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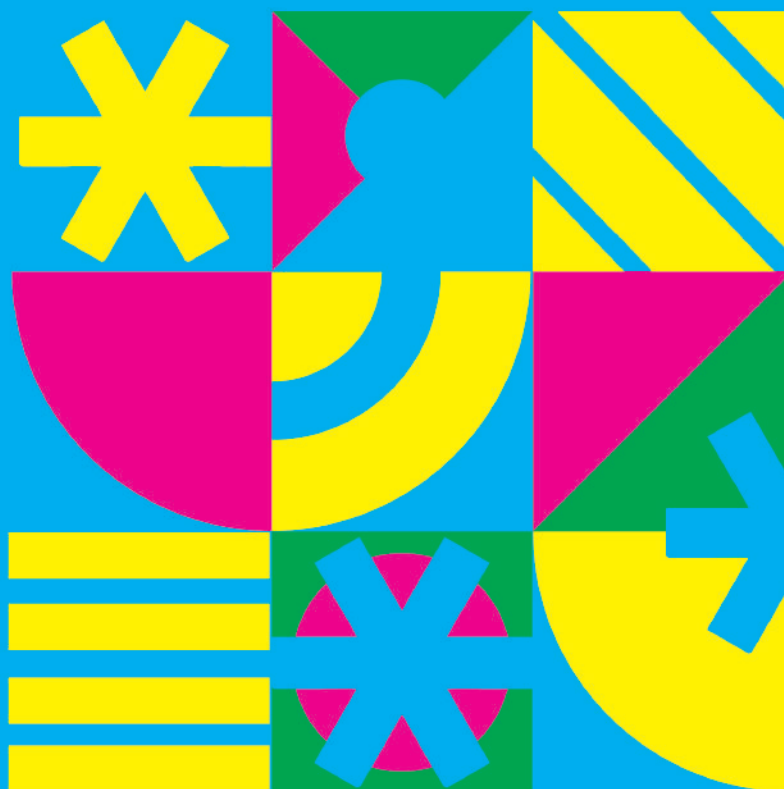
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# **The Convention on Human Rights and Biomedicine: Fundamental principles and the ratification value for Ukraine**

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## **ABSTRACT**

The author has hallmarked the principles of the Oviedo Convention, in particular, the preambular and Conventional axioms. The author has established, that the Oviedo Convention's fundamental principle is the principle of human dignity, which lies in the foundation of the majority of values, which have been declared in the standard. The author has also established, that the norm-principles, which were laid down in the preamble part, and Chapter I, act through the provisions of distinct conventional institutes, for example, "Consent", "Prohibition of discrimination". The national case law and the normative-creational practice justifies the necessity to ratify the Oviedo Convention by Ukraine.

**Key words:** Oviedo Convention, ratification, human rights

## **INTRODUCTION**

The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (ETS No 164) was signed by Ukraine on March 22, 2002, but it has not been ratified for already 20 years, and therefore, are not part of national legislation. It should be denoted, that the Republic of Latvia ratified the Oviedo Convention on February 25, 2010, so it has another normative basis for the protection of human rights in the field of biomedicine. For Ukraine, the ratification of this standard has been on the agenda of professional communities for a long time, but it was lost on the road map of the authorities. At present time, the order of the Ministry of Health of Ukraine "On preparation for the ratification of the Convention on the Protection of Human Rights and Human Dignity with regard to the use of biology and medicine: the Convention on Human Rights and Biomedicine", which was signed by Ukraine on March 22, 2002" dated 05/17/2006 No. 282, is still acting. This normative-legal act states that in order to fulfill the mandate of the Cabinet of Ministers of Ukraine (dated February 18, 2004 No. 4996/1), it is necessary to perform an analysis of the compliance of the legislative framework in the field of healthcare with the Convention of Oviedo, as well as determine the list of legal acts that are necessary to be adopted, to prepare draft laws on the changes and additions to the current acting laws, and to ensure the implementation of their respective legal expertise. Unfortunately, the state has not carried out a large-scale work in this direction.

The Conventional principles are significant for the formation of Ukrainian legislation and the definition of a national human rights-oriented vision. The Oviedo Convention provides professionals with novel law enforcement tools, and it expands the opportunities for effective law enforcement.

## **BASIC THEORETICAL AND PRACTICAL PROVISIONS**

The provisions of the Oviedo Convention are a value-oriented foundation that lays human-centered standards for all member states of the Council of Europe, and therefore for Ukraine, so the ratification of this international treaty is extremely necessary. We will begin the study of the basic foundation of the Oviedo Convention by clarifying the essence of the preamble of the international act, which is the heart of the guiding principles.

The following principles are among the preamble axioms:

- 1) protection and further implementation of human rights and fundamental freedoms;
- 2) achieving greater unity among the members of the Council of Europe;
- 3) respect for a person as an individual and as a member of the human community;
- 4) ensuring human dignity;
- 5) proper use of biology and medicine as a countermeasure against threats to human dignity;
- 6) use of progress in the field of biology and medicine for the benefit of present and future generations;
- 7) international cooperation as a tool for the use of the achievements of biology and medicine by all mankind;
- 8) public discussion of issues arising in connection with the application of biology and medicine and the solutions they require.

The priority among the axioms is insuring the human dignity, since the importance of human dignity, as such, is emphasized not only in the preamble, but also in the title of the Oviedo Convention. The Explanatory Report to the The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine [1] states, that the term “human rights” refers to the principles set forth in the European Convention of Human Rights, which guarantees the protection of such rights. The two Conventions possess not only the same foundation and approach, but also many ethical principles and legal concepts. Indeed, this Convention elaborates some of the principles enshrined in the European Convention of Human Rights. The term “person” was used owing to its general nature. However, the concept of human dignity, which must be upheld, is fundamental, as it underlies most of the values proclaimed in the Oviedo Convention.

Chapter I is important for understanding the foundations of the Oviedo Convention, which also regulates the convention postulates. Such a fundamental convention "sextet" establishes the following principles:

1. Protection of dignity and equity of all people.
2. Guaranteeing the cutaneous person – without discrimination – respect for his inviolability and other rights and basic freedoms of application in biology and medicine.
3. Update of national legislation by the contracting party to implement the provisions of the Oviedo Convention.
4. Human priority: the interests and well-being of an individual must prevail over the higher interests of society or science as a whole.
5. Equal access to medical care: taking into account medical needs and available resources, the state takes appropriate measures to ensure equal access to medical care of appropriate quality.
6. Professional standards: Any intervention in the field of health, including scientific research, must be carried out in accordance with relevant professional responsibilities and standards.

It is worth noting, that the norms-principles laid down in the preamble, as well as in the first chapter, act through the provisions of individual convention institutions, for example, "Consent", "Prohibition of discrimination". We will illustrate the conventional action with such examples, in particular, as:

1. *Art. 15* of the Oviedo Convention holds, that scientific research in the field of biology and medicine is considered unhindered, provided that the provisions of this Convention and other legal provisions that guarantee human protection are observed. This provision correlates with the preamble priority of the person over the interests of biology and medicine, as well as the convention basis of the main articles — the priority of the person.

2. *Art. 27* of the Oviedo Convention enshrines a provision that at the level of this international instrument, a minimum standard for the state application of biology and medicine is laid down, which national legislators have the right to expand. Therefore, each of the Contracting States has the right to introduce measures of broader protection in the field of

biology and medicine. This provision seems to be relevant for all basic postulates, regardless of the choice of the vector in which the state moves, but does not go to additional national guarantees of protection.

3. *Art. 28* of the Oviedo Convention embodies the preamble principle of public discussion, although it is established that the contracting states must ensure that fundamental questions that arise in connection with advances in the field of biology and medicine are the subject of a respective public discussion, which is to be found on the results, in particular, upon relevant medical, social, economic, ethical and legal implications and that their conjectural application is subject to proper consultation.

4. *Art. 26* of the Oviedo Convention determines the algorithm for derogating human rights according to this standard, taking into consideration the following: a) the derogation is permissible in cases explicitly provided by law, which is the only basis for it; b) derogation under the conditions necessary in a democratic society, which means the following:

- 1) in the interests of public safety;
- 2) for the necessity of the prevention of crime;
- 3) protection of public health;
- 4) the protection of the rights and freedoms of other people;

c) the basis, and one of the conditions, which are alternative, must necessarily be present in each limiting case; d) the Convention norms contain mandatory provision regarding the prohibition of restriction on any basis or condition in clearly defined cases.

Therefore, the derogations cannot apply to the following Conventional norms: 1) prohibition of discrimination (Article 11); 2) intervention in the genome (Article 13); 3) inhibition on selection (Article 14); 4) protection of persons subject to scientific research (Article 16); 5) protection of persons unable to consent to procedures, being carried out during scientific research (Article 17); 6) organ and tissue donation for whole transplantation from a living donor (Article 19); 7) protection of persons, who are unable to give consent to organ removal (Article 20); 8) prohibition on receiving financial benefits (Article 21).

5. It seems efficient to introduce control mechanisms in *Art. 30* of the Oviedo Convention in order to fulfill the first of the six principles for updating national legislation taking into account convention norms. Implementation monitoring by the Secretary General of the EC, at the request of a treaty body, provides an explanation of how its domestic legislation ensures the effective implementation of any provision of the Oviedo Convention.

The Oviedo Convention establishes minimal guarantees, so it is clear that these restrictions cannot be violated at the level of the national legislation of the contracting states.

## **RESEARCH FINDINGS OR DATA, EVALUATION OF RESEARCH RESULTS**

Today, the Oviedo Convention already indoctrinates into the normative-legal acts of Ukraine. In particular, in clause 1 of the Rules for the use of coercive measures of a medical nature in a special institution for the provision of psychiatric care, approved by the Order of the Ministry of Health of Ukraine (from 31.08.2017 No. 992), it is stated that the aforesaid Rules determine the necessary organizational and legal principles for the use of coercive measures of a medical nature in view of the priority of human rights and dignity specified in the The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the Criminal Code of Ukraine, the Code of Criminal Procedure of Ukraine, the Law of Ukraine “On Psychiatric Care”, the Law of Ukraine “Fundamentals of the Legislation of Ukraine on Health Care”. Despite the fact that the Oviedo Convention has not been ratified yet, it is the basis of a number of by-laws, which are acting in Ukraine.

It is interesting that national courts also refer to the Oviedo Convention when administering justice and making decisions upon different legal cases. For example, the Vinnytsia District Court of the Vinnytsia Oblast adjudicated a civil case (case No. 128/3269/21

[2]) based on a claim filed by plaintiff against the communal institution “Stryzhava Children's Music School” of the Stryzhava Village Council to declare it illegal and cancel the order on suspension from work and a penalty of plaintiff’s average income for the period of suspension in connection with the plaintiff’s refusal to be vaccinated against COVID-19. In its decision dated 08.02.2022, the Court satisfied the lawsuit of plaintiff in part: the Court canceled the order of the communal institution “Stryzhava Children's Music School” of Stryzhava Village Council No. 54-K dated 08.11.2021 “On the suspension from work of PERSON\_1”, who was the school accordion teacher and concertmaster from November 8, 2021, during the absence of the plaintiff’s vaccination against COVID – 19 without preserving the plaintiff’s wages. In particular, the Court motivated its decision as follows: *“According to Article 2, 5 of the The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the interests and well-being of an individual prevail over the exclusive interests of the entire society or science... Thus, according to the acting legislation of Ukraine, and according to the norms of international law, the coercion to experimental medical intervention is inadmissible. Accordingly, the refusal to participate in medical experiments cannot be a ground for suspension from work and a deprivation of wages.”* The Oviedo Convention also serves as a legal basis, since it is used to motivate the legal position of the parties to the proceedings. The decision of the Kyiv Court of Appeals (in the panel of the collegium of judges of the Judicial Chamber for Civil Cases) of 11.04.2019, case No. 22-ts/824/4723/2018 [3] reflects the position of the plaintiff, who claimed: “The employees of the State Institution “National Scientific Center “Institute of Cardiology named after the Academician M.D. Strazheska” of the NAMS of Ukraine” on 03/04/2017, during the medical examination of PERSON\_2, a number of norms of the national legislation were violated, namely: Article 5 of the The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine dated 04.04. 1997... in terms of conducting a medical examination without his consent or the consent of his relatives, without the decision of the investigating judge regarding the compulsory forensic medical examination”.

All the above-stated provides a vivid illustration of the relevance of the Oviedo Convention as an international instrument for Ukraine, its need for the protection of human rights, which undoubtedly displays the necessity of the state to ratify the Oviedo Convention.

## CONCLUSIONS

The ratification of the Oviedo Convention will serve as a confirmation of the European integration vector of Ukraine, the acceptance and multiplication of European values, and the effectiveness of the protection of human rights in the field of biomedicine. It should be denoted, that with such an international legal lacuna, the amount of legal tools is available for Ukraine is incomplete, as in the event of a violation of human rights, and an appeal to the European Court of Human Rights, the possibility of directly using the norms of the Oviedo Convention is excluded. We note that under the political and legal conditions of medical reform, the progress of medicine and biology, the increase in the number of medical malpractice cases related to the protection of human rights in the field of medical care, the actualization of the Oviedo Convention extremely necessary to establish a human-centered coordinate system.

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