MEDICAL CRIMINAL LAW IN THE RUSSIAN FEDERATION: PROBLEMS AND PROSPECTS OF DEVELOPMENT

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Annotation. The current state of medical services has long become one of the most important issues of understanding what exactly should serve as a template for their required quality, and why, the role and responsibility of a medical worker are not always considered as the main factors in resolving a situation when the life and health of a patient were exposed to unjustified danger. The article is devoted to the author's new approach to the criminal law regulation of public relations in the field of medical services.

Purpose of the article: The author aims to present a scientific approach and scientific substantiation of the possibility of the emergence in the future of a new sub-branch of criminal law — medical criminal law.

Methodology and methods: the article uses methods of analysis, synthesis, deduction, as well as the method of interpretation of legal norms, which make it possible to better comprehend the institutions of criminal law and highlight a new branch of law

Conclusions: the problem of the presence of imperfections in the current legislation is relevant to study, as evidenced by judicial practice in criminal cases, discussions and works of legal scholars. The author, citing examples from practice, draws attention to the density of the relationship between the sphere of medical services and other related services, and also draws parallels between the grounds that can and should cause the emergence of the considered branch of law.

Application of the results: The article is intended for the widest range of readers, including undergraduate and graduate students of higher educational institutions, who study the problems and imperfections of the current criminal law. The material can be used as a guide for the preparation of practical and seminars.

Key words: *medical law, health, criminal legislation, responsibility, health care system, medical*

services.

Introduction. The heightened social interest in the problem of responsibility of a medical officer has long attracted the attention of legal professionals. In particular, the latter, supporting their opinions with objective data (development of science, rich experience in practical provision of medical assistance, success of development of medicine in many countries, etc., continue to insist on the introduction of more stringent control measures on the part of public and government over the activities in the field of provision of medical services, motivating this by the fact that this field has its own specific features, and often, when resolving issues of proper legal assessment, bewilders law enforcement officers with respect to the issue of ascertainment of guilt by infliction of injury, if the rules of provision of the requested service were observed and are consistent with the accepted standards.

Only according to the official figures, published by the Ministry of Health of the Russian Federation as of July, 2020, about 70 thousand people die in this country due to medical errors and unprofessional performance of medical personnel. Emphasizing the problematic character of the quality of services in medicine, M. Murashko, the Head of the Ministry of Health of the Russian Federation, pointed out that in almost all the cases of death, these consequences could have been avoided if the activities of the doctors and medical officers were more competently coordinated: “These are the deaths that could have been prevented...” [6].

Formulation of the Problem. Meanwhile, the issues of human health, as well as human biological resources, as a line of research, have a fairly strong scientific foundation, and therefore the statement of medical researchers that the ethics of medical treatment has already recorded practically no cases of errors in the rendering of verdicts of the violation of the rules of this ethics, highlights the need for the introduction of a new direction of administrative control in this area, which implies the establishment of special mechanisms of responsibility, first of all, for the medical practitioners.

Thus, researchers N.G. Muratova and V.A. Spiridonov, placing emphasis on the sufficiency and diversity of various sources that determine the professionalism of the approach in this issue, as well as the availability of quality works and researches in the fields of medical law, forensic investigation, forensic medicine and forensic science, impress the need to recognize the systemacity of relationships of inter-branch nature between the medicine and the law. The authors also note that there is a need to establish a system of norms of law that would make it possible to correctly qualify the circumstances in criminal cases of crimes related to poor quality of the provision medical services (assistance), or refusal to provide them [8, c.107].

On top of everything else, it is necessary to consider, that medical activity is not conditioned exceptionally by those possibilities that find their expression in the provision of direct medical services on the part of doctors. This also includes the following: legal impact on the field of health protection (medical law); organizational arrangements, related to the issues of maintenance engineering support of the health care system; necessary personnel sufficiency and material and technical support; planning and universal development of the health care system at various levels (regional aspect); particularities in terms of provision of services to vulnerable categories of citizens at risk; preventive activities in the issue of countering various diseases of a massive (epidemic) nature; scientific and educational standardization of the sphere of medical services, etc.

Legal Regulation. Furthermore, according to the provisions of the Constitution of the Russian Federation, the right of the citizens to the provision of quality medical assistance is conditioned not only by the principle of correctness of its direct provision, but is covered by such a concept as “protection” (Art. 41 of the Constitution [1]), which, according to the provisions of various regulatory acts, including not only federal and regional laws (Federal Law “On the Fundamentals of Protection of Public Health” [3], Federal Law “On Compulsory Medical Insurance in the Russian Federation” [4]), governmental regulations

and decrees (Regulation of the Government of the Russian Federation “On Approval of the Rules for the Provision of Paid Medical Services by Medical Organizations” [5]), and various departmental acts, particularizing the aspects of this activity (Order of the Ministry of Health of the Russian Federation “On Approval of Criteria for Assessing the Quality of Medical Care” [6], Order of the Ministry of Health of the Russian Federation “On Approval of the Nomenclature of Medical Services” [7]), is considered as a complex phenomenon, the elements of which include not only the services, provided to the population by the treating personnel, but also the measures, aimed at the establishment of a single general direction, but also: disease prevention, provision with the necessary high-quality drugs and medicines, as well as with the equipment, in accordance with the demography of the region’s development and attraction of the necessary human resources.

In this regard, it is logical to ask the question: why is it only medical officials who should be the subjects of the crimes under analysis? Why is it the criminal responsibility, provided for in the criminal legislation, and, more specifically, the norms defining its incurrence when the consequences arise (for example, in the form of a “lethal” outcome), can be applied only to a doctor, a nurse and other persons whose responsibilities include direct provision of medical assistance, provided that the reasons of such consequences can themselves not only result from the actions (inaction) of medical officers?

Given the breadth of these activities, as well as taking into consideration the specifics set by the provisions of Art. 41 of the Constitution of the Russian Federation and other sources, it looks perfectly logical to single out a group of norms, which form a separate direction of regulation in the criminal legislation and establish a new sub-branch of law — medical criminal law.

Doctrinal Approaches. In this respect, it is not only the plurality of the acts, regulating the sphere of provision of medical services that is the reason for this differentiation, but, as I.A. Rarog and T.G. Ponyatovskaya point out, the fact that there is a number of norms, already existing in the criminal legislation of the Russian Federation, which establish the responsibility for the actions, committed directly in the process of provision of medical assistance to the patient, singling out a separate category of subjects of such actions, as well as scientific validity, which has gained certain support in the criminal legal science in the settlement of the issue of responsibility for undesirable consequences [11, p.820].

At the same time, it should be noted that this initiative also has its opponents who state that singling out a new direction in the criminal law will to a greater extent place emphasis not on the object, that is on the particularity of relationships in the field of provision of a socially relevant service, but on their subjective aspect, and, specifically, position of assessment of the subject’s actions, which, in turn, can lead to distortion of the basic principles of legal regulation, defined by the criminal legislation [10, p.167]. This is not groundless, since it is not only the actions, committed in the consequence of provision of a medical service that may be qualified as crimes in the area of health care, but also other actions where the reason for commission may not obligatorily consist in erroneous (negligent) impression of, for example, correctness of the treatment selected by the doctor, as a reason for the subsequent error, but quite an intentional crime (criminal homicide), committed through the unlawful use of special knowledge of medicine.

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It is fairly obvious that the mentioned crimes cannot fall into the category of crimes a doctor commits as a professional who has special knowledge in the field of medicamental impact on human health, or as an official on whose decision the possibility of direct influence on his (her) condition depends. In particular, actions committed by a doctor through the use of his (her) official position: bribe-taking (Art. 290 of the Criminal Code of The Russian Federation [2]), swindling (Art. 159 of the Criminal Code of The Russian Federation), etc., can hardly be qualified as crimes of this orientation. These actions, despite the relationship between the actions (inaction) of a representative of a medical organization (institution) and the consequences, which may affect the condition of a number of patients rather than a single patient, should not be assessed as actions, inherently relating to the area of direct (conscious) negative impact on their health and life. The provisions of Art. 264 of the Criminal Code of The Russian Federation can serve as an analogy of such an approach, where alcoholic (drug) intoxication is one of the attributes, increasing the responsibility for the infliction of injury to health due to the violation of the Traffic Rules of the Russian Federation. However, the legislator does not a priori consider this attribute as evidence of the driver's guilt, even if he (she) gets behind the wheel in this state absolutely deliberately.

It is also not surprising that crimes committed with respect to the employees of medical institutions cannot be qualified as crimes, which, in opinion of a number of researches, should form the foundation of the future branch. The position of the highest legislative body, which has reasonably rejected the draft law of one of the representative bodies of the constituent entity of the Russian Federation in terms of introducing amendments into Art. 124.1 of the Criminal Code of The Russian Federation with respect to criminalization of various violations, committed when communicating with medical officers, including criminal insult and use of violence with respect to the latter [9, p. 100], serves as a proof of scientific certainty in this issue.

Consequently, the distinction between the crimes committed in the field of provision of medical services (or medical assistance), and where human life and health are the object, should be made using a different approach, the essence of which consists in determining personal responsibility for the result, conditioned by the exceptional specifics of the provision of such a service, the procedure for the use of which on the part of the specialist has not obligatorily been defined legislatively, but, has, at the same time, been backed up by scientific medicine.

S.A. Rogozina, who initially considered the infliction of injury to health due to the provision of medical services (assistance) as negligence, expresses a similar position. In particular, she points out that, when determining the responsibility measures for similar violations, one should, in the first instance, distinguish between the concepts of "medical service" and "medical assistance", since not every service in the field of provision of medical assistance can form a risk, associated with the negative impact on human health. In particular, contacting a medical institution in order to obtain a certificate for visiting a swimming pool cannot form any risks, since in this case, no assistance is actually provided to the citizen. Given the particular specificity of the provision of medical assistance itself, as well as the particularities of the object of crimes, committed in the process of its provision, the objective aspect of such an action must find its expression in a gross violation of the prescriptions and prohibitions, the strict observance of which is conditioned by the duty of medical profession [12, p.122].

At the same time, as it has been proved in practice, gaps and contradictions in the national legislation do not allow one to fully form the correct idea of the correctness of development and implementation of a new branch into the criminal legislation. Some of the issues that must be resolved through the criminalization are in fact unresolvable on completely different grounds, in particular, poor legislative vision,

as well as asocial understanding of development of the criminal legislation in determining the causes of crimes committed. “Doctor-patient confidentiality” seems to be one of such reasons, which, as we know, conceals some of the information and does not allow one to fully assess the doctor’s actions subsequently. It is natural, to a certain extent, that the patient does not always tell the truth to his (her) doctor, for example, about the duration of the symptoms, as well as about the consequences, which may have a single manifestation. As a result, an error made by the doctor may become a consequence of the treatment prescribed by this doctor, but the reason for such an administration is the fault of the patient himself (herself). Alternatively, taking into consideration the fact that treatment can be provided in this country on an exclusively voluntary basis (with the consent of the patient), responsibility release mechanisms should be provided for, provided that the doctor, envisaging the negative progression of the disease without an urgent, for example, surgical intervention, has informed the patient of this fact, while fully understanding that even in the case of application of such an intervention, the patient’s life may be exposed to even higher risks.

Findings. In the context of determining the parameters of the differentiation under consideration, it is rational to raise the issue of complexity of the distinction between the injure to health, inflicted by the crime, and “injure” due to the provision of the emergency medical assistance, which was provided in order to prevent negative consequences of this crime. Thus, by the decision of the Ivanovo City Court, Mrs Moleva was found guilty of committing a crime, provided for by Part 1 of Art. 109 of the Criminal Code of The Russian Federation, on the ground that she, acting by negligence, maimed Mr Smirnov, her common-law husband, despite the fact that the latter, undergoing an almost one week treatment at the hospital, subsequently died. After some time, the prosecutor, by virtue of the requirements of the abovementioned Federal Law “On Compulsory Medical Insurance in the Russian Federation”, filed a claim against this citizen, which was grounded on the recovery of the money spent for the medical assistance, provided to Mr Smirnov by the medical institution. Traversing the particulars of the claim, the defendant stated that in such a case, it is a special expert opinion on the quality of the medical assistance, confirmed by a corresponding act, which can serve as a confirmation of validity of the particulars of the claim filed. Reviewing the validity of the claim, the court made a decision on the assignment of the abovementioned special expert opinion, the results of which made it possible to establish that the death of Mr Smirnov was caused not only by the maims committed in consequence of Mrs Moleva’s actions, but also untimeliness and poor quality of the provided medical assistance, which subsequently entailed not only the rejection of the claim, but also became a ground for the revision of the criminal case [13].

Thus, special attention should be paid to the nuances associated with inappropriate provision of medical services. In particular, in 2018, the Investigative Committee of the Russian Federation and the National Medical Chamber attempted to introduce amendments into Art. 124.1 of the Criminal Code of The Russian Federation with respect to criminalization of improper provision of medical services (assistance), since the issue of improper provision of such assistance will in this context be more relevant than intentional failure to provide assistance. At the same time, this initiative has not found sufficient support to date, since, as we pointed out earlier, the parameters of this differentiation should be supported by sufficient expert studies [15].

Conclusion. Meanwhile, even a quick assessment of the applicable provisions of the criminal legislation makes it possible to find out that the sphere of application of the criminal law in the control of medical activities is expanding; at the same time, frequent violation of the established prohibitions and prescriptions on the part of medical officers suggests that the dialectical component of this issue is in an active phase of development, which indicates the inevitability (regularity and expediency) of singling out of a group of norms into a relatively autonomous group, which will subsequently be referred to as medical criminal law.

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