THE SAFETY MEASURE OF PROHIBITING TO EXERCISE A PROFESSION, IMPOSED BY THE COURT IN CASE OF MAL PRAXIS, MAY ENVISAGE THE PROFESSION OF DOCTOR IN THE WIDER SENSE (AS A WHOLE) OR ONLY THE SPECIALTY THAT OCCASIONED THE COMMITTING OF THE OFFENCE PROVIDED IN THE CRIMINAL LAW

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Abstract

The present paper examines the possibility for the courts of law to order, in case of medical malpractice, the safety measure of prohibiting to exercise the profession of doctor in the wider sense, or only the specialty that occasioned the committing of the offence provided in the criminal law, analyzing the judicial practice regarding this issue. In accordance with Article 450 paragraph (2) of Law no. 95/2006, "disciplinary liability of doctors does not exclude criminal, tort or civil liability".

Between the regulation contained in Article 450 paragraph (2) of Law no. 95/2006 and the safety measure of prohibiting to exercise the profession of doctor, as criminal penalty, there is a close connection, within the meaning that the special law, in particular Law no. 95/2006 derogates from the general criminal law, in particular Article 111 of the Criminal Code in connection with the prohibition of exercising the medical profession.

The disciplinary penalties that may be imposed against doctors for mal praxis are listed in Article 455 of Law no. 95/2006. Article 455 letter (e) sets out, as disciplinary penalty which may be imposed against doctors "the prohibition to exercise the profession or certain medical activities" for a period ranging between one month and one year.

Comparing the provisions of Article 455 letter (e) of Law no. 95/2006 with the provisions of Article 111 of the Criminal Code, it may be noticed that the scope of disciplinary accountability of the doctor having committed the civil mal praxis is more comprehensive than the scope of the safety measure imposed by the criminal court.

Keywords: *medical malpractice, safety measures, criminal law, doctor's criminal liability*.

1. Introduction

In the criminal law literature, it was emphasized that, in committing an offence provided in the criminal law, certain circumstances of the social reality are targeted, which form part of a requisite nexus and which, if left not counteracted, the jeopardy arises that new offences provided in the criminal law would be perpetrated, for instance, a status of poor professional training by the offender who committed criminal offences without intention, because of such poor training, which could be the source of new offences provided in the criminal law[1]. Such a case can also be encountered when dealing with the professional fault of doctors (criminal *mal praxis*), which forms the object of our review. Counteracting such state of jeopardy may be achieved not solely by imposing penalties, but also through specific prevention measures, referred to in the criminal law as safety measures.

In the judicial practice, it was decided that what underlies „the adoption of safety measures provided for in Article 111 of the Criminal Law is the state of jeopardy resulting from the unsuitable and hazardous conditions under which the offender fulfils his profession or job or in which he conducts his activity, during the course of which he committed the offence provided in the criminal law[2]".

Safety measures have been defined as preventive criminal law penalties, stipulated by law, to be adopted by the court of law against individuals who have committed offences provided in the criminal law, with the view to removing a state of jeopardy that could generate new offences provided in the criminal law.[3] In other words, safety measures are coercion means of a preventive nature, aimed at precluding states of jeopardy that could potentially generate offences provided in the criminal law.

Situations that could potentially generate states of jeopardy also include, *inter alia*, the state of inability to perform a profession, such as the medical profession. Such states of jeopardy may not be counteracted by penalties, given that the states themselves result from realities that do not amount to violations of the criminal law, but through specific preventive measures – safety measures.

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[1] Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, Universul juridic Publishing House, Bucharest, 2014, p. 259;

[2] Bucharest Court of Appeals, First Criminal Division, criminal judgment no. 767/2000 in *Compendium of judicial practice in criminal matters for 2000 of Bucharest Court of Appeals*, pp. 78-79;

[3] Matei Basarab, *Drept penal. Partea generală*, volume I, 4th edition, revised and supplemented, Lumina Lex Publishing House, Bucharest, p. 312;

Article 108 letter (c) of the New Criminal Code sets forth the safety measure of „prohibiting to hold or perform a profession". The content of this measure is provided in Article 111 paragraph (1) of the Criminal Code, as follows:

"When the offender has committed the offence because of his inability, poor training or for other reasons rendering him unsuitable for holding a certain position, performing a certain profession or job or for conducting another activity, the measure of prohibiting the exercise of the right to hold that position or performing that profession, job, or activity may be adopted".

In the judicial practice, it was decided that what underlies "the adoption of safety measures provided for in Article 111 of the Criminal Law is the state of jeopardy resulting from the unsuitable and hazardous conditions under which the offender fulfils his profession or job or in which he conducts his activity, during the course of which he committed the offence provided in the criminal law[4]".

It follows that, in the case of this safety measure, the state of jeopardy emanating from the offender's inability may be the consequence of poor training (ignorance, lack of experience, superficiality, etc.), lack of skill or dexterity (confusions, errors, uncertainty, etc.) or any other situations that place the individual in the position of being deemed unsuitable (lack of knowledge and necessary skills) for performing the activity during the course of which the offence was committed[5]. If we strictly refer to doctors, examples may be the indifference to the rules of conduct laid down in the Medical Ethics Code, negligence in performing surgery, actions which require the keenest sense of attention, the doctor's fear, not justified by any severe need or his disregard of the risks which the patients face.

The state of jeopardy in cases of criminal professional negligence, in respect of doctors, in ascertaining whether they may continue to perform this profession, after having committed an offence provided in the criminal law, needs to be determined on a case-by-case basis, in consideration of the circumstances in which the offence was committed and in reliance upon the opinion of specialists in relation to the offender's ability to further perform the activity during the course of which he committed the offence.

2. Judicial practice

The matter under review is brought up by certain rulings issued by case-law in relation to the enforcement of the safety measure of prohibiting to exercise the profession against a doctor who has committed a criminal mal praxis offence.

In a certain case, the urological surgeon N.C. was arraigned in 2014 by the prosecutor's office for mal praxis, because by the inappropriate performance of the surgical act, he maimed the patient I.J., and was accused of having committed the criminal offence of unintentional bodily harm, as set forth in Article 196 of the Criminal Code.

The court sentenced the defendant N.C. to one year imprisonment to be served on probation, to pay EUR 125,000 as moral damages and the safety measure of prohibiting to exercise the profession set forth in Article 111 of the Criminal Code. The court ordered the safety measure of prohibiting to exercise the doctor profession, but not in the wider sense, but only that of urological surgeon because, according to the reasons given by the court, the criminal offence was committed in exercising such profession. The court being asked is to know whether the court could have prohibited the defendant from exercising the profession as doctor in the wider sense (as a whole) as a safety measure.

In another case, Pitești Court sentenced, by means of criminal judgment no. 2254 of 18 November 2010[6], the defendant P.L.S., a doctor having the specialty of obstetrics gynecology because, as a consequence of the superficiality shown in approaching this case, he caused bodily injury and infirmity both to the harmed party and to the baby born by her. The court found that, in this case, the provisions of Article 115 of the Criminal Code (previous – note added) applied, concerning the safety measure of prohibiting to exercise the right to hold a position or to exercise a profession or another job.

The court ordered the safety measure as follows: "because by the conduct adopted in relation to the injured party and implicitly in relation to the baby born by her, the defendant acted with severe superficiality in assessing his patient, as a result of inability or lack of skill, rendering him unsuitable for exercising the profession of senior doctor in the specialty of obstetrics gynecology".

This measure is, in the opinion of the court, precisely aimed at preventing a new case of this kind from occurring in the future, to preclude an obvious state of jeopardy generated by the defendant by his superficiality and incompetence in exercising the profession of senior doctor in the specialty of obstetrics gynecology.

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[4] Bucharest Court of Appeals, First Criminal Division, criminal judgment no. 767/2000 in *Compendium of judicial practice in criminal matters for 2000 of Bucharest Court of Appeals*, pp. 78-79;

[5] Vintilă Dongoroz, comment in the paper *Explicații teoretice ale Codului penal român,* Romanian Academy Publishing House, Bucharest, 1969, volume II, p. 296;

[6] It was published in the paper of Roxana Maria Călin, Mal praxis. Liability of the doctor and of the suppliers of medical services. Case-law, Hamangiu Publishing House, Bucharest 2014, p. 271.

3. Do the courts of law have the possibility to order the safety measure of prohibiting to exercise the profession of doctor within the wider sense?

Mention is to be made that in the above-mentioned cases, during the trial, the defendants' counsels have requested the courts of law that the safety measure they would order should be rather nuanced, within the meaning that such measure would not impact their entire medical career, and consequently that the safety measure should not cover the profession of doctor in the wider sense.

The question we should answer is whether the courts of law could order the safety measure of prohibiting to exercise the profession of doctor within the wider sense. In our opinion, this would not be possible, because the criminal law, in particular Article 111 of the Criminal Code, imperatively lays down only the "prohibition of exercising the profession" and not also other activities relating to the medical profession.

In upholding our opinion, we rely on Law no. 95/2006[7] governing the exercise of the medical profession, as special framework law, in the medical field. This law sets forth, in Chapter 3, Section VI, the doctors' liability for disciplinary misconduct, criminal mal praxis amounting to disciplinary misconduct.

In accordance with Article 450 paragraph (2) of Law no. 95/2006, "disciplinary liability of doctors does not exclude criminal, tort or civil liability". The provision quoted above reveals that disciplinary liability also occurs in the case where the doctor is guilty of a mal praxis offence which amounts to criminal offence, under the criminal law. Therefore, in such a case, disciplinary penalties should also be imposed against doctors, in addition to the criminal penalties. Therefore, between the regulation contained in Article 450 paragraph (2) of Law no. 95/2006 and the safety measure of prohibiting to exercise the profession of doctor, as criminal penalty, there is a close connection, within the meaning that the special law, in particular Law no. 95/2006 derogates from the general criminal law, in particular Article 111 of the Criminal Code in connection with the prohibition of exercising the medical profession.

Disciplinary liability of doctors under Law no. 95/2006 shall be determined by the "Disciplinary Panel" operating in the Territorial College of Doctors. The disciplinary penalties that may be imposed against doctors for mal praxis are listed in Article 455 of Law no. 95/2006. Article 455 letter (e) sets out, as disciplinary penalty which may be imposed against doctors "the prohibition to exercise the profession or certain medical activities" for a period ranging between one month and one year.

This regulation reveals that, in the opinion of the author of Law no. 95/2006, there is a clear distinction between the medical profession as such, in substance the specialty in which the doctor trained, as attested to by the degree, and other medical activities specific to medicine in general, which may be conducted by any doctor, such as: diagnosis, treatment and medical care.

In this concept, if, for instance, an urological surgeon commits mal praxis and causes only a civil prejudice to be incurred by the patient, the Discipline Panel may penalize such doctor by prohibiting to exercise the profession as urological surgeon for a period ranging between one month and one year, but the penalized doctor could continue to work, for instance, as doctor in a clinic, an urology office where he may examine patients, prescribe treatments and provide medical care in the field of urology. What the doctor at issue cannot conduct is the profession of urological surgeon during the period of prohibition.

In comparing the provisions of Article 455 letter (e) of Law no. 95/2006 with the provisions of Article 111 of the Criminal Code, it may be noticed that the scope of disciplinary accountability of the doctor having committed the civil mal praxis is more comprehensive than the scope of the safety measure imposed by the criminal court. Thus, whereas, in disciplinary terms, the Discipline Panel may order either the prohibition to exercise the medical profession for a definite period of time, or the prohibition to exercise certain activities which they may conduct, in case of the safety measure set forth in Article 111 of the Criminal Code, the court may only order the prohibition to exercise the medical profession, but not also other activities, and this means prohibition to exercise only the medical specialty of the doctor at issue in the future. In light of this conclusion, it follows that, in the cases referred to as models of case law, the courts have correctly and absolutely legally ordered as a safety measure the prohibition to exercise the medical profession in particular, the specialty in which he committed the offence provided by the criminal law and not the prohibition to exercise the medical profession in the wider sense, that is also the prohibition to exercise other medical activities.

Although the court of law may prohibit, by imposing the provisions of Article 111 of the Criminal Code, only to exercise the medical profession, but not also other medical activities which they could perform after the sentencing ruling becomes final, in fact, having regard to law no. 95/2006, the safety measure of prohibiting to exercise the medical profession, and in particular the specialty in which they committed the offence provided in the criminal law ordered by the court, entails total effects within the meaning that the doctor may no longer exercise the profession, but may no longer exercise other medical activities, either, such as diagnosis, treatment or medical care. In that respect, we believe that Law no. 95/2006 should be amended within the meaning that it may no longer entail such effects in the case of criminal mal praxis.

[7] Law no. 95/2006, on reform in the healthcare field, as subsequently amended and supplemented, was republished in Official Gazette of Romania no. 652 of 28 May 2015, when articles were renumbered.

Please find herein below a brief analysis into certain provisions of Law no. 95/2006, in light of which the doctor against whom the court of law ordered the safety measure of prohibiting to exercise the profession may no longer perform other medical activities, too, and this, in our opinion, is equivalent to a violation of the constitutional principle that all citizens shall be equal before the law.

In accordance with Law no. 95/2006 on the reform in the healthcare field, the medical profession is exercised in Romania in reliance upon the professional title corresponding to the professional qualification, as follows:

a) general medicine doctor;
b) specialist in one of the clinical or para-clinical specialties contained in the list of medical, medico-dentistry and pharmacy specialties in the healthcare network. The exercise of the medical profession is exercised by the College of Romanian College, in reliance upon the issuance of a "certificate as member of the College", based on the official title of medical qualification.

In accordance with Law no. 95/2006, in view of exercising the medical profession, the obligation is laid down in charge of doctors to enroll in the College of Romanian Doctors. When becoming a member of the above-mentioned professional body, the doctor shall automatically observe, in exercising this profession, the "By-Laws of Doctors' College" and the "Code of Medical Deontology", because these documents give rise to several obligations incumbent upon the doctors, the violation of which would result in administrative or disciplinary penalties.

In observance of Article 382 of Law no. 95/2006, doctors who are subject to cases of dishonor or incompatibility may not be authorized to exercise the medical profession. In this regard, Article 382 letter (b) stipulates that a doctor against whom the prohibition to exercise the profession was imposed as a safety measure, for the period indicated in the judgment issued by the court, shall become unworthy of exercising the profession. It derives that the article only refers to the exercise of the profession, and not of other activities, too, as stipulated in Article 455 letter (e). Having regard to the regulation contained in Article 382 of Law no. 95/2006, it may be noticed that the wording is faulty, because the court of law does not order the safety measure stipulated in Article 111 of the Criminal Code to be imposed for a specific period of time, but it is ordered for an indefinite period.

Upon committing the offence provided by the criminal law (mal praxis), in the vision of Law no. 95/2006, the doctor proves a dishonest behavior, and causes prejudices for the good name of the medical body of which they are a member, which, under the law, amounts to disciplinary misconduct. In reviewing such severe disciplinary misconduct, the Disciplinary Panel shall order, as a penalty against the doctor at issue, the withdrawal of the capacity as member of the College of Romanian Doctors for the period of time in which they fall under the scope of the safety measure of prohibiting to exercise the profession.

The decision of the Disciplinary Panel penalizing the doctor by withdrawing their capacity as member in the College of Romanian Doctors for having become unworthy of such capacity shall be delivered to the penalized doctor, to the Executive Office of the College of Romanian Doctors, to the Ministry of Health and to the employer.

When the decision is issued to withdraw the capacity as member in the College of Romanian Doctors, the penalized doctor shall automatically (rightfully) forfeit the authorization to perform the medical profession, in all its regard.

Coming back to the matter at issue, it follows from the considerations detailed herein above that, even if the courts of law order to prohibit the exercise of the profession, consisting in the prohibition to exercise the medical specialty in which the offence provided in the criminal law was committed, in light of the laws governing the exercise of the medical profession, they may no longer exercise the profession or other medical activities, for the period in which they are subject to such safety measure.

In order to return to the medical system, the doctor against whom the safety measure of prohibiting to exercise the profession was imposed may submit a motion to the court of law, to have such measure revoked. The settlement of the motion to revoke such measure shall take place by subpoena delivered to the person against whom the measure was imposed, after having heard their conclusions and the conclusions of the prosecutor.

4. Conclusion

To conclude, doctors do not need to request the court to impose the safety measure of prohibiting to exercise the profession against doctors having committed criminal mal praxis acts, in a more nuanced manner, because the court already does so, in light of its active role, in reliance upon the legal provisions.

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