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Romanian Constitutional Court Decision of Relevance in the Field of Medical Law

Elena TOADER[1], Cristina TEODORA POP[2]*

Abstract

Constitutionality review is of high significance in the area of medical law in terms of the effects that the decisions of the Constitutional Court, which have a final and generally binding nature, generate in this branch of law. The resultant of the previously reference legal effects is the constitutionalisation phenomenon of medical law, which consists of a process of interaction between constitutional and medical law rules, whose finality is both the reconciling of legal provisions governing the medical field with the provisions of the Basic Law, and the elevation of some of these rules at constitutional level. Among the decisions of the Constitutional Courts that are relevant for medical law is Decision no. 717 of 29 October 2015, whereby the impossibility to exclude medical doctors from the sphere of civil servants governed by the Criminal Code and Decision no. 184 of 29 March 2016. Related to the above mentioned decisions, is important to be mentioned that the decisions of the Constitutional Court of Romania regarding the erga omenes mandatory decisions of the Highest Court of Cassation and Justice of Romania have mandatory effect. Thus these decisions should be respected and applied by all the ordinary courts and by the Highest Court of Cassation and Justice, as well.

Keywords: Medical doctors; civil servants; passive bribery; High Court of Cassation and Justice; Constitutional Court decisions; constitutionalisation of medical law.

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Constitutional court Decision no.717 of 29 October 2015

One of the decisions of the Constitutional Court of known resonance in the field of medical law is Decision no.717 of 29 October 2015 [1] regarding the objection of unconstitutionality of the provisions in art. 175 para.(1) b) second sentence of the Criminal Code as interpreted by Decision no. 26 of 3 December 2014 of the High Court of Cassation and Justice – Panel for solving some points of law in criminal matters [2]. This decision has its own history that began in 2014, when the Court of Appeal Tîrgu Mureş – Division for criminal cases and cases involving minors and family, in resolving an appeal formulated against a judgment convicting a surgeon for perpetrating the criminal offense of passive bribery, in concurrence with the criminal offense of receiving undue benefits, provided for in art. 6 of the Law no.78/2000, in relation to art.254 para.1 of the Criminal Code of 1969, notified the High Court of Cassation and Justice according to art.475 para.(1) of the Code of Criminal Procedure in order to pass a preliminary judgment to solve the following point of law: „Art. 175 of the Criminal Code is interpreted in the meaning that the surgeon – employed under an employment contract for an indefinite period in a hospital unit of the public healthcare system, prosecuted on charges of perpetrating the criminal offense of passive bribery stipulated in art.289 of the Criminal Code – falls into the category of public servants stipulated in art.175 para. (1) c) of the Criminal Code, or in the category of civil servants stipulated in art. 175 para.(2) of the Criminal Code?". The High Court of Cassation and Justice decreed by Decision no. 26 of 3 December 2014 that a „medical doctor employed under a labor contract in a hospital unit of the public healthcare system acts as a civil servant in the sense of the provisions in art.175 para.1 b) second sentence of the Criminal Code. In arguing this solution, the legislator used the expression „public office of any kind", and not the one of „public office" so as to avoid creating an overlap between the „public office" within the meaning given by Law no.188/1999 and the expression used in art.175 para. (1) b) second sentence of the Criminal Code, thus showing who are the individuals considered to be public servants in the meaning of criminal law. Moreover, it was shown that the „public office of any kind" provided in art.175 para. (1) b) of the Criminal Code covers a broader category of individuals than the public office regulated in administrative law, and the concept of public servant within the meaning of criminal law is more comprehensive than that shown in art.2 of Law no. 188/1999. On the same occasion, the High Court of Cassation and Justice

found that the provisions of art.381 para. (2) of Law no. 95/2006, according to which „the medical doctor is not a public servant", does not exclude him/her from the category of public servants regulated by the Criminal Code, as this rule considers only the „nature of the medical profession and the fundamental obligations of the medical doctor towards his/her patient".

Criminal liability of medical doctors for crimes related to corruption and to the line of duty provided in title V of the special part of the Criminal Code was a consequence of the solution presented above. Under these circumstances, the medical doctor on trial for passive bribery and receiving undue benefits in the Case File of the Court of Appeal Tîrgu Mureş pleaded the objection of unconstitutionality of the provisions in art.175 para.(1) b) second sentence of the Criminal Code, pointing out that the expression „public office of any kind" included in the criticized legal provisions has generated an inconsistent court practice and that the interpretation given to the legal norm previously mentioned by the High Court of Cassation and Justice through Decision no.26 of 3 December 2014 violates the principle of accessibility and foreseeability of the law, a principle stipulated in art.7 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It was argued that in this way, the provisions of art.175 para.(1) b) second sentence of the Criminal Code violates the principle of lawfulness of incrimination, referred to in art.7 of the Convention, and also the requirements of clarity, precision and predictability of the law, resulting from the provisions in art.1 para.(5) of the Constitution. The Constitutional Court rejected as unfounded the objection of unconstitutionality thus pleaded, a solution passed by Decision no. 717 of 29 October 2015. By means of the previously mentioned decision, the court of constitutional disputes retained that the Decision of the High Court of Cassation and Justice no.26 of 3 December 2014 is grafted onto a natural process of formation of a case law following the entry into force of the new Criminal Code, case law that furthers the existing one with regard to art.147 of the Criminal Code of 1969, according to which the medical doctor was considered a public servant. The same decision has found that the criticized legal provisions have no ambiguous, unclear and unpredictable wording for a citizen having no thorough legal training, who must discern between the doctrinal interpretation specific to the criminal law, the one used in administrative law and the one used in the civil code and that they do not violate the requirements of clarity, accessibility and predictability of the law imposed by art.7, paragraph 1 of the Convention and art.1 para.(5) of the Constitution. In support of the latter argument, the Constitutional Court

referred to the jurisprudence of the European Court of Human Rights, respectively to the rulings in cases Cantoni against France, par.35, Dragotoniu and Militaru-Pidhorni against Romania, par. 35, Sud Fondi SRL and others against Italy, par. 109, which established that the principle of foreseeability of the law does not oppose to the idea that the individual in question could be determined to seek clarifying guidance in order to assess, to a reasonable extent under the circumstances of the case, the consequences that might arise from a given action and that this is especially the case of professionals, who are required to demonstrate great prudence in exercising their profession, which is why they are expected to pay special attention to the assessment of the risks involved. With regard to the observance of the same principle, the court in Strasbourg retained, through its rulings in cases S.W. against the United Kingdom, par.36, Dragotoniu and Militaru-Pidhorni against Romania, par. 36 and 37, Kafkaris against Cyprus, par. 141, Del Rio Prada against Spain, par.92 and 93, that however clearly a legal norm is drafted, in any system of law, there is an inevitable element of judicial interpretation, including in a provision of criminal law, that there will always be a need of clarifying vague points and adjusting to changing circumstances and that certainty is highly desirable, but it could lead to excessive rigidity, or the law must be able to adapt to situation changes. It was highlighted in this way that the decision-making role conferred to courts seeks exactly to preclude the doubts persisting when interpreting rules, and the progressive development of criminal law through jurisprudence as a source of law is a necessary and firmly rooted component in the legal tradition of Member States.

Constitutional Court Decision No.184 of 29 March 2016

Another decision of the Constitutional Court, which is etiologically related to the one previously analyzed and with a similar history, is the Decision no. 184 of 29 March 2016 [3], an article that regulated the crime of passive bribery. Retrospectively, the Military Court of Appeal Bucharest ordered by Conclusion of 16 February 2015 the notification of the High Court of Cassation and Justice for solving some points of law in the sense of whether the deed of a medical doctor, acting as public servant, of receiving additional payments or donations from patients, according to art.34 para. (2) of the Law on the rights of patients no.46/2003 [4], does or does not constitute the exercise of a right acknowledged by law, resulting in the applicability of the provisions in art.21 para.(1) first sentence of the Criminal

Code. Regarding this matter, the High Court of Cassation and Justice passed the Decision no.19 of 4 June 2015 [5], which ruled that the deed of the medical doctor employed under a labor contract in a hospital of the public healthcare systems, acting as a civil servant in the sense provided by the provisions of art.175 para.1 b) second sentence of the Criminal Code, of receiving additional payments or donations from patients, according to art.34 para.2 of the Law on the rights of patients no.46/2003 does not constitute an exercise of a right acknowledged by law resulting in the applicability of the provisions in art.21 para.1 first sentence of the Criminal Code. Under these circumstances, the Constitutional Court was notified on the objection of unconstitutionality of the provisions in art.289 – Passive bribery of the Criminal Code, an objection argued by the lack of clarity, precision and predictability of the text criticized, by reference to art.34 para.(2) of the Law no. 46/2003 on the rights of patients, according to which „the patient may offer to the employees or to the unit, where he/she was cared for, additional payments or donations, in compliance with the law". It was argued, this time again, that the criticized text is contrary to the provisions in paragraph 1 of the Convention and to the provisions in art.1 para. (5) of the Constitution, by ignoring the standards of clarity, precision and predictability of the law, whereby the author also shows that the provisions of art.289 of the Criminal Code, in conjunction with the provisions of art.34 para.(2) of the Law no. 46/2003, are infringing the principle of stability of legal relations. The Constitutional Court rejected this objection of unconstitutionality as unfounded by showing, on the one hand, that it cannot rule on the constitutionality of the provisions of art. 34 para.(2) of the Law no. 46/2003 without having been notified, and, on the other hand, that art. 289 of the Criminal Code does not present any constitutional flaws. Reference was made to the grounds of this solution, to the recitals in the Decisions of the High Court of Cassation and Justice no.26 of 3 December 2014 and no.19 of 4 June 2015 mentioned above. The effects of the decisions of the Constitutional Court of rejecting the objections of unconstitutionality are those set out in art.147 para.(4) of the Constitution and in art.11 para.(3) of the Law no.47/1992 on the organization and operation of the Constitutional Court [6] as these decisions are generating effects *erga omnes*, only for the future, as of their publishing date in the Official Gazette of Romania, Part I. Pursuant to art.475 et seq. of the Code of Criminal Procedure, the decisions of the High Court of Cassation and Justice ruled as preliminary judgments for solving some points of law are mandatory only for the courts, as of their publishing date in the

Official Gazette of Romania, Part I. As a matter of fact, both the Decisions of the High Court of Cassation and Justice no.26 of 3 December 2014 and no. 19 of 4 June 2015 and the Decisions of the Constitutional Court no.171 of 29 October 2015 and no.184 of 29 March 2016 are mandatory as of their publishing date. Moreover, with regard to the decisions of the court of constitutional disputes, they are mandatory both in terms of the solution and in terms of the recitals. This aspect was stated, having the value of a principle, by the Constitutional Court itself [7], through the Decision of the Constitutional Court Plenum no.1/1995 on the compulsoriness of its decisions passed within the framework of constitutionality review, and by Decision no.1415 of 4 November 2009 [8].

Under the conditions of this legal architecture of criminal liability, the capacity of civil servant of a medical doctor cannot be denied in the sense of criminal law, nor can the constitutionality of criminal liability of medical doctors for crimes related to corruption and to the line of duty, including the one referred to in art.289 of the Criminal Code, be denied. Regarding the latter, it is worth noting that the provisions of art.34 para.(2) of the Law no.46/2003 are addressing the „legal conditions" when regulating a patient's right to offer donations or additional payments to the medical unit, where he/she was treated, or to the medical doctor. Or, the broadest sense of the „law" means any legal act of general applicability, including the decisions of the Constitutional Court and of the High Court of Cassation and Justice passed on matters of law that are preliminary to solving the cases in question. For these reasons, we consider that, at present, the provisions of art.34 para.(2) of the Law no.46/2003 are ineffective. It is noteworthy, however, that according to art. 4771 of the Code of Criminal Procedure, the effects of the decisions of the High Court of Cassation and Justice, delivered in accordance with art.475 and the following of the Code of Criminal Procedure, shall also cease, inter alia, if unconstitutionality of the legal provisions that generated the point of law solved is found. It arises from this rule of criminal procedure that a future finding of unconstitutionality of the provisions in art.175 para.(1) b) of the Criminal Code, respectively of the provisions in art.34 para.(2) of the Law no.46/2003, even in interpretations expressly determined by the court of constitutional disputes, would determine the cessation by operation of law of the effects of the Decisions of the High Court of Cassation and Justice no.26 of 3 December 2014 and no.19 of 4 June 2015 and, therefore, the exclusion of medical doctors from the scope of the notion of „public servant in the meaning of criminal law" and, respectively, the applicability of

the provisions in art.34 para.(2) of the Law no.46/2003 [9]. However, until the Constitutional Courts rules any such decisions of unconstitutionality, the previously referenced legal provisions are benefitting from the presumption of constitutionality [10]. As a matter of fact, in addition to the effects explicitly specified expressis verbis in art. 147 para.(4) of the Constitution and art.11 para.(3) of the Law no. 47/1992, the Constitutional Court decisions analyzed in this article also generate the effect of constitutionalisation of medical law via the interference of the law rules above alleged, and the constitutional and conventional provisions that they were related to [11]. In this way, the provisions of art.381 para.(2) of the Law no.95/2006 and those of art.34 para.(2) of the Law no.46/2003 were put in agreement with the provisions of the Basic Law, and the issues of law deducted therefrom and stated by the Constitutional Court, having the value of a principle, in the recitals of Decisions no.171 of 29 October 2015 and no.184 of 29 March 2016 have acquired constitutional characteristics. Bulleted lists may be included and should look like this:

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[1] Decizia nr. 717 din 29 octombrie 2015 referitoare la excepţia de neconstituţionalitate dispoziţiilor art. 175 alin. (1) lit. b) teza a doua din Codul penal în interpretarea dată prin Decizia nr. 26 din 3 decembrie 2014 a înaltei Curţi de Casaţie şi Justiţie — Completul pentru dezlegarea unor chestiuni de drept în materie penală. Text publicat în Monitorul Oficial al României, Partea I, nr. 216 din 23 martie 2016. Available from: http://legeaz.net/monitorul-oficial-216-2016/decizie-ccr-717-2015

[2] Decizia Inaltei Curti de Casatie si Justitie nr. 26 din 3 decembrie 2014 (Completul pentru dezlegarea unor chestiuni de drept in materie penala) prin care s-a stabilit ca medicul angajat cu contract de munca intr-o unitate spitaliceasca din sistemul public de sanatate are calitatea de functionar public in acceptiunea dispozitiilor art. 175 alin. (1) lit. b) teza a II-a din Codul penal. Text publicat in Monitorul Oficial al Romaniei, Partea I, nr. 24 din 13 ianuarie 2015. Available from: http://www.avocatnet.ro/content/articles/id_39581/Decizia-ICCJ-nr-26-2014-Completul-pentru-dezlegarea-unor-chestiuni-de-drept-in-materie-penala.html

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