

Problems of Criminal Law Provisions in the Context of the COVID-19 Pandemic

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ABSTRACT

The current situation with the new coronavirus disease that modern humanity is experiencing is unprecedented. It brought many changes to various spheres of life. First of all, this concerns the development of medicine, chemistry, information technology, management, and organization of social processes. However, the sharp spread of the disease gave impetus to the legal regulation of public relations. Criminal legislation is no exception. The article analyzes the shortcomings and gaps in the general part of the criminal law's branch caused by the pandemic. The latter is considered as a source of danger to objects of criminal law protection. The most common cases of causing harm to objects of criminal law protection are analyzed. The authors gave a brief description of the changes in the criminal law of some states associated with the spread of the disease. The purpose of the article is to identify the shortcomings of the penal relations' legal regulation in the context of the COVID-19 pandemic, as well as to develop proposals for their elimination.

Keywords: *pandemic, COVID-19, coronavirus, criminal law, legitimate harm, exemption from punishment*

1. INTRODUCTION

Given the limited format of this work, we will consider only certain problems of the General Part of Criminal Law. They arise from several circumstances. Firstly, the coronavirus itself is capable of causing a person's condition that is dangerous to his life, which does not exclude the possibility of causing harm to other, less valuable objects of criminal law protection. Secondly, measures taken by public authorities and their representatives to prevent and reduce the number of patients are often associated with the restriction of human rights and freedoms, which requires a criminal legal assessment. And, thirdly, serving a sentence in the form of imprisonment increases the likelihood of mass illness in a confined space, which also requires the improvement of criminal legislation.

2. RESEARCH METHODOLOGY

The research methodology was based primarily on the formal-logical and comparative-legal methods. The formal-logical method was used to identify and describe the problems of the current criminal law during the coronavirus pandemic. This made it possible to classify the objects of criminal law protection that are harmed due to the spread of the disease, as well as to analyze the shortcomings of the current criminal legislation. The comparative legal method made it possible to use the experience of some foreign countries when formulating

proposals for improving the norms of Russian criminal law.

3. RESEARCH RESULTS

3.1. Pandemic COVID-19 as a threat to objects of criminal law protection

Before proceeding to the analysis of legal problems, we note that the pandemic can have a criminal legal significance only indirectly, as a phenomenon that represents a public danger. In Russian criminal law, the content of the concept of danger is not explained. Moreover, it is one of the basic ones. In the Russian language, "danger" is understood as "an opportunity, a threat of something dangerous, that is, capable of causing some harm, misfortune" [22]. When defining the concept of "danger" in the criminal law doctrine, it is often used with the word "threatening". S.I. Ozhegov in the dictionary of the Russian language under the word "threaten" means "to warn with a threat about something or to portend something bad, dangerous" [22]. The concept of "danger" requires explanation not only from etymological but also from philosophical and legal positions.

In criminal law, in its most general form, danger should be understood as an event or act (sources of danger) that harm public relations protected by criminal law. In most cases, this is human behavior or the manifestation of certain forces that have a destructive effect on a particular system. Such forces (natural, man-made, or social) can damage this system, disable or destroy it. Consequently, danger

always has a character and degree. In the first case, the social significance of the object, which is in danger, is taken into account, and in the second, the intensity of harm infliction and its volume.

Often, the concepts of public danger and harm are considered synonymous, but these are different concepts that relate to each other as a form and content [25]. Almost always, the danger presupposes some remoteness in time relative to the moment of the onset of its implementation's consequences. In other words, you can only talk about danger when harm has not yet been done. If there has already been a negative change in social relations, then the danger should be considered already realized.

We should keep in mind that danger does not always entail consequences, but this does not exclude its reality. For example, the disease, in principle, threatens the overwhelming majority of people who do not have appropriate immunity. However, this does not mean that everyone is 100% infected. Therefore, from our point of view, the use of the term "threatening" when characterizing a danger is to a certain extent tautological, that is, etymologically and logically redundant.

In the literature, there are many options for classifications of hazards. The Integrated Disaster Risk Research Program of the International Council of Science identifies six hazard groups [17]. Among them is a biological hazard, that is one that is caused by the impact of pathogenic disease-causing living organisms and (or) toxic substances. A pandemic also falls into this category. It is understood as the global spread of an infectious disease for which there is no vaccine or natural resistance of the body [24].

On March 11, 2020, the World Health Organization (WHO) announced that the spread of the coronavirus in the world has reached pandemic proportions. We will not discuss the clinical characteristics of this disease, as this is done in sufficient detail in many specialized medical publications. We only note that in the world there are already tens of millions of cases, and more than two hundred died from this disease [9]. In Russia, the new coronavirus infection was attributed to the number of diseases that pose a danger to others [23]. All this gives grounds to refer it to the number of phenomena posing a danger to objects protected by criminal law.

3.2. Lawful Injury Challenges in the COVID-19 Pandemic

The problems of the General Part of Criminal Law in the context of the spread of a new coronavirus infection are associated with the absence or difficulties in implementing the norms of some institutions. First of all, this concerns the institutions of the circumstances, excluding the criminality of the act and release from punishment.

Situations of harm's lawful infliction in modern conditions began to acquire unusual forms for the pre-coronavirus period. Even though the objects to which the damage is inflicted have not changed, the environment for the

commission of such acts is unconventional for the known circumstances excluding the criminality of the acts. Let's consider the typical cases of legitimate harm associated with the COVID-19 pandemic.

3.2.1. The collision of the patients' lives in conditions of a medical resources' lack

The problem of "collision of lives" in criminal law has been known for a long time [7, 8], including the medical field. However, mankind, perhaps, for the first time, faced such a scale of medical equipment and drugs' shortage. In these circumstances, doctors should choose between patients. And if the law proceeds from the principle of equality of all citizens, then modern conditions force medical workers in some countries to make decisions, taking into account not only the state of patients' health but also their age and even social status [16]. The current legislation of most countries of the world does not provide the necessary recommendations on this matter [2]. Criminal law does not provide for direct regulation of the lawful infliction of harm in such situations.

In this regard, the question arises about the possibility of bringing to the criminal responsibility of treating doctors [5], which, in our opinion, from the point of view of social justice is not entirely correct. To prevent such a development of events, we consider it necessary to add Chapter 8 of the Criminal Code of the Russian Federation to Article 391, which could be called "Collision of lives". It should provide for the conditions for the legality of actions in the collision of several lives.

3.2.2. Problems of urgency

The period of a pandemic, like various other emergencies, is associated with an increase in the number of harm cases in a state of emergency. One such example is the refusal of one patient in treatment, giving preference to an infected by a coronavirus. A similar case became known to English justice. So, M. was being treated in a hospital in London. With the onset of the pandemic, this institution was completely transferred to serve patients with COVID-19. But M. refused to leave her hospital ward. The conflict was resolved in the High Court of the University College London Hospitals. In the court's opinion, the risks associated with M.'s hospitalization outweighed any negative consequences associated with her moving to her apartment. Therefore, it was decided to forcibly expel her from the ward [4].

The given case demonstrates the presence of a state of extreme necessity in the actions of the authorities. There is a conflict of responsibilities, when, on the one hand, it is necessary to assist one patient, and, on the other, in conditions of imminent illness' danger of a large number of people, there is a need for their treatment. Today, this conflict of interest has become global. This fact indicates

the need for a doctrinal criminal legal assessment of new situations of extreme necessity.

3.2.3. The natural rights and freedoms restriction by state authorities

On the territory of the constituent entities of the Russian Federation, restrictive measures (quarantine) are introduced and cancelled by the state authorities. The basis for such decisions is the proposal or order of the chief state sanitary doctors. Following the Federal Law "On the Sanitary and Epidemiological Welfare of the Population" the list of infectious diseases, with the threat of the emergence and spread of which restrictive measures are introduced, are established by sanitary rules and other regulatory legal acts of the Russian Federation. This list has recently been supplemented with coronavirus infection.

Measures to combat the spread of infection, taken both in Russia and in many other states, are associated with the restriction of some natural human rights and freedoms protected by the norms of criminal law. Thus, by the Decree of the Mayor of Moscow dated March 5, 2020, several restrictive measures were introduced in the capital. Citizens were obliged to maintain a social distance of at least 1.5 m with each other and not to leave their place of residence (stay), except for the following cases: seeking emergency medical care and cases of a direct threat to life and health; following to the place (from the place) of the work, which is not suspended by the decree; following to the nearest place of purchase of goods, works, services, the sale of which is not limited by the decree; walking pets at a distance not exceeding 100 m from the place of residence (stay); removal of household waste to the nearest waste accumulation site.

The above rules, first of all, restrict the right to freedom of movement. However, in some cases, measures that affect privacy are applied. For example, in many states, it is practised to track the location of patients by their phone [18].

In the European Union, the practice of exchanging personal data has spread, including information about travel, as well as health conditions and diseases that may be infected. Member States exchange personal health data through an electronic information exchange system. At the same time, as emphasized in the literature, there is no proper legal regulation of the proportionality of harm for the sake of protecting public health [3].

In our opinion, it should be recognized that in such a situation the authorities proceeded from the precautionary principle, which is that "it is better to play it safe than to regret" [11]. It is consistent with the idea of the extreme necessity's criminal law institution, according to which "the lesser of two evils is chosen" [21].

3.2.4. Necessary defense issues during a pandemic

China was the first among all countries to face the deliberate concealment of information by people about the presence of COVID-19 infection [12]. Situations in which patients, who violate quarantine measures and endanger other people, make the question of the possibility of implementing the norm on necessary defence relevant.

Let's simulate the following speculative situation. Citizen A., realizing that he is infected with COVID-19, deliberately approaches another person to infect him. A logical question arises: can in such a situation, another person - V., who knows about A.'s illness, use violence against him to suppress his actions? Despite the lack of clarifications in legislation and judicial practice on actions in such conditions, they may turn out to be quite real.

Note that in the legal literature, clearly insufficient attention is paid to the problem of causing legitimate harm to patients who pose a danger to others. The only exceptions are some works [10, 20]. Nevertheless, we will express our own position towards the above incident.

In our opinion, the described behaviour of A. forms the right of those around him to the necessary defence. His actions are socially dangerous. In this case, V., knowing A.'s unlawful aims, may harm him. The most difficult question, in this case, is the question of the limits of such harm. We believe that such measures should be recognized as admissible, which excludes the possibility of A. spreading his disease to other persons. In other words, they do not go beyond the legitimacy of the defender's actions consisting of pushing A. away, restricting his freedom until the arrival of law enforcement officers, etc.

A similar assessment of the defender's actions when an infected person poses a threat of mass illness of people. Such actions in the absence of the latter's intent to infect others, constitute a crime under Art. 236 of the Criminal Code of the Russian Federation. This provision leads to criminal liability for violation of sanitary and epidemiological rules. However, the notion of "mass character" of the disease has no unambiguous interpretation. In judicial practice, it is usually understood as finding an infected person in crowded places. For example, in a vehicle (plane, bus) or indoors (airport, train station, subway car), etc.

The limits of defence will be somewhat expanded if it is known that an infected person deliberately (with direct or indirect intent) creates a threat of mass disease with coronavirus. We agree with the opinion of A.G. Kibalnik that such actions contain signs of a crime against life or health [19]. This means that in a state of necessary defence to prevent encroachment, it is possible to cause mild harm to health.

3.3. Problems of release from punishment

Another problem of the General Part of Criminal Law, which has received new aspects of relevance due to the spread of the pandemic, is associated with the institution of exemption from punishment. The fact is that places of deprivation of liberty and detention of prisoners create "favourable" conditions for the spread of infectious

diseases. This problem is especially acute during a pandemic when there is no vaccine and no sufficiently proven treatment methods. If a group of healthy convicts or prisoners who spend most of their time in a confined space adds with a symptomatic person, then the likelihood of infection of the rest becomes very high. In such cases, the burden on the medical units of such institutions may become unfeasible. As a consequence, this will entail non-provision or inappropriate provision of medical care and the possibility of patients' death.

The described scenario is typical for the penitentiary systems of almost all countries of the world. Given the severity of the problem, in March 2020, WHO published a guide to combating coronavirus disease, called "Preparedness, prevention, and control of COVID-19 in prisons and other places of detention" [15]. This critical situation gave rise to the authorities of individual countries to make a decision on the mass release of convicts from prisons. Messages about this began to appear in the press around March 2020 [1, 6, 13].

However, it should be noted that the current criminal legislation of most states does not regulate such cases. This circumstance makes it relevant to improve the norms of exemption from punishment [14]. In particular, in our opinion, it is necessary to bring in accordance with the extraordinary conditions of Art. 79 of the Criminal Code of the Russian Federation on parole from serving a sentence.

It should provide for expanding the circle of persons eligible for early release. This can be done by reducing the minimum actual title retirement period. It is also necessary to reduce the terms for replacing the unserved part of the punishment with a milder type of punishment (Article 80 of the Criminal Code of the Russian Federation).

The criminal procedure legislation also requires changes. For example, this could be a decrease in the minimum amount of bail (Article 106 of the Criminal Procedure Code of the Russian Federation), as well as expanding the circle of persons against whom a preventive measure in the form of house arrest can be applied (Article 107 of the Code of Criminal Procedure of the Russian Federation) by limiting the use of detention (Article 108 of the Criminal Procedure Code of the Russian Federation). In this aspect, it should be noted that the Supreme Court of the Russian Federation recommended the lower courts to take into account the fact of the spread of new coronavirus infection in Russia when deciding a preventive measure in the form of detention.

4. CONCLUSION

Summing up the analysis of the problems of the General Part of Criminal Law in the context of the spread of the COVID-19 pandemic, the following general conclusions can be drawn.

First, it should be recognized that the criminal legislation of neither Russia nor other states is not adapted to the legal regulation of public relations and their protection in conditions of total illness of the population. This

circumstance is indicated by hasty changes and additions to criminal laws aimed at preventing violations of sanitary and epidemiological requirements. Besides, many relations have remained unsettled and require improvements in legislation.

Secondly, the largest number of problems in the General part of criminal law concerns the institution of lawful infliction of harm (circumstances precluding the criminality of an act). The current norms do not regulate many situations of conflicts of legitimate interests and benefits. This puts the law enforcement officer in a difficult position and increases the risks of bringing him to criminal responsibility. First of all, this concerns the problem of "collision of lives", which has received the greatest relevance in modern reality. They also require judicial clarification and doctrinal interpretation of the rule of necessary defence and extreme necessity in conditions of protection from the danger associated with COVID-19.

Thirdly, the overcrowding of places of deprivation of liberty and detention in a pandemic brings the liberalization of the institution of exemption from punishment to the fore. First of all, it requires improving the provision on parole from serving a sentence and replacing the unserved part of the sentence with a milder type of punishment.

Fourth, according to some scientists, the COVID-19 pandemic is not the worst test for humans. It is quite possible that in the foreseeable future, humanity may face more dangerous threats. This means that our current experience must be used to develop a universal mechanism for regulating public relations in critical situations. For this, it is necessary to carry out comprehensive developments, both by scientists - representatives of natural and humanitarian sciences.

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