

UDC 352.001

DOI <https://doi.org/10.32782/chern.v5.2023.6>**O. V. Sinkevych**

Doctor of Law,

Professor at the Department of Constitutional Law

Taras Shevchenko National University of Kyiv

orcid.org/0000-0003-1700-9768**RIGHT TO HEALTH CARE: SOME CONSTITUTIONAL PROBLEMS
(CONFLICT OF THE CONSTITUTIONAL VALUES)**

The aim of the article is to contribute in the discussion should the vaccination be voluntary only or not from the constitutional values' point of view. The author underlines 2 problems.

The first one is how to solve the conflict of the constitutional values while distribute the vaccines in the fairest way? The author shows the national example of the positive discrimination – some groups of Ukrainians have the choice, when it comes about the vaccine's producer, some – don't. Though there are a lot of countries, that use the vaccine of the only one producer (Azerbaijan) or do not allow the residents to choose the type of the vaccine they will get (the United Kingdom).

The second one is how to solve the conflict of the constitutional values while deciding should the vaccination be mandatory or not? The author comments the decision of the Supreme Court (of Ukraine) on rather a scandalous case on the access to the secondary school education based on the vaccination. Supreme Court gave preference to the public health (interest) in this conflict of constitutional values – between this interest and the right to education in the form of visiting the secondary school. The Supreme Court also formulated the very important thesis, that the removal of a child from visiting the secondary school in such a case is not a punishment – but a preventive measurement (in terms of the public health issues). The author mentions *Vavřicka v. the Czech Republic* case of the European Court of Human rights and mentions that: a) this vaccination case of the ECHR is one of the very rare cases, when the Court decision goes along with the Ukrainian Supreme Court's practice, including the argumentation; b) still the Ukrainian courts pass different decisions on the vaccination cases like mentioned above – so, the unified practice is not created yet.

Key words: right to health, health care, private health, public health, constitutional values, constitutional principles, constitutional axiology, constitutional law, vaccination, collective immunity.

Сінкевич О. В. ПРАВО НА ОХОРОНУ ЗДОРОВ'Я: ДЕЯКІ КОНСТИТУЦІЙНІ ПРОБЛЕМИ (КОНФЛІКТ КОНСТИТУЦІЙНИХ ЦІННОСТЕЙ)

Мета статті – зробити внесок у дискусію про те, чи є вакцинація лише добровільною чи ні з точки зору конституційних цінностей. Автор виділяє 2 конституційні проблеми.

Перша – як вирішити конфлікт конституційних цінностей, розподіляючи вакцини найсправедливішим способом? Автор наводить національний приклад позитивної дискримінації – деякі групи українців мають вибір, коли йдеться про виробника вакцини, деякі – ні. Хоча є багато країн, які використовують вакцину єдиного виробника (Азербайджан) або не дозволяють жителям обирати тип вакцини, яку вони отримують (Велика Британія).

Друга – як вирішити конфлікт конституційних цінностей при вирішенні питання про (не) обов'язковість вакцинації? Автор коментує рішення Верховного Суду (України) щодо досить скандальної справи щодо доступу до загальної середньої освіти за вакцинацією. У цьому конфлікті конституційних цінностей Верховний Суд віддав перевагу громадському здоров'ю (інтересу) – між цим інтересом і правом на освіту у формі відвідування загальноосвітньої школи. Верховний Суд також сформулював дуже важливу тезу, що усунення дитини від відвідування загальноосвітньої школи в такому випадку є не покаранням, а профілактичним заходом (з точки зору охорони здоров'я). Автор згадує справу Європейського суду з прав людини *Vavřicka v. the Czech Republic* і зазначає, що: а) ця справа щодо вакцинації ЄСПЛ є однією з дуже рідкісних справ, коли рішення Суду узгоджується з практикою Верховного Суду України, включаючи аргументацію; б) все ще українські суди ухвалюють різні рішення у справах про вакцинацію, як зазначено вище – отже, єдиної практики ще не створено.

Ключові слова: право на здоров'я, охорона здоров'я, приватне здоров'я, громадське здоров'я, конституційні цінності, конституційні принципи, конституційна аксіологія, конституційне право, вакцинація, колективний імунітет.

The legal scientists agree that 'the right to health is a short form for the right to the highest attainable standard of physical and mental health. The right to health is not just the right to be healthy or the right to health, it contains a more complex and deeper understanding of the right to health'. The right to health has the strong connection with the problems of the vaccination and the collective immunity.

According to the CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health, 'health is a fundamental human right

indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity' [1].

The problems, connected with the vaccinations, are always at the agenda when it comes about the medical science. The new threats arise (COVID-19 is the latest), the new cases about the vaccination appear.

Yet because of the two main factors lately the vaccination became an essential topic for the lawyers

as well – most of all, for the constitutional lawyers. The first issue is COVID-19, that was mentioned above. The aggressiveness of the virus and how it spreads all around makes vaccines the major hope when it comes about both public and private health. The second issue is the collective immunity – in Ukraine it becomes weaker each year, as more people born (and obligatory vaccinated) in the Soviet times die – and more people born (and vaccinated voluntary by their parents' choice) in the independent Ukraine replace them in the society.

In Ukrainian legal literature we see the lack of the English language publication, that cover the problems of vaccination from the constitutional point of view. There are recent English-language papers by the constitutional experts [2–5] – but they mention mostly the Ukrainian medical reform in general. There is Ukrainian experience about the vaccination court cases, that might be interesting and useful to present at the level higher, than the state (country) level.

The aim of the article is to contribute in the discussion should the vaccination be voluntary only or not from the constitutional values' point of view. The methodology of this research follows legal science methods (hermeneutical, formal analysis, synthesis induction, deduction, comparison, etc). With these methods, we look at the problems of vaccination in Ukraine, abroad, also using the international perspective.

Main text. The vaccination has a long history in the world. It is considered to be the effective way of prophylactics of the dangerous diseases – according to the official position of the World Health Organization (WHO). P.J. Smith, D. Wood and P.M. Darden give an example, that 'the history of vaccination and assessment of vaccination coverage in the U.S. has its roots in the pre-Revolutionary War era. In many cases, development of vaccines, and attention devoted to the assessment of vaccination coverage, has grown from the impact of infectious disease on major world events such as wars' [6].

Because COVID-19 is a new virus and the vaccines are new as well, the main problems now are:

1. How to solve the conflict of the constitutional values while distribute the vaccines in the fairest way;

2. How to solve the conflict of the constitutional values while deciding should the vaccination be mandatory or not.

Regarding the first conflict it is essential to note, that so far most of the countries in the economical crisis, like Ukraine, are still waiting for the necessary number of the vaccine doses. In Ukraine the vaccination goes slowly, and the vaccine type means a lot to the recipients – Pfizer is the priority according to the survey, AstraZeneca frights the

female recipients because of the possible thromboses as a side effect, and all of the COVID-19 vaccine produced in China scares the most of the recipients. The state allows to choose the producer of the vaccine and distributes the vaccines in a way, that the 'most desired' Pfizer's Biontech is possible to get through the corporation vaccinations, while all other vaccines (Moderna's and Jonsen & Jonsen's vaccines are not used in the country so far) are offered to anybody on the request, they are always available in the special vaccination points.

Everything in the mentioned above is about the principle of equality. But also, it shows the example of the positive discrimination – some groups of Ukrainians have the choice, when it comes about the vaccine's producer, some – don't. Though there are a lot of countries, that use the vaccine of the only one producer (Azerbaijan) or do not allow the residents to choose the type of the vaccine they will get (the United Kingdom).

So, in the article we will cover the thoughts and explanations how to solve the conflict of the constitutional values while deciding should the vaccination be mandatory or not.

So far, the main question, that will give necessary grounds 'pro' or 'against' the mandatory COVID-19 vaccination should be solved by the medical professionals – it is the immunity threshold (if it is one).

There are a lot of facts now when the COVID-19 vaccination is mandatory. In Indonesia there is a fine for those, who refuses to be vaccinated, and Saudi Arabia has already made the vaccination obligatory for those, who are at the public or private service. India, China and Russia are also amongst the countries that makes COVID-19 vaccination mandatory based on the region or occupation. In Italy everyone who works in the medical sphere, should be mandatory vaccinated, because of the high risk of having COVID-19 [7].

It might be interesting to consider, that in spring 2021 the Supreme Court (of Ukraine) passed the decision on rather a scandalous case on the access to the secondary school education based on the vaccination. It is not COVID-19 vaccination, the case is about the vaccines that are included in the Children's Vaccination Schedule in Ukraine.

The case shows the parents, who's child wasn't vaccinated according to the Schedule because of their choice (not based on the medical reasons), as the one side, and one of the Ukrainian communal secondary schools. The director of the school claimed the child will visit the school only after getting the vaccination according to the age or the medical document that the child can't be vaccinated based on the medical reasons, is healthy and can visit the school.

The Supreme Court finds in this case the 'individual right (interest) to the education of a child who has not been vaccinated for various reasons, and "general right (interest)" of society, other parents and their children who have been vaccinated in the manner prescribed by the state' and concluded that the definition of the relationship between the two "interests" in favor of the "general interest of society" achieves a higher goal – the common good in the form of the right to safety and health, guaranteed by Articles 3, 27 and 49 of the Constitution of Ukraine.

The Supreme Court has taken into the account, that: 'Verkhovna Rada Commissioner for Human Rights Lyudmila Denisova stated that the exclusion from school of students who have not received the necessary vaccinations does not violate their right to education (such a strict requirement in Ukraine was introduced in September 2018 by a joint order of the Ministry of Health and Ministry of Education due to deteriorating situation). And the current legislation provides various forms of education, some of which can be implemented without visiting an educational institution' [8].

The Supreme Court cited Article 15 of the Law of Ukraine "On protection of the population from infectious diseases", which aims to protect the health and lives of children due to the complicated epidemic situation, and underlined: the stay of children, who have not received preventive vaccinations in organized groups, creates a risk of outbreaks of infectious diseases, that threaten the lives and health of not only these children, but also members of their families and employees of educational institutions, i.e. a child who has not been vaccinated, not only becomes potentially dangerous to the environment, but also at increased risk get sick by visiting crowded places.

Thus, the state, having established the rule that without vaccinations the child, cannot be admitted to classes, realizes the duty concerning safety of life and health not only of all children and employees of school or kindergarten, but also protects thus a child, who has not received preventive vaccinations.

Given the public interest, the temporary removal (until vaccination, obtaining a positive opinion of the medical advisory commission) of the child from classes did not lead to a violation of the child's constitutional right to education, which he may receive in other forms.

In other words, the Supreme Court gave preference to the public health (interest) in this conflict of constitutional values – between this interest and the right to education in the form of visiting the secondary school.

The Supreme Court also formulated the very important thesis, that the removal of a child from

visiting the secondary school in such a case is not a punishment – but a preventive measurement (in terms of the public health issues).

A lot of specialists in constitutional law of Ukraine do not agree with this decision of the Supreme Court. But it goes along with the trend, created by the European Court of the Human Rights. It is the case *Vavřička v. the Czech Republic*, based on Article 8-1 of the European Convention on Human Rights 1950 – respect for private life.

The situation was as follows. In 2013–2015 years, 6 applicants to the ECHR refused to follow the Mandatory Vaccination List of Czech Republic, that is why their children were (according to the applicants) restricted in some rights – like to visit the kindergarten. The Court 'by a majority, declared inadmissible the applicants' complaint under Article 9 as incompatible *ratione materiae* with this provision. In particular, they had not substantiated that their critical opinion on vaccination was of sufficient cogency, seriousness, cohesion and importance so as to constitute a conviction or belief attracting the guarantees of Article 9' [6].

In the context of this article, it is important to outline, that the Court stated:

'A mandatory approach to vaccination represented the authorities' answer to the pressing social need to protect individual and public health against the diseases in question and to guard against any downward trend in the child vaccination rate. It had been supported by relevant and sufficient reasons. In addition to the weighty public health rationale, the general consensus between States and the relevant expert data, the Court also had regard to the question of the best interests of children' [9].

It is interesting to mention 2 facts:

1. This vaccination case of the ECHR is one of the very rare cases, when the Court decision goes along with the Ukrainian Supreme Court's practice, including the argumentation;

2. Still the Ukrainian courts pass different decisions on the vaccination cases like mentioned above – so, the unified practice is not created yet.

For example, in June 2021, after the mentioned above decisions of the Ukrainian Supreme Court and the European Court of Human Rights were passed, the Odessa Regional Administrative Court declared illegal the decision of the city commission on technogenic and environmental safety and emergency situations on the prohibition of visiting kindergartens and schools for children who do not have vaccinations.

The details are as follows: in 2018 the parents got the place for their child in the communal kindergarten (the service is free, except of the food fee). But when they have submitted the documents, they've got the refusal, based on the absence of the Vaccination List – the child didn't have necessary

vaccinations. The head of the kindergarten appealed to the relevant Decision of the city commission on technogenic and environmental safety and emergency situations. It is important to underline, that this Decision isn't uploaded to the Register of Court Decisions of Ukraine, – therefore, it is impossible to analyze the Court's arguments in this article.

So, the battle pro and contra the vaccination starts between the parents on the playgrounds, continues with the communal education facilities – and will have a continuation because of the COVID-19 vaccination for the grown-ups.

Balancing pro and against the mandatory vaccination, C. Wright states: 'On the 'pro' side are those who say that legislation has had a dramatic effect in other areas of public health and safety (such as the indoor smoking ban, and use of seatbelts) so why not do the same with immunization. Others are more reserved however, expressing concerns that there is a lack of evidence that mandatory vaccination actually helps to increase uptake. In Australia a requirement for children to meet immunisation schedules has for a long time been attached to childcare payments. In an attempt to further improve vaccination rates, exemptions were removed as of January 2016. Six months later it was reported that more than 148,000 children who had not been up to date with their immunisations met their requirements as a result' [10].

On the 'contra' a lot of arguments might be mentioned. It is important to underline, that mandatory vaccination doesn't go along with the medical ethics (informed agreement of the patient is needed), might be seen as the violation of the human rights.

This article only outlines the processes around the vaccination in Ukraine and gives some correlation about the same developments in other countries and at the international level. There are still a lot of examples of the constitutional values' conflicts to discuss.

About the COVID-19 vaccination in general and mandatory vaccination in particular – there was never such a precedent of massive vaccination of the grown-ups in history (the flu vaccination comes pretty close) – so here we have the conflict between the individual freedom and the public health, state safety. COVID-19 vaccines were created urgently – here we have the conflict between the individual safety and the public safety.

About children vaccination it is recommended to keep in mind the constitutional family values (in Ukraine, the children are under the parents care and they take the major decisions about their life and health) and the right of children to physical integrity.

It is especially interesting, what would the EU member states do and how would the European Court of Justice react. As usual, when it comes about the human rights, the European Court of Justice supports the European Court of Human Rights, but the vaccination case might break this consensus down.

Conclusions. Coming back to the COVID-19 vaccination, it is necessary to underline:

- the humanity sees this virus particularly and other infections in general as a real global threat to the public and the individual health;

- the pandemic shows each state reacts according to the domestic situation, and the variety of choices is enormous.

Vaccines should be granted a special legal status, when it comes about their usage. As vaccines considered to be immunobiological drugs for medical use (forms active or passive immunity against diseases), only the state should regulate how to use the vaccines – not the individuals for themselves or for the family members (children etc.).

The states should be allowed to pass any decision in this sphere within their sovereignty (without the possible international sanctions) – but the UN and the WHO should pay more attention to deliver all of the information for the decisions about the vaccination inner state policy.

Also, the majority of the legal scholars discuss vaccination as it is. It is recommended to 'pair' the vaccination with the collective immunity – just like in the decision of the ECHR, mentioned above. The Court stated that "the goal should be to protect every child against serious diseases, through vaccination or collective immunity". So the collective immunity formation should be taken into the account every time the pros or contras of the mandatory vaccinations are discussed.

Bibliography

1. CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). URL: <https://www.refworld.org/pdfid/4538838d0.pdf>
2. Qaracayev C. Individual constitutional complaint in the Republic of Azerbaijan. *Науковий вісник Міжнародного гуманітарного університету. Сер.: Юриспруденція.* 2023. № 63. С. 34–37.
3. Mishyna N. European court of human rights' judgments implementation by local and regional authorities: relevant publications on the topic. *Наукові праці Національного університету «Одеська юридична академія».* Одеса, 2023. Т. 33. С. 52–57.
4. Qaracayev C. Local Self-government in the Republic of Azerbaijan: Problems of the Administrative Supervision. *Науковий вісник Міжнародного гуманітарного університету. Сер.: Юриспруденція.* 2022. № 57. С. 24–27.
5. Mishyna N. V. Role of local and regional authorities in the implementation of ECtHR judgments:

bibliographical review. *Юридичний вісник*. 2023. № 3. С. 146–151.

6. Smith P.J., Wood D., Darden P.M. Highlights of Historical Events Leading to National Surveillance of Vaccination Coverage in the United States. *Public Health Rep.* 2011. # 126 (Suppl 2). P. 3–12.

7. Via libera definitivo al dl Covid. Obbligo vaccinale per medici e sanitari. URL: https://www.ilsole24ore.com/art/via-libera-definitivo-dl-covid-obbligo-vaccinale-medici-e-sanitari-AEMcmtL?refresh_ce=1

8. Ms. Valeriya Lutkovska: "We destroyed by some steps in reforming of medicine that was more likely, than constructed something new". URL: <https://www.ombudsman.gov.ua/en/all-news/pr/171215-om-valeriya-lutkovska-okremimi-krokami-v-reformuvanni-meditsini-mi-shvids/>

9. Vavricka v. the Czech Republic (relinquishment). URL: <https://hudoc.echr.coe.int/>

10. Wright C. Should vaccination be mandatory? URL: <https://www.meningitis.org/blogs/should-vaccination-be-mandatory>

11. Сінькевич О. В. Функції конституційного права як галузі права України : монографія / Київський національний університет ім. Тараса Шевченка. Київ : Видавництво Ліра-К, 2020. 462 с.

12. Deshko L., Lotiuk O., Sinkevych O., Kravtsova Z., Kudriavtseva O., Cherniak I. The human right to quality medical care: changing the paradigm of international cooperation between states and interaction of public authorities and local self-government in foreign countries. *Georgian medical news*. 2021. № 10. P. 160–165.