

REVIEW ARTICLE

INVOLUNTARY ADMISSION OF A MENTALLY ILL PERSON AS RESTRICTIONS OF THE RIGHT TO LIBERTY

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INTRODUCTION

Issues of social isolation of a mentally ill person through his involuntary admission are relevant to the legal and medical sciences of any country in the world. Every fourth person in the world experiences mental or neurological disorders at some period of his life. About 450 million people suffer from such diseases, which puts mental disorders among the leading causes of deteriorating health and disability worldwide [1]. However, a mental disorder does not mean that a person with a mental illness is deprived of basic human and civil rights. It is important to ensure respect for human rights among such a vulnerable category of population as the mentally ill persons. At the same time, people with mental disorders may in some cases manifest the acts of aggression rather than endangering other people. There are frequent reports in the mass media that a mentally ill person has taken hostage either family members or outsiders, etc. There is a need for involuntary admission of a person with mental disorders. This problem is "supranational", it has international nature. Therefore, the task of law in general and civil law in particular, is to determine the criteria for the admissibility of involuntary admission of a mentally ill person, which is essentially a restriction of the human right to liberty.

It should be noted that a widespread violation of the fundamental rights and freedoms of a person with a mental disorder is his or her unjustified admission into such long-term psychiatric facilities as psychiatric hospitals, social boarding schools and shelters, where fundamental

human rights are not guaranteed. Conditions in such facilities are generally unacceptable, and patients are at risk of abuse or neglect or lack of appropriate care [2]. Ombudsmen also pay attention to this fact, pointing out that there is still the practice of applying physical restraint and / or isolation without documentary evidence of this fact in health care facilities, where people with mental disorders are kept [3, p. 140]. This indicates a violation of the human right to liberty.

There are many problematic issues regarding the involuntary admission of mentally ill persons, which attract the attention of both physicians and lawyers. The issues of involuntary admission in terms of admissibility of restriction of personal right to liberty have been studied on a piecemeal basis and are still relevant despite the significant scientific interest in the legal and ethical aspects of mental health [4-5], the problematic issues of involuntary treatment of mentally ill people [6; 7, p. 516-545], protection of mental health of persons deprived of liberty [8, p. 1204], observance of human rights while applying coercive measures of a medical nature in criminal proceedings [9].

THE AIM

The purpose of this research is to determine the grounds for involuntary admission of a mentally ill person in the context of possible restriction of his or her right to liberty, as well as to analyze the law-enforcement practice in this area.

MATERIALS AND METHODS

To achieve the purpose of the research, the authors have studied and analyzed international and legal acts, regulatory acts of certain countries on involuntary admission of a mentally ill person, the decision of the European Court of Human Rights, case law on involuntary admission of a mentally ill person. Conclusions and propositions based on the results of the research have been made on the basis of the analysis of scientific works of well-known specialists in the field of medicine and medical law, statistical data.

In the course of the research the authors have used a set of philosophical, general and special scientific research methods. In particular, the method of analysis and synthesis made it possible to clarify the grounds for involuntary admission of a mentally ill person and the factors stated in the case law of the European Court of Human Rights and national courts to establish the fact that such involuntary admission was lawful and necessary under certain circumstances. The comparative and legal method provided an opportunity to compare the experience of different foreign countries in the field of legal regulation of relations on involuntary admission of a mentally ill person.

REVIEW AND DISCUSSION

According to the World Health Organization (WHO), mental health is a state of well-being, when everyone can realize their own potential, cope with life stresses, productively and efficiently work, and contribute to the life of own community. Impaired mental health indicates the presence of a mental disorder. The American Psychiatric Association reports that one out of five adults in the United States has a mental disorder in any given year. Every 24th American adult suffers from a serious mental illness, and every 12th suffers from a substance abuse disorder [10]. However, not only the countries with the highest standard of living have such sad statistics. Thus, as of January 1, 2017, 1,673,328 people in Ukraine were registered due to mental and behavioral disorders, including 69,492 – due to disorders related to alcohol and drug addiction (or 3.9 percent of the population) [11].

One of the personal non-property rights of a mentally ill person is the right to liberty. The Universal Declaration of Human Rights (1948) proclaims in the Art. 3 that everyone has the right to life, liberty and security of person [12]. This provision of the Universal Declaration of Human Rights has been further embodied in other international legal acts. The right to liberty is provided by p. 1 of the Art. 9 of the International Covenant on Civil and Political Rights (1966) [13], subparagraph (e) of paragraph 1 of the Art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which provides that everyone has the right to liberty and security of person; no one shall be deprived of his liberty except in the following cases and in accordance with a procedure prescribed by law: the lawful retention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.

Many mentally ill people are persons with disabilities, so the protection of their fundamental rights, including the right to liberty, is carried out through additional legal mechanisms. Thus, the Article 14 of the Convention on the Rights of Persons with Disabilities (2006) declares that States Parties shall ensure that persons with disabilities, on an equal basis with others: (a) Enjoy the right to liberty and security of person; b) are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty [15]. These provisions of the Convention on the Rights of Persons with Disabilities stem from decades of UN work to change attitudes and approaches towards people with disabilities, including those with mental disorders. This international document raises the movement from the consideration of persons with disabilities as “objects” of charity, medical treatment and social protection to a new level up to the view of persons with disabilities as “subjects” endowed with the rights and capable of realizing these rights, and making decisions for their lives based on their free and informed consent, and treats them as active members of society [16]. Thus, the social isolation of mentally ill persons with disabilities through their involuntary admission should not lead to deprivation of their liberty, although restriction of their right to liberty in order to protect the rights and freedoms of others is possible.

Principle 15 of the UN General Assembly Resolution 46/119 “Protection of persons with mental illness and improvement of psychiatric care” (1992) also provides an approach that every effort should be made to avoid a person being treated in a mental health facility in order to avoid involuntary hospitalization. Principle 16 of this Resolution defines the specifics of involuntary admission of a person in a mental health facility as a patient in two cases: 1) if a person has been already voluntarily admitted as a patient, he may be involuntary detained in a mental health facility as a patient; 2) if a qualified mental health practitioner authorized by law for that purpose determines that the person has a mental illness and considers: a) That, because of that mental illness there is a serious likelihood of immediate or imminent harm to that person or other persons; or b) That, in the case of a person whose mental illness is severe and whose judgment is impaired, failure to admit or retain that person is likely to lead to a serious deterioration in his or her condition or will prevent the giving of appropriate treatment that can only be given by admission to a mental health facility in accordance with the principle of the least restrictive alternative. In the second case, if possible, you should seek the advice of another similar mental health practitioner, independent of the first. In case of disagreement of the second mental health practitioner with the first the involuntary admission or retention may not take place. Involuntary admission or retention shall initially be for a short period as specified by domestic law, for observation and preliminary treatment pending review of the admission or retention by the review body. The grounds of the admission shall be communicated

to the patient without delay and the fact of the admission and the grounds for it shall also be communicated promptly and in detail to the review body, to the patient's personal representative, if any, and unless the patient objects, to the patient's family. A mental health facility may receive involuntarily admitted patients only if the facility has been designated to do so by a competent authority prescribed by domestic law [17].

Characterizing the Regulations and views of the World Psychiatric Association on the rights and legal protection of the mentally ill persons, adopted by the General Assembly of the World Psychiatric Association at the VIII World Congress of Psychiatry (1989), Iryna Seniuta notes that this document contains a number of guarantees, as: 1) voluntary treatment should be encouraged and access to voluntary treatment should be regulated in the same way as the treatment of somatic diseases; 2) patients of mental health facilities or those who seek help voluntarily must be protected by the same legal and ethical rules as the patients with any other diseases; 3) the final decision on the admission or placement of a patient in a mental health facility may be taken only by a court or a competent independent body specified in the law, and only after appropriate and proper hearings; 4) the need for deprivation of liberty shall be reviewed at regular and fixed intervals in accordance with the provisions of national law; 5) imprisoned patients should have the right to a qualified guardian or lawyer to protect their interests [7, p. 531].

The above indicates that the priority is the voluntary treatment of a mentally ill person, free informed consent of such a person is the basis for the treatment of a mentally ill person. At the same time, when there is a danger both for the mentally ill person and for others, there is a need for his social isolation through involuntary admission. Determining the degree of such danger, its criteria, it is equally difficult for both a physician and a lawyer of the law enforcement agency that should decide on the involuntary admission of a mentally ill person.

Regarding the legal regulation of relations on involuntary admission of a mentally ill person, various countries have developed different approaches. Thus, the Law on Mental Health (1994), in the Republic of Poland, establishes two regimes of involuntary admission of a mentally ill person: emergency and non-emergency. A mentally ill patient in the first case may be admitted if he / she poses a direct threat to his or her life, life or health of others (the decision on the admission is taken by a psychiatrist, after which the decision is subject to judicial review). In the second case, a mentally ill patient can be admitted only on the basis of a court decision at the suit of a family member or social protection institution [18]. Subsequently, this Law was amended, in particular in 2008, in order to create a legal mechanism for providing persons with mental disorders with various forms of assistance that make life possible in the family and social environment.

Involuntary treatment of the mentally ill persons, under Swedish law, is generally considered as an undesirable exception to standard care. However, the law stipulates sepa-

rate judgments while deciding on involuntary treatment. In particular, there is ambiguity on the issue of suicide, since it is argued that the risk of suicide may not be sufficient for justified compulsory care. Besides, organizational factors sometimes lead to involuntary treatment decisions that could be avoided given a more patient-oriented health care organization [5].

The Mental Health Act 1983 of the United Kingdom, as amended in 2007, contains restrictions on involuntary mental health treatment of detained patients, but there are few of them. There are restrictions on psychosurgery and electroconvulsive therapy, and treatment that lasts more than three months and requires the second conclusion under the statutory scheme that it is "appropriate", but any other mental health treatment of detained patients may be mandatory provided at the discretion of the responsible clinician [6].

The Mental Health Act (2017) of India explicitly provides the rights of patients with mental illness and establishes the ethical and legal responsibilities of mental health professionals and the government. The rights of patients with mental illness are fundamental human rights and should be clearly stated, since they belong to a vulnerable group in terms of assessment, treatment and research. Such rights are respected considering the ethics of providing mental health care, which refers to respect for autonomy, the principle of non-abuse, charity and justice, confidentiality, informed consent to involuntary treatment, etc. [4].

Under Ukrainian Law on Mental Health Care, a person suffering from a mental disorder may be admitted to a mental health facility without his or her informed written consent or without the written consent of his or her legal representative, if his or her examination or treatment is possible only on inpatient basis and while establishing a severe mental disorder of a person, as a result of which he or she: commits or shows real intentions to commit actions that pose an immediate danger to him or her or others, or unable to meet their basic needs independently at a level that ensures his or her viability [19].

Under the national legislation of the respective country, mentally ill persons are often recognized as incapable persons depending on the degree of mental disorder. There is no single approach to the placement of incapable persons into specialized institutions in Europe, especially regarding the agency empowered to decide on the placement, and the guarantees provided to the persons concerned. In some countries (Austria, Estonia, Finland, France, Germany, Greece, Poland, Portugal and Turkey), the decision on involuntary admission of a person to the institution for a long term is taken directly or approved by a judge. Other legal systems (Belgium, Denmark, Hungary, Ireland, Latvia, Luxembourg, Monaco and the United Kingdom) allow a guardian, close relatives or administrative authorities to decide on the placement in a specialized institution without the authorization of a judge. A few essential requirements, which in particular relate to the health of a person, hazards or risks, and / or the provision of medical certificates, is applied in regard to the admission in all of

the above countries. In addition, the guarantees of several national legal systems include the obligation to interview the person concerned or to ascertain his or her views on his or her placement; the establishment of a time limit for termination or review of the placement by law or court; and the possibility of providing legal aid. The person concerned in some countries (Denmark, Estonia, Germany, Greece, Hungary, Ireland, Latvia, Poland, Slovakia, Switzerland and Turkey) has the opportunity to appeal against the initial placement decision without the consent of his / her guardian. Finally, some states (Denmark, Estonia, Finland, Germany, Greece, Ireland, Latvia, Poland, Switzerland and Turkey) directly allow the person concerned to apply periodically to the court for a review of the legality of long-term placement [20].

The movement to expand the boundaries of involuntary admission of the mentally ill has been actively developing in the United States in the early XX-th century, but since the 1960s Americans have been trying to achieve restrictions on involuntary admission of the mentally ill persons. The trial in Wisconsin in October 1972 in the case of *Lessard v. Schmidt* became heinous.

Alberta Lessard, who suffered from schizophrenia, filed a lawsuit alleging that the state law, under which she was subjected to involuntary civil commitment violated her constitutional rights, because it allowed involuntary civil commitment in a mental health facility for the period of 145 days without benefit of hearing on the necessity of detention; required no informing the patient about the right to such a jury trial; failed to give the right to counsel or appointment of counsel at a meaningful time; failed to permit counsel to be present at psychiatric interviews; failed to provide access to an independent psychiatric examination by a physician of the allegedly mentally ill person's choice; permitted commitment of a person without a determination that the person is in need of commitment "beyond a reasonable doubt" (the most strict standard of evidence, which was used only in criminal law at that time to prove the guilt of the accused) and failed to describe the standard for commitment so that persons may be able to ascertain the standard of conduct under which they may be detained with reasonable certainty. The court declared the existing involuntary psychiatric commitment procedure in Wisconsin to be unconstitutional, and required state authorities to make a mandatory court hearing with a patient's counsel on the validity of an immediate involuntary commitment of a mentally ill patient, to hold such a hearing no later than 48 hours after patient's involuntary commitment to a mental health facility, at the request of the patient to hold a full hearing to resolve the issue of the need for further involuntary stay of the patient in a mental health facility by a jury, etc. In addition, the court noted that the right of the country to deprive a person of fundamental liberty to freely go about own business should be based on the understanding that society was extremely interested in such deprivation [21].

As one can observe, society takes on the role of a "caring" family member while involuntary admission of a mentally ill person. The direct decision on such "care" and the need

for social isolation of a mentally ill person is made by a physician or a lawyer on behalf of society. If the decision for involuntary admission of a mentally ill person is made by a physician, he positively decides that a mentally ill person becomes dangerous primarily to himself, he can harm his health, then there is a "therapeutic need" for his involuntary admission. Besides, a physician establishes that a mentally ill person poses a threat to other members of society, manifests the acts of aggression, makes damage to property or health of others, commits sexual abuse, etc.

A rather difficult issue in the law-enforcement practice is to determine whether a mentally ill person actually commits actions that pose an immediate danger to him or others, which may be one of the conditions for involuntary admission of a mentally ill person and the basis for restricting his right to liberty. The legislator uses evaluative concepts to determine the grounds for involuntary admission of a mentally ill person, the interpretation of which will be carried out directly by the law enforcement agency, and its decision is the basis for the restriction of liberty of a mentally ill person.

Disputes over the involuntary admission of mentally ill persons are the subject of consideration by the European Court of Human Rights (ECHR) in the context of protecting the right to liberty and security of person, proclaimed in the Art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

Thus, the applicant of the ECHR judgment in case of "*Stanev v. Bulgaria*" (2012) (application No. 36760/06) complained about his placement in a social care home for people with mental disorders and about his inability to obtain permission to leave the home (Article 5 of the Convention). Referring to the relevant national law, the ECHR notes that Bulgarian law provides the placement in a social care institution as a protective measure taken at the request of the person concerned, and not as a coercive measure. However, given the specific circumstances of the case, this measure led to significant restrictions on personal liberty, led to deprivation of liberty without considering the applicant's opinion or wishes. With regard to the compliance of the procedure with established law, the ECHR notes that, first, the trustee of a person with limited incapacity is not authorized to take legal decisions on his behalf under national law. Any agreements entered into force in such cases are valid only if they are signed jointly by the trustee and the ward. The court concludes that the decision of the applicant's trustee to place him in a social care home for people with mental disorders without his prior consent is invalid under Bulgarian law. This conclusion is sufficient itself for the ECHR to find that the applicant's deprivation of liberty was contrary to the Article 5. In any case, the ECHR considered that the measure was not lawful within the meaning of the Article 5 § 1 of the Convention, because it was not based on any subparagraphs from (a) to (e). The ECHR notes that the applicant was entitled to social assistance because he had no housing and could not work as a result of his illness. It believes that the well-being of a person with mental disorders in certain circumstances

may be another factor that should be taken into account in addition to the medical examination while assessing the need to place a person in an institution. However, the objective need for housing and social assistance should not automatically lead to the application of measures related to deprivation of liberty. It is obvious to the ECHR that if the applicant had not been deprived of legal capacity due to his mental disorder, he would not have been deprived of his liberty [20].

The judgment of the European Court of Human Rights in the case of “I. N. v. Ukraine” (2016) (application No. 28472/08) is of interest regarding determining the criteria for involuntary admission of a mentally ill person and the expediency of restricting his right to liberty. This judgment states that the applicant had alleged that his placement in a mental health facility had been unlawful, that his examination by a psychiatrist had been carried out on the instructions of the prosecutor's office, because he had addressed the prosecutor's office with complaints on the actions of certain public authorities set out in an offensive form. According to the applicant, this fact could not be an excuse for placing him in a medical facility. The ECHR recalls that deprivation of liberty is such a serious measure that its application is justified only when other, less severe measures have been considered and found to be insufficient to safeguard the interests of the individual or society. This means that the compliance of deprivation of liberty with national legislation is not a sufficient condition; it must also be necessary in particular circumstances. With regard to the deprivation of liberty of persons with mental disorders, then a person cannot be deprived of liberty as “mentally ill”, if the following three minimum conditions are not met: first, it must be reliably proved that the person is mentally ill; secondly, the mental disorder must be of a type or degree that gives rise to involuntary confinement in a mental health facility; and thirdly, the validity of long-term detention in a mental health facility depends on the persistence of such a disease [22].

CONCLUSIONS

International legal norms and legislation of certain countries are aimed at ensuring the protection of human right to liberty in case of involuntary admission of a mentally ill person. The use of such a measure as involuntary admission of a mentally ill person is a restriction on the freedom of persons with mental disorders. A person cannot be deprived of liberty as “mentally ill”, if three conditions are not met: first, it must be reliably proved that the person is mentally ill; secondly, the mental disorder must be of a type or degree that gives rise to involuntary confinement in a psychiatric hospital; and thirdly, the validity of long-term stay in a psychiatric hospital depends on the persistence of such a disease. The national authority under specific circumstances taking a decision on the involuntary admission of a mentally ill person, which is a restriction on his or her right to liberty, may also consider additional factors as defined by national law.

Compulsory psychiatric treatment and restriction of the right to liberty of a mentally ill person may be justified, if we simultaneously take into account the requirement of “therapeutic necessity” for a mentally ill person, the requirement of protecting the rights and freedoms of others and guaranteeing their safety, the requirement of ensuring the best interests of a mentally ill person.

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