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THE CONSTITUTIONAL RIGHT TO HEALTH AND ACCESS TO MEDICINES

This article concerns the constitutional aspects of the right to health, specifically focusing on access to essential medicines and relying on international legal instruments, national constitutions, and judicial practice from countries such as South Africa, Brazil, Colombia, and Ukraine. The article considers how courts and governments are interpreting and enforcing this right. The analysis also considers the interaction between constitutional guarantees and international intellectual property frameworks, particularly the TRIPS Agreement and its flexibilities. In light of global health emergencies such as the COVID-19 pandemic and the war in Ukraine, the paper argues for a rights-based, resilient, and equitable approach to ensuring access to medicines as a constitutional obligation. A major challenge in realising the constitutional right to medicines is the tension between intellectual property (IP) protection under international law – particularly the TRIPS Agreement – and the obligation to ensure access to essential medicines.

The TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights), administered by the WTO, mandates minimum standards of patent protection, including for pharmaceutical products. However, Article 8 and Article 31 of TRIPS, along with the Doha Declaration on TRIPS and Public Health (2001), affirm that IP protection should not prevent member states from protecting public health and promoting access to medicines. Courts have often emphasised that commercial interests, including those of pharmaceutical companies, cannot override basic human rights, particularly in emergencies. This perspective aligns with the doctrine of proportionality, commonly applied in constitutional law to assess the legitimacy of state actions that restrict or prioritise certain rights.

Many constitutions provide a legal framework through which these flexibilities – such as compulsory licensing, parallel importation, and government use – can be operationalized. Constitutional courts have, in some cases, invoked these international provisions to justify limitations on patent rights in favor of public health imperatives.

Keywords: constitutional rights, right to health, access to medicines, human rights.

Чомахашвілі О., Іолкіна М.**Конституційне право на здоров'я та доступ до лікарських засобів**

Ця стаття присвячена конституційним аспектам права на здоров'я з особливим акцентом на доступ до основних лікарських засобів. Вона ґрунтується на міжнародних правових актах, національних конституціях та судовій практиці таких країн, як Південна Африка, Бразилія, Колумбія та Україна. У статті розглядається, як уряди та суди інтерпретують і реалізують це право. Також проаналізовано взаємодію між конституційними гарантіями та міжнародними режимами охорони прав інтелектуальної власності, зокрема Угодою ТРІПС і її гнучкими механізмами. В умовах глобальних загроз для здоров'я, таких як пандемія COVID-19 та війна в Україні, стаття обґрунтовує необхідність заснованого на правах людини, стійкого та справедливого підходу до забезпечення доступу до ліків як конституційного обов'язку держав.

Суди часто наголошували, що комерційні інтереси, в тому числі інтереси фармацевтичних компаній, не можуть переважати основні права людини, особливо в надзвичайних ситуаціях. Ця перспектива узгоджується з доктриною пропорційності, яка зазвичай застосовується в конституційному праві для оцінки легітимності дій держави, які обмежують або надають пріоритет певним правам.

Конституції багатьох країн передбачають правові рамки, за допомогою яких ці гнучкі можливості – такі як примусове ліцензування, паралельний імпорт і використання урядом – можуть бути реалізовані на практиці. У деяких випадках конституційні суди посилалися на ці міжнародні положення, щоб виправдати об-

меження патентних прав на користь імперативів громадського здоров'я.

Ключові слова: конституційні права, право на здоров'я, доступ до лікарських засобів.

Relevance of the problem under study. The right to health is a fundamental human right determined in numerous international legal instruments, including the Universal Declaration of Human Rights (Article 25) [1], the International Covenant on Economic, Social and Cultural Rights (Article 12) [2], and regional human rights treaties. Increasingly, this right is also enshrined in national constitutions, which affirm the duty of states to ensure that all individuals can attain the highest possible standard of health. An essential component of this right is equitable access to medicines.

The right to health is considered a natural right because it stems from the inherent dignity of every human being. Unlike rights granted by governments or institutions, natural rights are inalienable and universal – they belong to all individuals by being human. Health is essential to human survival, development, and autonomy; exercising all other rights becomes limited or even impossible.

From a philosophical perspective, thinkers such as John Locke and later natural law theorists argued that life, liberty, and the pursuit of well-being are fundamental to human existence and therefore must be protected. As a condition for preserving life and dignity, the right to health falls within this core category of rights.

As global health challenges intensify due to pandemics, conflicts, and economic disparities, the constitutional right to health is being interpreted with greater urgency and specificity. In this context, access to medicines is no longer merely a matter of health policy or market regulation—it has become a constitutional and legal imperative, particularly in states that have recognised this right within their national legal frameworks. This essay explores the constitutional dimensions of the right to health, the role of the judiciary in enforcing access to medicines, and the interaction between national constitutions and international intellectual property frameworks.

Analysis of recent research and publications. Scientists who have studied the problem: Petryshyn O. V. – studies human rights in constitutional law, in particular social rights; Skakun O. F. – examines the right to health care in the light of human rights and state guarantees; Hrytsenko I. A. – analyzes the formation of medical law as a branch; Serhiy Shevchuk – conducts research on the role of the judiciary in ensuring the right to medical care; V. M. Campo – in his works examines social rights in the system of constitutional regulation; Alicia Ely Yamin (Harvard University) – studies the right to health from a human rights perspective; Paul Hunt – former UN Special Rapporteur on the right to health; author of numerous reports on access to medicines; Lawrence Gostin is one of the leading American lawyers in the field of global health and law; Virginia Berridge is engaged in the historical and legal aspects of medical regulation.

Separately, the formation of medical law as a science is investigated, which includes the regulation of doctor-patient relations, bioethical norms, the right to informed consent, etc. Academic papers by N. Kvit, I. Senyuta, V. Pashkov, O. Kashyntseva.

But today, the issue of the constitutional right to health and access to medicines has acquired new relevance and requires additional consideration.

The purpose of the article. The article explores how the right to health is framed in various national constitutions – ranging from being a justiciable right (i.e., enforceable in court) to a more aspirational goal. Article identifies countries that explicitly guarantee access to healthcare services and essential medicines in their constitutions, helping highlight best practices.

Presentation of the main research material. The Right to Health in Constitutional Law. The inclusion of health rights in constitutions is a growing global trend. More than 70% of countries explicitly recognise health as a constitutional right [3].

These provisions vary in scope and enforceability:

- Directive principles (e.g., India) guide state policy but are not directly justifiable;
- Judicially enforceable constitutional rights (e.g., South Africa, Brazil) allow individuals to claim access to healthcare and essential medicines in court.

For example, Article 27 of the Constitution of South Africa guarantees the right to access healthcare services, including reproductive health and essential medicines [4]. Similarly, Article 196 of the Brazilian Constitution recognizes health as a right of all and a duty of the state, enforced through a publicly funded national health system [5].

In the context of Ukraine, Article 49 of the Constitution guarantees the right to health protection and medical care, and establishes that the state is responsible for ensuring this right through the development of healthcare infrastructure and the availability of medical services and medicines [6].

These constitutional provisions create a legal foundation upon which governments can be held accountable for their health policies, including the provision of life-saving medicines.

Access to Medicines as a Constitutional Obligation

The right to health includes several interrelated and essential elements:

- 1) availability – sufficient quantity of functioning healthcare facilities, services, and goods, including medicines;
- 2) accessibility – non-discriminatory, physically and economically accessible healthcare and essential drugs;
- 3) acceptability – respectful of medical ethics and culturally appropriate;
- 4) quality – scientifically and medically appropriate [7].

The state's failure to ensure access to medicines can constitute a violation of constitutional health rights. Courts in various jurisdictions have interpreted constitutional health provisions to include a positive obligation on the state to make essential drugs available, particularly for vulnerable populations.

For instance, in *Minister of Health v. Treatment Action Campaign* (South Africa, 2002), the Constitutional Court ruled that the government's failure to provide the drug Nevirapine to HIV-positive pregnant women in public hospitals violated their constitutional right to health [8].

Similarly, in Brazil, courts have routinely ordered the state to provide individuals with expensive medications not available in the public health system, interpreting the constitutional guarantee of health as overriding budgetary constraints [9].

Legal Enforcement of Pharmaceutical Access Rights.

The legal enforcement of pharmaceutical access rights through constitutional courts has become a key mechanism globally. Judiciaries have delivered precedent-setting decisions that often seek to reconcile the right to health with intellectual property interests.

Courts have often emphasised that commercial interests, including those of pharmaceutical companies, cannot override basic human rights, particularly in emergencies. This perspective aligns with the doctrine of proportionality, commonly applied in constitutional law to assess the legitimacy of state actions that restrict or prioritise certain rights.

For example, the Colombian Constitutional Court has recognised that the health system must prioritise universal access to essential treatments and has even declared systemic «states of unconstitutionality» when access is structurally impaired [10].

However, judicial activism in this domain also raises concerns. Some critics argue that court-mandated provision of high-cost medicines, especially those not on national formularies, may undermine equity and distort health budgets. Nonetheless, courts have increasingly refined their approaches by integrating evidence-based medicine and economic assessments into their rulings.

International Law, TRIPS, and Constitutional Rights.

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Ukraine, for example, is in the process of aligning its IP laws with EU standards while maintaining its constitutional obligations regarding healthcare. During the full-scale war, Ukraine invoked Article 73 of TRIPS (security exception) to justify limitations on certain IP protections for the sake of public health and national security [12].

Emergency Situations and Constitutional Derogations.

Constitutions often contain provisions for derogating certain rights during states of emergency. However, the right to health and access to life-saving medicines is typically non-derogable, or at least subject to strict proportionality and necessity tests.

The COVID-19 pandemic and the war in Ukraine have demonstrated the need for rapid, flexible legal mechanisms that do not compromise the essence of constitutional rights. In these contexts, governments have introduced fast-track procedures for drug approval, authorized generic production under compulsory licenses, and engaged in international cooperation for medicine procurement.

Courts have been generally supportive of such measures, especially where governments can show that their actions align with the constitutional mandate to protect life and health. This jurisprudence strengthens the argument that extraordinary times require the full activation of constitutional guarantees, not their suspension.

The European Perspective: A Move Toward Rights-Based Access.

Within the European Union, the Charter of Fundamental Rights of the EU affirms the right to healthcare (Article 35), and several member states recognize health as a constitutional right [13]. The European Court of Human Rights (ECtHR), though not a constitutional court, has in its jurisprudence underscored the importance of access to healthcare under Article 2 (right to life) and Article 8 (private life) of the European Convention on Human Rights.

In landmark cases such as *Sentges v. The Netherlands* and *Pentiacova v. Moldova*, the ECtHR highlighted the margin of appreciation states hold in allocating healthcare resources, while also affirming that unjustified denial of access to life-saving treatment may breach human rights [14].

This trend reflects a broader movement in Europe towards interpreting healthcare, and by extension access to medicines, as a rights-based entitlement rather than a discretionary service.

Conclusions. The recognition of access to medicines as part of the constitutional right to health has profound legal and ethical implications. It imposes positive obligations on states to ensure availability, accessibility, and affordability of essential drugs. Courts have become crucial actors in this field, mediating tensions between state budgets, commercial interests, and individual rights.

While international IP law remains a potential barrier, TRIPS flexibilities and human rights instruments provide a legal foundation for reconciling innovation with access. Emergencies like pandemics and armed conflicts further underline the necessity of adaptable legal frameworks that uphold the core values of constitutional democracies.

Ultimately, ensuring access to medicines as a constitutional right is not only a matter of legal doctrine – it is a test of a society's commitment to dignity, equality, and justice in the most vital area of human existence: the right to health.

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