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E.V. Yespergenova

*B. Beisenov Karaganda Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan, Kazakhstan
(E-mail: yevgeniyayes@mail.ru)*

Some issues of improving the criminal law standards regulated by Article 320 of the Penal Code of the Republic of Kazakhstan «Failure to assist sick person»

The purpose of this work is to develop scientific-based proposals to improve criminal legislation and practice of its application. Based on the results of the research the author offers recommendations for improving the current criminal legislation and legal precedents in issues of crossing for failure to assist sick person, in particular, the author's position on the concept, type and amount of the assistance provided is proposed. In addition, considering the analysis of the existing points of view of academic lawyers, a number of conclusions were drawn related to the definition of the concepts «sick person» and «patient», on the basis of which the author proposed his own vision of this concept. The conclusions, results, provisions reflected in the work are based on the analysis of the legal literature, the materials of law enforcement practice and the survey of the relevant circle of respondents and can be used in further scientific research, when developing proposals for legislation, in the teaching process while teaching the criminal law course.

Keywords: criminal legislation, penal code, criminal law standards, medical offenses, responsibility of medical workers, failure to assist, professional duties, sick person.

The rendering of assistance to the sick person is substantive, because the life of the sick person, as well as the possibility of his recovery depends on the timely and proper provision of medical care.

Helping a sick person is the professional duty of medical professionals. Since ancient times one of the founders of medicine Hippocrates has been formulated standards of behavior of the doctor (Oath of Hippocrates). According to Hippocrates, the doctor is the only profession that must begin with an oath to society because a person who has chosen this profession, who has studied for many years to help a person suffering from personality, naturally must make a promise to be worthy of the chosen case. In works that have survived to this day it is noted that «medicine is truly the noblest of all arts. But because of the ignorance of those who are engaged in it, and those who with frivolous condescension judge them, it is now far below all arts» [1].

Graduates of higher education organizations who have been trained in medical specialties and are currently taking the oath of a doctor of the Republic of Kazakhstan, who swear to provide medical care to everyone who needs it, regardless of age, gender, nationality, religion, social status and citizenship [2].

It is necessary to recognize that today the issues of medical deontology (the totality of ethical norms for the performance of one's professional duties by a medical worker) really are great importance for society. The ethical responsibilities of health workers are considered both internationally in the International Code of Medical Ethics and at the national level in the Code of Honor for Medical and Pharmaceutical Workers [2].

However, medical workers who solemnly promised to provide medical assistance do not always have it, so they are held liable in accordance with the legislation of the Republic of Kazakhstan. The cases of bringing persons to criminal responsibility for failure to assist sick person, as shown by the analysis of statistical

data in practice although they are relatively rare, do exist. So, in 2014 5 such offenses were registered, in 2015 - 5, in 2016 - 0, in 2017 – 2 [3].

According to Article 320 of the Penal Code of the Republic of Kazakhstan victim is a person in need of medical assistance but because of his physical incapacity or because of the lack of special medical knowledge he cannot provide medical assistance to himself.

As the analysis of legal literature shows some academic lawyers propose to legislatively fix the concept of a sick person because in their opinion a sick person can be not only a person suffering from any disease, regardless of its severity, but also a person who is not suffering from the disease but needing medical care, for example, a woman in childbirth [4; 86]. In medical practice the concepts of «sick person» and «patient» as a rule are interchangeable. In addition, there is a problem in determining the status of «patient» and the concept of «sick person». All this in turn creates difficulties in law enforcement practice. In connection with the indicated problem it should be noted that according to subpar. 87 pt. 1 Art. 1 of the Code of the Republic of Kazakhstan «On public health and health care system» the term «a patient» is defined as - an individual, who is (was) the consumer of health services [2]. At the same time, the concept of «sick person» is not legally fixed. According to the explanatory dictionary S.I. Ozhegov is a sick person it is struck by some kind of disease [5; 107]. The patient is a biological status that characterizes the deviation from the norm in the state of the organism [6]. Thus, the concept of «patient» is broader than that of the sick person because the status of the patient is acquired by any person who has applied to a medical institution, not necessarily for the purpose of treatment (for example, for prevention or medical examination). An analysis of legal literature shows that some authors suggest that the notion of a «sick person» should be legally fixed in a note to the criminal law stipulating responsibility for failure to assist sick person in the following wording: sick person - an individual who is in any painful condition who needs immediate medical attention, regardless of whether he applied for medical help or not [7; 345].

In our opinion, the legislative consolidation of the notion of «sick person» in a note to the article providing responsibility for failure to assist sick person will lead to excessive cluttering of the criminal legislation which can hardly be considered expedient. Moreover, the analysis of the Penal Code of the Republic of Kazakhstan shows that in some chapters, in particular, chapter 8 of the Penal Code of the Republic of Kazakhstan «Criminal infraction in the scope of economic activity» is dominated by a large amount of terms inherent in the sphere of economics, however, notes to each article of Chapter 8 PC RK explaining these concepts the legislator did not provide, thus did not overload the criminal legislation which is, in our opinion, justified.

At the same time, it must be recognized that the lack of appropriate explanations of the term «sick person» negatively affects law enforcement practice. In this regard we consider it expedient to define and consolidate the notion of «sick person» in the sectoral legislation in particular in the Code of the Republic of Kazakhstan «On public health and health care system» of September 18, 2009 which we believe will promote uniformity and effectiveness of criminal legislation evaluation of the deed.

Ya.A. Myts in addition to the legislative definition and consolidation of the concept of the sick person suggests in the dispositions of the rule providing responsibility for the act under analysis to expand the list of victims providing a sick person other than the sick person who needs medical assistance. The author proposes to refer to other persons: a woman in childbirth who also has the right for medical care under the law and this right is ensured by assigning an appropriate duty to provide necessary assistance to obstetricians and gynecologists; some categories of persons whose professional activity is associated with significant overloads for the organism (athletes performing in the professional ring, military, persons performing work in difficult working conditions, etc.). The doctor is obliged to conduct a medical examination with respect to them on the conclusion of which the life and health of that persons depends. Not revealing a discrepancy between the psychophysiological indicators of such persons, the state of their health by the established special rules to standards can lead to a lethal outcome [4].

In our opinion, the opinion of Ya.A. Myts should be accepted because indeed the concept of «sick person» does not encompass all possible states of the human body. For example, a woman in childbirth, in fact, is not a sick person but she needs timely, qualified medical care. I would like to note that in medical practice a person is considered a sick person when his state of health is examined and a final diagnosis is made. Until the time person is not examined and diagnosed by medical staff, it is not legally possible to consider him as a sick person (except when signs of a crisis health situation on the face). In practice there are cases when a person who seeks medical help has no signs of illness, there is no evidence that he is not a sick person, there are no medical records and he claims that he is sick. In such cases the above person in our opinion should also be

categorized as other persons in need of medical assistance. Recognize a sick such a person without a confirmatory diagnosis is not possible but medical personnel are obliged to examine and provide medical assistance.

In medical practice there are also cases when a person at the time of seeking medical help is healthy but his state of health is at the borderline in the transition to a morbid state. This category of people, in our opinion, should also be categorized as other persons in need of medical care because the state of his health may worsen in a short time and lead to unfavorable consequences. Thus, the medical worker is obliged to examine the patient's body and identify the prerequisites for the disease.

On the basis of the foregoing we consider advisable as victims in the title and disposition of Art. 320 of the Penal Code of Kazakhstan entrench along with sick persons other persons in need of medical assistance.

An additional argument in favor of the stated position is the results of a survey of members of a law enforcement agency who was asked: «Do you consider it appropriate to expand the circle of victims by including in the disposition Art. 320 of the Penal Code of the Republic of Kazakhstan «Failure to assist sick person» of other persons in need of medical assistance?», 81 % answered positively.

It should be noted that the legislator did not specifically indicate what kind of assistance the sick person did not have from the person obliged to provide it. However, as shown by the analysis of legal literature most scientists suggest that it is about medical care which follows from the very interpretation of the idiom «failure to assist sick person». At the same time some authors believe that this norm says not only about medical assistance but also about other necessary assistance. For example, F.Yu. Berdichevsky believes that the crime in question can be the failure to assist such assistance, such as the refusal of the pharmacy worker to provide a phone for calling an ambulance, the driver's refusal to transport the ambulance [8; 74].

I.F. Ogarkov believes that the inactivity of the relatives of the sick person and cohabiting conjoints for the organizational and material support of the victim should also be regarded as a failure to assist to the sick person [9; 68]. In turn according to I.V. Ivshyn the driver of the vehicle who refused without excuse to transport the sick person in need of emergency care is liable to criminal liability in the event of socially dangerous consequences [10; 129].

In connection with the foregoing I would like to focus on the following points: firstly, the legislator fixing the responsibility for the act in question in Chapter 12 of the Penal Code of the Republic of Kazakhstan «Medical Criminal Infractions», we believe, implied that this infraction is committed in the sphere of medical care. Secondly, it should be noted that in the sanction of the article under consideration one of the types of punishment provides for the deprivation of the right to occupy certain positions or engage in certain activities. And, finally, thirdly, inaction of persons who do not have medical education expressed in the failure to assist sick person, in our opinion, should lead to criminal liability under Article 119 of the Penal Code of the Republic of Kazakhstan «Leaving in danger» subject to appropriate conditions. In this regard we believe that there is no doubt about the fact that the composition of the criminal infraction provided for in Article 320 of the Penal Code of the Republic of Kazakhstan takes place solely in cases when it is a question of failure to assist medical assistance sick person. Moreover, in accordance with the Order of the Ministry of Health of the Republic of Kazakhstan of July 3, 2017, No. 450 «On Approval of the Rules for the Provision of Emergency Medical Assistance in the Republic of Kazakhstan» the drivers of ambulance (ambulance) should provide the necessary medical assistance because in law as one of the requirements for drivers are indicated that they must have first aid skills [11].

Thus, if it is a question of drivers of sanitary vehicles they will be prosecuted under Article 320 of the Penal Code of the Republic of Kazakhstan only if they did not receive the first medical aid which is rightly addressed in the works of such authors as I.I. Gorelik, T.V. Kirpichenko, N.G. Alexandrov. Moreover, they expressed a proposal on the expediency in the disposition of a norm providing for responsibility for failure to assist sick person pointing out the failure to assist medical assistance sick person. In our opinion, the authors' proposal is justified and acceptable for the Kazakh legislation as this clarification will help to avoid misunderstandings of the Penal Code of Kazakhstan and resolve problems in law enforcement practice. At the same time the content of the criminal law norm must correspond to its name, in this connection we believe that it is necessary to supplement both the disposition and the title of the article with an indication of medical assistance. In addition the principle of maximum specification of the norm to date meets the requirements of paragraph 2.8 of the Concept of the Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020.

It should be noted that as a result of our survey the overwhelming majority of **members of a law enforcement agency** to the question: «Do you consider it appropriate to add the word «medical» after the word

«failure» to Part 1 of article 320 of the Penal Code of the Republic of Kazakhstan? (86 % of respondents) responded positively.

According to Art. 38 of the Code «On public health and health care system» the main types of medical care are: pre-medical care, qualified medical care, specialized medical care, high-tech medical services, medical and social assistance [2].

At the same time medical assistance can be provided in the following forms: outpatient care, primary health care, consultative diagnostic care, inpatient care, hospital substitute treatment, emergency medical care, sanitary aviation, medical relief during emergencies, traditional medicine, folk medicine (healing) [2].

In turn failure to assist sick person means that there is no action on the part of medical personnel to provide the necessary assistance to the sick person. Failure to assist medical care can be expressed in a variety of forms. Thus I.I. Gorelik highlights some of them:

1) non-attendance of the medical worker to the sick person on a call, an invitation or his own initiative (the last case is possible if the medical worker knows that the patient needs his services but for some reason he or the relatives of the patient can not invite, for example, the absence of a telephone or remoteness of the patient and his relatives from the medical institution);

2) failure to assist sick person in a medical institution;

3) refuse to take a sick person to a medical institution where he was taken or appeared himself;

4) do not call a specialist by a medical professional who came to the patient but was not competent because of narrow specialization, lack of knowledge or for some other reason;

5) a medical worker without a preliminary examination prior to the diagnosis indicates that the patient does not need help [12; 35, 36].

As a condition for bringing a person to criminal liability under Article 320 of the Penal Code of Kazakhstan in the disposition of the analyzed article the legislator indicated the absence of valid reasons for failure to assist sick person. In legal literature for valid reasons the authors as a rule include force majeure circumstances that justify the omission of the medical worker: the lack of the possibility to render medical assistance in connection with the state of extreme necessity, force majeure, illness of the medical worker himself, lack of necessary medicines or tools, lack of transport for travel to the location of the patient, etc. This list is not exhaustive and the validity of the reasons for not providing assistance in each case is decided at the discretion of the court taking into account all the circumstances of the case.

Analysis of law enforcement practice shows that as valid reasons in the materials of criminal cases as a rule there are the following: a medical worker could not get to the premises from which the call was made for help because the door was locked and unlocked there was no one; lack of medicines, necessary devices and devices to help the sick person; the medical worker was not competent in providing the necessary assistance because he had another specialization; the medical worker had on his hands a medical document signed by the patient about the refusal to provide medical assistance and hospitalization.

In the light of the foregoing it should be noted that the medical worker on vacation is also obliged to provide assistance to the sick person if necessary. However, in the event that the medical worker does not possess the necessary knowledge or for other reasons cannot provide the necessary assistance, he must call another medical officer with the necessary knowledge or take the sick person to a medical institution.

In addition I would like to note that in Art. 91 of the Code of the Republic of Kazakhstan «On public health and health care system» states that every citizen has the right to be treated with dignity in the process of diagnosis, treatment and care, respectful attitude to his cultural and personal values, as well as relief of suffering to the extent permitted by this the existing level of medical technology [2], while it should be noted regardless of the severity of the disease. In cases when a medical worker knows that a person is hopelessly ill he must still provide the necessary assistance, fight to the end for the patient's life and use all available medical achievements thereby alleviating the sufferings of the sick person and prolonging the life span because for the sick person the medical worker is the last hope and he sees the strength and confidence in the cure in him. Thus, a medical worker in the event of failure to assist sick person that would allow him to prolong his life is, in our opinion, liable to criminal liability under Article 320 of the Penal Code of the Republic of Kazakhstan «Failure to assist sick person». The criminal liability for failure to assist sick person, as noted above, is provided only in cases where due to the omission of the medical worker the sick person is injured or died.

According to Part 1 of Art. 320 of the Penal Code of the Republic of Kazakhstan as a socially dangerous consequence of failure to assist sick person the legislator has foreseen - infliction of average gravity

harm to health of sick person by negligence; on Part 2 of the article under consideration - the death of sick person or infliction of grievous harm to his (her) health by negligence.

At the same time it should be noted that according to the analysis of legal literature some scholars believe that from the socially dangerous consequences of failure to assist sick person provided as an obligatory sign of the objective side of the crime it is necessary to refuse and establish the moment of the end of the crime proceeding from the fact of inactivity itself [4]. In their opinion a crime committed in the form of inaction cannot have a material composition because inaction as such does not entail consequences in the form of any changes in the material world. The consequences listed in the dispositions are not the result of the omission of the medical worker but are a consequence of the development of the internal processes of the victim's body conditioned by internal causes [4].

This point of view, in our opinion, has no valid reasons because according to the tendency of legislative practice in the criminal law sphere crimes connected with violation of special rules or norms should always lead to consequences otherwise it may be an administrative or disciplinary offense. That is if we divide this point of view, the line between the disciplinary offense on the part of the medical worker and the criminal offense is erased. Thus, in our opinion, the fact of failure to assist sick person in the category of criminally punishable acts should not be erected.

At the same time it is necessary to recognize that cases of failure to assist sick person which was infliction easy harm to health fall out of the legislator's view because as the analysis of the Code on Administrative Infractions shows such acts are not an administratively punishable offense. At the same time the degree of public danger of such acts is higher than the disciplinary act. In this regard we consider it advisable to provide for the provision in the Code on Administrative Infractions of the Republic of Kazakhstan for the failure to assist sick person as well as to other persons needing medical assistance without valid reasons by a person obliged to provide it in accordance with the law of the Republic of Kazakhstan or under a special rule if it is entailed infliction of light gravity harm to health of sick person by negligence or other person in need of medical assistance.

We believe that the given suggestion will serve to improve the legislation and law enforcement practice as a result of which the offense under consideration will receive an appropriate legal assessment and the punishment will be consistent with the principle of justice.

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E.B. Еспергенова

Қазақстан Республикасы ҚК-нің 320-бабында қарастырылған «Науқасқа көмек көрсетпеу» қылмыстық-құқықтық нормаларын жетілдірудің кейбір мәселелері

Аталған жұмыстың мақсаты қылмыстық заңнаманы және оны қолдану тәжірибесін жетілдіру бойынша ғылыми негізделген ұсыныстарды әзірлеу болып табылады. Автор жүргізілген зерттеудің нәтижесі бойынша қолданыстағы заңнаманы және науқасқа көмек көрсетпеуге қарсы әрекет ету мәселелері бойынша құқық қолдану тәжірибесін жетілдіру жөнінде ұсынымдар жасады, атап айтсақ, қажетті көрсетілетін көмектің түсінігі, түрі мен көлеміне қатысты авторлық позициясын ұсынды. Сондай-ақ автор заңгер-ғалымдардың пікірлеріне жүргізілген талдауды ескере отырып, «науқас» және «емделуші» ұғымдарын анықтаумен байланысты жасалған бірқатар қорытындылардың негізінде аталған ұғымға қатысты өзіндік көзқарасын ұсынады. Жұмыста көрініс тапқан қорытындылар, нәтижелер, ережелер заң әдебиеттеріне, құқық қолдану тәжірибесінің материалдарына жүргізілген талдауға және респонденттердің белгілі бір тобына жүргізілген сауалнамаға негізделген. Оларды әрі қарай ғылыми зерттеулерде, заңнамаға ұсыныстар әзірлеуде, қылмыстық құқық курсы оқытқан кезде оқу үдерісінде пайдалануға болады.

Кілт сөздер: қылмыстық заңнама, қылмыстық кодекс, қылмыстық-құқықтық нормалар, медициналық құқықбұзушылықтар, медицина қызметкерлерінің жауаптылығы, көмек көрсетпеу, кәсіби міндеттер, науқас.

E.B. Еспергенова

Некоторые вопросы совершенствования уголовно-правовой нормы, предусмотренной ст. 320 УК Республики Казахстан «Неоказание помощи больному»

Цель данной работы заключается в разработке научно обоснованных предложений по совершенствованию уголовного законодательства и практики его применения. По результатам проведенного исследования автором предлагаются рекомендации по совершенствованию действующего уголовного законодательства и правоприменительной практики в вопросах противодействия неоказанию помощи больному, в частности, предложена авторская позиция относительно понятия, вида и объема необходимой оказываемой помощи. Кроме того, с учетом анализа существующих точек зрения ученых-юристов, сделан ряд выводов, связанных с определением понятий «больной» и «пациент», на основе которых автором предложено собственное видение данных понятий. Выводы, результаты, положения, нашедшие отражение в работе, основаны на анализе юридической литературы, материалов правоприменительной практики и опросе соответствующего круга респондентов и могут быть использованы в ходе дальнейших научных исследований, при разработке предложений в законодательство, в учебном процессе при преподавании курса уголовного права.

Ключевые слова: уголовное законодательство, Уголовный кодекс, уголовно-правовые нормы, медицинские правонарушения, ответственность медицинских работников, неоказание помощи, профессиональные обязанности, больной.

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