THE EFFECTS OF THE RECENT MODIFICATIONS OF THE ROMANIAN CRIMINAL LEGISLATION ON THE CRIMINAL LIABILITY OF PHYSICIANS

Cristina Teodora POP[*]

ABSTRACT: *The physicians' criminal liability is an application of the criminal legislation in the field of medical services supply. This supposes the physicians' quality of active subject of certain infringements, stipulated in the Criminal Code and in special criminal laws, which confers the analyzed criminal responsibility field some specificity, deriving from the nature of the medical act. The Law concerning the modification and completion of the Law no.286/2009 regarding the Criminal Code and of Law no.78/2000 on the prevention, discovery and sanctioning of the corruption deeds, recently adopted by the Romanian Parliament, together with the Decision of the Constitutional Court of Romania no.650 on 25 October 2018 regarding the a priori constitutional control of the above mentioned law, corroborated with some other decisions of the Romanian Constitutional Court concerning the criminal Romanian legislation, determine important modifications of the physicians' criminal responsibly, both from the perspective of the main institutions of the substantial criminal law, incident in the field of medical responsibility, and form the perspective of the way of regulating the infringements which can be committed by physicians while providing the medical act. Thus, I appreciate I should analyze institutions like the continuing offense [art.35 par.(1) of the Criminal Code], the statute of limitations for criminal liability [art.154 par.(1) of the Criminal Code], the interruption of the statute of limitations [art.155 of the Criminal Code], the mediation agreement [art.1551 of the Criminal Code], the notion of public servant in the meaning of the criminal law [art.175 par.(2) of the Criminal Code], as well as the folowing infringements: abuse in office [art.297 of the Criminal Code], professional negligence [art.298 of the Criminal Code], corruption offenses and service offenses committed by other persons [art.308 of the Criminal Code], actions that resulted in extremely severe consequences [art.309 of the Criminal Code], creation of an organized crime group [art.367 of the Criminal Code], and illegal harvesting of tissues or organs [art.384 of the Criminal Code].*

KEY WORDS: *Criminal liability in the medical field, modifications of the criminal legislation, the decisions of the Constitutional Court of Romania, legal effects, applications of the criminal law*
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[*] Assistant-magistrate at the Constitutional Court of Romania, Associate professor PhD. at University of Bucharest, ROMANIA.

1. INTRODUCTORY ASPECTS

Criminal liability in the medical field is a form of criminal liability that involves the doctor as the active subject of the crime and the fact of committing acts stipulated by the criminal law when exercising this profession, respectively in the context of providing medical care.

In a previously published article (Pop, 2016) we identified the crimes that can be committed by doctors when performing the medical act, both those provided in the Criminal Code and those regulated in special laws. The crimes provided in the Criminal Code are the following: killing upon request of the victim (art.190 of the Criminal Code), manslaughter (art.192 of the Criminal Code), bodily harm with basic intent (art.196 of the Criminal Code) termination of pregnancy (art.201 of the Criminal Code), harming the fetus (art.202 of the Criminal Code), disclosure of professional secrecy (art.227 of the Criminal Code), bribe-taking (art.289 of the Criminal Code), abuse in office (art.297 of the Criminal Code), professional negligence (art.298 of the Criminal Code), unlawful practice of a profession or activity (art.348 of the Criminal Code), preventing the fighting of diseases (art.352 of the Criminal Code), transmission of acquired immunodeficiency syndrome (art.354 paragraph (4) of the Criminal Code), desecration of corpses or graves (art.383 of the Criminal Code) and illegal harvesting of tissues or organs (art.384 of the Criminal Code). To these are added: harvesting or transplantation of organs, tissues or cells, without the consent given under the conditions of the law (art.154 of Law no. 95/2006 on health reform), the compromising a forensic autopsy (art.155 of law no.95/2006), harvesting organs, tissues or cells for material gains (art.157 paragraph (1) of Law no. 95/2006), practicing, without law, the medical profession (art.393 of the Law no. 95/2006) and unlawful practice of the profession of dentist (art. 488 of Law no. 95/2006); non-observance of the confidentiality of medical data (art.37 of Law no. 46/2003 on patient rights); prescription of high risk drugs (art.6 paragraph (1) of Law no.143/2000), administration of high-risk drugs (art.7 of the Law no.143/2000) and urging someone to use high-risk drugs (art.10 of the Law no.143/2000); blood collection, without the patient's consent (art. 40 letter b) of Law no. 282/2005 regarding the organization of the blood transfusion activity, the donation of blood and blood components of human origin, as well as the quality assurance and sanitary safety, for their therapeutic use), drawing blood from a minor or from an unconscious person (article 40 letter c) of Law no. 282 / 2005), organizing the activity of blood transfusion in order to obtain material gains (art. 40 letter d) of Law no. 282/2005), not performing the regulatory biological control and the validation procedure (art. 40 letter e) of the Law no. 282/2005), carrying out activities in the field of blood transfusion without the authorization or accreditation provided by the law or under conditions other than those provided in the legal authorization (art. 40 letter f) of the Law no. 282/2005) and modification of the biological characteristics of the blood, without the patient's consent (art.40 letter g) of Law no. 282/2005]; the administration of any substance and / or methods forbidden to a sportsperson (art. 91 paragraph (7) of Law no. 227/2006 regarding the prevention and combating of doping in sports); unlawful practice of one of the professions of general care nurse, midwife or medical assistant (art. 19 paragraph (1) of the Government Emergency Ordinance no. 144/2008 on the exercise of the

professions of general nurse, midwife and medical assistant, as well as the organization and functioning of the Order of Nurses, Midwives and Medical Assistants in Romania).

I mention that, in this article the notion of "doctor" is used in a generic sense, meaning any person who belongs to the category of medical personnel, as defined in Article 653 paragraph (1) letter. a) of Law no.95 / 2006, and who is in the situation of providing a medical service. Thus, although, in order to ensure the unity of the text, this article speaks only of doctors, the arguments herein do not concern the doctor, *sensu stricto*, but also the dentist, the nurse and the midwife, when they have the quality of parties in certain legal relationships under the medical law, which have been concluded in order to provide medical services.

2. AMENDMENTS TO THE PROVISIONS OF THE CRIMINAL CODE, ADOPTED BETWEEN JULY 4, 2018 AND JULY 29, 2019

In the last years, the Constitutional Court has rendered numerous decisions which found that the legal provisions contained in the Criminal Code were unconstitutional. Taking into account the need to remove the issues of unconstitutionality thus determined, on July 4, 2018, the Parliament adopted the Law for amending and supplementing Law no.286/2009 regarding the Criminal Code, as well as Law no.78/2000 was developed and adopted for the prevention, discovery and sanctioning of corruption acts (hereinafter referred to as the *law* adopted on July 4, 2018). This was the object of the referral of the Constitutional Court, both by the President of Romania, as well as by a group of senators and deputies. The objections of unconstitutionality thus formulated were resolved by the contentious constitutional court by Decision no.650 of 25 October 2018 (ConstitutionalCourt, 2018), by which the Constitutional Court found that a significant number of provisions of the *law* adopted on July 4, 2018 are unconstitutional. Following the ruling of this decision, taking into account the provisions of art.147 paragraphs (2) and (4) and of art.18 paragraph (3) of Law no.47 / 1992 on the organization and functioning of the Constitutional Court, the Parliament amended the *law* adopted on 4 July 2018, in order to comply with the provisions of the Fundamental Law. The draft law, as amended following the ruling of Decision no.650 of October 25, 2018, was adopted on April 24, 2019 (this will be referred to as the *law* adopted on April 24, 2019) and has been the subject of new referrals of unconstitutionality, made by the President of Romania and a group of senators and deputies. In order to resolve these objections, the Constitutional Court rendered Decision no. 466 of July 29, 2019 (ConstitutionalCourt, 2019), by which it ruled on the unconstitutionality of the *law* adopted on April 24, 2019, as a whole.

3. AMENDMENTS TO THE PROVISIONS OF THE GENERAL PART OF THE CRIMINAL CODE, PERTAINING TO THE CRIMINAL LIABILITY OF DOCTORS

Among the amendments made to the provisions of the General Part of the Criminal Code, it is relevant, from the perspective of the present scientific approach, those regarding the provisions of art.35 paragraph (1), art.154 paragraph (1), art.155 and art.175 of the Code criminal law, which regulates the continuing offence, the statute of

limitations, the interruption of the statute of limitations term for criminal liability, the notion of public servant from the perspective of criminal law, as well as the amendments operated by introducing, after art.159 of the Criminal Code, the provisions of art. 159^1 on mediation agreement.

Art.35 paragraph (1) of the Criminal Code currently regulates the continuing offence as an offense which comprises several actions or inactions, each having the content of the same offence and which are committed in the perpetration of the same criminal resolution and against the same passive subject. The phrase "and against the same passive subject" was declared unconstitutional, by the Decision of the Constitutional Court no.368 of May 30, 2017 (ConstitutionalCourt, 2017), by which it was mainly held that the requirement of the unity of the passive subject in the case of the continuing offence is discriminatory for certain persons committing offences in a continuous form, since the knowledge of the identity of the passive subject is an circumstance that cannot be controlled by them (ConstitutionalCourt, 2017). In view of the aforementioned decision, by the *law* adopted on July 4, 2018, the Parliament amended the provisions of art.35 paragraph (1) of the Criminal Code, in the sense of eliminating from its contents the phrase declared unconstitutional, but maintained the condition analyzed regarding the offenses against the person. By the Decision no.650 of October 25, 2018, the Constitutional Court reiterated the decision on the unconstitutionality of the phrase "and against the same passive subject", ruling on the unconstitutionality of Article I para. 5 of the *law* adopted on July 4, 2018 (ConstitutionalCourt, 2018) yet by the *law* adopted on April 24 2019, the legislator did not implement this solution, which determined, together with other grounds for unconstitutionality, the ruling of the Decision no.466 of July 29, 2019. Thus, in order to observe the provisions of art.147 paragraph (2) of the Constitution, the regulation of the continuing offence against the person must exclude the condition of its perpetration against the same passive subject.

The most frequent offenses against the person committed by doctors in the performance of the medical act are those of manslaughter (art.192 paragraph (2) of the Criminal Code) and bodily harm with basic intent (art.196 paragraph (3) of the Criminal Code). In their case, however, the legislator provided, in paragraphs (3) and respectively (4) of the previously mentioned articles, as aggravated forms, the production of the consequences on two or more persons. Also, if a doctor causes, through the actions taken when providing the medical service, the death of several persons, with direct intent, and not with basic intent, he/she will be charged with the crime of aggravated murder provided for in art. paragraph (1) letter f) of the Criminal Code.

In the case of other offenses against the person that can be committed by doctors in performing the medical act, namely killing upon request by the victim (art.190 of the Criminal Code), termination of pregnancy (art.201 of the Criminal Code) and harming the fetus (art.202 of The Criminal Code), in the situation of committing them in a continuing form, the provisions of art. 35 paragraph (1) of the Criminal Code are applicable excluding the condition of their perpetration against the same passive subject. However, the situations of committing the previously mentioned offences, in continuing form, against different passive subjects can only be exceptional. According to some doctrinal opinions, which we consider to be well reasoned, in the case of continuing offenses against the person, the unity of the passive subject must remain a condition of their existence (Streteanu & Nițu, 2018).

Art. 154 paragraph (1) of the Criminal Code regulates statute of limitations of criminal liability, stipulating, at present, a term of 10 years, when the law regulates for the offense committed the sentence of imprisonment longer than 10 years, but which does not exceed 20 years [154 paragraph (1) letter b) of the Criminal Code], and a term of 8 years, when the law stipulates for the offence committed the prison sentence of more than 5 years, but not exceeding 10 years [Article 154 paragraph (1) letter c) of the Criminal Code]. Both by the *law* adopted on July 4, 2018 and by the *law* adopted on April 24, 2019, these terms are modified, for the purpose of regulating an 8-year limitation period, at paragraph (1) letter b) of 154 of the Criminal Code, and of a limitation period of 6 years, in letter c) of the same paragraph.

Thus, in the case of doctors committing, in the performance of the medical act, some offenses, for which the law provides for penalties between the limits regulated in art. 154 paragraph (1) letter b) and c) of the Criminal Code, they will benefit from a relaxation of the sanctioning regime, from the perspective of the statute of limitations of the criminal liability, the new regulation representing, for this reason, a more favorable criminal law for the doctors who have committed such offences under the applicable legislation and who will be held criminally liable, according to the provisions of the Criminal Code, amended and supplemented by the law adopted on April 24, 2019. The following offenses are included in this category: manslaughter (art.192, paragraph 2 of the Criminal Code), termination of pregnancy (art.201, paragraph (2) and (3) of the Criminal Code), harming the fetus (art.202, paragraph (2) of the Criminal Code), bribe-taking (art.289 of the Criminal Code), transmission of acquired immunodeficiency syndrome (art.354 paragraph (4) of the Criminal Code), harvesting and transplant of organs, tissues or cells without with the legally given consent (art.154 of Law no.95/2006) and harvesting of organs, tissues or cells for material gains [art. 157align. (1) of Law no. 95/2006]. We emphasize the fact that from the previous list the offense of abuse in office is missing [art. 297 paragraph (1) of the Criminal Code], since, in this case, the *law* adopted on July 4, 2018 stipulates the prison sentence from 2 to 5 years, instead of the current prison sentence of 2 to 7 years.

Art.155 of the Criminal Code regulates the interruption of the statute of limitations term for criminal liability. Currently, art.155 paragraph (1) of the Criminal Code stipulates that the interruption of the statute of limitations term for criminal liability takes place as a result of the performance of any step in the lawsuit in question, a legal provision that has been declared unconstitutional, by the Decision of the Constitutional Court no. 297 of April 26, 2018 (ConstitutionalCourt, 2018), by which it was found that the legislative solution, which provides for the interruption of the statute of limitations term for criminal liability as a result of the performance of "any step in the lawsuit in question", is unconstitutional. In the reasoning of this ruling, the Constitutional Court mainly held that the effects of the provisions of art.155 paragraph (1) of the Criminal Code must have a predictable character by reference to the person who committed a deed stipulated by the criminal law, the latter having to be assured the possibility of knowing the situation as regards the interruption of the statute of limitations term for criminal liability and the beginning of a new limitation term.

It has also been shown that the date of performing a procedural act that produces the aforementioned effect is also the date from which the new limitation period begins to run and can be calculated. At the same time, the Court held that "to accept the opposite

solution means to create, when performing procedural acts that are not communicated to the suspect or the defendant and which have the effect of interrupting the statute of limitations term for criminal liability, a state of perpetual uncertainty for the person concerned, given the impossibility of a reasonable assessment of the time interval in which he can be held criminally liable for the acts committed, uncertainty that may last until the completion of the special limitation term, provided in art. 155 para. (4) of the Criminal Code. " (ConstitutionalCourt, 2018).

Taking over the solution so ruled, *the law* adopted on July 4, 2018, regulates, at art. I, paragraph 27 as regards art.155 paragraph (1) of the Criminal Code, the fact that the interruption of the statute of limitations term for criminal liability is made by those procedural acts, which, according to the law, must be communicated to the suspect or the defendant in the criminal trial. However, the legislator made a regulatory mistake when trying to correct the provisions of art. 155 paragraph (2) of the Criminal Code, according to the considerations of Decision no. 297 of April 26, 2018, stipulating that, after each interruption of the statute of limitations term for criminal liability, a new term begins to run as regards the person in favor of whom the prescription runs, and this is from the moment at which the procedural act was communicated. This provision was declared unconstitutional by Decision no.650 of October 25, 2018 (ConstitutionalCourt, 2019), taking into account the previous case law of the Constitutional Court, according to which the above mentioned solution affects "the substance of the institution of limitations, that of being a consequence of reducing the social impact of the committed criminal acts" and transforms it into a legal means that aims to absolve the person of the enforcement of the criminal penalty, "thus replacing the significance of the institution of the statute of limitations for criminal liability with one of its effects." (ConstitutionalCourt, 2017).

It was held that "in the case of the crimes committed in participation, such a solution would determine the granting, different from one participant to the other, of a form of social pardon depending on whether procedural acts in their cases were performed or not. However, this would be a violation of the principle of equality in rights, by creating a more favorable legal regime for the persons who took part in the commission of the crime, but for whom no procedural acts in the case have been performed, and who are in the same legal situation with the persons who, having the same status, as participants in the commission of the crime, have been subject to such acts" (ConstitutionalCourt, 2017). By the *law* adopted on April 24, 2019, the Parliament took out the content of art. 155 paragraph (2) of the Criminal Code, proposed by the *law* adopted on July 4, 2018, but omitted the current regulation, provided in art. 155 par. (3) of the Criminal Code, in its current form, according to which the interruption of the statute of limitations term produces effects for all the participants in the crime, even if the interruption act concerns only some of them. In these conditions, a possible promulgation and entry into force of the *law* adopted on April 24, 2019, in its current form, would create a legislative void regarding the categories of persons for whom a new limitation period begins to run, in the event of the interruption of the statute of limitations term for criminal liability.

However, by Decision no. 466 of July 29, 2019, the Constitutional Court ruled on the unconstitutionality of the *law* adopted on April 24, 2019, as a whole, showing that, according to Article 147 paragraph (2) of the Constitution, the Parliament has the obligation to implement the decisions of the Constitutional Court, in their entirety, a partial takeover of the solutions ruled by them representing a violation of the

aforementioned constitutional provision. (ConstitutionalCourt, 2019) Thus, as a result of the Decision no. 466 of July 29, 2019, the *law* adopted on April 24, 2019 is to provide that the interruption of the limitation term will have an effect on all the participants in the crime, and the lack of such a provision in the article 155 of the Criminal Code will determine its application, as an effect of the above-mentioned decisions of the Constitutional Court.

Also, compared to the current regulation, which provides, in art.155 paragraph (4) of the Criminal Code, a term of the special limitation equal to double the limitation term, established according to art.155 paragraph (1) of the Criminal Code, the *law* adopted on July 4, 2018 and the *law* adopted on April 24, 2019 provide that the special limitation is finished when a period of time equal to one and a half of the limitation term thus established is completed.

In view of all these considerations, we conclude that in the event of the commission by two or more doctors, in participation, of a crime, when performing a medical act, the statute of limitations term for criminal liability is interrupted only by the performance of those procedural acts which, according to the law, should be communicated to the person who has the status of suspect or accused and that such interruption produces effects on all the participants in the crime. In addition, the participants in the crime, from the perspective of the analyzed hypothesis, will benefit from a lessening of the criminal liability regime, determined by the reduction of the special limitation term.

By means of paragraph 28 of article I of the *law* adopted on July 4, 2018, after article 159 of the Criminal Code, a new article was introduced, art.159^1, regarding the mediation agreement.

Mediation is a subject of real interest in the legal liability of physicians, as they frequently resort to this way of ceasing the trials in which they have the quality of defendants. From the perspective of the criminal law, mediation is a cause for the removal of criminal liability, along with amnesty, statute of limitations, absence of prior complaint and reconciliation. Currently, mediation in criminal cases is regulated by art.67-70 of Law no.192/2006 on the mediation and organization of the profession of mediator, in a separate section of this law - Section 2 with the title *Special provisions on mediation in criminal cases*. According to art.67, paragraph (2) of Law no.192 / 2006, in criminal cases, mediation applies only in the case of offenses for which, according to the law, the withdrawal of the previous complaint or the reconciliation of the parties removes the criminal liability, if the perpetrator admitted the offence in front of the judicial bodies or, in front of the mediator. And, according to paragraph (2^2) of the second statement of the same article, the conclusion of a mediation agreement in relation to the criminal aspect of the case may intervene until the act of referral to the court is read.

Unlike the legal provision previously stated, article 159^1 of the Criminal Code, as regulated by the law adopted on July 4, 2018, provides for the possibility of concluding the mediation agreement, in the criminal lawsuit, until the date of a final decision. This legal provision was declared unconstitutional by Decision no.650 of October 25, 2018 and the Court held that "the introduction of a new possibility to cease the criminal lawsuit, in addition to the reconciliation of the parties, generates discrimination between the procedural subjects who express their will to reconcile in front of a mediator and those who do it in front of the judicial bodies" (ConstitutionalCourt, 2018), considering that, by Decision no. 397 of June 15, 2016 (ConstitutionalCourt, 2016), it established that

the provisions of art. 67 of Law no. 192/2006 regarding mediation and organization of the profession of mediator, in the interpretation given by Decision no. 9 of April 17, 2015 of the High Court of Cassation and Justice – the Panel for criminal matters (ConstitutionalCourt, 2015), are constitutional insofar as the conclusion of a mediation agreement regarding the offences for which the reconciliation can take place, produces effects only if it takes place until the court referral document is read.

As a result of the aforementioned solution, the *law* adopted on April 24, 2019 should have included a form of the provisions of art. 159^1 of the Criminal Code that should have provided as a procedural moment until the mediation agreement can be concluded in the criminal process, the moment of reading the court referral document. However, the *law* adopted on April 24, 2019 does not contain provisions regarding mediation, thus leaving the above analyzed provisions of art.159^1 unchanged. However, taking into account the binding effect of the decisions of the Constitutional Court, regulated in art.147 paragraph (2) of the Fundamental Law, as well as the arguments underlying the considerations of the Decision no.466 of July 29, 2019 (ConstitutionalCourt, 2019) and the solution delivered by it, the agreement mediation will have no effect on the criminal aspect of the case if it is concluded after the court referral document is read.

Thus, if a doctor commits a crime in the performance of the medical act and chooses to conclude a mediation agreement, in order to remove his criminal liability, this agreement will produce legal effects only if it occurs until the court's referral document is read. In the hypothesis of the lack, in the future, from the content of the General Part of the Criminal Code, of the provisions of art. 159^1 regulated by art.I p.28 of the *law* adopted on July 4, 2018, the provisions of art.67- -70 of Law no.192 / 2006, with the "amendments" brought to them by the Constitutional Court Decision no. 397 of June 15, 2016 will be enforceable. It is to be noted that the mediation agreement has effects only with respect to the persons that are parties to it.

Finally, by para. 30 of art.I of the *law* adopted on July 4, 2018, paragraph (2) of art.175 of the Criminal Code was repealed, according to which "it is considered a public servant, within the meaning of the criminal law, the person supplying a public-interest service which they have been vested with by the public authorities or who shall be subject to the latter's control or supervision with respect to carrying out such public service." According to the doctrine [1] (Michinici & Dunea, 2016) (Pascu, 2016) , art. 175 (2) of the Criminal Code, in the form in force at the time of writing this article, regulates a so-called category of "assimilated public servants", in the sense that they are assimilated to the category of public servants within the meaning of the criminal law, provided for in art. 175 paragraph (1) of the Criminal Code. The lawyers, public notaries, authorized independent experts, bailiffs, mediators, private detectives, but also the doctors who work in medical practices and in the private health system were assimilated to the category of public servants (Michinici & Dunea, 2016) (Pascu, 2016). This is because, by the Decision of the High Court of Cassation and Justice no. 26 of December 3, 2014 (ConstitutionalCourt, 2014), the doctors with permanent employment contracts in the public health system, were included in the category of public servants within the meaning of the criminal law, provided for in art.175 paragraph (1) letter b) of the Criminal Code. Moreover, both the Constitutional Court, by Decision no.2 of January 15, 2014 (ConstitutionalCourt, 2014), and the High Court of Cassation and Justice, by Decision no.26 of December 3, 2014, mentioned above, held that non-financing from

public funds represents the criterion for determining the sphere of the persons who fall under art. 175 paragraph (2) of the Criminal Code and that there are categories of persons exercising liberal professions and who are "public servants" under the conditions of art. 175 paragraph (2) of the new Criminal Code, when they are not financed from the state budget, when they carry out their activity according to a special law, when they exercise a public interest service and are subject to the control or supervision of a public authority.

Determining the scope of the provisions of art. 175 of the Criminal Code has relevance by reference to the provisions of Title V of the Special Part of the Criminal Code, which regulates corruption and service offenses. These are crimes whose qualified active subject is the public servant qualified. Therefore, the repeal of para. (2) in art. 175 of the Criminal Code, through the criticized text, has the effect of reducing the incidence of criminal dispositions of art. 289-309 of the Criminal Code, by restricting the categories of persons that could be charged with these offenses. To these is added the offense of tampering with official documents, in the aggravated version provided in par. (2) in art. 320 of the Criminal Code, which can also be committed only by a public servant within the meaning of the criminal law. Also, art. 289 of the Criminal Code, which regulates the offense of taking bribe, provides, at par. (2), that the act of taking bribe incriminated in par. (1) of the same article, is a criminal offense only when it is committed in connection with the non-fulfillment, the delay in the performance of an act regarding his/her legal duties or in connection with an act contrary to these duties, in the event of their being committed by one of the categories of persons provided for in art. 175 paragraph (2) of the Criminal Code.

Therefore, the repeal of art.175 paragraph (2) of the Criminal Code would have had the effect of removing the criminal liability of the doctors from the private health system for corruption or service offenses.

By the Decision no.650 of October 25, 2018 (ConstitutionalCourt, 2018) the Constitutional Court, however, found for the unconstitutionality of the provisions of art.I, para. 30 of the *law* adopted on July 4, 2018, holding that they contravene the constitutional provisions of art.1 paragraph (3) and (5) and Article 11. And, as a result of this decision, the *law* adopted on April 24, 2019 does not provide for a legal provision repealing the provisions of art.175 paragraph (2) of the Criminal Code. Thus, the doctors who work in the private health system will be criminally liable for corruption and service offenses, according to the provisions of art.175 paragraph (2) of the Criminal Code, corroborated with those of art.308 of the same code.

4. AMENDMENTS TO THE PROVISIONS OF THE SPECIAL PART OF THE CRIMINAL CODE, INCIDENT IN THE FIELD OF CRIMINAL LIABILITY OF DOCTORS

One of the most disputed rules of incrimination, listed among those that stipulate crimes that could pertain to the doctors while performing the medical act, is the one provided in art.297 paragraph (1) of the Criminal Code, which regulates the abuse in office. This has been several times subject to judicial review, the most relevant decisions ruled by the Constitutional Court, in this respect, being Decision no.405 of June 15, 2016 (ConstitutionalCourt, 2016) and Decision no.392 of June 6, 2017 (ConstitutionalCourt,

2017). By Decision no. 405 of June 15, 2016, the constitutional contentious court stated that the provisions of this article are constitutional insofar as the phrase "implements faultily" in their content means "implements by violating the law", a solution that has transformed the reviewed text in a subsidiary regulation, applicable in case of the absence of other legal provisions that incriminate the committed acts.

By the Decision no.392 of June 6, 2017, the Constitutional Court held the necessity of establishing a threshold of the damage and of the circumstance of the damage produced by committing the act, elements according to which it could assessed the incidence or not of the criminal law, respectively of the analyzed provisions of art. 297 paragraph (1) of the Criminal Code. The Constitutional Court held, however, that the regulation in the analyzed incrimination regulation of the damage value threshold and of the intensity of the damage of the right or the legitimate interest resulted from the commission of the act constitutes the obligation of the legislator, pointing out that passivity may determine the occurrence of incoherent and unstable situations contrary to the principle of security of legal relationships, in its component regarding the clarity and predictability of the law.

By art.I para. (50) of the *law* adopted on July 4, 2018, the Parliament reconfigured the provisions of art.297 of the Criminal Code stipulating, in paragraph (1) of this article, particularly, that the duties exercised by the public servant who has the status of active subject of the offence of abuse in office must be regulated by laws, Government ordinances or emergency ordinances and that the acts committed must consist in the violation of such duties. At the same time, a value threshold of the damage caused by the acts of abuse in office, equal to the equivalent of the national gross minimum wage, was regulated. Also, the punishment provided for the offence of abuse in office has been reduced, from the prison from 2 to 7 years, to the prison from 2 to 5 years. By the Decision no.650 of October 25, 2018 (ConstitutionalCourt, 2018) the Constitutional Court found, however, for the unconstitutionality of the provisions of art.I, para. (50) of the *law* adopted on July 4, 2018, showing that the legislator should have defined the intensity of the damage to the legitimate rights or interests of the person, natural or legal, in the position of passive subject of the offence of abuse in office, and also held that establishing a value threshold for the inflicted injury, which is derisory, does not solve the problem of the "character of the *ultima ratio* of the criminal sanction", and "the same problems regarding the difficulty of delimiting the various forms of liability, compared to the criminal one will continue to exist." (ConstitutionalCourt, 2018)

By the *law* adopted on April 24, 2019, the Parliament did not intervene on the provisions of Article 297 paragraph (1) of the Criminal Code, an aspect which actually determined the Constitutional Court to rule on the solution contained in Decision no. 466 of July 29, 2019. The latter, according to the provisions of art.147 paragraph (2) of the Constitution, will compel the legislator to modify the text of art.297 of the Criminal Code, in compliance with the above-mentioned decisions.

The provisions of art.298 of the Criminal Code regulate the offense of professional negligence, which refers to the culpable breach by a public official of a professional duty by failing to carrying it out or by faultily carrying it out, if it results in damage or violation of the legitimate rights or interests of a natural or legal entity, an offence that shall be punishable by no less than 3 months and no more than 3 years of imprisonment, or by a fine.

This regulation was repealed by Article I para. 52 of the *law* adopted on July 4, 2018, repealing rule that was found to be constitutional, by Decision no.650 of October 25, 2018, [1] (ConstitutionalCourt, 2018) and maintained, by Article I para. 33 of *the law* adopted on April 24, 2019.

Thus, in relation to the purpose of this article, it is to be remembered that the entry into force of the analyzed legislative changes will determine the exclusion of the criminal liability of the doctors for the acts of professional negligence.

Art.308 of the Criminal Code regulates corruption and service offenses committed by other persons, other than public servants, within the meaning of the criminal law, provided for in art.175 paragraph (1) of the Criminal Code. Thus, there are incriminated the acts of taking bribe, giving bribe, influence peddling, buying influence, embezzlement, abuse in office, professional negligence, abuse of power for sexual gain, abuse of position and disclosure of information classified as service secret or not public, committed by assimilated public servants, regulated in art. 175 paragraph (2) of the Criminal Code. According to paragraph (2) of art.308 of the Criminal Code, in the hypothesis of paragraph (1) of the same article, the special limits of the penalties for the listed offenses are reduced by one third.

By art.I para. 53 of the law adopted on July 4, 2018, two new paragraphs were introduced in the structure of art.308 of the Criminal Code, which provide, on the one hand, for the further reduction of the special limits of the established penalties by half , according to art.308 paragraph (2) of the Criminal Code, in the case of committing offenses regulated in art.295 and art.297-300 of the Criminal Code, when the perpetrator fully covers the damage caused, during the criminal prosecution or the lawsuit, before the decision of the court becomes final, and, on the other hand, the fact that the provisions of paragraph (3) previously mentioned have an effect on all the participants in committing the crime, even if the payment was made only by one or a part of them. Although, by Decision no.650 of October 25, 2018 [1] (ConstitutionalCourt, 2018), the Constitutional Court found that the provisions of Article I para. 53 of the *law* adopted on July 4, 2018 are constitutional, by Article I para. 34 of the *law* adopted on April 24, 2019, in the content of paragraph (3) of art.308 of the Criminal Code, only the crimes of embezzlement, abuse in office, abuse of power for sexual gain, abuse of position were maintained, and only for them was to be applied the reduction by half of the special limits of the penalties established according to art.308 paragraph (2) of the Criminal Code, provided the other conditions stipulated in the hypothesis of the incrimination rule are fulfilled.

As we have shown above, the provisions of art.308 of the Criminal Code pertain to the sphere of criminal liability of the doctors who carry out their activity within the private health system.

The provisions of art.309 of the Criminal Code regulate the facts that have produced very serious consequences, showing that, in the case where, by committing crimes of embezzlement, abuse in office, professional negligence, abuse of position, disclosure of information classified as state secret , disclosure of information classified as service secret or non-public information, illegal obtaining of funds or diversion of funds, particularly serious consequences have been produced, the special limits of the penalties provided by law are increased by half. “Particularly serious consequences" means, according to art. 183 of the Criminal Code, material damages greater than 2,000,000 lei.

By art.I para. 54 of the *law* adopted on July 4, 2018, only the offenses regulated in art.295, 300, 303, 304, 306 and 307 of the Criminal Code were maintained in the hypothesis of the analyzed regulation and the limits of the penalties are stipulated as increasing by one-third. By the Decision no.650 of October 25, 2018, the Constitutional Court found for the constitutionality of the provisions of art. I, para.54, indicating that these are the option of the lawmaker, following the applicable criminal policy. The same form of art.309 of the Criminal Code was also maintained by art.I para.35 of the *law* adopted on April 24, 2019.

Therefore, the commission by a doctor, in the execution of the medical act, of one of the offenses provided for in art.309 of the Criminal Code and causing, by this, a material damage bigger than 2,000,000 lei will have the effect of increasing with a one third of the special limits of the punishment provided by law for the crime committed.

Another crime that could be relevant from the perspective of the criminal liability of doctors is the creation of an organized crime group, provided for in art.367 of the Criminal Code. By art.62 of the *law* adopted on July 4, 2018, the Parliament modified the definition of the notion of "organized crime group", provided for in art.367 paragraph (6) of the Criminal Code, making a direct transposition of the definition of the same notions, provided for in art. 2 letter a) of the United Nations Convention against Transnational Organized Crimes, adopted in New York on November 15, 2000, which was ratified by the Romanian State, together with the two additional protocols to this Convention - the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, in addition to the United Nations Convention against Transnational Organized Crimes and the Protocol Against the Smuggling of Migrants by Land, Sea and Air - by Law no. 565/2002. According to the text thus adopted, "organized crime group" means a structured group, made up of three or more persons, which exists for a certain period of time and acts in a coordinated manner for the purpose of perpetrating one or more serious crimes, in order to obtain directly or indirectly a financial benefit financial or another material benefit." The provisions of Article I para. 62 of the *law* adopted on July 4, 2018 were found to be constitutional by Decision no.650 of October 25, 2018, which is why they were not modified by the *law* adopted on April 24, 2019.

Unlike the regulation in force, the provisions of art.367 paragraph (6) of the Criminal Code regulated by art.I para.62 of the *law* adopted on July 4, 2018 stipulate the condition of setting up the organized crime group for the purpose of obtaining, directly or indirectly, of a financial benefit or other material benefit, an aspect that restricts the scope of the provisions of art.367 of the Criminal Code. Basically, according to the new regulation, the provisions of art.367 of the Criminal Code are no longer incidental in the hypothesis of organizing a crime group for a purpose other than obtaining a material gain.

Art. 384 of the Criminal Code regulates the crime of illegal harvesting of tissues or organs. It currently provides only that the harvesting of tissues or organs from a corpse, without having the right to do so, is punishable by imprisonment from 6 months to 3 years or with a fine. The provisions of art.384 of the Criminal Code constitute the general law in relation to the offenses of illegal harvesting of organs and tissues from deceased donors, regulated in the content of Title VI of the Law no. 95/2006 (Pop, 2016).

By art.I para. 63 of the *law* adopted on July 4, 2018, in the article 384 of the Criminal Code, a new paragraph was introduced, consisting of an aggravated form of the offense

provided for in art.384 paragraph (1) of the Criminal Code, which incriminates the same facts in the hypothesis in which, by means of this, a forensic autopsy, required under the law, is tampered, a situation in which the regulated punishment is imprisonment from 2 to 5 years. This is nothing more than a taking over of the content of the incrimination rule provided in art.155 of Law no.95 / 2006, with the mention that the latter provides, for committing the same acts, the punishment of imprisonment from 6 months to 3 years, alternatively with the fine. This difference of sanctioning regime will determine the impossibility of applying in the future the provisions of art.384 paragraph (2) of the Criminal Code and will require a new intervention of the legislator, most likely, in the sense of repealing art.155 of Law no.95 / 2006. Until then, an application solution might be considered obsolete to the provision previously mentioned, given the succession of legislative interventions over time.

The provisions of Article I para. 63 of the *law* adopted on July 4, 2018 were not challenged by the unconstitutionality objection that forms the object of the Decision no.650 of October 25, 2018, and will therefore be promulgated in their current form.

5. THE EFFECTS OF THE CONSTITUTIONAL COURT DECISION NO.650 OF OCTOBER 25, 2018 AND OF THE CONSTITUTIONAL COURT DECISION NO.466 OF JULY 29, 2019

The effects of the decisions to admit the unconstitutionality objections are those provided in art.147 paragraphs (2) and (4) of the Constitution and in art.18 paragraph (3) of Law no.47/1992 on the organization and functioning of the Constitutional Court. By reference to the above mentioned constitutional rule, corroborated with the provisions of paragraph (4) of the same article, the Decision of the Constitutional Court no.650 of October 25, 2018, from the date of its publication in the Official Gazette of Romania, compelled the legislator to make the *law* adopted on July 4, 2018 compliant with the determined constitutional provisions, which, by the aforementioned decision, would have been violated. In this respect, the *law* adopted on April 24, 2019, which constituted the object of judicial review exercised by the Decision of the Constitutional Court no. 466 of July 29, 2019. On this occasion, the Constitutional Court found that *the law* adopted on April 24, 2019 was unconstitutional as a whole, the main reason for unconstitutionality being, according to the Press Release of the Constitutional Court of July 29, 2019, that, by the law adopted on April 24, 2019, the Parliament did not transpose the decisions the court of constitutional litigation, by which it found for the unconstitutionality of several legal provisions contained in the Criminal Code, in their entirety, an aspect that signifies a violation of the constitutional provisions of art. 147 paragraph (2). Under these conditions, after the drafting of Decision no.466 of July 29, 2019 and after its publication in the Official Gazette of Romania, Part I, the legislator is obliged to proceed to eliminate the issues of unconstitutionality from the law adopted on April 24, 2019.

In this respect, it is to be noted that, according to an extended case law of the Constitutional Court, the general binding effect of its decisions is attached not only to the decision, but also to the recitals on which its decision is based, and by the phrase "recitals that the decision of the Court is based on" it is understood "the unitary set of arguments, which presented in a logical succession make the legal reasoning on which the solution given by the Court is based." (ConstitutionalCourt, 2017)

At the same time, it is mandatory that the latter legislative procedure be limited to the agreement of the *law* adopted on April 24, 2019 with the provisions of the Constitution, and other legislative interventions on the provisions of the analyzed law cannot be operated, which are not required by the solution or the recitals no. 466 of July 29, 2019. In this regard, the Constitutional Court has ruled, in its case-law (ConstitutionalCourt, 2004), that the provisions of art. 147 paragraph (2) of the Constitution "refer to the review of a law or certain legal provisions whose unconstitutionality was found by a decision of the Constitutional Court, given on the occasion of the a priori judicial review [...] "and that they" limit the resumption of the legislative review process only with regard to the provisions found to be unconstitutional by the Constitutional Court" Therefore, "the lawmaker has no constitutional competence to modify the legal provisions that have not been challenged from the perspective of constitutionality, nor those challenged, but whose constitutionality has been ascertained by the judicial act of the Court." (Pop & Marin, 2019)

To conclude, the lawmaker's constitutional obligation to proceed according to the provisions of art.147 paragraph (2) of the Fundamental Law is imperfect, as, in its case, a form of legal liability for non-compliance is not regulated. The legal effect, which sanctions, in an indirect manner, the failure of the lawmaker to comply with the provisions of art. 147 para. (2) of the Constitution is deciding on the unconstitutionality of legal provisions, adopted as such, by way of *a posteriori* judicial review, which is made according to art. d) of the Constitution (Pop & Marin, 2019).

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