

## **PARTICULARITIES OF CRIMINAL LIABILITY OF PHYSICIANS FOR CORRUPTION AND PROFESSION-RELATED CRIMES**

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**ABSTRACT:***The hypothesis of committal of corruption profession-related crimes by physicians is a very disputed legal issue in Romania, as far as all the infringements regulated in Chapter I of Title V of the Special Part of Criminal Code can be committed only by civil servants in the sense of criminal law. The quality of “civil servants, in the sense of criminal law” of physicians, who are employed in the public medical health system in Romania, was settled by the High Court of Cassation and Justice, by Decision no. 26 of the 3rd of December 2014, and then by Decision no. 19 of the 4th of June 2015, and was reaffirmed by the Constitutional Court, by Decision no. 717 of the 29th of October 2015. Even if scholars are still doubting the quality of the Romania criminal law - referring the expressions “civil servant, in the sense of administrative law” and “civil servant, in the sense of criminal law” - in the view of article 1 paragraph 5 of Constitution, and its conformity with article 7 of the European Convention of Human Rights, in my opinion physicians, working for the public health system in Romania, are criminal liable at least for the infringements stipulated at article 289, 297, and 298 of the Criminal Code.*

**KEY WORDS:** *corruption and while in office infringements; civil servant in the sense of criminal law; physicians’ criminal liability; legal peculiarities of the medical act, case-law of the High Court of Cassation and Justice; case-law of the Constitutional Court*

**JEL Classification:** *K14*

### **1. CIVIL SERVANTS’ CAPACITY OF PHYSICIANS IN THE SENSE OF CRIMINAL LAW**

Considering that the corruption and profession-related crimes regulated by Title V of the Special Part of the Criminal Code are crimes that have as qualified active subject the public servants, in the sense of the public criminal law, the criminal liability of physicians for this category of crimes involves the classification of physicians in the aforementioned capacity, as defined in article 175 of the Criminal Code.

Despite the fact that this is a matter which is still under intense dispute in the Romanian doctrine<sup>1</sup>, the classification of physicians who carry on their activity in the public health system, in the sphere of public servants, in the sense of the criminal law, was established

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<sup>1</sup> <https://www.juridice.ro/464761/medicul-este-sau-nu-este-functionar-public.html>.

with mandatory value for the courts of law by the High Court of Cassation and Justice, through its Decision no. 26 of the 3<sup>rd</sup> of December 2014<sup>2</sup>, ruled on the occasion of a request for a preliminary decision settlement. In this respect, the Tirgu-Mures Appellate Court - Criminal Section and for causes with minors and related to family, when settling a criminal claim having as object the establishment of the guilt of a physician for the crime of bribery and receipt of undue benefits, notified The High Court of Cassation and Justice asking it to clarify the following legal matter: "*Art. 175 of the Criminal Code shall be construed in the sense that the surgeon - employee with labour contract for an indefinite period of time in a hospital belonging to the public health system, indicted for claims of bribe taking as regulated by art. 289 of the Criminal Code, shall be considered public servant in the meaning referred to in article 175 para. (1) letter (a) of the Criminal Code, or public servant in the meaning referred to in art. 175 para. (2) of the Criminal Code?*"<sup>3</sup> All the above provided that, as per the administrative law, namely in accordance with art. 2, para. (1) thesis I of Law no. 188/1999<sup>4</sup>, the public servant is defined as "*any person appointed, as per the legal applicable conditions, in a public position or office*" (Ifrim, 2015), and in accordance with the provisions of art. 381 para. (2)<sup>5</sup> of Law no. 95/2006<sup>6</sup>, "*the physician is not a public servant and may not be assimilated to a public servant*", exclusion legally motivated by the nature of the physician profession and through the obligations they have towards their patients. The response of the High Court of Cassation and Justice to the question such worded was that "*the physician employed with a labour contract in a hospital unit belonging to the public health system, has the capacity of public servant within the meaning of the provisions of art. 175(1) (b) thesis II of the Criminal Code*". In order to issue this solution, the Supreme Court of Justice stated that the legislator uses, in the content of the art. 175(1) (b) thesis II of the Criminal Code, the syntagm "*public position/office of any nature*", and not that of "*public position/office*", in order to avoid creating an overlap between "*public position/office*", in the sense given by Law no. 188/1999 and the wording used in the Criminal Code. It was also retained, resorting to the conceptual autonomy of the criminal law, that the notion of "*public servant in the sense of the criminal law*" is more comprehensive than that mentioned in art. 2 of Law no. 188/1999 and that the provisions of art. 381 (2) of Law no. 95/2006, according to which

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<sup>2</sup> The decision of the High Court of Cassation and Justice no. 26 of the 3<sup>rd</sup> of December 2014 concerning the issuance of a preliminary decision in view of settling in principle the manner of interpretation of the provisions contained in art. 175 of the Criminal Code, respectively if the surgeon employed with labour contract for an indefinite period in a hospital unit from the public health system, indicted with charges of bribe taking provided for by the provisions of art. 289(1) of the Criminal Code, falls within the category of civil servants referred to in art. 175(1)(c) of the Criminal Code or in the category of civil servant referred to in art. 175(2) of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 24 of the 13<sup>th</sup> of January 2015.

<sup>3</sup> See the Conclusion of the Tirgu-Mures Appellate Court - Criminal Section and for causes with minors and related to family of the 24<sup>th</sup> of September 2014, pronounced in the Case File no. 7.932/102/2012.

<sup>4</sup> Law no.188/1999 on civil servants, republished in the Official Gazette of Romania, Part I, no.365 of the 29<sup>th</sup> of May 2007.

<sup>5</sup> para. 2 of art. 381 of Law no. 95/2006 was introduced in the content of this law, through the provisions of art. I point 38 of Law no. 132/2014 on the approval of the G. E. O. no. 2/2014 for modifying and completing Law no. 95/2006 on the reform in the health system, as well as for the modification and completion of certain normative acts, as a result of an important social pressure coming from various organisations of professional medical personnel.

<sup>6</sup> Law no. 95/2006 on the reform in the public health system, republished in the Official Gazette of Romania, Part I, no.652 of 28 August 2015.

"*the physician is not a public servant*", do not exclude the physician from the category of civil servants in the sense of the criminal law (Michinici, 2014). The consequence of such decision was the liability of physicians, employed with labour contract in the public health system, for corruption and profession-related crimes (Pop, 2016). Well, there were also distinguish doctrinaire opinions (Duvac, 2011) saying that actually physicians are public servants according to art.175 para.2 of the Criminal Code (Udroiu, 2014), that implies similar, but more restricted legal effects (Cicîntă-Crişu, 2014).

This legal reality and the same rationale were reiterated by the High Court of Cassation and Justice, less than a year later, through the same judicial mechanism referred to in art. 475-477<sup>1</sup> in the Criminal Procedure Code, more exactly, by Decision no. 19 of the 4<sup>th</sup> of June 2015<sup>7</sup>. This time, the Bucharest Military Appellate Court in addressed the Supreme Court, raising the following matter of law: "*whether the action of a physician, which has the capacity of public servant, to receive additional payments or donations from patients, under the conditions laid down in art. 34 (2) of the Law on patient rights no. 46/2003, constitutes or not an exercise of a right recognised by law, resulting in the incidence of the provisions of art. 21 para. 1 thesis I of the Criminal Code*"<sup>8</sup>. In settling the aforementioned request, the High Court of Cassation and Justice ruled that "*the action of a physician employed with labour contract in a hospital belonging to the public health system, which has the capacity of public servant, in the sense of the provisions of art. 175(1)(b) thesis II of the Criminal Code, to receive additional payments or donations from patients, under the conditions laid down in art. 34(2) of the Law on patient rights no. 46/2003, does not constitute an exercise of a right recognised by law having as a result the incidence of the provisions of art. 21 para. (1) thesis I of the Criminal Code.*" The considerations of the Decision of the Constitutional Court no. 2 of the 15<sup>th</sup> of January 2014<sup>9</sup>, ruling that the granting of a distinct legal status, privileged from the perspective of criminal liability, would be contrary to the principle of equal rights of citizens, as provided for by the constitutional norm of art. 16 as well as the solution and considerations of the Decision no. 26 of the 3<sup>rd</sup> of December 2014, analysed above, were taken into consideration.

In this legal context, in the same case file on the commission by a physician of acts of corruption, on the docket of the Tirgu-Mures Appellate Court, one invoked the exception of unconstitutionality of the provisions of art. 175(1)(b) of thesis II of the Criminal Code, in the interpretation given by Decision no. 26 of the 3<sup>rd</sup> of December 2014 of the High Court of Cassation and Justice - the Court called to settle the law matters in the criminal field, the author of the exception believing that the coexistence in the Romanian legislation of the notion of "*public servant in the sense of criminal law*" and the notion of "*public*

<sup>7</sup> The decision of the High Court of Cassation and Justice no. 19 of the 4<sup>th</sup> June 2015 regarding the issuance of a preliminary decision for the settlement of a principle matter of law: "*Whether the action of a physician, which has the capacity of public servant, to receive additional payments or donations from patients, under the conditions laid down in art. 34 (2) of the Law on patient rights no. 46/2003, constitutes or not an exercise of a right recognized by law, resulting in the incidence of the provisions of art. 21 para. 1 thesis I of the Criminal Code*", published in the Official Gazette of Romania Part I, no. 590 of the 5<sup>th</sup> of August 2015.

<sup>8</sup> See the Conclusion of the 16<sup>th</sup> of February 2015 of the Bucharest Military Appellate Court, pronounced in the Case File no. 34/753/2013.

<sup>9</sup> The decision of the Constitutional Court no. 2 of the 15<sup>th</sup> of January 2014 regarding the objection of unconstitutionality of the provisions of art. I, point 5 and art. II point 3 of the Law for the modification and completion of certain normative acts and the sole art. of the Law for the amendment of art. 253<sup>1</sup> of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 71 of the 29<sup>th</sup> of January 2014.

*servant in the sense of administrative law*", notions whose meaning is claimed to be different, the national criminal legislation breaches the principle of legality of incrimination and punishment, provided for in art. 7 of the European Convention of Human Rights and in art. 23 para. (12) of the Constitution. One invoked at the same time the non-observance of the law quality standards, imposed by the constitutional mechanism of art. 1 para. (5) of the Constitution. As a result, the Constitutional Court adopted the Decision no. 717 of the 29<sup>th</sup> of October 2015<sup>10</sup>, through which the Court ascertained the constitutionality of the legal provisions subject to control in relation with the criticism formulated, and found that the provisions of art. 381 of Law no. 95/2006 may not justify a possible lack of criminal protection of patients, considering the importance of the guarantee of public health in Romania by the state, guarantee provided in art. 34(1) in the Constitution. With referral to the jurisprudence of the European Court of Human Rights concerning the principles *nullum crimen sine lege* and *nulla poena sine lege* and the criteria of observing such principles, respectively to court orders such as those of the 7<sup>th</sup> of February 2002, the 29<sup>th</sup> of March 2006, the 24<sup>th</sup> of May 2007, the 17<sup>th</sup> of September 2009 and of 21<sup>st</sup> of October 2013, ruled in the cases *E.K. versus Turkey*, paragraph 51, *Achour versus France*, paragraphs 41 and 42 *Dragotoniu and Militaru-Pidhorni versus Romania*, paragraphs 33 and 34, *Scoppola versus Italy* (no. 2), paragraphs 93, 94 and 99, and *Del Rio Prada versus Spain*, paragraphs 78, 79 and 91, the Constitutional Court has consistently stated that the two criticised notions have distinct meanings, without this aspect affecting the clarity, accuracy and predictability of the provisions of art. 175 para. (1) letter (b)) thesis II of the Criminal Code or their compliance with the provisions of art. 7 of the European Convention of Human Rights.

By this solution, which, unlike those of the High Court of Cassation and Justice pronounced by the preliminary decisions for the settlement of law matters, is mandatory *erga omnes*, and not only for the courts of law<sup>11</sup>, the Constitutional Court conferred the certainty of criminal liability of physicians serving in the public health system for those crimes provided for in the Criminal Code or in the special laws, which have as special active subject public servants in the sense of the criminal law. Considering that, in the absence of any new information able to change the jurisprudence of the Constitutional Court, the effects of this solution may be removed only by a decision of the European Court for Human Rights, which would have to rule on the non-compliance of the provisions of art. 175 paragraph (1) letter (b) thesis II of the Criminal Code with the provisions of art. 7 above, the criminal liability of physicians for corruption and profession-related crimes has become a legal certainty, incontestable *ex lege*.

A specific condition of the criminal liability of physicians for the analysed crimes is that the facts must be committed during the exercise of the profession. Thus, keeping in mind the nature of the medical act and its substantial characteristics, I appreciate that the corruption and profession-related crimes which may be committed by physicians, while

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<sup>10</sup> The Decision of the Constitutional Court no. 717 of the 29<sup>th</sup> of October 2015 related to the exception of unconstitutionality of the provisions referred to in art. 175(1) (b) thesis II of the Criminal Code in the interpretation given by the Decision no. 26 of the 3<sup>rd</sup> of December 2014 of the High Court of Cassation and Justice - the Court entrusted with the settlement of law matters in the criminal field, published in the Official Gazette of Romania, Part I, no. 216 of the 23<sup>rd</sup> of March 2016.

<sup>11</sup> See art. 477(3) of the Criminal Procedure Code and art. 147 para. (4) in the Constitution and art. 11 para. (3) of Law no. 47/1992 on the organisation and operation of the Constitutional Court.

exercising such capacity, are those laid down in art. 289(1), art. 297 and 298 of the Criminal Code. Also, whereas a particularity of the criminal liability in the medical act is that the majority of the crimes committed by physicians in the exercise of the profession are committed as a consequence of culpable fault, the crimes regulated by art. 289 and 297 of the Criminal Code, are committed with intention, aspect which constitutes an exception from the rule stated above.

## **2. CRIMINAL LIABILITY OF PHYSICIANS FOR CRIMES OF BRIBE-TAKING, REFERRED TO IN ART. 289(1) OF THE CRIMINAL CODE**

In relation to the bribe-taking crime, the capacity of the physician who is its active subject was settled by the jurisprudence of the High Court of Cassation and Justice and the Constitutional Court, analysed under item 1 above. Thus, any action of the physician of demanding, receipt or acceptance of promises of undue benefits or any inaction of not rejecting the promise of such benefits, come from the part of the patient, constitutes a bribe-taking crime. As the concept of "*benefits*" is used in a broad sense by the legislator, it refers to any kind of reward or patrimonial advantage, regardless whether it refers to money or other movable or immovable property. It belongs to the essence of the bribe taking crime that these patrimonial benefits are claimed or received as counter-service for the conduct of the active subject, who, in exchange, pledges to fulfil, not to fulfil, to expedite or to delay the fulfilment of an act that belongs to the scope of his/her job duties or to fulfil an act contrary to those duties. In the case of physicians, the bribe taking crimes in general is done by the physician's promising to complete or speed up the completion of the medical act or a certain medical operation (Cicîntă-Crişu, 2014). Also, the patrimonial benefit constituting the bribery may be destined to the physician or to another person. Although the analysed incrimination norm uses the words "*for himself/herself or for another*", I appreciate that it must be interpreted extensively, in the sense in which the patrimonial advantage could be directed not only to another natural person, but also to a legal person. Therefore, the conditioning by the physician of the completion or speeding up of the completion of the medical act on payment by the patient of a sum of money or on the donation of money or of goods with patrimonial value to a private law legal person, such as the associations and foundations, constitute bribe taking in the sense of art. 289 para. (1) of the Criminal Code. The subjective side of the crime is given by the perpetrator's guilt, in the form of direct intention. As the hypothesis of the incrimination norm does not provide the condition that the aim intended by committing the crime is fulfilled, the bribe taking crime may be retained even if subsequently to the claim, receipt or acceptance to receive benefits, the active subject, i.e. the physician, does not carry out the professional acts or the medical acts promised or even if the patrimonial benefits, after demanding or accepting the promise, are not received.

It is important to specify that the passive subject of the bribe-taking crime is the state (Ivan, 2016), through the sanitary unit where the active subject carried on his/her activity, which has the obligation to ensure the provision of the services in the field of public health in terms of honesty and probity of the physicians involved. This is necessary as a superficial analysis of the regulation could lead to the conclusion that the patient, who is the active subject of the medical law legal relation, who is the actual briber, is criminally liable for the bribe-giving crime. In reality, the provisions of art. 290 of the Criminal Code,

which constitute the general norm in the analysed matter must be corroborated with the stipulations of art. 34 para. (2) of Law no. 46/2003, which, in turn, may be legally valorised only in the interpretation given by the decision of the High Court of Cassation and Justice no.19 of the 4<sup>th</sup> of June 2015, to which I referred in point 1 above. For these reasons, I appreciate that in the current settlement, in the extended sense of the latter notion, the patient who offers donations or supplementary payments to the health unit in which he was treated or to its employees is not criminally liable for the bribe-giving crime, being exonerated by the very considerations of the decision described above<sup>12</sup>.

Last but not least, we should remark that in para. 2 of art. 289 of the Criminal Code provides a form assimilated to the basic form of the bribe-taking crime, which has as active subject a public servant, in the sense of the provisions of art.175 para. (2) of Criminal Code, and the material elements of its objective side is restricted to the commission of the deeds provided in para. (1) of the same article only in connection with the failure to fulfil or the delay of the performance of an act belonging to the legal duties of the public servant related to the carrying out of an act contrary to those duties. This assimilated form of the crime is not relevant by reference to the criminal liability in the medical act, because the physicians, employees of the health care units belonging to the public health system, are public servants in the sense of art. 175 para. (1) letter (b) thesis II of the Criminal Code, and the physicians employed by the health care units in the private health system are liable for the bribe-taking crime in accordance with the provisions of art. 308 of the Criminal Code as I intend to argue in point 5 below.

### **3. CRIMINAL LIABILITY OF PHYSICIANS FOR THE CRIME OF ABUSE IN OFFICE, PROVIDED IN ART. 297 OF THE CRIMINAL CODE**

In my opinion, the crime of abuse in office, in the variant regulated in art. 297 para. (1) of the Criminal Code is objectionable, regardless of the field where the active subject carries on his/her activity, even after the ruling by the Constitutional Court Decision No.405 of 15<sup>th</sup> of June 2016<sup>13</sup>, by which it was ruled that the provisions of article 246 of the 1969 Criminal Code and of art. 297(1) of the Criminal Code are in line with the Constitution to the extent that the phrase "*fulfils in a faulty manner*" from the content thereof shall be understood as "*fulfils by the infringement of the law*". This happens because the incrimination norm, settled in art. 297 para. (1) of the Criminal Code, does not

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<sup>12</sup> By the decision no. 19 of the 4<sup>th</sup> of June 2015 the High Court of Cassation and Justice stated, inter alia, that "*even if one admits the existence of a right of the physician to receive additional payments or donations, correlative to the right of the patient to provide employees or the unit where he or she was treated additional payments or donations, in compliance with the law, it is obvious that the "observance of the law" refers both to the observance of the law by the "patient" and to the observance of the law by "employees of the unit", when, on the one hand, the patient offers additional payments or donations, and on the other hand, the "employees" of the medical unit receive these additional payments or donations. It is possible that the patient offers additional payments or donations, with the observance of the law (circumstance which may exclude any criminal liability), but the receipt thereof is not made by the "employees" in compliance with the law because the law prohibits the receipt of additional payments or donations by the latter.*"

<sup>13</sup> The decision of the Constitutional Court no.405 of the 15<sup>th</sup> of June 2016 related to the exception of unconstitutionality of the provisions referred to in art. 246 of the 1969 Criminal Code, art. 297(1) of the Criminal Code and of art. 132 of the Law no.78/2000 for preventing, discovering and sanctioning of acts of corruption, published in the Official Gazette of Romania, Part I, no.517 of the 8<sup>th</sup> of July 2016.

condition the commission of the deed on the purpose of obtaining a benefit for himself/herself or for another, implying that one shall punish also the deeds of abuse committed with indirect intent. From this perspective, the legal provision analysed seems illogical, describing the behaviour of a bizarre public servant, who can commit one or more of the deeds listed in the hypothesis of the legal norm analysed, through which he or she causes a loss or a damage of the rights or legitimate interests of a natural or a legal person, aiming at or accepting this result, only to test the responsiveness of the state bodies and not to obtain or to procure any benefit.

In the case of medical criminal liability, the variant provided in art. 297 para. (1) of the Criminal Code of the crime of abuse in office, consists in the non-fulfilment or defections fulfilment by the physician of operations specific to the medical act (Pop, 2016). For its existence, it is necessary that the crime committed by the physician produces damage or an injury to the patient or to another natural or legal persons. The term "*damage*" shall mean a prejudice which may be of moral or patrimonial nature, and "*injury*" a harm to the physical integrity or health (Ionas, 2015). The following are specific to the defections performance of the medical act: physical and moral injuries provoked to the patient. It is important to specify that the crime regulated by art. 297 para. (1) of the Criminal Code will be retained in the charge of a physician only if the acts committed, causing prejudices, are contrary to a legal provision, in restrained sense, in accordance with the decision of the Constitutional Court no.405 of the 15<sup>th</sup> June 2016, and this infringement which is not sanctioned by another judicial regulation. In other words, the constituting content of the crime of abuse in office may be committed only by the violation of another legal provision, including an incrimination norm, hypothesis which does not cause however the retaining of an ideal concurrence of crimes of abuse in office, due to the subsidiary character of the incriminating provision of art. 297 para. (1) of the Criminal Code. In this context, it is incident the problem of the existence and observance of medical standard, as, in realising the medical act, they represent landmarks of the observance by the physician, in relation with the patients, of the medical attributions they have in the treatment of each ailment or in the improvement of the health conditions. In this respect, I appreciated that the crime of abuse in office, in its standard form, may be retained in the case of the breach by the physicians of the medical standards approved by a normative act, on the level of the law, the deed investigated does not fall within the incidence of another legal provisions of substantial criminal law<sup>14</sup>.

Much more frequent in the sphere of medical criminal liability, is the assimilated form of the crime of abuse in office described in art. 297 para. (2) of the Criminal Code, which consists in the exercise of job attributions, with the restriction of the exercise of a right of a person or the creation for that person of a situations of inferiority grounded on race, nationality, ethnic origin, language, religion, gender, sexual orientation, political affiliation, wealth, age, disability, chronic non-infectious disease or infection HIV/AIDS (Paraschiv, 2016). If an active subject of this criminal variant is a physician, the crime is retained when the physician, by his or her actions or inactions, committed during the execution of the medical act, restrains the exercise by a patient or by a potential patient of a right he or she has, or created to him or her an inferiority situation, by the application of

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<sup>14</sup> At least this (of regulations with subsidiary nature) is the meaning given to the abuse in office, by the considerations of the Decision of the Constitutional Court no.405 of the 15<sup>th</sup> of June 2016, para. 61-70.

discriminating criteria among those provided in the hypothesis of the incrimination norm. It is the example of the physician who, based on race, nationality or ethnic origin, refuse to grant medical the assistance needed by a sick person who has the right to be treated in the medical unit where the physician carried on his or her activity, which leads to the worsening of the patient health condition, as well as the case of the physician who knows the ethnic origin of the patient, and consequently applies a less efficient treatment, harming in this way the health condition of the said patient.

In this criminal variant, the immediate consequence of the abuse in office consists in the affectation of the prestige of the medical unit where the active subject is employed, by the restriction by the physician to exercise the right to medical treatment, or by the creation by the physician of a situation of inferiority for a patient, and the form of guilt is the direct intention, the author being aware that the injured person has a certain nationality, ethnicity, religion, political orientation, etc. and committing the deed just in the light of this quality (Pop, 2016).

#### **4. CRIMINAL LIABILITY OF PHYSICIANS FOR THE CRIME OF NEGLIGENCE IN OFFICE PROVIDED IN ART. 298 OF THE CRIMINAL CODE**

From the perspective of the criminal liability in the medical act, the crime of negligence in office consists in an action of faulty fulfilment or omission to fulfil a job task, committed by a physician in the execution of the medical act. Job task in this context shall mean any obligation that falls within the responsibility of the physician in the process of providing the medical service to the patient. These obligations are very diverse from a medical specialty to another and from one category of treatments to another. And in this respect, I consider that it is necessary to adopt, in Romania, the medical standards and uniform medical protocols for each type of medical treatment, so that the observance of the medical obligations specific to each category of medical acts can be easily verified and proved. At the same time, the deeds committed must cause damage or injury of the rights or legitimate interests of the patient or of natural and legal persons with which he or she is in direct relation, of personal or professional nature (Pop, 2016).

A specific trait of the crime of negligence in office committed by fault, in whatever form, aspect resulting even from the marginal denomination of art. 298 of the Criminal Code and from the use by the legislator of the notion of "*negligence*". In this respect, the ability of the physician to foresee the results of his or her deeds shall be assessed by reference to the standard of the physician with average professional training.

#### **5. ATTENUATED AND AGGRAVATED FORMS OF CRIMINAL LIABILITY OF PHYSICIANS FOR CORRUPTION AND PROFESSION-RELATED CRIME, PROVIDED IN ART. 308 AND ART. 309 OF THE CRIMINAL CODE**

The provisions of art. 308 of the Criminal Code, having the marginal name "*Corruption and profession-related crimes committed by other persons*", provide the reduction by a third of the special limits of the punishment, in the case of commission of the crimes provided in art. 289-292, 295, 297-300 and 304 of the Criminal Code, by persons or in relation with the persons exercising on a permanent or temporary basis, with or without

remuneration, of a task of any nature in the service of a natural person among those provided in art. 175 para. (2) of the Criminal Code or within any legal person. We are, in this case, in the presence of an attenuated form of the of crimes listed in the hypothesis of the norm in art. 308 of the Criminal Code, determined by the quality of *the active subject* of these crimes. This aspect was stated by the High Court of Cassation and Justice - the Panel entrusted within the settlement of criminal law matters by the Decision no. 1 of the 19<sup>th</sup> of January 2015<sup>15</sup>, in which it stated that "the provisions of art. 308 of the Criminal Code is *an attenuated form* of the crime of embezzlement of funds, referred to in art. 295 of the Criminal Code".

Among the crimes listed, in the context of this analysis are relevant those covered by art. 289, art. 297 and art. 298 of the Criminal Code which, interpreted by reference to art. 308 of the Criminal Code, lead to the conclusion that the physicians employed of the health care units in the health private system are criminally liable for the commission of crimes of bribe-taking, abuser in office and negligent in office, being subject to the punishment provided in the aforementioned articles, whose special limits are reduced by a third (Michinici, 2014). This incrimination variant is the object of a lot of criticism form the part of jurists, and form the part of physicians It is claimed, on the one had, the assurance by the legislator of an increased criminal projection to legal person whose private capital belongs to the state, compared to the criminal protection granted to legal persons whose private capital belongs to other law subjects, aspects which could represent a discrimination, meant to breach both the constitutional provisions of art. 16 and the provisions of art.44 para (2) thesis I of the Constitutional, according to which the private property is guaranteed and equally protected by the law., irrespective of the holder, being also invoked the jurisprudence of the Constitutional Court which affirms the obligatory character and importance of observing this constitutional principle<sup>16</sup>. On the other hand one claims the discrimination produced by the provisions of art. 308 of the Criminal Code, between persons having the same profession, namely the profession of physician, because the physicians employed within the private health care units are applied criminal punishments clearly shorter compared to those that may be applied to the physicians carrying on their activity in the public health system, in the case of commission of the same corruption and profession-related crimes (Pop, 2016).

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<sup>15</sup> The decision of the High Court of Cassation and Justice no.1/2015 related to the request formulated by the Oradea Appellate Court - Criminal Section and for causes with minors requiring the ruling of a preliminary decision for the settlement of the law matter in the sense to establish if the crime provided in art. 308 of the Criminal Code is an autonomous crime, a cause for the reduction of the limits of punishment or an attenuated form of the crime referred to in art. 295 of the Criminal Code, published in the Official Gazette of Romania, Part I, no.105 of the 10<sup>th</sup> of February 2015.

<sup>16</sup> See the decision adopted by the Constitutional Court no.177 of the 15<sup>th</sup> of December 1998 related to the exception of unconstitutionality of the provisions referred to in art. 213 para. 2 from the Criminal Code, published in the Official Gazette of Romania, Part I, no.77 of the 24<sup>th</sup> of February 1999; the decision adopted by the Constitutional Court no. 5 of the 4<sup>th</sup> of February 1999 related to the exception of unconstitutionality of the provisions of art. 214 para. 3 of the Criminal Code, published in the Official Gazette of Romania, Part I, no. 95 of the 5<sup>th</sup> of March 1999; the decision adopted by the Constitutional Court no.755 of the 16<sup>th</sup> of December 2014 related to the exception of unconstitutionality of the provisions of art. 20 para. (1) thesis related to preliminary contracts of Law no. 17/2014 on certain measures governing the sale-purchase of extra muros farming land and amending Law no.268/2001 on the privatisation of commercial companies managing pieces of land in the public and private property of the state with farming destination and establishment of the Agency of the State Domains, published in the Official Gazette of Romania, Part I, no.101 of the 9<sup>th</sup> of February 2015.

Finally, the provisions of art. 309 of the Criminal Code provide an aggravated form of the crimes covered by art. 295, art. 297, art. 298, art. 300, art. 303, art. 304, art. 306 or art. 307 of the Criminal Code, consisting in the production of extremely serious consequences<sup>17</sup>, in which case the special limits of the punishments provided by the law are increased by one half. Considering that from among the crimes analysed in the present article, those producing prejudices valuable in money are the abuse in office and negligence in office, I conclude that if by the commission of any of the crimes provided in art. 297 and art. 298 of the Criminal Code, a physician causes prejudices whose value is higher than 2 million lei, the special limits of the punishment provided for the crime committed will be increased by half.

Finally, keeping in mind the way of regulation, I appreciate that the provisions of art. 308 and art. 309 of the Criminal Code may be simultaneously incident, if a physician employed in a health care unit in the private health system commits one of the crimes regulated by art. 297 and art. 298 of the Criminal Code, causing prejudices with a value higher than that provided in art. 183 of the Criminal Code. In this case, the special limits of the punishment, provided for the crimes of abuse in office and for negligence in office, reduced by a third, shall be increased by half.

## 6. CONCLUSIONS AND RECOMMENDATIONS

Thus, the criminal liability of physicians for corruption infringements became a reality which cannot be ignored any longer, by the Romanian judicial authorities and by the other beneficiaries of the law. Anyway, this criminal liability is applicable only for the corruption facts committed by physicians after the moment when Decision no. 26 of the 3<sup>rd</sup> of December 2014 of the High Court of Cassation and Justice was published in the Official Gazette of Romania, because, according to art.474 para.4 of the Criminal Procedure Code, this category of decision become mandatory for all the Romanian courts, starting with the date of their publication. Regarding the transitory situations, in which corruption facts were committed by physicians before the above mentioned moment and were not definitively solved before the same date, in these kind of criminal files, the physicians criminal liability for corruption infringements is not applicable, as their applicability would infringe both principle of legality of incrimination, stipulated at art.23 para.12 of the Romania Constitution and at art.7 of the Convention, and principal of application of the most favorable criminal law, stipulated at art.15 para.2 of the Romania Constitution.

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<sup>17</sup> The term "extremely serious consequences", according to art.183 of the Criminal Code, shall mean a material damage higher than 2 million lei.

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