RIGHT TO MEDICAL INFORMATION IN THE NATIONAL COURT PRACTICE AND IN THE JUDGEMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Preface

Ukraine belongs to the continental law system, where judicial precedent is not recognized as a source of law. As defines I. Ilchenko, precedent law in Ukraine, will probably never take the same place among the sources of law as it takes in the anglo-saxon legal family, but still it is not worth objecting to some of the precedent's law perspectives in the national legal system [2].

Societal development, change of normative mechanisms, courts institutional reorganizations, doctrinal modification change the role of a judicial precedent in a national legal system, which gives reasons to assert that judicial precedent becomes a non-typical (quasi-source of law) source of law, which can potentially transform into a source of Ukrainian law.

Legislative changes and institutional renovations in the judicial system were an important stage in the formation of this source of law. According to Article 38 of the Law of Ukraine "On Judicature and Judges' Status", Supreme Court of Ukraine is the highest judicial body in the system of courts of general jurisdiction, which among its other powers is entitled to review cases on the grounds of dissimilar application by the courts (court) of cassation of the same legal norm of material law to analogous relations as it is foreseen by the procedural law.

It is worth highlighting that according to Article 360-7 of the Civil Procedural Code of Ukraine, judgement of the Supreme Court of Ukraine, which was delivered as a result of considering the application as regards to reviewing the court decision on the grounds of dissimilar application by the court of cassation of the same legal norms of material law in the analogous relations, is binding for all subjects of state power, which apply

legal acts that comprise this legal norm in their activity and for all courts of Ukraine. Courts shall make their case-law be in conformity with the Supreme Court of Ukraine judgement.

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[2] Ільченко І. Деякі питання застосування Конвенції про захист прав людини і основоположних свобод та практики Європейського суду з прав людини (Ilchenko I. Certain Aspects of Application of the Convention for the protection of Human Rights and Fundamental Freedoms and Case-law of the European Court of Human Rights)/ [Електронний режим доступу] http://www.minjust.gov.ua/14103.

Another type of court decisions, which can be referred to quasi sources of law are the judgements of the Constitutional Court of Ukraine, judgements that have often generated scientific debates. It should be noted that judgements of the Constitutional Court of Ukraine have a binding force on the whole territory of Ukraine, are final and cannot be appealed against. Analysis of Articles 61 and 65 of the Law of Ukraine "On the Constitutional Court of Ukraine" gives reasons to assume that legal acts of the Constitutional Court of Ukraine are normatively binding for all legal relations participants. As defines the scholar in the sphere of constitutional law I.A. Ivanovs'ka, a research of peculiarities of the Constitutional Court of Ukraine acts enables to ascertain that these acts have legal nature and foresee legal regulation of the most important social relations, are designated for all subjects of legal relations or for a part of these subjects as well as can be applied for numerous times when regulating social relations [3].

This judicial institution is the only body which has the powers to interpret the Constitution of Ukraine. In the aspect of the above-mentioned, quite well inherent seem to be the words of the head of the Supreme Court of the USA Charles Hughes (1862 — 1948) that "Constitution of the USA — is what the Supreme Court will say about it [4].

Very specific role in the national legal system plays case-law of the European Court of Human Rights (hereinafter — ECtHR) and the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter — Convention), which application became most topical with the adoption of the Law of Ukraine "On Execution of the Judgements and Application of the Case-law of the European Court of Human Rights" of 23 February 2006. (hereinafter — the Law of 2006).

Article 2 of the Law of 2006 foresees that judgements of the ECtHR are binding and are to be executed by Ukraine according to Article 46 of the Convention. One of key articles of the Law of 2006 is Article 17, which foresees that national courts shall apply the Convention and case-law of the European Court as a source of law when hearing cases. Analysis of the definitions of the Law of 2006 affirms that case-law of the Court is a case-law of the European Court of Human Rights and European Commission of Human Rights; hence, this means that the case-law of the ECtHR which concerns other states than Ukraine, shall be applied by national courts when solving disputes.

Format of the European Convention and the mechanism owing to which the Convention is enforced — case-law of the European court, create peculiar legal circle i.e. the Convention cannot exist without its being interpreted by the European Court, and the European Court cannot function without the Convention[5].

Taking this legal circle into account let us analyze one of the most important rights in the sphere of health care — right to medical information, the

[3] Івановська А., Юридична природа актів Конституційного Суду України (Ivanovska A. Legal Nature of the Acts of Constitutional Court of Ukraine) // Університетські наукові записки. — 2005. — № 4 (16). — С. 42-50.

[4] Ільченко І. (I. Ilchenko), supra note 2.

[5] Ibidem.

realization of which is closely connected with other rights, in particular right to medical interference, right to refuse from medical interference, right to confidentiality of one's state of health.

Conflicts of laws, discrepancies of laws' application, problematic legal application issues raise the need to work out a scientific and practical way, directed at optimization of the whole range of problems. On the one hand this will simplify realization of the right to medical information and on the other hand, in case of violation of this right, this will favor an effective protection of human rights. In order to illustrate law-enforcement mechanisms we shall take use of not only court decisions, which can be considered as a quasi-source of law, but also other case-law examples, which explicitly highlight problems which an individual faces when exercising his rights.

Regulation of the Right to Medical Information under the Laws of Ukraine

Analyzing the right to medical information in the light of case-law either national or the one of the ECtHR it is important to elucidate the way this right is regulated by the laws, which will illustrate a range of issues, including those which raises the necessity of applying to courts.

In Ukraine, Convention has the same status as other legal acts and it is a part of national legislation of Ukraine according to Article 9 of the Constitution, which foresees the following:

> "International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. Conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine"

Article 8 of the Convention foresees the right to respect for private and family life, which ECtHR applies when trying cases connected with violation of the right to medical information.

A constitutional basis of this right is fixed in Articles 32 and 34 of the Constitution of Ukraine, which provides for the right to examine information about oneself that is not a state secret or other secret protected by the law, at the bodies of state power, bodies of local self-government, institutions and organisations.

Such possibility is regulated in detail in Article 285 of the Civil Code of Ukraine (hereinafter — Civil Code) and paragraph "e" of Article 6 and Article 39 of the Law of Ukraine "On Principles of Ukrainian Health Care Legislation" (hereinafter — Principles).

In particular Article 39 of the Principles foresees that:

> "Article 39 Responsibility to provide medical information
>
> A patient who has reached the age of majority is entitled to receive accurate and complete information about his/her health, including familiarization with relevant medical documentation regarding his/her health.
>
> Parents (adoptive parents), guardians, custodians have the right to obtain information about the state of health of the child or the ward.
>
> A health care employee shall provide a patient with information about his/her health, purpose of proposed examination and treatment, possible prognosis for the disease, including risks to life and health, in an accessible form.

> In case information about patient's disease can worsen his state of health or worsen state of health of persons enumerated in paragraph 2 of this Article, harm the process of treatment, medical staff can provide non-complete information about state of health of a patient, restrict a possibility to familiarize with certain medical records. In the case of death of a patient, members of his family or other persons authorized by them may be present when the causes of his/her death are examined and become acquainted with the conclusions about the causes of death and have the right against these conclusions in the court."

In the context of defining legal boundaries of the right to medical information one should not evade regulation of this right by other social regulator — bioethical norms, which are foreseen in the Code of Ethics of Ukrainian Doctor, which was adopted and signed during All-Ukrainian meeting of doctors' organizations and at the X meeting of All-Ukrainian Doctors' Association (27 September 2009) (hereinafter — Code of Ethics).

Subparagraph 3.7 of the Code of Ethics foresees that a patient has the right to exhaustive information about his health, but a patient can refuse from it or appoint a person, who should be informed about patient's state of health. Information can be concealed from a patient in cases when there are substantial reasons to consider that such information can cause serious harm to a patient. But in case a patient insists on providing him such information a doctor shall provide a patient with exhaustive information. In case of unfavourable prognosis for a patient a doctor should inform him about it delicately and carefully, by leaving a hope to continue the life and possibly a successful result.

Legal Application and Legal Realization Issues

I. As Regards to Conceptual and Categorical Apparatus

Article 39 of the Principles most exhaustively regulates the right to medical information, but, as we can observe, it foresees the right through the prism of a responsibility to provide such information, which is elucidated in the name of Article. It should be noted that when enumerating patients' rights in the Principles the lawmaker didn't follow the lawmaking unification, since, for example, Article 39-1 of the Principles, which guarantees the right to medical confidentiality has the title "Right to confidentiality of one's state of health". Notwithstanding the norms, which are fixed in Article 285 of the Civil Code and Article 39 of the Principles by their content are practically the same, Article of the Civil Code was defined through the right — "Right to information about ones state of health". Again there arises a question: what is the correlation between notions "medical information" and "information about the state of health"? In order to provide the answer to this question we should analyze part 3 of Article 39 of the Principles, which on the one hand foresees a responsibility of a medical professional to provide medical information and on the other hand — from this norm there evolves a definition of the notion "medical information". Hence, the text of this norm provides that information about the state of health is a composite element of medical information.

When carrying out a "normative section" of the right to medical information, of course one of the most important things is clarification of the defini-

tion "medical information". For the first time this term was defined in the judgement of the Constitutional Court of Ukraine in the case as regards to official interpreting of Articles 3, 23, 31, 47, 48 of the Law of Ukraine "On Information" and Article 12 of the Law of Ukraine "On Public Prosecution" (case of K.H. Ustymenko) of 30 October 1997 (hereinafter — judgement in the case of Ustymenko)

> "Medical information that is information about state of health of a person, history of his /her disease, aim of a proposed examinations and medical measures, prognosis of a possible development of disease including availability of a risk to life and health, by its legal regime belongs to confidential information, that is information with limited access. A doctor is obliged to provide such information at the request of a patient, members of his family or legal representatives completely and in accessible form".

Constitutional Court of Ukraine did not simply suggest a definition of the term and thus played a role of a "quasi-lawmaker", but also precisely established the regime of information and a range of subjects, who are entitled to medical information. But it should be noted at once that the interpretation was conducted basing on the wording of Principles which existed at the time the judgement was passed. Of course it doesn't impact the validity of this judgement. As it is defined in the doctrine of the constitutional law legal standpoints of the Constitutional Court of Ukraine are fixed in the acts on official interpretation and in case legal acts were abolished these standpoints can become a legal basis for adoption of a new act instead of the old one and need to be similarly interpreted, hence the importance of the Constitutional Court of Ukraine interpretations may be preserved [(6)]. To prove this statement it should be highlighted that a new wording of the Principles, which is valid today, absorbed the legal standpoint of the Constitutional Court of Ukraine in the judgement of Ustymenko case.

II. As Regards to Access to Medical Information and Getting Familiar with Medical Records.

When realizing the right of a patient to medical information, which is foreseen by Article 285 and Article 39 of the Principles one of the most complicated issues is the aspect of getting familiar with certain medical records, which concern patient's health. Normative regulation of this issue through the prism of a phrase "get familiar" does not explicitly foresee the right to make copies of primary medical records, hence there are numerous difficulties, which patients face when realizing this right.

Often applying to health care facilities with requests to receive copies of necessary medical records does not bring successful results and patients or their legal representatives or their family members, who get familiar with medical information about the person who is under guardianship or about a deceased family member, under the norms of the legislation are ineffectual. Hence the number of cases as regards to protection of this right in courts increased.

In the judgement in the case of Ustymenko Constitutional Court of Ukraine stated that in cases of refusal to provide or in cases of deliberate concealing information from a patient, members of

[(6)] Івановська A. (Ivanovska A.), supra note 3

his family or legal representatives, such actions or omissions to act can be appealed against either to the court, health care facility or state body in the sphere of healthcare at person's choice.

One of the interesting decisions is the decision of Pershotravnevyi district court of the town C. (2012). A plaintiff applied to the court with a claim against the respondent as regards to providing copies of medical records. In her claim plaintiff referred to the fact that on September 9, 2011 she applied to the chief doctor of the Regional clinical hospital as regards to provision of copies of medical records of her husband X, who stayed on in-patient treatment in that health care facility in the resuscitation department from 27 June 2011 till 28 July 2011. Later on, plaintiff received a reply, where it was stated that "primary medical records should not be given out to private persons". The plaintiff indicated that she didn't ask to provide her "primary records", as it was stated in the answer letter to her application, but on the contrary she asked for a copy of her husband medical history. Besides this, plaintiff also applied to regional communal institution "Hospital of Emergency Medical Care" as regards to providing her copies of medical history of her husband X., who was admitted to the urological department on the 20 of June, 2011 and was discharged from the resuscitation ward on the 27 of June, 2011. Similarly in this case plaintiff received the response to her application, by which she was refused of receiving copies of her husband medical history.

Having tried the case, Pershotravnevyi district court of the town of C. satisfied the complaint and obliged Regional clinical hospital and Hospital of Emergency Medical Care to provide copies of medical history of X. completely and found the actions of the respondents to be unlawful. When passing a decision the court basically relied on Article 285 of the Civil Code of Ukraine, which foresees the right of the deceased person family members to be present and observe the process of examining reasons for death of a person and get familiar with the conclusion as regards to the persons death. In its decision the court also referred to the standpoint of the Constitutional Court of Ukraine, fixed in its judgement in Ustymenko case of 30 October 1997, where it goes about doctor's obligation to provide medical information completely and in accessible manner upon patient's request or request of patient family members.

Very important is the standpoint of the ECtHR, which was expressed in judgement in case of K.H. and others v. Slovakia (2009) [7], when the ECtHR noted that the complaint in issue concerned the exercise by the applicants of their right of effective access to information concerning their health and reproductive status. Such information under the Court's point of view was linked to the applicants' private and family lives within the meaning of Article 8. In this case the ECtHR noted the following:

> "Bearing in mind that the exercise of the right under Article 8 to respect for one's private and family life must be practical and effective, the Court takes the view that such positive obligations should extend, in particular in cases like the present one where personal data are concerned, to the making available to the data subject of copies of his or her data files".

[7] *K.H. and Others v. Slovakia*, no. 32881/04, ECHR, 2009.

> The applicants in that case obtained judicial orders permitting them to consult their medical records in their entirety, but they were not allowed to make copies of them under the Health Care Act 1994.
>
> Although it was not for the applicants to justify the requests for copies of their own medical files, the Court would nevertheless underline that the applicants considered that the possibility of obtaining exclusively handwritten excerpts of the medical files did not provide them with effective access to the relevant documents concerning their health. The original records, which could not be reproduced manually, contained information which the applicants considered important from the point of view of their moral and physical integrity as they suspected that they had been subjected to an intervention affecting their reproductive status.
>
> The Court also observes that the applicants considered it necessary to have all the documentation in the form of photocopies so that an independent expert, possibly abroad, could examine them, and also in order to safeguard against the possible inadvertent destruction of the originals are of relevance.
>
> There has therefore been a failure to fulfill the positive obligation to ensure effective respect for the applicants' private and family lives in breach of Article 8 of the Convention".

Of course such legal standpoint of the ECtHR, which is a source of law for Ukraine, definitely resolved the problem as regards to correct understanding of competent state bodies' obligation to provide for effective realization of the right to information in the aspect of receiving copies of medical records.

Within the above-mentioned legal standpoints of judicial instances it is worth making several scientific and practical comments as regards to these issues.

1. Right to medical information, including the right to get familiar with medical records belongs to an adult patient. Before the age of 18 such right should be vested with his/her parents or other parents, who are acting in his/her interests. To realize ones right to get familiar with medical records a person should apply legal guarantees, which are fixed in the Law of Ukraine "On Personal Data Protection" in addition to provisions, foreseen in part 1 of Article 285 of the Civil code, part 1 of Article 39 of the Principles. According to Article 8 of the Law of Ukraine "On Personal Data Protection", a subject of personal data (i.e. a patient in our case) has the right to access his personal data. Personal non-property rights to personal data, which are enjoyed by every person, are inalienable and inviolable.
2. To receive personal data, in particular, copies of medical records, it is necessary to prepare a request for access to personal data, which should be then submitted to the owner of personal data (or administrator, who acts according to the contract, which was concluded with the owner in written form), in particular health care facilities notwithstanding their form of property, according to Article 2, part 2 of Article 4 of the Law on Ukraine "On Personal Data Protection".
3. Request for access to personal data shall meet the established requirements as regards to its content. A patient should indicate:
   1) Full name, place of residence (abiding-place) and details of the document proving his identity (for instance passport);

2) Information on the basis of personal data in respect of which the request is submitted, or information about the owner or manager of personal data (the patient should clearly indicate the health care facility, where his personal data are preserved, place of registration of the legal entity, etc.)
3) A list of personal data, which are requested (it is worth clearly indicating which copy of medical records the patient needs, including for example, the number of medical card, since the patient at discharge gets discharging epicrisis, where this number is indicated);
4) The purpose and/or the legal basis for the request (a person should indicate not only the basic legal norms governing access to personal data, but also necessary legal acts, which fix the right to medical information).

4. It is worth paying attention to the decision, passed by the Pershotravnevyi district court of the town of C. Which when hearing the case applied the Law of Ukraine "On Access to Public Information". Basically the dispute had been resolved correctly, but on the same time a wrong legal basis was chosen, since in that case the court should apply provisions of the Law of Ukraine "On Personal Data Protection", which had been in force at the material time of the legal relations.
5. A request of a patient should be satisfied within the time period of 30 calendar days, starting from the day such request was received. An access to personal data can be postponed to a maximum of 45 calendar days, about what an applicant should be informed.
6. A refusal in access to personal data should be conducted in written from, where reasons for such refusal must be indicated. A refusal can be permitted in case the access to such data is forbidden by the law.
7. It should be noted that under part 1 of Article 19 of the Law of Ukraine "On Personal Data Protection" access of patients' personal data is free of charge.
8. It is worth paying attention to one more mechanism of receiving access to personal data, which is fulfilled owing to other authorized persons, for instance, lawyers, which happens quite seldom in practice. A lawyer has a specific legal instrument — lawyer's request. Order of lawyer's request execution is regulated by Article 24 of the Law of Ukraine "On Advocacy and Advocate's Activity". In this aspect it is worth pointing out several accents:
   8.1. One should keep in mind that copies of two documents verified by the lawyer shall be added to the lawyer's request a) certificate for advocate's activity; b) warrant or a proxy granted by the body of state power, authorized to provide free legal aid.
   8.2. A reply to lawyer's request shall be provided not later than 5 days starting such request was received. A term of providing reply to lawyer's request can be prolonged for not more than 20 workdays

with taking into account information that is requested (for instance, preparation of a big amount of information).

8.3. If replying to lawyer's request foresees preparation of copies of documents amounting more than ten pages, a lawyer shall compensate for actual expenses for making copies and printing.

8.4. A lawyer is entitled to receive upon his request information or copies of documents with the exception of information with limited access and copies of documents, which include information with limited access. According to Article 21 of the Law of Ukraine "On Information" there are three types of information with limited access, i.e. confidential, secret and official (service) information. Medical information belongs to confidential. Taking into account the above mentioned we can sum up that a lawyer can only demand information about his client, with whom he concluded a legal aid agreement or who authorized a lawyer to represent his interests by granting a proxy. In this case a client should grant his lawyer such a power — receive access to personal data.

First of all it is worth highlighting that right to medical information, within the context of protection from illegal disclosure, is closely connected with the right to confidentiality of a state of health, which is the guarantee of the first right.

Hence, it is relevantly to figure out national laws, which foresee one more patient's right — right to confidentiality of a state of health, in particular Article 286 of Civil Code and Article 39-1 of the Principles:

> "A patient has the right to confidentiality regarding one's state of health, the fact of seeking medical assistance, diagnosis and the information obtained during one's medical examination.
>
> One may not demand and provide information about the diagnosis and treatment of an individual at his/her place of work or study".

One more legal norm in this context is foreseen in Article 40 of the Principles, which is called "Medical Confidentiality", which explicitly provides for a responsibility of medical professionals and other persons, who in the course of fulfilling their professional or service duties got to know about a disease, medical examination, medical survey and its results, intimate and family sides of a person, not to disclose such information, with the exception of cases foreseen by the law.

In the judgement in Ustymenko case Constitutional Court of Ukraine defined a rule of applying information about person's state of health: medical secret — information about the patient and medical information is information for the patient. As we can see the preposition changes essence of a phrase. With the view of the above mentioned, in order to point out joint legal application segments in each of these rights we suggest one more rule: medical secret = medical information + information of non-medical character. Hence, there is no doubt as regards to the fact that the grounds for research as

well as intertwining of mechanisms of these rights realization and protection are common.

National court practice is full of examples, where on the one hand a subject of an application thinks that he has the right to medical information and demands such information lawfully, while on the other hand — such provision of information can bear unlawful character and so violate the right of other person to confidentiality of his/her state of health. Lack of knowledge of the peculiarities of these rights realization raises numerous problems and court cases in practice.

For instance, in June 2012 X. applied to the court with a lawsuit against central district hospital A. and asked the court to find actions of the respondent hospital illegal and oblige the respondent to execute certain actions. X. substantiated he claims by the following facts: when she stayed on in-patient treatment in the central district hospital A. on the 19th of February 2012 C. committed against X. a transgression. At lawyer's request, who represented interests of X. as regards to the period of C's staying in the hospital and reasons for staying in the hospital, her diagnosis and her state of health as well as reasons for terminating treatment, respondent hospital provided a response indicating that C. was discharged from hospital for violating rules of the hospital. Referring to the fact that X. didn't receive full response, X. asked the court to find actions of the Central district hospital illegal and oblige a hospital to provide her full response at her lawyer's request as regards to treatment of C. By the decision of B. district court of 30 October 2012 X. was refused in satisfying her lawsuit.

By resolution of the court of appeal of S. region (2012) an appeal of X. was rejected and decision of the B. district court was left without changes.

Of course in this case the lawyer exceeded his powers and by his request wanted to obtain information about the state of health of a person, who wasn't his client, which is illegal. Information about C. is confidential, and hence should not be disclosed to a lawyer. We cannot exclude the fact that the lawyer needed such information in order to fulfill his professional duties, but he would be able to receive such information at the court's order, by submitting a petition, when the case was already tried by the court.

Another example is: D. filed a lawsuit against central district hospital No. 1. In order to prove his claims, plaintiff indicated that the respondent upon lawyer of C. request disclosed information about D's applying to the first-aid center on 2 March, 2002 and D's diagnosis without D's prior consent. This information was used against D. and caused him material and moral damages. D. asked the court to find actions of the central district hospital No. 1 as regards to providing lawyer of C with information about D's state of health illegal and oblige a respondent hospital compensate D 235,5 hryvnias for material damages and 10000 hryvnias for moral damages. By decision of the F. district court of the city of H of 21 March 2011a lawsuit was left without satisfaction.

Appellate court of R. region (2011) after hearing the appeal of D. repealed a first instance court decision in part where the first instance court refused finding actions of the respondent hospital illegal and thus in this part, appellate court satisfied claims of

a D. and found actions of the respondent hospital illegal.

When passing its decision the first instance court referred to the norms of the Law of Ukraine "On Advocacy" of 12 December 1992 (was current at the material rime of a dispute), in particular Article 6 of this law, which provided for the right of a lawyer to collect data about facts, which can be used as evidence in civil, commercial and criminal cases when carrying our his duties of providing legal aid. Appellate court did not agree with such position of the first instance court and referred to Article 39-1 of the Law of Ukraine "On Principles of Ukrainian Health Care Legislation", which foresees the right of patient to confidentiality of his state of health, the fact of seeking medical assistance, diagnosis and the information obtained during one's medical examination. Appellate court put into the basis of his decision part 2 of Article 11 of the Law of Ukraine "On information", which forbids collecting, storing, applying and disseminating confidential information about a person, except other is foreseen by the law.

It is worth noting that Appellate court of R, region correctly defined a conflict between the right to medical information and right to medical confidentiality, when satisfying claims of D. since in this case the lawyer was not entitled to receive information about D's state of health, as he wasn't empowered for representing interests of D. In this case a right to medical confidentiality of one's state of health was violated and the court of appeal in its turn provided for protection of this right.

In this context it is worth pointing out rich case-law of the ECtHR. In its judgement in case of M.S. v. Sweden (1997) [8] ECtHR highlighted the following:

> "Protection of personal data, particularly 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. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention".

In its judgement in case Z v. Finland (1997) [9] the ECtHR noted the following:

> "Court will take into account 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. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.
>
> Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community.

[8] *M. S. v. Sweden*, no. 74/1996/693/885, ECHR, 1997.
[9] *Z. v. Finland,* no. 22009/93, ECHR, 1997.

> The domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.
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> The above considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection. The disclosure of such data may dramatically affect his or her private and family life, as well as social and employment situation, by exposing him or her to opprobrium and the risk of ostracism. For this reason it may also discourage persons from seeking diagnosis or treatment and thus undermine any preventive efforts by the community to contain the pandemic. The interests in protecting the confidentiality of such information will therefore weigh heavily in the balance in determining whether the interference was proportionate to the legitimate aim pursued. Such interference cannot be compatible with Article 8 of the Convention unless it is justified by an overriding requirement in the public interest.
>
> In view of the highly intimate and sensitive nature of information concerning a person's HIV status, any State measures compelling communication or disclosure of such information without the consent of the patient call for the most careful scrutiny on the part of the Court, as do the safeguards designed to secure an effective protection".

Quite positive seem to be guarantees, foreseen by the national laws, in particular Law of Ukraine "On Resistance to Diseases Caused by Human Immunodeficiency Virus (HIV), and Legal and Social Protection of People Living with HIV" for people, who are living with HIV, in particular those, which are connected with protection of their medical information. Part 1 of Article 13 of this Law provides that all people living with HIV enjoy the right to unimpeded getting familiar with information about one's state of health, which is stored in health care facilities.

In the meaning of the abovementioned Law, medical information comprises such data: a) information about the results of testing in order to detect HIV; b) whether a person is or is not infected with HIV. Medical professionals are obliged to take all necessary steps to secure proper storage of confidential information about persons, who are living with HIV and protection of such information from being disclosed. The laws provide for explicit range of subjects whom a medical professional can disclose such data lawfully:

1) A person, who underwent testing;
2) As regards to patients, who are under 14 — their parents or other legal representatives of such person;
3) Other medical professionals and health care facilities — only if such disclosure is connected with treatment of such person and upon an informed consent of this person provided in written form.
4) Other persons — only under the court decisions and in cases foreseen by the law.

Not less important is a legal standpoint of the ECtHR, which was elucidated in its judgement in the case I v. Finland (2008) [(10)].

> "Between 1989 and 1994 the applicant worked on fixed-term contracts as a nurse in the polyclinic for eye diseases in a public hospital. From 1987 she paid regular visits to the polyclinic for infectious diseases of the same hospital, having been diagnosed as HIV-positive.

[(10)] *I. v. Finland,* no. 20511/03, ECHR, 2008.

Early in 1992 the applicant began to suspect that her colleagues were aware of her illness. At that time hospital staff had free access to the patient register which contained information on patients' diagnoses and treating doctors. Having confided her suspicions to her doctor in summer 1992, the hospital's register was amended so that henceforth only the treating clinic's personnel had access to its patients' records.

"The Court observes that it has not been contended before it that there was any deliberate unauthorized disclosure of the applicant's medical data such as to constitute an interference with her right to respect for her private life. Nor has the applicant challenged the fact of compilation and storage of her medical data. She complains rather that there was a failure on the part of the hospital to guarantee the security of her data against unauthorized access, or, in Convention terms, a breach of the State's positive obligation to secure respect for her private life by means of a system of data protection rules and safeguards.

The protection of personal data, in particular 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. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The above considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection, given the sensitive issues surrounding this disease. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.

The Government has not explained why the guarantees provided by the domestic law were not observed in the instant hospital. The Court notes that it was only in 1992, following the applicant's suspicions about information leak, that only the treating clinic's personnel had access to her medical records. The Court also observes that it was only after the applicant's complaint to the County Administrative Board that a retrospective control of data access was established. Consequently, the applicant's argument that her medical data were not adequately secured against unauthorized access at the material time must be upheld.

The Court notes that the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. What is required in this connection is practical and effective protection to exclude any possibility of unauthorized access occurring in the first place. Such protection was not given here. There has therefore been a violation of Article 8 of the Convention".

National health care system is being also transferred to electronic database of personal data of patients starting from the pilot region of the state (city of Kyiv, Dnipropetrovs and Vinniza regions), where this system is being experimentally reformed. According to the resolution of the Cabinet of Ministers of Ukraine "On Approving a Regulation on Electronic Register of Patients" of 6 Jun, 2012 No. 546, register is a unitary information system of storing, updating, using and circulating by way of disseminating, realization and transferring as well as destroying data about a natural person and medical care, which was provided to him/her. Owners of the register (health care facilities) if there exists a patient's consent to processing of his/her personal data, include information to the register, process this information and provide for protection of personal data, which are included to the register.

The Law of Ukraine "On Personal data Protection" implemented an important application construction — consent to processing of personal data. In the sphere of health care there had been devel-

oped a typical form "Informed Voluntary Consent of a Patient to Processing of Personal Data" which was normatively fixed in two by-law acts, in particular in Order of the Ministry of Health of Ukraine "On Approving Forms of Primary Registration Records and Instructions of their Filling in, which Are Used in Health Care Facilities Notwithstanding their Form of Property and Subordination" of 14 February 2012 No. 110 and in Order of the Ministry of Health "On Approving Forms of Primary Registration Records and Instructions of their Filling in, which Are Used in Health Care Facilities that Provide Out-patient and Policlinic and In-patient Treatment to the Population Notwithstanding their Form of Property and Subordination" of 25 May, 2013 No. 435. Each of these forms is used together with normatively fixed medical records.

66 Issue of getting familiar with relevant medical records, which are a source of medical information, is full of practical questions and raises a necessity for legal regulation through the prism of securing the right of a patient not to get familiar, but to make copies of relevant medical records, which concern his/her health.

III. As Regards to Peculiarities of Medical Information

Analysis of current legislation enables to enumerate peculiarities of medical information, these are: a) accessibility; b) accuracy; c) completeness; d) timeliness [(11)].

Accessible form of information has two aspects. External, which lies in patient's or his legal representative's or any person, authorized by them (for instance, lawyer) access to such information, that is by filing a request and as a consequence receiving such information. Internal — providing information in an understandable for a patient or other competent subject manner.

Accuracy of information means providing information, contained in medical records.

Completeness of information shall be considered in two variants: the first one lies in providing information according to a request, which was formulated in a procedural document of a competent subject, request of a patient for access to personal data, request of a legal representative, lawyer's request. A second one lies in doctor's providing information before carrying out medical interference, hospitalization etc, in amount caused by a specific situation when receiving informed, and voluntary consent of a patient to diagnostics procedure, treatment, carrying out surgical operation and anaesthetize. A form of such consent was normatively stipulated in order of the Ministry of Health of Ukraine "On Approving Forms of Primary Registration Records and Instructions of their Filling in, which Are Used in Health Care Facilities Notwithstanding their Form of Property and Subordination" of 14 February 2012 No. 110

Timeliness of information manifests itself in two forms of exercising the responsibility of providing medical information, in particular: a) providing information requested within a timeframe set by the law; b) providing medical information prior to the moment medical care is provided.

[(11)] Byrne I., Ezer T., Cohen J., Overall J., Senyuta I. Human Rights in Patient Care: A Practitioner Guide/ Under scientific editing of Senyuta I. — Lviv: LOBF Publishing House «Medicine and Law», 2012. — 497 p. — P. 381.

In the judgement in case R.R. v. Poland (2011)[12] the ECtHR defined:

> "The right of access to such information falling within the ambit of the notion of private life can be said to comprise, in the Court's view a right to obtain available information on one's condition. The significance of timely access to information concerning one's condition applies with particular force to situations where rapid developments in the individual's condition occur and his or her capacity to take relevant decisions is thereby reduced.
>
> In the same vein, in the context of pregnancy, the effective access to relevant information on the mother's and foetus' health, where legislation allows for abortion in certain situations, is directly relevant for the exercise of personal autonomy. On the 18th week of the applicant's pregnancy there was carried out an ultrasound scan. Later a physician estimated that it could not be ruled out that the foetus was affected with some malformation and informed the applicant thereof. The applicant told him that she wished to have an abortion if the suspicion proved true.
>
> In the present case the essential problem was precisely that of access to medical procedures, enabling the applicant to acquire full information about the fetus' health.
>
> The Court observes that the nature of the issues involved in a woman's decision to terminate a pregnancy is such that the time factor is of critical importance. The Court is of the view that there was ample time between week 18 of the pregnancy, when the suspicions first arose, and week 22, the stage which is regarded as time-limit for legal abortion when genetic testing could have been performed.
>
> As a result, the applicant was unable to obtain a diagnosis of the fetus' condition, established with the requisite certainty, by genetic tests within the time-limit for abortion to remain a lawful option for her.
>
> The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms which would have enabled the applicant to seek access to a diagnostic service, decisive for the possibility of exercising her right to take an informed decision as to whether to seek an abortion or not.
>
> The Court concludes that the authorities failed to comply with their positive obligations to secure to the applicant effective respect for her private life and that there has therefore been a breach of Article 8 of the Convention".

It seems that every peculiarity of medical information can raise a necessity for the protection of a person's rights both by national and international instruments.

Every peculiarity serves for better understanding of the amount of the right to medical information as well as its legal application features and if it is necessary its protection.

Concluding Remarks

When researching different elements of the right's to medical information structure we can figure out several remarks, which will favor optimization of legal realization and legal application:

1. It is worth changing the formulation of ability in the legislation from the right to information about one's state of health into right to medical information, which is more correct within the frameworks of correlation between notions, since medical information — is the entirety and respectively, information about a state of one's health is its integral part.
2. Wording of Article 39 of the Principles should be changed: name of Article should

[12] *R.R. v. Poland,* no. 27617/04, ECHR, 2011.

be elucidated through the prism of a right instead of an obligation as it is today, which in its turn will provide for normative uniformity as well.

3. On the level of Civil Code and Principles it is necessary to guarantee the right to receive copies of medical records, which concern state of health of a patient, instead of right to get familiar with medical records.
4. Legal standpoints of the ECtHR and other courts, legal acts of which are considered as quasi-sources of law shall be researched in order to effectively secure the right of a person by all court instances and in order to improve national laws of Ukraine.
5. Doctrinal and practical research was carried out in order to focus the attention on the necessity of uniform and correct application of material norms which regulate relations, connected with realization of the right to medical information by the courts.
6. It is the court practice that explicitly "uncovers" problems, which shall be resolved in a complex way both legislatively and by way of effective judicial and other law-enforcement procedures.