ukraine. It is likely that these issues will be regulated by the contract on military service concluded between the foreigner and the state, represented by the Ministry of Defense of Ukraine. After all, according to the standard form of this contract, which is set out in the Annex to the above Regulation, the Ministry undertakes to ensure that a foreign serviceperson is granted the right to healthcare and the right to receive medical care in healthcare facilities of the Ministry of Defense of Ukraine (clause 2).

However, it is extremely important to clearly understand the terms of payment for foreigners who have a valid health insurance policy – for example, for emergency medical care provided to them in a state or municipal healthcare facility. After all, a person in need of such assistance may be unconscious or may lack identification documents, and citizens who request such assistance may not know about the insurance policy and may call an ambulance from a state or municipal healthcare facility. According to part 3 of Art. 3 of the Law of Ukraine "On Emergency Medical Care" of 22 September 2012, calling for such assistance is the duty of Ukrainian citizens.

In turn, special legislation on the issue of emergency care is also inconsistent in terms of payment by different categories of individuals. Thus, the Law of Ukraine "On Emergency Medical Care" of 2012 provides that, on the territory of Ukraine, every citizen of Ukraine and any other person has the right to free, affordable, timely, and quality emergency medical care (Part 1 of Art. 3). However, foreigners and stateless individuals temporarily staying on the territory of Ukraine are provided with emergency

medical care in accordance with the procedure established by the Cabinet of Ministers of Ukraine (Part 2). Thus, the Law does not provide for the special legal regulation of emergency medical care for foreigners and stateless individuals temporarily residing in Ukraine. Therefore, we can conclude that they, along with citizens of Ukraine, are entitled to free medical care.

At the same time, Ukraine has not developed a separate procedure for providing emergency medical care to foreigners and stateless individuals temporarily staying in Ukraine, which was discussed in Part 2 of Art. 3 of the Law of Ukraine "On Emergency Medical Care" of 2012; no such separate procedure has been developed for foreigners and stateless persons temporarily residing here. Instead, there is a more comprehensive document approved by the decision of the Cabinet of Ministers of Ukraine No. 121 (2014), which outlines a

> Procedure for providing medical care to foreigners and stateless individuals who permanently reside or temporarily stay on the territory of Ukraine … and compensation for the cost of medical services and medicines provided to foreigners and stateless individuals temporarily residing or staying on the territory of Ukraine.

According to § 2^1 of this Procedure, foreigners and stateless individuals temporarily residing in Ukraine, as well as persons temporarily staying in Ukraine, are obliged to reimburse the full cost of medical services and medicines related to the provision of emergency medical care to the state. At the same time, in accordance with § 2 of the Procedure, foreigners and stateless individuals temporarily residing or staying in Ukraine are granted medical care on a paid basis, unless otherwise stipulated by international treaties or laws of Ukraine.

Thus, on the issue of payment for medical services including emergency medical care, without any legal grounds an executive body, i.e., the Cabinet of Ministers of Ukraine, equated the legal status of individuals temporarily residing in Ukraine with the legal status of individuals temporarily staying here. In this case, the Procedure defines a subject that establishes the cost of medical care (proper health care institution) and a form of payment (cash and non-cash in the national currency). However, this regulation applies only to medical care provided to a foreigner or a person without citizenship temporarily staying on the territory of Ukraine; it does not apply to individuals temporarily residing in Ukraine.

The aforementioned problems cannot be solved by the application of the general norm of the Law of Ukraine "On Fundamentals of the Legislation of Ukraine on Health Care" regulating the rights and duties of foreigners in the field of health care, as it establishes the national mode for foreigners and stateless individuals permanently residing on the territory of Ukraine and for persons recognized as refugees or persons in need of additional protection. According to this Law, the rights and obligations in the field of health care of foreigners and stateless individuals temporarily staying on the territory of Ukraine must be determined by the laws of Ukraine and relevant international agreements. At the same time, the legal status of foreigners and stateless individuals temporarily residing in Ukraine is again not regulated by law.

Practice shows that healthcare issues for foreigners and stateless persons temporarily residing in Ukraine may arise not only in connection with payment for emergency medical care provided to them outside the health insurance policy. For example, in 2021, the Solomianskyi District Court of Kyiv considered case No. 760/8326/21 on fraud and abuse of office. Law enforcement agencies uncovered a criminal scheme to fraudulently obtain foreigners' money for their admission to medical universities in Ukraine. This case is interesting for this study because the prosecutor , during the investigation of this case, found and seized 271 voluntary health insurance contracts for foreign citizens in Ukraine, a significant part of which covered the costs associated with the treatment of COVID-19 and subsequent observation. It can be assumed that as a result of these investigative actions, hundreds of foreign students in Ukraine were left without health insurance, and therefore, in the event of illness, if they did not have the means, they might not have received the medical care that they needed. In the context of the COVID-19 pandemic, this could have posed a great danger to their health.

Gaps in Ukrainian legislation in the sphere of the provision of free medical care to certain categories of individuals have already become a matter at issue by CESCR, which, in its 2020 "Concluding Observations on Ukraine's Seventh Periodic Report", expressed the concern that "as a result of recent health care reform of the health-care system asylum seekers were deprived of the right to free medical care that existed before, including emergency medical care and initial medical examinations" (§ 38).

Indeed, the Law "On State Financial Guarantees", together with foreigners and stateless individuals temporarily residing in Ukraine, has overlooked foreigners and stateless persons who have applied to the competent state authorities for recognition as a refugee or a person in need of additional protection, as well as foreigners and stateless persons in respect of whom a decision has been made to draw up documents to resolve the issue of recognition as a refugee or a person in need of additional protection. While they were mentioned in the Procedure of 2014, this provides only for free medical examination for these persons and emergency medical care (§ 4), and does not say anything about medical care in general. Moreover, a mechanism to cover the costs of medical examinations and emergency medical care for such patients at the expense of budget funds has not been developed.

Another vulnerable category of individuals in terms of health care is foreign nationals who are held in temporary accommodation centres for foreigners and stateless persons illegally staying in Ukraine (TACs). Despite the fact that the issue of providing them with medical care is regulated by the relevant bylaw (specifically, Instructions, 2016), there are still many unresolved issues in practice. This is due, in particular, to the aforementioned medical reform, which does not provide for the state to cover the costs of medical care for foreigners who are illegally staying in Ukraine and are accommodated in TACs. For example, in 2023, a citizen of Morocco who was held in a temporary detention facility in Ukraine was provided with the necessary dental care only with the assistance of the Ukrainian Parliament Commissioner for Human Rights. In particular, the Ukrainian Parliament Commissioner for Human Rights initiated an inspection at the request of this person, during which he found that:

> foreigners and stateless persons temporarily staying on the territory of Ukraine, within the framework of the medical guarantees programme, are provided with payment for the necessary medical services and medicines related to the provision of emergency medical care by the state. Such persons are obliged to reimburse the state for the full cost of the medical services and medicines provided. Medical services and medicines related to the provision of other types of medical care are paid for by foreigners and stateless persons temporarily staying in Ukraine at their own expense, voluntary health insurance or other sources not prohibited by law. (Ombudsman of Ukraine, 2023).

It is clear that the subject of the Kingdom of Morocco did not have the necessary funds for dental treatment. Therefore, the management of the TACs turned to NGOs and the International Organization for Migration in Ukraine for help, and the latter provided the necessary funding.

It is also worth noting that before the medical reform, there were fewer significant problems with the financing of medical care provided to foreigners in TACs. For example, when considering case No. 743/354/18 (Decision in case No. 760/8326/21, 2018) on the extension of the detention of an Angolan citizen in 2018, the latter complained that he did not receive proper medical care in the Chernihiv TACs. In this regard, the court issued a separate ruling to inform the administration of the TACs of the Angolan citizen's complaints. However, the Chernihiv TACs subsequently provided evidence of the provision of adequate medical care to the Angolan citizen, which was carried out not only at the TACs' health centre, but also at the Chernihiv Regional Hospital (Resolution in case No. 743/354/18, 2018). That is, before the medical reform, the state provided medical care to persons held in temporary detention facilities.

Conclusion

Against the background of the proclaimed right of everyone to health care, Art. 49 of the Constitution of Ukraine provides for the obligation of the state to provide basic elements of this right – i.e., the efficiency and accessibility of medical care – not to all individuals, but only to citizens. Adopted in

1996, the Constitution does not fully reflect sufficiently high international standards in the field of the right to health. These standards are enshrined in the ICESCR, to which the Ukrainian SSR has been a party since 1973. In particular, if we follow the information of ICESCR, then Part 3 of Art. 49 of the Constitution does not reflect the provisions of Art. 12 of the Covenant, i.e., the international legal obligation of the state to create conditions that would provide all with medical assistance and medical care in case of sickness. Provided in Part 3 of Art. 49 of the Constitution, the obligation of the state to create conditions for effective and accessible to all citizens medical care is limited in object and subject composition of this obligation.

At the same time, the analysis of current soft international law acts in the field of human rights, primarily prepared in the Comment No. 14 (2000), further highlights the shortcomings of the regulation of the right to health enshrined in Part 3 of Art. 49 of the Constitution. After all, these instruments place special emphasis on the connection between the right to health and the international legal obligations of ICESCR member states in this field of law, with the key principle of international human rights law – that is, the principle of equality and non-discrimination. In turn, the latter is implemented through the obligation of states to extend the right to health to various categories of non-citizens (CESCR General Comment No. 20, 2009) and through the obligation of states to ensure respect for the right of non-citizens to an adequate level of physical and mental health by, inter alia, not applying the policy of denial or restriction of access to preventive, curative, and palliative care (Recommendation, 2005) to them. Moreover, the global community now recognizes that xenophobia against non-citizens is one of the main sources of present-day racism.

The comparison of Part 3 of Art. 49 of the Constitution with the relevant provisions of the constitutions of other states also indicates problems with the Ukrainian Constitution on this issue. In particular, a number of states which Ukraine shares borders with and which belong to the group of post-socialist countries use an approach somewhat similar to that implemented in the Constitution. Namely, the constitutions of states such as Romania, Moldova, Hungary, Slovakia, and Poland extend the right to health care to all, but at the same time establish the positive obligation of the state to assist only citizens in exercising this right. In the authors' opinion, this obligation is associated with the gratuitous nature of state medicine, and this circumstance makes such differentiated by subject composition legal regulation more reasonable than the approach enshrined in Part 3 of Art. 49 of the Constitution.

It should be emphasized that further Ukrainian legislation in the field of health does not always guarantee access and efficiency of medical care to certain categories of foreigners. In particular, the current health care reform in Ukraine does not properly address the health rights of foreigners and stateless individuals temporarily residing in Ukraine, first of all, who are illegally staying in the country. Nor does it address foreigners and stateless persons who have applied to the competent authorities with a statement of recognition as a refugee or a person in need of additional protection. Incidentally, this issue has already been considered by the UN Committee on Economic, Social and Cultural Rights.

Thus, given the facts that the Constitution is relatively rigid and the procedure for amending it is quite complex and lengthy, the Ukrainian parliament, taking into account the provisions of the International Bill of Human Rights, should eliminate all shortcomings that limit the rights of foreigners in the field of healthcare from the laws and regulations of Ukraine, primarily those concerning persons who are illegally staying in the territory of Ukraine.

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