

CRIMES RELATED TO THE PROFESSION OF MEDIC

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Abstract: a comparative study on the penal responsibility of the medical profession in respect of the form of employment, private practice or employed by the government.

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Exercising the profession of medic is the right of an individual, of Romanian citizenship, who has a medical diploma, issued by medical university from Romania or from abroad, recognized and validated by Law¹

Exercising the profession of medic is endorsed by the Board of Medics from Romania and licensed by the Ministry of Health, accordingly to the procedures stated by Law².

The profession of medic must prevent diseases, promote, maintain and recover individual and community health as its main task is to insure public health³.

In the same time, by exercising his/her profession, the medic must prove availability, honesty, devotion and respect to human being⁴.

Line 2 of art. 6 states that the medic is not a public employee due to its humane and liberal exercise.

As the Law states, the medic must be graduated of a university degree medical institution, recognized by Law, and the professional freedom gives the opportunity to the medic to take initiative and decision and to assume

¹ The medical profession can be performed in Romania by foreign medics, in they fulfill the legal prerequisites and bases on reciprocal agreement between Romania and other countries (art.370 of the Law n.95/2006, Title XII regarding the exercise on the medical profession, organization and function of the Board of Medics from Romania)

² Law n.95/2006, Title XII regarding the exercise on the medical profession, organization and function of the Board of Medics from Romania, published in the Official Journal of Romania, Part I, n. 372 of 28.04.2006

³ Law n.95/2006, Title XII regarding the exercise on the medical profession, organization and function of the Board of Medics from Romania, art. 374, pct.1.

⁴ Ibidem, art. 374, pct.2

full responsibility during the exercise of the medical act⁵:

Exercising the medical profession can be done only with the prior liberal profession licensing by the Ministry of Health, only if certain prerequisites of the Law are fulfilled⁶.

The legislator established in the content of the Law certain aspects in respect of the incompatibility and unworthy of the exercise of medical profession, also in respect of the liberal practice license of medical profession and in respect of the initiation, organization and function of the Board of Medics from Romania.

The Law regarding the exercise of the medical profession impeaches as a criminal act, punishable by penal law, the exercise of the medical profession by an individual without the proper qualifications.

This article does not include certain proper penal sanctions, but it refers to other penal law regulations^{7*}.

In respect to the sanction regime, it should be emphasis that the punishment for this type of criminal behavior, is the one established by the Penal Law, better said, the punishment for "illegal exercise of a profession" ⁸.

The crime in question is considered committed only at the point when it's proven that such medical profession was exercised by an individual without the proper qualifications and such danger for the social relations defended by the Law, was produced, underlining the importance of the need for several acts to be fulfilled in order to consider them as an act of exercise⁹.

The juridical object of the criminal act stated by the Law is the social relationship regarding the regime of exercising the medical profession only under the strict legal prerequisites, the penal protection reflecting over the initiation and development of these relations.

Also, under certain circumstances, the protection includes the social relationship over the physical integrity and health of the individuals to whom the profession incriminated is exercise.

The juridical object will exist only if the action in question is illegally exercise by a medic to an individual (for example, when an individual is operated on by an unauthorized person).

⁵ Ibidem, art.375, pct 1

⁶ Ibidem, art. 379, pct.1

⁷ Eliodor Tanislav, Nicolae Conea, Constantin Gheorghe, Mihail Conea, Crimes punished by penal special law, Publisher Semne, Bucuresti, 2000, pag. 388

⁸ Art. 281 of the Penal Code

⁹ Ibidem 7

The author (the immediate active subject) of the crime is clearly stated by art. 41 as any individual, since the Law does not stipulates any special prerequisites for him/her, and so it is not circumstanced. However, the author of this crime can be a generalist medic, if he/she will performs gynecology maneuver or naturist medicine without being certified in the field, or the medicine plant sellers¹⁰.

In order for the crime to be committed, certain acts are required, specific only for the profession of medic, to be fulfilled by a person without the proper certification, even if they are committed by a nurse or a biotherapist.

If several individuals agree to exercise this profession although they do not fulfill the legal prerequisites, in the same place, at the same moment, each one will be prosecuted for separate offence and author of the same crime, and not as coauthor of the other offenders.

The passive subject is the state, as the representative of the society concerned by the exercise of the medical profession under certain legal conditions, and in the event of abusive and illegal exercise towards an individual he/she will be the secondary passive subject.

The objective aspect of the offence, regarding the material element, will consist in the actions of the offender to perform medical acts without holding this official charge. Practicing this profession by an individual without prior licensing means he/she performs typical acts of the medical profession (treatments, surgeries etc.)¹¹.

From the legal provisions referring -the term "practice" we draw the conclusion that isolated acts that have slight connection to the medical profession do not fulfill the material element of the offence (for example, medical hygiene advice or direction served as part of a friendship communication or the prescription of medicine that will be later administrate)¹²

The immediate consequence under the objective aspect of the offence is made of the danger situation for the social relationships, shown in the impeachment of the offence by the special Law, consequence directly related to the crime.

The subjective aspect is the culpability, demonstrated by a direct

¹⁰ Ibidem 7, pag 387

¹¹ Ibidem 7, pag. 579

¹² Eliodor Tanislav, Gheorghe Oprisan, Romanian Labour Law Magazine, n.6/2007, pag.

or indirect intention; respective, the offender envisage the result of his/her future actions and he/she pursues it (direct intention) or he/she will only accept the outcome of the actions (indirect intention). The text of the Law does not envisage requirements in respect of the purpose to the offender nor to the motive that determined such action¹³.

Although the crime presumptively can be fulfilled in all imperfect forms, the Law does not punish the preparation acts or the attempt.

From the procedural point of view, the impeachment can be initiated ex officio, the judicial police body bearing the investigative jurisdiction, and first instance will be carried out by the City Courts.

An important issue that should be thoroughly analysed is the antithesis between the prerequisites of the medical profession Law and the ones stated in the art. 147 of the Penal Code.

First of all, the medic is not a public employee during the exercise of the medical profession, due to its humane and liberal nature, but the Penal Code refers to public employee as any individual that exercise permanently or temporarily, for any purpose, regardless of the nomination, with a commission of any nature, paid or not, with in an institution mentioned by art. 145 of the Penal Code Line 1 of art. 147 of the Penal Code refer to the "employee" also as any worker, employed by a company, other than the ones mentioned in the previous line.

From the two lines arouses the question if the medic is either a public employee or just a worker and if the art. 147 of the Penal Code are mandatory for him/her.

On one hand stands the opinion that the medic is not a public employee, based on the law that regulates the exercise of the medical profession, thus the humane and liberal nature of the profession.

The humane nature of the profession clearly emerges from the art. 374, point 2, but it is not optional, since the medic is bound by the oath to perform such duty, sworn at the graduation from the medical university.

The liberal side of the profession reflects in the option given by the legislator for the medic to perform his/her duties either in an institution under the control of the Ministry of Health or other minister's own medical service, or in the private sector.

¹³ Eliodor Tanislav, Nicolae Conea, Eliodor Tanislav jr., Crimes punished by penal special law – Legislation, doctrine, jurisprudence, Publisher Semne, Bucuresti, 2006

On the other hand, a completely different opinion, emerged from the previous Law (Law nr. 74/1995 regarding the exercise of the medical profession), in art. 12, line 3, stated that the medic is a public employee and can perform either in the private sector or in an institution under the control of the Ministry of Health or other minister's own medical service.

The issue of the medics that exercise their profession in the private sector is pretty clear in its self. However, the medics that perform in an institution under the control of the Ministry of Health or other minister's own medical service, are public employees, since they sign a labour contract and for their activity receive a regular pay.

Under these circumstances, the medic can be active subject of the felony of receiving bribe, regardless of the means to commit it¹⁴.

¹⁴ Ibidem 7, pag.579