CRIMINAL IMPLICATIONS OF THE CONSENT TO THE MEDICAL PROCEDURE

George Antoniu[*]

ABSTRACT

The author examines comprehensively and from various aspects the penal implications of a potential victim's consent to various medical acts, drawing the conclusion of the limited character of the consent in penal matters.

Keywords: consent of the victim, the medical, penal implications

1. Setting himself to examine the influences exercised on the criminal law by the latest scientific conquests over life, the famous magazine *Revue internationale de droit penal* publishes in one of its latest issues, a series of interesting thematic studies[1], deserving to be known and especially, to compare the innovating processes at which the respective studies hint with those developed in the Romanian criminal doctrine and laws in the matter.

Among these, in this study we are concerned with the limits which would require the consent of the person undergoing a medical procedure with criminal consequences. In other words, such consequences could be developed if only the concerned person explicitly expressed his will to undergo a medical procedure, knowingly agreeing to the prejudice to the health and his bodily integrity[2].

2. To this end, the quoted author refers to a solution of the French Court of Cassation and Justice of 1942, which decided that: "any surgeon working in a medical service is obliged, except force majeure events, to get the consent of the patient before any surgery" (Judgment of 28 January 1942, in Teysser case), the respective solution being substantiated based upon the idea of respect of the human being. The same solution is consecrated in the Code of Medical Deontology published in the year 1995, art. 36 (the consent of the examined or treated patient has to be obtained in all cases). In art. 16-3 of the French Civil Code, the consent of the concerned patient has to be obtained beforehand in case of any prejudice to the bodily integrity of human body. According to the French law of 4 March 2002, on the patients' rights, art. 1111-4 paragraph (3) of the French Public Health Code, no

[*] Professor, PhD., Honorary Scientific Director of „Acad. Andrei Rădulescu" Legal Research Institute of Romanian Academy; e-mail: juridic_institut@yahoo.com; revdpenal@gmail.com

[1] Carole Girault, *Avant-Propos*, Revue Internationale de droit penal, no. 1-2/2011 (82[e] annee), p. 15-17.

[2] M. Patrick Mistretta, *L illusion du consentement du deliquant a l acte medical et aux soins en droit penal*, Revue Internationale de droit penal, no. 1-2/2011 (82[e] annee), p. 19-39.

medical procedure, no treatment can be undergone without the patient's free and knowing consent, and this consent may be withdrawn at any time.

3. Likewise, important international documents establish the obligation of the authorities to observe the consent given by the concerned patient in relation to the medical procedure proposed or needed to be undergone on his/her body (see the Convention on human rights and biomedicine, as well as art. 3-2 of the Charter of the fundamental rights of the European Union. Likewise, the European Court of Human Rights ruled in the sense that the non-respect of the patient's consent to the medical procedure could be deemed as an infringement of art. 8 paragraph (1) of the European Convention (Judgment of 29 April 2002, in Pretty case)[1].

4. Although there is such a general establishment in the domestic and international laws, in favor of recognizing the right of a person to accept or refuse a medical procedure in relation to his body integrity, the concept according to which this solution could be extended to the criminal law only to a somehow small extent, is also unanimous.

It has been rightly stated that the criminal law protecting values which, in principle, are not negotiable, as they concern the public order and the general interest of the collectivity, would be unrealistic and inconsistent with this feature of the criminal law, the expansion and generalization of the above-mentioned solution being applicable also in relation to the values protected by the criminal law and the transformation of the criminal law into a consensualist law.

Is it possible in terms of criminal law, to claim the respect of the individual freedom to accept or refuse the medical procedure in spite of the repressive and preventive nature of this branch of law? Is it possible to talk about the need to respect the consent to the medical procedure with criminal consequences which could give expression to the individual freedom, even if this could be made without taking into consideration other interests of special protection of the social values concerning the entire society?[2]

5. We should try to answer these questions based upon the regulations of the Romanian criminal law into force.

For instance, in case of an offence of apparently light beating (beating not having produced any injury), could the victim refuse any medical finding for the purpose of avoiding the classification of the offence in the crime of common assault (art. 193 paragraph (1) of the new Criminal Code) and to give the reasons for not agreeing to initiate the criminal proceeding against the perpetrator? From a certain view, in this situation, the refusal of the medical procedure would have also the signification of an attitude of resignation of the victim who accepts the beating without complaining before the authorities. In the situation in which the injured party does not intend to initiate any criminal proceeding, the offence shall not have any consequence in the legal field, but, possibly, only from the individual point of view (the pain caused by the beating which he/she suffered from the aggressor), a consequence which the concerned party accepts for various reasons (friendship, kinship, refusal to get in touch with the authorities, preparation for a more severe revenge, a feeling of disregard or contempt towards the aggressor etc.). It is possible, even in case of a simple beating, that the injured party negotiate with the aggressor about the attitude which he/she will adopt and claim that certain requirements

[1] M. Patrick Mistretta, *op. cit.*, p. 21.

[2] M. Patrick Mistretta, *op. cit.*, p. 22-23.

should be met in order to refuse the medical procedure and the initiation of the criminal proceeding against the perpetrator. Within these limits (of a simple beating), the social value protected by the criminal law (bodily integrity) becomes thus negotiable, and the criminal consequences decisively depend on the victim's consent.

We do not exclude in this case as well, the fact that an exceptional situation, namely that following the negotiations, the injured party should not be satisfied anymore and consequently, the initiation of the criminal proceeding against the perpetrator be decided and he/she possibly undergo a medical procedure for finding the simple beating.

However, if the victim suffered not only a simple beating, but a prejudice to his/her health or bodily integrity, is it possible for him/her to refuse to give the content to undergo the finding medical procedure?

It is noted that, in this case, it could be a bodily injury requiring different periods of medical care (up to 90 days or more than 90 days), and each period of medical care should involve different legal classifications of the offence (art. 193 paragraph (2), art. 194), distinct penalties and different regimes from the point of view of the possibility to initiate the criminal proceeding upon prior complaint and upon reconciliation of the parties (this is possible only in case of the offences provided in art. 190 and art. 196, while art. 194 of the Criminal Code excludes the initiation of the criminal proceeding upon prior complaint, and also the reconciliation of the parties.

In relation to these consequences which the offence of bodily injury could produce, is it possible to admit a refusal of the injured person regarding the finding medical procedure?

Undoubtedly that, in principle, the victim could resign to suffer also these consequences on his/her body, refusing the finding medical procedure and holding the aggressor criminally liable. Such an attitude would not result in any legal consequences to be suffered by the aggressor, but if only the bodily injury is not serious (involving more than 90 days of medical care), as otherwise, the authorities may be notified ex officio for holding the aggressor criminally liable, and the reconciliation of the parties is possible provided that it is expressly set forth (art. 159 paragraph (1).

Consequently, the social value protected by law, in the above-mentioned cases, would seem to be negotiable, but only limitatively, namely, unless the prejudice to the bodily integrity or health requires a period exceeding 90 days of medical care.

If the negotiation is accepted within the above-mentioned limits and the defendant agrees to the possible claims of the injured person, the latter consent not to undergo a finding medical procedure will be valid and will produce adequate consequences (non-initiation of a criminal trial).

If the prejudice suffered by the injured party involves medical care for more than 90 days, even if the injured person's consent is given, the criminal proceeding will be initiated ex officio (insofar as the relevant authorities are notified). This means that the admission of these serious consequences by the injured party is subject to an obvious risk for the aggressor, that the authorities could be notified ex officio and however, initiate the criminal proceeding. This threat will hang over the aggressor until the expiry of the limitation period of the criminality.

However, the refusal of the medical procedure may be expressed as well, from the procedural point of view, not only by the refusal of initiating the criminal proceeding, but by the failure to lodge the prior complaint within 3 months from the time when the injured person became aware of the offence being committed (art. 296 of the Code of Criminal

Procedure), an assumption in which art. 16 letter e) of the Code of Criminal Procedure operates, this being a cause of preventing the initiation or the conduct of the criminal proceeding. However, even if the injured party lodged the prior complaint in due time, in case he/she leaves it unexamined for a long period of time subsequently, it will result in the prescription of the criminality and implicitly, the prevention from conducting the criminal proceeding (art. 16 letter f) of the Code of Criminal Procedure).

We could draw the conclusion that the medical procedure could be regularly refused only in the situation of beating or common assault causing physical pains or bodily injury resulting in medical care for a period up to 90 days, but not in case of a bodily injury susceptible to medical care for a period exceeding 90 days, as the existence of such injury and the extended period of medical care could be provided only in a medical finding, namely in case of undergoing a medical procedure.

Thus, it could be stated that the social value itself protected under art. 193 and art. 196 of the Criminal Code would be negotiable, as the medical procedure could be consented or refused according to the injured person's will influenced by various purposes or purely individual interests. However, even within the above-mentioned limits, exceptionally, a medical procedure could be necessary if there were any indications that the aggressor suffered from a disease making him bad-tempered and dangerous for the people around him, or in case the defendant showed any signs of lunacy, as he suffered from a mental disease which did not allow him to control his exterior behavior or to realize the kind of his gestures.

Otherwise, in other cases, the medical procedure is absolutely needed for the existence of the constituent elements of the crime. For instance, in case of killing or injury of the newborn, committed by mother, in case of aggression against the fetus or of the crime of injury to the fetus (art. 200, 201, 202).

In case of crime of blackmail (art. 107), the medical procedure is imposed on the perpetrator in order to establish the constituent elements of the crime. It is the same procedure for the establishment of the constituent elements of the crime of rape (art. 218 C. pen.), and of the aggravated variant, provided in art. 218 paragraph 3 letter e). Moreover, it is the same procedure for the offence of sexual aggression (art. 219 paragraph (2) letter e).

The crimes against patrimony, the medical procedure is required in case of crime of qualified burglary (art. 234 paragraph (3)). It is the same procedure for the existence of the crime of piracy (art. 235 paragraph (3) of the Criminal Code).

The medical procedure is involved as a required procedure as well, for the establishment of the constituent elements of the crime of judicial assault (art. 279 of the Criminal Code), of abusive behavior (art. 296 paragraph (2) or of the crime of torture (art. 282 paragraph (2) of the Criminal Code), or of submission to ill-treatments (art. 281), of non-observance of the regime of nuclear materials or of other radioactive substances (art. 345, 347), of non-observance of the explosive materials (art. 346, 347), of ill-treatments of minors (art. 197), of venereal contamination (art. 353 of the Criminal Code), of transmission of the acquired immunodeficiency syndrome (art. 354), of food falsification or falsification of other products (art. 357), of battle (art. 198 of the Criminal Code), of absconding from military service during the war (art. 432 of the Criminal Code).

The medical procedure is implicit in case of all these crimes of the Special Part of the Criminal Code, either in defining the constituent elements of the crime, or in the existence of an aggravating circumstance.

The medical investigation is ***imposed*** on the perpetrator, in these cases, in order to get a correct classification of the offences. Most of the time, the medical examination is requested even by the perpetrator, in order to prove the actual seriousness of the violence acts caused to the victim, or it is requested by the victim, for the purpose of establishing the injuries caused to him/her, and it influences the period of medical care and a correct legal classification of the offence.

Any attempt to abscond from the medical procedure, in such situations, could be interpreted only to the detriment of the perpetrator, who will be informed about this aspect by the authorities.

Voluntarily undergoing the medical procedure, in all these cases, does not represent the expression of the individual freedom of the perpetrator (as in other matters), but the expression of his interests in working together with the authorities, for the purpose of finding out the truth and of deciding criminal liability.

Under these circumstances, could we talk about the free, knowing consent to the medical procedure in the criminal law, as a basic condition for undergoing the procedure?

Instead, the condition of the consent, with some exceptions, appears to be an obstacle in undergoing the medical procedure and in deciding the perpetrator's criminal liability[1].

Actually, even in cases in which the consent is necessary, it represents an imperative requirement of the medical procedure and thus, we could not talk about a free and knowing consent, but about a consent which became negation, with some exceptions.

[1] M. Patrick Mistretta, *op. cit.*, p. 23.