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POSSIBILITY OF RATIFICATION BY UKRAINE OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND DIGNITY OF HUMAN BEING WITH REGARD TO THE APPLICATION OF BIOLOGY AND MEDICINE: PROS AND CONS

The article analyzes pros and cons for the ratification of the Convention for the protection of human rights and dignity of human being with regard to the application of biology and medicine by Ukraine. It outlines that the ratification of this Convention will further expand the human rights and freedoms safeguards in the field of biomedical trials. The possibility of appealing to the European Court of Human Rights for advisory opinions on the basis of the Convention for the protection of human rights and dignity of human being with regard to the application of biology and medicine has been highlighted. It has been emphasized that such ratification can be possible for Ukraine only in case of bringing the national legislation into line with the requirements of said Convention.

Key-words: Convention for the protection of human rights and dignity of human being with regard to the application of biology and medicine; Convention on human rights and biomedicine (Oviedo Convention), innovative activities in the field of biology and medicine; international standards of human rights and freedoms.

Despite sometimes diametrically opposite attitude of the public towards them, modern achievements of scientific and technological progress do not leave anyone indifferent. Thus, it is difficult to overestimate their importance. However, advances in biology and medicine, as well as any break-

throughs in this area in the past, raise moral and ethical issues that need to be addressed at both national and international levels. One cannot but agree with the assertion that advances in biology and medicine raise concerns about «respect for fundamental values concerning human rights and human dignity» [10, p. 5].

According to the Statute of the Council of Europe (hereinafter referred to as the CoE), the aim of this international organization is to achieve greater unity between its members in order to protect and implement the ideals and principles of common heritage and to promote their economic and social progress, in particular, drafting agreements in economic, social, cultural, scientific, legal and administrative matters, as well as in the promotion and further implementation of human rights and freedoms (paragraphs a, b of Article 1) [11]. Convention for the protection of human rights and dignity of human being with regard to the application of biology and medicine: Convention on human rights and biomedicine dated 4 April, 1997 (hereinafter referred to as the Oviedo Convention) is intended to be an instrument at regional (European) level that can address ethical issues in biology and medicine at the present stage. It was this international treaty that became the first CoE document to combine human rights and biomedicine.

Issues related to the Oviedo Convention have been the subject of research by various scholars, including P. Borry, P. Buzaz, K. Dierickx, T. Goffin, N. Khendel, H. Nys, B. Ostrovska, F. Seatzu, I. Senyuta, Kh.Tereshko and others. Despite the resonance generated by this international treaty in scientific circles, there is relatively little work on the expediency of its ratification in Ukraine.

The objective of the paper is to identify and analyze the arguments pros and cons the ratification of the Oviedo Convention by Ukraine and to identify ways to overcome possible obstacles to such ratification.

According to official CoE information, as of 3 February, 2021, the Oviedo Convention has been ratified by 29 states and signed without ratification by 6 of them [3]. Such statistics show the positive dynamics of the perception of this international agreement among European countries. As for Ukraine, as it is known, the Oviedo Convention has only been signed by our state, but not ratified by it yet [4]. The both processes of ratification and «signature» of the international treaties reflect the interest of this or that state to be bound by their provisions. However, there is a significant difference between them. Ratification of the international treaty by the state shall undergo two steps: the internal procedure and the expression of the consent to be bound by its provisions [9]. On the other hand, the signature means that the state will refrain from direct violation of the treaty.

As it is stated in the research literature, one of the most common reasons for signing this international treaty without its further ratification is the impossibility of ensuring its requirements by the respective states [9]. It is based on Article 1 of the Oviedo Convention, which proclaims, «[t]he Party shall take

in its domestic law the measures necessary to give effect to the provisions of this Convention». This opinion seems valid at least for Ukraine, as the relevant national legislation on innovation activities in the field of biology and medicine is at the stage of formation in our country [16, p. 102].

On the other hand, there is no denying the professional interest in the Oviedo Convention. Thus, on the website of the Official Internet Representation of the President of Ukraine there was registered a petition № 22/097410-ep «Ratification of the Oviedo Convention – Convention for the protection of human rights and dignity of human being with regard to the application of biology and medicine: Convention on human rights and biomedicine» by S. Kuzmenko, Director of the Higher School of Advocacy of the Ukrainian National Bar Association on the ratification of this international agreement [17]. However, not enough public votes were collected in favor of the petition.

In view of the above, possible arguments pros and cons the ratification of the Oviedo Convention by Ukraine shall be analyzed.

First of all, it seems appropriate to present arguments in favor of such ratification.

The Oviedo Convention aims to affirm human dignity as a fundamental principle that must be preserved in the context of scientific and technological progress. Thus, in accordance with Part 1 of Article 1 of this Convention, its States Parties shall protect the dignity and identity of all human beings and shall ensure to every person, without discrimination, respect for his or her inviolability and other rights and fundamental freedoms with regard to the application of biology and medicine». This provision is fully consistent with the legislation of Ukraine, because in Article 3 of the Constitution of our state, a person, his or her life and health, honor, dignity and inviolability are also defined as the highest social value [15].

The provisions of Articles 11 (prohibition of discrimination on the basis of genetics), 14 (prohibition of sex selection), 18 (prohibition of the cultivation of human embryos for research purposes) of the Oviedo Convention and the Additional Protocol to the Convention for the protection of human rights and dignity of human being with regard to the application of biology and medicine, can be an evidence in favor of this argument. Thus, all these provisions are aimed at protecting human dignity during innovative activities in the field of biology and medicine.

These provisions are fully consistent with the case-law of the Constitutional Court of Ukraine. In particular, in its judgment dated 17 April, 2005, № 1-пн/2005 it had stressed that Ukraine as a social, legal state policy aims at creating conditions that ensure a sufficient standard of living, free and comprehensive human development as the highest social value, his or her life, and health, honor and dignity [18]. Approval and observance of social standards enshrined in regulations is a constitutional duty of the state. The activity of its law-making and law-enforcement bodies should be carried out according to the principles of justice, humanism, supremacy and direct effect

of the norms of the Constitution of Ukraine, and its powers should be within the limits established by the Basic Law of Ukraine.

The provisions of the Oviedo Convention, while not declarative, provide for a wide margin of appreciation for the States-Parties on all matters relating to bioethics. Article 27 of this international treaty states that States-Parties have the right to provide wider protection than that foreseen in the Oviedo Convention. At the same time, the exercise of the rights and protection provisions contained in this Convention may not be subject to any restrictions other than those established by law and necessary in a democratic society in the interests of public safety, crime prevention, public health or in order to protect the rights and freedoms of others (Article 26). Thus, it can be concluded that it provides only the necessary minimum, which is subject to restrictions only in exceptional cases, which should be ensured in a particular state, and everything above this minimum is left to the discretion of the state itself.

Under the Article 9 of the Constitution of Ukraine, current international treaties, the binding nature of which has been approved by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. And Part 3 of Article 22 provides for the impossibility of narrowing the content and scope of existing human rights and freedoms when adopting new laws or amending existing laws. Moreover, from the content of Articles 21, 22 of the Constitution of Ukraine it follows that human rights are inexhaustible, inalienable and inviolable. Therefore, the provisions of the Oviedo Convention do not contradict the Constitution of Ukraine, and its ratification will help solve the problems of human rights and responsibilities in innovative activities in the field of biology and medicine.

Establishing the authority of the state in the international arena. Thus, cutting-edge developments in biomedicine based on international law, namely the principles of humanity, non-discrimination and respect for human dignity, are important in today's world, and ratification of the Oviedo Convention is one of the main steps towards their proper regulation. According to Article 15 of this Convention, research in the fields of biology and medicine may be carried out without hindrance, provided that its requirements are complied with.

Establishing the principle of non-discrimination in the Oviedo Convention. As it was already stated above, according to the Article 1 of this international treaty, respect for inviolability and other rights and fundamental freedoms with regard to the application of biology and medicine shall be ensured by the States-Parties to each person, without discrimination. Article 11 declares that a person cannot be discriminated on the basis of his or her genetic heredity. As already mentioned, this provision is extremely important in modern society and must be reflected in the regulation of innovation in the field of biology and medicine.

Possibility of interpretation of the provisions of the Oviedo Convention by the European Court of Human Rights (hereinafter referred to as the ECtHR,

the Court). This possibility is provided in Article 29 of the Oviedo Convention. Thus, the ECtHR has the right to provide advisory opinions on legal issues concerning the interpretation of the said Convention. The court does not have to refer to a specific case for an advisory opinion.

However, it should be noted that there has not been issued such opinions so far. For now, there is only the theoretical possibility of providing such opinions. At the same time, in general, the institute of advisory opinions provided by the Court is quite successful. Thus, the ECtHR forms them on certain issues at the request of the Government of the Member State of the CoE on topical controversial issues in the field of fundamental human rights and freedoms. the advisory opinion at the request of the French Government on children born by surrogate mothers abroad, which was taken into account by the national authorities, can serve as an example of this institute effectiveness [1].

As for the arguments against ratification of the Oviedo Convention by Ukraine, the most significant ones of them seem to be the following.

Absence of a supervisory authority empowered to impose sanctions on the States-Parties in the event of non-compliance with the provisions of the Oviedo Convention. This argument is to some extent related to the previous one, despite the fact that they reflect, so to speak, different sides of one medal, given the following.

Although the Oviedo Convention is not a so-called «soft law» such as the Universal Declaration of Human Rights, the formal absence of a monitoring body, which enforces its provisions, calls into question their universality for States-Parties. In particular, if to compare it with the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (hereinafter referred to as the ECHR), the second has more effective mechanism for protecting such rights, due to the functioning of the ECtHR as the only body capable of monitoring the implementation of obligations under ECHR. Thus, Article 35 The ECHR confers on the Court the power of a single body capable of interpreting it [5]. In addition, according to the theory of delegation, Member States delegate certain powers to the ECtHR, in the context of which it is able to help them «collectively control themselves». On the one hand, the States-Parties have undertaken to implement the final judgments of the ECtHR in their legislation, and on the other hand, they themselves monitor such implementation, acting on behalf of the Committee of Ministers of the Council of Europe [13]. Being secured by the supervisory authority, the ECHR's instructions become real rather than declarative.

In addition to the above, the case-law of the ECtHR is the only tool for interpreting Conventional provisions. The case-law of the Court expressed in its judgments align the general rules of the ECHR with the realities of today. This aspect also seems important given that the Oviedo Convention was adopted in 1997, and therefore its provisions also require alignment with the realities of today. In this regard, the research literature emphasizes the possibility of supplementing the Oviedo Convention with addi-

tional protocols, as has already been done on topical issues in 1998, 2002, 2004, and 2008 [12].

Sometimes, as a result of the application of advances in biomedicine, human rights violations are considered by the ECtHR. However, it is not possible to apply to the Court on the ground that the State has failed to fulfill its obligations under the Oviedo Convention alone. As the ECHR does not provide for the right to health care, the ECtHR can be contacted on the basis of its other articles, which are relevant to each case. In particular, in case of violation of biomedical human rights it is possible to refer to Art. 2 (right to life), Art. 3 (prohibition of torture), Art. 6 (right to a fair trial), Art. 8 (right to respect for private and family life), Art. 14 (prohibition of discrimination) [19]. Therefore, if it is not possible to refer directly to the Oviedo Convention, the Court nevertheless applies it in its judgments.

In general, the Court applies the Oviedo Convention in its judgments in several ways, namely [14]:

– as an international standard, the violation of which was admitted or not allowed by the respondent state, in the rubric «Relevant international material» of the judgment [7];

– as a tool for interpreting the ECHR, as the Oviedo Convention «contains a higher standard» [6].

It should also be noted that the Preamble to the Oviedo Convention states that the parties took into account, among other international instruments, the ECHR when adopting it. However, despite the lack of a direct indication of the ECtHR's ability to hear cases under the Oviedo Convention, the Court often refers to it in its judgments. An example is the Court's judgment in *Glass v. the United Kingdom*, where the ECtHR cites the criteria for admissibility of consent to medical intervention set out in the Oviedo Convention [8].

In the context of this argument, attention should also be drawn to the fact that, during its operation, the ECtHR has become, so to speak, «a hostage to its own effectiveness». At the moment, the ECtHR not only has a stable workload, but is simply full of appeals, and that fact significantly extends the term of their consideration. That is why it is considered inexpedient to add the Oviedo Convention as a possible ground for filing a complaint with the Court.

The Oviedo Convention is really a political compromise, not a consensus of states. Some authors emphasize that the Oviedo Convention is in fact a purely political compromise, and does not express the will of states in the field of biology and medicine, because given the many differences in the regulation of biomedicine in European countries, it is impossible to unify all relevant issues in the said field [2]. However, one should not forget the wide discretion provided by the Oviedo Convention to States-Parties. Thus, it regulates only the basic provisions of the field, leaving the specification at the discretion of the member states.

The prevalence of individual interests over the interests of society or science, provided for in Art. 2 of the Oviedo Convention. This provision can be inter-

preted in two ways. On the one hand, it is quite appropriate in accordance with international standards, as well as national standards of individual states. On the other hand, this provision is too categorical, as the interests of the individual may still be limited to the interests of society as a whole (in particular, public health), but only in exceptional cases and temporarily. Such a provision, provided for in the Oviedo Convention, seems more appropriate, since it does not, without prejudice to the particular importance of individual interests, impose their exceptional restrictions on the public interest.

All in all, the arguments against the ratification of the Oviedo Convention by Ukraine are to some extent offset by the obvious positive aspects of such a possible ratification. An important aspect and, at the same time, a prerequisite for its implementation is the harmonization of national legislation with the provisions of this international treaty.

The following conclusions can be drawn from the above.

1. Although objective arguments can be made both pros and cons the ratification of the Oviedo Convention by Ukraine, such ratification will have a positive impact on the adoption of international and regional standards of legal regulation of innovation activities in the field of biology and medicine in our country. In general, ratification of the Oviedo Convention will contribute to the regulatory provisions in Ukraine on those institutes in this area that are relatively new and need to be consolidated both at the national level and by acceding to international treaties, improvement. Alignment of national legislation with the provisions of this international treaty will further expand the safeguards of human rights and freedoms in the field of biology and medicine.

2. The opportunity to seek advice from the ECtHR will make it possible to resolve controversial issues arising in the field of innovation in biology and medicine, with maximum respect for human rights and freedoms, given the positive European practice of obtaining such advisory opinions on similar issues.

3. In order to create the conditions for ratification of the Oviedo Convention by our State, the Government must not forget to bring national legislation into line with its provisions in order to make it more effective in practice, as a large number of Conventional provisions give States-Parties a wide margin of discretion in the regulation of different issues.

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Можливість ратифікації Україною Конвенції про захист прав і гідності людини щодо застосування біології та медицини: за і проти

Сучасний науково-технічний прогрес, попри подекуди діаметрально протилежне ставлення до нього з боку громадськості, не залишає байдужим нікого. Однак досягнення у сфері біології та медицини, як і будь-які прориви у згаданій сфері в минулому, породжують проблеми морально-етичного характеру, що підлягають вирішенню як на національному, так і на міжнародному рівнях. Конвенція про захист прав і гідності людини щодо застосування біології та медицини: Конвенція про права людини і біомедицину покликана стати тим інструментом на регіональному (європейському) рівні, який здатен врегулювати етичні питання досягнень біології та медицини на сучасному етапі. Саме цей міжнародний договір став першим документом Ради Європи, який поєднав права людини та біомедицину.

Відповідно до офіційної інформації Ради Європи, Конвенцію про захист прав і гідності людини щодо застосування біології та медицини станом на 3 лютого 2021 р. ратифікувало 29 держав, а підписало без ратифікації – 6. Така статистика свідчить про позитивну динаміку сприйняття цього міжнародного договору країнами Європи. Україна, як відомо, тільки підписала Конвенцію, однак не ратифікувала.

Стаття присвячена аналізу аргументів за і проти ратифікації Україною Конвенції про захист прав і гідності людини щодо застосування біології та медицини.

Ключові слова: Конвенція про захист прав і гідності людини щодо застосування біології та медицини; Конвенція про права людини і біомедицину (Конвенція Ов'єдо), інноваційна діяльність у сфері біології та медицини; міжнародні стандарти прав і свобод людини.

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