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Articles

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Criminal Law Protection of the Autonomy of Patients in Ukraine. Part 1

Prawnokarna ochrona autonomii pacjenta na Ukrainie. Część pierwsza

ABSTRACT

The article aims to analyze the phenomenon of "patient's autonomy" as an object of criminal law protection. Patients' autonomy is one of the most important rights. Respect for it is one of the factors ensuring the correct treatment process. The article is divided into two parts. In this part, the authors analyze the legal acts of Ukraine, which regulate the process of providing medical services and guarantee patients' right to autonomy. The authors discuss, i.a., the issue of the patient's consent to medical interventions or the right to information about his or her state of health. They also point to statistics on offences committed by medical staff members in connection with their professional activities. Furthermore, they point out that the problem of violation of patient's autonomy should be looked at not only from the legal but also from the social point of view. This applies to the patient–medical relationship, in which the doctor plays a leading role. Moreover, the content of these relations lies not only on the professional but also on the bioethical level.

Keywords: patient; patient's autonomy; treatment process; violation of patient's autonomy; doctor; criminal law protection

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INTRODUCTION

A relatively new, intensively developing branch of law has recently appeared in Ukraine, namely medical law. It is a complex area which comprises a set of legal norms regulating social relations in the field of medical activity. The medical law covers all participants of legal relationships specified in contracts for the provision of medical care: on the one hand, these include medical staff such as doctors, paramedics, nurses, midwives, lab technicians, pharmacists, administrative health service workers, numerous medical technicians, etc., and on the other hand: patients over 15 years of age, parents and legal representatives of patients – children under 15 years of age. Subjects of medical law are also state, municipal or private organizations providing medical services.

The main participants of the legal relations at issue are: the patient; medical workers (in particular – the attending physician); medical institutions; health insurance organizations; the insurer (insurers); governmental regulatory and management bodies in the healthcare sector. These issues were discussed in detail in scientific sources.[1]

The following entities may participate in medical legal relations as well: authorities issuing permits for medical institutions to carry out therapeutic activities (licenses and certificates); medical associations; controlling organizations (trade unions, consumer protection societies, anti-monopoly committee, etc.); courts.

In Ukraine, the development of the market of medical services predetermines the need and necessity of introducing a mechanism of the implementation (in line with international legal standards) of norms ensuring civil rights and freedoms in the field of health protection. The analysis of the situation that has developed leads to the conclusion that most healthcare staff in healthcare facilities have a superficial knowledge of the legal regulations governing their activities. The issues of awareness and legal liability provided for in the applicable legislation in the field

[1] F.Y. Berdichevskiy, *Ugolovnaya otvetstvennost meditsinskogo personala za narusheniye professionalnykh obyazanostey*, Moskva 1970, p. 128; A.G. Blinov, *Ucheniye ob ugolovno-pravovoy okhrane prav i svobod patsiyenta*, Saratov 2014 (avtoref. diss. na soiskaniye nauch. stepeni d-ra yurid. nauk), p. 46; T.V. Varchuk, *Viktimologicheskiye modelirovaniye v kriminologii i praktike preduprezhdeniya prestupnosti*, Moskva 2012, p. 120; L.O. Gural, *Stanovlennya ta istorychna obumovlenist vidpovidalnosti za zapodiyannya tilesnykh ushkodzhen v ukrayinskomu kryminalomu pravi*, "Nashe pravo" 2016, no. 2, pp. 144–149; O.M. Dzhuzha, D.M. Tychyna, *Chy isnuye henetychna skhylnist osoby do vchynennya kryminalnoho pravoporushennya?*, "Pravovyy chasopys Donbasu" 2020, no. 1(70), pp. 135–144; N.E. Krylova, *Uholovnaya otvet·stvennost za prynuzhdenyya k donorstvu orhanov y tkaney cheloveka po zakonodatelstvu Rossyy ta Ukrayny*, "Vestnyk Moskovskoho unyversyteta. Seryya Pravo" 2004, no. 5, p. 49; *Naukovo-praktychnyy komentar do Kryminalnoho kodeksu Ukrayiny*, eds. M.I. Melnyk, M.I. Khavronyuk, Kyyiv 2012, p. 1316; H.V. Chebotarova, *Kryminalno-pravovi problem transplantatsiyi orhaniv abo tkanyn lyudyny ta donorstva*, Kyyiv 2003 (dys. kand. yuryd. nauk.), p. 219.

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of health care crimes should be considered with the participation of lawyers. In particular, it should be noted that the issues of criminal liability for an injury caused by a specific actor, a medical doctor or pharmacist, to a person, in particular to a patient, is a complex problem that should be solved using the norms of medical law, civil law and criminal law.

Everyone has a natural right to health protection. Society and the state are responsible for ensuring the necessary level of health protection for Ukrainian citizens and for the preservation of the genetic resources of the Ukrainian nation. The state has the task of ensuring the priority for health protection, improvement of working conditions, education, life and recreation of the population, solving environmental problems and the improvement of medical care. The liability for committing a crime is one of the most important issues addressed by legal theory. Taking the point of view that legal liability is the use of state coercive measures against a person who breached the law, it should be noted that this approach also applies to the issues of human health protection. This problem is also reflected in scientific works.[2]

As practice shows, not only medical personnel, but also directors of healthcare institutions are hardly aware of the legal liability provided for by the applicable legislation in terms of violations of health care law. At the same time, knowledge of the bases, types and consequences of legal liability disciplines medical workers on the one hand and reduces the possibility of being unjustifiably held liable on the other. Considering the increase in the number of notifications of crime reported to law enforcement agencies by citizens, and lawsuits concerning the inappropriate level of medical care, more and more attention should be paid to the problems of legal liability of medical practitioners for violations of the law related to practicing the medical profession (when providing health services).

It should be noted that the work is the first part of a comprehensive study of patient protection in Ukraine. Therefore, many problematic issues such as involuntary treatment, autonomy of the patient in prison, autonomy of psychiatric patients and patients in a state of intoxication will be analyzed in the second part of the study.

[2] V. Shulha, *Stavlennya ta rozvytok derzhavnoho rehulyuvannya transplantatsiyi v Ukrayini*, "Visnyk Natsionalnoyi akademiyi derzhavnoho upravlinnya pry Prezydentovi Ukrayiny" 2012, no. 1, pp. 153–160; H.V. Didkivska, *Kryminolohichna kharakterystyka pravovoho zabezpechennya vzayemodiy i mizhnarodnykh system zapobihannya zlochynnosti*, "Pravo ta derzhavne upravlinnya" 2019, no. 1(34), pp. 195–199; D.A. Dorogin, *Protivopravnyye deyaniya, svyazannyye s organami i (ili) tkanyami cheloveka: ugolovno-pravovoye issledovaniye*, Moskva 2016, p. 222; Y.A. Drgonets, P. Khollender, *Sovremennaya meditsina I pravo; per. so slovats*, Moskva 1991, p. 336; L.A. Zherzh, *Zakonodatelnoye regulirovaniye ugolovno otvetstvennosti za nezakonnuyu transplantatsiyu: istoriko-pravovoy analiz*, "Legea Şi Viaţa" 2019, no. 1/2(325), pp. 41–46.

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METHODOLOGICAL FRAMEWORK

Traditional legal research, authoritative texts like legislation, case law and doctrinal literature are considered the main formal sources of information for understanding positive law. Building on this information legal scholars organize, analyze and re-present this information in such a way as to persuade their colleagues, legislators, judges and practitioners to follow their line of thought.[3]

The following methods are applied: formal-logical – for the formation of new concepts, their classification, typology of the studied phenomena, i.e. the division into separate types, subtypes; eliminating inaccuracies and contradictions, etc.[4] This method involves the use of logical laws and rules (they are also called methods-techniques or logical techniques): the ascent from abstract to concrete, abstraction, analysis and synthesis, induction and deduction, modeling, etc. In many respects, this method (along with the comparative) is the main one in the study. The formal-logical (dogmatic) method of research is quite common in the science of criminal law. With its help, it is possible to define conformity of construction of norm of criminal law to laws and rules of formal logic. This method is also used throughout the work both in the study and in formulating conclusions.

Formal-dogmatic, or legal method, based on the use of rules of formal logic for knowledge of law, is a traditional, inherent in legal science, since it proceeds from its nature. Its essence is in the formulation and disclosure of legal concepts, the construction of legal structures, and clarification of the actual content of the law. This method was used in the analysis of legislative provisions.[5] At all stages of scientific research, the dialectical method is used. This method determines the paths of any scientific study. It helps to explore all the phenomena in the relationship, interdependence and historical development.

The historical method is used for understanding the right-state events, facts, ideas (theories) having time and spatial certainty in the context of their origin, formation and development, revealing of internal and external relations, patterns and contradictions, unity of subjective and objective moments.[6] The purpose of this method is to determine the value of the object under study for the period of functioning, developmental prospects, connection with the present.

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[3] A.B. Ponomarev, *Metodologiya nauchnykh issledovaniy: ucheb. Posobiye*, Perm 2014, p. 186.

[4] O.A. Yegorova, *K voprosu o roli logicheskikh sredstv I metodov v yuridicheskom poznanii i deyatelnosti*, "Vestnik Yuzhno-Uralskogo gosudarstvennogo universiteta. Seriya Pravo" 2013, vol. 13(4), pp. 6–12.

[5] I.G. Napalkova, *Formalno-yuridicheskiy metod kak osnova metodologii yuridicheskogo pozitivizma*, "Filosofiya prava" 2018, no. 3(86), pp. 7–12.

[6] O.A. Yegorova, *Funktsii istoricheskikh i logicheskikh metodov v yuridicheskom poznanii*, "Vestnik Yuzhno-Uralskogo gosudarstvennogo universiteta. Seriya Pravo" 2016, vol. 16(2), pp. 26–35.

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Comparative method involves comparing single-order legal concepts, phenomena and processes to establish similarities and account for differences between them. A prerequisite for applying this method is comparability of its objects (belonging to the same kind, type, the presence of similar structures, functions, tasks, goals, etc.). Comparisons are used in the classification of right-wing phenomena, clarification of their historical sequence, genetic links between them, general and specific patterns of development, traditions and innovations.[7]

The methodological basis of the study are the general scientific methods of cognition, by means of which the authors solve the problem of the crucial importance of patient's autonomy.[8]

LITERATURE REVIEW

Chinese researcher J. Tao Lai Po-Wah analyzes various decision-making models under the principle of patient autonomy. These models are: the patient's priority (domination) model, in which the patient's autonomy is the guiding value; the family priority model where the main value is the relationship of the family to the patient; the doctor's priority model, in which the guiding value is the benefit of medical service.[9]

Each model has its own advantages and disadvantages. A question should be asked: What do all these models have in common in the context of the implementation of the principle of patient autonomy? On their basis, and generally in all relationship models, the decisive place and role are assigned to the doctor and the information that is communicated to the patient. As already mentioned, in many cases the patient does not have sufficient and necessary competence to make decisions. Therefore, in almost all decision-making cases, most of the responsibility rests with the doctors. Only in a few cases is the patient able to make a meaningful independent decision. This is the case when the patient is a medical practitioner himself or is completely dependent on someone they trust who is fully competent about his illness and treatment.

Russian scholar T.V. Meshcheryakova, when analyzing various concepts of patient's autonomy, concludes that the emergence of the principle of patient's au-

[7] A.D. Tikhomirov, *Sravnitelnoye pravovedeniye: metodologicheskiye problem komparativnoy samorefleksii v ukrainskoy interpretatsii*, "Vestnik Universiteta imeni O.Ye. Kutafina (MGYUA)" 2016, no. 3, pp. 39–51.

[8] V.N. Samorodov, *Metodologicheskiye osnovaniya sovremennoy yuridicheskoy nauki: postanovka problemy*, "Vestnik MGTU" 2014, vol. 17(4), pp. 759–768.

[9] J. Tao Lai Po-Wah, *A Confucian Approach to a "Shared Family Decision Model" in Health Care: Reflections on Moral Pluralism*, [in:] *Global Bioethics: The Collapse of Consensus*, ed. H. Tristram Engelhardt, Houston 2006, pp. 154–179.

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tonomy is a manifestation of recognition of the human right to self-determination and a form of recognition of one's moral uniqueness, that is, in fact, recognition of the right to realize how a person understands and pursues his or her individual aims, needs and preferences, and what limit for interference with his or her self-accepts.[10] It must therefore be recognized that patient autonomy is a complex, multi-level phenomenon. It is composed of rights which the patient has the possibility (entitlement) to exercise at his/her own discretion.

Ukrainian scholars in the field have presented several methodological approaches to the classification of patient's rights. First of all, these are: rights relating to the provision of medical care; rights relating to patient's awareness; rights to medical privacy. M.I. Maleina proposes to systematize patients' rights according to the area concerned: rights in providing information about the diagnosis, treatment methods and possible consequences; rights to create and respect the methods and order of treatment; rights to maintain medical privacy; rights concerning refusal of treatment.[11]

A broader approach to the systematization of patients' rights is proposed by S.G. Stetsenko. Patients' rights are divided into general and specific rights. General rights include: the right to choose treatment methods; the right to choose a doctor and a medical facility; the right to consent to or refuse treatment; the right to information on one's health status; the right to medical expert's opinion; the rights of patients in hospital (the right to allow access to the patient of other medical staff, family members, notaries, lawyers); the right to medicines and prosthetics.[12] Specific patients' rights include those rights which depend on the direction of medical activity, the nature of the patient's illness, the characteristics of specific patient groups.

THE REALITY OF HEALTH CARE IN UKRAINE

The organization and implementation of preventive and combating actions is within the responsibility of executive authorities. It should be noted that currently there is insufficient funding for the medical sector and that flagrant violations of the procedures for dealing with the epidemic take place.

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[10] T.V. Meshcheryakova, *Avtonomiya patsiyenta: natsionalnoye v globalnom kontekste*, "Vestnik tomskogo gosudarstvennogo universiteta" 2011, no. 3, https://cyberleninka.ru/article/n/avtonomiya-patsienta-natsionalnoe-v-globalnom-kontekste/viewer [access: 28.09.2021], pp. 34–40.

[11] M.I. Maleina, *Zashchita lichnykh neimushchestvennykh prav sovetskikh grazhdan*, Moskva 1991, p. 126.

[12] S.G. Stetsenko, [in:] *Medychne pravo Ukrayiny: pidruchnyk*, eds. S.G. Stetsenko, V.Y. Stetsenko, I.Y. Senyuta, Kyyiv 2008, p. 166.

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A total of 984 hospitals struggle with a financial deficit, i.e., in 2020, they will receive less money than in 2019 (a decrease by 10–50%), which will ultimately lead to a reduction in the number of medical staff. The tuberculosis prevention and treatment service, psychiatric hospitals, medical emergency service and highly specialized wards are also at special risk. As a result of the reform, the Ukrainian tuberculosis prevention and treatment service currently has a financial deficit of 80%. The audit of the Ministry of Health also confirmed that the introduction of the second stage of the medical reform may currently lead to the closure of hospitals, reduction in the financing of health care facilities and reduction in the number of medical staff. Currently, there are 156,000 doctors and 296,000 mid-level and junior medical staff members in Ukraine.[13]

Under the principle of autonomy, the patient has the right to access medical services. This right is ensured by the state, the system of state healthcare facilities, where citizens should be provided qualified medical care free of charge.

The second stage of medical reform in Ukraine began in 2020. Currently, innovations within the system operate at a basic level and include the services of a primary care physician, therapist and pediatrician. The medical guarantee program is also being launched. The comprehensive medical care system will be free of charge for Ukrainians, but certain services may be payable. Since April 2020, Ukraine has introduced the Medical Services Program, covering six types of medical care: basic, specialist outpatient, hospital, emergency, palliative, rehabilitation and the program of reimbursement for medicines.[14]

This means that since April 2020, the principle of "money follows the patient" has been applied at all levels of medical care. Money for medical services for patients is to be transferred to hospitals by the National Health Service of Ukraine. This is how the basic level works – the services of therapists, primary care physicians and pediatricians.

This means for the patient that he/she has already paid for medical services in taxes, and the state transfers the money directly to the hospital. However, not all the services will be free of charge. In particular, the following will remain paid: dentistry (except for emergencies), cosmetic procedures, massages. Services will remain free provided that the patient adheres to a set of rules. For example, if a person seeks the medical consultation (e.g., of a surgeon) without a referral, the hospital has the right to charge him/her for the service. In order for a secondary

[13] *Medreforma v Ukraine: Minzdrav nedovolen vtorym etapom i gotovit korennyye izmeneniya*, 13.04.2020, https://tsn.ua/ru/ukrayina/medreforma-v-ukraine-minzdrav-nedovolen-vtorym-etapom-i-gotovit-korennye-izmeneniya-1538127.html [access: 12.09.2021].

[14] *Medreforma v Ukraine: spisok platnykh i besplatnykh meditsinskikh uslug*, 6.01.2020, https://aif.ua/health/medreforma_v_ukraine_spisok_platnyh_i_besplatnyh_medicinskih_uslug [access: 28.09.2021].

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care medical consultation to be free of charge, a referral from a publicly contracted primary care physician must be obtained. The free services available without a referral include those provided by the obstetrician-gynecologist, dentist, pediatrician, psychiatrist and narcologist. In addition, emergency medical assistance is provided free of charge and without referral.[15]

In Ukraine, citizens can be provided a whole range of medical analyzes free of charge. All funds needed for blood and urine tests are free of charge, which means that one does not have to buy gloves or syringes, for example. All this should be provided by primary care institutions.

Qualified medical care should be understood as the constituent elements of the patient's autonomy, such as the free choice of a doctor, the choice of treatment methods in line with doctor's recommendations and the choice of a healthcare establishment. Pursuant to the Bases of the Healthcare Legislation of Ukraine of 19 November 1992[16] (hereinafter: the Bases), it is the responsibility of medical and pharmaceutical staff to provide citizens with timely and skillful medical care in the event of an accident and other extreme situations. The same act provides for the general right of the patient to be provided with medical information and the obligation to obtain the patient's direct consent to medical intervention.

In Ukraine, at the statutory level, these rights are enshrined as a right to freely choose medical procedures and medical establishments, including the right to freely choose a doctor. In addition to these rights, the Bases provide for the right to keep information about one's own health in secret. This right is part of a wider phenomenon, namely the right to the protection of personal data and the right to confidentiality. In this matter, the Criminal Code of Ukraine provides for a general principle contained in Article 182 "Infringement of the inviolability of private life".

Any information relating to education, marital status, health status, religious beliefs and other information about a person who does not wish to disclose it constitutes confidential information about that person. If the data constituting confidential information are within the scope of medical privacy, then the Criminal Code of Ukraine provides for a number of specific provisions (Article 145 "Illegal disclosure of information covered by medical privacy" and a number of others) that we will further examine and in which the perpetrator of the crime is a special actor, who in most cases is a medical professional.

[15] *Medreforma: k kakim vracham mozhno popast bez napravleniya*, 11.01.2020, https://nostalji102fm.com.ua/news/ukraina/30002-medreforma-k-kakim-vracham-mozhno-popast-bez-napravlenija [access: 21.08.2021].

[16] Zakon Ukrayiny, Osnovy zakonodavstva Ukrayiny pro okhoronu zdorovya, no. 2801-XII (Vidomosti Verkhovnoyi Rady Ukrayiny 1993, no. 4, p. 19), https://zakon.rada.gov.ua/laws/show/2801-12#Text [access: 10.06.2021].

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LEGAL BASIS OF THE LIABILITY OF MEDICAL WORKERS IN UKRAINE

While noting the existence of international normative acts that provide for patients' rights (the European Charter of Patients' Rights, the Declaration of Lisbon on the Rights of the Patient, the Convention on Human Rights and Biomedicine, i.e. so-called European Convention on Bioethics), we will focus on a brief analysis of Ukrainian normative acts regulating patients' rights, noting that, in principle, the Ukrainian standards on patient's autonomy correspond to international ones at the general regulatory level. As a rule, fundamental problems arise at the stage of application of the law.

The main normative act on health care in Ukraine is the Bases of the Healthcare Legislation of Ukraine of 19 November 1992. Pursuant to this act, it is possible to limit the rights of citizens because of their health condition (Article 9). A number of principles concerning prevention, provision of medical care, and the issues of compulsory treatment are specified in the Act of 6 April 2000 on the protection of the population against infectious diseases.[17] Moreover, the Constitution of Ukraine[18] provides for the protection of public health through appropriate financing.

Pursuant to Article 80 of the Bases, persons guilty of breaching health provisions are subject to civil, administrative or criminal liability. It should be noted that, in accordance with Part 3 of Article 34 of the Bases, the medical practitioner is not responsible for the patient's health if the patient refused to accept medical recommendations or breached the treatment regime prescribed for him.

Criminal liability is the strictest type of legal liability of medical professionals for violations of law committed by them in the performance of professional activities. In accordance with Part 1 of Article 2 of the Criminal Code of Ukraine (hereinafter: CCU), the basis for criminal liability is the commission by a person of a socially dangerous act that fulfills the statutory features of an offence, as provided for in the Code.

Medical employees are held liable on a general basis, but in addition, the Criminal Code of Ukraine provides for types of crimes specifically related to the professional activities of the medical practitioner.

Offences committed by medical staff members in connection with their professional activities may be conditionally arranged as follows:

− offences against human (patient's) life and health,

[17] Zakon Ukrayiny, Pro zakhyst naselennya vid infektsiynykh khvorob, no. 1645-III (Vidomosti Verkhovnoyi Rady Ukrayiny 2000, no. 29, p. 228), https://zakon.rada.gov.ua/laws/show/1645-14#Text [access: 21.06.2021].

[18] Constitution of Ukraine of 28 June 1996 (Vidomosti Verkhovnoyi Rady Ukrayiny 1996, no. 30, p. 141), http://zakon2.rada.gov.ua/laws/show/254к/96-вр [access: 10.07.2021].

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- offences against human (patient's) rights,
- business offences in medical practice,
- offences related to trafficking in drugs, psychotropic substances, their analogues or precursors and other offences against public health,
- other offences committed by medical practitioners in connection with their professional activities.

The vast majority of "medical" offences are concentrated in Section II of the Criminal Code of Ukraine "Crimes against life and health". This group should cover the elements provided for in the following provisions:

- Article 131 CCU "Improper performance of professional duties resulting in infecting a person with HIV or other incurable infectious disease",
- Article 132 CCU "Disclosure of information on the performed medical examinations for the detection of human infection with HIV or other incurable infectious disease",
- Article 134 CCU "Illegal abortion or sterilization",
- Article 137 CCU "Improper exercise of duties to protect the life and health of children",
- Article 138 CCU "Illegal medical activities",
- Article 139 CCU "Failure to provide aid to the patient by a healthcare professional",
- Article 140 CCU "Improper performance of professional duties by a medical or pharmaceutical professional",
- Article 141 CCU "Violation of the rights of the patient",
- Article 142 CCU "Illegal experiments on humans",
- Article 143 CCU "Violation of the statutory procedure for transplanting human anatomical material",
- Article 144 CCU "Forced Donation",
- Article 145 CCU "Unlawful disclosure of information covered by medical privacy".[19]

They are not allocated in a separate section of the Special Part of the Criminal Code of Ukraine and are not properly systematized (Table 1).

[19] These crimes will be discussed in the second part of this study.

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Table 1. Statistics for 2019

No.	Article of the Criminal Code of Ukraine	Number of cases that were on consideration	Number of cases already considered	Number of considered cases with the court decision	Number of convicted persons
Article 130 "Infection with human immunodeficiency virus or another incurable infectious diseases"	0	0	0	0	0
Article 131 "Improper performance of professional duties resulting in infecting a person with HIV or other incurable infectious disease"	0	0	0	0	0
Article 132 "Disclosure of information on the performed medical examinations for the detection of human infection with HIV or other incurable infectious disease"	0	0	0	0	0
Article 134 "Illegal abortion or sterilization"	0	0	0	0	0
Article 138 "Illegal medical activities"	0	0	0	0	0
Article 139 "Failure to provide aid to the patient by a healthcare professional"	0	0	0	0	0
Article 140 "Improper performance of professional duties by a medical or pharmaceutical professional"	6	3	0	0	0
Article 141 "Violation of the rights of the patient"	0	0	0	0	0
Article 142 "Illegal experiments on humans"	0	0	0	0	0
Article 143 "Violation of the statutory procedure for transplanting human anatomical material"	1	0	0	0	0
Article 144 "Forced Donation"	0	0	0	0	0
Article 145 "Unlawful disclosure of information covered by medical privacy"	0	0	0	0	0

Source: own elaboration.

It should be noted that cases of medical personnel members being criminally prosecuted, let alone sentenced, are quite rare in Ukraine. However, the heads of healthcare facilities must know what kind of behavior (acts or omissions) may give rise to criminal liability and how to prevent the improper behavior of their subordinates. As has already been mentioned, apart from criminal liability, there is also administrative and civil liability for breaches of medical law.[20] Currently, the health care system in Ukraine is in a highly unsatisfactory condition. People are

[20] Pismo Ministerstva yustitsii Ukrainy "Otvetstvennost meditsinskikh rabotnikov", 26.06.2011, www.medlawcenter.com.ua/ru/105/490.html [access: 20.06.2021].

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not provided with affordable and high quality medical services, medical services are expensive and in some cases even inaccessible to the majority of the population, especially as the country has a very sharp division into rich and poor people. The situation in 2020 has been greatly exacerbated by the pandemic, which has led not only to an increase in the number of patients, but also to unemployment and impoverishment of a large portion of the population. Researchers who deal with the problem of legal liability for the violation of patients' rights also point to such negative factors as the sale of counterfeit medicines in pharmacies, often at an inflated price and not meeting the appropriate standards. This, in turn, reduces the quality of medical services provided, which have simply become unavailable to most people. In addition, medical staff shows indifferent and rude attitude to patients, resulting in sluggishness and medical negligence. And while there is an explanation for these negative phenomena: excessive workload of medical personnel, insufficient number of this staff due to low wages, insufficient state funding of the medical sector, it is clear that this cannot be taken as an excuse.[21]

RESULTS AND DISCUSSION

At the same time, there are many private doctor's offices, companies providing medical services or public medical institutions providing paid medical services in Ukraine. This gives patients a wide choice of medical services. This phenomenon should be, and is, widely regarded as the implementation of the principle of patient's autonomy, which should be considered an essential attribute of law-making in the field of medicine, and also as an important condition for medical doctors and lawyers to master biomedical ethics from the position of social regulation of medical activity.[22]

In accordance with this principle, a person has a specific form of choice, personal freedom of action, in the performance of which one is able to make decisions and act in accordance with one's own values and principles.

It is usually distinguished in bioethics between the concepts of autonomy of personality, autonomy of choice and autonomy of action. Although this principle, like bioethics itself, was established relatively recently, namely in the 20th century, today several declaratory norms of bioethics, which is undoubtedly a progressive phenomenon, are significantly restricted by financial capabilities of people. This fully applies to the situation in Ukraine today.

[21] S.V. Knysh, *Yurydychna vidpovidalnist za pravoporushennya u sferi okhorony zdoroya v Ukrayini*, "Pravo i Bezpeka" 2018, no. 4(71), pp. 43–49.

[22] S.G. Stetsenko, [in:] *Medychne pravo Ukrayiny (realizatsiya ta zakhyst prav patsiyentiv)*, eds. S. G. Stetsenko, V.O. Halay, Kyyiv 2010, p. 23.

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We should stress the great importance of the principle of patient's autonomy, according to which a patient has the right to consent to medical intervention, refuse to be provided medical services, and to choose his/her own treatment methods, medical facility and doctor.

At the same time, it should be noted that these principles (which fully apply to the principle of patient's autonomy), will only work if there is a real material basis for their actual implementation. For example, for many citizens of Ukraine, the possibility of choosing specific methods of treatment or medical facilities is out of reach and infeasible due to the high cost of medical services. At present, prices for medical services are quite high, for example, magnetic resonance imaging (MRI) costs between 1,250 and 4,000 UAH in a public health care facility, and this service is not covered by the basic health care package. The prices for dental services are also very high. The minimum wage in Ukraine is 4,723 UAH and the minimum pension is 1,769 UAH. This means that not all Ukrainian citizens can exercise their autonomy in medical services.

The legal framework for implementing this principle in Ukrainian legislation has been fully developed. Firstly, this principle is enshrined in the Constitution of Ukraine (Articles 3, 28, 32 and 49). In addition, according to Article 6 of the Bases, every citizen of Ukraine has the right to properly skilled medical care, including the free choice of a doctor, the choice of treatment methods according to the doctor's recommendations, the choice of a healthcare facility; reliable and up-to-date information about their health status and the health condition of the population, including existing and possible risk factors and their degree.

It should be noted that the latter, namely general data on the health condition of the population of a city, region or country is particularly important at this stage. It seems that the COVID-19 indicators are deliberately either underestimated or overestimated. It is impossible to draw a true picture. According to Article 39 of the Bases, a patient of age has the right to reliable and complete information about his or her health status, including in particular the right to consult the relevant medical documentation concerning his or her health.

Pursuant to Article 43 of the Bases, the informed consent of a patient (under Article 39 of the Bases) is necessary for the application of certain methods of diagnosis, prevention and treatment. For patients under 14 years of age, as well as for patients who have been legally incapacitated, medical intervention is carried out with the consent of the patient's statutory representatives. Patients of legal age with full legal capacity have the right to refuse treatment.[23]

One of the problematic aspects of patient's autonomy is the issue of the patient being provided with true and complete information about his or her own health. Pursuant to Articles 4 and 39 of the Bases, if information about the patient's con-

[23] Zakon Ukrayiny, Osnovy zakonodavstva Ukrayiny pro okhoronu zdorovya, no. 2801-XII.

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dition may lead to a deterioration in patient's health or deteriorate the treatment process, the medical staff have the right to provide incomplete information about that condition and to limit the possibility of consulting certain medical documents. This issue remains unresolved in ethical and bioethical terms.

There are both opponents and supporters of concealing the true state of affairs. On the one hand, if a patient is in poor health, information with a negative context can worsen his/her condition and even hasten his/her death.[24] On the other hand, concealing information about the actual health condition of a patient is a kind of violation of both human rights and the principle of patient autonomy.[25] Such a person is deprived of the possibility of making important decisions in the social aspect – meeting with one's relatives, disposing of property. In this case, we notice a breach of the principle of the patient's autonomy in the fact that the patient does not know the true situation, which deprives him/her of the right to make a decision to change the method of treatment and choose another medical facility. This ultimately deprives the patient of the right to discontinue treatment, which is one of the elements of the principle of patient autonomy. In this case – in our opinion – the principle of patient autonomy should definitely be respected. However, the doctor must do this as tactfully and professionally as possible, taking into account the patient's characteristics and the possible negative and positive consequences of this disclosure. It is the doctor's duty, but not right, to minimize the risk of negative consequences that may result from any medical actions and omissions.[26]

It should be especially noted that unprofessional actions of the doctor may lead to, e.g., iatrogenic diseases. In this case, the doctor does not formally violate the principle of the patient's autonomy, but acts carelessly, unprofessionally, which can lead to serious consequences. And although this issue is practically unexplored in the science of both medical law and criminal law, it appears to be of particular interest. It goes slightly beyond the scope of the topic at issue, but given its importance, some features of iatrogenic diseases should be noted. There are several classifications of iatrogenesis. There are deontological types of iatrogenesis that are caused by a violation of the rules of deontology in relation to the patient. They are sometimes called informational iatrogenesis. In this case, iatrogenic diseases are to the doctor's influence on the mental state of a person. Deontological iatrogenesis, affecting the patient, can also cause mental illness. In such a case, the basic

[24] O.V. Sirenko, *Povedinka poterpiloho yak skladova yoho kryminalistychnoyi kharakterystyky*, "Mizhnarodnyy yurydychnyy visnyk: zbirnyk Natsionalnoho uniwersytetu derzhavnoyi podatkovoyi sluzhby Ukrayiny" 2015, no. 1(2), pp. 127–133.

[25] I.N. Sopilko, S.Y. Likhovaya, N.V. Uvarova, *Novaya sushchnost i vidovoye deleniye ugolovnykh pravonarusheniy i otvetstvennosti*, "Vserossiyskiy kriminologicheskiy zhurnal" 2018, vol. 12(6), pp. 905–913.

[26] N.I. Panov, *Sposob soversheniya prestupleniya i ugolovnaya otvetstvennost*, Kharkov 1982, p. 161.

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condition for attributing guilt to a medical staff member is to establish a causal relationship between his behaviour and the resulting consequence, which is an iatrogenic mental illness. The role of the doctor in the genesis of iatrogenic diseases has been analyzed by Ukrainian scientists.[27]

There are iatrogenic diseases caused by self-medication: the use of medicines that have not been prescribed by a medical doctor. The issue of criminal liability for causing injury in the form of iatrogenic diseases has not been studied in the legal literature virtually at all. However, some authors mention this phenomenon in the context of criminal law. For example, O.O. Dudorov pointed out that iatrogenic diseases should be considered serious consequences within the meaning of the constitutive feature of the offence provided for in Part 1 of Article 140 CCU "Improper performance of professional duties by a medical or pharmaceutical professional".[28]

Respecting the patient's autonomy is a fundamental principle of modern bioethics, which challenges the doctor's unconditional competence in the matters of positive and negative consequences of his relationship with the patient.

In bioethics, the following conditions for a possible informed autonomous choice are indicated:

- existence of an actor capable of making the right decision (consent or refusal),
- appropriate form and content of expression of this decision,
- no coercion or misinformation (deception),
- availability of relevant information,
- patient's decision-making powers.

It should be especially noted that in most cases, in the relationship between the patient and the doctor, the leading and responsible role belongs to the doctor. He is obliged to provide the patient with such information as may ensure the right choice or decision under the principle of patient's autonomy. In some situations, the patient is simply unable to make the right, independent decisions (for example, about providing emergency medical care). In many cases, the patient simply does not have sufficient knowledge to make responsible decisions within his or her autonomy, sometimes the patient completely gives up taking advantage of this principle and fully trusts the doctor. This issue is considered in detail by L.A. Zherzh and other authors.[29]

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[27] Y.S. Hrytchuk, Y.M. Pavlychko, Y.M. Hrytchuk, *Rol likarya u vynyknenni yatrohennykh zakhvoryuvan*, "Medytsyna zaliznychnoho transportu Ukrayiny" 2004, no. 2, pp. 98–99; O.O. Myslyva, *Kryminalno-pravova kharakterystyka ta zapobihannya nezakonniy diyalnosti u sferi transplantatsiyi*, Dnipropetrovsk 2011 (avtoref. dys. na zdobuttya nauk. stupenya kand. yuryd. nauk), p. 20.

[28] O.O. Dudorov, [in:] *Naukovo-praktychnyy komentar do Kryminalnoho kodeksu Ukrayiny*, eds. M.I. Melnyk, M.I. Khavronyuk, Kyyiv 2009, p. 332.

[29] L.A. Zherzh, K.V. Myronchuk, Y.M. Kharkovets, *Pravovyy analiz "Prezumptsiy i zhody" ta "Prezumptsiyiy i nezhody" pry nezakonniy transplantatsiyi orhaniv abo tkanyn lyudyny*, "Porivny-

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We can conclude that, in most cases, the patient–doctor relationship is asymmetrical. The doctor has knowledge not available to the patient, and often the patient completely trusts the doctor. Therefore, the importance of the principle of patient's autonomy consists not only in the prohibition of making any obstacles to the patient's independent actions, but also in the necessity of cooperation in the exercise of patient's autonomy.

CONCLUSIONS

An analysis of international normative acts in the field of medicine and the protection of human health, and of Ukraine's legislation in this area, allows us to state that the Ukrainian legislation is formally in line with international norms and standards. These include the European Charter of Patients' Rights, the European Social Charter, the Declaration of Lisbon on the Rights of the Patient, the Convention on Human Rights and Biomedicine. Regarding the Ukrainian legislation, apart from the Bases for Health Protection Legislation of Ukraine already mentioned, it includes the following acts: on State Social Standards and State Social Guarantees, on the Protection of the Population against Infectious Diseases, Order of the Ministry of Health of Ukraine on the Approval of Procedures for Selection of a Primary Care Physician and Making a Statement on Selection of a Primary Care Physician. There are also a number of normative acts which, as indicated, constitute medical law as a separate branch of law in Ukraine.

In normative acts, practically all patients' rights are regulated and guaranteed at a statutory level, which is the essence and content of the principle of patient autonomy. Patients' rights are not only secured by ensuring them at a statutory level. The existence of patient autonomy is ensured by another multi-component phenomenon, also defined at the legislative level, such as the duties of medical and pharmaceutical personnel members. It is the fulfillment of these obligations, compliance with them in accordance with legal, social and bioethical norms, which is the real guarantee of the principle of patient's autonomy.

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alno-analitychne pravo: elektronne naukove fakhove vydannya yurydychnoho fakultetu DVNZ Uzhhorodskyy natsionalnyy universytet" 2017, no. 6, pp. 307–310; L.A. Zherzh, V.V. Rozmayita, *Determinanty koruptsiyi u diyalnosti medychnykh pratsivnykiv. Fiskalna polityka: teoretychni ta praktychni aspekty yurydychnoyi nauky: zbirnyk tez dopovidey II Mizhnarodnoyi naukovo-praktychnoyi konferentsiyi (23 lystopada 2018 roku)*, Irpin 2018, pp. 59–62; iidem, *Ponyattya kryminalnoyi vidpovidalnosti medychnykh pratsivnykiv za vchynennya profesiynykh zlochyniv ta yiyi osoblyvosti. II Vseukrayinski naukovo-pravovi chytannya pamyati doktora yurydychnykh nauk, profesora, zasluzhenoho yurysta Ukrayiny, chlen-korespondenta Natsionalnoyi akademiyi pravovykh nauk Ukrayiny Niny Romanivny Nyzhnyk: zb. materialiv*, Irpin 2018, pp. 160–163.

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When a patient appears at a healthcare facility, three forms of legal relationship arise: 1) between the doctor and the patient; 2) between the healthcare establishment and the patient; 3) between the doctor and the healthcare establishment.[30]

In our opinion, this legal relationship between the doctor and the patient is subject to criminal law protection. Due to the specific nature of criminal liability, the subject of which is an individual, it is precisely particularly dangerous behaviours committed by healthcare workers that should be considered as crimes against the rights of the patient and, as a result, directed against the patient's autonomy.

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[30] S.V. Knysh, *op. cit.*, p. 45.

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ABSTRAKT

Celem artykułu jest analiza zjawiska „autonomii pacjenta" jako przedmiotu ochrony prawnokarnej. Autonomia pacjenta jest jednym z najważniejszych praw. Jej poszanowanie jest jednym z czynników zapewniających prawidłowy proces leczenia. Artykuł podzielony jest na dwie części. W tej części autorzy analizują akty prawne Ukrainy, które regulują proces udzielania świadczeń medycznych i gwarantują prawo pacjenta do autonomii, a także odnoszą się m.in. do kwestii zgody pacjenta na interwencje medyczne oraz do prawa do informacji o jego stanie zdrowia. Wskazują również na statystyki dotyczące przestępstw popełnianych przez członków personelu medycznego w związku z wykonywaniem czynności zawodowych. Ponadto zwracają uwagę, że na problem naruszania autonomii pacjenta należy spojrzeć nie tylko z prawnego, ale i ze społecznego punktu widzenia. Dotyczy to relacji pacjent–lekarz, w której lekarz odgrywa wiodącą rolę. Co więcej, treść tych relacji leży nie tylko na płaszczyźnie zawodowej, ale i na płaszczyźnie bioetycznej.

Słowa kluczowe: pacjent; autonomia pacjenta; prawa pacjenta; naruszenie autonomii pacjenta; lekarz; ochrona prawnokarna