

Criminal law ensuring the information security of persons living with the immunodeficiency virus

Vyacheslav I. Borisov, Olexander O. Pashchenko, Kateryna A. Novikova

ACADEMICIAN STASHIS SCIENTIFIC RESEARCH INSTITUTE FOR THE STUDY OF CRIME PROBLEMS NATIONAL ACADEMY OF LAW SCIENCES OF UKRAINE, KHARKIV, UKRAINE

ABSTRACT

Aim: To determine the specifics of criminal liability for disclosing information about a medical examination for detection of infection with the human immunodeficiency virus or another incurable infectious disease under the criminal legislation of Poland and Ukraine in order to improve the legal protection of the interests of people living with HIV.

Materials and Methods: The authors used the decisions of national courts in the field of ensuring the information security of a person living with the immunodeficiency virus, international and national legal acts of Ukraine and Poland. The study was carried out on the basis of a systematic approach using the methods of dialectical and formal logic, general scientific and special legal research methods.

Conclusions: It was determined the need to use the means of criminal liability only in extreme cases to ensure proper legal protection of the interests of people living with HIV, healthcare professionals, other related entities, and the public interest.

KEY WORDS: information security, HIV infection, criminal law, offences, liability

Wiad Lek. 2024;77(12):2523-2528. doi: 10.36740/WLek/196335 DOI

INTRODUCTION

By the end of 2022, about 39 million people worldwide were living with human immunodeficiency virus (hereinafter referred to as HIV). At the same time, 25.6 million people live in the African region, about 3.8 million are residents of North and South America, 3.9 million are residents of Southeast Asia, 3 million are residents of the European region, 490,000 are in the Eastern Mediterranean and 2.2 million are in the Western Pacific [1]. As of 01.04.2024, 157,139 people living with HIV were under medical supervision in health care facilities in Ukraine, which are 383.3 per 100,000 people [2]. In Poland, at the beginning of 2024, 19,496 patients were being treated for HIV infection [3]. It should be noted that these are only official data. We currently do not know the actual number of people who are carriers of the infection or suffer from this disease. However, even these figures confirm the fact that HIV infection is a serious social problem for Ukraine, and obviously a certain problem for Poland.

At the same time, HIV/AIDS is not only a social problem, but also an individual tragedy. People living with HIV often face discrimination due to the disease, which leads to low attendance at counseling and HIV testing, identity crisis, social isolation, loneliness, low self-es-

teem and lack of interest in overcoming the disease [4]. People living with HIV/AIDS often experience violence related to the disease. A study conducted among people living with HIV/AIDS in South Africa found that out of 500 survey participants, 16.1% reported experiencing physical violence, with 57.7% of them being perpetrated by intimate partners such as husbands and wives [5].

Discrimination and stigmatization of HIV/AIDS-infected people make it necessary to properly ensure the confidentiality of information about a person's illness. An important role in ensuring compliance with such information security of a person belongs to the means of criminal legislation. In contrast to the Criminal Code of the Republic of Poland, the Criminal Code of Ukraine contains a special provision regarding responsibility for disclosing information on conducting a medical examination to detect infection with the human immunodeficiency virus or another incurable infectious disease (Article 132 of the Criminal Code of Ukraine).

AIM

To determine the peculiarities of criminal liability for disclosure of information about a medical examination to detect infection with the human immunodeficiency

virus or other incurable infectious disease under the criminal laws of Poland and Ukraine in order to improve legal protection of the interests of a sick person, to draw public attention to the existing problem and the need to solve it.

MATERIALS AND METHODS

To achieve the objectives of the study, the authors analyzed statistical data from the World Health Organization, the Public Health Centre of the Ministry of Health of Ukraine, and the National Centre for AIDS Prevention and Control in Poland on the number of HIV-infected people in this country and other regions of the world. The study also uses statistical data from criminal cases in Ukraine and Poland concerning offences in the field of information security of a person living with the immunodeficiency virus. The author analyses the provisions of the Criminal Code of the Republic of Poland of 06 June 1997 and the Criminal Code of Ukraine of 05 April 2001 in this area. An exhaustive list of court decisions in Poland (51 verdicts), which mention HIV, was studied.

The methods of theoretical analysis and synthesis were used in the study of the content of legislative norms and provisions contained in international and national legal acts on combating the spread of HIV and protecting the rights of people living with it. Certain issues required the use of the systematic analysis method, in particular, during the study of legal acts in the medical field and comparing its provisions with criminal law.

The formal and legal analysis of international and national legislation was used to study the differences in their application in Poland and Ukraine for various criminal offences, and to formulate proposals for improving liability for such offences in accordance with their social danger and harmfulness.

In solving the research tasks, the historical method was also used, which allowed the authors to trace the attitude of modern medicine to HIV infection, its transmission methods and the possibilities of influencing it through antiretroviral therapy, starting from the first cases of its detection to the present.

REVIEW AND DISCUSSION

Unlike in Ukraine, the criminal law of Poland does not specifically address the issue of ensuring the information security of a person living with an immunodeficiency virus. However, this is not to say that this problem is not given any attention at all. The Polish Criminal Code provides for liability for disclosure of information in connection with the performance of official duties.

Thus, according to § 1 of Article 266 of this Code, liability is established for the person's actions who, contrary to the law provisions or his/her obligations, discloses or uses information that he/she has become aware of in connection with the performance of official duties, work, public, social, economic or scientific activities. These actions include disclosure of information about a patient regarding HIV infection or AIDS [6]. At the same time, Polish law contains provisions that should be taken into account when disclosing information about a patient without his or his/her consent when:

- 1) it is provided for by law;
- 2) the medical examination was conducted at the request of a person entitled to do so, in accordance with certain acts, bodies and institutions; when the physician is obliged to report the patient's health status only to these bodies and institutions;
- 3) keeping the secret may endanger the life or health of the patient or other persons;
- 4) the patient or his/her legal representative agrees to disclosure of the secret, having previously informed the patient of the adverse consequences for him/her;
- 5) there is a need to transfer the necessary information about the patient related to the provision of medical services to another physician or authorized persons involved in the provision of these services;
- 6) it is necessary for practical training of the medical profession;
- 7) it is necessary for scientific purposes;
- 8) it is necessary to provide the necessary information about the patient to the healthcare professional, while the disclosure of secrecy may be disclosed only to the extent necessary [7]. Thus, we can see that in Poland there is a sufficient range of statutory exceptions related to information leakage, which allow not applying criminal liability to healthcare professionals without justified necessity.

In contrast, the Criminal Code of Ukraine contains a special provision establishing liability for disclosure of information about a medical examination to detect infection with human immunodeficiency virus or other incurable infectious disease (Article 132). According to Ukrainian scholars, the social danger of this act lies in the fact that informing at least one unauthorized person that a person is HIV-positive or has AIDS causes the latter to suffer, humiliates his or her honor and dignity, and causes significant damage to the good name of not only this person, but also those close to him or her [8]. Only the following individuals shall be liable for this criminal offence 1) officials of a healthcare facility, 2) auxiliary workers who have unauthorizedly obtained the relevant information, and 3) medical professionals if they have become aware of the relevant information

in connection with the performance of their official or professional duties.

Ukrainian lawyers note that in addition to medical personnel, the subjects of this criminal offence may also be employees of law enforcement agencies, prisons, etc. [8]. At the same time, Ukrainian scholars also cite certain restrictions on the interpretation of the subject of this offence: it can only be persons who have reported information about positive data on HIV infection or AIDS or other incurable infectious disease found during the examination, while the notification of an examination that gave negative results is not covered by Article 132 of the Criminal Code of Ukraine [9]. Unfortunately, it was not possible to identify the real position of the law enforcement agencies of Ukraine on this issue, since since the entry into force of the Criminal Code of Ukraine in 2001, we found only one sentence for this criminal offence in the Unified State Register of Court Decisions of Ukraine, and that one was with limited access [10]. According to the information provided by the Office of the Prosecutor General from 2013 till 2023, 7 criminal offences under this article were registered, of which only one criminal offence was reported, where the proceedings were sent to court with an indictment [11].

It is worth noting that along with the special legislative prescription contained in Article 132 of the Criminal Code, the legislator of Ukraine has also provided for a general rule in Article 145 of the Criminal Code – illegal disclosure of medical secrets. According to the Prosecutor General's Office, 55 criminal offences were registered under this article [11]. However, if we look at the court statistics, there is no data on the verdicts passed by the courts under Article 145 of the Criminal Code over the past ten years [12]. That is, the effectiveness of the general rule specified in Article 145 of the Criminal Code of Ukraine is actually zero, and some of the advantages that law enforcement practice gives to the special rule specified in Article 132 of the Criminal Code are insignificant.

The following conclusions can be drawn from the data obtained. First of all, there are very few criminal proceedings in these cases due to the fact that there are a lot of latent carriers of HIV infection in Ukraine (those who do not know that they are HIV-infected). This is, in particular, due to the rather long period of time between HIV infection and its detection. In addition, there is still a significant fear that outsiders will find out that a person is ill. In this regard, there is also a fear of being registered, as well as failure to take other actions necessary for timely treatment. It seems that a small number of registered offences are related to this.

Regarding the implementation of criminal proceedings in relation to medical secrecy and its disclosure, it should

also be borne in mind that today they are quite difficult to prove, and therefore, on more or less appropriate pretexts, criminal proceedings are closed (for example, because there is insufficient evidence to prove the person's guilt in court and the possibilities of obtaining it have been exhausted) or the person is released from criminal liability (for example, due to effective remorse). In addition, the victim may not be aware that information about him/her has been disclosed, inter alia, due to the lack of a proper mechanism for informing him/her of this fact (for example, due to hacking of the Health system or the introduction of new methods of obtaining such information via the Internet).

Finally, we can also conclude that the legislative norms that provide for liability for these criminal offenses are imperfect, as well as the general perception of the fact of such disclosure as not being a significant violation of civil rights.

In the context of ensuring human information security, Polish researchers raise the question of the expediency of criminalization and social justification if a person knows that he/she is infected with HIV and directly exposes another person to the virus. For example, what is the significance of the analyzed crime in the public perception and what role does it play in the justice practice? [13]

The fact is that the criminalization of actions in this area has its origins in the situation that developed in the world after the first case of HIV was recorded in the United States in 1981 and the subsequent rapid increase in morbidity and mortality from diseases caused by this virus impact on the human body. At that time, medical science had a very rough understanding of the infection and its transmission, and there was no effective antiretroviral therapy. Therefore, public concern about the consequences of AIDS began to become critical.

In Ukraine, back in Soviet times, in November 1987, the Criminal Code of 1960 was amended with a provision (Article 108²) that established liability not only for "infection of another person with AIDS by a person who knew that he/she had the disease" (Part 2), but also for "knowingly putting another person in danger of contracting AIDS" (Part 1) [14]. A little later, in December 1991, the Criminal Code in force at that time was supplemented with two more articles related to HIV infection and AIDS: Article 108³ "Infection with the human immunodeficiency virus by medical, pharmaceutical and other workers", i.e. a provision that became special to Article 108² of the Criminal Code, Article 108⁴ "Disclosure of information on medical examination for human immunodeficiency virus infection and its results" [15], i.e. a norm analogous to Article 132 of the current Criminal Code.

At the time, in the context of the spread of the AIDS epidemic worldwide, which was called the “plague of the twentieth century,” such legislative decisions seemed justified. Therefore, in the original version of the Criminal Code (2001) there were three norms that corresponded to the above: Article 130 “Infection with HIV or any other incurable contagious disease”, Article 131 “Professional misconduct causing infection of a person with HIV or any other incurable contagious disease”, Article 132 “Disclosure of information on medical examination for HIV or any other incurable contagious disease” [16].

However, over time, the situation regarding the disease in question has begun to change dramatically as a result of medical science advances. Thanks to modern antiretroviral therapy, people living with HIV have the opportunity to live a full life without putting their sexual partners at risk of infection, and to give birth to healthy children without transmitting HIV infection to them [17]. These circumstances are also reflected in the investigative and judicial practice of Ukraine in recent years regarding the application of the Criminal Code provisions for acts that were the HIV infection subject. In addition to the indicators of application of Article 132 of the Criminal Code of Ukraine, we consider it appropriate to provide official information on the application of Articles 130 and 131 of the Criminal Code of Ukraine. In the period from 2013 to 2023, law enforcement agencies of Ukraine registered 83 criminal offenses classified under Article 130 of the Criminal Code [11]; 8 people were convicted under this article [12], while no one has been convicted of this criminal offense in the last 5 years.

As for the criminal offenses under Article 131 of the Criminal Code, 18 cases were registered during the specified period [11], but no one was convicted under this article [12]. In this regard, current research rightly notes that one of the negative aspects of the criminalization of HIV transmission is that it has slowed down the detection and timely treatment of new cases of HIV infection [17]. Therefore, it is no coincidence that one of the international legal documents emphasizes that criminalization is deadly; it fuels the HIV pandemic. Abuse of criminal law also massively violates human rights around the world. The evidence of such harm is compelling and undeniable [18].

In this regard, criminal liability should be *ultra ratio*, when other means of special preventive and legal influence are no longer able to work. In most cases, preference should be given to the use of other means: timely detection of HIV, the use of antiretroviral therapy, which helps to transform the virus in such a way that it can no longer be transmitted. Therefore, the position of the drafters of the new Criminal Code of Ukraine seems quite consistent, where, on the one hand, there are no longer any special provisions related to HIV and AIDS, and on the other hand, the circumstance associated with dangerous contagious diseases (including AIDS [19]) is included in the list of signs that define health damage caused to a person as grave, namely infection of a person with a particularly dangerous contagious disease or its causative agent (subpara. e, clause 3, part 1, Article 1.4.3) [20].

CONCLUSIONS



The study demonstrates the need for a systematic approach to the regulation and application of liability for violation of information security of a person living with an immunodeficiency virus.

During the resolution of the issue regarding the criminalization of certain offenses that may be committed in this area, it is appropriate to take into account their public danger. Thus, at present, criminal liability for any violation of the information security of a person living with an immunodeficiency virus seems inappropriate.

In the criminal legislation of Poland, the issue related to ensuring the information security of a person living with the immunodeficiency virus is not specifically identified, but the responsibility for disclosing information in connection with the performance of official duties is established. Such actions also include possible cases of gossiping about a patient about HIV infection or AIDS. In contrast to this, the Criminal Code of Ukraine contains a special rule that establishes responsibility for disclosing information on conducting a medical examination to detect infection with the human immunodeficiency virus or another incurable contagious disease, the practice of which has not become widespread. The draft of the new Criminal Code of Ukraine no longer contains such a norm, as well as other special norms related to HIV infection and AIDS.

REFERENCES

1. HIV data and statistics. World Health Organization. <https://www.who.int/teams/global-hiv-hepatitis-and-stis-programmes/hiv-strategic-information/hiv-data-and-statistics> [Accessed 25 July 2024]
2. Statystyka z VIL/SNIDU. Tsentr hromadskoho zdorov'ia MOZ Ukrainy. [Statistics on HIV/AIDS. Center for Public Health of the Ministry of Health of Ukraine]. <https://phc.org.ua/kontrol-zakhvoryuvan/vilsnid/statistika-z-vilsnidu> [Accessed 25 July 2024] (Ukrainian)

3. Podstawowe informacje epidemiologiczne. Krajowe centrum DS. [Basic epidemiological information.]. AIDS Agenda Ministra Zdrowia. https://aids.gov.pl/hiv_aids/450-2-2/?cn-reloaded=1 [Accessed 25 July 2024] (Polish)
4. Parker R, Aggleton P. HIV and AIDS-related stigma and discrimination: a conceptual framework and implications for action. *Social Science & Medicine*. 2003;57(1):13–24. doi:10.1016/S0277-9536(02)00304-0. DOI 
5. Dos Santos MM, Kruger P, Mellors SE et al. An exploratory survey measuring stigma and discrimination experienced by people living with HIV/AIDS in South Africa: the People Living with HIV Stigma Index. *BMC Public Health*. 2014;14(1):80. doi:10.1186/1471-2458-14-80.
6. Jakubowicz J, Jakubowicz O, Żaba C et al. Zagadnienia prawne związane z zakażeniem wirusem HIV i chorobą AIDS. [Legal Issues Related to HIV Infection and AIDS]. *Postępy Dermatologii i Alergologii XXVI*. 2009;3:150–154. (Polish)
7. Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty. [Act of 5 December 1996 on the professions of physician and dentist.]. *Dz. U.* 1997, p.152. (Polish)
8. Baulin Y, Borysov V, Havrysh S et al. Kryminalnyi kodeks Ukrainy: naukowo-praktychnyi komentar: u 2 t. T. 2: Osoblyva chastyna. [Criminal Code of Ukraine: Scientific –Practical Commentary: in 2 vols. Vol. 2: Special part]. 5-te vyd. Kharkiv: Pravo. 2013. (Ukrainian)
9. Bazhanov M, Stashis V, Tatchii V. Ugolovnoe pravo Ukrainy: Osobennaja chast': uchebnyk [Criminal Law of Ukraine: Special Part: textbook]. Kyiv: Jurinkom Inter. 2003. (Russian)
10. Vyrok Tsentralnoho raionnoho sudu m. Simferopolia u spravi № 122/9610/2012 vid 22.01.2013 [Judgment of the Central District Court of Simferopol in case № 122/9610/2012, 22.01.2013]. Yedynyi derzhavnyi reiestr sudovykh rishen. <https://reyestr.court.gov.ua/Review/33251278>. [Accessed 25 July 2024] (Ukrainian)
11. Pro zareiestrovani kryminalni pravoporushennia ta rezultaty yikh dosudovoho rozsliduvannia. [On registered offenses and the results of their pre-trial investigation]. Ofis Heneralnoho prokurora. <https://gp.gov.ua/ua/posts/pro-zareiestrovani-kryminalni-pravoporushennia-ta-rezultati-yih-dosudovogo-rozsliduvannya-2>. [Accessed 25 July 2024] (Ukrainian)
12. Sudova statystyka. [Judicial statistics]. Sudova vlada Ukrainy. https://court.gov.ua/inshe/sudova_statystyka/ [Accessed 25 July 2024] (Ukrainian)
13. Banasik K. Przestępstwo narażenia na zarażenie wirusem HIV (art. 161 §1 k.k.). [The crime of exposure to HIV infection (Article 161 §1 of the Penal Code).]. *Prokuratura i Prawo*. 2009;6:53–61. (Polish)
14. Ukaz Prezydii Verkhovnoi Rady Ukrainiskoi RSR vid 25 lystop. 1987 r. № 4981-XI. Pro vnesennia dopovnen do deiakykh zakonodavchykh aktiv Ukrainiskoi RSR pro kryminalni pravoporushennia ta rezultaty yikh dosudovoho rozsliduvannia [Decree of the Presidium of the Supreme Soviet of the Ukrainian SSR on November 25, 1987. № 4981-XI. On Amendments to Certain Legislative Acts of the Ukrainian SSR]. *Vidomosti Verkhovnoi Rady Ukrainiskoi RSR*. 1987;49:1008. (Ukrainian)
15. Zakon Ukrainy vid 12 hrud. 1991 r. № 1974-XII. Pro vnesennia zmin i dopovnen do Kryminalnoho i Kryminalno-protseusualnoho kodeksiv Ukrainiskoi RSR [Law of Ukraine on December 12, 1991. № 1974-XII. On Amendments and Additions to the Criminal Code and the Code of Criminal Procedure of the Ukrainian SSR]. *Vidomosti Verkhovnoi Rady Ukrainy*. 1992;11:154. (Ukrainian)
16. Zakon Ukrainy vid 5 kvit. 2001 r. № 2341-III. Kryminalnyi kodeks Ukrainy [Law of Ukraine on April 5, 2001. № 2341-III. Criminal Code of Ukraine]. *Vidomosti Verkhovnoi Rady Ukrainy*. 2001;25–26:131. (Ukrainian)
17. Rachynska V, Hutorova N. Vstup [Introduction]. *Kryminalizatsiia infikuvannia virusom imunodefitsytu liudyny v Ukraini: medychna nauka proty bezpidstavnoho kryminalnoho peresliduvannia liudei, yaki zhyvut z VIL: zb. analit. materialiv: elektron. nauk. vyd. Kharkiv: Pravo*. 2023, pp.4-9. (Ukrainian)
18. UNAIDS Reference Group on HIV and Human Rights. Decriminalisation and the end of AIDS: keep the promise, follow the science, and fulfill human rights. *Sex Reprod Health Matters*. 2023;31(1):2194188. doi: 10.1080/26410397.2023.2194188. DOI 
19. Nakaz Ministerstva okhorony zdorov'ia Ukrainy vid 19.07.1995. № 133. Pro zatverdzhennia Pereliku osoblyvo nebezpechnykh, nebezpechnykh infektsiinykh ta parazytarnykh khvorob liudyny i nosiistva zbudnykiv tsykh khvorob [Order of the Ministry of Health of Ukraine on July 19, 1995. № 133. On Approval of the List of Particularly Dangerous, Dangerous Contagious and Parasitic Human Diseases and Carriers of Pathogens of These Diseases]. <https://zakon.rada.gov.ua/rada/show/v0133282-95#Text> [Accessed 25 July 2024] (Ukrainian)
20. Proiekt stanom na 02.07.2024. Kryminalnyi kodeks Ukrainy [Project as of July 02, 2024. The Criminal Code of Ukraine]. <https://newcriminalcode.org.ua/upload/media/2024/07/03/kontrolnyj-tekst-proyektu-kk-stanom-na-02-07-2024.pdf> [Accessed 25 July 2024] (Ukrainian)

The paper was written within the framework of the fundamental topic “Theoretical, legislative and law-enforcement problems of criminal-legal protection of information security in Ukraine” (state registration N 0121U114324).

CONFLICT OF INTEREST

The Authors declare no conflict of interest

CORRESPONDING AUTHOR

Vyacheslav I. Borisov

Academician Stashis Scientific Research Institute
for the Study of Crime Problems
National Academy of Law Sciences of Ukraine
49 Pushkinska St., 61002 Kharkiv Ukraine
e-mail: borisov_v.i@ukr.net

ORCID AND CONTRIBUTIONSHIP

Vyacheslav I. Borisov: 0000-0003-0291-9347 **D** **E** **F**

Olexander O. Pashchenko: 0000-0001-9640-0137 **A** **D** **E**

Kateryna A. Novikova: 0000-0001-8646-3441 **A** **B** **D**

A – Work concept and design, **B** – Data collection and analysis, **C** – Responsibility for statistical analysis, **D** – Writing the article, **E** – Critical review, **F** – Final approval of the article

RECEIVED: 04.08.2024

ACCEPTED: 22.11.2024

