

DOI: <https://doi.org/10.34069/AI/2022.53.05.12>

How to Cite:

Pevko, S., Romaniuk, V., Perekopskyi, S., Khan, O., & Shaituro, O. (2022). Legality of restrictions on human rights and freedoms in a Covid-19 Pandemic: The experience of Ukraine. *Amazonia Investiga*, 11(53), 122-131. <https://doi.org/10.34069/AI/2022.53.05.12>

## Legality of restrictions on human rights and freedoms in a Covid-19 Pandemic: The experience of Ukraine

### ПРАВОМІРНІСТЬ ОБМЕЖЕНЬ ПРАВ І СВОБОД ЛЮДИНИ У ПЕРІОД ПАНДЕМІЇ COVID-19: ДОСВІД УКРАЇНИ

Received: February 20, 2022

Accepted: April 25, 2022

Written by:

**Stanislav Pevko**<sup>54</sup><https://orcid.org/0000-0002-1488-9715><https://publons.com/researcher/4796465/>**Vitalii Romaniuk**<sup>55</sup><https://orcid.org/0000-0001-6077-4591><https://publons.com/researcher/3201774/vitalii-romaniuk/>**Serhii Perekopskyi**<sup>56</sup><https://orcid.org/0000-0001-6304-7795><https://publons.com/researcher/4959990/serhii-perekopskyi/>**Oleksandr Khan**<sup>57</sup><https://orcid.org/0000-0001-9912-1547><https://publons.com/researcher/4960027/khan-oleksandr/>**Olga Shaituro**<sup>58</sup><https://orcid.org/0000-0002-0614-0595><https://publons.com/researcher/4958395/olga-shaituro/>

#### Abstract

The purpose of the study is to examine the content of the right to health during the COVID-19 pandemic. The study focused on the legitimacy of restrictions on constitutional rights and freedoms due to mandatory vaccination and other restriction measures in Ukraine. Diversified views of scholars on this issue were established, the legislative basis for establishing restrictions on constitutional rights and freedoms of citizens was determined, and the method of normative establishment of such restrictions during the COVID-19 pandemic adopted by the Government of Ukraine was criticized. The legal positions of the European Court of Human Rights, the Constitutional Court of Ukraine and the Supreme Court of Ukraine on the legality of compulsory vaccination during a pandemic and restrictions on the constitutional rights and freedoms of citizens are presented. To achieve the goal of the research, general scientific research methods were used, such as: analysis,

#### Анотація

Мета дослідження – дослідити зміст права на здоров'я під час пандемії COVID-19. Дослідження зосереджувалося на правомірності обмежень конституційних прав і свобод через обов'язкову вакцинацію та інші заходи обмеження в Україні. Встановлено різноманітні погляди науковців на це питання, визначено законодавчу базу для встановлення обмежень конституційних прав і свобод громадян, піддано критиці прийняту Урядом України методику нормативного встановлення таких обмежень під час пандемії COVID-19. Викладено правові позиції Європейського суду з прав людини, Конституційного Суду України та Верховного Суду України щодо правомірності обов'язкової вакцинації під час пандемії та інших обмежень конституційних прав і свобод громадян. Для досягнення мети дослідження були використані загальнонаукові методи дослідження, такі як: аналіз, синтез, моделювання та абстрагування. За допомогою цих методів визначено складові елементи права особи на охорону здоров'я,

<sup>54</sup> Kharkiv National University of Internal Affairs, Ukraine.

<sup>55</sup> Kharkiv National University of Internal Affairs, Ukraine.

<sup>56</sup> Kharkiv National University of Internal Affairs, Ukraine.

<sup>57</sup> Kharkiv National University of Internal Affairs, Ukraine.

<sup>58</sup> Karazin Kharkiv National University, Kharkiv, Ukraine.



synthesis, modeling and abstraction. These methods were used to determine the constituent elements of a person's right to health care, to determine their relationship, to give specific examples of solving the problem of vaccination, to draw conclusions on the legality of vaccination and to limit certain constitutional rights of citizens.

**Key words:** rights to health, the COVID-19 pandemic, compulsory vaccination, restrictions on constitutional rights and freedoms, rights of arrested persons.

## Introduction

The rapid spread of the acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 in the modern world has caused a major health problem. Governments, looking for ways to stop its spread and reduce morbidity and mortality among the population, usually resort to measures to limit contact between citizens: bans or restrictions on mass events (cultural, educational, sports, social), establishing a rule on keeping a distance (1.5-2 meters) during individual contacts among citizens, setting restrictions on the number of people visiting public catering and trade establishments, service establishments, etc., public transport, establishing mandatory vaccination for citizens - representatives certain professions, mandatory wearing of protective masks and others. From the point of view of legal theory, these measures, on the one hand, are aimed at ensuring the right to health of citizens, and on the other hand, lead to a significant restriction of other constitutional rights of citizens. This raises the legitimate question of the possibility of restricting one right in order to secure another right. The search for an answer to this question was aimed at a study on the example of Ukraine.

The article considers the concept of the right to health care and its place in the system of fundamental human rights and freedoms. It is stated that the human right to health care belongs to social rights. It is normatively enshrined in Article 49 of the Constitution of Ukraine. This right corresponds to the obligation of the state to develop, finance and actually implement programs to protect the population from infectious diseases. It is stated that the Cabinet of Ministers of Ukraine and the Ministry of Health of Ukraine adopted a number of decisions that are normative, ie mandatory, and which are aimed at overcoming the COVID-19 pandemic. According to their content, the envisaged restrictions significantly narrow the scope of

визначено їх взаємозв'язок, наведено конкретні приклади вирішення проблеми вакцинації, зроблено висновки щодо правомірності вакцинації та обмеження окремих конституційних прав громадян.

**Ключові слова:** право на здоров'я, пандемія COVID-19, обов'язкова вакцинація, обмеження конституційних прав і свобод, права заарештованих.

some constitutional rights and freedoms of citizens. In particular, such as: the right to personal integrity, freedom of movement, the right to work and education. According to the results of the analysis of well-known scientific research on this issue, international legislation and case law, the general legitimacy of establishing at the legislative level limited rights and freedoms of citizens to combat the pandemic of coronavirus infection.

Further on the text of the article it was stated, that restrictions on human rights and freedoms may be established only by the Constitution and laws of Ukraine, and not by by-laws. the Government Resolution, which imposes a number of restrictions on the exercise of constitutional human rights and freedoms, is a bylaw. Having resolved by a by-law the issue referred by the Constitution of Ukraine to the sphere of exclusive legislative regulation, the Cabinet of Ministers of Ukraine took over the powers of the Verkhovna Rada of Ukraine as the sole legislative body. Thus, the Government of Ukraine issued the Resolution of the Cabinet of Ministers of Ukraine "On Quarantine and Restrictive Anti-Epidemic Measures to Prevent the Spread of Acute Respiratory Disease COVID-19 Caused by SARS-CoV-2 Coronavirus" (Law № 1236, 2020) such a method of decision-making in the field of human rights, which is incompatible with the Constitution of Ukraine, as it violates the principle of separation of powers provided for in the second part of Article 6, Article 75, paragraph 3 of the first part of Article 85, paragraph 1 of the first part of Article 92 of the Constitution (Law № 254к/96-ВР, 1996).

As a result, the authors concluded that the establishment of mandatory vaccination for certain categories of professions and the

establishment of appropriate restrictions on the exercise of their rights, or rather changes in the conditions for the exercise of their rights, is legitimate. However, the issue of establishing restrictions on the constitutional rights and freedoms of citizens at the level of bylaws: acts of the Government and the Ministry of Health remains controversial. In a democratic society, such restrictions should be determined at the level of law - an act of Parliament.

### **Theoretical framework and Literature Review**

The theoretical basis for studying the essence of the right to health care in the system of other basic human rights was determined by such scientists as: M.V. Tsvik, O.V. Petryshyn, L.V. Avramenko in the scientific work "General Theory of State and Law" (Tsvik et al, 2009), O.F. Skakun "Theory of Law and State" (Skakun, O., 2009). Normative and legal regulation at the national and international level has been studied by such scholars as: V. Ya. Tatsiy in the work "Constitution of Ukraine. Scientific and practical commentary" (Tatsiy et al, 2011). In Ukraine, this issue was considered at international scientific conferences by such persons as V.F. Moskalenko, T.S. Guzeva, G.V. Inshakova "Regulation of the right to health care in international regulations" (Moskalenko et al, 2008). Also the issue of restriction of individual rights from the point of view of medical law was considered by S.G. Stetsenko in the monograph "Medical Law of Ukraine" (Stetsenko et al, 2008). It should be noted that the problems of restriction of human rights and freedoms have often been the subject of research by foreign scientists. These include: Ensuring Rights while Protecting Health: The Importance of Using a Human Rights Approach in Implementing Public Health Responses to COVID-19 (Zweig et al, 2021), One Health, COVID-19, and a Right to Health for Human and Nonhuman Animals (Bernotas and others, 2021), Is Mandatory Vaccination for COVID-19 Constitutional under Brazilian Law? (Wang et al, 2021), Fault Lines of Refugee Exclusion: Statelessness, Gender, and COVID-19 in South Asia (Chakraborty & Bhabha, 2021).

The main feature of the rule of law and civil society is not only the objective existence of human and civil rights and freedoms, but also their real provision by the state. Establishing measures of possible behavior, the order of their implementation, guaranteeing their existence is the main purpose of the state. In this case, the

rules of conduct are established in the relevant regulations: the Constitution, laws, bylaws.

One of the general provisions of the constitutional order of society and the state is that a person, his life and health, honor and dignity, inviolability and security are recognized as the highest social value. The rights, freedoms and responsibilities of man and citizen are integral elements of the legal essence of man, which is manifested in his relations with other people, social and political institutions, the state. Human rights express and guarantee a certain degree (norm) of freedom and responsibility, which is formal, as it should not depend on other characteristics - race, skin color, gender, political, religious and other preferences. At the same time, human rights have their own meaning - freedom, which is recognized as an important asset for the harmonious development of both the individual and society. (Tsvik et al, 2009)

Over time, a certain classification of human rights and freedoms has emerged in the legal literature. Physical rights and freedoms include the right to life, liberty and security of person, the environment safe for life and health, health care and medical care, and a sufficient standard of living for oneself and family.

The category of personal rights and freedoms includes the right to free development of one's personality, respect for dignity, freedom of thought and speech, worldview and religion, freedom of movement and choice of residence.

Political rights and freedoms of man and citizen should include the right to citizenship, freedom of association in political parties, the right to assemble peacefully without weapons and to hold rallies, marches and demonstrations, to participate in public affairs, in referendums, to freely elect and be elected to public authorities and local governments, equal access to public service.

Humanitarian rights and human freedoms are the right to education, to enjoy the achievements of culture and art, freedom of creativity, copyright.

The Constitution of Ukraine includes the right to social security, pensions and other types of social benefits and allowances, and the right to housing. (Tsvik et al, 2009)

Economic rights and freedoms - the ability (freedom) of man and citizen to own, use and dispose of consumer goods and the main factors of economic activity: property (property rights)

and their labor force (the right to choose the type of occupation), and therefore use it independently or under an employment contract (right to work), as well as to show entrepreneurship and initiative in the realization of their abilities, respectively, the acquisition of means of subsistence, participating in the production of material and other goods (freedom of enterprise). (Skakun, 2009).

The human right to health is one of the social rights of individuals. The meaning of the right to health is not always as clear as the term "health". In the literature on human rights and health laws, the expressions "right to health", "right to health care" are most common. Various authors have not yet been able to reach a consensus on which term should be considered the most successful. At the international level, the term "right to health" has become quite widespread, which, in our opinion, is most in line with the concept. The term "right to health" more fully reveals the essence of international human rights agreements and helps to realize that this category includes not only the right to health care, but also the right to a number of conditions, including socio-economic, without which health is impossible. However, in recent decades, the concept of the "right to health" has become more common in international and national law. (Moskalenko, Guzeva & Inshakova, 2008).

Legal regulation of human health exists as long as law exists. There are two levels of protection: the health of the nation and the health of the individual. The nation's health care is an older form of health care legal protection. It is known that in the Middle Ages there were legal norms that established various forms of prohibitions in order to protect collective health. In particular, restrictions on freedom of movement during epidemics were used as a control over infectious diseases. Reduction of harmful effects on health, prevention of diseases due to changes in human behavior confirmed the importance of these norms. Because health education has not always been an effective means of instilling behavior, it is the law that has been used as the most effective method of enforcing health standards. Thus, such a preventive means of health care as the restriction of human rights has come into modern law from the past.

The individual right to health care at the international level began to be established in the middle of the twentieth century. The individual's right to health care, on the one hand, provides opportunities for individuals in this area of public relations, and on the other hand, creates

obligations for the state, which are generally manifested in providing it with effective means of health care for each individual. At the same time, the multifaceted implementation of the right to health care, the variety of conditions that affect human health, differences in socio-economic development of states and models of health care system hinder the creation of a single concept of human rights to realize their potential health care. (Moskalenko, Guzeva & Inshakova, 2008)

### Methodology

The following general scientific methods were used in this study: hypothetical-deductive method, analysis, induction.

The hypothetical-deductive method provided an opportunity to create a system of deductively related hypotheses, from which ultimately derived allegations of empirical facts, namely by examining the legal basis of vaccination and court conclusions on the rights of persons who may be violated in connection with conducting this procedure, a statement was made about the legality of these measures.

The analysis helped in the division, the problems of legality of the vaccination procedure, the constituent components that were analyzed and as a result, a legal assumption was made about the legality of these actions.

Induction is a logical approach to research that summarizes the results of observations and experiments and the movement of thought from individual to general, which consisted of research from individual components of the right to health and vaccination procedures to conclude the legality of this policy.

The following specific scientific methods of jurisprudence were used in this study: special-legal method, theoretical-legal method. Using a special legal method, a description of the phenomena of state and legal reality was made using legal terminology, namely the medical procedure of vaccination through the right to health care; highlights the activities of social actors in terms of legal models of behavior, from the standpoint of legal or illegal, mandatory or possible, namely analyzed the introduction of vaccination by the authorities on the legality of the decision and its Constitution of Ukraine, laws of Ukraine and human rights.

## Results and discussion

In Ukraine, the right to health care is enshrined in Article 49 of the Constitution: "Everyone has the right to health care, medical assistance and medical insurance. Health care is provided by state funding of relevant socio-economic, health and health prevention programs. The state creates conditions for effective and accessible medical care for all citizens. In state and municipal health care facilities, medical care is provided free of charge; the existing network of such institutions cannot be reduced. The state promotes the development of medical institutions of all forms of ownership. The state takes care of the development of physical culture and sports, ensures sanitary and epidemiological well-being". (Law № 254к/96-BP, 1996). Proclaimed a legal norm aimed at providing a person and a citizen with the opportunity to receive medical care; state assistance in public health; guarantee of health insurance.

The implementation of this legal rule is manifested, inter alia, through the development, funding and actual implementation of programs aimed at protecting the population from infectious diseases COVID-19. Public health policy in this direction is also a means of realizing the right of citizens to health care. After all, the state is a social phenomenon created to ensure the interests of its inhabitants, so the implementation of this right is entrusted to the state in the face of its bodies.

During 2020-2021, the Cabinet of Ministers of Ukraine and the Ministry of Health of Ukraine adopted a number of decisions that are normative, ie mandatory, and which are aimed at overcoming the COVID-19 pandemic. According to their content, the envisaged restrictions significantly narrow the scope of some constitutional rights and freedoms of citizens. In particular, such as: the right to personal integrity, freedom of movement, the right to work and education.

On December 9, 2020, the Cabinet of Ministers of Ukraine adopted a resolution "On the establishment of quarantine and the introduction of restrictive anti-epidemic measures to prevent the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2" (Law № 1236, 2020), which provides a set of mandatory measures for the population of the country, which in its content also limits the set of constitutional rights of individuals. Depending on the epidemic situation on the territory of the state, a "green", "yellow", "orange" or "red"

level of epidemic danger of the spread of COVID-19 is established. Moreover, each subsequent level provides for more significant restrictions on the rights and freedoms of citizens compared to the previous one. For example, in the regions where the "red" level of epidemic danger is established, the Government prohibits:

- 1) reception of visitors by business entities engaged in the field of public catering (bars, restaurants, cafes, etc.), in shopping and entertainment centers, in the field of trade and consumer services, cultural institutions, sports facilities (except for certain exceptions);
- 2) holding all mass (cultural, sports, entertainment, social, religious, advertising, scientific, educational, professional, thematic and other) events, except for official sports events;
- 3) the activities of markets other than food;
- 4) visits to educational institutions by applicants for education, except for preschoolers, students of special educational institutions and grades 1-4 of general secondary education (except for certain exceptions);
- 5) carrying out regular and irregular transportation of passengers by road and rail within the respective regions, except for transit traffic and private travel;
- 6) carrying out of planned hospitalization measures by state and municipal health care institutions, except for carrying out urgent and urgent hospitalization measures, if as a result of their transfer (postponement) there is a significant risk to human life or health;
- 7) stay without wearing personal protective equipment, including respirators or protective masks in public areas, etc.

Restrictions on detainees are more burdensome. In particular, there is a general ban on visiting detention centers by associations of citizens, representatives of charitable organizations, visits to detainees except for law enforcement officers, courts, representatives of embassies and consulates of relevant states, employees of the Office of the United Nations High Commissioner to the United Nations. refugees, lawyers, and relatives, provided they have completed a full course of vaccination or a confirmed negative COVID-19 test. (Law № 1236, 2020). Restrictions imposed during the quarantine do not allow to fully apply measures to respond to crimes. There are difficulties in conducting any investigative (search) and procedural actions that involve contact with the suspect and other participants in criminal proceedings, difficulties

in detaining a person and his stay in temporary detention facilities until a court decision, etc.

The possibility of restricting fundamental human rights and freedoms by the state is provided for in most international legal acts regulating human rights and fundamental freedoms. Each agreement defines the limits of possible restrictions and an exhaustive list of grounds for them, as well as establishes a number of rights that under any circumstances can not be limited. For example, Art. 29 of the Universal Declaration of Human Rights contains the formulation of permanent restrictions necessary for the existence of society, but such that may be imposed by the state "to meet the just demands of morality, public order and general welfare" (Law. Universal Declaration of Human Rights, 1948). In Art. 10 of the European Convention on Human Rights contains a similar basis "in the interests of national security and territorial integrity", etc. (Law. Convention for the Protection of Human Rights and Fundamental Freedoms, 1950).

Such restrictions may be imposed only by law and to the extent prescribed by law. In our opinion, considering the problem of restriction of human rights, it is necessary to distinguish two concepts: the first - direct restriction of rights (as deprivation of owners of rights or part of a right), second - restrictions on the exercise of rights (as full or partial realization impossibility of certain rights). The second approach to understanding restrictions assumes that all rights in full remain with the person - the holder of rights, and only the possibility of their realization ceases. This type of restriction can be voluntary (when a person waives the right, for example, in private prosecution cases), or forced - applied depending on external, mostly unpredictable, circumstances. The principle of human rights is based on the idea that people in any case have the right and opportunity to choose a certain way of life. (Donelli, 2004).

The Constitution of Ukraine contains both concepts related to the restriction of rights. In particular, Part 2 of Art. 64 declares that in conditions of martial law or state of emergency, certain restrictions on rights and freedoms may be imposed, indicating the duration of these restrictions. At the same time, some articles concerning certain rights contain conditions for restricting their exercise. For example, Part 3 of Art. 34 (the right to freedom of thought and speech, the freedom to express one's views and beliefs, the right to freely collect, store, use and disseminate information) provides that the

exercise of these rights may be restricted by law in the interests of national security, territorial integrity or public order, to prevent riots or crimes, to protect public health, to protect the reputation or rights of others, to prevent the disclosure of confidential information, or to maintain the authority and impartiality of justice. In Part 2 of Art. 35 (right to freedom of thought and religion) stipulates that the exercise of this right may be restricted by law only in the interests of protection of public order, health and morals of the population or protection of the rights and freedoms of others. Part 2 of Art. 39 (the right to assemble peacefully, unarmed and to hold rallies, marches and demonstrations), which states that restrictions on the exercise of this right may be imposed by a court in accordance with law and only in the interests of national security and public order to prevent riots or crimes, to protect the health of the population or to protect the rights and freedoms of others (Law № 254к/96-ВР, 1996.).

It seems that it is more accurate to formulate these restrictions as restrictions on the exercise (or realization) of rights, because even in martial law or state of emergency is not a temporary deprivation of citizens of certain rights, and temporarily makes it impossible to use them in full. The Constitutional Court of Ukraine has made an important step in protecting the constitutional rights and freedoms of man and citizen from arbitrary restrictions, determining that the restriction of constitutional rights and freedoms must have a legitimate aim; be conditioned by the public need to achieve this goal, proportionate and reasonable; in case of restriction of the right the legislator is obliged to introduce such legal regulation which will give the chance to achieve optimally the legitimate purpose with the minimum interference in realization of the corresponding right, and not to break its essential maintenance. (Judgment of the Constitutional Court of Ukraine № 3-рп / 2015, 2015).

Consider in more detail the legal mechanism for restricting the right to personal integrity. This natural human right is limited by compulsory vaccination for workers in certain occupations. Thus, the Ministry of Health of Ukraine issued an order dated 04.10.2021 № 2153 "On approval of the List of professions, industries and organizations whose employees are subject to mandatory preventive vaccinations". Compulsory preventive vaccinations against acute respiratory disease COVID-19 are subject to employees of central and local executive bodies, educational institutions and research

institutions, regardless of type and form of ownership. (Law № 2153, 2021).

The question arises whether the norms of the Constitution of Ukraine are violated due to the relevant state policy. After all, according to Article 43, everyone has the right to work, which includes the opportunity to earn a living by work, which he freely chooses or freely agrees to. The state creates conditions for the full exercise of citizens' right to work, guarantees equal opportunities in choosing a profession and type of employment. Article 24 of the Constitution of Ukraine also states that citizens have equal constitutional rights and freedoms and are equal before the law (Law № 254к/96-BP, 1996).

There is a question not only of forcing vaccination, which at first glance does not correspond to the concept of "the right to health care", but also of violating the equality of citizens before the law by giving preference to vaccinated persons. For example, this is the case when non-vaccinated persons are not allowed to enter public places or are admitted only if they have certificates of prior testing for the absence of COVID-19.

We will remind that the right is a measure of possible behavior which order of realization is established by the law. There are such forms of realization of the right as observance, execution and use. Use is a form of realization of the subjective right at which implementation of authorizing norms of the right is carried out.

The use of a right differs from the two previous forms in that the person is given the right to decide whether to exercise the right or not. But in any case, if a person wishes, this rule will be implemented. For example, in accordance with Part 1 of Art. 35 of the Constitution of Ukraine, everyone has the right to freedom of thought and religion. Usually the use involves active behavior. (Gusareva & Tikhomirova, 2017)

Permit norms (the right to health care is a permissive norm) are implemented in the form of use. Their implementation is envisaged according to the person's own will. Forcing a person to exercise his right contradicts the general legal provisions. This norm is also contained in a normative legal act that has a higher legal force (the Constitution of Ukraine) than the order of the Ministry of Health. Based on this, it can be assumed that forcing vaccination is, at first glance, illegal and unconstitutional. However, if the right to health care is considered in an objective sense, the

restrictions in society that may be imposed by the state to prevent the spread of an infectious disease may be legitimate. After all, the relevant restrictive measures are taken for public necessity. This category is contained in the Law of Ukraine "On Alienation of Land Plots and Other Real Estate Objects Located on Them, which are in Private Ownership, for Public Needs or Public Necessity". According to paragraphs 5 and 6 of Article 1 of the Law, public necessity - due to national interests or the interests of the territorial community exclusive need to ensure the forced alienation of land and other real estate located on it, in the manner prescribed by law (Law № 1559-VI, 2021)

Thus, social necessity can be defined as due to the national interests or the interests of the territorial community the exclusive need to commit or refrain from teaching certain actions.

Given that the state represents the interests of the whole society living in its territory, and the territorial community represents the interests of persons living in the relevant administrative-territorial unit, we can assume that the public interest is in the interest of society as a whole. In case of restriction of certain rights and freedoms of individuals in the public interest, it is necessary to determine what is the right to health care in accordance with the provisions of national legislation of Ukraine.

According to Article 3 of the Law of Ukraine "Fundamentals of Ukrainian Legislation on Health Care", health care is a system of measures aimed at preserving and restoring physiological and psychological functions, optimal performance and social activity at the maximum biologically possible individual life expectancy. According to Article 6 of the Law, every citizen of Ukraine has the right to health care, which provides: the opportunity to have naturally necessary resources for subsistence (food, clothing, etc.), safe sanitary and epidemiological existence, safe for life and health working conditions, the right to receive medical care, to participate in the activities of government bodies in the field of state health policy, the right to protection and compensation for damage caused by illegal actions in the field of health care, etc. (Law № 2801-XII, 2021).

The International Covenant on Economic, Social and Cultural Rights of 19 October 1973 defines the right to health as the right of everyone to the highest attainable standard of physical and mental health. In order to exercise this right, the state has a duty to prevent and treat epidemic,

endemic, occupational and other diseases and to control them. (Law A/RES/2200 A, 1973)

That is, based on these tasks of the state, it can be determined that coercive vaccination measures can be provided for in state policy. Vaccination is one way to prevent and treat epidemic diseases and control them.

Based on the legal regulation of public health, national legislation provides for the introduction of vaccination not because of possible behavior, but because of the necessary behavior. Article 10 of the Law of Ukraine "Fundamentals of the Legislation of Ukraine on Health Care", citizens of Ukraine are obliged to take care of their health and the health of children, not to harm the health of other citizens; in cases provided by law to undergo preventive medical examinations and vaccinations. Thus, vaccination is provided as a duty of citizens, which ensures the fulfillment of the duty to take care of their health, the health of children and other citizens.

Legislative consolidation of the obligation of citizens to vaccinate is also provided in parts 2 and 3 of the Law of Ukraine "On Protection of Infectious Diseases", according to which employees of certain professions, industries and organizations whose activities may infect these workers and ( or) the spread of infectious diseases by them are subject to mandatory preventive vaccinations against infectious diseases. In case of refusal or evasion of obligatory preventive vaccinations in the order established by the law, these workers are suspended from performance of the specified types of works. The list of occupations, industries and organizations whose employees are subject to mandatory preventive vaccinations against other relevant infectious diseases is established by the central executive body, which ensures the formation of state policy in the field of health care.

In case of threat of occurrence of especially dangerous infectious disease or mass spread of dangerous infectious disease in the corresponding territories and objects obligatory preventive inoculations against this infectious disease according to epidemic indications can be carried out.. (Law № 1645-III, 2000).

Therefore, vaccination against infectious diseases is mandatory in cases provided by law. The possibility of dismissal in connection with the refusal to vaccinate is provided in Article 46 of the Labor Code of Ukraine: "dismissal of employees by the owner or his authorized body

is allowed in the case of: refusal or evasion of obligatory medical examinations, training, instruction and testing of knowledge on labor protection and fire protection; in other cases provided by law ". (Law № 322-VIII, 1971).

According to the European Court of Human Rights, the freedom to consent to medical intervention is a principle of case law. (Judgment of the European Court of Human Rights in the case № 2346/02, 2002). In some cases, the court recognized compulsory vaccination as an unwanted medical intervention carried out without voluntary consent, which was an interference with the right to respect for private life, including the physical and psychological integrity of the individual ("Salvetti v. Italy", "Matter v. Slovakia") (Demchenko & Dubitskaya, 2017). However, in case "Solomakhin v. Ukraine", the Court found that compulsory vaccination was required by law and had a legitimate aim, and found no evidence that the vaccination in question had harmed the applicant's health. (Judgment of the European Court of Human Rights № 24429/03, 2011).

The Constitutional Court of Ukraine in the case of the constitutional petition of the Supreme Court on the constitutionality of certain provisions of the resolution of the Cabinet of Ministers of Ukraine "On quarantine to prevent the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2" also supported the introduced quarantine restrictions. (Judgment of the Constitutional Court of Ukraine № 10-r / 2020, 2020)

In Ukraine, the question of the legitimacy of quarantine restrictions due to the inconsistency of their form with the Constitutional provisions remains controversial. The fact is that these restrictions on the essence of constitutional rights of citizens are set at the level of bylaws of the Government: Resolution of the Cabinet of Ministers of Ukraine "On quarantine and introduction of restrictive anti-epidemic measures to prevent the spread of acute respiratory disease, COVID-19 caused by coronavirus SARS-CoV-2 " (Law № 1236, 2020), Order of the Ministry of Health of Ukraine " On approval of the List of professions, industries and organizations whose employees are subject to mandatory preventive vaccination" (Law № 2153, 2021).

Restrictions on human rights and freedoms may be established only by the Constitution and laws of Ukraine, and not by by-laws. The supremacy of the Constitution of Ukraine does not make



sense if its principles and norms that guarantee human rights and freedoms are grossly violated.

Thus, in particular, from the provision of paragraph 1 of the first part of Article 92 of the Constitution of Ukraine, which provides that only the laws of Ukraine determine "human and civil rights and freedoms, guarantees of these rights and freedoms", it follows that the scope of these restrictions of Ukraine. In Ukraine, the only body of legislative power is the Parliament - the Verkhovna Rada of Ukraine, which in accordance with paragraph 3 of the first part of Article 85 of the Constitution of Ukraine adopts laws. It can be seen from the above that the Verkhovna Rada of Ukraine could not delegate the authority to adopt an act restricting the exercise of constitutional human rights and freedoms to any other body of state power. However, the Government Resolution, which imposes a number of restrictions on the exercise of constitutional human rights and freedoms, is a bylaw. Having resolved by a by-law the issue referred by the Constitution of Ukraine to the sphere of exclusive legislative regulation, the Cabinet of Ministers of Ukraine took over the powers of the Verkhovna Rada of Ukraine as the sole legislative body. Thus, the Government of Ukraine issued the Resolution of the Cabinet of Ministers of Ukraine "On Quarantine and Restrictive Anti-Epidemic Measures to Prevent the Spread of Acute Respiratory Disease COVID-19 Caused by SARS-CoV-2 Coronavirus" such a method of decision-making in the field of human rights, which is incompatible with the Constitution of Ukraine, as it violates the principle of separation of powers provided for in the second part of Article 6, Article 75, paragraph 3 of the first part of Article 85, paragraph 1 of the first part of Article 92 of the Constitution.

### Conclusions

Thus, analyzing the legal basis for vaccination in Ukraine, it is clear that this is not a right of every person and citizen, but a duty. This obligation is directly regulated by the Law of Ukraine "On the Fundamentals of the Legislation of Ukraine on Health Care", which provides a general rule establishing the mandatory vaccination in cases provided by law. Another normative legal act regulates specific subjects and grounds on which vaccination can be carried out, this issue is regulated by the Law of Ukraine "On Protection of the Population from Infectious Diseases". Therefore, the establishment of mandatory vaccination for certain categories of professions and the establishment of appropriate restrictions

on the exercise of their rights, or rather changes in the conditions for the exercise of their rights, is legitimate. However, the issue of establishing restrictions on the constitutional rights and freedoms of citizens at the level of bylaws: acts of the Government and the Ministry of Health remains controversial. In our opinion, in a democratic society, such restrictions should be determined at the level of law - an act of Parliament. Otherwise, the public thinks that such acts of the Government or ministries are illegitimate.

### Bibliographic references

- Bernotas, K., Sellars, L., & Sebo, J. (2021). One Health, COVID-19, and a Right to Health for Human and Nonhuman Animals. *Health and Human Rights Journal*, 23(2), 35-47.
- Chakraborty, R., & Bhabha, J. (2021). Fault Lines of Refugee Exclusion: Statelessness, Gender, and COVID-19 in South Asia. *Health and Human Rights Journal*, Vol 23/1, 237-250.
- Code of Administrative Procedure of Ukraine № 3-rp/2015. Judgment of the Constitutional Court of Ukraine in the case of the constitutional petition of the Commissioner for Human Rights of Ukraine on the constitutionality of the provisions of the second part of Article 1712, Database "Legislation of Ukraine", April 8, 2015
- Demchenko, I. S., & Dubitskaya, N. T. (2017). Regulatory regulation of compulsory vaccination: pros and cons. *Journal of Kyiv University of Law*, № 4, 133-138.
- Donelli, J. (2004). *Human rights in international politics*. Lviv: Calvary.
- Gusareva, S., & Tikhomirova, O. (2017). *Theory of state and law*. Kiev: NAVS.
- Judgment of the European Court of Human Rights in the case of Priti v. The United Kingdom № 2346/02. Database "Legislation of Ukraine", April 29, 2002.
- Judgment of the European Court of Human Rights in the case of Solomakhin v. Ukraine № 24429/03. Database "Legislation of Ukraine", March 15, 2011.
- Judgment of the Constitutional Court of Ukraine № 10-r / 2020, in the case of the constitutional petition of the Supreme Court on the constitutionality of certain provisions of the resolution of the Cabinet of Ministers of Ukraine "On quarantine to prevent the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2 and SARS-CoV-CoV stages of mitigation of anti-epidemic measures ", provisions of parts one, three of Article 29 of the Law of Ukraine" On

- the State Budget of Ukraine for 2020 ", paragraph nine of item 2 of Section II" Final Provisions "of the Law of Ukraine" On Amendments to the Law of Ukraine " About the State Budget of Ukraine for 2020" Database "Legislation of Ukraine", August 28, 2020.
- Law № 1559-VI. On the alienation of land plots, other real estate objects located on them, which are in private ownership, for public needs or for reasons of public necessity, 2021. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1559-17#Text>
- Law № 254к/96-BP. Constitution of Ukraine, 1996. Retrieved from: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>
- Law № 2153. About the statement of the List of the trades, manufactures and the organizations which workers are subject to obligatory preventive, 2021. Retrieved from: <https://moz.gov.ua/article/ministry-mandates/nakaz-moz-ukraini-vid-04102021-2153-pro-zatverdzhennja-pereliku-profesij-virobnictv-ta-organizacij-pracivniki-jakih-pidljagajut-obovjazkovim-profilaktichnim-sheplennjam>
- Law № 2801-XII. Fundamentals of Ukrainian legislation on health care, 2021. Retrieved from: <https://zakon.rada.gov.ua/laws/show/2801-12#Text>
- Law A/RES/2200. A International Covenant on Economic, Social and Cultural Rights, 1973. Retrieved from: [https://zakon.rada.gov.ua/laws/show/995\\_042#Text](https://zakon.rada.gov.ua/laws/show/995_042#Text)
- Law № 1645-III. About protection of the population against infectious diseases, 2000. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1645-14#n9>
- Law № 322-VIII. Labor Code of Ukraine, 1971. Retrieved from: <https://zakon.rada.gov.ua/laws/show/322-08#Text>
- Law. Universal Declaration of Human Rights, 1948. Retrieved from: [http://zakon4.rada.gov.ua/laws/show/995\\_015](http://zakon4.rada.gov.ua/laws/show/995_015)
- Law. Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. Retrieved from: [http://zakon5.rada.gov.ua/laws/show/995\\_004](http://zakon5.rada.gov.ua/laws/show/995_004).
- Law № 1236. On quarantine to prevent the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2 and SARS-CoV-CoV stages of mitigation of anti-epidemic measures. December 9, 2020. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1236-2020-%D0%BF#Text>
- Moskalenko, V., Guzeva, T., & Inshakova, G. (2008). Regulation of the right to healthcare in international legislative acts. Medical law of Ukraine: the legal status of patients in Ukraine and its legislation (genesis, development, problems and prospects for improvement): Proceedings of the II All-Ukrainian scientific-practical conference, 189-190.
- Skakun, O. (2009). Theory of state and law. Kiev: Alert.
- Stetsenko S.G., Stetsenko V.Yu., & Senyuta I.Ya. (2008). Medical law of Ukraine. Kiev: Legal unity All-Ukrainian association of publishers.
- Tatsiy, V., and others (2011). Constitution of Ukraine: scientific and practical commentary. Kharkiv: Law
- Tsvik, M., and others (2009). General theory of state and law. Kharkiv: Law.
- Wang, D. W. L., Moribe, G., & Arruda, A. L. G. (2021) Is Mandatory Vaccination for COVID-19 Constitutional under Brazilian Law? Health and Human Rights Journal, 23(1), 163-174.
- Zweig, S.A., Zapf, A.J., Beyrer, C., Guha-Sapir, D., & Haar, R. J. (2021). Ensuring Rights while Protecting Health: The Importance of Using a Human Rights Approach in Implementing Public Health Responses to COVID-19. Health and Human Rights Journal, 23(2), 173-186.