MEDICAL SECRECY IN THE CONTEXT OF DOCTOR'S OBLIGATION AND PATIENT'S RIGHT: LEGAL ANALYSIS

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I. INTRODUCTION

A. Abstract

The Article points out the existence of certain problems with the regulation of certain aspects of the consolidation and implementation of medical secrecy in Ukraine. Emphasis is placed on the need for legal analysis and proposals for their solution. It

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also emphasizes the need to develop a comprehensive approach to building public confidence in the system of medical services, which should be based on the establishment of effective state guarantees for the protection of patients' rights, which includes the institution of medical secrecy. It has been determined to which legal regime information on the state of health of an individual belongs under the current legislation of Ukraine and the official interpretation of the Basic Law by the Constitutional Court of Ukraine. The disadvantages of using the term "doctor's secrecy" are noted and the advantages of using the term "medical secrecy" in the legislative process are given. The experience of regulating the institute of medical secrecy in international legal acts is presented and a parallel with the relevant norms of national legislation is drawn. It is indicated what information constitutes medical secrecy, who is the subject of medical secrecy. The time limits for maintaining medical secrecy have been determined. The existence of problems in the possibility of disclosing medical

secrecy after the death of a person is noted. The importance of the patient's right to maintain secrecy about his health is substantiated, based on the regulations of Ukraine and international law. The right to medical secrecy of people living with HIV and the possibility of compensation for its violation are considered separately. It is noted that an important aspect of the existence of any obligation is the responsibility for its violation. In this context, the types of legal liability for the disclosure of medical secrecy are considered. The judicial practice in cases of disclosure of medical secrecy, including the decision of the European Court of Human Rights, is analyzed. Emphasis is placed on the existence of significant practical problems with the public law aspect of liability for illegal disclosure of medical secrecy. It is proposed to improve the legal regulation of medical secrecy.

B. Relevance of the Research Topic

In the process of reforms taking place in Ukraine, the issue of improving the level of protection of patients' rights remains extremely important. One of these inalienable rights is the right to medical secrecy. The existence of this right is necessary in the context of the existence of trust in society both in medical workers and in the entire system of providing medical services in the state. Without such trust, many will refuse to receive such services, putting their lives and health at risk, or will not provide medical professionals with information that may be important for obtaining quality treatment, which, in the event of complex epidemiological situations in the state, may have not only personal, but also significant social harm. As noted by Carmen M. Cusack, the state must take into account that patients have a "reasonable expectation" of maintaining their confidentiality in connection with

receiving medical services.[2] Therefore, an integrated approach to building public confidence in the healthcare system should be based on the establishment of effective state guarantees for the protection of patients' rights, which include the institution of medical secrecy. Currently, there are certain problems with the preparation of certain aspects of the consolidation and implementation of medical secrecy in Ukraine, which requires its legal analysis and the development of proposals for their solution.

The purpose of the Article is to clarify the essence and content of the concept of "medical secrecy" in the context of observance by doctors and other persons, their obligations, and the realization of the rights of patients, formulating the most perfect definition for fixing in national legislation in order to

[2] CARMEN M. CUSACK, LAWS RELATING TO SEX, PREGNANCY, AND INFANCY: ISSUES IN CRIMINAL JUSTICE (2015), AT 189, *available at* https://books.google.com.ua/books?id=ZArACQAAQBAJ&pg=PT17&lpg=PT17&dq=carmen+m.+cusack+privacy+health&source=bl&ots=A5dZ-pGDeS&sig=ACfU3U1CIgpnSy-wqevLT-gcE9-_vGTLYA&hl=ru&sa=X&ved=2ahUKEwiNuqn10cD4AhVsk_0HHZfwB60Q6AF6BAgSEAM#v=onepage&q=carmen%20m.%20cusack%20privacy%20health&f=false.

unambiguously interpret and apply the identification of existing problems of the institution of medical secrecy in the system of law of Ukraine and providing proposals for their solution.

II. PRESENTATION OF THE MAIN MATERIAL

One of the basic constitutional rights is the right to freedom of thought and speech, to freely express one's views and beliefs. Everyone has the right to freely collect, store, use and distribute information orally, in writing or in another way—at their choice. However, according to the provisions of Article (Art.) Three of the Constitution of Ukraine, a person, his life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value, therefore, along with the consolidation of the aforementioned right, conditions are established under which it can be limited. Relevant restrictions may, firstly, be established exclusively by law, and secondly, they must concern the interests of national security, territorial integrity, or public order in order to prevent riot or crime, for public

health, to protect the reputation or rights of others, to prevent disclosure of information received in confidence, or to maintain the authority and impartiality of justice. Moreover, the Constitution of Ukraine in Art. 32 establishes:

> No one can be subjected to interference in his personal and family life, except in cases provided for by the Constitution of Ukraine. It is not allowed to collect, store, use and distribute confidential information about a person without his consent, except in cases specified by law, and only in the interests of national security, economic well-being and human rights.[3]

The Constitutional Court of Ukraine, in its official interpretation of this article, indicated that information about the personal and family life of an individual (personal data about it) is any information or a set of information about an individual that is identified or can be specifically identified, namely: nationality, education, marital status, religious

[3] Constitution of Ukraine: Law of Ukraine, No. 254k/96-BP, June 28, 1996. Information of the Verkhovna Rada of Ukraine No. 30 (1996), at 141, *available at* https://zakon.rada.gov.ua/laws/main/254k/96-вр#Text (Jun. 19, 2022).

beliefs, state of health, financial condition, address, date and place of birth, place of residence and stay, etc., data on personal property and non-property relations of this person with other persons, in particular family members, as well as information about events and facts that have taken place or are taking place in the domestic, intimate, friendly, professional, business, and other spheres of a person's life, with the exception of data on the exercise of powers by a person holding a position related to the implementation of the functions of the state or local self-governments. Such information about an individual and his family members is confidential and can be distributed only with their consent, except in cases specified by law, and only in the interests of national security, economic well-being, and human rights.[4] That is to say, from the provisions of the Constitution of Ukraine it clearly

[4] Decision of the Constitutional Court of Ukraine, January 20, 2012, No. 2-рп/2012, In the Case of the Constitutional Submission of the Zhashkiv District Council of the Cherkasy Region Regarding the Official Interpretation of the Provisions of the First and Second Parts of Article 32 and the Second and Third Parts of Article 34 of the Constitution of Ukraine, OFFICIAL GAZETTE OF UKRAINE No. 9 (2012), at 332.

follows that information about the state of health of an individual is information about the personal and family life of an individual, and therefore is confidential. According to the provisions of the Law of Ukraine

> On Information dated October 2, 1992 Number (No.) 2657-XII, confidential information is information about an individual, as well as information, access to which is limited to an individual or legal entity, except for subjects of authority. Confidential information can be distributed at the request (consent) of the relevant person in the manner determined by him/her in accordance with the conditions provided for by him/her, as well as in other cases specified by law.[5]

One of the main problems in the legal analysis of the institution of medical secrecy is the lack of a definition of this term in the legislation and the ambiguity of its understanding among specialized scientists. The Law of Ukraine "Fundamentals of

[5] On Information: Law of Ukraine, No. 2657-XII, October 2, 1992. Information of the Verkhovna Rada of Ukraine, No. 48 (1992), at 650, *available at* https://zakon.rada.gov.ua/laws/show/2657-12 (June 19, 2022).

Ukrainian Legislation on Health Care" dated November 19, 1992 No. 2801-XII only indicates the term "doctor's secrecy," which means that medical workers and other persons who, in connection with the performance of professional or official duties, became aware of the disease, medical examination, survey and their results, and intimate and family aspects of the life of a citizen do not have the right to disclose this information, except for the cases provided by legislative acts. When using information constituting a doctor's secrecy in the educational process, research work, including in cases of its publication in specialized literature, the anonymity of the patient must be ensured.[6] According to the author, in general, the use of the term "doctor's secrecy" by the legislator in relation to the relevant legal relations is not correct enough, since the subject composition of this obligation is not limited only to doctors, but also includes all other medical workers,

[6] Fundamentals of the Legislation of Ukraine on Health Care: Law of Ukraine of November 19, 1992 No. 2801-XII. Information of the Verkhovna Rada of Ukraine № 4 (1993) at 19, *available at* https://zakon.rada.gov.ua/laws/show/2801-12#n551 (June 19, 2022).

as well as other persons who, in connection with information covered by the regime of doctor's secrecy became known in the performance of professional or official duties.

Medical secrecy is often understood as a synonym for doctor's secrecy. So, for example, in a message from the official website of the Ministry of Health of Ukraine entitled "The patient has the right: What you need to know about the right to medical secrecy," in fact, it is not about the right of the patient, but about the obligation of doctors and other persons not to disclose relevant information.[7] Hanna Reznikova during her report at the seminar "Protection of the Rights of Medical Workers: Practical Recommendations and Strategic Proposals" also indicated that most scientists tend to believe that the terms "doctor's" and "medical" secrecy are conditional and are more often used as synonyms, because there is still no clear legal

[7] Ministry of Health of Ukraine, "The Patient Has the Right: What You Need to Know about the Right to Medical Secrecy," February 19, 2019, *available at* https://moz.gov.ua/article/health/pacient-mae-pravo-scho-treba-znati-pro-pravo-na-n-medichnu-tamnicju.

distinction between these concepts.[8] Also, the term "medical secrecy" is given in some by-laws of Ukraine in the sense of an identical definition of "doctor's secrecy."

The modern legislative understanding of the concept of "doctor's secrecy" includes only the definition of the obligations of specific subjects (medical workers and other persons who, in connection with the performance of professional or official duties, became aware of the disease, medical examination, survey and their results, intimate and family aspects of the life of a citizen), ignoring the corresponding right of the patient. In the same Law of Ukraine "Fundamentals of Ukrainian Legislation on Health Care," the patient's rights to a secrecy about his health, the fact of seeking medical help, diagnosis, as well as information obtained during his medical examination, are separated from the content

[8] Hanna Reznikova, Protection of the Rights of Medical Workers: Practical Recommendations and Strategic Proposals, Kyiv, June 12, 2017, https://kd.od.court.gov.ua/sud1514/pres-centr/general/356269/.

of the term "doctor's secrecy."[9] In the provisions of Art. 286 of the Civil Code of Ukraine dated January 16, 2003 No. 435-IV stipulates that the right of an individual to a secrecy about the state of health, the fact of seeking medical help, a diagnosis, as well as information obtained during his medical examination includes the obligation of other individuals to refrain from disseminating information that became known to them in connection with the performance of official duties or from other sources.[10] Therefore, the author considers it appropriate to exclude the term "doctor's secrecy" from the legislation and replace it with the term "medical secrecy," which will include, on the one hand, the patient's right to a secrecy about his health, the fact of seeking medical help, diagnosis, information, obtained during his medical

[9] Fundamentals of the Legislation of Ukraine on Health Care: Law of Ukraine of November 19, 1992 No. 2801-XII. Information of the Verkhovna Rada of Ukraine № 4 (1993) at 19, *available at* https://zakon.rada.gov.ua/laws/show/2801-12#n551 (June 19, 2022).
[10] Civil Code of Ukraine, January 16, 2003 (2022) (amendments and additions). Information of the Verkhovna Rada of Ukraine. No. 40-44 (2003) at 356, *available at* https://zakon.rada.gov.ua/laws/show/435-15 (June 19, 2022).

examination, information about the intimate and family aspects of the patient's life, and on the other hand, the obligation of medical workers and other persons who, in connection with the performance of professional or official duties, became aware of such information not to disclose it except as provided by law. The corresponding change in legislation focuses on the deeper content of the definition of patients' rights and will clearly correspond to the subject composition of persons to whom this obligation applies, separating them from other individuals who refrain from disseminating such information.

In general, the institution of medical secrecy is enshrined in a large number of international legal acts. Thus, in the European Charter of Patients' Rights in 2002, everyone has the right to confidentiality of personal information, including information about their state of health and possible diagnostic or therapeutic procedures, as well as to protect their privacy during diagnostic

examinations.[11] The International Code of Medical Ethics of 1949 states that a doctor must keep everything he knows about his patient in absolute secrecy, even after the death of the latter.[12] A very detailed substantive part of medical secrecy is disclosed in the 1994 Declaration on the Policy on Ensuring the Rights of the Patient in Europe, which states that all information about the patient's health status, diagnosis, prognosis and treatment of his disease, as well as any other personal information should be stored in secret, even after the death of the patient. Confidential information may be disclosed only when there is the express consent of the patient or is required by law. The consent of the patient to the disclosure of confidential information to the medical personnel involved in his treatment is presumed. All data that could reveal the identity of a

[11] European Charter of Patients' Rights, Council of Europe, June 20, 2002, *available at* https://phc.org.ua/sites/default/files/uploads/files/hartia.pdf.

[12] International Code of Medical Ethics. Adopted by the 3rd General Assembly of the World Medical Association, Geneva, Switzerland (Oct. 1949); 22nd World Medical Assembly, Sydney, Australia (Aug. 1968); and 35th World Medical Assembly, Venice, Italy (1983), *available at* https://zakon.rada.gov.ua/laws/show/990_002.

patient must be protected. The degree of protection should be adequate for the form of data storage. Components of the human body from which identification information can be obtained must also be stored in a secure manner. Patients who come and go to a health care facility have the right to expect that the facility has the supplies and equipment necessary to guarantee the preservation of medical secrecy, especially in cases where health workers provide care, conduct research, and provide treatment procedures.[13] That is to say, the Declaration establishes not only personal requirements for subjects of the obligation to maintain medical secrecy, but also requirements for the technical ability of specialized institutions to prevent the possibility of its disclosure.

As can be seen from the norms of international legal acts, medical secrecy is not limited in time. Even after the death of the patient, the respective

[13] Declaration on the Policy on Ensuring the Rights of the Patient in Europe adopted by the European Conference on Patient Rights, Amsterdam, Netherlands (Mar. 1994), *available at* https://med.sumdu.edu.ua/images/content/doctors/Deontology/Patients_rights_WHO.pdf.

subjects still have the obligation to preserve it. This international principle is also reflected in the national Code of Ethics of the Doctor of Ukraine dated September 27, 2009, which notes:

> Every patient has the right to keep personal secrets. The doctor, as well as other persons involved in the provision of medical care, are obliged to keep doctor's secrecy even after the death of the patient, as well as the fact of seeking medical help, unless otherwise ordered by the patient or if this disease does not threaten his relatives and society.[14]

The practical guide "Human Rights in the Sphere of Health" notes that there is an opinion about the absolute nature of medical secrecy, including after the death of a citizen. The legislator regulates this issue only in the aspect of consolidation in part four of Art. 285 of the Civil Code of Ukraine and part five of Art. 39-1 of the Law of Ukraine "Fundamentals of Ukrainian Legislation on Health Care" the right of

[14] Code of Ethics of a Doctor of Ukraine, Adopted and signed by the All-Ukrainian Congress of Medical Organizations and the 10th Congress of the All-Ukrainian Medical Society, Yevpatoria (Sep. 27, 2009), *available at* https://zakon.rada.gov.ua/rada/show/n0001748-09.

family members or other individuals authorized by them, in the event of the patient's death, to be present at the study of the causes of his death and get acquainted with the conclusions about the causes of death, as well as the right to appeal these findings to the court. The authors of the manual agree with those researchers who, as an exception, allow the disclosure of the secrecy of the deceased. Such exceptions include the disclosure of information in the interests of: the rehabilitation of a deceased person, but necessarily with the consent of the legal successors, family members, relatives, heirs of the deceased, and protection of the rights of family members, since they have the right, in particular, to compensation for moral harm, etc. Interested persons requiring information must properly justify the need to obtain it.[15] This problem deserves attention, because if it becomes necessary to obtain data

[15] I. BERN, T. EZER, J. COHEN, J. OVERALL, & I. SENYUTA, *Medicine and Law*, HUMAN RIGHTS IN THE SPHERE OF PROTECTION: A PRACTICAL GUIDE / FOR THE SCIENCE (I. SENYUTA, 2012), AT 552, *available at* http://medicallaw.org.ua/vydavnytstvo/praktychnyi-posibnyk-prava-liudyny-u-sferi-okhorony-zdorovia/6-prava-ta-obovjazki-pacijentiv-za-zakonodavstvom-ukrajini/61-prava-patientsiv/616-pravo-na-privatnist-i-konfidenciinist/.

constituting a medical secrecy after the death of a person, one must clearly understand the subject composition of the right to receive such information and the conditions under which such a right can be exercised. Unfortunately, national legislation does not provide for a clear procedure for disclosing medical secrecy after the death of a person, which indicates the need for the legislator to resolve this issue.

An important aspect of the existence of any obligation is responsibility for its violation, since without this such a rule loses its practical effectiveness. Therefore, the Law of Ukraine "Fundamentals of Ukrainian Legislation on Health Care" provides that persons guilty of violating the legislation on health care bear civil, administrative, or criminal liability in accordance with the law.[16] Since the norms on the right to secrecy about the state of health and doctor's secrecy relate to the legislation

[16] Fundamentals of the Legislation of Ukraine on Health Care: Law of Ukraine of November 19, 1992 No. 2801-XII. Information of the Verkhovna Rada of Ukraine № 4 (1993) at 19, *available at* https://zakon.rada.gov.ua/laws/show/2801-12#n551 (June 19, 2022).

on health care, it can be concluded that the legislator has fixed three exclusive possible types of liability for their violation. In fact, it is possible to apply two types of liability: criminal and civil.

The Criminal Code of Ukraine dated April 5, 2001 No. 2341-III contains two articles concerning the issues of disclosure of information constituting doctor's secrecy. First, is Art. 132, which establishes criminal liability for the disclosure by an official of a medical institution, an auxiliary worker who arbitrarily obtained information, or a medical worker of information about a medical examination of a person to identify infection with the human immunodeficiency virus or other incurable infectious disease dangerous to human life, or acquired immunodeficiency syndrome (AIDS) and its results, which became known to them in connection with the performance of official or professional duties.[17] Vyacheslav Pushin notes in this regard that the

[17] Criminal Code of Ukraine, No. 2341-III, April 5, 2001. Information of the Verkhovna Rada of Ukraine, № 25-26 (2001), at 131, *available at* http://zakon3.rada.gov.ua/laws/show/2341-14 (June 20, 2022).

disclosure of information means that a person who is obliged to keep the relevant information in secret illegally acquaints unauthorized persons with it or, by his/her behavior, creates conditions that provide unauthorized persons with the opportunity to familiarize themselves with the relevant information.[18] The methods of disclosure of information may be different, however, for the qualification of an offense committed under Art. 132 of the Criminal Code of Ukraine, these methods do not affect it: information in conversations, provision of documents containing relevant information to an extraneous person, careless storage or loss of such documents, etc.[19] In addition, according to Art. 15 of the Law of Ukraine "On combating the spread of diseases caused by the human immunodeficiency virus (HIV), and the legal and social protection of people living with HIV" dated December 12, 1991

[18] *Infra* note.

[19] Vyacheslav Pushin, Clarification of the Consequences of Disclosing Medical Secrecy, Ukrainian Helsinki Human Rights Union (Sep. 12, 2018), *available at* https://helsinki.org.ua/articles/roz-yasnennya-schodo-naslidkiv-nezakonnoho-rozholoshennya-likarskoji-tajemnytsi-lzhv/#:~:text.

No. 1972-XII, people living with HIV have the right to compensation for harm associated with the restriction their rights due to disclosure or revelation of information about their positive HIV status.[20] That is to say, thus, the legislator separately notes the right to medical secrecy of people living with HIV, and the possibility of compensation for harm for its violation. This specification is connected with the state's increased attention to the spread of HIV in Ukraine and the problems of people living with HIV, as well as the existence of special rules regarding the possibility of disclosing information about a person's positive HIV status.

Another article establishing criminal liability for violation of doctor's secrecy is Art. 145 of the Criminal Code of Ukraine "Illegal disclosure of doctor's secrecy." It notes that liability arises for the deliberate disclosure of doctor's secrecy by a person

[20] On Combating the Spread of Diseases Caused by the Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living with HIV: Law of Ukraine, No. 1972-XII, December 12, 1991. Information of the Verkhovna Rada of Ukraine No. 11 (1992), at 152, *available at* https://zakon.rada.gov.ua/laws/show/1972-12 (June 20, 2022).

to whom it became known in connection with the performance of professional or official duties, if such an act entailed serious consequences.[21] As noted in the Scientific and Practical Commentary of the Criminal Code of Ukraine, the disclosure of doctor's secrecy is expressed in the illegal communication of this information to another person (persons). Severe consequences are a mandatory sign of the objective side. A causal relationship must be established between the severe consequences and the disclosure of medical secrecy. The subjective side of the crime is expressed in intent. Only careless guilt (criminal self-confidence or criminal negligence) is possible to serious consequences.

The subject of the crime is a person to whom this information became known in connection with the performance of professional (doctor, pharmacist, nurse, paramedic, etc.) or official duties (chief physician, head of department, etc.). Other citizens

[21] Criminal Code of Ukraine, No. 2341-III, April 5, 2001. Information of the Verkhovna Rada of Ukraine, № 25-26 (2001), at 131, *available at* http://zakon3.rada.gov.ua/laws/show/2341-14 (June 20, 2022).

to whom this information became known not in connection with the performance of their professional or official duties, but from other sources, cannot be the subject of this crime.[22] The composition of this crime gives grounds to draw a logical conclusion about the existence of problems with the public law aspect of responsibility for the illegal disclosure of doctor's secrecy. Firstly, these are the problems of the subject composition, since this crime can only be committed by a special subject, however, neither criminal nor administrative legislation contains rules on the responsibility of other persons who illegally disclosed information constituting a doctor's secrecy. The inability to bring a non-specialist subject to criminal or administrative responsibility is a factor that worsens the situation of the victim and limits his ability to achieve fair satisfaction of the violated right. Secondly, it is the obligatory occurrence of severe consequences and a

[22] CRIMINAL CODE OF UKRAINE, SCIENTIFIC AND PRACTICAL COMMENTARY: IN 2 VOLUMES, SUPPLEMENT (V. YA. TATSIYA, V. P. PSHONKY, V. I. BORYSOVA, V. I. TYUTYUGINA, 5TH ED., 2013). VOLUME 2: SPECIAL PART, (Yu. V. Baulin, V. I. Borisov, V. I. Tyutyugin, et al., 2013) AT 1040.

causal relationship between the action and the effect. Severe consequences are not a clearly defined concept; therefore, each specific case requires their separate assessment, reinforcing the role of the subjectivity of the court, which does not comply with the principle of legal certainty as an integral element of the rule of law. In addition, the very necessity of mandatory severe consequences as part of this crime is called into question by the author, since in order to ensure real protection of the rights of patients by the state, the very fact of disclosing information constituting medical secrecy must be subject to public liability.[23] For this, it is necessary either to exclude from Art. 145 of the Criminal Code of Ukraine, the requirement for mandatory severe consequences, or to supplement the Code of Ukraine on Administrative Offenses of December 7, 1984 No. 8073-X with a new article, where such consequences will not be provided. The author is inclined to the second option and considers it appropriate to expand the subject composition of the

[23] *See supra* note 19.

relevant administrative offense, in contrast to Art. 145 of the Criminal Code of Ukraine, setting out the content of the new article in the following edition: "Illegal disclosure of medical secrecy by a person who became aware of it in connection with the performance of professional, official duties or from other sources."[24]

The issue of legislation governing public liability for the disclosure of information constituting a medical secrecy, respectively, cannot but be reflected in judicial practice. In fact, in the entire history of independent Ukraine, only isolated cases can be counted when people were actually brought to criminal responsibility under Art. 132, 145 of the Criminal Code of Ukraine, although this problem has been and remains relevant. This was done for the first time only in 2013. On January 22, 2013, the Central District Court of the city of Simferopol convicted a medical worker of the "Yalinka" orphanage for disclosing the child's HIV status. By a court verdict, the guilty person was deprived of the right to practice

[24] *Supra* note 19.

medicine and was obliged to pay a fine.[25] T. Bordunis, the lawyer of the injured party, then expressed the hope that this precedent "will help change people's minds and teach doctors to be silent."[26] However, unfortunately, there have been no changes. According to the Office of the Prosecutor General, from January 2017 to April 2021, under Art. 132, 145 of the Criminal Code of Ukraine, only 53 criminal proceedings were registered. Of these, 22 were closed on the basis of paragraphs one, two, four, six, 9-1 Part 1 Art. 284 Code of Criminal Procedure of Ukraine.[27] According to the State Judicial Administration, in 2018 through 2020, not a single sentence was issued under Art.

[25] *For the First Time in Ukraine, a Doctor Was Punished for Disclosing an HIV Diagnosis*, *Grechka*, February 22, 2013, *available at* https://gre4ka.info/suspilstvo/2429-vpershe-v-ukraini-medyka-pokaraly-za-rozholoshennia-diahnozu-vil.

[26] *This Case Will Teach Doctors to Keep Quiet*, February 21, 2013, *available at* https://m.day.kyiv.ua/uk/article/cuspilstvo/cey-vipadok-navchit-likariv-movchati.

[27] Response to I.M. Shkarivska's Request Regarding the Provision of Information, Office of the General Prosecutor, May 11, 2021, *available at* https://dostup.pravda.com.ua/request/86063/response/242090/attach/3/11...pdf?cookie_passthrough=1.

132, 145 of the Criminal Code of Ukraine.[28] Such statistics are an indicator of the ineffectiveness of the application of the existing norms of criminal law in the mechanism for protecting the rights of patients, therefore, as noted, it is necessary either to amend the Criminal Code of Ukraine or add a new article to the Code of Administrative Offenses.

The situation is somewhat better with the possibility of bringing the perpetrator to liability in civil proceedings due to a violation of the right of a person to the secret of health, provided for in Art. 286 of the Civil Code of Ukraine. This is due, among other things, to the existence of relevant practice of the Cassation Civil Court within the Supreme Court. This fact is important for the formation of a unified, systematic approach to protecting the rights of patients in court, since, according to Part six of Art. 13 of the Law of Ukraine "On the judiciary and the

[28] Regarding Consideration of the Request Dated May 2, 2021 of I. M. Shkarivska, State Judicial Administration, Response, May 18, 2021, *available at* https://dostup.pravda.com.ua/request/86063/response/271909/attach/3/008.pdf?cookie_passthrough=1.

status of judges" dated June 2, 2016 No. 1402-VIII, the conclusions on the application of the rules of law set forth in the decisions of the Supreme Court are taken into account by other courts when applying such rules of law.[29] In this context, the landmark legal position of the Supreme Court as part of the panel of judges of the Third Judicial Chamber of the Civil Court of Cassation dated December 4, 2019 in case No. 760/8719/17 is, where it was noted that health information is personal data, their collection could be only with the consent of the person, except as otherwise provided by law. That is to say, it is prohibited not only to collect, but also to store, use and distribute confidential information about a person without his/her prior consent, except in cases specified by law, and only in the interests of national security, economic well-being, and human rights and freedoms. Therefore, the Supreme Court noted that the collection, storage, dissemination and other types

[29] On the Judicial System and the Status of Judges: Law of Ukraine, No. 1402-VIII, June 2, 2016. Information of the Verkhovna Rada of Ukraine, No. 31 (2016), at 54, *available at* https://zakon.rada.gov.ua/laws/show/1402-19 (*last visited* June 20, 2022).

of processing of such information fall under the scope of Article Eight of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.[30] It stipulates that everyone has the right to respect for their private and family life, their housing and correspondence. Public authorities may not interfere with the exercise of this right, except when the interference is in accordance with the law and is necessary in a democratic society in the interests of the national and public security or economic well-being of the country, for the prevention of riot or crime, for the protection of health or morals, or for the protection of rights and freedoms of other persons.[31]

The Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the European Court of Human Rights (ECHR) are the source of law in Ukraine and should be applied

[30] Resolution of the Supreme Court in Case No. 760/8719/17 (Dec. 4, 2019), *available at* https://zakononline.com.ua/court-decisions/show/86162369.

[31] Convention on the Protection of Human Rights and Fundamental Freedoms, International Document, November 4, 1950, *available at* http://zakon2.rada.gov.ua/laws/show/995_004.

by the courts when considering cases in accordance with Art. 17 of the Law of Ukraine "On the execution of decisions and the application of the practice of the European Court of Human Rights" dated February 23, 2006 No. 3477-IV.[32] An important practice of the ECHR on the institution of medical secrecy is, for example, the case "Z v. Finland," in which the court emphasized that the protection of personal data, not only medical data, is extremely important for a person to exercise his right to respect for private and family life, guaranteed by Article Eight Convention for the Protection of Human Rights and Fundamental Freedoms. Respect for the confidentiality of information about the state of one's health is an integral principle of the legal systems of the Member States to this Convention. Decisive is not only respect for the medical secrecy of the patient, but also ensuring his confidence in the medical profession

[32] On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights: Law of Ukraine, No. 3477-IV (February 23, 2006). Information of the Verkhovna Rada of Ukraine, No. 30 (2006) *available at* https://zakon.rada.gov.ua/laws/show/3477-15 (*last visited* June 20, 2022) at 260.

and medical services in general. Without such protection, individuals in need of medical care may be deterred from providing personal and intimate information that may be necessary to receive appropriate treatment, as well as from seeking such care and thus exposing themselves and their health, and in case of infectious disease and public health, to danger. Thus, native law should provide sufficient safeguards to prevent the transfer or disclosure of medical secrecy, which may be contrary to the provisions of Article Eight of the Convention for the Protection of Human Rights and Fundamental Freedoms.[33] That is to say, we see that both national judicial practice and the practice of the ECHR emphasize the importance of the existence of the institution of medical secrecy in the context of protecting the rights of individuals to secrecy about the state of health, respect for private and family life, which can only be realized by imposing on medical

[33] Case Z v. Finland, Decision of the European Court of Human Rights, Strasbourg, France, January 25, 1997, *at available* http://medicallaw.org.ua/fileadmin/user_upload/pdf/Z_against_Finland.pdf.

professionals and other persons are obliged not to disclose the relevant information, except as provided by law, establish liability for its violation and provide other sufficient guarantees in order to prevent the transfer or disclosure of medical secrecy.

III. CONCLUSIONS

Summing up the above, the author notes the following. Firstly, from the provisions of the Constitution of Ukraine and relevant legislation it clearly follows that information about the state of health of an individual is information about the personal and family life of an individual, and therefore is confidential, which establishes special rules for handling such information. Secondly, one of the main problems in the legal analysis of the institution of medical secrecy is the lack of a definition of this term in the legislation and the ambiguity of its understanding among specialized scientists. The Law of Ukraine "Fundamentals of Ukrainian Legislation on Health Care" specifies only the term "doctor's secrecy." According to the author,

in general, the use of the term “doctor’s secrecy” by the legislator in relation to the relevant legal relations is not correct enough, since the subject composition of this obligation is not limited only to doctors, but also includes all other medical workers, as well as other persons who, in connection with information covered by the regime of doctor’s secrecy became known in the performance of professional or official duties.

Thirdly, “medical secrecy” is often understood as a synonym for “doctor’s secrecy.” The modern legislative definition of the concept of “doctor’s secrecy” includes only the definition of the obligation of specific subjects, without indicating the corresponding right of the patient. Therefore, the author considers it appropriate to exclude the term "doctor’s secrecy" from the legislation and replace it with the term “medical secrecy,” which will include, on the one hand, the patient’s right to a secret about his health, the fact of seeking medical help, diagnosis, information, obtained during his medical examination, information about the intimate and

family aspects of the patient's life, and on the other hand, the obligation of medical workers and other persons who, in connection with the performance of professional or official duties, became aware of such information not to disclose them, except as provided by law.

Fourth, there are certain legislative problems on the possibility of revealing medical secrecy after the death of a person, since in the event of the need to obtain data that constitutes a medical secrecy in such a situation, one must clearly understand the subject composition of the right to obtain such information and conditions under which such right can be realized. Unfortunately, so far, a clear procedure for revealing medical secrecy after the death of a person by national legislation is not provided, which indicates the need to resolve this issue by the legislator. Fifthly, after analyzing the problems of public liability for the disclosure of information constituting a doctor's secrecy, the author came to the conclusion that it should either be excluded from the composition of the criminal offense under Art.

145 of the Criminal Code of Ukraine, the requirement for mandatory severe consequences, or supplement the Code of Ukraine on Administrative Offenses with a new article, where such consequences will not be provided. The author is inclined to the second option and considers it appropriate to also expand the subject composition of the relevant administrative offense, in contrast to the current edition of Art. 145 of the Criminal Code of Ukraine, stating the content of the new article as follows: "Illegal disclosure of a medical secrecy by a person who became aware of it in connection with the performance of professional, official duties or from other sources." Sixthly, we see that both national judicial practice and the practice of the ECHR emphasize the importance of the existence of the institution of medical secrecy in the context of protecting the rights of individuals to a secret about their state of health, respect for private and family life, which can only be realized by imposing on medical professionals and other persons of the obligation not to disclose relevant information,

except as provided by law, establish liability for its violation and provide other sufficient guarantees in order to prevent the transfer or disclosure of medical secrecy.