Articles

Studia Iuridica Lublinensia vol. 32, 3, 2023
DOI: 10.17951/sil.2023.32.3.163-183

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The Development of Medical Law in the Field of Gynecology and the Relationship with Criminal Law: The Applicability of the Legal Framework of the Republic of Kosovo

Rozwój prawa medycznego w dziedzinie ginekologii a jego związek z prawem karnym. Obowiązywanie ram prawnych Republiki Kosowa

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ABSTRACT

Medical care and services in accordance with the rules and standards accepted by medical science are the moral and legal duty of the physician or any health worker. The set of legal norms as institutional mechanisms that regulate the rights and responsibilities of medical professionals and their patients is the main field of this research. The article aims to present the concept and importance of the research and development of medical law in the Republic of Kosovo. The purpose of the research is to make the connection between the provisions of medical law and the field of gynecology due to the violation of the rights of patients as well as the hesitation or lack of will in reporting such cases. The theoretical method was used for data collection, with which previous studies on medical law were consulted. The statistical method was used to present the number of induced abortions in the Department of Gynecology in Pristina. The interview method was used for the purpose of collecting data that refer to practical cases where physicians may have acted in violation of the law, as well as the presentation of those situations when, due to a serious health condition, they undertook medical actions without consulting with the patient or family members. The research indicates that the Criminal Code of the Republic of Kosovo has incorporated irresponsible medical treatment and failure to provide medical assistance as criminal offenses that are closely related to the exercise of professional medical duties and responsibilities. In the Republic of Kosovo, elective termination of pregnancy is allowed at the will of the woman who is of adult age, while termination of pregnancy with the motive of choosing the gender of the fetus is prohibited. Elective termination is permissible until the end of the tenth week of pregnancy.

Keywords: Kosovo; Criminal Code; medical law; gynecology; patient

INTRODUCTION

The legal order as a part of the social order, but regulated by legal norms, produces or causes legal consequences or effects in different areas of social life, including in this direction also the legal determinations to care services or health protection. One of the elements of the rule of law is the readiness and acceptance of the obligation that society or the state in particular guarantee the protection, promotion, and implementation of human rights. There are some rights that can be directly violated by medical activity, such as the right to life, bodily integrity, and human health. As a result of this, society in general and health professionals in particular, must be fully informed about the duties that the law assigns to them. Therefore, this paper aims to present in detail the concept and importance of the study of medical law and the need for the inclusion and study of this field by the societies of states with consolidated democracy. The paper, on the other hand, also aims to present the legal-criminal treatment of possible abuses of health care providers, including the sanctions they may face after determining criminal liability. The field of gynecology is closely related to maternal and child health where the medical staff is responsible for adequate treatment in ensuring and maintaining the health of this category of society. The purpose of this article is to provide an interpreted summary of the current legal provisions of the Republic of Kosovo, on

medical law in the field of gynecology. It has been attempted to make a connection between these provisions and the field of gynecology due to the actuality of the violation of these rights in an ongoing manner. An attempt has been made to raise collective awareness of the rights enjoyed by patients and their violation by the medical staff.

In the preparation of the research, theoretical methods were mainly used, through which various studies were consulted that refer to the development of medical law and the benefits that medical law brings to society and especially to patients. On the other hand, this method was used during the consultation of legal documents starting from the Constitution of the Republic of Kosovo,[1] which through the affirmative provision proclaimed health care as a constitutional category. Through the theoretical method, some of the forms of criminal offenses that are defined in the Criminal Code of the Republic of Kosovo have been analyzed, which can be committed in practice by the physician if his acts are in conflict with the law and medical ethics, as well as the legal regulation of the permissibility of termination of pregnancy has been addressed. The statistical method was used to present the number of induced abortions in the Department of Gynecology in Pristina. In the practical presentation of cases when the patient's health is at risk and there is a need for urgent medical intervention, the interview method with medical professionals from the gynecological field was used.

Through this paper, an attempt is made to make a valuable contribution in the field of law in the development of medical law that would once be a point of reference and incentive in the creation of new researches for the treatment of such a topic. This will serve to enrich the current legal literature with new knowledge on medical law by analyzing the features of the legal systems of modern countries and the way in which these countries deal with issues related to health care, especially gynecological care.

RESEARCH AND RESULTS

1. The concept and importance of the study of medical law

Medical law is the collection of legal norms or laws in general that regulate the rights and professional medical expertise of physicians and their patients. When we say the professional field, this term also includes the responsibilities that are attributed to the physician during the exercise of his duties defined by law. This discipline in its composition can deal with different types of topics, but in its

[1] Kushtetuta e Republikës së Kosovës, 9.4.2008, Nr. K-09042008.

structure, it is considered to consist of three main branches: confidentiality, law or criminal law as well as negligence.[2]

Confidentiality, as the first part of medical law, as the name itself indicates, precisely regulates those situations that have to do with the protection and preservation of data related to the patient's health condition. In principle, all information regarding the patient's health and the treatments he undergoes are confidential and the physician who informs about this data during the exercise of the profession is obliged to respect the legal regulations of confidentiality. However, confidentiality is not absolute because patient information may be shared among a team of health professionals. Also, information can be disclosed where the public interest in disclosure outweighs the public interest in respecting confidentiality.[3]

Health care providers are morally and legally obligated to fulfill their professional health obligations in terms of patient care. The physician is expected to provide health care in accordance with the accepted medical standards that correspond to the knowledge and health treatments accepted by contemporary medical systems, otherwise he will be responsible for medical negligence.[4] So, there are those situations when health care providers do not undertake the actions for which they were forced to carry out, so that if they would undertake them in a timely and appropriate manner, the consequences could be avoided, in this particular case the damage to the health of the patient. The development of new technology related to medical science, in most countries, has influenced the increase in the number of abuses from the medical field. Such situations are confronting judges with new challenges in evaluating evidence.[5] Legal-criminal science has accepted the concept of criminal responsibility in cases where criminal offenses are committed through omission. The obligation of a responsible person, in this case the physician or health care provider, to undertake appropriate health measures and provide medical assistance to the patient, derives from the law. The cases when the physician, contrary to the legal provisions that oblige him to act in the interest of the patient, disregards the legal obligations and does not provide help, service, or medical treatment thereby causing the deterioration of the health condition of the patient, represents a typical example of committing criminal offenses by omission. These issues are regulated by the second field of medical law, which is related to negligence. Based on research developed on the knowledge of medical law and its

[2] N. Madison, *What Is Medical Law?*, 2022, https://www.mylawquestions.com/what-is-medical-law.htm (access: 17.10.2022).

[3] E. Jackson, *Medical Law: Text, Cases and Materials*, Oxford 2016, p. 389.

[4] C. Bieber, *Medical Negligence: Legal Definition & Examples*, 2022, https://www.forbes.com/advisor/legal/medical-malpractice/medical-negligence (access: 18.10.2022).

[5] I. Wrześniewska-Wal, *Medical-Malpractice Disputes – Analysis of the Use of Evidence from Medical Disciplinary Proceedings in Litigation for Damages*, "Studia Iuridica Lublinensia" 2022, vol. 31(3), pp. 271–290.

negligence among physicians, it turns out that in the United States, approx. 195,000 people die because of medical errors.[6] To reduce medico-legal issues, increased attention and an enforceable standard of medical care to avoid medical negligence and errors must be accompanied by better communication with patients. This communication must be clear and effective to share a common language.[7]

Health care is a noble profession, healing and saving the patient's life. The study of the rules of medical law is very important precisely for the fact that the physician or nurse must build and deepen his/her knowledge that is related to his/her competences because it is precisely the rules of medical law that determine the limits of the exercise of their competences. Another goal of the study of medical law is the protection of patients from various errors or abuses in the medical system.

2. Legal framework

The Constitution of the Republic of Kosovo, as the highest legal and political act of a state, proclaims and guarantees fundamental human rights and freedoms as a constitutional category, which rights create the obligation without distinction of citizens or institutions for their respect and inviolability. The respect, protection, and guarantee of human rights prove how democratic a state or society in general is.

Among the rights guaranteed by the constitution in question, which is closely related to human dignity and well-being, whether physical or mental, is the right to protection or health care. In the framework of the protection of rights related to health protection, the Constitution of the Republic of Kosovo guarantees that health care and social security are regulated by law.[8] With this provision, the Constitution has not defined the substantive elements of health care or protection or the entities that will be able to use this right, but with regard to these features, it expressly refers to the law for the definition and clarification of these issues. On the basis of what is determined by the constitutional provisions, health protection acquires the status of a legal right.[9]

The Law on Health of the Republic of Kosovo[10] determines that citizens or residents are guaranteed the right to equal access to health care services without

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[6] A. Haripriya, V. Haripriya, *Knowledge about Medical Law and Its Negligence among Doctors: A Cross-Sectional Study*, "International Journal of Scientific and Research Publications" 2014, vol. 4(5).

[7] M.M Chou, *Litigation in Obstetrics: A Lesson Learnt and a Lesson to Share*, "Taiwanese Journal of Obstetrics and Gynecology" 2006, vol. 45(1), pp. 1–9.

[8] Article 51 (1) of the Constitution of the Republic of Kosovo.

[9] E. Hasani, I. Cukalovic, *Commentary-Constitution of the Republic of Kosovo*, Pristina 2013, p. 194.

[10] Ligji 04/L-125 për Shëndetësi, 13.12.2012, https://gzk.rks-gov.net/ActDetail.aspx?ActID=8666 (access: 20.10.2022).

any discrimination,[11] while the Law on the Rights and Responsibilities of Kosovo Residents in the Health System[12] enumerates several rights related to provision of adequate and quality health care services. According to this Law, health care will always be adequate when it is undertaken on the basis of ethical and professional rules in accordance with the guidelines related to the health service.[13] Physicians and health personnel must understand the legal basis of treatment between them and patients, recognize and understand the rights and obligations of patients as well as the rights and obligations of physicians to avoid negative consequences for patients during medical services.[14]

In principle, the purpose of health care services consists in facilitating and improving the physical, psychological, and social condition of the citizen, which service, due to its importance in the society of a country, enjoys protection through institutional mechanisms. However, despite the fact that the state guarantees the functioning of such an activity for the benefit of society, some illegal acts can often lead to the violation or obstruction of the fair and ethical development of the health activity. In the international sphere, the World Health Organization has made a great contribution to the right to medicine by supporting governments to strengthen medical services. Meanwhile, the International Labor Organization also provides a contribution related to social/health protection and the improvement of working conditions that contribute to maintaining peace in the world.[15]

The Republic of Kosovo has not signed the Biomedicine Convention, unlike the Republic of Albania, which signed and ratified it at the end of March 2011. Regardless of this, the legal system of the Republic of Kosovo has regulated most of the medical issues related to medical care and medical interventions, especially invasive ones, in accordance with international rules and standards, including the convention in question. In this direction, similar to the provisions of the Biomedicine Convention, laws from the health field have guaranteed access to medical services in an equal way, without any discrimination, respecting dignity, privacy, and personal integrity. Each patient has the right to be informed in detail about examinations and interventions, including their risks. For any invasive intervention, written consent of the citizen is necessary, which can be withdrawn at any time. Similar to the provisions of the Convention, regarding the protection of persons

[11] Article 4 (1) of the Law on Health.

[12] Ligji 2004/38 për të Drejtat dhe Përgjegjësitë e Banorëve të Kosovës në Sistemin Shëndetësor, 19.11.2004, https://gzk.rks-gov.net/ActDetail.aspx?ActID=2454 (access: 20.10.2022).

[13] Article 4 (2) of the Law on the Rights and Responsibilities of Kosovo Residents in the Health System.

[14] I. Heriani, G. Gunarto, A. Masdhurohatun, *Legal Protection of Patient Rights in Indonesia*, "Sriwijaya Law Review" 2019, vol. 3(1), pp. 75–85.

[15] A. Riza, *E Drejta e Organizatave Ndërkombëtare dhe Organizatat Ndërkombëtare*, Prishtinë 2012, pp. 229–231.

who cannot give their consent, the intervention will be carried out only with the authorization of the representatives or an authority provided by law. In a specific case, the health institution must undertake the procedure to ensure the consent of the court. However, if a citizen's life is directly threatened, it is not necessary to obtain a statement from the court for the intervention. In support of the rules arising from the Biomedicine Convention, the Constitution of the Republic of Kosovo has constitutionalized the right not to be subjected to medical treatment against his/her will, as well as the right not to participate in medical or scientific experiments without giving prior consent.

3. Medical law according to criminal law

The law or criminal law as the third component area of medical law in principle regulates and protects human health and integrity since recently the medical technological systems have been significantly developed, creating easier opportunities for misuse and failures during health care that affect the interest of the patient. In all situations when health care providers during their work apply methods that are in conflict with professional medical rules or when the physician does not possess the skills required for certain interventions in a way that damages the patient's health, the rules of criminal law come into play, which fabricate or create the criminal responsibility that is dedicated to the physician.

The purpose of criminal law is to protect society from criminality as a negative and dangerous phenomenon, which it achieves by defining criminal offenses separately in the respective societies. Crime in the medical field is intolerable and states should always build advanced institutional mechanisms that fight the various abuses in the medical profession because, as is known, it is the patient who ultimately suffers the consequences of these degrading acts. Some of the most common causes of legal claims by patients are failure to diagnose, intraoperative complications, obtaining consent, unnecessary surgical interventions, or even poor supervision by the medical staff.[16]

In this direction, the rules of criminal law protect the values or legal goods belonging to individuals through the definition of criminal offenses based on the protected object or the object against which illegal acts are taken. Therefore, in order to fight as efficiently as possible against such illegal acts, the Criminal Code[17]

[16] L.C. Edozien, *Medico-Legal Issues in Gynaecology*, "Obstetrics, Gynaecology and Reproductive Medicine" 2009, vol. 19(7), pp. 187–192.

[17] Kodi 06/l-074 Penal i Republikës së Kosovës, 14.1.2019, https://gzk.rks-gov.net/ActDetail.aspx?ActID=18413 (access: 21.10.2022), hereinafter: the Criminal Code of the Republic of Kosovo of 14 January 2019.

foresees several criminal offenses through which the provision of fair, adequate, professional, and ethical health care is violated.

The offense which in practice can be committed more often causing harmful effects on the patient's health is irresponsible medical treatment and failure to provide medical assistance.

The Criminal Code defines that irresponsible medical treatment is carried out in those cases when the physician, dentist or other health worker, who, when providing health care services, openly uses an inappropriate means or method of treatment or in any other way openly does not apply the rules of the health care profession or openly acts in a careless manner, thus causing the worsening of the illness or health damage of another person, shall be punished by imprisonment not exceeding one (1) year.[18]

According to the provision presented above, the subject who appears as the perpetrator of this criminal offense by violating the duties, whether moral or professional, is the physician, respectively the person who possesses a diploma from the faculty or school of medicine. Such subjects in the literature of criminal law are characterized as *delicta propria* since they hold a certain position in society and that during the consideration of the issue it is not the same when an act is committed by a simple subject (*delicta communia*) without any certain position in life social and when signed by the official person with powers entrusted by law.

Another issue defined by the Criminal Code is the use of inappropriate means or methods of treatment. Inappropriate means or methods of treatment are determined by medical science and practice. Inappropriate medical methods can be considered those cases when, during the treatment of the disease, the physician applies methods that are in conflict with medical rules and standards. Inappropriate means of treatment are those cases when the physician or health worker gives pills or substances to the patient that are harmful to his health or, according to the rules of medical science, are not recommended for the concrete diagnosis of the patient.[19]

As such, this act can be carried out by omission when appropriate medical measures are not taken, or it can also be carried out by act when these measures are taken against medical rules. The main consequence of this criminal offense is the deterioration and impairment of the person's health condition. It is important to mention when this criminal offense is actually considered to exist. Here, the causal connection (causal) between the act by which the crime was committed and the cause of the consequence, in this particular case the damage to the person's health, must be proven. In the absence of this causal connection, such a criminal offense is considered non-existent in terms of its commission. Regarding the determination of the subjective elements, this criminal offense is committed intentionally and that

[18] Article 254 (1) of the Criminal Code of the Republic of Kosovo of 14 January 2019.

[19] I. Salihu, *Criminal Law – Special Part*, Pristina 2014, p. 347.

with eventual intent, on the contrary, if it was committed with direct intent, the perpetrator will be responsible for the criminal offense of bodily injury or murder, depending on the consequence that is caused.[20] The eventual intent exists when the perpetrator was aware that due to the act or omission, the prohibited consequence could be caused, but he/she consciously agreed to it being caused. The cause of the consequence is not foreseen as certain by the perpetrator, but he/she is aware that his/her act creates a possibility or a great risk for causing the consequence. So, this act is committed intentionally if the physician knowingly uses means or methods of treatment that are in conflict with the rules of medical science. It will remain the responsibility of the court to verify all the concrete circumstances of how the medical means or methods were used.

If we analyze the Criminal Code, which was in force until April 2019,[21] we notice that the criminal provision with Article 260 contained a total of four paragraphs that regulated the legal-criminal aspect of the criminal offense of "Irresponsible medical treatment". The first and second paragraphs dealt with cases when the physician or health worker obviously used inappropriate mean or method of medical treatment or did not use hygienic measures. The third and fourth paragraphs regulated situations where, as a result of inappropriate medical means or methods or non-use of hygienic measures, a consequence resulting in serious damage to the health or even the death of the patient would be caused.[22] In this criminal offense, the old Criminal Code did not contain specific provisions punishing actions committed through negligence. Consequently, the legal-criminal science has determined that the perpetrator is punished for the criminal offense committed due to negligence only when the law foresees such a possibility. Therefore, the Criminal Code has followed the necessary changes and with special paragraphs has sanctioned the action committed due to negligence. After the entry into force of the new Criminal Code, the treatment of this criminal offense has been expanded to a total of eight paragraphs. From paragraph 5 to paragraph 8, the situations when the physician or health worker acts negligently are regulated, in which case the punishments for this type of guilt are foreseen, which we will mention below. If the physician or health worker, by acting negligently, uses inappropriate means or methods and causes the deterioration of the health condition, the perpetrator shall be punished by imprisonment not exceeding six months. If due to the negligence of the physician or health worker, the other person suffers a serious bodily injury or the existing illness

[20] I. Salihu, H. Zhitija, F. Hasani, *Commentary on the Criminal Code of the Republic of Kosovo*, Pristina 2014, p. 719.

[21] Kodi 04/L-082 Penal i Republikës së Kosovës, 13.7.2012, https://gzk.rks-gov.net/ActDetail.aspx?ActID=2834 (access: 8.5.2023), hereinafter: the Criminal Code of the Republic of Kosovo of 13 July 2012.

[22] Article 260 (1) to (4) of the Criminal Code of the Republic of Kosovo of 13 July 2012.

is considerably deteriorated, the perpetrator shall be punished by imprisonment not exceeding one year. If due to the negligence of the physician or health worker another person suffers a particularly serious bodily injury or a person's pregnancy is terminated, then the perpetrator shall be punished by imprisonment not exceeding three years. And the last paragraph has defined that if as a result of the negligence of the physician or health worker one or more persons die, the perpetrator shall be punished by imprisonment of one to eight years. Also at this point, it is necessary to prove whether it was acted with conscious or unconscious negligence. Therefore, in the case of determining criminal responsibility, it will be verified whether the perpetrator was aware that the consequence could be caused as a result of his act or omission and he thought lightly that it would not be caused or that it could be prevented by the perpetrator or should be aware of this possibility according to personal and professional characteristics (case of unconscious negligence).

Failure to provide medical assistance, which is classified as a criminal offense in the group of criminal offenses against public health, is considered committed when the physician or another health worker, who contrary to his duty refuses to provide medical assistance to a person who needs such assistance, although he is aware or should be aware that such failure to act may result in serious bodily injury or serious damage to the health or death of the person.[23]

Through the incrimination of this criminal offense, the aim is to protect the patient's health and life. The physician is burdened with the moral and legal obligation to provide appropriate medical assistance within his abilities and capacities, on the contrary, failure to fulfill this obligation is not only a violation of medical ethics, but also a criminal offense.[24]

The perpetrating act is presented as not providing medical assistance to the person in need. So, failure to provide medical assistance consists in refusing such a request or not taking such a request into consideration, pretending not to hear, see, or act with initiative. The medical assistance in question is related to the first emergency medical assistance which is necessary to avoid the worsening of the patient's health condition. The criminal offense will also exist in the case when the physician refuses to provide medical assistance due to of non-territorial competence or the internal organization of the health system by instructing him to present himself at an ambulance or other health hospital. The perpetrator of this criminal offense, as in the previous offense, remains the physician or the person who graduated from the Faculty of Medicine. In terms of guilt, this criminal offense is committed intentionally. Failure to provide medical assistance is a criminal offense that represents an example of committing a criminal offense by omission. While, in relation to the subjective element, intent is also defined as a form of guilt. The

[23] Article 255 (1) of the Criminal Code of the Republic of Kosovo of 14 January 2019.

[24] I. Salihu, *op. cit.*, p. 351.

perpetrator of this criminal offense must be aware or could have been aware that such omission could cause serious health damage to the person or his/her death. The perpetrator is or may be aware of the consequences of his/her omission based on his/her personal observation, information directly received from the patient or from a third person according to the description of the symptoms.

In principle, criminal offenses directed against public health are committed by physicians or health care providers. The provisions mentioned above determine that the active subject of these criminal offenses is the person who possesses the necessary qualifications to exercise the duty of a physician or health professional. In this regard, a gynecologist can also appear as an active subject in the commission of a crime from the medical field. The provisions that define criminal offenses against public health are blanket provisions. The latter means that to determine the content elements of situations in medical practices, we must refer to the rules from medical science. In order to clearly understand the blanket character of legal-criminal norms, we can mention the following example. The Criminal Code, among the factual description of when the criminal offense of irresponsible medical treatment is committed, only determines that this offense is committed when the physician uses inappropriate medical means or methods, without specifying which methods we are talking about. Here the blanket character is expressed by guiding us to the medical rules and standards, through which inappropriate medical methods are defined in the specific case.

Similar to physicians from different branches of medicine who answer to the law for their acts contrary to medical rules and standards, gynecologists can also enter this group of subjects whenever their act violate medical science and harm or harm the patient's health. For the application of inappropriate methods or means or for refusing to provide medical assistance, they will be penalized according to the above-mentioned provisions.

4. Medical law in the field of gynecology

The Republic of Kosovo, through the Law on Termination of Pregnancy,[25] provides a favorable legal environment and specific treatment for issues related to termination of pregnancy, protecting women's health from the risks that may come from illegal abortions. The law in question guarantees every female person to freely decide on the termination of pregnancy in accordance with the criteria defined by this law. Every woman over the age of 18 has the right to request an elective termination of pregnancy. Elective termination of pregnancy is termination of pregnancy with the purpose and desire of the woman without medical reasons. For such cases,

[25] Ligji 03/L-110 për Ndërprerjen e Shtatzënësisë, 6.2.2009, https://gzk.rks-gov.net/ActDetail.aspx?ActID=2624 (access: 22.10.2022).

the pregnant woman is obliged to consult a specialist physician from the relevant field at least three days before this elective termination. The law also regulates the time during which elective termination of pregnancy can be performed, which respecting this deadline can be done until the end of the tenth week of pregnancy, calculating the time or deadline from the first day of the last menstrual cycle. All terminations of pregnancy not respecting this deadline are in conflict with the law in question and must be done by a professional health commission.[26]

The physician or specialist from the field of gynecology-obstetrics is obliged to inform the pregnant woman at the first visit by giving her advice and instructions on some issues that are primarily related to the medical risks or emotional difficulties that termination of pregnancy brings, with the institutions that offer moral and social support for the mother and the family, the rights that are guaranteed to them by law, as well as the health institutions that carry out the termination of pregnancy in safe medical conditions. In cases where the woman, even after being informed during the medical visit of the risks she may face, insists on elective termination of pregnancy, then it is required that her request be confirmed, this confirmation, which in principle must be in writing, but if not such a thing is possible, the woman's verbal statement made in the presence of two witnesses is sufficient.[27]

According to the Article 14 of the Law on Termination of Pregnancy, termination of pregnancy with the motive of selecting the gender of the fetus is prohibited. Whereas, termination of pregnancy for medical reasons can be done in two cases:

- when is ascertained that pregnancy continuation or child birth endangers the female's life or health, termination of pregnancy can be done at any period of pregnancy under the decision of the medical Commission and with the female's consent in the state of conscience,
- when it is verified that fetus has incompatible malformations to life, disease or serious status which cause serious invalidity and have insecure treatment, termination of pregnancy can be performed at any time after recommendation and decision made by medical Commission for termination of pregnancy and the patient's consent in state of conscious.[28]

From the provisions discussed above, we can see that the Law, in addition to the professional medical recommendations and instructions that come from the relevant medical commissions, at the same time gives importance and free space for respect to the will, desire or pleasure of the patient, in this particular case the pregnant woman. The situation when consent is required from the pregnant woman can be complicated in cases where she has no ability or her ability to act is limited.

[26] Article 1 (1), Article 5 (1) to (3), Article 6 (1), and Article 7 (1) of the Law on Termination of Pregnancy.

[27] Article 8 (1) and Article 10 (1) of the Law on Termination of Pregnancy.

[28] Article 15 (1) and (1) of the Law on Termination of Pregnancy.

The Law on Termination of Pregnancy defines three cases when the termination of pregnancy can be done up to the twenty-second week of pregnancy and that induced birth (the exit or expulsion of the fetus after the twenty-second week of pregnancy under the influence of pills or with surgical intervention) can be done even later when it is proven that the pregnancy occurred as a result of criminal offenses:

- rape,
- undesirable sexual relationships of females who are victims of trafficking and forced sexual exploitation,
- sexual relations with juveniles or incest.[29]

Regarding the punitive measures, the following law determines that if the health professional does not act in accordance with the provisions of the Law on Termination of Pregnancy, in addition to the punitive measures incorporated in the Law on Health, the same can also answer for the criminal offense "Unlawful termination of pregnancy". For this criminal offense, the Criminal Code (2019) defines that anyone who, contrary to the Law on Termination of Pregnancy and with the consent of the pregnant woman, terminates the pregnancy, initiates the termination of the pregnancy or helps her to terminate the pregnancy, shall be punished by imprisonment of six (6) months to three (3) years, while anyone who terminates or begins to terminate a pregnancy without the consent of the pregnant woman, shall be punished by imprisonment of one (1) to eight (8) years.[30] According to a research conducted on the prevention of legal claims in the field of gynecology, it turns out that the American College of Obstetricians and Gynecologists (ACOG) states that nearly 80% of obstetrics and gynecology specialists will be prosecuted for their medical services at least once or more during their career. It is estimated that an obstetrics and gynecology specialist gets an average of 2.5 lawsuits related to the medical services he provides during his career.[31]

The results of a research conducted with the aim of determining the number of artificial abortions in the University Clinical Center of Kosovo (UCCK), specifically in Pristina for the period between 2005–2007, show a summary figure of abortions performed during these years with a total of 1,079 abortions.

[29] Article 16 of the Law on Termination of Pregnancy.

[30] Article 178 (1) to (2) of the Criminal Code of the Republic of Kosovo of 14 January 2019.

[31] I Gde Sastra Winata, Vallery Giscard Delano Temmar, *Law Claims in the Field of Obstetrics and Gynecology: How to Prevent and Overcome Them*, "International Journal of Science and Research" 2021, vol. 10(7), pp. 599–601.

Table 1. Number of induced abortions for the period 2005–2007 in UCCK, Pristina

Year	Number of induced abortions in UCCK
2005	486
2006	300
2007	293
Total	1,079

Source: Authors' own elaboration.

From this number of 1,079 artificial abortions, it results that 51.5% of the women who had an abortion were aged 20–35. Regarding early births, the study shows that 43% of women had more than four previous births, while 7.7% of patients were pregnant for the first time. The time of performing abortions turns out to be between the seventh and the ninth week[32].

According to the interview conducted by I. Banjska with the head of the Division of Maternal and Child Health and Reproductive Health within the Ministry of Justice as part of her research on abortions in Kosovo, she emphasizes that regardless of the legal obligation for clinics to report cases of induced abortions, most of them do not fulfill this legal obligation. The numbers that have managed to be secured by her belong to the induced abortions only in the Gynecology Department of the UCCK, respectively in Pristina, and do not include the regional departments of the UCCK, as these departments find it difficult to report the numbers.[33] The data regarding the number of induced abortions are presented in Table 2.

Table 2. Number of induced abortions for the period 2012–2018 in UCCK, Pristina

Year	Number of induced abortions in UCCK
2012	67
2013	124
2014	130
2015	106
2016	111
2017	121
2018 (May)	67
Total	726

Source: Authors' own elaboration.

Based on the United Nations Population Fund (UNFPA) report of 2009, Kosovo is faced with an abortion rate of 480 abortions per 1,000 live births, while the report

[32] M. Paçarada, N. Kongjeli, G.Kongjeli, B. Obërtinca, *Artificial Abortions Performed at the University Clinical Centre of Kosovo from January 2005 to December 2007*, "Medical Archives" 2009, vol. 63(2).

[33] I. Banjska, *Abortions in Kosovo: An Analysis of Induced Abortions and Reproductive Health in Kosovo from 1999 to 2019*, Pristina 2019, https://artpolis-ks.com/wp-content/uploads/2019/10/ABORTET-N%C3%8B-KOSOV%C3%8B.pdf (access: 25.10.2022).

of the Kosovo Agency for Statistics states that 8% of women aged 15–49 have had at least one intentional abortion and almost a fifth (17%) of those aged 45 to 49. Among women who have had abortions, 71% have had one abortion while 25% have had two or three abortions, and 4% had four or more abortions.[34]

5. Gynecological practice in relation to medical intervention in emergency situations

In the framework of this research, with the aim of analyzing emergency medical intervention situations and their compatibility with the law, a written interview was submitted to the Department of Gynecology. Competent physicians in this field have been asked to mention in the first place if they have faced any illegal situation. In addition to this, it was also requested to mention any other situation when it was intervened in an urgent manner without consulting the patient and family members. In order to preserve privacy, the physicians were not asked to declare their identity.

The interview was answered by two physicians from the relevant department, who, when asked if they have faced any illegal situation, mentioned only a few cases from other municipalities when their colleagues were accused by patients or family members of illegal actions. The first case happened in the municipality of Lipjan when the patient went to the gynecologist, who then raped her by closing the door and breaking her phone while she was trying to call her husband. The patient stated that the case happened at that time when there was no one in his office. Meanwhile, another case happened in the municipality of Gjilan when the gynecologist terminated the minor's pregnancy without her or her opponent's consent, damaging her health.

In the question of whether they faced any situation when it was necessary to act urgently, they mentioned two cases that happened recently. During the last few months, in the exercise of health care duties, they have faced two situations in which, in order to protect the patient's health, they have decided on invasive intervention without consulting the patient or her family members. In the first case, the patient hospitalized in the thirty-fifth week of pregnancy was initially treated with adequate pills due to high hypertension (160/100). In the late hours of nursing, there was severe bleeding due to premature placental abruption. In such a situation, without the consent of the patient and her family, in the interest of the mother and the fetus, it was decided to perform a caesarean section. Then, the case was explained to the patient and her family about the reasons for the intervention without obtaining their consent.

[34] L. Molliqaj, *Shame on the Body*, Pristina 2016, https://preportr.cohu.org/sq/hulumtime/Turpi-mbi-trupin-108 (access: 27.10.2022).

In the second case, the patient was admitted with bleeding from the uterus in the eighth week of pregnancy as an incomplete spontaneous abortion. During the treatment, there was severe bleeding and after medical examinations, an ectopic pregnancy was found (in the early caesarean section) and with a council decision, it was decided to remove the uterus without the consent of the patient or family members. Even in this situation after the treatment, the patient and her family members were informed of the reasons why it has been decided to remove the organ and the risks that would be posed to the patient if it were not done in this way.

From this we can understand that during the exercise of authorizations or medical duties, each health professional may face those situations in which, in principle, the written consent of the citizen is required for the undertaking of invasive interventions, or in case the citizen is unable to do so, then the given statement is sufficient in writing or in any other way in the presence of two witnesses. Physicians working in gynecology departments, in accordance with their duties, must always inform patients of the risks of death, adhere to high medical practices and obtain the patient's consent.[35] The situation can be complicated in those cases when the patient is in a health emergency and lacks the ability to act or the patient is not aware of giving consent to undergo invasive interventions. In such cases with the aim of preserving the patient's health, giving consent or refusal can be exercised in accordance with the legal provisions by the following persons:[36]

- legal representative of the citizen,
- spouse or conjugal partner,
- heir over the age of 18,
- parent,
- sister or brother,
- grandfather or grandmother,
- health professional, in case of absence of the family member.

The citizen's consent is not required if the intervention or specific act is implemented: (1) seriously endangers the health and physical safety of others – including the fetus after the tenth week of pregnancy, in accordance with the Law, or (2) directly endangers the life of the citizen.

6. Judicial practice

On 13 February 2012 the former District Public Prosecution filed an indictment against the suspect N.N. for committing the criminal offense "Unlawful Termination

[35] T. Hamasaki, A. Hagihara, *A Comparison of Medical Litigation Filed against Obstetrics and Gynecology, Internal Medicine, and Surgery Departments*, "BMC Medical Ethics" 2015, vol. 16.

[36] Article 11 of the Law on the on the Rights and Responsibilities of Kosovo Residents in the Health System.

of Pregnancy in Attempt" against the person with whom he had been in a relationship.[37] On 15 January 2018 the Basic Court in Pristina, through its verdict, found the suspect N.N. guilty of committing the above-mentioned criminal offense, sentenced by imprisonment to one (1) year. The Basic Court established that the suspect, with the intention of terminating the pregnancy, physically abused the victim, with whom he was in a love relationship, by handcuffing her hands, her legs with a belt, while covering her mouth with a handkerchief, and then he punched her in different parts of the body, including the lower part of the back, with the aim of terminating the pregnancy, which was unwanted by him. The victim was initially threatened with the intention of aborting the child, but this interruption had not ended.[38]

The Basic Court, during the examination and evaluation of the case, administered the evidence as follows: (i) the testimony of the injured party; (ii) the report of the Emergency Center with no. 20158, on 6 July 2011; (iii) the report from UCCK, Clinic of Gynecology, on 6 July 2011; (iv) the report on the physical examination, on 6 July 2011, prepared by the forensic expert A.G.; (v) the report no. PP-510/5/2011, on 23 December 2011, prepared by forensic expert A.G.; (vi) photo-documentation; (vii) the confidential photo documentation, made during the medical-legal check, on 6 July 2011; and (viii) SMS from the report of Post Telecom of Kosovo, dated 8 August 2011.

Contrary to this decision, the defendant filed an appeal against the judgment of the Basic Court in the Appeal Court, claiming a violation of the provisions of the criminal procedure, incomplete and incorrect verification of the factual situation and violation of the criminal law. The Appeal Court contradicting all the claims of the complainant, rejected[39] the appeal as unfounded and confirmed the judgment of the Basic Court.

Regardless of the decision of the Appeal Court, the defendant continued again with the aforementioned complaints and claims and submits a request for protection of legality against the judgment of the Basic Court and the Appeal Court. The Supreme Court rejected the request for protection of legality as unfounded.[40] The Supreme Court, in relation to the defendant's claim for violating the provisions of the criminal procedure, reasoned that "the judgment of the first instance was not based only on the statement of the victim, but also on other evidence that was under judicial review (…). In the reasoning, all the administered evidences were evaluated and the fact that both judgments are based on only one evidence – the statement of the injured party does not stand". According to the Supreme Court, the Basic Court had taken other evidence as a basis, namely the reports of the

[37] Indictment of the former District Public Prosecution of 13 February 2012, PP. no. 510/05/2011.
[38] Judgment of the Basic Court of 15 January 2018, P. no. 927/14.
[39] Judgment of the Appeal Court of 19 November 2018, PA1. no. 358/2018.
[40] Judgment of the Supreme Court of 7 March 2019, PML. no. 49/2019.

relevant specialized medical institutions and forensic expertise, including the material evidence of electronic communication, where it was proven that the victim's pregnancy was unwanted. Subsequently, the Supreme Court also reasoned that the Basic Court had not taken into account his defense in the Prosecutor's Office for the reason that the Basic Court, in accordance with Article 346 (1) of the Criminal Procedure Code of Kosovo, had respected the right of defense those convicted in silence during the judicial proceedings of this court.

While, regarding the claims of the appellant for the violation of the criminal law, the Supreme Court reasoned: "(…) physicians and midwives are not the only persons who can commit this criminal offense (unlawful termination of pregnancy) as well as claimed in the request, but this criminal offense can be committed by anyone, and in the specific case [the appellant], he tried to terminate the unwanted pregnancy for him, without the consent of the victim. (…) This is proven by the injuries caused by violent blows with a strong mean".

The judicial case has not ended even at the third instance, since the convicted person has submitted a complaint to the Constitutional Court with the claim that during the trial from the first instance to the third instance, several rights were violated, such as equality before the law (Article 24 of the Constitution of the Republic of Kosovo), the prohibition of discrimination (Article 14 of the European Convention on Human Rights), the right to freedom and security (Article 29 of the Constitution of the Republic of Kosovo in conjunction to Article 5 of the Universal Declaration of Human Rights) as well as the right to a fair and impartial trial (Article 31 of the Constitution of the Republic of Kosovo in conjunction to Article 6 of the European Convention for a regular judicial process).

The Constitutional Court, after dealing with and analyzing all the claims of the complainant and reviewing the three judgments of the regular courts, concluded that the defendant's complaint regarding the claims mentioned above is clearly unfounded on constitutional grounds.[41]

CONCLUSIONS

Through this research, an effort has been made to collect the most accurate and authentic data so that the results of the work are true and concise in order to present a comprehensive overview of the development of medical law in the Republic of Kosovo.

Medical law as a whole of legal norms applicable within a country regulates the professional activity of physicians or health care providers and the rights that belong to patients. According to the structure, this discipline consists of three main

[41] Decision of the Constitutional Court of 28 August 2020 on the inadmissibility, RK. 1615/20.

branches, such as confidentiality, criminal law, and negligence. The research shows that the Republic of Kosovo through the Constitution as the highest juridical-political act of the state provides constitutional support for health care, guaranteeing that this care is regulated through laws or other by-laws. The current laws that refer to health in the Republic of Kosovo guarantee the right of every citizen without any discrimination to have access to health care services.

Health professionals are required to act in accordance with the legal provisions and the principles of science or medical ethics, otherwise they will be held criminally responsible for their acts. The research work proves that the legal norms of the Republic of Kosovo have gone through several processes of internal filters until their drafting with the aim of ensuring the correct functioning of the legal order. The Criminal Code has incorporated irresponsible medical treatment and failure to provide medical assistance as criminal offenses that are closely related to the exercise of professional medical duties and responsibilities.

In the Republic of Kosovo, elective termination of pregnancy is allowed at the will of the woman who is of adult age, while termination of pregnancy with the motive of choosing the gender of the fetus is prohibited. Elective termination is permissible until the end of the tenth week of pregnancy, respecting the desire and will of the pregnant woman. On the contrary, the health professional will be responsible for the criminal offense of unlawful termination of pregnancy.

The research also highlights the spread of the number of induced abortions in the Gynecology Department for the Pristina region as regional departments find it difficult to report such cases. As a result, it is difficult to estimate the average prevalence of this phenomenon in Kosovo. So, from 2005 to 2007, 1,079 abortions were performed in this Department, while from 2012 to 2018, a total of 726 abortions were performed.

REFERENCES

Literature

Chou M.M., *Litigation in Obstetrics: A Lesson Learnt and a Lesson to Share*, "Taiwanese Journal of Obstetrics and Gynecology" 2006, vol. 45(1), **DOI: https://doi.org/10.1016/S1028-4559(09)60183-2**.

Edozien L.C., *Medico-Legal Issues in Gynaecology*, "Obstetrics, Gynaecology and Reproductive Medicine" 2009, vol. 19(7), **DOI: https://doi.org/10.1016/j.ogrm.2009.03.005**.

Hamasaki T., Hagihara A., *A Comparison of Medical Litigation Filed against Obstetrics and Gynecology, Internal Medicine, and Surgery Departments*, "BMC Medical Ethics" 2015, vol. 16, **DOI: https://doi.org/10.1186/s12910-015-0065-1**.

Harirpriya A., Haripriya V., *Knowledge about Medical Law and Its Negligence among Doctors: A Cross-Sectional Study*, "International Journal of Scientific and Research Publications" 2014, vol. 4(5).

Hasani E., Cukalovic I., *Commentary-Constitution of the Republic of Kosovo*, Pristina 2013.
Heriani I., Gunarto G., Masdhurohatun A., *Legal Protection of Patient Rights in Indonesia*, "Sriwijaya Law Review" 2019, vol. 3(1), **DOI: https://dx.doi.org/10.28946/slrev.Vol3.Iss1.134.pp75-85**.
I Gde Sastra Winata, Vallery Giscard Delano Temmar, *Law Claims in the Field of Obstetrics and Gynecology: How to Prevent and Overcome Them*, "International Journal of Science and Research" 2021, vol. 10(7).
Jackson E., *Medical Law: Text, Cases and Materials*, Oxford 2016.
Paçarada M., Kongjeli N., Kongjeli G., Obërtinca B., *Artificial Abortions Performed at the University Clinical Centre of Kosovo from January 2005 to December 2007*, "Medical Archives" 2009, vol. 63(2).
Riza A., *E Drejta e Organizatave Ndërkombëtare dhe Organizatat Ndërkombëtare*, Prishtinë 2012.
Salihu I., *Criminal Law – Special Part*, Pristina 2014.
Salihu I., Zhitija H., Hasani F., *Commentary on the Criminal Code of the Republic of Kosovo*, Pristina 2014.
Wrześniewska-Wal I., *Medical-Malpractice Disputes – Analysis of the Use of Evidence from Medical Disciplinary Proceedings in Litigation for Damages*, "Studia Iuridica Lublinensia" 2022, vol. 31(3), **DOI: https://dx.doi.org/10.17951/sil.2022.31.3.271-290**.

Online sources

Banjska I., *Abortions in Kosovo: An Analysis of Induced Abortions and Reproductive Health in Kosovo from 1999 to 2019*, Pristina 2019, https://artpolis-ks.com/wp-content/uploads/2019/10/ABORTET-N%C3%8B-KOSOV%C3%8B.pdf (access: 25.10.2022). [in Albanian]
Bieber C., *Medical Negligence: Legal Definition & Examples*, 2022, https://www.forbes.com/advisor/legal/medical-malpractice/medical-negligence (access: 18.10.2022).
Madison N., *What Is Medical Law?*, 2022, https://www.mylawquestions.com/what-is-medical-law.htm (access: 17.10.2022).
Molliqaj L., *Shame on the Body*, Pristina 2016, https://preportr.cohu.org/sq/hulumtime/Turpi-mbi-trupin-108 (access: 27.10.2022). [in Albanian]

Legal acts

Kodi 04/L-082 Penal i Republikës së Kosovës, 13.7.2012, https://gzk.rks-gov.net/ActDetail.aspx?ActID=2834 (access: 8.5.2023).
Kodi 06/l-074 Penal i Republikës së Kosovës, 14.1.2019, https://gzk.rks-gov.net/ActDetail.aspx?ActID=18413 (access: 21.10.2022).
Kushtetuta e Republikës së Kosovës, 9.4.2008, Nr. K-09042008.
Ligji 04/L-125 për Shëndetësi, 13.12.2012, https://gzk.rks-gov.net/ActDetail.aspx?ActID=8666 (access: 20.10.2022).
Ligji 2004/38 për të Drejtat dhe Përgjegjësitë e Banorëve të Kosovës në Sistemin Shëndetësor, 19.11.2004, https://gzk.rks-gov.net/ActDetail.aspx?ActID=2454 (access: 20.10.2022).
Ligji 03/L-110 për Ndërprerjen e Shtatzënësisë, 6.2.2009, https://gzk.rks-gov.net/ActDetail.aspx?ActID=2624 (access: 22.10.2022).

Case law

Decision of the Constitutional Court of 28 August 2020 on the inadmissibility, RK. 1615/20.
Indictment of the former District Public Prosecution of 13 February 2012, PP. no. 510/05/2011.

Judgment of the Appeal Court of 19 November 2018, PA1. no. 358/2018.
Judgment of the Basic Court of 15 January 2018, P. no. 927/14.
Judgment of the Supreme Court of 7 March 2019, PML. no. 49/2019.

ABSTRAKT

Opieka zdrowotna i usługi medyczne zgodne z przepisami i standardami przyjętymi w naukach medycznych stanowią moralny i prawny obowiązek lekarza i każdego innego pracownika ochrony zdrowia. Zbiór norm prawnych jako instytucjonalnych mechanizmów regulujących prawa i obowiązki pracowników medycznych i ich pacjentów stanowią główny obszar niniejszego opracowania. Artykuł ma na celu przedstawienie koncepcji i wagi badań oraz rozwoju w zakresie prawa medycznego Republiki Kosowa. Celem badań jest określenie powiązania pomiędzy przepisami prawa medycznego a dziedziną ginekologii w związku z naruszaniem praw pacjentów oraz niechęcią lub brakiem woli przy zgłaszaniu takich przypadków. Zastosowano metodę teoretyczną zbierania danych, opierając się na istniejących badaniach w zakresie prawa medycznego. Metodę statystyczną zastosowano do przedstawienia liczby zabiegów aborcji dokonanych na Oddziale Ginekologicznym w Prisztinie. Metodę wywiadu użyto w celu zebrania danych odnoszących się do przypadków z praktyki, w których lekarze mogli działać niezgodnie z prawem, a także przedstawienia takich sytuacji, w których ze względu na poważny stan zdrowia pacjenta podejmowano czynności lecznicze bez konsultacji z pacjentem lub jego bliskimi. Badanie wskazuje na to, że Kodeks karny Republiki Kosowa uznaje nieodpowiedzialne czynności lecznicze i nieudzielenie pomocy medycznej za przestępstwa ściśle związane z wykonywaniem medycznych obowiązków i kompetencji zawodowych. W Republice Kosowa przerwanie ciąży na życzenie jest dopuszczalne na żądanie kobiety dorosłej, natomiast przerwanie ciąży ze względu na wybór płci płodu jest zabronione. Aborcja na życzenie jest dopuszczalna do końca dziesiątego tygodnia ciąży.

Słowa kluczowe: Kosowo; Kodeks karny; prawo medyczne; ginekologia; pacjent