

ISSUES OF PUBLIC AND PRIVATE LEGAL REGULATION OF SEPARATE SOCIAL RELATIONS

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CRIMINAL LAW PROTECTION OF THE RIGHT TO PRIVACY IN THE MEDICAL FIELD: INTERNATIONAL AND NATIONAL CONTEXT

Олена Рябчинська, Едуард Стоматов. КРИМІНАЛЬНО-ПРАВОВА ОХОРОНА ПРАВА НА ПРИВАТНЕ ЖИТТЯ У МЕДИЧНІЙ СФЕРІ: МІЖНАРОДНИЙ ТА НАЦІОНАЛЬНИЙ КОНТЕКСТ. У статті проаналізовано основні положення правового регулювання змісту інформації про стан здоров'я особи у міжнародних документах, так і в національному законодавстві, та її співвідношення з такими поняттями як особисте та сімейне життя, конфіденційна інформація, медична інформація, лікарська таємниця, медична таємниця, враховуючи міжнародно-правові стандарти у цій сфері, а також наукові дослідження з теорії права та галузевих дисциплін, зокрема конституційного, кримінального, адміністративного та цивільного права, законодавства у сфері інформації, охорони здоров'я та практики ЄСПЛ, тощо.

Перспективними напрямками досліджень у сфері кримінально-правової охорони недоторканності приватного життя в медичній сфері є: аналіз співвідношення права особи на особисте та сімейне життя як об'єкта кримінально-правової охорони та об'єкта кримінальних правопорушень, передбачених ст. 132 та ст. 145 КК України; уточнення змісту понять «лікарська таємниця», «медична таємниця», «конфіденційна інформація про стан здоров'я» з метою усунення існуючих нечітко визначених, суперечливих положень, прогалин нормативно-правової бази в частині інформаційних та правовідносин, що негативно впливають на забезпечення конституційних прав і свобод людини і громадянина; встановлення осіб, які можуть мати доступ до такої конфіденційної інформації, з метою з'ясування кола осіб, які можуть бути визнані суб'єктами кримінального правопорушення, передбаченого ст. 145 КК України; удосконалення правового регулювання порядку збирання, зберігання, використання та обігу інформації, зокрема, про психічний стан особи, її примусового обстеження та лікування, використання конфіденційних даних у сфері психіатрії, до якої Конституційний Суд України звернув увагу при тлумаченні статей 3, 23, 31, 47, 48 Закону України «Про інформацію» тощо.

Ключові слова: право на повагу до приватного життя, інформація про стан здоров'я людини, конфіденційна інформація, лікарська таємниця, медична таємниця.

Relevance of the study. The European Convention on Human Rights (ECHR) states that everyone has the right to respect for their private and family life, their home, and correspondence. To comply with these requirements, the Constitution of Ukraine guarantees the inviolability of

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the dwelling place (Art. 30), the secrecy of mail, telephone conversations, telegraph and other correspondence (Art. 31), and non-interference in private and family life, except in cases envisaged by the Constitution of Ukraine (Art. 32). The right to secrecy of private (personal) and family life is considered in the aspect of the right to information privacy [1, p. 95]. According to Pt. 2 of Art. 8 of this Convention, public authorities shall not interfere with the exercise of this right, except in cases where the interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic welfare of a country, for the prevention of riot or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Protection of a person from interference in their private and family life is one of the basic principles of information relations in the state (Art. 2), and ensuring everyone's access to information is the direction of the state information policy (Art. 3) [2]. Information about the condition of human health also belongs to this sphere of privacy.

Recent publications review. Admission of information about the human health condition as an element of their lives' privacy is declared, first of all, at the international level in such documents as: the Directive 95/46/EC of the European Parliament and of the Council "On the protection of individuals with regard to the processing of personal data and on the free movement of such data" in terms of regulation of provisions on access to medical information; the Geneva Declaration of the World Medical Association (1948); the Declaration on the Promotion of Patients' Rights in Europe (adopted by the World Health Organization in 1994), which contains a provision that all information about the patient's health status, diagnosis, prognosis, and treatment of their disease, as well as any other personal information, should be kept confidential, even after the patient's death, etc.

The need for special legal protection of the patient's interests is also enshrined in a number of declarations and conventions adopted by international organizations of doctors and patients, in particular the World Health Organization (WHO) and the World Medical Association (WMA). Among them: the WHO Declaration of Alma-Ata on Primary Health Care (1978), the WHO Ljubljana Charter on Reforming Health Care in Europe (1996), the WMA Tokyo Declaration on Guidelines for Physicians Covering Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in Relation to Detention and Imprisonment (1975), the WMA Declaration of Lisbon on the Rights of the Patient, the WMA Declaration on Euthanasia (1987), and the WMA Declaration on Transplantation of Human Organs (1987) [3, p. 79].

Among the international documents on patients' rights, the most important are the Declaration on the Promotion of Patients' Rights in Europe (1994) and the European Charter of Patients' Rights of 2002 [4, p. 126]. In the Declaration on the Promotion of Patients' Rights (1994), among the principles of patients' rights, along with such as respect for human dignity, self-determination, physical and mental inviolability and protection, respect for moral, cultural, and religious values, the possibility of protecting one's own health to the extent that existing measures of prevention and treatment of diseases allow, and the possibility of achieving the highest level of health for oneself, the principle of respect for confidentiality is also indicated [5].

The article's objective is to analyze the fundamental provisions of legal regulation of the content of information about a person's health status and its correlation with such concepts used both in international documents and national legislation as private and family life, confidential information, medical information, medical secrecy, and medical privacy, taking into account international legal standards in this field as well as academic research in the theory of law and branch disciplines, in particular constitutional, criminal, administrative, and civil law, legislation in the field of information, health care, and ECHR practices, etc.

Discussion. Today, the European Charter of Patients' Rights of 2002 defines the optimal scope of patients' individual rights. Among them are: 1) the right to preventive measures; 2) the right to accessibility of medical services; 3) the right to information, i.e. the right to receive any information about own health status, about medical services and ways of receiving these services; 4) the right to consent, i.e. the right to receive any information that will allow the patient to actively participate in decision-making about their health; 5) the right to freedom of choice between different medical procedures and institutions (specialists) on the basis of relevant information; 6) the right to privacy and confidentiality of personal information; 7) the right to respect for the patient's time; 8) the right to comply with quality standards of medical care; 9) the right to safety; 10) the right to innovation; 11) the right to prevent, if possible, suffering and pain; 12) the right to an individual approach to treatment; 13) the right to appeal; 14) the right to

compensation in case of physical or moral and psychological harm caused by the actions of a medical institution [6].

According to Pt. 2 of Art. 11 of the Law of Ukraine "On Information" it shall not be allowed to gather, store, use, and disseminate confidential information about a person without their consent, except in cases determined by law and only in the interests of the national security, economic welfare, and protection of human rights [2]. Confidential information¹ about an individual includes health data (Pt. 2 of Art. 11 of the Law of Ukraine "On Information"). Moreover, everyone is provided with free access to information that concerns them personally, except in cases provided by law. According to Art. 286 of the Civil Code of Ukraine, an individual has the right to secrecy about their health status, the fact of seeking medical care, the diagnosis, as well as information obtained during their medical check-up. It is prohibited to demand and submit information about the diagnosis and methods of treatment of an individual at the place of work or study. An individual is obliged to refrain from spreading information specified in Pt. 1 of this Article, which became known to them in connection with the fulfillment of their official duties or from other sources (Art. 286) [7]. Thus, the secrecy about the health status in the context of this Article is information about: 1) the fact of seeking medical care; 2) the diagnosis; 3) information obtained during the medical check-up; 4) information about the methods of treatment of the person.

The Constitutional Court of Ukraine emphasizes that "when studying this issue, it is necessary to clearly distinguish the rules for the use of information related to medical privacy (information about the patient) as opposed to medical information (information for the patient)" [8]. The obligation to provide medical information is stipulated in Art. 39 of the Fundamentals of Legislation of Ukraine on Healthcare and consists in the fact that the doctor is obliged to provide the patient, their family members, or their legal representatives with such information in full and in an accessible form.

The content of medical information is evidence of the status of a person's health, their medical history, the purpose of the offered examinations and treatment measures, and the prognosis of the possible development of the disease, including the existing risk to life and health. According to the legal regime, medical information is confidential, i.e., restricted access information. In cases of refusal to provide medical information or intentional concealment of it from the patient, their family members, or their legal representative, they can appeal the actions or inactions of the doctor directly to the court or, at their own choice, to a medical institution or health authority. Intentional concealment of medical information from the patient is a violation of the right to access information.

The analysis of Art. 39, 391 and 40 of the Law of Ukraine "Fundamentals of the Legislation of Ukraine on Healthcare" shows that the patient's right to secrecy about their health status, the fact of seeking medical care, the diagnosis, as well as information obtained during their medical check-up (medical information), corresponds to the prohibition of medical workers and other persons who, in connection with the fulfillment of professional or official duties, became aware of the disease, medical check-up, examination, and their results, of intimate and family life of a citizen, to disclose this information, except in cases provided for by legislative acts. It is also prohibited to demand and provide information about the diagnosis and treatment methods of the patient at the place of work or study.

Criminal law protection of human privacy field in terms of information about their health status is currently limited to criminalization of medical privacy disclosure (Art. 145 of the Criminal Code of Ukraine) and disclosure of information about medical check-up to detect infection with human immunodeficiency virus or other incurable infectious disease (Art. 132 of the Criminal Code of Ukraine).

Therefore, in the context of criminal law, it is about medical privacy, which, according to Art. 40 of the Law of Ukraine "Fundamentals of the Legislation of Ukraine on Healthcare", is a broader concept than confidential information about the health status of a person, because along with information about the disease, medical check-up, examination, and their results, it also includes information about the intimate and family aspects of a citizen's life.

In the criminal law doctrine, the objective side of the illegal disclosure of medical privacy is interpreted, in particular, as the disclosure of the following information: 1) the fact of applying for psychiatric care and treatment in a psychiatric institution or staying in psychoneurological

¹ As well as data on their ethnicity, education, marital status, religious beliefs, address, date and place of birth, etc.

institutions for social protection or special training, as well as other information about the condition of person's mental health, their private life; 2) infection of a person with a sexually-transmitted infectious disease, conducted medical check-ups and examinations in this regard, data of an intimate nature obtained due to performing professional duties by officials and medical workers of health care institutions; 3) results of medical check-up of persons who have applied for marriage registration [9].

Specialists, studying the legal status of the patient, emphasize the consideration of such fundamental aspects that make up the content of such status as: "the object of confidentiality is personally sensitive information for the patient, the disclosure of which will lead to significant moral suffering; a significant range of subjects who must comply with the rules of confidentiality; a multi-component subject of confidential information; a permanent confidentiality of information.

Compliance with medical privacy is considered one of the legal guarantees of patients' rights as a basic structural element of the patient's legal status" [10, p. 6; 17]. Among the offers for improving the principle of confidentiality at the regulatory level, the following deserve attention in particular: harmonization of terminology by replacing it with a single "medical secrecy" term; development of clearly defined instructions for the preservation of medical privacy, a list and forms of documents on the transfer of such information, permits of subjects of primary medical information, obligations of medical workers not to disclose medical secrecy; clear definition of subjects that must keep patient information confidential, in particular healers, pharmacists, employers, if personal medical records are kept at the place of work [10, p. 23].

The research literature suggests that "in recent years, the number of crimes committed in the medical field is constantly growing. Attention is drawn to crimes related to non-compliance with patient rights and violation of medical privacy, especially by law enforcement agencies of Ukraine" [11, p. 57]. We cannot unconditionally agree with this point of view, based on statistics for the last five years² (from 2017 to 2021), because for the commission of criminal offenses under Art. 132 and Art. 145 of the Criminal Code of Ukraine, for all these years, 9 criminal proceedings under Art. 132 of the Criminal Code of Ukraine and 44 criminal proceedings under Art. 145 of the Criminal Code of Ukraine were registered, while no one was notified of suspicion and no one was sentenced [12].

Despite the existing mechanism for preventing violations of this right in the legal system of the country, the statistics of applications of Ukrainian citizens to the ECHR due to violation of this conventional right is considered disappointing [13, p. 100]. In particular, the ECHR has in its portfolio more than one decision on the violation of the rights, for example, of patients to respect for private life, as such recognizes the following situations: disclosure without the patient's consent of medical records (case histories) containing confidential personal data about the patient by the clinic to the Social Insurance Administration and, accordingly, to a wider range of civil servants (see *M.S. v. Sweden*, 27 August 1997, § 35, Reports 1997-IV); disclosure of medical data by medical institutions, in particular to the patient's employer (see *Radu v. the Republic of Moldova*, no. 50073/07, § 27, 15 April 2014) (count 35 of the judgment); the hospital's failure to inform the applicant of the results of her HIV test and the disclosure of the applicant's positive HIV status to her mother and workplace (*M.K. v. Ukraine* (no. 24867/13)). Any interference with the individual rights under Art. 8 of the European Convention on Human Rights may only be justified under Par. 2 Art. 8 of this Convention if it is in accordance with the law, pursues one or more of the legitimate aims referred to in that Paragraph and is necessary in a democratic society for the achievement of that aim (see *Azer Ahmadov v. Azerbaijan*, no. 3409/10, § 63, 22 July 2021) (count 36 of the judgment) [14].

The ECHR has previously recognized that employers may have a legitimate interest in information about the physical health of employees, especially in the context of assigning them certain professional duties related to specific skills, functions, or competencies, but emphasized that the collection and processing of relevant information must be lawful and ensure a fair balance between the interests of the employer and the candidate's privacy concerns (see *Surikov v. Ukraine*, no. 42788/06, § 91, 26 January 2017) (count 54 of the judgment).

Conclusions. It is advisable to define the following as a promising area of research in the field of criminal law protection of private life of a person in the medical field: analysis of the correlation between the right of a person to private and family life as an object of criminal

² In between 2008-2012, no one was sentenced under Art. 132 and Art. 145 of the Criminal Code of Ukraine.

law protection and the object of criminal offenses under Art. 132 and Art. 145 of the Criminal Code of Ukraine; clarification of the content of the "medical privacy", "medical secrecy", and "confidential information about the health status" concepts in order to eliminate the existing unclearly defined, conflicting provisions, and gaps in the regulatory framework in the part of informational and legal relations that negatively affect the ensuring of constitutional rights and freedoms of a person and a citizen; identification of persons who may have access to such confidential information in order to clarify the circle of persons who may be recognized as subjects of a criminal offense under Art. 145 of the Criminal Code of Ukraine; improvement of the legal regulation of the procedure for collection, storage, use and circulation of information, in particular, on the mental state of a person, their compulsory examination and treatment, use of confidential data in the field of psychiatry, to which the Constitutional Court of Ukraine drew attention when interpreting Articles 3, 23, 31, 47, 48 of the Law of Ukraine "On Information", etc.

Conflict of Interest and other Ethics Statements

The authors declare no conflict of interest.

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ABSTRACT

The article analyzed the fundamental provisions of legal regulation of the information content about a person's health status and its correlation with such concepts used both in international documents and national legislation as private and family life, confidential information, medical information, medical secrecy, and medical privacy, taking into account international legal standards in this field as well as academic research in the theory of law and branch disciplines, in particular constitutional, criminal, administrative, and civil law, legislation in the field of information, health care, and ECHR practices, etc.

The following are the promising areas of research in the field of criminal law protection of a person's privacy in the medical field: analysis of the correlation between the right of a person to private and family life as an object of criminal law protection and the object of criminal offenses under Art. 132 and Art. 145 of the Criminal Code of Ukraine; clarification of the content of the "medical privacy", "medical secrecy", and "confidential information about the health status" concepts in order to eliminate the existing unclearly defined, conflicting provisions, and gaps in the regulatory framework in the part of informational and legal relations that negatively affect the ensuring of constitutional rights and freedoms of a person and a citizen; identification of persons who may have access to such confidential information in order to clarify

the circle of persons who may be recognized as subjects of a criminal offense under Art. 145 of the Criminal Code of Ukraine; improvement of the legal regulation of the procedure for collection, storage, use and circulation of information, in particular, on the mental state of a person, their compulsory examination and treatment, use of confidential data in the field of psychiatry, to which the Constitutional Court of Ukraine drew attention when interpreting Articles 3, 23, 31, 47, 48 of the Law of Ukraine "On Information", etc.

Keywords: *the right to respect for private life, information about the human health status, confidential information, medical secrecy, medical privacy.*

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CRIMINOLOGICAL CHARACTERISTICS OF THE IDENTITY OF THE ABUSER WHO COMMITS A CRIMINAL OFFENSE IN THE HOME SPHERE

Катерина Буряк. КРИМІНОЛОГІЧНА ХАРАКТЕРИСТИКА ОСОБИ КРИВДНИКА, ЯКИЙ ВЧИНЯЄ КРИМІНАЛЬНЕ ПРАВОПОРУШЕННЯ У ПОБУТОВІЙ СФЕРІ. У статті досліджено особу кривдника, який вчиняє домашнє насильство. Запропоновано визначення кривдника, який вчиняє побутовий злочин, як сукупність суспільно значущих характеристик і відносин особи, що характеризують її як вчинення злочинів у сфері сімейно-побутових відносин. Проаналізовано структурні елементи кримінологічної характеристики особи злочинця, а саме: соціально-демографічні; кримінально-правовий; соціально-рольові; морально-психологічні. Соціально-демографічні характеристики особистості злочинця висвітлюються відомостями про стать, вік, освіту, місце народження і проживання, громадянство та іншими демографічними даними.

Кримінально-правова характеристика – це відомості про склад вчиненого злочину, спрямованість і мотивацію злочинної поведінки, одноосібність чи груповий характер злочинної діяльності, форму співучасті (виконавець, організатор, підбурювач, пособник), інтенсивність злочинної діяльності, характер злочинної діяльності, характер злочинної діяльності. наявність судимостей і так далі. Соціально-рольові характеристики розкривають функції особистості, зумовлені її становищем у системі існуючих суспільних відносин, належністю до певної соціальної групи, взаємодією з іншими людьми та організаціями в різних сферах суспільного життя. До моральних якостей людини належать її світогляд, духовність, погляди, переконання, установки, ціннісні орієнтації.

Злочинців відрізняє негативне або байдуже ставлення до виконання своїх громадських обов'язків, дотримання правових норм, вибір протиправних засобів задоволення особистих потреб, егоїзм, ігнорування суспільних інтересів тощо. Сформовано портрет злочинця, який вчиняє домашнє насильство. Запропоновано ефективну систему заходів із запобігання та протидії домашньому насильству, яка має базуватися на ефективній просвітницькій діяльності щодо спричинення побутових злочинів.

Ключові слова: *кривдник, домашнє насильство, портрет обличчя злочинця, протидія домашньому насильству.*

Relevance of the study. With Ukraine obtaining candidate status, there are many social issues that need to be addressed, the introduction of European regulation and values, the sphere of family relations and the problem of domestic crime is no exception. For the correct selection of the mechanism for regulating the counteraction and prevention of domestic crime, we decided

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