REVIEW ARTICLE

CONTENTS

Medical confidentiality as an element of privacy vs. public interest in crime disclosure: striving for balance

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ABSTRACT

Aim: This article aims to raise awareness and stimulate scientific discussion on the issue of protecting medical confidentiality during criminal proceedings, with the goal of further improving legal tools to ensure compliance with the standards of the European Court of Human Rights (hereinafter referred to as the ECHR) in this field.

Materials and Methods: In preparing the article, the following issues were addressed: the provisions of international legal acts; the legal positions of the ECHR related to the protection of medical confidentiality in criminal proceedings; and scientific research in this field. The methodological basis of the research includes the method of generalization, methods of analysis and synthesis.

Conclusions: The right to confidentiality regarding health status may be restricted during criminal procedural activities in forms prescribed by law. Such a restriction will be considered lawful and justified in a democratic society, provided that the interference meets the set of criteria established by the practice of the ECHR. The storage of biological material outside the scope of criminal proceedings is, in some cases, justified to safeguard public interests in a democratic society; however, under certain conditions, it may conflict with the principles of the presumption of innocence and the right to privacy.

KEY WORDS: medical secret and confidential medical information, collection of biological samples, privacy, investigative actions, ECHR practice, criminal process

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INTRODUCTION

Criminal procedural activities are often associated with intrusions into the sphere of human rights and fundamental freedoms. One such example is the disclosure of medical information without the patient's consent. Therefore, achieving a fair balance between the public interest in investigating criminal offenses to hold perpetrators accountable and the individual's right to confidentiality of health information as part of the right to privacy is impossible without establishing certain guidelines. Searching for such guidelines for states that uphold European values is entirely justified in the practice of the ECHR.

AIM

This article aims to raise awareness and stimulate scientific discussion on the issue of protecting medical confidentiality during criminal proceedings, with the goal of further improving legal tools to ensure compliance with ECHR standards in this field.

MATERIALS AND METHODS

The basis for the preparation of the article was international legal acts (in particular: the Convention on Human Rights and Biomedicine (1997); the International Code of Medical Ethics (1949); the Declaration on the Promotion of Patients' Rights in Europe (1994); the Convention for the Protection of Human Rights and Fundamental Freedoms of (1950)), as well as empirical material – the judicial practice of the ECHR. The selection of specific ECHR rulings was determined by their significance in assessing the legality of intrusions into the right to respect for private and family life through the disclosure of information constituting medical confidentiality. A total of 9 ECHR decisions were analyzed. Supplementary materials included rulings of national courts in Ukraine and scientific articles by domestic and foreign scholars. During the investigation, a combination of general scientific and specific methods of cognition was used, including the method of generalization, and methods of analysis and synthesis. The generalization method was employed in studying

ECHR practice to formulate criteria for the legality of disclosing health-related confidentiality in light of convention standards. The methods of analysis and synthesis facilitated the identification of key motives in the ECHR's positions, which subsequently allowed for the development of a comprehensive understanding of generally accepted standards for protecting medical confidentiality in criminal proceedings.

REVIEW AND DISCUSSION

International legal instruments guarantee everyone the right to confidentiality of health information (Article 10 of the Convention on Human Rights and Biomedicine of April 4, 1997; the International Code of Medical Ethics (1949); and the Declaration on the Promotion of Patients' Rights in Europe of 1994). The ECHR considers medical information as part of the right to respect for private and family life, which is protected under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter referred to as the Convention): "The Court has held that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. The disclosure of such data may dramatically affect an individual's private and family life, as well as his or her social and employment situation" [1].

It should be noted that at the level of national legal regulation, the legislator has adopted European values and established mechanisms for protecting health-related confidentiality. At the same time, this right is not absolute and may be restricted by the state in certain areas to achieve public objectives. One such example is criminal procedural activity.

The provisions of the Criminal Procedure Code (hereinafter referred to as the CPC) of Ukraine prohibit the questioning of medical workers and other individuals who, in the course of their professional or official duties, have become aware of a person's illness, medical examinations, evaluations, and their results, as well as intimate and family aspects of a person's life—information constituting medical confidentiality (para. 4, part 2, Article 65 of the CPC of Ukraine). Similar prohibitions are provided for in the criminal procedure laws of other European countries (e.g., Article 72 of the Estonian CPC, Article 53 of the German CPC, and Articles 155 and 157 of the Austrian CPC). However, in Ukrainian judicial practice, there have been cases where courts have granted motions from parties in criminal proceedings to summon medical workers for questioning as witnesses [2-4] or issued orders to compel the attendance of medical workers, despite the prohibition established by part 3 of Article 140 of the CPC of Ukraine [5-7].

The CPC of Ukraine also establishes a procedural order for obtaining a court order to access information that may constitute medical confidentiality (para. 2, part 1, Article 162 of the CPC of Ukraine). In this case, the patient's consent, who entrusted the information, is not required.

At the same time, scholars have repeatedly argued against the unacceptable absolutization of medical confidentiality due to: a) cases where participants in criminal proceedings manipulate their health condition to delay investigative, procedural actions, or judicial proceedings (V. Mykhailenko) [8]; b) the need for the rehabilitation of a deceased participant in criminal proceedings (D. Shynharov) [9]. Some scientists also suggested the possibility of interrogating a medical worker as a witness by a court decision using mechanisms to protect confidential information (for example, by conducting interrogation in a closed court session) [10].

At the same time, to find a fair balance between the objectives of criminal proceedings and the right to confidentiality of health information, it is advisable to rely on the criteria established by the practice of the European Court of Human Rights (ECHR). Therefore, let us examine them in more detail, focusing on the following areas of research: 1) obtaining information about a person's health condition through questioning a medical worker as a witness or obtaining a court order for access to information that may constitute medical confidentiality; 2) interaction between medical workers and the media regarding the health status of patients who may be participants in criminal proceedings; 3) storage of biological material outside the scope of criminal proceedings.

1. *Obtaining information about a person's health condition through questioning a medical worker as a witness or obtaining a court order for access to information that may constitute medical confidentiality.* Interference with the right to respect for private and family life, including the right to confidentiality of health information, is justified if: a) medical information impacts the comprehensive, complete, and objective investigation of the case circumstances (for example, the qualification of a criminal offense) [11]; b) medical information is requested within the framework of criminal proceedings to fulfill its objectives and in relation to individuals who have acquired procedural status in the criminal proceedings, rather than for preventive purposes [2]; c) the pre-trial investigation body has used alternative methods to obtain infor-

mation about the health status before requesting a court order for access to medical documentation [2]; d) the state has ensured the confidentiality of the health information obtained within the framework of criminal proceedings [11, 12].

For example, in the case of Z. v. Finland (Application No. 22009/93), the applicant considered the questioning of doctors as witnesses regarding her health circumstances to be an interference with the right provided under Article 8 of the Convention. The ECHR, in turn, noted that such actions undoubtedly constitute a restriction of the right under Article 8 of the Convention but are justified in a democratic society. The purpose of this measure was solely to obtain information from the doctors about when the applicant's husband knew or had grounds to believe that he was HIV-positive. Their testimony, at the time of the investigation, could have been decisive in determining whether the applicant's husband was guilty of committing only sexual offenses or additionally guilty of attempting intentional murder when the test results indicating his HIV-positive status were already known (para. 102). Moreover, the questioning was conducted before the city court with video recording, and the court had previously decided that the court hearing minutes, including the transcript, were not subject to disclosure. Individuals involved in the process were required to treat the information as confidential and not subject to disclosure (para. 103). In this regard, the ECHR concluded that the various orders requiring the applicant's medical consultants to testify were based on relevant and sufficient grounds aligned with the legitimate aim pursued. There was a reasonable proportional relationship between the measures and the legislative purpose, which did not violate Article 8 of the Convention (para. 105) [11].

In the case of Avilkina and Others v. Russia (Application No. 1585/09), the applicants complained that the prosecutor's office had requested doctors to disclose information from their medical files without their consent and without any criminal investigation justifying such disclosure. As a result, confidential medical information was disclosed [2]. The prosecutor's interference significantly complicated the second applicant's treatment, obstructing the use of alternative non-blood treatment methods, including erythropoietin. The attitude of medical personnel towards her noticeably worsened. Additionally, an article appeared in the media in which one of the doctors openly discussed the second applicant's case. The fourth applicant was unable to consult the medical institution where she had previously been treated due to the threat of repeated disclosure of her medical records (para. 41) [2].

Thus, the ECHR found a violation of Article 8 of the Convention because: 1) the applicants were neither suspects nor accused in any criminal investigation; 2) the prosecutor was merely conducting an inquiry into the activities of the applicants' religious organization following complaints received by his office; 3) the medical facilities where the applicants underwent treatment did not report any alleged criminal behavior to the prosecutor's office; 4) the prosecutor had alternative options besides ordering the disclosure of confidential medical information, such as seeking the applicants' consent or questioning them regarding the matter (paras. 47–48) [2].

2. *Interaction of Medical Personnel with the Media Regarding the Health Status of Patients Involved in Criminal Proceedings.* There have been cases in practice where medical personnel provide comments to the media about the health status of patients involved in criminal proceedings that attract public interest or even share excerpts from medical records (including photographs or video materials) with journalists. Two key questions arise in this context: 1. Does a doctor have the right to take photographs of a patient for medical purposes? 2. In what ways can such materials be used?

According to I. Seniuta, a medical professional, when it is necessary to photograph a patient in order to document clinical results before and after an intervention, must obtain written consent. The statement should include the following key provisions: 1) the patient grants permission for photography for clinical purposes, with the understanding that these images will be placed in their medical records; 2) if the medical professional intends to share these photographs on social media to present their work or publish them at conferences for scientific purposes, the patient must give explicit consent for such publication, specifying the purpose and ensuring that personal identification details are included [13].

In the case of Ageyevy v. Russia (Application no. 7075/10), the applicants, who were accused of failing to fulfill their parental duties, complained that doctors had provided journalists with photographs of their son, information about his health condition, and granted the film crew unrestricted access to the child, including the possibility of further interviews. Subsequently, various national media outlets published articles with titles such as "Mother with a devil's heart," "I was beaten by my Mum," "Mummy beat me up with a hot kettle full of boiling water," "Monster-mummy is facing jail for ill-treatment of child," and "Mummy tortured adopted child," among others (para. 65). The government argued that the photographs, which showed the victim's burns, were taken for medical purposes, and that the media had

received permission to film only in the hospital lobby. However, the ECHR found a violation of Article 8 of the Convention, as such interference was not foreseen by law (para. 183) [14].

3. *Storage of biological material outside the scope of criminal proceedings*. The criminal procedural legislation outlines the procedure for collecting biological samples for forensic examination (part 3 of Art. 245 of the CPC of Ukraine). However, the issue of storage remains unregulated at the level of the CPC of Ukraine. On the other hand, Article 5 of the Law of Ukraine "On the State Registration of Human Genomic Information" stipulates that information about individuals convicted of intentional crimes (the legislator narrows this list to crimes against the foundations of national security of Ukraine, life, health, liberty, honor, dignity, sexual freedom and integrity of the person, property, public safety, the circulation of narcotic drugs, psychotropic substances, their analogues or precursors, crimes against peace, the security of mankind, and international law and order) (clause 3, part 1, Art. 5 of the Law) must be registered, and this information is stored in the Electronic Register for 50 years (part 2, Art. 18 of the Law) (the genomic information is to be stored for 50 years. The biological material, based on which this information has been generated, is destroyed after the person has served their sentence, but no later than the expiration of the retention period set by the manufacturer of the means (systems) for collecting biological samples (para. 2, part 1, Art. 14 of the Law)). The pretrial investigation authorities and the court have the right to use this information for identifying individuals who have committed criminal offenses (part 1, Art. 16 of the Law), and the oversight of human rights compliance is entrusted to the relevant Ombudsman of the Verkhovna Rada of Ukraine (part 1, Art. 19 of the Law) [15].

It should be noted that during the legislative process, the conclusions of the Main Scientific and Expert Department dated May 31, 2021, criticized these provisions due to: 1) excessive storage periods for genomic information; 2) an insufficiently effective control mechanism, since the Verkhovna Rada Commissioner for Human Rights does not have real powers to influence the Ministry of Internal Affairs of Ukraine's system of bodies [16]. Supporting these observations, we would also add that certain provisions of the Law of Ukraine "On the State Registration of Human Genomic Information" may be contradictory from an ethical standpoint in terms of adhering to the principles o f the presumption of innocence and non-interference in private life. Therefore, let us examine some ethical aspects of their relationship (this issue has already been addressed by some scholars [17]).

Scholars highlight five criteria that the ECHR considers when balancing the right to respect for private life (Art. 8 of the Convention) with the storage of biological samples: 1) type of biological samples; 2) severity of the criminal offense; 3) procedural status of the person (acquitted or convicted); 4) presence of previous convictions; 5) age. Moreover, scholars note that these criteria can be used to assess compliance with the principle of presumption of innocence [17].

Considering the conclusions already formed by scholars[17], it should be noted that in the practice of the ECHR, the approach has developed that the mere storage of biological samples cannot be equated with the expression of suspicion [18], and the assumption about a person's involvement in criminal offenses (referring to a tendency towards unlawful behavior) does not fall under the concept of "accusation" as defined in Art. 6 of the Convention [19].

At the same time, the storage of materials of individuals who: (a) were initially suspected of committing a minor crime or (b) had criminal proceedings closed or had a judgment of acquittal become final [18-21], leads to treating them as guilty [18]. On the other hand, the storage of materials of individuals convicted of committing crimes of a certain level of severity is necessary in a democratic society, and therefore does not violate the principle of the presumption of innocence [19, 20].

In its turn, national judicial practice sets its own trends in law enforcement. Unlike the ECHR, Ukrainian courts, when deciding on the storage of samples outside of criminal proceedings, are guided solely by the first criterion – the type of biological samples (in the following, only guilty verdicts are analyzed. It should be noted that when studying law enforcement practice, the authors did not find any acquittal verdicts in which the court decided to keep biological samples in the criminal proceedings. This trend is positive from the standpoint of observing the principles of the presumption of innocence and non-interference in private life). For example, in case No. 344/22140/19, the court, having found the person previously convicted of serious criminal offenses guilty (criminal law qualification: Part 1 of Art. 115, Part 3 of Art. 357, Part 1 of Art. 358, Part 3 of Art. 358, Part 4 of Art. 358, Part 2 of Art. 190 of the Criminal Code of Ukraine) ruled to destroy biological samples, specifically blood samples, buccal epithelium, nail clippings, and hand swabs [22]. It should be noted that this approach contradicts the Law of Ukraine "On the State Registration of Genomic Information," which provides for the storage of biolog-

ical material of convicted individuals until they have served their sentence (paragraph 2, part 1 of Art. 14 of the Law). A similar approach was applied in other cases, both for those previously convicted [23-25] and for those not previously convicted [26, 27], before the adoption of Law No. 2391-IX.

In contrast, fingerprint samples are stored after a conviction has been issued, both for individuals who have been previously convicted [28, 29] and for those who have not been convicted [30-32].

In scientific discourse, these trends are explained by the gradation of biological samples based on the degree of interference with the right to respect for private life, which has developed within the first criterion: (a) highest level – cellular material, as it contains information that not only allows identification of a person but also reveals details about their health and potential diseases, which goes beyond the needs of criminal investigations; (b) medium level – DNA profile, which, while including a more limited amount of private information than cellular material, still provides the possibility of revealing cellular connections or ethnic origin, also going beyond the scope of criminal investigations; (c) lowest level – fingerprint samples, which only allow for identification of a person and do not disclose any other confidential information about them [17].

In summary, the storage of biological material outside the scope of criminal proceedings may conflict with the principles of the presumption of innocence and the right to privacy if the material is stored and used to identify individuals who have committed a criminal offense after an acquittal, the closure of criminal proceedings, or the completion of the punishment by the person from whom the material was collected. On the other hand, the storage of biological material from individuals who have already been convicted and subsequently found guilty of committing serious or particularly serious criminal offenses (for the entire period of serving the sentence – until the conviction is expunged) is necessary in a democratic society and, therefore, largely justified.

It is noteworthy that general issues of medical confidentiality (including some criminal procedural aspects in individual studies) were studied by Daria I. Klepka, Iryna O. Krytska, Anna S. Sydorenko [33], Philip Rieder, Micheline Louis-Courvoisier, Philippe Huber [34], Kristin E. Schleiter [35], Keren Semyonov-Tal [36], D.O. Shynharov [9], T. Korcheva, O. Nevelska-Hordieieva, D. Voitenko [37]. The criminal-legal assessment of the protection of medical confidentiality is highlighted in the dissertation by L. Karpenko [38], and the scientific article by T. Mykhailychenko, O. Horpyniuk, and V. Rak [39]. The administrative-legal context of understanding medical confidentiality was addressed by I.V. Shatkovska [40]. The legal nature of medical confidentiality, as well as the balance between medical confidentiality and criminal justice, was studied by Polish scholars, including Burdziak, Konrad, Kowalewska-Łukuć, Magdalena [41], A. Kaminska-Nawrot, D. Bienkowska, J. Falecki, R. Depczynski, D. Czarnecki [42], A. Pilarska, A. Zimmermann, A. Zdun-Ryzewska [43], K. Michalak [44]. However, the scientific works demonstrate a lack of comprehensive understanding of the implemented convention standards regarding the fair balance between the objectives of criminal proceedings and the confidentiality of health information as part of the right to privacy. This article provides an overview of the main standards established by the case law of the ECHR regarding the protection of medical confidentiality in the course of criminal proceedings. However, this overview is not exhaustive, indicating the need for further research.

CONCLUSIONS

1. The right to the confidentiality of health information may be restricted in the course of criminal procedural activities, specifically in the following forms: a) obtaining information about health status through the interrogation of a medical professional as a witness or obtaining a court order for access to information that may constitute medical confidentiality; b) interaction between medical professionals and the media regarding the health status of patients who may be involved in criminal proceedings; c) storage of biological material outside of criminal proceedings.
2. Interference with the right to the confidentiality of health information as part of the right to respect for private and family life is justified if: a) the medical information affects the comprehensive, complete, and objective investigation of the circumstances of the case (for example, the qualification of a criminal offense); b) the medical information is requested within the framework of a criminal proceeding to fulfill its objectives and pertains to individuals who have acquired a procedural status in the criminal proceedings, rather than for preventive purposes; c) the pre-trial investigation body has used alternative methods of obtaining information about the health status before requesting a court order for access to medical records; d) the state ensures the confidentiality of the health information obtained within the framework of criminal proceedings; e) the dissemination of information about health status is provided by law.

3. The storage of biological material outside of criminal proceedings may conflict with the principles of the presumption of innocence and non-interference with private life if the biological material is stored and used for the identification of individuals who have committed a criminal offense after an acquittal, closure of the criminal case, or the completion of a sentence by the individual from whom the material was taken. However, the storage of biological material from individuals who have already been convicted and are again found guilty of committing serious or particularly serious criminal offenses (for the entire period of sentence – until the conviction is expunged) is necessary in a democratic society and, therefore, largely justified.

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CONFLICT OF INTEREST

The Authors declare no conflict of interest

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