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Liability for non-fulfillment or improper fulfillment of professional duties by the medical or pharmaceutical worker on criminal legislation of the post-soviet states

Abstract: It is analyzed the foreign criminal law in sphere of establishment of criminal responsibility for crimes, to perform or improper performance of professional duties medical or pharmaceutical professional. Based on this study it is made a conclusion about improvement of Article 140 of the Criminal Code of Ukraine.

Key words: foreign states; criminal liability; failure; inadequate performance; professional responsibilities; medical or pharmacist.

According to information of All-Ukrainian Council on protection of the rights and safety of the patients, number of the crimes stipulated by the article 140 of the Criminal Code of Ukraine (further the CC of Ukraine) “Non-fulfillment or improper fulfillment of professional duty by the medical or pharmaceutical worker” are increased in Ukraine from year to year. Taking into account significance of life and health of an individual during providing of medical assistance it is necessary to carry out comparative-legal research of an experience of the foreign countries of the post-soviet area in respect of criminal responsibility for similar crime.

Such comparative analysis is an important in connection with that criminal legislation of these states has a lot of similarities as it was adopted on the base of common normative-legal act - the Fundamentals of criminal legislation of the USSR and the union republics of 1958 – and the most countries had adhered of the continuity principle. In addition, such studying assists not only existed, and revealing and deciding of new urgent problems and might be the basis for introducing of suggestions on improving of the national legislations.

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V.A. Glushkov, V.V. Mareyev, A.S. Paramonova, S.S. Pastushenko, T.Yu. Tarasevich, G.V. Chebotarev and others analyzed in their works some aspects of criminal responsibility for non-fulfillment or improper fulfillment of the professional duties by the medical or pharmaceutical worker on criminal legislation of the foreign states. Mainly, these issues of the criminal legislation of the post-soviet area states had been considered by these scientists indirectly; therefore this is required more detailed studying.

In order to make a comparative - legal research of the problem of criminal responsibility for non-fulfillment or improper fulfillment of the professional duties by the medical or pharmaceutical worker were analyzed the appropriate norms of the Criminal Codes of Azerbaijan (23), Armenia (24), Belarus (25), Georgia (26), Estonia (37), Kazakhstan (27), Kirgizstan (28), Latvia (29), Lithuania (30), Moldova (31), Tajikistan (33), Turkmenistan (34), Uzbekistan (35), Russia (32), Ukraine (36)¹

Analysis of the provisions of the CC of these states allows dividing these codes conditionally into the groups in dependence on variant of criminalization for non-fulfillment or improper fulfillment of the professional duties by the medical or pharmaceutical worker:

1. The Criminal Codes establishing responsibility for such crime in a separate article – the CC of Armenia (art. 130), Belarus (art. 162), Kazakhstan (art. 114), Kirgizstan (art. 119), Latvia (art. 138), Tajikistan (art. 129), Turkmenistan (art. 122), Uzbekistan (art. 116), Ukraine (art. 140). These articles are placed by a lawmaker in the structural parts of above mentioned Criminal Codes, which provide responsibility for the crime against person (life and health of an individual).

2. The Criminal Codes, which do not establish responsibility for this crime in a separate article, but they foreseen such qualifying sign of some crimes against individual as infliction a death (or serious harm of the health) on imprudence “due to violation of special regulations safety of handling” (p. 3, art. 132; p. 3, art. 137 of the CC of Lithuania), “due to improper fulfillment by a person of his professional duties” (p. 2, art. 109; p. 2, art. 118 of the CC of the RF).

¹ Further, it will be used short names of the states

3. The Criminal Codes, which do not establish any responsibility for this crime in a separate article and foreseen of appropriate qualifying sign (the CC of Azerbaijan, Georgia, Estonia, Moldova)².

In our opinion, absence in the Criminal Code of special article about responsibility for non-fulfillment or improper fulfillment of the professional duties by the medical or pharmaceutical worker comes to inadequate and incorrect juridical qualification of this professional offence. But otherwise, investigative-judicial practice has to go on the way of application to the guilty individuals of the articles for imprudence murder or infliction of body harms. Emerging of appropriate qualifying fact does not allow keeping of a principle of justice, which requires that punishment and other measures of the criminal-legal nature, applying to an individual committing crime, would be corresponded to the character and degree of social danger of the crime, circumstances of its committing and a personality of culprit, and also correct to qualify externally similar, but having its independent objects of the crime. Therefore, it is more acceptable is the first variant of establishing of criminal responsibility for such actions.

Criminalizing non-fulfillment or improper fulfillment of the professional duties by the medical or pharmaceutical worker in separate articles, the lawmakers of appropriate states, as rule, do not indicate on a victim from this crime (the CC of Kazakhstan, Kirgizstan, Latvia, and Turkmenistan). In some countries we meet such special indication: “sick person” (the CC of Uzbekistan, Ukraine), “patient” (the CC of Armenia, Belarus, Tajikistan). We believe that in dispositions of appropriate articles of analyzed Criminal Codes is reasonable to indicate a victim since that is just what is determined a specific person, to whom is inflicted a harm in result of committing of this crime. We think that the more acceptable term is “a patient”. As in compliance with the semantic meaning, the word “a sick person” means the person suffering from some diseases (opposite to healthy individual) (T.F. Yefremova); affected by some diseases is those, who is ill (S.I. Ozhegov, N.Yu. Shvedova, D.N.

² In connection with absence of the article in these countries, which establishes responsibility for non-fulfillment or improper fulfillment of the professional duties by the medical or pharmaceutical worker, these Criminal Codes will not be analyzed by us.

Ushakova) (3). Obviously, that the right to appeal to medical institution has a sick person and healthy individual with purpose to determine of a state of his health (for example for carrying out a medical examination). Consequently, usage of the term “a sick person” in dispositions of some Criminal Codes of analyzed countries considerably makes narrow a volume of the notion of a victim from this crime. In order to improve criminal legislations of the Criminal Codes we consider it necessary to use of the term “a patient” for indication of a victim.

Being analyzed an objective side of the criminalizing socially danger deed, we point out that, as rule, lawmakers of the proper countries provide the criminal responsibility for the two alternative deeds - non-fulfillment or improper fulfillment of the professional duties (the CC of Armenia, Kazakhstan, Kirgizstan, Latvia, Tajikistan, Turkmenistan, Uzbekistan, Ukraine). In the CC of Belarus, Lithuania, RF is established the criminal responsibility for the one socially danger deed - improper fulfillment of the professional duties (the CC of Belarus, RF) or for violation of special rules of handling safety (the CC of Lithuania). We think it reasonable to provide the criminal responsibility for the two alternative deeds since they are differed between each other. First, non-fulfillment is inaction, when a subject had to be and could fulfill of his professional duties (1, p. 62), non-fulfillment of those actions, which he due to work done should be committed (8, p. 323-324); and improper fulfillment is an action, which is done not like it requires the special rules, instructions (9, p. 321-323); incomplete, untimely, incompetent actions (4, p. 67). Second, in juridical works non-fulfillment of the professional duties, as rule, is considered as refusal to examine of a sick person, come to call, intervention into a disease process, in admission into a medical institution (where he was delivered or arrived himself), in hospitalization, care for a sick person, providing in an urgent medical assistance (14, p. 145), in producing of the items of medical purposes (under applying of sick pensioners or the person who have the privileges) (6, p. 65). And improper fulfillment is a technical (for example, the cases of leaving foreign objects during surgery); tactical (for example, wrong determination of the indications for surgery); diagnostic (ex. wrong diagnosis of disease); deontological violations (for

example, conflicts with sick persons); violations during producing items of the medical purposes (2, p. 75-76; 6, p. 65; 14, p. 65). Third, the courts are recognized under non-fulfillment of the professional duties by the medical or pharmaceutical worker the following: the failure to conduct diagnosis (15); failure to notify of the doctors (16); treatment without permission of a head of the surgical department (17); failure to place in hospital (18) or examination (19); and improper fulfillment is a wrongly established diagnosis (20); improper care (22). Therefore, in our opinion, it is acceptable the first variant of establishing of a criminal responsibility for the two alternative deeds – non-fulfillment or improper fulfillment of the professional duties.

All simple facts of the crimes of analyzed Criminal Codes as of a mandatory sign of the objective side foreseen the beginning of such socially danger consequences: harm to health of moderate severity (the CC of Kazakhstan, Turkmenistan, and Tajikistan); serious or less serious body injuries (the CC of Belarus), serious or less serious harm (the CC of Armenia); severe or moderate bodily injuries (the CC of Latvia, Uzbekistan); serious consequences (the CC of Ukraine), a serious harm to health (the CC of Lithuania, RF), lengthy disorder of health, joined with firmly disability more than one-third (the CC of Kirgizstan), death (the CC of Lithuania, RF). We cannot perceive a formulation of the socially danger consequences of a lawmaker of some countries. So, we consider unsuccessful indication on such consequence of the crime as a lengthy disorder of health, joined with firmly disability more than one-third since such disorder is an independence sign of moderate bodily injuries being too casuistic. We believe that the more accurate formulation of the socially danger consequences are “severe consequences”. Just this notion includes a death, severe or moderate bodily injuries. Such interpretation is based on that principal understanding of the essence of socially danger consequences including in the facts of crime, dependent on the ways of the problem solution of an object of crime. As V.A. Navrotsky fairly pointed out, commonly accepted thesis about that socially danger consequences of crime are negative changes in its object, lay in the basis of that a harm containing in violation of this object should not be recognized by the consequences of the crime, encroaching on this object. For

instance, ownership relation is an object of theft, and consequently, the consequences of this crime might be considered only losses of property, material nature (7, p. 41). Thus, we think that to serious consequences of non-fulfillment or improper fulfillment of the professional duties by the medical or pharmaceutical worker might be related only those negative changes in those social relations, which provide safety of life and health of an individual in sphere of medical service. It is reasonable to classify a death, severity and moderate body injuries are caused due to non-fulfillment or improper fulfillment of the professional duties by the medical or pharmaceutical worker as the serious consequences.

Naturally, a subject of the crime is indicated in analyzed facts and named by a lawmaker as a medical worker (the CC of Belarus, Kirgizstan, Latvia, Tajikistan, Turkmenistan); a medical or pharmaceutical worker (the CC of Kazakhstan, Ukraine); a person carrying out medical assistance and medical service (the CC of Armenia); a person performing his/her professional duties (the CC of the RF, Uzbekistan). We cannot agree with decision of a lawmaker to call a subject of appropriate crime by a medical worker since in such way the actions of pharmaceutical worker in providing a pharmaceutical care, which is understood as a combination of the measures to provide pharmacology and therapy, producing and providing of the items of the medical purpose, pharmaceuticals care, which are implemented for a sick person, are remained non-punished. The name of a subject of crime “a person fulfilling his/her professional duties” cannot be accepted by us since the professional duties can fulfill not only medical or pharmaceutical workers, but and other persons. Definition of a subject of crime as “a person carrying out a medical assistance and medical service” is unacceptable since in this case it is necessary to make clear in addition these notions. In our view, a subject of crime should be called “a medical or pharmaceutical worker” since only such way is fuller provided responsibility of these categories of the medical personal.

Practically in all analyzed Criminal Codes the responsibility for this crime is differentiated by a lawmaker (except the CC of Lithuania and the RF since they have been determined only the main facts of violation). They are stipulated the following

qualifying signs: severe harm or death of an individual (the CC of Kazakhstan); severe harm to health or death of a patient or infection with HIV (the CC of Tajikistan); severe harm to health or death of a victim (the CC of Turkmenistan); heavy consequences of a minor (the CC of Ukraine); death or infection with HIV of an individual (the CC of Armenia, Belarus, Latvia); death of a victim (the CC of Kirgizstan, Uzbekistan). In some Criminal Codes are also provided especially qualifying signs, such as: human sacrifices, other serious consequences (the CC of Tajikistan, Uzbekistan); moderate severity or severe harm to health of a person committed by an official (p. 3), death (p. 4), and death committed by an official (p. 5) (the CC of Kazakhstan).

We cannot agree with decision of a lawmaker as to attribution to qualifying signs a death, moderate severity or severe harm to health. In our opinion, they are attributed to serious consequences and as an obligatory sign of objective side of they belong to simple facts of crime. We think it unsuccessful to attribute to qualifying signs the actions of official persons since their encroachments have a higher degree of social danger and these actions should be qualified on other articles, stipulating responsibility for malfeasances. From our point of view it is unjustifiably to apply for a term “human sacrifices” as description of qualifying sign, as this is introduced considerable confusion in its interpretation due to it is absent definition in the CC of Ukraine, which would establish a common sense of this notion. We believe “infection with HIV” more correct formulation since the rules established for counteraction to distributing of this infection have general nature and touch to all medical and pharmaceutical workers of all specialties. According to article 53 of the Basic Laws of Ukraine on Health protection, the article 4 of the Law of Ukraine “On preventing of infection with Acquired Immunodeficiency Syndrome (HIV) and social protection of population” the state guarantees safety of treatment and diagnostic process to the patients ... for performance of the measures directed to prevent distribution of HIV infection ... (10, p. 12). Nevertheless “infection with HIV of a person” should belong to grave consequences as negative changes in those social relations, guaranteeing the protection of life and health of an individual in sphere of medical service. In our

opinion, the qualifying sign as “heavy consequences to health of a minor” is an acceptable since the health protection of minors is under special control of the state as we are speaking about full-bodied and healthy replenishment of a nation. Therefore, a proper fulfillment of the professional duties by the medical or pharmaceutical worker is one of the priorities of the state. As S.G. Sirenko justly pointed out, establishing of enhanced responsibility for encroachment on minors might be explained by actual recognition of a lawmaker those circumstances that minors are the persons being in helpless state (13, p. 6). Consequently, we think that in order to improve criminal legislation of some countries necessary to provide such qualifying sign as “heavy consequences of a minor”.

In sanctions for simple kinds of crimes of analyzed Criminal Codes, establishing responsibility for non-fulfillment or improper fulfillment of the professional duties by the medical or pharmaceutical worker is provided application of such kinds of the main punishments: penalty (the CC of Armenia, Belarus, Kazakhstan, Kirgizstan, Latvia, Tajikistan); deprivation of the right to occupy certain positions or to do certain activity (the CC of Belarus, Kazakhstan, Kirgizstan, Tajikistan, Turkmenistan, Uzbekistan, Ukraine); compulsory works (the CC of Tajikistan); correctional works (the CC of Belarus, Turkmenistan, Uzbekistan, Ukraine); arrest (the CC of Armenia); restriction of freedom (the CC of Belarus, Kazakhstan, RF, Ukraine); deprivation of freedom (the CC of Latvia, Tajikistan, RF, Ukraine). Sanctions for simple kinds of crimes in CC of the RF, Latvia are stipulated as cumulative. It is indicated on opportunity in them into application of additional punishment in form of depriving the right to occupy certain positions or do certain activity.

We consider it necessity to application of such kind of punishment as penalty since it is one of the goal-directed and effective means in fight with crimes and with help of it might be strengthened total punitive potential of punishment.

According to fair ideas of P.A. Popras, payment of a penalty has influence as to the right to property of convicted so and on material position of innocent individuals (members of his/her family etc.) (11, p. 32). Thus, to improve criminal legislation of Ukraine is acceptable to supplement a sanction of p. 1, article 140 of the CC Ukraine

with such punishment as a penalty and compulsory works. This assertion is based on if to supplement penalty into sanction of p. 1 of article 140 of the CC Ukraine then it will be equaled punishments, various of level of gravity, for instance, a penalty is less strong kind of punishment, and compulsory works and restriction of freedom, in compliance with article 51 of the CC of Ukraine are on fifth and ninth position in the punishment system. It is existed in theory of criminal law an opinion that considerable “jumps” on “stairs” of punishments in sanctions, as rule, are not justified (5, p. 328). Therefore, we think it necessity to application of such kind of punishment s as compulsory works in order to smooth these different “jumps”.

Consequently, made comparative legal research of the foreign criminal legislation of the post-soviet states allowed determining some perspective directions of improvement of national legislation through introducing the correctives in existed norm and supplement it with some orders.

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