

# КРИМІНАЛЬНЕ ПРАВО ТА КРИМІНОЛОГІЯ

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## **INFECTION WITH VIRUSES AND INFECTING A PERSON AS A KIND OF CRIMES AGAINST LIFE AND HEALTH OF A PERSON UNDER THE CRIMINAL CODE OF UKRAINE**

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The article deals with the problem of criminal liability for human infection with various types of infectious and viral diseases. Considering that the Criminal Code of Ukraine singles out the special articles envisaging the criminal liability for infecting a person with certain types of diseases, the author provides the comparison of the size of liability for such infection with the liability for causing harm to health as a result of various kinds of traumatic factors. It is concluded that in its essence the infection of a person with various kinds of infections and viruses can be considered as a special kind of causing harm to health, as well as causing harm to health due to any other traumatic factors. The conclusion that there is no need for special norms that provide for liability for infecting with diseases, since in all cases such acts can be qualified under the general norms, which stipulate liability for causing harm to health is substantiated.

*Keywords:* harm to health; infecting with virus or infection; criminal liability; crime against health; differentiation of liability.

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The title of Section II of the Special Part of the Criminal Code of Ukraine «Crimes against the life and health of a person» clearly testifies to the fact that the object of criminal legal protection within this section is human life and health. However one can assert about the existence of a whole range of criminal legal norms within this section, regarding which, it can be stated with a certain convention that they foresee not the direct, but so to say the veiled (false) encroachments on human life or health. It goes about a whole range of special criminal legal norms, which, due to the complicated, as a rule, non-legal, terminology, unsuccessful or unnecessary differentiation of criminal liability, create artificial problems in distinguishing the relevant norms from the norms that provide for general encroachments on life or health of a person.

These are the rules stipulated in Art. 130 of the CC «Infection with a human immunodeficiency virus or other incurable infectious disease», Art. 131 of the CC «Improper performance of professional duties that caused the infection of person with a human immunodeficiency virus or other incurable infectious disease», as well as Art. 133 of the CC «Infection with venereal disease». Let's try to consider the named norms and analyze their correlation with the general norms, which foresee the general (classical) encroachments on human life or health. It is this analysis that can provide arguments to

substantiate the assumption about the possibility of sufficient unification of Section II of the Special Part of the CC of Ukraine.

First of all, I would like to point out that many controversial issues concerning the crimes against life and health are caused by the imperfect legislative technique, especially in legislator's attempts to differentiate the criminal liability for encroachments on the respective objects of criminal legal protection by constructing special norms. In fact, it can be argued that excessive and, sometimes, unreasonable singling out the special norms leads not to differentiation, but to a peculiar accumulation of articles, to understand the correlation of which is not only extremely difficult, but sometimes impossible.

Taking into account the location of the respective norms in the system of the Special Part of the CC, I will start an analysis from the norms provided for in Art. 130 of the CC «Infection with a human immunodeficiency virus or other incurable infectious disease» and Art. 131 of the CC «Improper performance of professional duties that caused the infection of person with a human immunodeficiency virus or other incurable infectious disease». First of all, I would like to note that in the scientific literature it is quite correctly noted that the philological drawback of Articles 130, 131 of the CC, which is immediately striking, is that their dispositions are grammatically formulated in such a way as to criminalize the infection with the diseases of viral etiology only [3, c. 308]. It is difficult to say whether this is the principled position of the legislator, or simply an error that is associated with inadequate review of the text of the Articles by the philologists. But at present time it looks as if from the formal point of view the liability in the abovementioned Articles is foreseen only for infection with viral diseases.

Accepting the scholars' views about this disadvantage, I cannot agree with the idea that the improvement of these Articles should be aimed at eliminating only their philological deficiencies in order to expand the types of pathogens of various diseases from which infection may occur. It seems that it is such an improvement that can criminalize the corresponding actions regarding the possible infection with the other various life-threatening illnesses caused not by viruses, but by bacteria, prions or other pathogens [1]. In this respect, I consider to be quite correct the opinion of P. P. Andrushko, who proves that human infection with any other disease of non-viral etiology should be qualified as a crime against life or health [3, c. 308]. Consequently, in this case, we are immediately faced with the problem of distinguishing the considered corpora delicti from classical corpora delicti, which involve the infliction of various kinds of bodily injuries and murders, as well as the problem of expediency of independent singling out Art. 130 of the CC, if its shortcomings can be eliminated by applying classical norms that provide for liability for causing harm to life and health.

I cannot agree with the position of those scholars, who attribute the corpora delicti, provided by Art. 130 of the CC «Infection with a human immunodeficiency virus or other incurable infectious disease», Art. 131 of the CC «Improper performance of professional duties that caused the infection of person with a human immunodeficiency virus or other incurable infectious disease» and Art. 133 of the CC «Infection with venereal disease», to the so-called group of crimes that pose a danger to life or health of a person, actually contrasting them with crimes that cause real harm to human life or health. As one of the main arguments in favor of this position, scientists point out that the named corpora delicti are characterized by the fact that the legislator does not indicate the specific size of the harm caused to health. At the same time, such an approach, as scientists point out, is entirely justified, since the very fact of infection is socially dangerous, as far as at this moment it is absolutely impossible to foresee further course, treatment and the ultimate effects of the disease, which largely depend on the immune status of a particular person [2].

However, the fact that the legislator does not specify the harm to health in any way does not indicate that the mentioned crimes do not cause the harm to health at all. After all, the very fact of the infection of any etiology getting inside the human body from the point of view of medicine will require treatment, and in some cases, an urgent medical care in order to destroy the respective infection. So, for example, the presence in the human body of parasites (helminths) is quite rightly attributed by physicians to health disorders. However, it is obvious that predicting the harm from their parasitism, as well as the timing of possible treatment is very difficult. In other words, infecting a person is a harm to health. I think that this is so obvious fact that it is clear not only to doctors.

The presence of any infection immediately affects the immune system and all other systems of the body and forces them to work for destroying these non-native organisms of the human body, exhausting the body of the person itself. Of course, it is impossible to predict the duration of such treatment and its results with absolute precision in all cases, but in this field there are as well certain patterns of treatment, in particular, depending on the etiology of the infection. In addition, it should be noted that in the case of injuries, which are considered as the so-called classical (traditional) health harm, it is quite often impossible to predict treatment outcomes. After all, the healing of bones of a typical fracture as well depends on the immune status of a particular person, the treatment regimen, the quality of the medicine and many other circumstances that may call into question any treatment prognosis, but this does not in any way prevent the attribution of such kind of health harm to bodily injuries.

Consequently, there are all the grounds to consider human infection with any disease, regardless of its etiology, as a kind of bodily injury. Of course, the definition of a particular type of bodily injury in this case, first of all, will depend on how much time the doctors will need to neutralize the respective infection, as well as on the extent to which the infection of a person has affected his ability to work. After all, these factors, in accordance with national legislation, primarily affect the severity of the harm to health. Such an approach to the understanding of bodily injury is fully consistent with the understanding of this notion in the Rules of forensic assessment of the severity of bodily injury. In accordance with these Rules, bodily injury is a violation of the anatomical integrity of tissues, organs and their functions, which arises as a result of the action of one or several external harmful factors – physical, chemical, biological, and psychic. Opponents of this position that does not consider a person infection as harm to health, should be remembered that many HIV-infected persons register disability because of the presence of respective virus in their organism, indicating the loss of ability to work, and, consequently, the presence of certain features of bodily injury (of actual harm to health). Thus, I believe that the criminal legal norms, which provides for criminal liability for cases of actual human infection with any disease, can be considered as special rules in relation to the rules that provide for liability for causing various kinds of bodily injuries. A special feature in such cases is the method of committing a crime – the infection of a person with a certain disease, which does not affect the degree of social danger of the crime as a whole, which confirms the conclusion that singling out the special norms is groundless.

The position, according to which infecting a person is not considered as a form of causing direct harm to her health, can create quite dangerous situations in law enforcement, when the actual infecting another person with a certain type of infection cannot be qualified according to Articles 130, 131 of the CC. Indeed, for such an understanding of the public danger of the appropriate encroachment the act of a person who has infected another person with an infection of non-viral etiology, generally cannot be qualified under any of the articles that criminalize crimes against life or health. At the

same time the imperfect construction of Art. 130 of the CC precisely in such cases will require the qualification of the perpetrator's actions under the general norms, which provide for liability for crimes against the life or health of a person.

Legislative constructions of Part 1 and Part 4 Art. 130 of the CC give grounds for a formally correct conclusion that the subject in the named *corpora delicti* is general, that is, an uninfected person can as well be the subject. However, this can't be applied to Part 2 and 3 Art. 130 of the CC, the disposition of which clearly implies that the subject of these crimes may be only the person who is the carrier of the corresponding virus. Part 2 Art. 130 of the CC provides for criminal liability for the careless infection of another person with a human immunodeficiency virus or other incurable infectious disease, if the perpetrator knew that he is the carrier of this virus. Hence, the question arises as to how to qualify the acts of a person who is not himself a carrier of the corresponding virus, but nevertheless has infected another person with the corresponding infection by negligence? The actions of medical, pharmaceutical or other workers who have improperly executed their duties may be qualified in such cases under the relevant part of Art. 131 of the CC. However, how should be qualified in such cases an act of a person, if the subject of the crime is general? I consider that in such cases, in the presence of all other grounds, there are no obstacles to the qualification of the perpetrator's actions under Art. 128 of the CC as for causing grievous or moderate bodily injury by negligence. This very conclusion can be reached on the basis of the stated above argumentation that the norms that establish the liability for infecting a person with various diseases are special in relation to the norms that provide for liability for causing bodily injury (causing harm to health).

In my opinion, the abovementioned problem situations allow us to ask a more general question: what is the need for singling out the special rules, which provide for the liability for infecting a person, if there are general norms that provide for liability for causing harm to health? It should be noted that in the cases under consideration it can be argued not only about the lack of sufficient justification for the differentiation of liability, but as well about the unjustified establishing more severe liability in comparison with the general norms that provide for liability for harm to health. Thus, for example, it is difficult to explain why a negligent infection of a person with a human immunodeficiency virus or other incurable infectious disease under Part 2 Art. 130 of the CC causes the possibility of imposing a punishment in the form of imprisonment up to five years (qualified *corpus delicti*, stipulated in Part 3 Art. 130 of the CC, – up to eight years), while causing grievous or moderate bodily injury by negligence under Art. 128 of the CC causes maximum punishment in the form of restraint of liberty for a term up to two years. For intentional infection in accordance with Part 4 Art. 130 of the CC the maximum punishment in the form of ten years imprisonment not only exceeds the sanction of Part 1 Art. 121 of the CC, which establishes liability for intentional grievous bodily injury, but as well for three years exceeds the minimum amount of punishment for the basic *corpus delicti* of intentional murder.

I consider that there are no compelling arguments to prove that the mentioned way of causing bodily injury (infection) can so greatly increase the public danger of the respective encroachments. The crimes against life and health are characterized by the fact that the method of committing the crime can be a qualifying feature in the cases where its application poses a danger to the life or health of others, or if a particular method directly enhances the suffering of the victim while causing him harm. These properties are not inherent in infection as a method of causing harm to human health, and therefore there are hardly any reasons to construct the qualified *corpora delicti* of bodily injuries, taking into account this method as a qualifying feature.

The situation with the sanction of Part 1 Art. 131 of the CC «Improper performance of professional duties that caused the infection of person with a human immunodeficiency virus or other incurable infectious disease» is even more strange. The legislator in this case as well makes the criminal liability more severe in comparison with the sanction of Art. 128 of the CC. However, to a certain extent, establishing more severe liability in this case may be justified by a special subject of this corpus delicti: a medical, pharmaceutical or other employee who improperly performs his professional duties. After all, within this category of workers there are special (higher) requirements for observance of the certain rules of security. At the same time it is not completely clear why Part 1 Art. 131 of the CC is actually a privileged norm in relation to a similar act committed by negligence, but by the general subject, stipulated in Part 2 Art. 130 of the CC. Thus, the maximum punishment in the sanction of Part 1 Art. 131 of the CC is two years lesser than the maximum penalty provided for in the sanction of Part 2 Art. 130 of the CC. As for the general trend of differentiation of criminal liability, one should ask the legislator: why not to increase the criminal liability for intentional infections committed by a special subject? After all, these categories of people possess much more special knowledge, as well as special opportunities for such an infection?

Considering that Part 4 Art. 130 of the CC envisages the liability for the infection with the incurable disease virus that is dangerous to human life, which in its turn determines the possibility of causing death to a person from such infection, there arises a problem of distinguishing this corpus delicti from the corpus delicti of attempted murder. I have already stressed on the legislator's not quite right approach to defining the terms and kinds of punishments in the sanction of Part 4 Art. 130 of the CC, which provides for liability for intentional infecting a human immunodeficiency virus or other incurable infectious disease that is dangerous to human life. Because despite the fact that Part 4 Art. 130 of the CC, as follows directly from the disposition of this Article, does not cover the death of a person, the maximum limit of the punishment in the form of imprisonment in the sanction of this Article exceeds for three years the minimum amount of punishment for intentional murder.

However, even such a sanction does not allow, in my opinion, to assert that Part 4 Art. 130 of the CC envisages a special form of attempted murder, taking into account the special way of encroaching life – the infection of victim with a virus or other illness that is dangerous for life. After all, the very fact of the human infection with an incurable disease virus that is dangerous for life does not allow asserting that such infection necessarily leads to the death of a person within more or less defined period. Different clinical pictures of the disease do not allow the guilty, in all cases, of infection to rely on the obligatory causing the death of the victim, which is typical of the attempted murder. In this regard, one should agree with the opinion of P. P. Andrushko, who considers that the issue of attributing a certain disease to the incurable is rather conditional and depends on various circumstances [3, c. 308].

Theoretically, one can model a situation when the human infection with a dangerous to his life disease can be qualified as an attempted murder. If such intentional infection was caused during, for example, a long expedition to the mountains, when the guilty is clearly aware of the impossibility to provide timely medical assistance to the victim in case of rapid development of the disease. In such cases, only the extraordinary properties of victim's immune system or other unforeseen for the guilty circumstances may prevent the victim's death. However, such examples are more likely to be the exceptions to the general rule concerning the infection of a person with a particular illness.

If Parts 2, 3, 4 Art. 130 of the CC and Art. 131 of the CC envisage in fact special rules on causing bodily injury, then in Part 1 Art. 130 of the CC the legislator has constructed the so-called delict of danger creation. In Part 1 Art. 130 of the CC it goes about creating the situation when a person creates a real danger of infecting another person with a human immunodeficiency virus or other incurable infectious disease that is dangerous to human life. Certainly, in this case, it cannot be argued that this norm is special in relation to the norms that provide for liability for bodily injury (causing harm to health). In this case, it goes about so-called delict of danger creation. In literature it has already for a long time been suggested the need to single out the general norms that would establish criminal liability for creating a real danger to life or health, regardless of those factors that are the cause of such a danger [5].

The idea of creating such norms when it goes about the danger only to health can hardly be considered justified because the range of possible harm to health is extremely broad and it is virtually impossible to determine the creation of danger of which harm to the health has taken place, and consequently, to differentiate liability properly. Actually, this does not apply fully to Part 1 Art. 130 of the CC, which in this respect is quite acceptable in its design, since it clearly stipulates what kind of danger to health is concerned. At the same time, the construction of such rules aimed at criminal legal protection of human life, but not the health, is well-grounded. The existence of a separate norm in which criminal liability for the intentional creation of a danger to a person's life without the purpose of causing his death would be envisaged will allow to criminalize a large number of such acts that are currently occurring in the most various spheres. In particular, it is an issue of theft of sewage hatches, the lack of which on unlit roads turns the movement of people into the game of the so-called Russian roulette.

Critical remarks are caused by the separate singling out Art. 133 of the CC «Infection with venereal disease» by the legislator. In fact, in this case, it actually goes about a special way of causing bodily injury (harm to health), which, depending on the disorder of health and disability, can be qualified under the general articles, which stipulate liability for causing harm to health. The differentiation of criminal liability for such kind of health harm by the way of singling out the special norm with an separate sanction in a separate Article, as is currently the case in the standing CC, can as well lead to problematic situations in law enforcement. Firstly, I'd like to note that Part 1 Art. 133 of the CC provides for criminal liability both for intentional and for the negligent infection with venereal disease, which in principle is the violation of the rules of liability differentiation. However, the analysis of the sanction of Part 1 Art. 133 of the CC gives grounds as well for other critical remarks.

Thus, in particular, the maximum punishment in the form of imprisonment for a term up to two years, on the one hand, allows us to conclude that according to its public danger the legislator equates this crime only to minor bodily injuries. And only such qualifying feature as «grave consequences», provided in Part 3 Art. 133 of the CC, allows to cover such a disorder of health caused by intentional infection with sexually transmitted diseases, which is equivalent to intentional moderate bodily injury. However, sexually transmitted diseases can cause even more serious harm to health, which, in its effects, is equivalent to grievous bodily injury.

Today, medicine has no effective medications to completely destroy cytomegalovirus, which can be sexually transmitted. In some cases, infection with such a virus will give grounds for concluding that there are signs of grievous bodily injury in the form of a health disorder, combined with a permanent loss of capacity of at least one third, or loss of reproductive function (loss of the body functions). Thus, the question arises

concerning how to qualify the intentional infection with cytomegalovirus, if the sanction of Art. 133 of the CC does not cover health harm at the level of social danger of intentional grievous bodily injury?

On the other hand, when it goes about negligent infection with venereal disease, in Art. 133 of the CC there is an unjustified making criminal liability more severe in comparison with liability for negligent bodily injury. In particular, if the sanction of Art. 128 of the CC «Negligent grievous or moderate bodily injury» provides for maximum punishment in the form of restraint of liberty for a term up to two years, then Part 1 Art. 133 of the CC provides for the possibility of sentencing in the form of imprisonment for a term up to two years. It is unclear by what circumstances the legislator's approach has been caused, if the liability for negligent infection with venereal disease is much more severe than liability for negligent grievous or moderate bodily injury? If the sanction of Part 1 Art. 133 of the CC makes it possible to conclude that the main corpus delicti covers the negligent grievous or moderate bodily injury, then the question arises as to what, then, the consequences for a person, except the death, does the qualifying feature «grave consequences» include in Part 3 Art. 133 of the CC, the attitude towards which can be expressed in negligence?

The construction of this corpus delicti poses as well the other questions concerning subject of the corpus delicti which are similar to those that have already arisen during the analysis of the corpora delicti provided in Art. 130 of the CC. It goes about how to qualify the actions of a person who is not ill with a venereal disease, but intentionally or by negligence has infected another person with venereal disease? In such cases, the scientists propose to qualify the offender's actions under the general articles envisaging liability for bodily injury [4, с. 331]. Despite the fact that the social danger of such infection, especially if it has been committed intentionally, will be no lesser, the liability of the subject under the general norms envisaging liability for causing bodily injury will be substantially mitigated. This will be especially evident in those cases when the infection has been committed by negligence. In addition, the legislator does not differentiate the liability for the infection with a venereal disease, committed by a medical or other employee, who was obliged to follow the special rules for protecting the other persons from infection. At present time the respective acts as well of such subjects can be qualified only under the general articles that provide for liability for the crimes against life and health.

Consequently, an analysis of the norms that provide for the liability for infecting a person with various types of diseases, shows that there is no need in the existence of such separate norms. After all, in their essence, they are only the special norms that actually provide for liability for causing various kinds of bodily injury (harm to health), depending on the way they are caused. At the same time, absolutely groundless and unjustified differentiation of criminal liability takes place during their creation. Instead, in this case, the differentiation of liability is quite possible and it should be provided not with consideration of method of causing the harm to health, which in this case does not increase the social danger of the act, but considering the features of the special subject of the crime, that can be indicated in disposition of the article by the reference to breach of the special rules aimed at protecting human life and health.

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## ЗАРАЖЕННЯ ВІРУСАМИ ТА ІНФІКУВАННЯ ЛЮДИНИ ЯК РІЗНОВИД ЗЛОЧИНІВ ПРОТИ ЖИТТЯ ТА ЗДОРОВ'Я ОСОБИ ЗА КК УКРАЇНИ

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Розглянуто проблему кримінальної відповідальності за зараження людини різними видами інфекційних та вірусних захворювань. Враховуючи те, що в КК України виділено окремі статті, які передбачають відповідальність за зараження особи деякими видами захворювань, проведено порівняння розміру відповідальності, яка передбачена за таке зараження, з відповідальністю за заподіяння шкоди здоров'ю внаслідок дії різного роду травмуючих факторів. Аргументовано, що, на перший погляд, створюється враження, що законодавець шляхом виділення окремих (спеціальних) норм, які передбачають відповідальність за зараження різного роду захворюваннями, намагається забезпечити реалізацію принципу диференціації кримінальної відповідальності. Натомість у статті доведено, що в такий спосіб законодавець створює лише непотрібну казуїстику у встановленні кримінальної відповідальності за заподіяння шкоди життю чи здоров'ю людини. Адже окреме існування таких норм створює лише спірні проблеми, які стосуються співвідношення вказаних норм із загальними нормами про заподіяння шкоди життю чи здоров'ю людини. При цьому стверджено, що існування такої групи норм є проблематичним не тільки з погляду кваліфікації, але й з погляду обґрунтування визначення змісту санкцій за вчинення діянь, які пов'язані зі зараженням певними захворюваннями. Адже очевидним є той факт, що диференціація кримінальної відповідальності полягає не просто у встановленні інших розмірів чи видів покарань у санкціях кримінально-правових норм, які



передбачають однорідні посягання, а в обґрунтованій необхідності посилення чи послаблення відповідальності порівняно з вже існуючими загальними нормами. Зроблено висновок про те, що за своєю суттю зараження особи різного роду інфекціями та вірусами можна розглядати як спеціальний вид заподіяння шкоди здоров'ю, так само як і заподіяння шкоди здоров'ю внаслідок будь-яких інших травмуючих чинників. Якщо з погляду медицини можна і потрібно диференціювати різні види зараження, що визначає характер лікування та прогнози перебігу захворювання, то з погляду кримінального права така диференціація відповідальності з урахуванням виду захворювання є безпідставною. Аргументовано висновок про те, що немає потреби у конструюванні спеціальних норм, які передбачають відповідальність за зараження різного роду захворюваннями, оскільки у всіх випадках такі діяння можна кваліфікувати за загальними нормами, що передбачають відповідальність за заподіяння шкоди здоров'ю, а додаткової диференціації кримінальної відповідальності вони не потребують.

*Ключові слова:* шкода здоров'ю; зараження вірусом або інфекцією; кримінальна відповідальність; злочин проти здоров'я; диференціація відповідальності.

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