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CRIMINAL LAW ANALYSIS OF THE PECULIARITIES OF ILLEGAL EXPERIMENTATION ON HUMANS IN LIGHT OF INTERNATIONAL EXPERIENCE

Abstract. Purpose. The purpose of the article is to further standardize the objective and subjective elements of the corpus delicti under Article 142 of the Criminal Code of Ukraine, taking into account the achievements of contemporary criminal law doctrine. **Results.** To determine the elements of the corpus delicti provided for in Article 142 of the Criminal Code of Ukraine (hereinafter – CC of Ukraine) “Illegal Experimentation on a Human Being,” the author conducted a comprehensive comparative legal study on the subject matter of the research. It has been established that the basis for drafting numerous state and professional codes regulating the determination of norms governing criminal liability for illegal experimentation on a human being in countries of the Romano-Germanic legal system was the 1947 Nuremberg Code, a codification of rules for conducting experiments on humans that contains ten fundamental principles of medical, biological, psychological, or other research. The continuation of the Nuremberg Code is the 1964 Declaration of Helsinki, which, in turn, serves as a system of ethical principles for the medical community in matters of human experimentation. Such documents are of a recommendatory nature and stipulate that, in the course of biomedical research involving human subjects, legal and ethical norms must be observed in accordance with the legislation of the specific country where such research is conducted. **Conclusions.** It is emphasized that legal (criminal) liability for illegal medical, biological, psychological, or other experimentation on a human being is established not only by national legislation but also by the laws of other European countries of the Romano-Germanic legal system, as it constitutes the most dangerous violation of bioethics. This is confirmed by a comparative analysis of the criminal legislation of Austria, Estonia, Poland, France, and Switzerland, which has shown that the regulation of research involving human subjects is based on international legal instruments of both general and specialized nature. At the same time, research into criminally unlawful acts in the fields of medical genetics, transplantation, and reproduction makes it possible to improve national legislative regulation and judicial practice regarding illegal human experimentation.

Key words: experimentation, human being, criminally unlawful act, criminal offense, corpus delicti, qualifying elements, moral and ethical aspects, international experience.

1. Introduction

With the entry into force of the Criminal Code of Ukraine in 2001, a provision establishing liability for illegal experimentation on a human being (Article 142 of the Criminal Code of Ukraine) was introduced. In other words, the incorporation of such a provision into the Criminal Code of Ukraine meets the needs of both Ukrainian society and the international community. This provision is the result of more than fifty years of the civilized world's struggle against unlawful human experimentation, and the development of this approach, particularly in consolidating the fundamental principles of such activity, is reflected in numerous international legal instruments. Among them, special mention should be made of the 1947 Nuremberg Code and the Declaration of Helsinki of the World Medical Association “Ethi-

cal Principles for Medical Research Involving Human Subjects” of 1964, as revised in 2008. These documents define the list of key principles, as well as the moral, ethical, and legal concepts governing research involving human subjects, having influenced the establishment of criminal liability for such unlawful conduct in the countries of the Romano-Germanic legal system.

However, as judicial practice demonstrates, Article 142 of the Criminal Code of Ukraine has, in fact, never been applied by domestic courts, which indicates that the latency of illegal human experimentation remains extremely high. For this reason, the study of the legal elements (corpus delicti) of such a criminal offense acquires particular importance.

It should be emphasized that the issue of conducting a systematic analysis of illegal

experimentation on a human being in Ukraine has long ceased to be the subject of specialized research. At the same time, various aspects of this matter have been examined by a significant number of Ukrainian scholars, among whom the following should be noted: O. Horokhovska, S. Hrynychak, V. Yehorova, I. Kritsak, T. Lutsnyi, O. Panchuk, O. Pasieka, O. Sapronov, I. Sydoruk, M. Syploki, M. Khavroniuk, T. Khar, A. Shalia, Yu. Shopina, among others. Nevertheless, comparative legal studies of criminal liability for illegal experimentation on a human being are absent, which indicates the necessity of a detailed examination of this issue.

The purpose of this article is to further standardize the objective and subjective elements of the corpus delicti under Article 142 of the Criminal Code of Ukraine, taking into account the achievements of modern criminal law doctrine.

2. Development of International Regulation on Countering Illegal Experimentation on Humans and Its Influence on Ukrainian Legislation

The Nuremberg Code contains ten fundamental principles relating to medical, biological, psychological, and other experimentation on humans, namely: *voluntary consent of the individual as an absolutely essential condition for conducting any research on them; experiments must yield results for the good of society that cannot be obtained by other methods; experiments on animals must precede those on humans; avoidance of all unnecessary physical and mental suffering; experiments must not be conducted where there is a prior reason to believe that death or disabling injury will occur; the degree of risk taken by the subject must never exceed the humanitarian importance of the problem; proper preparations must be made to protect the subject against even remote possibilities of injury, disability, or death; experiments must be conducted only by scientifically qualified persons; the subject must be at liberty to end the experiment at any stage; the scientist in charge must be prepared to terminate the experiment at any stage if continuation is likely to result in injury, disability, or death to the subject* (Protection of Research Participants, 2010).

It should be noted that the continuation of the trend set by the Nuremberg Doctors' Trial in 1947 was the development and adoption in 1964 of the Declaration of Helsinki, which establishes ethical principles for the medical community regarding human experimentation. Since its adoption, the Declaration of Helsinki has undergone eight revisions, the most recent of which was adopted in 2000 (Declaration of Helsinki of the World Medical Association "Ethical Principles of Medical

Research Involving Human Subjects": Declaration of the World Medical Association, 1964). Although the above-mentioned international legal acts provide for criminal, civil, and ethical liability arising under the law, these documents are recommendatory in nature and stipulate that, in conducting biomedical research involving human subjects, legal and ethical norms are regulated by the legislation of the specific country where the research takes place.

Relevant criminal provisions are contained in the criminal legislation of Ukraine and certain European countries. In particular, the Criminal Code of Ukraine contains Article 142 "Illegal Experimentation on a Human Being" in Section II of the Special Part "Criminal Offenses Against Life and Health of a Person," which establishes liability for "illegal medical, biological, psychological, or other experimentation on a human being, if such experimentation created a danger to the person's life or health" (Criminal Code of Ukraine, 2001).

Given that the disposition of Article 142 of the Criminal Code of Ukraine is blanket in nature, it is necessary to refer to other normative legal acts that define the procedure for conducting experiments on humans. Thus, according to Article 45 of the Fundamental Legislation of Ukraine on Health Care, the use of medical and biological experiments on humans is permitted for socially beneficial purposes. However, this is allowed only when scientifically justified, when the anticipated success outweighs the risk of serious consequences for health or life, when the experiment is public, when the adult, legally capable person participating in the experiment is fully informed and freely agrees to its conduct, and, if necessary, preserves medical confidentiality.

As for restrictions regarding certain categories of persons on whom research may be conducted, experimental studies on patients, prisoners of war, and detainees are prohibited, as are therapeutic experiments on persons with diseases not directly related to the objective of the study.

Accordingly, the primary direct object of the criminal offense is the health and life of the individual, and the additional mandatory object is the established procedure for conducting experimentation on humans.

Regarding the objective element of the corpus delicti, it is material in nature and is expressed in the following acts:

1. *socially dangerous act* – illegal conduct of medical and biological experiments (e.g., research on the biological capabilities of the human body in extreme conditions, under the influence of gravity, high temperatures, or oxygen deficiency), psychological experiments

(e.g., research on the psychophysiological capabilities of the human brain under hypnosis, in the context of memorizing large volumes of information), or other experiments (any scientific research) on a human being;

2. *socially dangerous consequences* – creation of a danger to the life or health of a person;

3. *causal link* between the socially dangerous act and the socially dangerous consequences.

The subjective element is characterized by direct intent with respect to the act and negligence with respect to the consequences (Part 1 of Article 142 of the Criminal Code of Ukraine) and prolonged health disorder of the victim (Part 2 of Article 142 of the Criminal Code of Ukraine).

The subject of this criminal offense is general (a natural, sane person who has reached the age of 16).

The qualifying elements of this criminal offense (Part 2 of Article 142 of the Criminal Code of Ukraine) provide for liability for illegal medical, biological, psychological, or other experimentation posing a danger to life or health, if such experimentation has any of the following features:

1. conducted on a minor;
2. conducted on two or more persons;
3. carried out by coercion;
4. carried out by deception;
5. resulting in prolonged health disorder of the victim.

Minors include both children under the age of 14 and those aged 14 to 18 (Article 3 of the Criminal Procedure Code of Ukraine). The feature “two or more persons” refers to the minimum number of victims harmed as a result of the criminal offense. If the number of victims is two or more, the perpetrator’s act is classified under Part 2 of Article 142 of the Criminal Code; however, this circumstance does not change the legal classification but is taken into account by the court when imposing criminal liability and punishment.

The qualifying element “by coercion or deception” is, at present, scarcely elaborated upon in the Criminal Code of Ukraine. At the same time, Article 40 of the Criminal Code of Ukraine specifies that coercion may be physical or psychological, resulting in a person being unable to control their conduct. Deception is understood as the communication of false information or the concealment of information that should have been disclosed. Furthermore, the *Rules for Forensic Medical Determination of the Degree of Severity of Bodily Injuries* (Section 2.2.2) define “prolonged health disorder” as a health impairment lasting more than three weeks (over 21 days).

It is worth noting that a criminal offense of this type is considered complete from the moment a real threat to a person’s life or health is created.

As for foreign legislation on this matter, it should be noted that the principal states of the Romano-Germanic legal system contain relevant provisions in their criminal codes. For example, Section III “On Endangering a Person” in Book II of the Criminal Code of France “On Crimes and Offenses Against Persons” includes a special Subsection IV “On Conducting Experiments on Humans,” which establishes criminal liability for unlawful biomedical research on a human being, i.e., “conducting and organizing biomedical research on a person without obtaining the voluntary, informed, and explicit consent of the person, their parents, or guardian, in cases provided for by the Public Health Code.” The Criminal Code of France also contains a specific provision that the same penalties apply if biomedical research is conducted after previously granted consent has been withdrawn. However, these provisions “do not apply to research on a person’s genetic characteristics or identification through genetic fingerprinting carried out for scientific purposes” (Menchynskyi, 2017). An interesting aspect of this offense is the possibility of holding a legal entity criminally liable as a subject of the offense.

In the section of Estonian criminal legislation entitled “Offenses Against Persons,” there is an article on unlawful research on a person (Article 124-5 of the Criminal Code of Estonia) (Criminal (Penitentiary) Code of the Republic of Estonia, 2005), which defines it as the conduct of medical or scientific research on a person who has not given valid consent. Under the terminology of the Criminal Code of Estonia, this offense is classified as a second-degree crime (Criminal (Penitentiary) Code of the Republic of Estonia, 2005).

3. Specific Features of the Unlawful Conduct of Experiments on Humans under the Legislation of Austria, Switzerland, and Poland

An interesting example is provided by Austrian criminal law, which establishes liability for unauthorized medical treatment (§ 110 of the Austrian Criminal Code) (*Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Strafgesetzbuch*, 2023). This offense is included in the section “On Criminal Acts Against Liberty,” which the Austrian legislator interprets quite broadly. The elements of the offense consist of “treating another person without their voluntary consent, including by using medical knowledge” (*Bundesrecht konsolidiert*, 2023). Austrian law classifies such conduct as a misdemeanor, punishable by imprisonment for up to six months or a fine.

The Austrian Criminal Code also provides for the liability of a physician if “in the physician’s opinion, delaying treatment could have caused serious harm to the patient’s life or health, but in reality such harm did not exist, and the physician failed to obtain the patient’s consent, although such consent could have been obtained with due diligence” (*Bundesrecht konsolidiert*, 2023). In other words, criminal liability may arise when a physician erroneously assesses the urgency of treatment, commits a factual error, and proceeds without patient consent, where such an error could have been avoided with proper medical care (a form of negligence). This negligence is possible when the person “fails to exercise the due caution that should be observed in the circumstances of the case and is incapable of doing so given their physical and mental abilities” (*Bundesrecht konsolidiert*, 2023).

It should be emphasized that, regardless of the form of culpability, unauthorized medical treatment can only be prosecuted on the basis of a complaint by the person subjected to such treatment. In this context, medical ethics in biomedical research is also linked to another provision of the Austrian Criminal Code establishing liability for the disclosure of medical secrets. According to Article 121 of the Austrian Criminal Code, “persons who disclose or otherwise use information about a patient’s health status that was entrusted to them exclusively in the course of their professional activity—such as providing treatment, care, nursing, medication, conducting medical research, or carrying out tasks related to the functioning of medical institutions or medical insurance—are liable only in cases where there is a risk of violating the patient’s legitimate interests” (*Bundesrecht konsolidiert*, 2023).

Such actions are classified as a misdemeanor and are punishable by imprisonment for up to six months or a fine, and they are prosecuted only upon the victim’s complaint. Qualified circumstances include cases “where the disclosure or use of a medical secret was committed with the purpose of obtaining profit or with the intent to cause direct harm to another person” (*Bundesrecht konsolidiert*, 2023). If such aggravating circumstances are present, the offense is punishable by imprisonment for up to one year. Similar liability is established for an expert involved in legal proceedings “if they disclose or use a secret that became known to them in connection with their professional activity, and their conduct may harm the legitimate interests of a person” (*Bundesrecht konsolidiert*, 2023). For such an expert to be held liable, a complaint from the injured party is required.

In addition, Article 184 of the Austrian Criminal Code establishes liability for

the offense committed when “a person systematically provides medical assistance to a large number of people without having the necessary qualifications” (*Bundesrecht konsolidiert*, 2023). This conduct is classified as a criminal infraction, punishable by imprisonment for up to three months and a fine.

Similarly, certain provisions of the Swiss Criminal Code relating to the establishment of legal liability for the disclosure of secrets “obtained in the course of research activities in the field of medicine or health care” resemble those in Austrian law (Swiss Criminal Code, 1937). However, such confidential information may be disclosed with the authorization of an expert commission. Conditions for disclosure include the absence of a direct prohibition in the application by the person concerned, the impossibility or disproportionate difficulty of obtaining the consent of the authorized person, or when the benefit of the research outweighs the benefit of preserving confidentiality. The expert commission must grant authorization and impose an obligation to ensure the security of undisclosed information (Swiss Criminal Code, 1937).

If there is no threat to the interests of individuals or if personal data has been anonymized before the research begins, the commission may grant a so-called general authorization or determine the necessary procedure. The chair and members of the commission are appointed by the Federal Council (*Bundesrat*), which determines its composition and procedures (Swiss Criminal Code, 1937).

Article 321 of the Swiss Criminal Code establishes liability for the disclosure of secrets entrusted to doctors, pharmacists, midwives, and nurses. The offense is prosecuted upon the complaint of the victim and is punishable by imprisonment for not less than three days and not more than three years or a fine (Swiss Criminal Code, 1937).

Under Section XXIII “Crimes Against Liberty” of the Polish Criminal Code, liability is established for conducting medical treatment without the patient’s consent (Article 192 of the Polish Criminal Code). Such conduct is punishable by a fine, restriction of liberty, or imprisonment for up to two years. Prosecution is initiated on the basis of a complaint from the victim (Menchynskyi, 2017).

4. Conclusions

Thus, taking into account the above, it should be noted that the 1947 Nuremberg Code and the Declaration of Helsinki are of a recommendatory nature and stipulate that biomedical research involving human subjects should be guided by legal and ethical standards in accordance with the legislation of the specific country

where the research is conducted. At the same time, there are certain exceptions to such activities, namely: research experiments on patients, prisoners of war, and incarcerated individuals, as well as therapeutic experiments on persons with illnesses not directly related to the purpose of the study, are prohibited. In turn, research involving patients or healthy volunteers must be conducted under the supervision of a physician or other medical professional with the appropriate qualifications. Responsibility for protecting the research subject lies with the physician or other medical professional, and not with the subject themselves, even if they have given consent.

It should be emphasized that the issue of criminal liability for unlawful experiments on humans always requires attention, but it is particularly important during wartime, given the latent nature of such a criminal offense. Thus, criminal liability for unlawful experiments on humans—representing the most dangerous violation of bioethics—is widely established in the criminal legislation of countries belonging to the Romano-Germanic legal system. A comparative study of the experience of other countries that have introduced criminal liability for offenses in the fields of medical genetics, transplantation, and reproduction makes it possible to implement such provisions into national legal regulation and judicial practice regarding the conduct of unlawful experiments on humans.

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КРИМІНАЛЬНО-ПРАВОВИЙ АНАЛІЗ ОСОБЛИВОСТЕЙ НЕЗАКОННОГО ПРОВЕДЕННЯ ДОСЛІДІВ НАД ЛЮДИНОЮ З УРАХУВАННЯМ МІЖНАРОДНОГО ДОСВІДУ

Анотація. *Метою статті* є подальше унормування об'єктивних та суб'єктивних ознак передбачених складом кримінального правопорушення за ст. 142 КК України з урахуванням досягнень сучасної доктрини кримінально-правової науки. **Результати.** З метою визначення ознак складу кримінального правопорушення передбаченого ст. 142 Кримінального кодексу України (далі – КК України) «Незаконне проведення дослідів над людиною» автором проведено комплексне порівняльно-правове дослідження за темою предмета наукової розвідки. Визначено, що основою для укладання багатьох державних та професійних кодексів, які регулюють питання пов'язані із визначенням норм, які регламентують положення щодо кримінальної відповідальності за незаконне проведення дослідів над людиною у країнах романо-германської правової системи став Нюрнберзький кодекс 1947 року, як уложення правил проведення експериментів над людьми, який уміщує десять основних принципів медико-біологічних, психологічних або інших дослідів. При цьому, продовженням Нюрнберзького кодексу є розроблена Гельсінська декларація 1964 р., яка своєю чергою

виступає своєрідною системою етичних принципів для медичного співтовариства в питаннях проведення експериментів над людиною. Такі документи мають рекомендаційний характер і передбачають, що під час проведення біомедичних досліджень за участю людини слід керуватися правовими та етичними нормами відповідно до законодавства конкретної країни, де вони проводяться.

Висновки. Наголошено, що юридична (кримінальна) відповідальність за незаконне проведення медико-біологічних, психологічних або інших дослідів над людиною передбачена не тільки національним законодавством, але й законодавством інших європейських країн романо-германської правової системи, як найнебезпечніше порушення біоетики, що підтверджується проведеним порівняльним дослідженням кримінального законодавства Австрії, Естонії, Польщі, Франції, Швейцарії, яким визначено, що регулювання досліджень над людиною ґрунтується на міжнародному законодавстві загального та спеціального характеру. Водночас таке дослідження за кримінально-протиправні діяння у сфері медичної генетики, трансплантації та репродукції дають можливість удосконалити національне законодавче регулювання та судову практику щодо незаконного експериментування над людиною.

Ключові слова: дослід, людина, кримінально-протиправне діяння, кримінальне правопорушення, склад кримінального правопорушення, кваліфікуючі ознаки, морально-етичні аспекти, міжнародний досвід.