

Medical Criminal Offences in the New Criminal Code of the Republic of Kazakhstan

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Abstract

The article aims to analyze the issue of medical criminal offences. Medical criminal offences were originally introduced into the criminal law used on the territory of the Commonwealth of Independent States by separate chapter XII. The role of these offences in the protection of human health is defined. The main problems of medical criminal offences are determined on the basis of the new Criminal code of the Republic of Kazakhstan. An increased focus is put on the considered violations. Proprietary methods to solve the problems are proposed.

Keywords: criminal code, code of the Republic of Kazakhstan ‘On People’s Health and Healthcare System’, criminal infractions, offences, misconducts, medical criminal offences, liability of medical and pharmaceutical workers

1. Introduction

One of the most important tasks of any state is to take care of its citizens’ health. According to the Constitution of the Republic of Kazakhstan of 1995, a person is the highest value (Constitution of Republic of Kazakhstan). On the basis hereof and article 88 of the Code of the Republic of Kazakhstan dated September 18, 2009 ‘On People’s Health and Healthcare System’ anyone has a right to obtain a guaranteed extent of medical aid provided by health workers under the right to the health and its protection for free (Code of the Republic of Kazakhstan, 2009).

Health workers have to render medical aid to citizens applying to therapeutic institutions irrespective of their subordination and status, specialization, professional skill and also on the road, in premises, on a plane, in the water, in a car, in the street, at home irrespective of the time of the day or whether at rest, on vacation, etc.

In the State of the Nation Address President N. A. Nazarbaev (State of the Nation Address by President of the Republic of Kazakhstan, January 29, 2010) announced that prolongation of a person’s life to 72 was the most important goal. A set of state measures enabling successful modernization of the country has been accepted for this purpose.

The human right to medical services is fixed in international legislation such as article 25 of the Universal Declaration of Human Rights (The Universal Declaration of Human Rights, 1948), WHO (World Health Organization) Constitution (accepted in New-York on July 22, 1946) (World Health Organization (WHO), 1946, July); Constitution of the Republic of Kazakhstan according to international legislation and international agreements of the Republic of Kazakhstan.

The acts offer a wider interpretation of the right of a person to health care as compared to the provisions of the Constitution of Kazakhstan Republic. That is why we need to provide more qualitative medical aid.

Medical activity is strictly regulated mainly under administrative regulations (medical instructions and orders) on the one hand and purely professional rules on the other hand. These orders and instructions define a medical activity and state what methods must be used to treat certain diseases, when a surgery is recommended, under what conditions a patient’s consent for a surgery must be provided, etc. The principles already developed by criminal law that have to be used in cases of extreme necessity, reasonable risk and consent of the injured are contained in professional instructions intended for doctors with the corresponding medical qualification.

The issues of criminal liability for the offences in the sphere of medical support, advisability of selecting and studying the provisions of the Criminal code concerning the liability of medical workers are becoming increasingly important nowadays.

There are no official statistical data concerning the violation of rights by medical workers. A certain idea of the condition of crime in medicine is presented in media reports and reports of citizens sent to law enforcement authorities. Healthcare bodies conceal the existing state of things. Medicine loses its popularity. This results in criminalization of the considered sphere and growth of the corresponding criminal activities. That is why a thorough studying of legal healthcare problems, reasons and conditions is necessary.

The quality of medical aid is determined following examination and treatment of a patient in the total correspondence with this type of pathology and category of a medical institution. Modern medicine considers improper quality of medical aid as a defect in rendering medical aid.

A defect in rendering medical aid consists in improper quality of rendering medical aid in the form of diagnostic mistakes, treatment of a patient or organization of medical aid that produced or could produce a negative impact on the therapeutic process and a patient's health.

All defects of medical aid are divided into 4 basic groups: defects of organization in rendering the medical aid, defects of diagnostics, defects of treatment, defects not related to the violations by medical personnel. The first 3 groups of defects denote certain liabilities of doctors for their omissions and only the last group excludes the medical liability.

According to B. N. Tazhibaev, *a professional medical criminal offence* includes an intended and reckless act (acts or omissions) of a medical worker *fulfilling the functional obligations* causing harm to the health of a certain individual or group of people prohibited by the criminal law under the threat of punishment. The same definitions were contained in the works by other scientists (Rustemova, 2003).

Criminalization of acts creating a real threat to the life and health of a human being is required. They diminish a person's quality of life due to the loss of their professional capability. It is necessary to consider the issue of intensifying the criminal liability of medical workers for socially dangerous acts committed by them and causing the death or harm to a person's health.

In this article we'll consider a new chapter of the XII Criminal code of the Republic of Kazakhstan, types of offences committed by medical workers only. The analysis of foreign legislation concerning medical offences is provided. We'll present our vision of the system of medical offences.

2. Method

As the subject of the present criminal and legal research is mainly of an interdisciplinary type we used the fundamental provisions of criminal law, criminology, medical law, philosophy, sociology, psychology, medicine and pharmacy during its development.

Besides, in the working process we applied general scientific and special methods such as systemic, statistical and comparative methods alongside with such particular and sociological methods as analysis of documents and observation.

Accuracy and substantiation of the conclusions made during the research were obtained with the usage of a considerable amount of legislative, monographic, periodical and Internet sources of legal, sociological, psychological and criminological origin, analysis of statistical data made by the Committee of Legal Statistics and Special Records of the General Prosecutor's Office of Kazakhstan, prevention programs and Salmatty Kazakhstan State program.

3. Results

The Criminal code of the Republic of Kazakhstan of 1997 (hereinafter referred to as the old Criminal code) revealed the intention of the state to enable better protection of supreme values. During the last fourteen years of the 21st century some amendments were proposed to over 300 articles of the old Criminal code. Corrections of the criminal law were intended to solve the problems met in law enforcement practice. However, the strategy of solving systemic problems of the old criminal law using corrections only was ineffective.

Due to that the wording of the new Criminal code was developed preserving many time-proven criminal and legal institutions.

A new Criminal code of the Republic of Kazakhstan (hereinafter referred to as the new Criminal code) was adopted on July 3, 2014. It entered into force on January 1, 2015. The most significant novelty of the new

Criminal code was represented by the system of criminal acts and criminal infractions. In case of criminal infractions there is a wide range of mild punishments including public and corrective works and minimum period of limitations. The lack of conviction for criminal crimes is the principal factor.

The main stress was put on the wide application of punitive measures alternative to deprivation of freedom such as penalty and community service. A penalty is the principal punishment for crimes. The penalty amount is increased. The sphere of its application includes any minor and moderate offences not related to the infliction of death.

It was for the first time in the CIS history when a special chapter concerning medical criminal offences was introduced into the new Criminal code due to improvement of quality life and the possibility to obtain qualified medical aid. It considers criminal liability of medical and pharmaceutical workers for the criminal offences committed by them and leading to causing death or harm to a human being's health.

Uniting medical offences into a special chapter is one of the aims set by President of the Republic of Kazakhstan Nursultan Nazarbaev in the message called 'Strategy Kazakhstan 2050' (President's message) featuring harsher punishment for crimes against maternity and childhood.

Illegal circulation of counterfeit drugs, medical devices and medical equipment causing severe consequences was criminalized. It happened due to the abundance of counterfeit products in the market leading to a considerably decreased therapeutic effect in various diseases. Punishments for offences against maternity and childhood are intensified. The old Criminal code lacked a separate chapter devoted to criminal offences and all the offences committed by medical workers were distributed all over chapters.

It must be noted that the new chapter of the 12th Criminal code unites only professional medical criminal offences. Other offences committed by medical workers using their professional special knowledge but in cooperation with the common subject of crime are regulated by other chapters of the Criminal code.

Based on the new Criminal code of the Republic of Kazakhstan medical workers are subject to criminal liability for the professional offences set in articles 317-323 (Criminal code of the Republic of Kazakhstan, 2014).

An object is one of compulsory elements (parties) of the legally defined crime. That is why there is no criminal infraction without an object. Any socially dangerous act classified by the criminal law as an offence infringes on a definite object. A criminal offence results in a justifiable threat of causing a rather serious or significant damage to a certain object.

A legislator conducts such complex procedures as systematization and codification of criminal law standards considering the features of the object of the criminal violation.

The *object* of any criminal violation consists of public relations where certain benefits, interests of people, and public and state interests are mediated. The subjects (participants) of these relations are always represented by people only. That is why in the broad sense of the word any offence concerns (violates) these or those interests of certain people, does dramatic harm to them or creates a danger of causing the harm.

Interest is a more concrete manifestation of a public relation. There are no and there can be no public relations without the relation between the bearers (subjects) and their interests. Public relations reflect the integrity of various relations between people in the society.

Certain groups of interests can be called a *special or generic* object of a criminal infraction. This provision must always be confirmed by relatively independent groups of articles from the Special Part of the Criminal code uniting the so-called cognate offences in relation to which the corresponding legal rules are formulated and united in chapters of the Special Part of the Criminal code. There are XVIII chapters in the new Criminal code of the Republic of Kazakhstan of 2014.

Their peculiarity consisted in the aiming at the satisfaction of consistent interests. The consistent peculiarity of socially significant interests protected by the criminal law must be determined not accidentally but on the basis of really existing interests and certain objective criteria realized by the society.

Alongside with the generic object there is also a *subgroup (specific) object* when narrow groups of relations can be differentiated among a large group of close relationships requiring a single and complex criminal protection. Health of the population and public morality being an independent social value are protected using a set of political, economic, legal, medical and other means.

Health of the population as a specific object of the considered group of offences is an integrity of public relations supplying all people inhabiting the territory of the state with safe conditions of life.

Subsequent specification in the Criminal code denotes 'subgroup' legal rules concerning offences. This process can be implemented in two directions: according to the subject of an interest, the type and essence of the most protected interest.

Now, when a new chapter is devoted to medical offences it is necessary to determine the specific object of these violations.

The specific object is the basis for systematization of legal rules of the Special part of the Criminal code. It determined the social danger of the infraction and its position in the Special part of the Criminal code. The essence of the relations in the sphere of medical assistance is discovered by means of an interest or benefit.

The works of such scientists of the former USSR as E. I. Kairzhanov (2008), p.160; N. I. Korzhansky (1992), V. N. Kudryavtsev (1972), A. V. Naumov (2004), B. G. Nikiforov (1960), E. A. Frolov etc. (1969, p. 312) and other younger Russian researchers such as V. N. Vinokurov (2012, p. 288); N. V. Henry (2011, p. 60); G. P. Novoselov (2001) are widely known.

Analysis of healthcare workers' activity indicates that breach of their professional duties can be observed only while providing medical assistance. That is why only certain relations enabling the proper activity of healthcare institutions that deal with health protection can be related to the object. Efficient functioning of healthcare bodies and institutions and non-impairment of citizens' right to health protection can be possible only when the principle of rendering qualified medical aid is followed.

A specific subject of medical acts and its illegal activity form an element that brings the offences into a united whole. These are medical or pharmaceutical workers only i.e. people who have undergone special medical and pharmaceutical training in the corresponding high and secondary medical institutions. The medical terms are defined by the legislator in the Code of the Republic of Kazakhstan 'On People's Health and Healthcare System'. This code was adopted for the first time in the entire post-Soviet area.

Thus, article 1 of the Code of the Republic of Kazakhstan 'On People's Health and Healthcare System' contains the following definitions: medical workers, medical activity, pharmaceutical workers, and pharmaceutical activity. However, it doesn't define the notion of '*medical support*'. This is a gap in the legislation.

Medical support consists in prevention of various diseases, rendering aid to a patient, temporary disability examination, forensic examination, etc.

The identified signs enabled to determine the range of offences. They must be divided into two groups.

The first group includes a medical and pharmaceutical worker as a *special subject of the offence* (articles 317-323). The mentioned workers have high medical (pharmaceutical) education, category certificate, and a license to perform medical (pharmaceutical) activities.

Besides, this group doesn't include the components of crime the subject of which is a *medical worker only* (articles 116, 127, 129, 247 and 315 of the Criminal code of the republic of Kazakhstan). This was reflected in special literature in medicine and criminal law.

The second group of offences includes socially dangerous acts with the liability incurred both by a medical worker *and other persons*. These acts can include the criminal offences described in articles 114, 303, 304, 326, 366, 369, 371, etc.

The most dangerous of them are manipulations with illegal transplantation of human organs and tissues; this results in the commitment of such felonies as murder, human trafficking, kidnapping, etc. We don't consider this type of offences in this article.

Human health is an additional object. An offence is deemed to be completed from the moment when the stable medical activity was disturbed. According to the old Criminal code, human life and health relate to the object of the offences committed by medical workers. The offence is completed from the date of a moderate personal injury.

Offences enumerated in chapter XII of the Special part of the new Criminal code give rise to different value judgements and suggestions as in the old Criminal code the offences were grouped in different chapters in accordance with the specific object. For instance, lawyer S. Burnabaeva believes that 'violation of medical confidentiality could be observed in the third chapter of the old Criminal code where the specific object was presented by social relations regulating personal constitutional rights and freedoms of a human being and citizen of the Republic of Kazakhstan. The rights of the citizens were protected under the criminal legislation on the basis of the personal privacy principle requiring an anonymous treatment (Enshina, 2014).

4. Discussion

Consideration of the provisions of the New Criminal Code on medical offences will be incomplete if they are not compared with the provisions of criminal legislation of foreign countries.

The majority of European laws act in accordance with the Anglo-Saxon system where judicial legislation is used instead of codes. Due to that it will be more complicated to compare the Criminal code of Kazakhstan with the European legislation. For instance, the Criminal code of Austria sets special provisions concerning criminal liability in paragraphs 856-857 applied in case of improper treatment (Criminal code of Austria, 1974).

Literature contains a detailed description of constituent elements of medical offences set in the Criminal code of the Russian Federation, the Kyrgyz Republic, the Republic of Uzbekistan, the Republic of Lithuania, the Republic of Estonia, Georgia, Moldova, the Republic of Azerbaijan (Kruglikova & Kuznetsova, 2002, p. 464).

The Criminal code of Ukraine contains detailed data about criminalization in the sphere of medical support (Naumov, 2002, p. 82).

A more explicit explanation is presented in the Criminal code of the People's Republic of China of 1997. Paragraph 5 of Chapter 6 denotes Crimes against public health (Criminal code of the People's Republic of China, 1997). As far as medical offences go, the Criminal code of the Federal Republic of Germany of 1998 pays more attention to illegal termination of pregnancy by medical workers (Criminal code of the Federal Republic of Germany of 1998).

Thus, a renowned Moldavian criminologist V. N. Florya suggests it is necessary to isolate certain articles making up separate 11A chapter devoted to 'Medical crimes against patients' life and health' in the Special part of the Criminal codes of Moldova, Russia, Ukraine and Romania (Florya, 2009, p. 4).

The Criminal code of Moldova includes offences that are not present in the new Criminal code of Kazakhstan yet (articles 148, 160, 161, 214, 215). The issue of necessity and advisability of introducing a criminal liability for such offences must be settled just on the basis of the accepted medical and investigative practice, extent of act and other criminal factors.

As you can see, the criminal legislation of foreign countries lacks uniformity.

Thus, almost all the considered offences are committed only by medical professionals or with two forms of guilt. In rare cases we deal with reckless medical offences. Due to the special knowledge they are aware of their criminal actions or criminal omissions and resulting harmful consequences.

5. Conclusion

Having considered and analyzed medical criminal offences as per the Criminal code of the Republic of Kazakhstan we believe that articles 116, 127, 129 and 315 have to be included into chapter XII of this Code. For instance, article 116 (Enforcement of removal of organs or illegal removal of human organs and tissues) originated from the word 'move' as only a person with high medical education in the area of transplantation can move organs and tissues from a person's body for the purpose of their transplantation; in accordance with article 127 ('Unlawful commitment to a psychiatric hospital') only psychiatrists can decide on admission of a person to the psychiatric institution due to a mental disorder, the court can't pass a corresponding judgment without the decision; article 129 ('Cloning of human beings') - the notion of a human being's cloning is given in the Code of the Republic of Kazakhstan 'On People's Health and Healthcare System'; article 315 ('Illegal withdrawal of human organs and tissues') describing illegal withdrawal of these organs for the purpose of their transplantation or sale.

Considering progress in medicine and increased growth of offences in the sphere of withdrawal and usage of stem cell tissues of a human embryo it would be sufficient to add new crime components in the sphere of protection of genetic material of a human being as a biological unit and new reproductive biotechnologies to chapter XII of the new Criminal code.

Reform of the criminal legislation and improved level of liability will lead to the improved quality of medical activity reducing outpouring of money aimed at treatment abroad and help to improve the financial material resources of medical and pharmaceutical institutions producing a significant impact on the quality and activity of citizens' lives.

It must be noted that it is not possible to analyze all provisions of foreign criminal legislation in the sphere of medical and pharmaceutical population support. We didn't consider criminal legislation of foreign countries concerning euthanasia, violation of medical confidentiality, new biotechnologies and they are a subject to independent studying.

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